CASE NOTES

Powell v Thompson [1991] 1 NZLR 597. High Court Auckland. Thomas J.

The treatment of strangers as constructive trustees has received considerable judicial and academic comment. The topic is fraught with controversy. *Powell v Thompson* demonstrates this. The case has attracted some academic analysis[1] and in at least one recent decision has been the subject of judicial consideration.[2] It is notable in two respects. One controversial aspect of the case involves the claimed basis of a stranger's liability for knowing receipt or dealing. The major bone of contention centres on Thomas J's assertion that unjust enrichment underlies this head of liability. This gives rise to immediate difficulty since it is still uncertain whether this restitutionary principle forms part of the law of New Zealand. Also of note is the treatment accorded to knowing receipt and knowing assistance, in particular, the degree of knowledge thought necessary to found liability for the latter.

The case involved the embezzlement of funds. The plaintiffs' mother worked as a clerk at an accountancy firm. She systematically defrauded the defendant, a client of the firm, of $289,482. To help remedy the situation she sold to the defendant, in fraud of powers of attorney, a house in which she and her daughters, the plaintiffs, held equal shares. From the proceeds of sale she repaid $72,700 to the defendant, without the plaintiffs' knowledge. The plaintiffs sought the return of two-thirds of this money.

The judge held that the defendant was a constructive trustee of these funds on the basis of both knowing receipt and knowing assistance. According to Thomas J these heads of liability differ in two basic respects.[3] The underlying basis of liability for knowing receipt is, in His Honour's view, "the unjust enrichment of the defendant at the expense of the plaintiff".[4] This the judge considered unconscionable and therefore deserving of a constructive trust; the constructive trust being, in His Honour's opinion, a vehicle "by which equity reverses the unconscionable".[5] With knowing assistance the basis of liability was thought to be "the conduct of the defendant in participating in a breach of trust".[6] This latter basis is wholly unremarkable. However, the same cannot be said of the former.

Some twelve years ago, in *Avondale Printers v Haggie,* Mahon J rather emphatically stated that "unjust enrichment is not part of the law of New Zealand...".[7]

1 Watts, [1990] NZRLR 330, 333; Fardell & Fulton, "Constructive trusts — A new era" [1991] NZLJ 90, 98.

2 *Equiticorp Industries Group Ltd v Hawkins*, High Court, Auckland, 16 April 1991 (CP 2455/89), Wylie J.

3 [1991] 1 NZLR 597, 607.

4 Ibid.

5 Supra at note 3, at 605.

6 Supra at note 3.

7 [1979] 2 NZLR 124, 155 (SC).

Since this case there have been at least three Court of Appeal decisions which have considered the matter.[8] In none of these cases has it been necessary to express a decided opinion on the point. They do however demonstrate a general willingness to entertain the concept of unjust enrichment whilst leaving open its precise scope.[9] For this reason one cannot rule out altogether Thomas J's resort to restitutionary principle. Indeed, rather compelling support for such an approach is to be found in the writing of Professor Birks, who contends that the recipient's liability is strict, subject only to special defences.[10] He believes knowledge is not a necessary ingredient to found liability per se, mere receipt will suffice. It is only in relation to the defences that knowledge is thought to have any relevance. Thomas J does not appear to have had this approach directly in mind,[11] although there is some indication that he may be favourably disposed to it.[12]

With respect, Thomas J's judgment fails to address the place of unjust enrichment in this country. It also omits any analysis of the case law such as would support a restitutionary basis of liability. Given the prominence which the judge accords unjust enrichment these matters are conspicuous by their absence. This is particularly so in view of Wylie J's remark in *Equiticorp Industries Group Ltd v Hawkins* that "[i]t was this approach [the founding of knowing receipt on unjust enrichment] which I think enabled him [Thomas J] to pay less regard to some of the dicta from earlier cases than others might do".[13]

Apart from Thomas J's passing remark that knowledge may not be necessary in knowing receipt cases,[14] His Honour's general approach with regard to the degree of knowledge required for liability under this head accords with the tide of authority.[15] The judge accepts that all five levels of knowledge on the *Baden Delvaux*[16] scale are applicable. However, although reference is made to *Westpac Banking Corporation v Savin*[17] as to the necessary degree of knowledge required, no mention

8 *Hayward v Giordani* [1983] NZLR 140, *Pasi v Kamana* [1986] 1 NZLR 603, *Gillies v Keogh* [1989] 2 NZLR 327.

9 MacKay, "Use of the action for money had and received in Australia and New Zealand". Thesis, LLM, University of Auckland 1988 at 77.

10 Birks, "Misdirected funds: restitution from the recipient" [1989] LMCLQ 296. Cf Burrows, "Misdirected Funds — A reply" (1990) 106 LQR 20.

11 Supra at note 3, at 608. Nor does he appear to have had the fault-based restitutionary approach in mind either since an indication that knowledge may not be necessary conflicts with this, see note 12.

12 "[K]nowledge may not be necessary in order to activate equity's jurisdiction . . .", supra at note 3, at 608.

13 Supra at note 2, at 52.

14 Supra at note 12.

15 See for example, *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41 (CA), *Marr v Arabco Traders Ltd* (1987) 1 NZBLC 102,732 and *Mogal Corporation Ltd v Australasia Investment Ltd (in liq)* (1990) 3 NZBLC 101, 783 in New Zealand; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1985) 132 CLR 373 (HCA) and *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, rev'd on other grounds (1984) 156 CLR 41 in Australia; *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 (CA) and *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] 1 Ch 246 (CA) in England.

16 [1983] BCLC 325, 407.

