Contracting out of the Matrimonial Property Act 1976

Yvonne Cripps*

The Matrimonial Property Act 1976 and the rule of equal division it introduces have already been subject to much comment and criticism. For those who do not desire the provisions of the Act to govern their property interests, section 21 of the Act creates a power to enter into matrimonial property agreements regulating the ownership and division of their property as they think fit. In this article Yvonne Cripps examines the nature, extent and validity of those agreements, and their limits in theory and form in practice.

The common law has remained relatively static since Atkin L.J. said[1]

> The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold courts.

However embodied in section 21 of the Matrimonial Property Act 1976 is a statutory development which might have surprised even that learned judge. Section 21 creates a power to enter into matrimonial property agreements for the purpose of contracting out of the provisions of the Act.

Against the background of comment and criticism attracted by the Act it may be predicted that many spouses will not be content to let the statutory regime rule their property interests. For them section 21 provides some measure of solace. Nevertheless it may be that section 21 will not prove to be an easy escape route for either spouses or their legal advisers. Issues such as the form of the agreement, the possibility of its subsequent variation, the gift and stamp duty implications of contracting out and even the more fundamental question of the extent to which it is possible to contract out give rise to difficulties. It is proposed in this article to discuss these issues and to devote some attention to the possibility of further reform.[2]

* Junior Lecturer in Law, Victoria University of Wellington.

1. *Balfour* v. *Balfour* [1919] 2 K.B. 571, 579.
2. For a review of the historical antecedents and overseas equivalents of the agreement under s. 21 see Y. Cripps "Contracting out of the Matrimonial Property Act 1976" LL.M. Research Paper, V.U.W. 1977, of which this article is part.

I. THE NATURE OF THE AGREEMENT

What is the nature of an agreement under section 21? Is it a contract? Section 21 contains a reference to "contracting out of the provisions of the Act" but the word used throughout is "agreement". Although it is tempting to simply assume that the agreement is a contract, such an assumption must be justified. Subsection (11) provides some guidance by stating that nothing contained in subsections (8) and (10) "shall limit or affect" any enactment or rule of law or of equity whereby "a contract" is void, voidable or unenforceable on any "other ground". Those words indicate that the grounds in subsections (8) and (10) also relate to contracts. In addition the courts have treated separation and maintenance agreements as contracts. The same is true of the property agreements which are often contained in them[3] and it seems likely that this status will also be accorded to agreements which are entered into under section 21.

The question of whether an agreement can be described as a contract is not merely of semantic significance. For example, if the agreement was not a contract offer and acceptance would be sufficient to bind the parties if the other requirements of section 21 were fulfilled. On the other hand it follows from the apparently contractual nature of the agreement that consideration[4] and an intention to create legal relations must be present before a binding agreement can be formed. It would be difficult to argue that spouses who go to the trouble and expense of entering into an agreement under section 21 did not intend to create legal relations but the problem of finding consideration in an agreement which makes no express mention of it is not quite so easy. Nevertheless it is probable that the court would be willing to find consideration in the parties' relinquishment of any rights and claims that they may have against each other under the Act.

It should also be noted that if the agreement is a contract the normal contractual remedies will be available to the parties in the event of a breach. Damages can be granted and where that remedy is inadequate specific performance can be decreed. In the latter case the relevant equitable principles will be taken into account. Thus where the evidence discloses that the bargain may have been unfair the party seeking the decree may be called upon to establish that the agreement in question was " 'fair, just and reasonable'[5] and that no advantage was taken."[6]

The doctrine of privity may also be relevant. In the course of making a contract concerning the status, ownership, and division of their property, one of the spouses may wish to ensure that a benefit is conferred on the child of a previous marriage. If for some reason the parent could not or would not take

3. *K* v. *K* [1976] 2 N.Z.L.R. 31, 38.
4. Also post, p. 117. Note that s. 21(4) provides that the power of husband and wife to make gifts to each other is not limited or affected by s. 21.
5. Cf. s. 21(10)(c) which relates to the factors to which the court will have regard in determining whether it is unjust to give effect to an agreement.
6. *K* v. *K* supra fn. 3., 39, citing from *Morrison* v. *Coast Finance Ltd.* (1965) 55 D.L.R. (2d.) 710, 713. In the former case it was held to be relevant that consideration although present, and presumably sufficient, was inadequate. The refusal to grant a decree of specific performance was based on the fact that the agreement involved constituted an unfair bargain. The emotional condition of the wife was also considered. O'Regan J. expressly disapproved of the fact that the wife had not been independently advised before she signed the deed.

steps to enforce the agreement in the case of default, the child, who cannot be a party to the agreement in terms of section 21(1) and 21(2), could not do so. Conversely, of course, the doctrine ensures that the parties cannot impose any liabilities on their children.[7]

II. THE EXTENT OF THE AGREEMENT

The possible extent of the agreement is at least as important although considerably more difficult to determine than its nature. Section 21(1) provides that subject to section 47 of the Act, a husband and wife, or any two persons in contemplation of their marriage to each other,[8] may "for the purpose of contracting out" of the provisions of the Act make such agreement with respect to the status, ownership and division[9] of their property (including future property) as they think fit. There is also provision in section 21(2) for an agreement for the purposes of "settling any differences" that have arisen between the husband and wife concerning property. This subsection appears to be aimed at encouraging spouses to resolve their own disputes so that litigation becomes merely a last resort. The question which arises out of these subsections is whether spouses who make an agreement under subsection (2) can contract out of all or any of the provisions of the Act. By way of contrast with subsection (1) there is no reference to "contracting out". Does this mean that spouses who state that their agreement has been entered into under subsection (2) can only settle their differences in accordance with the provisions of the Act?

The legislature's approach to distinguishing between agreements for the purposes of contracting out and settling differences was unfortunate.[10] An agreement entered into under subsection (1) for the purpose of contracting out of the Act may constitute an agreement which is settling differences between the spouses. Equally, it seems that if an agreement is expressed to have been entered into solely under subsection (2), for the purpose of settling differences, clauses which have the effect of contracting out of the Act could conceivably be held to be invalid.

A further difficulty is created by the fact that subsection (2) relates only to differences which "have arisen". Unlike subsection (1), subsection (2) contains no reference to an agreement concerning future property. What happens if spouses wish to settle differences which might arise in relation to property acquired in the future? If the "settlement" was in accordance with the provisions of the Act this type of agreement would not constitute an agreement for the purpose of contracting out. In fact such an agreement could be held to be invalid as it appears to fall within neither of the two subsections.

7. Cf. s. 21(16), post, p. 107.
8. Although the problems are likely to be of a different nature, it is interesting to note that the legislature has adopted a phrase which has been the subject of much conflicting judicial interpretation in the context of s. 13 of the Wills Amendment Act 1955. Note also that cl. 16 and 49 which would have extended the provisions of the Matrimonial Property Act, including s. 21, to de facto spouses were struck out on the second reading of the Matrimonial Property Bill 1975.
9. Presumably it is possible to make an agreement concerning the possession of property. Cf. s. 25(3).
10. When the Matrimonial Property Bill was introduced into the House there was no equivalent of s. 21(2) and no reference to either contracting out or settling differences.

