Fairness

Sir Robin Cooke*

This speech was delivered on 10 July 1989. In it Sir Robin reviews recent decisions of the Court of Appeal in the fields of the Treaty of Waitangi administrative law, employment and constructive trusts with an eye to the weight given to the idea of fairness in New Zealand jurisprudence.

I INTRODUCTION

It seems to have become almost a conventional obligation of the modern judge to undertake on invitation a certain amount of extra-judicial disquisition on legal subjects or trends. Judgments are no longer the only place in which judicial thinking is expected to be exposed. I have some reservations about this development. It is healthy insofar as it forces a more ordered and wider examination of the principles that one applies in day-to-day work. It is unhealthy insofar as it tempts one to try to proselytise or, worse, to approach the decision of future cases primarily in the light of avowed commitment to a creed. Perhaps one may be helped to avoid the dangers by being conscious of them. And there is certainly no audience with which an Australasian judge should be more ready to share his current legal thinking, in the hope of learning something from the response, than the Australasian Universities Law Schools Association.

Another invitation accepted this year is to take part in a symposium on the law of remedies at the University of Windsor, Ontario, in October. My reason for mentioning this is that in the draft programme I am said to be speaking on 'the hidden policy factors which enter into the discretion a Judge has as to the appropriate remedy'. In fact that is far from my intention, although the symposium remains attractive. I am against hidden policy factors. Major premises should not be inarticulate, although they do not need constant restatement. A just decision is surely more likely if the judge recognises a responsiblity to be frank.

In New Zealand there has been for some time a tendency to some judicial glasnost. It applies not only - and obviously - when the case requires the exercise of a statutory discretion, but also when a new point arises for decision. It has become less common to pretend that questions can be solved by combining bits of existing knowledge or precedent, that everything will follow from deductive analysis from established precedents if only we get the first principles embodied in them right. Judges are not accustomed to speak of legal positivism, yet undoubtedly there have been many and still are some who think instinctively that there is probably only one true answer to a new question, as if developing the law

* President of the Court of Appeal, New Zealand.

were like solving a crossword puzzle. I happen to be addicted to crossword puzzles but find the work of deciding cases entirely different. It is the contrast that makes crosswords a recreation.

There is now a more open acknowledgement that deciding a new point may not be primarily a process of deduction; and that the search is rather for the solution that seems fair and just after balancing all the relevant considerations. Some lawyers, possibly many lawyers, find this disturbing. It affronts their sense of hope or ideal that the law exists apart from the individuals who make it. Probably lawyers of that school of thought would accept that at some stage the law was made by judges, but at least subconsciously they hold the belief that the time of all that has now very largely passed. They find plausible support for their position in the appeal to certainty.

It is very easy to say that if judges decide according to their view of what is fair, the law ceases to be certain. The Chancellor's foot is readily rejected as a criterion, but without consideration of how far differences in the length of human feet are significant in relation to the object to be measured. In truth, however, the cases as regards which that kind of argument is raised are usually cases where the law is uncertain: the person appealing to certainty is really appealing for the more conservative solution. The apparently black-and-white rules to be found in *Anson on Contracts* have been just as productive of litigation as, for instance, the present evolving principles about constructive trusts.

The waiting list of civil cases ready for hearing in the New Zealand Court of Appeal, or supposedly ready, presently contains about 24 cases. That figure is mentioned not for the purpose of boasting of Herculean labours by the judges. Fortunately the corresponding criminal figure does not call for disclosure, being irrelevant as there is rightly little room for judicial innovation in criminal law. But the gratifyingly low civil figure, the lowest for many years, is one answer to any who suggest that there is a dangerous willingness in the Court to depart from established principles and give judgment merely according to equity and good conscience. There is no queue of appellants asking for established principles to be jettisoned and the law bent in their favour. Of course other factors contribute to the situation. The High Court Judges could reasonably claim that it betokens their own excellence in the civil field. The point I make is that there is no hard evidence that the weight that we have been giving to simple fairness in deciding grey area cases is leading to more uncertainty than existed before.