17 Supra at note 15.

is made of *Marr v Arabco Traders Ltd* or *Mogal Corporation Ltd v Australasia Investment Ltd*[18] which also discuss this.

Thomas J's treatment of knowing assistance is another controversial aspect of the case. It has been suggested that in this area His Honour has "effectively rewritten the law".[19] The judgment is curious in two respects. His Honour adopts the less authoritative view of the requisite degree of knowledge. Furthermore, the judge rejects the dishonest or fraudulent design criterion.

His Honour takes the view that all five types of *Baden Delvaux* knowledge are relevant to knowing assistance.[20] Judicial support for this approach is limited.[21] The majority of cases consider nothing below level three knowledge to be sufficient.[22]

In the *Equiticorp Industries* decision Wylie J is particularly scathing of Thomas J's flexible approach toward knowledge, describing it as motivated by the "ill-defined and undisciplined objective of being fair".[23] There is, however, some academic support for Thomas J's treatment of knowledge in this context.[24] Indeed, there is some attractiveness attached to the thesis that liability in knowing assistance cases should arise only where the breach of trust has resulted in a loss to the beneficiary, and the stranger has been at fault.[25] The latter requirement is assessed according to the test of a "reasonable person in the position of the stranger".[26] There remains, however, a substantial body of law which favours something approaching actual knowledge. This cannot be ignored.

Thomas J considered himself able to hold that a fraudulent and dishonest design was not a prerequisite to liability for knowing assistance.[27] This the judge acknowledged went against the English authorities, but he considered that the New

[18] Ibid; cf *Re Montagu's Settlement Trusts* [1987] 1 Ch 264, 285.

[19] Fardell & Fulton, supra at note 1, at 99.

[20] Supra at note 3, at 611.

[21] Some support comes from *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602, *MacDonald v Hauer* (1976) 72 DLR (3d) 110, *Baden Delvaux* supra at note 16 and *Ontario Wheat Producers' Marketing Board v Royal Bank of Canada* (1983) 41 OR (2d) 294, minority dicta in *Consul Development* supra at note 15, at 386 (McTiernan J), and rather curious dicta in *Agip (Africa)* on appeal [*Agip (Africa) Ltd v Jackson*, Court of Appeal, England, 21 Dec 1990. *The Times* 9 Jan 1991] which must be regarded as per incuriam.

[22] *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, *Consul Development* supra at note 15, *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 1)* [1979] 1 Ch 250, *US Surgical Corporation* supra at note 15, *Westpac v Savin* supra at note 15, at 70 (Sir Clifford Richmond), *Re Montagu's Settlement* supra at note 18, *Lion Breweries Ltd v Scarrott* (1987) 3 NZCLC 100, 042, *Marr v Arabco Traders Ltd* supra at note 15, *Barclays Bank Plc v Quincecare Ltd* [1988] FLR 166, *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340, *Agip (Africa)* at first instance, [1989] 3 WLR 1367, *Eagle Trust v SBC Securities* , Chancery Division, England, 15 Jan 1990, Vinelott J, *The Times* 14 Feb 1991, and *Equiticorp Industries* supra at note 2.

[23] Supra at note 2, at 55.

[24] Loughlan, "Liability for Assistance in Breach of Fiduciary Duty" (1989) 9 Ox JLS 260; Maxton, [1990] NZRLR 89, 94; cf Birks, supra at note 10, at 334-338.

[25] Loughlan, ibid, 261.

[26] Ibid, 268.

[27] Supra at note 3, at 615.

Zealand Court of Appeal had not endorsed that approach,[28] and furthermore it had advocated an expansive approach to constructive trusteeship.[29]

In terms of the Court of Appeal's "non-endorsement", it must be said that while it has not expressly taken the stricter English approach neither has it ruled it out. The Court has simply not yet had to decide this point. Thomas J's remark is thus, with respect, rather misleading. Neither can Sir Clifford Richmond's dicta in *Westpac v Savin*, to the effect that the English view is to be favoured[30] be lightly explained away. Wylie J in the *Equiticorp Industries* case confesses to being unable to read Sir Clifford Richmond's comments in the manner in which Thomas J proposes.[31]

While it is true that the Court of Appeal has taken a liberal approach to the imposition of constructive trusts in recent years this has not been without the retention of some measure of control. In the *Equiticorp Industries* case Wylie J cites with approval[32] a passage from the judgement of Cooke P in *Elders Pastoral*[33] which ought properly to be the last word on this matter. His Honour said:[34]

> When constructive trusts are under consideration the Court must have some responsibility to try to do equity *without violating settled principle.*

— *Kelvin McDonald* *

* LLB

[28] Ibid, 612.
[29] Ibid, 615.
[30] Supra at note 15, at 70.
[31] Supra at note 2, at 53.
[32] Ibid, 56.
[33] [1989] 2 NZLR 180 (CA).
[34] Ibid, 186 (emphasis added).

New Zealand Apple and Pear Marketing Board v Apple Fields Limited [1991] 1 NZLR 257. Privy Council. Lord Bridge of Harwich, Lord Roskill, Lord Oliver of Aylemerton, Lord Jauncey of Tullichettle and Lord Lowry. Judgment delivered by Lord Bridge of Harwich.

Calls for the abolition of the appeal to the Privy Council will be renewed with the decision in this case; it is another example of the growing divergence between the Privy Council and the New Zealand Court of Appeal. The case is also significant for the effect it will have on primary producer boards.

The dispute arose when the Apple and Pear Marketing Board (the Board) imposed a levy on the output of new growers and on the increased production of existing growers. The Board is empowered to raise this levy by s 31 of the Apple and Pear Marketing Act 1971.

