# CASE NOTES

## EXCEPTIONAL HARDSHIP AND RECONCILIATION

The Commonwealth Matrimonial Causes Act 1959-1966 s.43 provides that proceedings for dissolution of marriage, except in the cases of adultery, wilful refusal to consummate and rape, sodomy or bestiality,[1] shall not be instituted within three years after the date of marriage except by leave of the Court. The Court will not grant leave under this section unless, *inter alia,* refusal to grant leave would result in exceptional hardship to the applicant.[2] In addition s.43(4) provides that in determining an application the court shall have regard to the possibility of a reconciliation between the parties before the expiration of the three year period. The purpose of s.43 is clear: as Barry J. put it in the case of *Hickson* v. *Hickson,*[3] 'Section 43 is thus designed to prevent the premature filing of petitions, and one of its objects is to ensure that a reasonable trial shall be given to marriage so far as that can be achieved by an enforced duration'. The relationship between s.43(4) and the remainder of s.43 was considered by Selby J. of the Supreme Court of New South Wales in the recent case of *Szagmeister* v. *Szagmeister.*[4]

In that case the applicant wife sought leave to institute proceedings within the three year period on the grounds of cruelty. She had, in general terms, referred to a deterioration in her health as a result of the husband's conduct, but the learned judge pointed out[5] that there was no medical evidence to support her claim. Although, he went on to say, that he could envisage cases where such circumstances could amount to exceptional hardship.[6] Principally, however, the wife relied on the contention that her application should be granted as there was no chance of a reconciliation. Selby J. held that improbability of reconciliation would not, of itself, constitute exceptional hardship giving rise to leave to present a petition within the statutory period.

Counsel for the applicant relied chiefly on two decisions of the Supreme Court of the Australian Capital Territory: *Drzola* v. *Drzola*[7] and *Bentley* v. *Bentley.*[8] In the former case, Joske J. referred[9] with

1 s.28 (a), (c) and (e).
2 s.43 (3).
3 (1961) 2 F.L.R. 123 at p. 125.
4 (1969) 15 F.L.R. 240.
5 At p. 241.
6 See e.g. *Hillier* v. *Hillier* [1958] P. 186. *Jones* v. *Jones* (1962) 4 F.L.R. 467.
7 (1967) 11 F.L.R. 215.
8 (1968) 11 F.L.R. 408.
9 At p. 216.

approval to two dicta of Denning L.J. In *Bowman* v. *Bowman,*[10] Denning L.J. had said,[11] 'The really important consideration in all these cases is to see whether there is any chance of reconciliation'. In *Simpson* v. *Simpson,*[12] he had commented,[13] 'In all applications of this kind the possibility of reconciliation is a most important aspect of the case'. On the other hand, Bucknill L.J. in *Fisher* v. *Fisher*[14] had regarded the unlikelihood of reconciliation as not amounting to exceptional hardship. Joske J. did not accept Bucknill L.J.'s view nor the view of the Full Court of the Supreme Court of New South Wales in *Osborn* v. *Osborn,*[15] who he claimed had ignored the relevance of the possibility of reconciliation by attaching too great an importance to the difference between the English and Australian statutory provisions. Joske J. went on to say,[16] 'The Court is under a positive obligation to take the question of the possibility of reconciliation into consideration, in order to determine whether there is or is not exceptional hardship on the applicant by leave to proceed being refused. The fact that the legislature has expressly stipulated this indicates the importance the legislature attaches to this matter'. *Bentley* v. *Bentley* is by no means as strong a case as *Drzola,* although Kerr J. referred with approval[17] to Joske J.'s remarks in that case.

In *Szagmeister,* however, Selby J. considered that he was bound by the decision of the New South Wales Full Court in *Osborn.* There, in a joint judgment, the Court[18] commented, 'Whilst the prospects of reconciliation are doubtless matters to which the Court must have regard, the mandatory provisions of the section make it plain that it is by no means the sole test, for the Court is enjoined to refuse the application unless such refusal would impose exceptional hardship upon the applicant. The importance of this provision arises from the undoubted fact that some hardship is imposed on any party to the marriage whose spouse has been guilty of some matrimonial offence'. It is suggested that the view expressed by the Full Court and accepted, albeit reluctantly, by Selby J. is quite unrealistic and seems to be at odds with the rational and humane application of divorce law. The aim of s.43 is to discourage precipitate petitions on certain grounds rather than an artificial protection for marriages which have collapsed utterly.