Indeed one is beginning to suspect that the criterion of fairness can produce more certainty than the a priori arguments of technically learned lawyers. In a democratic and egalitarian society, and New Zealand sets out to be and largely is (though regrettably less than affluent), it may be that once the facts of any given case have been fully elicited most people would agree on the fair result. If the law provides that answer, it satisfies proper expectations. To the extent that the law produces a result that is not fair in a particular case, the law has failed. Bad law makes hard cases.

For fairness to work as an effective criterion it is necessary that the society have a more-or-less common set of values and that this value be high among them. While New Zealand is in many respects a vocal and divided society, and while some members of the society achieve prominence by being vocal in attempts to make it more divided, I think that the ideal of fairness and a sense of what it requires in particular cases is quite strongly evident. It is independent of religious belief, yet it can find inspiration in Christian teaching, as Lord Atkin's use of the neighbour principle in *Donoghue* v *Stevenson*[1] classically demonstrates.

In stressing the need for common values, as in much else connected with this paper, I am indebted to Prue Taylor of the Law Faculty at Victoria University of Wellington. For an example of a different kind of society, where different albeit common values appear to prevail, she draws attention to the Koran, s 20, 135:

> O ye who believe!
> Stand out firmly
> For justice, as witnesses
> To Allah, even as against
> Yourselves, or your parents,
> Or your kin, and whether
> It be (against) rich or poor:

The commentary to the section reads:[1a]

> Justice is God's attribute, and to stand firm for justice is to be a witness to God, even if it is detrimental to our own interests (as we conceive them) or the interests of those who are near and dear to us. According to the Latin saying 'Let justice be done though heaven should fall'.
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> But Islamic justice is something higher than the formal justice of Roman Law or any other human Law. It is even more penetrative than the subtler justice in the speculations of the Greek philosophers. It searches out the innermost motives, because we are to act as in the presence of God, to Whom all things, acts, and motives are known.

It may be arguable that our concept of justice, in which fairness plays a large part, is less noble than the Islamic one in that it is more secular and does not draw the same distinction between human and divine standards. Be that as it may, a New Zealand judge is not normally confronted by any conflict of that nature. Our task is commonly simpler. In tackling it we undoubtedly make undisguised use of the idea of fairness. So much so that the title suggested to me for this paper was 'Fairness: A Guiding Force in the Development of New Zealand Jurisprudence'. As a title I prefer the simpler and less pretentious 'Fairness', but the result is much

1 [1932] AC 562.

1a The translation and commentary is from A Yusuf Ali *The Holy Qur-an* (Sh Muhammad Ashraf, Lahore, 1980).

the same, and I propose to give actual examples of the way in which we have used the idea in different fields of law.

II THE TREATY

At first reaction there is an inclination to apologise to Australians in the audience for giving the Treaty of Waitangi first place in the examples, especially as other aspects of the subject will have been before you yesterday. But not on second thoughts. Race relations is probably the major challenge facing New Zealand law, with our 13 per cent Maori population. But there are few countries in which it has not become or is in the course of becoming a significant problem. The Australian aborigines; Fiji; New Caledonia; Malaysia; Salman Rushdie; the Canadian Indians; the Russian provinces; South Africa - the list could go on and on. No exceptional prescience is required to say that the subject is likely to dominate the Commonwealth Law Conference in Auckland next April.

The Treaty of Waitangi, in the drafting of which no lawyer took any part for none was available, was signed in 1840 by Captain Hobson on behalf of the Queen and more than five hundred chiefs and leaders of Maori tribes. There were different versions of the Treaty but the differences do not matter much. In all versions it is a simple document of a preamble and three articles. The basic effect was that the Queen was to govern and the Maori to be her subjects; in return their chieftainship and possessions were to be protected, but sales of land to the Crown could be negotiated. The expectation that the Queen's government would bring law and order to an increasingly lawless land appears to have been a major incentive for the Maori signatories.

The actual language of the Treaty, in any of its versions, is not of much help in answering specific problems arising in today's infinitely more complex society. It is the spirit that is important; and in *New Zealand Maori Council* v *Attorney-General*[2] the Court of Appeal held that the spirit was partnership, with the corollary of duties of mutual good faith and reasonableness between the races, which will apply of course while they remain separately identifiable races. The expression 'fairness' was not used, but I do hesitate to mention the case as a prime example of the force of the concept, for it comes to essentially the same thing.