For Apple Fields Ltd, as a large producer, the cost of the levy was substantial.

Apple Fields went to the High Court objecting that the levy breached s 27 of the Commerce Act 1986 which reads:

> (1) No person shall enter into a contract or arrangement . . . that has the purpose, or is likely to have the effect, of substantially lessening competition in a market.

Holland J held that there was a breach of s 27 and granted to Apple Fields the declaration sought.[1]

On appeal, the Board relied on s 43 of the Commerce Act, which provides a statutory exception to things otherwise forbidden by the Commerce Act where there is "specific authorisation" in an Act for the thing complained of. The Court of Appeal held that s 31 was a "specific authorisation" within the meaning of s 43 of the Commerce Act.[2] This, it was held, permitted the Board to raise a levy otherwise prohibited by s 27.

The case went to the Privy Council on this point. The advice of their Lordships, delivered by Lord Bridge of Harwich, overruled the decision of the Court of Appeal. Their Lordships held that s 31 authorised the Board to raise the levy on growers, but it did not, as a matter of statutory interpretation, amount to the "specific authorisation" required by s 43 to excuse a breach of s 27.

One effect of this decision for primary producer boards in New Zealand is to circumscribe their ability to levy members. These levies are used to fund the activities of the boards. For members of producer boards the decision means that when levies are set, board members will have to consider whether the levy will have the likely effect of substantially lessening competition. This may limit both the way the levy is raised on various producers and the amount of the levy charged. The effect of the levy on competition must be considered whatever its actual purpose; a breach of s 27 will occur where the likely effect will be a substantial lessening of competition, regardless of the actual intention of the party raising the levy.

Other powers conferred on the boards may also be circumscribed by the decision. The grading of produce, licensing, inspection and the determination of payouts could, in certain circumstances, have the effect of substantially lessening competition and therefore be subject to challenge by producers. Should these challenges succeed in sufficient numbers it will be necessary for the legislature to reconsider the role of producer boards in New Zealand. If it is decided that the boards should retain their current position, then their empowering legislation or the Commerce Act will need to be amended. In Australia, for example, the legislature has provided that the Trade Practices Act 1974 does not apply to organisations performing functions relating to the marketing of primary products.[3] Alternatively, if a pro-competition policy is preferred the matter should be put beyond doubt by the inclusion of a section, such as s 60 of the New Zealand Horticulture Export Authority Act 1987, which provides that sections in the Act shall not derogate from the Commerce Act.

The broader issue raised by the *Apple Fields* case is whether, in light of the

1 *Apple Fields Ltd v The New Zealand Apple and Pear Marketing Board* (1989) 2 NZBLC 103, 564.
2 *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158.
3 Trade Practices Act 1974, s 172(2).

growing divergence between the Court of Appeal and the Privy Council, New Zealand should retain the right of appeal to the Privy Council. The *Apple Fields* case illustrates this divergence in the area of statutory interpretation, although much more fundamental differences of judicial method underlie the judgments.

The Court of Appeal approached interpretation of the term "specific authorisation" by looking at the purpose of the Apple and Pear Marketing Act. Cooke P said:[4]

> Further, to the extent that there may be any doubt or ambiguity, it is right in my view to have regard to the major and special position that producer boards have occupied in the New Zealand economy. The Commerce Act represents a new philosophy of promoting unrestricted market-forces. Its provisions are very general. The special statutory provisions about the raising of capital by the Apple and Pear Marketing Board antedate the new statutory philosophy. It is impossible to be confident that in 1986 Parliament meant to override them.

In agreeing with the main judgments of Cooke P and Richardson J, Casey J said:[5]

> I incline to the view that the relationship between [the Board] and the growers is so close to a producer marketing co-operative and differs so much from an ordinary marketing situation, that it may be questionable whether the Commerce Act was ever intended to apply to that relationship.

The Privy Council disagreed with this inference. They argued that the absence of a provision in the Commerce Act corresponding to s 172(2) in the equivalent Australian legislation, excluding the application of the Commerce Act to producer boards, made it reasonably clear that the Act was intended to apply.

In arriving at their decision the Court of Appeal makes a policy choice against the prevailing pro-competition policy and in favour of a style of economic management characterised by the producer boards. Policy choices of this kind are distinctive of the general approach of the Court of Appeal.

The approach of the Privy Council on the other hand was to construe the clear words of the statute, without reference to extrinsic factors. In rejecting the reasoning of the Court of Appeal Lord Bridge said:[6]

> Their Lordships fully recognise the great importance which the Judicial Committee of the Privy Council should always attach to the opinions of Judges exercising jurisdiction in a Commonwealth country in any matter which may reflect their knowledge of local conditions. Yet, when an issue is wholly governed by statute, its resolution must be purely a matter of interpretation.

It followed from this that their Lordships were unable to find that s 31 was "specific authorisation".

The basis for the disagreement between the Privy Council and the Court of Appeal can be found in a statement of Sir Robin Cooke at the New Zealand Law Conference 1987 in which His Honour said:[7]

> From the point of view of an appellate judge hearing cases day by day it seems more than a decade since the pretence of legal formalism was abandoned and much more emphasis began to be placed

[4] Supra at note 2, at 165.
[5] Ibid, 176.
[6] *New Zealand Apple and Pear Marketing Board v Apple Fields Limited* [1991] 1 NZLR 257, 262.
[7] Sir Robin Cooke "The New Zealand National Legal Identity" New Zealand Law Conference, Christchurch, 1987, p 268.