One seemingly attractive possibility for the draftsman is to avoid mentioning the relevant subsection and to simply state that an agreement has been entered into pursuant to section 21 of the Act. Unfortunately, it will not always be wise to proceed in this manner as the way in which the two subsections have been drafted may lead to some important, if unintended, results. For example, it can be argued that an agreement which is exclusively entered into under subsection (2), for the purpose of settling differences in accordance with the Act, should not attract gift duty.[11] Sections 4(5)(b) and 4(3) of the Matrimonial Property Act open the way for such an argument.

Section 4(5)(b) provides that nothing in the Matrimonial Property Act is to affect the law relating to the imposition, assessment and collection of estate duty. Gift duty is not mentioned. Section 4(3) states that unless otherwise expressly provided all Acts are to be read subject to the Matrimonial Property Act. On the basis of the two subsections it is reasonable to assume that certain of the provisions of the Act can have an effect on the incidence of gift duty. The next step in the analysis involves section 61 of the Estate and Gift Duties Act 1968 which provides that gift duty shall be payable on dutiable gifts. A gift, as defined in section 2, is any disposition of property otherwise than by will, in return for which fully adequate consideration in money or money's worth has not passed to the person who makes the disposition. The key word as far as section 21 of the Matrimonial Property Act is concerned is "disposition".[12] In section 2 of the Estate and Gift Duties Act 1968 "disposition of property" is described as "any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property, whether at law or in equity . . ."

The basis of the argument is that if spouses enter into an agrement which does no more than settle differences in accordance with the Act it can be claimed that there has not been a disposition of property. The reason being that an agreement which does not purport to alter the provisions of the Act as they relate to the status, ownership and division of the property of the spouses can be regarded simply as a declaration or affirmation of the rights and interests which are already conferred on the parties by the Act.

The case of a husband who owns the matrimonial home and who, in the absence of fully adequate consideration, enters into an agreement to transfer a half share in it to his wife provides a clear example. It is arguable that in that situation gift duty is not payable. The reason for this is that it may be suggested that the husband has merely agreed to give his wife the share in the matrimonial home which she already has under the Act. In actual terms the agreement to give a half share only serves to ensure that the wife's claim to the home will not be disputed by the husband.

The validity of the line of reasoning set out above depends largely on the nature of the interest which the Matrimonial Property Act confers on spouses. In order to argue that an agreement for the purpose of settling differences under section 21(2) does not constitute a disposition it would be necessary to show

11. The stamp duty implications of s. 21 are discussed post, p. 112.
12. As a disposition includes a settlement, according to s. 2 of the Estate and Gift Duties Act 1968, it may be possible to claim that this inclusion destroys any argument that the agreement under s. 21(2) is not a disposition. On the other hand, the word "settlement" may refer only to the equitable device which is of sixteenth century rather than twentieth century origin.

that the Matrimonial Property Act confers, on the spouses, an ascertainable interest in property during the subsistence of the marriage. If this is not the case then an agreement of the type described above, entered into prior to the breakdown of marriage and an application to the court, could indeed be said to constitute a disposition of property in the sense that the wife would not have a present interest and the husband would be disposing of his own property.

The question of the nature of the interest conferred by the Act is beyond the scope of this paper but it has received thorough treatment elsewhere.[13] Although the Act provides little guidance on this point it seems that there are some indications that a spouse's interest in the matrimonial home devolves at marriage whereas the interest in a family chattel like a yacht is only a deferred one which, broadly speaking, accrues when the breakdown of marriage is evidenced by the fact that the parties begin to live apart.[14] In other words, in the absence of a judicial pronouncement, it is possible to speculate that if the agreement discussed above related to any item of matrimonial property other than the matrimonial home it would probably be held to attract gift duty in view of the fact that the wife's interest would not have accrued. In such a situation the husband could truly be said to be disposing of his property.

Perhaps the legislature was content to waive implicitly the gift duty which is payable on the inter-spousal disposition of a share in the matrimonial home in the absence of the obligatory "fully adequate consideration". The apparent confinement of gifting possibilities to an agreement which covers the matrimonial home means that the already infinitesimal amount of gift duty collected will not diminish to the extent that it vanishes altogether. Conceivably the legislature's attitude was reinforced by the thought that practitioners who have not exploited the gifting advantages involved in the registration of a joint family home are unlikely to employ section 21(2) merely as a device to enable spouses to escape gift duty on the disposition of a share in the matrimonial home.

The distinction between subsections (1) and (2) has been explored but the question of how far an agreement can extend has not yet been resolved. Section 21(3), which does not limit the generality of subsections (1) and (2), offers some assistance by describing the possible content of an agreement. The combined effect of paragraphs (a) and (c) of subsection (3) is that "any property or class of property" can be deemed to be matrimonial or separate and that shares in matrimonial property and methods of division can be prescribed by agreement. Paragraph (c) is particularly useful as it helps to throw some light on the position in relation to agreements which purport to regulate matrimonial property interests after the death of one of the spouses.

Section 5 stipulates that the Act is to apply only during the joint lifetime of the spouses and therefore it is unlikely that couples would wish to contract out in relation to the after-death situation for the simple reason that the Act itself does not extend that far. However, if the ubiquitous subsections (1) and (2) of section 21 can be viewed as distinct empowering clauses, it might be arguable that, although there would be no need for spouses to contract out of the Act under section 21(1), they may wish to use section 21(2) to enter into an

13. Angelo and Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 N.Z.U.L.R. 237.
14. Ibid., 256, 257.

agreement which would serve to settle property matters and to expedite division and administration in the event of the death of either of the spouses. Section 21(3)(c) obviates any doubt as to the possibility of making such an agreement. It provides that an agreement may define the share of the matrimonial property that each spouse will be entitled to upon the dissolution of the marriage "otherwise than by death". The clear meaning of these words is that section 21 does not empower spouses to enter into an agreement which defines the share which the surviving spouse will receive upon the death of their partner. Despite this at least one agreement which contravenes section 21(3)(b) has already been drafted. It contains the following clause:[15]

> It is acknowledged that if the parties agree the matrimonial home can be sold at any time and that upon sale or other disposal of it the net proceeds thereof shall be shared in the following fashion:— If the said matrimonial home is sold upon the death of the wife or thirty years from the date of this agreement then 75 per cent of the total net proceeds shall go to the wife's estate and the balance to the husband.