Furthermore, the judgment of Selby J. reveals an attitude towards the interpretation of statutes which is, to the present writer,

10 [1949] P. 353.
11 At p. 357.
12 [1954] 1 W.L.R. 994.
13 At p. 996.
14 [1948] p. 263 at p. 266.
15 (1961) 2 F.L.R. 29, which Selby J. ultimately followed.
16 At p. 218.
17 At p. 411.
18 Dovey, Nield and Chambers JJ. at p. 34.

fundamentally disquieting. The major problem to which statutory interpretation gives rise today is the relationship between Court and legislature as regards particular legislation.[19] There can be no question but that the Courts do not now solely seek to discover legislative intent. As Donaldson J. put it in the case of *Corocraft Ltd* v. *Pan American Airways*,[20] '[the Courts are] finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing'. In *Szagmeister*, Selby J. refused to adopt a creative approach towards s.43. As he put it, [21] ' . . . it is not open to a judge to apply his views as to expediency or policy or what he considers to be sound common sense by departing from the plain meaning of the language employed by the legislature'. In view of what has been said earlier and, particularly, in view of Joske J.'s decision in *Drzola* v. *Drzola* one might well doubt whether the meaning of the statute is plain as Selby J. seems to suggest. One's disquiet is further increased when, at the end of his judgment, the learned judge says,[22] 'If I were free to exercise an unfettered discretion in the matter now before me and able to decide it by the dictates of reason and common sense, I would grant the application'. It need only be said that this last comment must have provided even less consolation for the applicant whose marriage had broken down than for the student of statutory interpretation.

*Frank Bates**

## CROWN PRIVILEGE—CONWAY v. RIMMER APPLIED

The facts of the recent decision of Moller J. of the Supreme Court of New Zealand in *Pollock* v. *Pollock and Grey*[1] do not, at first sight, seem to be of immediate interest and importance. It was not concerned, as was *Duncan* v. *Cammell Laird*[2] with the defence of the realm, nor even indirectly, as was *Conway* v. *Rimmer*,[3] with the fight against crime, yet it is a case which provides certain features of interest both from the point of view of the doctrine of precedent and also showing how, in the field of Administrative Law, old notions die hard. In *Pollock's* case, the petitioner had served a *subpoena duces tecum* on two officers of the child welfare department requiring production of a departmental file dealing with an application by the petitioner and the respondent to adopt a certain baby and to give evidence both as to alleged conversations and as to results of observations made by the officers during the adoption inquiries. It

19 See Bloom (1970) 32 M.L.R. 197.
20 [1968] 3 W.L.R. 714 at p. 732.
21 At p. 243.
22 At p. 244.
* LL.M. (Sheff.), Lecturer in Law, University of Tasmania.
1 [1970] N.Z.L.R. 771.
2 [1942] 1 All E.R. 587.
3 [1968] 1 All E.R. 874.

was clear from the evidence that it was believed that the respondent had committed adultery. The Minister of Health intervened and claimed crown privilege in respect of the production of the file and the giving of oral evidence. Counsel for the Minister made it clear that the claim of privilege was made in respect of the *class* of document and not in relation to the contents. Moller J. held, first, that the evidence involved in the particular case was of such a kind that a judge should be able to assess its effect upon the public interest as effectively as the minister. Second, that having regard to the nature of the evidence the minister's claim of privilege would not be upheld, although, as the evidence was elicited, the claim for privilege would require to be reconsidered from time to time. With regard to the nature of the general claim for privilege, the learned judge said,[4] ' . . . I think that *Conway's* case gives me power to look at the general nature of the class privilege claimed and reach a decision as to whether the evidence sought to be withheld is of such a nature that its disclosure could possibly have such repercussions upon the public interest that the minister must be accepted as being the best, and only judge in the matter, or is of such a nature that a judge of this court should be able to assess its effect upon the public interest at least equally as well as the minister. I hold, without hesitation, that the evidence sought to be withheld is of the latter kind'. Moller J. went on to say that, as a result of the House of Lords decision in *Conway* v. *Rimmer,* he would be entitled to inspect the documents concerned with a view to deciding whether the greater public interest was involved in upholding the claim for privilege or in admitting the evidence in litigation. The problem of greater public interest was considered by their Lordships in *Conway* v. *Rimmer,*[5] and Moller J.'s analysis is very much in accord with theirs. Indeed, *Conway* v. *Rimmer* was the only decision to which Moller J. specifically referred in the course of his judgment. This fact is particularly interesting in view of the New Zealand Court of Appeal's decision in *Corbett* v. *Social Security Commission,*[6] which followed the decision of the Judicial Committee of the Privy Council in *Robinson* v. *South Australia* (No. 2),[7] thus refusing to apply the full weight of the rule in *Duncan* v. *Cammell Laird.* In *Corbett's* case, two of the three judges expressed differing opinions as to whether decisions of the House of Lords should be followed in New Zealand, in preference to those of the Judicial Committee. North J. said[8] that, ' . . . it necessarily follows that this court must approach very cautiously indeed the argument that Courts in New Zealand should follow and apply a judgment of the House of Lords in