> on working out a philosophical approach — to use a somewhat pompous term to describe conscious value judgements.

Those favouring the abolition of appeals to the Privy Council have sought to make the issue one of New Zealand's need to assert its legal identity. In his speech to the Law Conference Sir Robin Cooke also said:[8]

> We must accept responsibility for our own national legal destiny and recognise that the Privy Council has outlived its time. Not to take the obvious decision now would be to renounce part of our nationhood.

In the light of New Zealand's "coming of age" as a legal system the abolition of the right of appeal to the Privy Council seems inevitable, and the argument that a mature legal system should be free of colonial entanglements is an attractive one. This argument should not, however, obscure two issues which should be resolved first. A suitable replacement must be found for the Privy Council as the third tier of the system of appeals. Secondly, and more importantly, it must be decided whether the distinctive New Zealand legal identity should be one which gives judges, as opposed to the legislature, the power to make policy decisions or "value judgements" with potentially far-reaching effects. On this question, the warning of Lord Scarman in *Duport Steel Ltd v Sirs* is salutory:[9]

> For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (or, as Seldon put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today.

A failure to resolve these issues before abolishing appeals to the Privy Council would, of itself, argue strongly that the right of appeal be retained.

The Privy Council decision in *Apple Fields* is significant both for its effect on producer boards and for the reversal of the Court of Appeal decision. It may be argued that the divergence between the Privy Council and the New Zealand Court of Appeal is reason for the abolition of appeals to the former. However, it is submitted, in light of Lord Scarman's warning, that the more important question does not concern New Zealand's distinctive legal identity, but rather the power of the courts to decide questions of policy such as those raised in the *Apple Fields* case.

— *Andrew Culley**

* BCom

[8] Ibid, 271.
[9] [1980] 1 All ER 529, 551.

Dahya v Dahya [1990] NZFLR 529. Court of Appeal. Cooke P, Richardson, Casey, Bisson, Hardie Boys JJ.

Whelan v Waitaki Meats Ltd (1990) 3 NZELC 98,317. High Court Wellington. Gallen J.

Calculated departure from precedent is fundamental to the development of the law in step with social changes. The issue was examined in the above two cases, both delivered in November 1990.

The *Whelan* case concerned the alleged wrongful dismissal, under the guise of an abrupt forced early retirement, of a successful, long-serving manager who held a high profile in the local community as a result of his job. In addition to special damages for wrongful dismissal, Mr Whelan sought general damages of $200,000. Gallen J in the High Court found that there was a breach of an implied term in Mr Whelan's employment contract that his employer would not conduct itself in such a manner as to cause injury to his feelings.[1]

However, loss from such a breach would be non-pecuniary, and the long-standing rule established in *Addis v Gramophone Company Ltd*,[2] also an employment contract case, limits damages for breach of contract to the actual monetary loss. At the time of the *Whelan* decision, this rule had the effect of denying damages to employees who were not members of unions.[3] The *Addis* rule was last applied in an unfair dismissal case in New Zealand in *Vivian v Coca-Cola Export Corporation*.[4] Subsequently the rule has been openly criticised by the Court of Appeal as being inappropriate in such cases.[5]

With this security, plus the aid of an extensive review of interpretations of *Addis* by Mulgan,[6] Gallen J followed Canadian cases in concluding that *Addis* was a particular application of the rule in *Hadley v Baxendale*,[7] limiting damages to those which are a foreseeable consequence of the breach.[8] As the commercial context operating in 1909 was clearly different from that surrounding employment contracts of the 1980s, His Honour felt able not to apply *Addis*, and to find that loss of the kind Mr Whelan had suffered was a likely consequence of a breach of employment contract. Mr Whelan was awarded compensatory damages of $50,000.

The judgments in the *Dahya* case, a matrimonial property dispute involving the interpretation of s 11(3)(b)(ii) of the Matrimonial Property Act 1976, were delivered

1 (1990) 3 NZELC 98,317, 98,330.
2 [1909] AC 488.
3 It should be noted that the Employment Contracts Act 1991 now makes personal grievance procedures available to all employees.
4 [1984] 2 NZLR 289.
5 *Hetherington v Faudet* [1989]2 NZLR 224, 227; (1989)2 NZELC 96,740, 96,742.
6 Mulgan, "Implying terms into the contract of employment: Damages for wrongful dismissal in New Zealand" [1989] NZLJ 121.
7 (1854) 9 Exch 341.
8 Supra at note 1.

by the Court of Appeal, sitting with five judges, nine days later. In the High Court, Eichelbaum J had followed as binding *Brown v Brown*,[9] where a majority of the Court of Appeal had held that co-ownership of the matrimonial house with other persons prevented it from being defined as matrimonial property under the Act. In *Dahya*, a majority of four decided that *Brown* should not be followed (Richardson J in dissent held that *Brown* had been correctly decided[10]).

In their judgments both Cooke P and Richardson J carefully examined the question of when the Court of Appeal should depart from its own decisions, focussing particularly on questions of statutory interpretation. Both took the opportunity to comment on the role of the Court of Appeal compared with that of the Privy Council. Richardson J listed four reasons for departing from previous authority:[11] where social justice outweighs uncertainty; where it is unrealistic to expect Parliament to be able to develop legislation to cover an area of law; where it is impractical to expect the appellant to be able to appeal to the Privy Council; and where:

> in as much as our laws are designed to meet conditions and values in our society, this Court must accept responsibility for the administration of the laws of New Zealand.