Although section 21(3) provides an indication of the scope of the agreement under section 21 it leaves several important questions unanswered. For example, is it possible to contract out of every section in the Act? Section 21(1) empowers the spouses to contract out of "the provisions of this Act", but it is submitted that those words cannot be interpreted as authority for a power to contract out of every provision.[16] Section 21 itself is the most obvious limiting case. Clearly an agreement for the purpose of contracting out of sections 21(4), (5) and (6) which regulate the form of an agreement, or section 21(8) which relates to void agreements, will not be upheld by the courts. An agreement in which the parties purport to contract out of section 21(1) would be to contract out of the power to contract out. The effect of such an agreement would merely be to deprive the spouses of the right to contract out of the Act. Accordingly the intriguing question of whether it is possible to enter into this type of agreement is of little practical significance as it is unlikely that spouses would wish to go to the trouble of entering into an agreement of that nature when the same result could quite simply and effectively be achieved by one of the parties refusing to consent to an agreement.

On the other hand agreements which alter the effect of section 21(11) have already been drafted.[17] Subsection (11) states that the provisions of the Act which

15. Although it is possible to include clauses which are testamentary amongst clauses which are effective before death (see *Re McDonald* (1911) 30 N.Z.L.R. 896) there are several reasons why an agreement under s. 21 would not constitute a will. For instance the Wills Act 1837 (U.K.), s. 9 requires, inter alia, that the testator is to sign in the presence of two or more attesting witnesses present at the same time. It is also essential to the nature of a will that the testator is able to revoke it at any time.
16. The power to contract out is uncommon. For example, it does not exist at all under the Family Protection Act 1955. See *Parish* v. *Parish* [1924] N.Z.L.R. 307 which involved an attempt to contract out of the Family Protection Act 1908. See also *A* v. *A* [1967] N.Z.L.R. 357 in relation to the Destitute Persons Act 1910, s. 24. In that case an agreement between husband and wife did not affect the power of the court to make a maintenance order. Also *Buckthought* v. *Buckthought* (1977) Unreported, Rotorua Registry, A 113/76. However cf. Joint Family Homes Act 1964, s. 11(3), which, in effect, provides that if a "notice of consent" is signed by both spouses, the statutory settlement scheme can be altered to a limited extent.
17. Post, p. 116.

concern void agreements are not to limit or affect any enactment or rule of law or of equity whereby a contract is void, voidable or unenforceable on any other ground. It is possible to envisage argument to the effect that spouses can contract out of section 21(15) which provides that any matrimonial property which is not subject to an agreement will be subject to the provisions of the Act. Some spouses who have chosen to contract completely out of the Act have found it expedient to agree that all property not covered by their agreement can be divided at a future date or that, in the absence of agreement in the future, it will be divided according to specified fixed shares. However, in the view of the writer the parties have not contracted out of subsection (15) in these cases. The very fact that provision has been made for fixed or future division means that the property is governed by an agreement and is therefore outside the ambit of subsection (15) in the first place.

The arguments outlined above relate only to the impossibility of entering into a valid agreement for the purpose of contracting out of all of the provisions of section 21. It is now necessary to consider the broader question of whether there are any other sections in the Act out of which the spouses cannot contract. Section 26, like section 47,[18] clearly overrides section 21 in the sense that section 21(16) provides that an order made under section 26 of the Act shall have effect notwithstanding any agreement under section 21. Thus the court can disregard the fact that the spouses have agreed as to the ownership of certain specific items of property and can make an order settling the property on the children of the marriage.[19]

It is relatively easy to identify sections 26 and 47 and parts of section 21 as provisions which cannot be contracted out of. However uncertainty as to the possible extent of the agreement still remains. It is heightened by the fact that some sections of the Act are specifically stated to be subject to section 21 whilst the majority are not. Sections 2(2) and 2(3), which stipulate the dates on which the value of property and the shares in it will be determined, and section 9(5), which governs property acquired by a husband or wife after a court order has been made, are declared to be subject to section 21. Conversely sections 11, 12 and 15 specify a number of sections to which they are subject and section 21 is not among them. In spite of this section 11 is clearly capable of being altered by agreement.[20] It therefore seems reasonable to assume that the absence of the "subject to" usage is not significant and in fact frequent references to the overriding nature of section 21 can be said to be superfluous. Why, then, are sections 2(2), 2(3) and 9(5) expressed to be subject to section 21? Perhaps it is because those subsections relate to the administration of division whereas sections 11, 12 and 15 can loosely be described as those which govern the substantive rules of division. One hypothesis is that the "administrative" provisions were declared to be subject to section 21 in order to quell any possible doubts as to the existence of a power to contract out of sections which govern the administration of division.

18. Section 47 relates to agreements which defeat creditors.
19. See also Matrimonial Proceedings Act 1963, s. 79(5). This subsection was added by a consequential amendment in the second schedule of the Matrimonial Property Act 1976. In relation to agreements under s. 21 the court can only exercise the powers conferred in s. 79 if that course of action is required in the interests of any child of the marriage.
20. See ss. 21(3)(a) and (10)(3).

The fact that section 13, which relates to marriages of short duration, is not expressed to be subject to section 21 has certainly not proved to be a deterrent in practice. The writer noted the following clause in an agreement entered into under section 21:

> As between the husband and the wife, any proceedings to which, but for this Agreement, the provisions of the Matrimonial Property Act 1976 would apply, whether brought under section 23 of that Act or which are subject to the provisions of section 4(4) of that Act including questions of jurisdiction arising prior to the commencement of the hearing or disposal of such proceedings shall be decided as though the parties hereto were not married until the 1st day of March 1985 and notwithstanding section 36 of that Act, the parties hereto declare that in any proceedings as aforesaid they shall each be estopped from asserting that they were married before the said 1st day of March 1985 and barred from adducing any evidence to suggest that they were married on any other date.

The question of how far the power to contract out extends is certainly not without practical significance. For example, if an agreement is drafted in the broadest possible terms for the purpose of contracting out of the provisions of the Act the spouses could lose the protection of some important sections. It may therefore be unwise to adopt a blanket clause of the kind which is currently being used in Wellington for the purpose of contracting out under section 21. Such a clause typically provides that the agreement is

> in full settlement of all questions of matrimonial property [and that] each party hereby agrees with the other that neither party has any claim upon the other either under the Matrimonial Property Act 1976 or under the Matrimonial Proceedings Act 1963 to any property whatsoever of the other and that this agreement is in full settlement of all or any of the rights that either party might have against the other whether under the Matrimonial Property Act 1976, the Matrimonial Proceedings Act 1963 (so far as that Act relates to matrimonial property) or under any Act or Acts passed in amendment thereof or in substitution thereto . . .

Such an agreement could, for instance, deprive the spouses of the right to lodge a notice of interest against title under section 42. In terms of section 43, which deals with the restraint of dispositions, any claim of the party seeking the restraint could be held to be only under the agreement, whereas section 43 requires that a person seeking a restraint should have a claim under the Act.