The broad principle seems to be reasonably viable in implementing the spirit of the Treaty today. In stating it the Court hoped that the two sides would be able, with this encouragement, to work out agreed solutions to specific problems without the need for judicial rulings. An agreed solution was evolved by the parties in the first *Maori Council* case itself, which concerned the State-Owned Enterprises Act 1986. The solution was expressed in an amending Act. In approving the terms the Court added purely as a precaution that leave was reserved to apply in case anything unforeseen arose.[3] Something unforeseen did arise in that

2 [1987] 1 NZLR 641.
3 Above n 2, 719.

the Government changed its policy about forests on Crown lands, proposing instead of transferring the lands to state enterprises with the possibility of sale thereafter, as orginially intended, to retain ownership but grant long-term cutting rights to successful tenderers. That led to an application by the Maori Council pursuant to the leave reserved. In a judgment delivered in March this year we said:[4]

> Partnership certainly does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if Maori have some fair claim, other initiatives have still made the greater contribution. For example - and it is only an example - that might well be true of some pine forests. Moreover, the common interest may point to the sale of forestry rights, or some of them, to the best commercial advantage. But, as the Forestry Working Group recognised, it would be inconsistent with the principles of the Treaty to reach a decision as to whether there should be a general sale without consultation.
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> A main complaint about the national hui in January 1989 is that the people there were confronted with a fait accompli. A Maori translation of the French words is *he kaupapa kua tau ke e kore taea te whakatika* - a proposal that has already been decided that you cannot correct. Assuredly that would not represent the spirit of the partnership which is at the heart of the principles of the Treaty of Waitangi referred to in s 9 of the State-Owned Enterprises Act.
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> The Court thinks it best to say no more about the present dispute at this stage, hoping that it will be resolved in the spirit of partnership and in accordance with the principles of the Treaty.

Since then the Court has heard no more. No news may be good news. Similarly major issues about fisheries and coal have arisen and are under negotiation, but no court has as yet been forced to make a decision. There appears to have been in the main a responsible approach on both sides; the concept of fairness is slowly receiving practical implementation. Progress will continue to be slow, but I believe that ultimately it is certain. To believe so is necessary.

III ADMINISTRATIVE LAW

Another belief, though not this time a necessary one, is that the next subject - administrative law - is becoming overwritten: that not a great deal can any longer be usefully added to it in the direction of new principles or refinements of existing principles. Variations occur in the mood of the courts from time to time, and moods differ from country to country; the problems become ever more difficult and challenging as society becomes ever more complex and conscious of the possibility of legal remedies against the administration; but the problems are essentially of fact, to be resolved in the main by the application of tolerably well settled principles.

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4 *New Zealand Maori Council* v *Attorney-General* (CA 54/8,; 20 March 1989).

In papers delivered in 1979 and 1986[5] I have suggested that at least most of administrative law can be comprised in a single proposition: the administrator must act fairly, reasonably and in accordance with the law. By the time of the second of those papers it was possible to claim much support for this proposition from the House of Lords, very similar formulations in slightly different language being contained in the speeches of Lord Diplock and Lord Roskill in *Council of Civil Service Unions* v *Minister for Civil Service*[6] and Lord Roskill again in *Wheeler* v *Leicester City Council*[7]. Now an illuminating phrase, in less formal language, is to be found in the judgment of Lord Donaldson of Lymington MR in *R* v *Panel on Take-overs and Mergers, ex parte Guinness plc*:[8]