Cooke P, noting that it is not right to overrule a prior decision merely because a different opinion is held on a finely balanced point on a later occasion, reviewed Privy Council decisions where departure from precedent had been discussed.[12] Not surprisingly, he preferred the approach that the local appellate tribunal is better placed than the Privy Council to make decisions about local social legislation. He also dealt with the importance of taking into account case-law development in other countries,[13] and like Richardson J he considered that:[14]

> [T]he New Zealand Courts should not abrogate the responsibility of trying to adjudicate on New Zealand justiciable problems.

Cooke P argued that a bench of five should feel sufficiently confident to depart from its own prior decision, especially if that decision was not unanimous. He noted that to follow the earlier decision merely as a matter of precedent, and because the Privy Council would have the power to overrule it, only forces the appellant into the costly exercise of a further appeal.

Neither Cooke P nor Richardson J referred to the comments of the Privy Council in *Hart v O'Connor*[15] that, if the issue in question is not based on considerations peculiar to New Zealand, the Privy Council:[16]

9 [1984] 1 NZLR 374.
10 [1990] NZFLR 529, 539.
11 Ibid, 538-539.
12 *Geelong Harbor Trust Commissioners v Gibbs Bright & Co* [1974] AC 810; *Attorney-General* v *Reynolds* [1980] AC 637, following *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA).
13 Supra at note 10, at 534.
14 Ibid, 535.
15 [1985] AC 1000.
16 Ibid, 1017 per Lord Brightman.

> could not properly treat the unanimous view of the courts of New Zealand as being necessarily decisive.

The *Dahya* and *Whelan* decisions demonstrate two very different techniques for departure from precedent. The *Whelan* decision is a "back to basics" technique, distinguishing the precedent by limiting it to its social context, while the *Dahya* case provides a checklist for departure from precedent in cases involving statutory interpretation. Whether the Privy Council would agree with either approach is another question.

*— Rae Nield**

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Flickinger v Crown Colony of Hong Kong [1991] 1 NZLR 439. Court of Appeal. Cooke P, Richardson, Casey, Bisson and Jeffries JJ. Judgment of the Court delivered by Cooke P.

When the unentrenched New Zealand Bill of Rights Act was passed on 28 August 1990, it was described as "sapped of most of its vitality, debilitated by concerns relating to the preservation of parliamentary sovereignty and the appropriate role of judicial review".[1] It was to be a "'mere' canon of interpretation"[2] with the Courts clearly being unable to impliedly repeal or revoke legislation. Certainly it would appear that its ability to affirm, protect, and promote human rights and fundamental freedoms has been weakened.

In *Flickinger*, the appellant, Robert Lee Flickinger, applied to the High Court for habeas corpus and to be discharged under s 10 of the Fugitive Offenders Act 1881 (UK). His application was declined and he appealed to the Court of Appeal. Section 66 of the Judicature Act 1908 states that:

> [T]he Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order save as herein mentioned, of [the High Court]...

Historically the New Zealand courts have interpreted this provision restrictively as not conferring a right of appeal in criminal matters.

Ex parte Bouvy (No 3) [3] established that an application for habeas corpus or to prevent extradition in respect of pending criminal proceedings is a criminal matter. *R v Clarke*[4] is the most recent Court of Appeal decision in a long line of cases holding

1 Paciocco, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZRLR 353.

2 Rishworth, "A Canadian Bill of Rights for New Zealand? The Justice and Law Reform Committee's Final Report" [1989] NZRLR 83, 95.

3 (1900) 18 NZLR 608.

4 [1985] 2 NZLR 212.

that there is no right of appeal in criminal matters under s 66 of the Judicature Act 1908.

In reaching their decision in this case the Court of Appeal considered this precedent in light of the recently introduced New Zealand Bill of Rights Act 1990, s 6 of which provides:

> [W]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Section 23(1)(c) provides:

> [E]veryone who is arrested or who is detained under any enactment . . .
> (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

The Court of Appeal therefore considered that if a meaning consistent with the rights and freedoms contained in the Bill of Rights could be given to s 66 of the Judicature Act, that meaning should be preferred.

The Court then looked at a number of constitutional cases decided by the Privy Council recommending that similar constitutional provisions should be construed generously so as "to give to individuals the full measure of the fundamental rights and freedoms referred to".[5] In *Fisher*[6] it was held that a constitutional instrument should not necessarily be construed in the manner and according to the rules which applied to Acts of Parliament, and that there is room for interpreting it with less rigidity, and greater generosity, than other Acts.

The Court of Appeal applied this approach, and gave s 66 of the Judicature Act a wider interpretation than previously, to give full measure to the rights specified in s 23(1)(c) of the New Zealand Bill of Rights Act. This was consistent with other democracies which have given rights of appeal in habeas corpus and extradition matters.

It was assumed without deciding that the right of appeal conferred by s 66 of the Judicature Act should now be treated as embracing habeas corpus and the like in criminal matters. Accepting jurisdiction the Court of Appeal then dismissed the proceedings, holding that, on the facts, the refusal to grant the remedy had been justified.

While acknowledging that the comments of the Court of Appeal on the Bill of Rights Act 1990 are obiter, the significance of the decision should not be underestimated, and it is not limited to habeas corpus affairs. The Court of Appeal is sending a clear signal that it intends adopting a more liberal and expansive attitude to the provisions of the Act. If the Court's approach is adopted in subsequent decisions, the criticisms of the New Zealand Bill of Rights Act may prove ill-founded.[7]

— Joanna Pidgeon

[5] *Minister of Home Affairs v Fisher* [1980] AC 319, 328–329.
[6] Ibid.
[7] The New Zealand Bill of Rights Act 1990 is reviewed in the Legislation Notes section of this issue: (1991) 6 AULR 611.