Although there is a strong argument that sections 42, 43 and 44 are administrative provisions out of which it is impossible to contract, agreements should be drafted carefully in order to ensure that statutory safeguards are not lost. Parties who wish to contract out of the Act can specify that they do not wish to contract out of every section. If the task of drawing up an exhaustive list of sections which will continue to apply is too daunting then a preamble or extended recital can be employed. Without ever reaching the level of the specific a preamble could provide the court with a guide as to the intention of the parties to a disputed agreement. One recital which has been used is:

> *Whereas* the parties hereto intend to marry each other.
> *And Whereas* the parties hereto wish to ensure themselves of the security of their respective financial positions in view of the possible effects of the Matrimonial Property Act 1976
> *And Whereas* the parties hereto are fully aware of their respective rights and obligations under the Domestic Proceedings Act 1968 and the Matrimonial Proceedings Act 1963

And Whereas the parties hereto wish to contract out of the said provisions of the Matrimonial Property Act 1976 as a whole but are content for some of the provisions of the said Act to apply to them
And Whereas the parties hereto have agreed to make such provision as they themselves think fit for the status ownership and division of their property (including future property)
And Whereas the parties intend to make such provision by changing the structure of the said Act so that the effects of the application of the said Act with every amendment provided for by this agreement shall in many situations be different from what such effects would have been had this agreement not been made.

Another possible approach is for the parties to agree that the Matrimonial Property Act 1976 shall apply except that provisions . . . shall not apply. However to overlook one section could be to defeat the intention of the parties.

While the precedents quoted above illustrate not only the possible extent of an agreement but also the way in which specific clauses can be drafted it is now necessary to turn directly to an examination of the form of the agreement.

III. THE FORM OF THE AGREEMENT

Subsections (4), (5) and (6) of section 21 govern the form of the agreement. In order to comply with subsections (4) and (5) an agreement must be in writing and signed by both parties. Each party must have had independent legal advice before signing and in terms of subsection (6), the signature of each party to the agreement must be witnessed. The witness is to certify that before the relevant party signed the agreement he explained the effects and implications of the agreement to him. In practice, subsections (4) to (6) have already given rise to difficulties and differing interpretations.[21] For instance, it would appear that in an attempt to ensure that the spouses do not "bargain away their legal rights without understanding the implications"[22] the legislature may have overlooked the likelihood that incomplete or inaccurate advice will be given by overseas advisers who are not fully conversant with the Act.[23] In terms of subsection (6) the notary public or commonwealth solicitor may be an appropriate witness but is he the appropriate adviser? One possible solution is to make provision for a witness overseas but for explanation by a local solicitor. Thus a New Zealand solicitor would, presumably by letter, explain the effects of the statute to his client overseas. The witness could, on the production of the letter, certify that the party whose signature he is witnessing has had the effect of the agreement explained by an appropriate person, namely a solicitor of the Supreme Court of New Zealand. This would provide an added safeguard for the party signing. The explanation would be received directly from its original source and not through an overseas notary or solicitor. Of course situations in which advice is not even requested from New Zealand can also be envisaged. A more complicated procedure would be for the New Zealand solicitor to send a certificate directly to a specified

21. Policy questions surrounding the legal advice requirement are discussed post, pp. 119-120.
22. N.Z. Parliamentary Debates, Vol. 402, 1975: 5116, on the occasion of the introduction of the Bill.
23. Professor Webb has already noted that practitioners foresee problems in this context. See *Matrimonial Property Act Seminar* "The Matrimonial Property Act 1976 — A Quick Guide" (Legal Research Foundation) Auckland 1977, 23, 39. See also Fisher *The Matrimonial Property Act 1976* (Wellington, 1977) 27.

witness on receipt of the acknowledgement from the client of his letter of explanation.

The legislature did not set out any particular form of certificate. As might be expected, few solicitors have adopted exactly the same method of certification. The most unequivocal approach would appear to be for the solicitor to sign as witness and then again on the certificate, specifying that he is the witness and a solicitor and that in terms of section 21 of the Matrimonial Property Act 1976 he has, prior to the agreement being signed, explained the effects and implications of the agreement to the party signing. Unfortunately sloppy practices have already arisen. Some solicitors merely certify that they "have explained to the husband/wife the full effect and implications of this agreement." No mention is made of whether the explanation is given before the agreement has been signed in spite of the fact that the act of giving advice after the agreement has been signed was "not one to be recommended as standard practice" even prior to the commencement of the Act.[24] Such a failure to comply with subsection (6) would no doubt be handled and disposed of under subsection (9) if it could be shown that the party involved had actually been advised prior to signing. If the advice had not in fact been given beforehand and the party affected had, as a result, signed away any rights or claims then the question of material prejudice might arise and the agreement could be held to be void under subsection (8)(a). One agreement which has been drafted contains a certificate to the effect that the provisions of the Matrimonial Property Act 1976 have been explained to the signatory. Is this sufficient? It is not absolutely clear that the precise effect of the agreement involved was explained.

Although the section is silent on the point it is obvious that an agreement can be varied. What is considerably less obvious is the form which the variation should take. Those who wish to be absolutely certain can draw up a new agreement each time a variation is sought. This approach leaves little room for doubt as to validity, but it is cumbersome and probably over-cautious. Perhaps an analogy can be made with the law relating to the variation of wills. A codicil to a will must take the same form as the will itself.[25] Similarly it is likely that a contract which purports to vary an agreement under section 21 must also take the same form as its parent but it is unfortunate that the point is not specifically dealt with.

Despite the fact that there is no reference in section 21 to the discharge of an agreement it is clear that it can be achieved by both parties entering into another contract.[26] The situation with regard to the form of the discharging contract is again unclear. Broadly speaking the original agreement is void if it does not take the form prescribed in section 21. It is conceivable that an agreement to discharge must also comply with the section which governs the existence of the original agreement. In relation to contracts which must be in writing in order to bind, the House of Lords in *Morris* v. *Baron & Co*[27] has held that the form of a discharging contract will depend on the extent to which the

24. *K* v. *K* [1976] 2 N.Z.L.R. 31, 38.
25. Wills Act 1837 (U.K.), ss. 1 and 9.
26. Presumably unilateral discharge would be possible if an agreement contained a clause which permitted that course of action.
27. [1918] A.C. 1.

parties intend to alter their existing contractual relations. That is, for our purposes, whether they intend variation (or partial discharge) or discharge simpliciter. In both cases the intention of the parties is evidenced by the terms of the discharging contract. In the former instance, an oral contract will not be sufficient to discharge the original written one. In the latter case an oral discharge is sufficient as the original agreement is not merely altered and then left standing but is completely extinguished. It is not contended that the rule in the *Morris* case stands for the proposition that a contract which varies or partially discharges an existing agreement must also conform to all the appropriate statutory requirements governing the original agreement. Rather the case decides the question of whether an agreement in writing must be varied by an agreement in writing as opposed to a parol agreement. This is a question to which the Matrimonial Property Act 1976 provides no answer.