[4] At p. 772.
[5] See, for example, the remarks of Lord Upjohn at p. 891.
[6] [1962] N.Z.L.R. 878.
[7] [1931] A.C. 704.
[8] At p. 901.

preference to an earlier contrary judgment of the Privy Council in the absence of any direction from the Privy Council to that effect'. However, the learned Judge continued by saying that, at the same time, the Court would be justified in following a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council, particularly if the House had discussed the Privy Council decision and had pointed out where the Committee had erred. But this course would only be justified where the case solely involved principles of English law which were admittedly a part of New Zealand law and where there were no differentiating local circumstances. On the other hand, Cleary J. considered[9] that the question must be, ' . . . whether, after a later inconsistent decision of the House of Lords, the Privy Council is likely to adhere to an earlier decision of its own. Where the House of Lords has made it plain how and in what respects error arose in the earlier case, so that it would seem wholly unlikely that there could be any reversal to the earlier decision, then I think that a New Zealand court should follow the House of Lords'. Thus, the two judges demonstrated a rather different emphasis with regard to the problem and, although the question was not strictly in issue in *Pollock's* case, it might well have been so had the House of Lords upheld the Court of Appeal's decision in *Conway's* case, particularly when one bears in mind the recentness of that case.

Another interesting aspect of the case was Moller J.'s discussion of the purposes for which the evidence was likely to be required. As he himself described the situation,[10] 'I realise that it may be argued that candour, or the lack of it, in conversations or inquiries in respect of a proposed adoption could have a marked bearing upon the future happiness and general welfare of the child concerned. Equally do I realise that divorce may, by some, be looked upon as a luxury of self-indulgence, and damages for adultery as being, in the modern social climate, something of an anachronism. But as long as the law allows petitions for divorce to be presented, and damages against a co-respondent to be claimed in respect of them, the requirement properly remains that everything legally possible that can be done to achieve justice between the parties must, in my view, be done in the same way as if the proceedings were of a different and, in the opinion of some citizens perhaps, a more praiseworthy type of action'. It is suggested that Moller J.'s statement of policy with regard to crown privilege and family proceedings is both correct and valuable. The problems which are inherent in preventing divorce proceedings from being secretive and squalid are only too obvious. Crown privilege should not be used to obscure the course of this particularly problematical kind of litigation. Moller J.'s realistic

9 At p. 915.
10 At p. 773.

attitude towards divorce law is, therefore, to be wholeheartedly welcomed.[11]

It remains only to comment briefly upon the nature of the claim for privilege made by counsel for the minister. First, it was made clear that the claim was based upon the 'class' of document and not the contents. The entire notion of class-based privilege has been subjected to some particularly severe criticism[12] and one is perhaps a little surprised that it should have been advanced in this context. As Professor Wade has described it,[13] 'This practice was particularly injurious since it enabled privilege to be claimed not because the particular documents were themselves secret but merely because it was thought that all documents of that kind should be confidential'. The cases in which this claim was successfully made[14] clearly illustrate the dangers involved. It was further advanced on behalf of the minister that to allow the evidence to be produced would prejudice the candour of communication with and within the department. One needs go no further than the remarks of Lord Morris in *Conway* v. *Rimmer*[15] to discover the essential of this contention, particularly in the factual context of *Pollock's* case. As his Lordship puts it, 'Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer might well be encouraged rather than frustrated. The law is ample in its protection of those who are honest in recording opinions which they are under a duty to express'. Although, therefore, *Pollock* v. *Pollock and Grey* cannot be described as being notable for the arguments which were advanced in favour of the claim for privilege, it is most certainly valuable in that it has provided a clear and workable statement of policy with regard to the production of documents in family law proceedings.

*Frank Bates**

---

11 Moller J. (at p. 774) went on to say that dismissal of the Crown claim would not *ipso facto* mean that such evidence would be admissible in subsequent proceedings. That would be determined by the ordinary rules of evidence. For example, evidence of conversations between an officer of the department and a member of the public, who was not an adoptive parent, might well be excluded by the hearsay rule.

12 See, for example, Clark (1967) 30 M.L.R. 489 and the remarks of Singleton L.J. in *Ellis* v. *Home Office* [1953] 2 All E.R. 149 at p. 159.

13 'Administrative Law' (2nd Ed.) at p. 85.

14 For example, *Ellis* v. *Home Office* (supra), *Broome* v. *Broome* [1955] P. 109, *Gain* v. *Gain* [1962] 1 All E.R. 63.

15 At p. 891.

* LL.M. (Sheff.), Lecturer in Law, University of Tasmania.