H v ACC [1990] 2 NZAR 289. Accident Compensation Appeal Authority. P J Cartwright Esq.

The issue of the adoption of a doctrine of informed consent into New Zealand law is relatively recent. This has been discussed by a number of authors.[1] One of the reasons for the doctrine's lack of development was the introduction of Accident Compensation legislation in 1972. A general lack of awareness of the informed consent doctrine among the legal profession and general public alike has also precluded progress.

The question arose recently in the Accident Compensation Appeal Authority decision *H v ACC*.[2] Although the Cervical Cancer Inquiry report stated a preference for the Australian approach,[3] and the Medical Council of New Zealand has advocated the full disclosure standard,[4] the Authority preferred the English decision *Sidaway,* in which the House of Lords stated that the doctrine of informed consent had no place in English law.[5]

In *H v ACC* two main issues were addressed (only the first will be considered here). First, the patient, Mrs H, underwent a sterilisation operation, but had not been informed that the procedure had a recognised failure rate. Second, in reply to a specific question asked she was advised that contraception could be discontinued after the operation. Mrs H subsequently became pregnant and claimed accident compensation, unsuccessfully. On appeal, Mrs H's counsel adopted the *Sidaway* approach in arguing "lack of informed consent".

P J Cartwright Esq reviewed the literature on the doctrine of informed consent and concluded:[6]

> I accept the submission of Mr Evans that *Sidaway*, although not technically binding on New Zealand Courts and Tribunals, correctly expresses the law. Applying the test in *Sidaway* to Dr D, that he was required to act in accordance with a practice accepted at the time as proper by a responsible body of medical opinion, I am satisfied that Dr D was in breach of his duty to Mr and Mrs H in failing to warn them of the risk of possible pregnancy before the operation.

The decision turned on specialist evidence which suggested that a prudent gynaecologist in 1983 would warn his or her patient of the small risk that the procedure could fail.

P J Cartwright Esq goes on to state:[7]

> The discretion and final decision on the proposed treatment option (subject to the patient's informed

1 See Vennell [1989] NZRLR 184; Vennell, "Medical misfortune in a no fault society" in Mann & Harvard (eds) *No Fault Compensation in Medicine* (1989); Cartwright, "The Report of the Cervical Cancer Inquiry" (1988).

2 *H v ACC* [1990] NZAR 289.

3 Cartwright, supra at note 1.

4 Medical Council of New Zealand, "A Statement for the Medical Profession on Information and Consent", June 1990.

5 *Sidaway v Board of Governors of Bethlem Royal Hospital* [1985] 2 WLR 480.

6 Supra at note 2, at 305.

7 Ibid.

> consent when appropriate) must always remain with a doctor, although obviously the wishes of the patient and the particular treatment option proposed by the doctor will often coincide.

It is clear that he is rejecting the *Canterbury* full disclosure standard[8] in favour of *Sidaway*. P J Cartwright Esq advocates disclosure based upon standard medical practice. This view has been criticised as paternalistic.[9] It is suggested that the predominant issues ought, more appropriately, to be consumer rights, individual autonomy, and the right of each individual to determine what will happen to his or her body. The issues, therefore, are not simply medical. It is submitted that the individual requires the most appropriate information that a prudent doctor could give a prudent patient in their particular circumstances.

P J Cartwright Esq also indicates what he considers to be the position of *Smith v Auckland Hospital Board*[10] in New Zealand law, concluding that *Smith* turns on the very narrow point of the duty of care imposed upon a doctor in answering a question put to him or her by a patient. Therefore, he does not follow the interpretation of *Smith* applied in previous New Zealand cases[11] that there is no general duty on a doctor to volunteer a warning either as to risk or as to the possibility of failure.

With regard to the first issue in the case, Mrs H failed since she could not establish that the damage suffered (pregnancy) was causally connected to the breach of duty. There was no evidence that Mrs H would not have chosen to proceed with the tubal ligation had she been informed of the risk of failure. But, as has been pointed out in discussion of the case, had Mrs H known of the risks, she would have continued taking the contraceptive pill until the effectiveness of the surgery was determined.[12] Upon that reasoning, therefore, the doctor's breach of duty did cause the damage suffered.

P J Cartwright Esq applies a causal connection test based on his interpretation of the decision of the Court of Appeal in *Smith* on this issue. The test seems to be a subjective one, such that:[13]

> [I]f a *proper* answer had been given [by the doctor]. . . *the* patient would have refused to undergo the treatment or procedure either immediately or after further questions and answers.

It must be noted that as P J Cartwright Esq adopted the professional standard test to determine breach of duty, the *proper* answer would involve the disclosure of that information which a reasonably prudent doctor would disclose. Thus, the answer would not necessarily make allowance for the patient in *all* his or her circumstances. Applying such a test in itself raises questions: "What is proper?"; "Upon whose standard is this based?"; "Can an individual make a decisive choice when the

8 *Canterbury v Spence* (1972) 464 F 2d 772.

9 See Teff, "Consent to medical procedures: Paternalism, self-determination or therapeutic alliance?" (1985) 101 LQR 432; Brazier, "Patient autonomy and consent to treatment: the role of law?" (1987) 7 Legal Studies 169.

10 [1965] NZLR 191 (CA).

11 *Priestley*, ACAA Decision 14/84; *Re K* (1986) 6 NZAR 231; *Gosling v ACC* [1990] NZAR 76.

12 Paterson, "Informed consent and medical misadventure", *New Zealand Doctor*, 19 Nov 1990, 20.

13 Supra at note 2, at 306 (emphasis added).

decision is dependent upon information that may not necessarily relate to all the individual's circumstances?".