Some practitioners have drafted agreements which expressly reserve a right for the parties to cancel, suspend or vary any agreement already entered into by them. The prescribed form is usually stated to be that set out in subsections (4) to (6) of section 21. It seems likely that this will be regarded as a desirable approach, yet it is possible that a lesser standard could be accepted in view of the fact that the legislation makes no express mention of variation or discharge. Perhaps the agreements referred to in subsections (1) and (2) can be said to impliedly include agreements for the variation or discharge of those already in existence. Subsection (3) may lessen the likelihod of such a finding although it is not to be read as limiting the generality of subsections (1) and (2). It is also worth noting that section 41(2)(b) of the Act deals with the discharge of court orders. These orders cease to have any effect when, inter alia, an agreement is made by the parties concerned. An agreement of this type must be signed and witnessed in accordance with subsections (4) and (6) of the Act. The receipt of independent legal advice before signing was obviously not thought to be necessary.

Section 21 relates to the form of agreements which are made after 1 February 1977. Under section 57(5) agreements entered into before that date remain valid and have effect as if the Matrimonial Property Act 1976 had not been passed. Section 55(1) provides that in dealing with applications the court shall have regard to "any agreement entered into by the parties prior to the commencement of the Act". It would seem that a common intention is still the relevant criterion in these cases and the court might have to gather evidence of the all-important intent from the conduct of the parties.

The application of the Matrimonial Property Act 1963 depends partly on the relationship between section 55(1) and section 57(5). Pauline Vaver has commented on the different words used in the two subsections and has suggested that this may result in the emergence of diverse standards.[28] Section 57(5) refers to "any agreement . . . by way of settlement of any question that has arisen in relation to matrimonial property . . .". Section 55(1) simply refers to "any agreement". Vaver supports the interpretation that the agreement referred to in section 57(5) is the type of agreement which was sufficient to constitute a common intention under section 6(2) of the 1963 Act and that the agreement in section 55(1) can be a vague, implied agreement for any purpose, whether or not intended to enure. That is,

28. Vaver "Notes on the Matrimonial Property Act 1976" 55, 70 in *Matrimonial Property Act Seminar,* op. cit.

under section 55(1) the courts will examine, but not necessarily give effect to, any agreement. Fisher advances an alternative, and arguably more tenable, interpretation of these subsections, suggesting that section 57(5) applies only when "there is a compromise of a dispute". Any other type of agreement must fall within section 55(1).[29]

The important question of the standard by which the agreement in section 55(1) will be judged is not fully covered by either Vaver or Fisher. When the Bill was introduced into the House there was only one relevant provision. The court was to have regard to "any agreement or understanding" entered into before the commencement of the Act. There was no reference to the Act not having been passed. In addition the fact that the words "or understanding" were removed may indicate that "any agreement" was not intended to be construed in its widest sense. It is also worth noting that section 55(1) is subject to section 57(5). This factor, when taken into account along with the limitation to a specific type of agreement in section 57(5) may indicate that less formal agreements will not be construed "as if the Act had not been passed". For better or for worse, they may fall to be reviewed according to the provisions of section 21 — provisions which did not exist when the agreement was entered into. The existence of section 55(1) renders the Act unclear on this point and an amendment would be welcome.

In spite of the protection offered by section 57(1) attempts are currently being made to transform pre-1977 agreements into valid agreements under section 21. For example, a matrimonial property agreement might have formed one or more of the clauses of a separation agreement. If the spouses decide to attempt a reconciliation and resume cohabitation this could have the effect of terminating the separation agreement[30] including the part of it which relates to matrimonial property. If the spouses wish their property arrangement to stand up to scrutiny under section 21 it may be desirable to draw up a new agreement. Some solicitors have chosen to annex to the separation agreement a clause which states that the provisions of the agreement, as they relate to matrimonial property, shall continue to be binding on the parties. The clause or clauses are then signed, witnessed and certified in accordance wtih the requirements of subsections (4) to (6).

Section 54 of the Matrimonial Property Act inserts a new paragraph into section 11(2) of the Stamp and Cheque Duties Act 1971. The relevant part of that subsection now provides that no duty shall be payable on "an instrument required for any of the purposes of the Matrimonial Property Act 1976". Initially the Inland Revenue Department interpreted these words restrictively. In response to a letter from a member of the Wellington District Law Society the department stated that separation agreements or agreements entered into on divorce would not be exempt from stamp duty. The department's view was that the only exempt instruments would be those required to carry into effect the terms of a court order under sections 25 to 34 of the Matrimonial Property Act.[31]

29. Fisher, op. cit., 27. In Fisher's terms a compromise is equivalent to an agreement for the purpose of settling differences under s. 21(2).
30. *Nichol* v. *Nichol* (1886) 31 Ch.D. 524.
31. The Department's reply is reproduced in *Council Brief* (Newsletter of the Wellington District Law Society) March 1977. Deed duty is not as important in this context not only because the agreement need not take the form of a deed but also because of the lesser amount involved.

Perhaps this reply was not surprising as conveyance duty is assessed on an *ad valorem* basis and a considerable amount could be payable on a matrimonial property agreement. Nevertheless, the department's interpretation seemed contrary to the plain words of the section and, as the Society pointed out, it could have led to a resort to the former practice of commencing proceedings and then settling by consent. When the matter was taken up by the New Zealand Law Society the department changed its stance and now advises that any instruments necessary for a transfer of property between spouses following the break-up of a marriage will be exempt from stamp duty. However the reversal was probably not accompanied by complete repentance as it is clear that the Commissioner does not envisage that the exemption will extend to agreements entered into before a marriage or during its subsistence.

IV. VOID, VOIDABLE AND UNENFORCEABLE AGREEMENTS

In accordance with section 21(8)(a) an agreement made under section 21 is void if the subsections prescribing the form and procedures for the creation of an agreement have not been complied with. Under subsection (8)(b) the agreement is void if the court is satisfied that it would be unjust to give effect to it.[32]

The harshness of subsection (8)(a) is mitigated by subsection (9) which gives the court a power to declare that an agreement "shall have effect in whole or in part or for any particular purpose" if it appears that non-compliance has not materially prejudiced the interests of any party to the agreement. A similar qualification does not appear in relation to paragraph (b) and it would seem that an agreement which is void under that paragraph falls *in toto*. It is also noticeable that the court has a power to refuse to give effect to the agreement but no power to vary it and that subsection (12) replaces the clauses of void, voidable or unenforceable agreements with the provisions of the Act.[33] Some solicitors have adopted the practice of including a clause in their agreements to the effect that "each of the clauses numbered . . . to . . . shall be deemed to be a separate agreement and shall be severable one from the other". Confronted with such an agreement the court might sever the unjust clauses and give effect to the rest of the agreement as nothing in the section expressly prohibits such a course of action.

Subsection (10) is pivotal. It sets out a list of criteria to which the court is to have regard in determining whether it would be unjust to give effect to an agreement. Under paragraph (a) the provisions of the agreement are to be taken into account. The directive is clear enough although the paragraph could encourage litigation as it will be very difficult to predict with certainty precisely which provisions will influence the court towards a finding of injustice. Paragraph (b) requires the court to consider the time that has elapsed since the agreement was entered into. Again this provision is rather cryptic and a number of different interpretations can be adopted. For example, it might be said that if a very short period of time has passed between the making of an agreement and the

32. These grounds are not exhaustive. Under s. 47(1) an agreement which is intended to defeat creditors is void as against those creditors and the Official Assignee. If the agreement merely has the effect of defeating creditors it is initially void but is endowed with new life and effect after a two year period has elapsed.
33. Note the power to vary under Matrimonial Proceedings Act 1963, s. 79(5).

presentation of an application to the court, there would be less force in the argument that such an agreement is unjust and should be set aside. Similarly what is just today could be unjust in thirty years' time. In fact it will be difficult to apply this provision in isolation from paragraph (d), which directs the court to have regard to any change in circumstances since the agreement was entered into.

Conceivably the circumstances which surround the making of an application could also affect the operation of the paragraph. Under section 25(2) the court cannot make an order unless it is satisfied that the parties are living apart or that their marriage has been dissolved or that one spouse is endangering or diminishing the value of the matrimonial property by gross mismanagement or wilful or reckless dissipation of property or earnings. In addition, section 25(3) provides that a court order relating to specific property may be made at any time.[34] When there is an application to have the agreement declared void at a time when the marriage has not broken down there may be grounds for suggesting that the application, if made shortly after the agreement, should not be viewed favourably by the courts. Why should the courts interfere in such a case?[35] However if there has been a long period between agreement and application lapse of time may incline the courts towards deciding that the agreement is unjust.

The result might be reversed if the marriage has broken down before application is made. In that situation it could be claimed that although the parties recognised that there was a possibility that their marriage could come to an end before it was dissolved by death, they entered into the agreement intending that their marriage would endure. In other words not many spouses would expect their marriage to break down within the space of two or three years and it is reasonable to conjecture that a matrimonial property agreement made in contemplation of short-term breakdown would be different from the majority of agreements which are presumably entered into by parties who believe that their marriage will not founder in the immediate future. Thus if breakdown occurs rapidly provisions made in the expectation that the marriage would last longer than it in fact does may be considered to be unjust.

Paragraphs (c) and (d) deal respectively with the unfairness or unreasonableness of the agreement in the light of "all the circumstances at the time it was entered into" and in the light of "any changes in circumstances" since then. Such provisions are not without precedent. For example section 2(2) of the Minors' Contracts Amendment Act 1971 provides that the court may "inquire into the fairness and reasonableness of any contract . . . at the time the contract was entered into".[36] However such paternalism has not been reserved for the minor. Similar provisions appear in section 79(2) of the Matrimonial Proceedings Act 1963 and also in section 85 of the Domestic Proceedings Act 1968, as amended by section 17 of the Domestic Proceedings Amendment Act 1971. The case law which surrounds these sections may provide both the court and the practitioner with some guide as to the application of subsections (8)(a) and (10).

34. Property covered by an agreement can be said to be specific property and although neither s. 21 nor s. 25 refers to applications concerning agreements, the words "order" and "declaration" which appear in subss. (2) and (3) respectively can encompass a judicial declaration that an agreement is void under s. 21.
35. In France the spouses cannot even agree to vary their contract unless they have been married for two years. See Code Civil, art. 1397.
36. See also the repealed s. 6(2) of the Minors' Contracts Act 1969.

Section 79 has not been of much assistance to spouses who challenge agreements. The decision of the Supreme Court in *Ridgen* v. *Ridgen*[37] is important in this context. In that case the wife claimed that she had only signed away her rights in the matrimonial home because her husband had refused to agree to a separation if she did not. Her contributions, both monetary and otherwise, appeared to be as great as those of her husband. The case turned on the question of separate legal advice. The judge felt that where the parties had been separately advised the court should be reluctant to exercise its powers under section 79. To do otherwise would be to "cause the court to be inundated with applications". This was despite the fact that he suggested that people involved in matrimonial disputes tend to act "irrationally" and that this may cause them to brush aside legal advice which could defer their plans for a separation. If the reasoning in that case is applied to subsections (8)(a) and (10) then it would seem that the court will only rarely refuse to give effect to agreements. The converse is true in relation to agreements which have not complied with subsection (5). In such instances, the *Ridgen* case suggests the courts may be reluctant to save the agreement in whole or in part under subsection (9). However it must be noted that the test in subsections (8)(a) and (10) is injustice. This is a factor which is not mentioned in section 79 and the court in *Ridgen* referred only to the fact that a court should set aside an agreement which is "manifestly" unjust. If the injustice argument is taken into account, section 85(3) of the Domestic Proceedings Act 1968 might prove to be of even greater assistance in the interpretation of section 21(8)(a) than is section 79. The court may exercise its powers to vary or cancel a maintenance agreement if, under section 85(3), it is satisfied that "at the date of the agreement its provisions were . . . unfair or unreasonable, or that since the date of the agreement . . . the circumstances have so changed" that the court ought to exercise its powers. The subsection is an amalgam of paragraphs (a), (c) and (d) of subsection (10). It has been held that under subsection (3) an agreement will be unfair at the time it was entered into if the matter complained of was "so at variance with the original contemplation of the parties that the party seeking the variation would not, in the opinion of the Court, have entered into the particular agreement had he or she known of the true position".[38]

In relation to the change in circumstances limb of section 85(3) it has been held that one appropriate case for variation or cancellation is where the wife has started to earn a large salary.[39] Vaver has pointed out that in relation to section 21(10)(d) it is unlikely that a breakdown of the marriage will be regarded as a change in circumstances as this event was contemplated by the parties when they made the agreement.[40] However, as she goes on to note, the court is to have regard to changes in circumstances "whether or not those changes were foreseen

37. (1976) Unreported, Rotorua Registry, M.27/76. Vaver, op. cit., cites *McKavanagh* v. *MKavanagh* (1974) Unreported, Auckland Registry, D.1151/73. In that case the court was reluctant to set aside an agreement under s. 79 because the husband had received independent legal advice. This was in spite of the fact that he had been "distraught" when he signed and said that this prevented him from understanding that he was signing away his property. See also *Hammond* v. *Hammond* [1974] 1 N.Z.L.R. 135.
38. *Richards* v. *Richards* [1972] N.Z.L.R. 222, 227. The husband did not know that his wife and children had free board.
39. *Nelson* v. *Nelson* [1970] N.Z.L.J. 487.
40. Vaver, op. cit., 67.

by the parties". Presumably the court will have regard to the fact that there has been misconduct or that one party has been incapacitated, or has won a large sum of money.[41]

Any additional and unspecified matters to be taken into account under paragraph (c) could include factors such as general matrimonial misconduct and the failure of one of the spouses to disclose all of his assets. The latter factor can be used to illustrate an important point concerning the interrelationship of subsections (10) and (11). The proposition is that some of the factors to be considered under subsection (10) will also be of direct relevance under subsection (11). As has already been indicated, subsection (11) preserves all the common law, equitable and statutory rules relating to void, voidable and unenforceable contracts although this has not deterred some parties from agreeing that their contract is in full settlement of all rights and claims under any statute, or rule of common law or of equity. Because a "family arrangement" is a contract *uberrimae fidei* there is a duty to disclose all of the material facts at the time the agreement is entered into. If an agreement under section 21 can be said to fall within this class of contract, then equity demands that a full disclosure be made. Thus it is apparent that an agreement which has survived the rigours of court scrutiny under the relevant provisions of section 21 may still be susceptible to examination under subsection (11).