The only English case on point is *Chatterton v Gerson,*[14] where Bristow J seems to have adopted (obiter) a subjective test. He appears to regard as important that which *the* patient would have decided. Yet, on the evidence, the Judge determined that she was a person "desperate for pain relief".[15] His Honour asked what Mrs Chatterton would have done, and then qualified the reply by incorporating a test of reasonableness as a means of assessing the credibility of the plaintiff's evidence.

In Canada, Laskin CJC held that the issue of causation had to be tested objectively.[16] A patient has to prove, not that he or she personally would have declined the treatment if properly warned, but that a reasonable patient in his or her position would not have proceeded with the treatment if fully informed. In Australia, it has been suggested that the test of causation should be subjective.[17]

Notwithstanding the test used for breach, a totally subjective test for causation may, as Laskin CJC points out, place too much emphasis on the hindsight of the patient.[18] Yet, a totally objective test, it is submitted, places a very high evidential burden on the plaintiff.

Had it been determined that Mrs H would not have proceeded with the operation the question remains, would the Appeal Authority or New Zealand courts tag an element of objective reasonableness onto the subjective causation view, as a means of testing the credibility of the plaintiff's evidence?[19]

In the report of the Cervical Cancer Inquiry 1988, Judge Sylvia Cartwright, commenting on informed consent, correctly points out:[20]

> Compensation is only one factor, however. Most patients would like to know the possible risks and benefits of a medical procedure before deciding whether to take part in a medical research trial or to accept treatment.

Judge Sylvia Cartwright favours the view espoused by the Australian courts,[21] which apply a dual standard. They have said that a doctor must provide information that a reasonable doctor would give a reasonable patient, considering the specific circumstances of that particular patient.[22] This view was pursued again by the Cartwright Task Force of the Auckland Area Health Board in their report of May 1990. It seems clear that the procedures they plan to implement are also based on the

14 [1981] 1 All ER 257.
15 Ibid, 267.
16 *Reibl v Hughes* (1980) 114 DLR (3d) 1.
17 "Informed consent to medical treatment", Discussion Paper No 7, 1987, Australian Law Reform Commission.
18 Supra at note 16, at 15-16.
19 See Weinrib, "A step forward in factual causation", (1975) 38 MLR 518; and Roberston, "Overcoming the causation hurdle in informed consent cases: the principle in *McGee v NCB*" (1984) 22 UWOL Rev 75.
20 Cartwright, supra at note 1, at 135.
21 *F v R* (1983) 33 SASR 189.
22 Supra at note 17.

Australian approach to the doctrine of informed consent.[23]

In June 1990 the Medical Council offered formal comment on the criteria appropriate for informed consent in New Zealand.[24] The Medical Council requires *full information* to be given, the standard being that which reflects the existing knowledge of the actual patient and the practitioner. This is arguably an adoption of the United States view of the doctrine of informed consent. The adoption of this view by the Medical Council is not surprising — the Council will want to recommend to the medical profession how they can avoid any liability.

This brings the argument back full circle. What exactly is the status of the doctrine of informed consent in New Zealand law? As previously outlined, various approaches are being either suggested or applied. The Australian Law Reform Commission saw no need for legislative clarification on this issue.[25] However, in New Zealand the *Sidaway* judgment is far more influential, as evidenced by the decision in *H v ACC*. The question is, should *Sidaway* in fact be used as the influential precedent for further New Zealand law? Judge Sylvia Cartwright considers that:[26]

> [T]he New Zealand Courts, if they had been freed from the constraints imposed by the Accident Compensation Act 1972 and its amendments, would be more likely to follow the Australian example. As a consequence of that legislation, the law in New Zealand relating to informed consent may need to be spelt out specifically.

The Health Commissioner Bill 1990 may be a step in this direction, but it is still unclear in the Bill what approach to the informed consent debate the Commissioner will adopt.[27]

It is debatable whether *Sidaway* should define the law for New Zealand. It is submitted, therefore, that there is a definite need for the legislature to clarify the issue concerning the actual status of the doctrine of informed consent in New Zealand today.

— *Nicola Burkitt**

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[23] Auckland Area Health Board, "Summary of the Cervical Cancer Recommendations Affecting the Board", May 1990, sections 3.1.12 and 3.1.13.

[24] Supra at note 4.

[25] Supra at note 17.

[26] Cartwright, supra at note 1, at 136.

[27] See ss 2 and 17 of the Health Commission Bill 1990.

R v Collis [1990] 2 NZLR 287. Court of Appeal. Casey, Hardie Boys and Wylie JJ.

The facts of this case required the Court of Appeal to consider the question of forfeiture of private property to the Crown. The position represented by older cases is that forfeiture will not be permitted if a proprietary right can be established without reliance on an illegality, unless an Act of Parliament specifically empowers such forfeiture. More recent cases have added to this the suggestion that claimed property should not be returned against the court's "conscience". By a majority the Court of Appeal supported the traditional view. This is remarkable considering that the property returned was the substantial proceeds of drug-dealing.

Police executing a search warrant seized cannabis and $103,000 in cash. Collis was subsequently charged and convicted of possessing the cannabis for supply. He denied ownership of the money at trial, but after conviction claimed the money was his after all. Section 199 of the Summary Proceedings Act 1957 provides that money or property seized under a search warrant and no longer required should either be returned to the person entitled or disposed of as the Court sees fit. In evidence Collis admitted the money was the proceeds of illegal drug dealing. A further charge was laid on the basis of this evidence but dismissed on a technicality.