In this context there is an important point to be made in relation to the contractual doctrine of inequality of bargaining power. This new doctrine was espoused by Lord Denning M.R. in *Lloyds Bank Ltd.* v. *Bundy*.[42] Prior to this case the courts did not usually grant relief to a party who had suffered the burden of a harsh and oppressive contract, although equity had occasionally intervened in the eighteenth and nineteenth centuries in order to set aside "unconscionable" contracts.[43] These were cases where one party had used his superior power to gain an advantage over a weaker party. The doctrine was not based on undue influence or duress but turned on disproportionate economic power which led to unequal bargaining strengths. Lord Denning picked up the threads of this doctrine and wove it into a formula which, as one writer has suggested, "appears to cover all cases of duress, undue influence and unconscionable contracts".[44]

As there is nothing in subsections (8) and (10) of section 21 which limits or affects any rule of law or equity there appears to be no reason why a dissatisfied party could not apply to the court claiming that it would be unjust to give effect to the agreement in terms of subsections (8)(b) and (10). If this argument fails he could apply again for relief on the separate ground that it would be unjust

41. Cf. *Ridgen* v. *Ridgen* supra fn. 37. It was implied that a large inflationary increase in the value of property was not a change in circumstances under s. 79. See *Hall* v. *Hall* [1970] N.Z.L.R. 1132 in relation to loss of income because of illness. Beattie J. held that under s. 85(3) the court did not have to vary the agreement in precise proportion to the exact monetary loss caused by the change in circumstances.
42. [1975] Q.B. 326.
43. Moneylenders Act 1908, s. 3 is an example of legislative intervention.
44. Clarke "Unequal Bargaining Power in the Law of Contract" (1975) 49 A.L.J. 229, 231. The doctrine has been supported in *Clifford Davis Management Ltd.* v. *W.E.A. Records Ltd* [1975] 1 All E.R. 237 and *A. Schroeder Music Publishing Co* v. *Macaulay* [1974] 1 W.L.R. 1308.

to give effect to the agreement which, it could be argued, is a contract which is tainted by the element of inequality of bargaining power.

But is the important new doctrine applicable to agreements which are governed by section 21? Lord Denning after examining the relevant cases, stated:[45]

> They rest on 'inequality of bargaining power'. By virtue of it, the English Law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressure brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other . . . I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.

The opening reference to a party who has not received independent advice tends to indicate that the advice requirement in section 21(5) might exclude the application of the doctrine. However, the last two sentences of the quotation qualify that initial statement. It is also interesting to note that the doctrine appears to cover the case where a spouse signs a contract because of his desire that his marriage should go ahead.

Subsection (11) contemplates grounds other than unfairness. It can, for instance, extend to an examination of the sufficiency of consideration.[46] Mistake, undue influence, and duress are all relevant vitiating factors under subsection (11). The doctrine of frustration could also apply. Take the example of an agreement which is made in contemplation of marriage. What happens if the parties do not marry? The necessary implied term that the parties would, in the circumstances, have intended that the contract be discharged would no doubt be found. However such a result would depend on a finding that marriage was the true basis of the contract.

The question of contractual capacity should not be overlooked. Section 21(7) governs minors' contracts. There is no conflict with the Minors' Contracts Act 1969[47] for the simple reason that section 4(3) of the Matrimonial Property Act states that unless otherwise expressly provided, every other Act is to be read subject to the Matrimonial Property Act.[48] In the absence of express provisions relating to the contractual capacity of persons of unsound mind and drunkards it would appear that, by virtue of subsection (11), those contracts are to be governed by the existing common law and statutory rules which relate to them.

Finally, the ubiquitous notion of public policy deserves some mention. The question of whether an agreement is void because it is contrary to public policy can be considered under subsections (10)(a), (10)(e) or subsection (11). The categories of contract which are contrary to public policy have remained relatively static, and, theoretically, it is not open to a judge to invent new heads although it is permissible to argue by analogy from the existing ones. One type of contract which has been held to be contrary to public policy is the contract which is

45. *Bundy* v. *Lloyds Bank Ltd* supra fn. 42, 339.
46. Arguably the adequacy of consideration could be examined under subs. (10)(e) or (10)(c).
47. Cf. the position under ss. 5, 6 and 9 of that Act and s. 2 of the 1971 Amendment Act.
48. Also Minors' Contracts Act 1969, s. 15(3).

"prejudicial to the marriage status". A contract which provides for or encourages a future separation or divorce falls within this group.[49] Section 21 of the Matrimonial Property Act has made a substantial inroad into this rule as it is clear that an agreement of the type which is now empowered by the section would have been a nullity at common law. Statutory intervention in this area was timely as the rule was being overtaken by modern-day attitudes and realities. However the extent to which section 21 destroys the common law public policy ground is not certain. For instance, a contract is also void at common law, in terms of this heading, if it prevents the dissolution of a marriage which has broken down. The rationale for this is that such a contract prejudices the status of marriage as it encourages extra-marital relationships by discouraging divorce and remarriage. Thus it may still be possible that an agreement could be said to be contrary to public policy either under subsections (10)(a) or (10)(e) or at common law under subsection (11) if it provides that a spouse who seeks a divorce will not share in any matrimonial property.

The question of the extent to which parties are empowered to contract out of the Act has already been canvassed. It is worth noting that one class of agreement which has been held to be void as contrary to public policy is a contract to oust the jurisdiction of the court. An agreement drafted in the widest possible terms in order to exclude the provisions of the Act could be said to fall into this category.

V. CONCLUSION

On the basis of the popularity of agreements in other jurisdictions which have statutory regimes similar to that of New Zealand it appears that section 21 has the potential to affect large numbers of people.[50] Interviews conducted by the writer indicate that as at 1 September 1977, only seven months after its introduction, approximately two hundred agreements under section 21 had been entered into in Wellington. It is a little too early to attempt to identify a trend in relation to the terms and contents of the agreements, however there does appear to be an identifiable, if predictable, pattern in relation to the previous marital status of the parties to the agreements. A large majority had already been married and were making the agreement before they entered into their second marriage.[51]

It would be unfortunate if lack of information was the sole reason for some spouses failing to avail themselves of the opportunity to choose a regime which suits them. A survey conducted in France[52] indicates that in that country, ignorance of both the legal and contractual regimes is a real problem. In the case of the breakdown of the marriage bitterness and animosity may prevent the

49. *Fender* v. *St. John-Mildmay* [1938] A.C. 1.
50. Since the introduction of community of acquisition regimes in France and Quebec approximately 15% of couples in France and 53% in Quebec have contracted out. See further Angelo and Atkin [1976] N.Z.L.J. 424, 427. See also Fisher, op. cit., 24, and Hahlo *The South African Law of Husband and Wife*, 3rd ed. (Cape Town, 1969) 283.
51. In one American study of fifty-four contracts eighty percent were found to involve men who had been married previously. Ninety percent of these men also had children from former marriages. Seventy percent of the contracts involved women who had been married previously, and of these ninety-four percent had children from their former marriages. See Gamble "The Antenuptial Agreement" (1972) 26 Univ. Miami L.Rev. 692, 730.
52. Poisson *Travaux du 52nd Congrès des Notaires de France* (1953) 116-122.

spouses from reaching agreement. Had they been fully aware of the effects of the statutory regime and the possible alternatives, they might have agreed at the outset and avoided dispute later on, although it is arguable that the same animosity which could result in lack of agreement after breakdown might cause spouses to challenge an existing agreement. In this context the Israeli solution is an appealing one. Before the solemnisation of a marriage in Israel the marriage registrar must explain to the intending spouses that in the absence of a property agreement the statutory regime will automatically govern.[53] If all those who applied for a marriage licence were informed of the effect of the new Matrimonial Property Act and the possibility of making an agreement the much vaunted free choice would become more of a reality and the statutory regime would not win merely by default.

Perhaps the agreement, like the marriage contract, is to be the preserve of the wealthy. Independent legal advice and attestation is mandatory and also costly. A service like the French notarial system which is free[54] is unlikely to eventuate and is difficult to envisage in operation in the New Zealand setting. However, a small but innovative step towards reducing what might otherwise be a prohibitive cost has already been taken in New Zealand. The Legal Aid Board has declared that legal aid is available for separation agreements even if no attempt to institute proceedings is made.[55] The Board's ruling clearly covers the property arrangements which are often contained in separation agreements. Unfortunately it appears to leave open the question of whether aid will be granted when an agreement which covers only property is entered into at the time when divorce, on a ground other than separation, is sought. A declaration that legal aid extends to such an agreement would be welcome.

In the preceding paragraphs the focus has been on freedom of contract. However that is only one side of the contractual coin and the obverse should not be overlooked. The legislature's belief in freedom of contract[56] is clearly unaccompanied by a belief in sanctity of contract. Sections 21(8) and 21(10) give the court jurisdiction to consider whether it would be unjust to give effect to agreements made under section 21 of the Act. In the writer's opinion this power of judicial review is desirable as sanctity and certainty should give way to fairness and justice. Nevertheless the power will have to be exercised with restraint as contracts which are freely open to judicial impeachment are unlikely to gain widespread acceptance.

On the other hand it can be argued that provision for judicial review is unnecessary. The requirement that the parties to matrimonial property agreements receive independent legal advice could be thought to be a sufficient safeguard. Those who point to such safeguards should consider other matrimonial legislation which has a protective function. An analogy may be found in section 13 of the Domestic Proceedings Act 1968 which provides that every lawyer acting for a husband or wife under that Act has a duty "to take all such proper steps as

53. See s 3(6) of the Spouses (Property Relations) Law 1973, reproduced in Shifman "Property Relations Between Spouses" (1976) 11 Is. L.R. 98, 107.
54. Code Civil, art. 1394.
55. Legal Aid Board, Ruling No. 36, 21 November 1972. Deed duty on the separation agreement will be met as a disbursement but conveyance duty is not covered.
56. As evidenced in *Matrimonial Property — Comparable Sharing. An Explanation of the Matrimonial Property Bill 1975* (Wellington, 1975) Parliamentary Paper E6, 11.

in . . . his opinion may assist in effecting a reconciliation". Whilst the letter of the law is observed here the spirit is often neglected.[57] The independent legal advice requirement in the Matrimonial Property Act could well meet the same fate. In addition even the most conscientious legal advice might not prevent pressures which could result in the acceptance of harsh terms and the rejection of sound advice.

The power of judicial review is not unknown in matrimonial legislation as the court could set aside agreements between husband and wife before the 1976 Act came into existence.[58] Equally, sections 21(8) and (10) reflect an increasing trend, in statute and at common law, towards the judicial review of contracts. This tendency is typified by Lord Denning's recent recognition of a common law doctrine of inequality of bargaining power. Furthermore the Contracts and Commercial Law Reform Committee has recommended that the power of the court to examine harsh and unconscionable credit contracts under the Moneylenders Act 1908 should be expanded.[59] In fact the Committee suggested that the legislation should contain a set of guidelines to which the court should have regard when determining whether a contract is harsh and unconscionable. Those guidelines parallel certain provisions in section 21(10) of the Matrimonial Property Act.[60] Commercial contracts have provided lawyers with the classic caricature of parties at arm's length. In spite of this tradition and the nature of the contract, modern reformers have seen the necessity for safeguards in that area. Surely there is an even greater need for the protection of the parties to the matrimonial property agreement — a need which justifies the existence of the sweeping powers of judicial review in section 21 of the new Act.

The Matrimonial Property Act is an important and controversial piece of legislation. Paradoxically, section 21, which permits parties to contract out of the provisions of the Act, may have wider social consequences than the Act itself. For many spouses a visit to the lawyer rather than the vicar may become the first priority before marriage. Accordingly it is essential that the profession is prepared to meet this new responsibility. It must ensure that the implications of the agreement under section 21 are fully understood by the community.

57. See Wellington District Law Society Letter *Standards of Conduct in Domestic Proceedings* 17 August 1977, pp. 1, 3 and 4. Also Macrae "Conciliation in Domestic Proceedings" [1973] N.Z.L.J. 188.
58. For example, Matrimonial Proceedings Act 1963, s. 79 and Domestic Proceedings Act 1968, s. 85.
59. Report of the Contracts and Commercial Law Reform Committee *Credit Contracts* (Wellington, 1977) para. 7.23.
60. Especially s. 21(10)(c). It is interesting to note that in para. 8.43 of the Credit Contracts report, op. cit., the Committee proposed that a debtor should be entitled to rescind a controlled credit contract within three days of statutory disclosure. It was felt that this would enable him to evaluate the terms of the agreement and receive additional advice on it. Similarly, in submissions on the Matrimonial Property Bill it was suggested that there should be a seven day waiting period between the solicitor's explanation of the effect of the agreement under s. 21 and the date upon which it is signed.