The money could not be forfeited under s 32 (3) of the Misuse of Drugs Act 1975 and it was no longer required as evidence. Thus, the District Court ordered the money paid as Collis requested. The Crown applied pursuant to s 380 of the Crimes Act 1961 to reserve for the opinion of the Court of Appeal, as a question of law, whether the order was correct.

The Crown submitted that the general principle in Halsbury's Laws of England applied in this case:[1]

> It is contrary to public policy to allow any claim by which a person or his estate would benefit directly or indirectly from his criminal act . . .

This general principle is recognised in law as the maxim *ex turpi causa non oritur actio.*

In *Euro-Diam Ltd v Bathurst* Kerr LJ summarised the maxim:[2]

> The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plantiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice.

The majority (Casey and Hardie Boys JJ) agreed with the principle but cited the decision in *Bowmakers Ltd v Barnet Instruments Ltd* as being relevant.[3] That case determined that a possessory right to property will be enforced against another who, without any claim of right, is detaining the property, provided the claimant is not

1 Halsbury's Laws of England (4th ed) (1976) vol 11 para 572; this paragraph is not included in the 4th edition reissue (1990) but the principle is discussed at (4th ed) (1975) vol 12 para 1136.
2 [1988] 2 All ER 23, 28.
3 [1945] KB 65.

forced to found the claim on an illegal contract or to plead illegality to support the claim. In application to the present case Collis had a proprietary claim to the money that was superior to any other claim.

The Court then turned to consider the grounds on which the exercise of the discretion in s 199 of the Summary Proceedings Act 1957 could result in forfeiture of personal property. The Crown had submitted that the *Bowmakers* principle was widened by recent English cases.

In *Thackwell v Barclays Bank Plc*[4] the plaintiff sought to rely on the *Bowmakers* principle but Hutchison J adopted the proposition that the case-law revealed two distinct lines of authority. The first was *Bowmakers* and the second laid down the "conscience test" which involved:[5]

> seeking to answer two questions; first, whether there has been illegality of which the court should take notice and, second, whether in all the circumstances it would be an affront to the public conscience if by affording him the relief sought the court was to be indirectly assisting or encouraging the plaintiff in his criminal act.

Casey J distinguishes *Thackwell* from the present case by stating that if the Court in that case had granted the plaintiff the relief sought (the payment of a cheque which was the proceeds of a fraudulent financing scheme) it would have provided the plaintiff with the very advantage intended to be achieved by the illegal activity, i.e. the Court would have been completing the illegal transaction, whereas in the present case the transaction was already complete. With the greatest respect to the learned Judge this distinction is an extremely fine one. Collis set out to make financial gain from illegal activity and by ordering the money to be paid as Collis requested the result is to provide that gain.

Casey J also disapproves of the "conscience test" applied in *Thackwell*'s case:[6]

> the Courts should confine themselves to their role of enforcing the law and treating it [criminal law] as the only relevant expression of public morality.

Hardie Boys J takes a similar view of the "conscience test". His Honour says that it is important to follow the law and not morality as judges perceive it to be, which would inevitably involve an element of subjectiveness. The learned Judge favours the decision in *Euro-Diam* where Kerr LJ reviewed many of the cases in this area and said:[7]

> the ex turpi causa defence will also fail if the plaintiff's claim is for the delivery up of his goods . . . and if he is able to assert a proprietary or possessory title to them even if this is derived from an illegal contract...

This restates the *Bowmakers* principle. Hardie Boys J called in aid the case of *Gordon v Chief Commissioner of Metropolitan Police*[8] as being authority that the

4 [1986] 1 All ER 676.
5 Ibid, 687.
6 [1990] 2 NZLR 287, 293.
7 Supra at note 2, at 29.
8 [1910] 2 KB 1080.

law provides for confiscation, and where it does not it cannot have been intended. He goes on to say that public policy does not justify forfeiture without statutory authority.

Wylie J dissents by advancing the public policy issues and distinguishing those cases relied on by the majority. He starts from the proposition that the Court should not be involved in a result offensive to the public conscience. Nor did he see the case as one concerning the forfeiture of personal property unauthorised by law. Rather he saw it as one in which the Court was required to consider the proper disposal of property that was lawfully in police custody as a result of a search warrant.

On the *Bowmakers* principle Wylie J cites passages in the judgment of du Parcq LJ which state that the principle is not without exception:[9] a plaintiff could not, for example, claim the return of goods such as obscene books, or heroin or cannabis, by simply asserting a proprietary right. The question then is should money produced by dealing in illegal transactions be such an exception?

R v Collis can be cited as authority for the following principles. The general principle that the Court will not assist an estate to benefit from criminal activity does not apply where a proprietary right can be established without having to rely on criminal or illegal conduct. And secondly, the power of confiscation or forfeiture must be statutory and where it is not the courts should not seek to extend it.

It is ironic that the Court of Appeal should be the forum for the return of the profits of drug-dealing to offenders while branches of Government spend so much time and money trying to prevent it. It has been suggested elsewhere that the common law did not develop a general principle of forfeiture to the Crown because this was the very position that the common law was moving away from.[10] The historical penalties of escheat and forfeiture were seen as too severe in their application, and their revival is not suggested here. The development of the common law has sought to ensure that the courts do not assist the perpetrators of crime, whilst also trying to ensure that proprietary rights are not defeated arbitrarily. Unfortunately, on occasion, it would appear that the balancing act required to achieve these two goals might produce a socially unacceptable result.

— *Jonathan Temm*

[9] Supra at note 6, at 303–304.
[10] Watts, "Restitution" [1990] NZRLR 330, 352.