> The court's jurisdiction and limitations on its exercise are established in *Ex p Datafin plc*. However the present appeal calls for a further review and, in particular, consideration of whether the separate grounds for granting relief (illegality, irrationality, procedural impropriety and, possible, proportionality) are appropriate in all situations. Illegality would certainly apply if the panel acted in breach of the general law, but it is more difficult to apply in the context of an alleged misinterpretation of its own rules by a body which under the scheme is both legislator and interpreter. Irrationality, at least in the sense of failing to take account of relevant factors or taking account of irrelevant factors, is a difficult concept in the context of a body which is itself charged with the duty of making a judgment on what is and what is not relevant, although clearly a theoretical scenario could be constructed in which the panel acted on the basis of considerations which on any view must have been irrelevant or ignored something which on any view must have been relevant. And similar problems arise with procedural impropriety in the narrow sense of failing to follow accepted procedures, given the nature of the panel and of its functions and the lack of any statutory or other guidance as to its procedures which are intended to be of its own devising. Similarly, in the broad sense of breach of the rules of natural justice, what is or is not fair may depend on underlying value judgments by the panel as to the time scale which is appropriate for decision, the consequences of delay and matters of that kind. Approaching the problem on the basis of separate grounds for relief may at once bring several interlocking and mutually inconsistent considerations into play. Were the underlying judgments tainted by illegality or irrationality? If not, accepting those judgments, was the action unfair? If the underlying judgments were so tainted, was the action unfair on the basis of judgments which might reasonably have been made? The permutations, if not endless, are considerable and confusing.
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> It may be that the true view is that, in the context of a body whose constitution, functions and powers are sui generis, the court should review the panel's acts and omissions more in the round than might otherwise be the case and, whilst basing its decision on familiar concepts, should eschew any formal categorisation. It was Lord Diplock who in *Council of Service Service Unions* v *Minister for the Civil Service*

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5 *Third Thoughts on Administrative Law* [1979] NZ Recent Law 218; *The Struggle for Simplicity in Administrative Law*, included in *Judicial Review of Administrative Action in the 1980's* (Oxford University Press, Auckland, 1986).

6 [1985] AC 374, 408-11, 414-15.

7 [1985] AC 1054, 1078-9.

8 [1989] 1 All ER 509, 512-3.

> [1984] 3 All ER 935, [1985] AC 374 formulated the currently accepted categorisations in an attempt to rid the courts of shackles bred of the technicalities surrounding the old prerogative writs. But he added that further development on a case-by-case basis might add further grounds (see [1984] 3 All ER 935 at 950, [1985] AC 374 at 410). In the context of the present appeal he might have considered an innominate ground formed of an amalgam of his own grounds with perhaps added elements, reflecting the unique nature of the panel, its powers and duties and the environment in which it operates, for he would surely have joined in deploring any use of his own categorisation as a fetter on the continuous development of the new 'public law court'. In relation to such an innominate ground the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take.

While what the Master of the Rolls said about the 'innominate ground' was expressly related to the particular case of the panel, it is capable of providing wider guidance. No teacher of administrative law is likely to be content with telling students that the real question is always whether "something has gone wrong of a nature and degree requiring the intervention of the court and, if so, what form the intervention should take"; but the student who has absorbed the message that this is always the ultimate question will already be a master of first principles.

To illustrate that the simple test of fairness enables the court to go straight to the heart of a difficult case, one can take the example of a case we decided in November, *New Zealand Fishing Industry Association* v *Minister of Agriculture and Fisheries*.[9] It arose from the fairly new parliamentary policy of requiring commercial fishers to pay resource rentals to the Crown on the footing that in being allotted quotas they are allowed to use a national asset. This Minister proposed increases of up to 50 per cent in the rentals. In the light of representations from the industry he reduced this to a maximum 20 per cent. The industry still claimed that the increases were invalid, on the ground that they were based solely on the prices paid on sales of quotas, whereas the Act required the Minister to consider also net financial returns from fish caught. The evidence suggested that he had not separately considered such figures for net returns as were available, and in particular those submitted to him by the industry, but had treated the available figures for trading prices, if heavily discounted, as a sufficient indication of net returns.

Whether that was a valid approach was not an easy question, but in tackling it there was no need to indulge in legal refinements. If there was a failure to have regard to a mandatory factor the decision would not have been in accordance with law and would be vitiated by not taking into account relevant considerations. In view of the obvious importance of net returns, it would also be unreasonable and unfair. So the complaint of unfairness really said it all, as counsel for the industry in effect recognised in his practical argument. Ultimately the Court decided that, bearing in mind the caution shown by the extent of the discount, the decision was

9 [1988] 1 NZLR 544.

not unfair. Judicial intervention was not called for. No doubt opinions could differ as to the correctness of that decision, but I am sure we would not have been helped by attempting a more elaborate dissection of legal principles.

In some cases, when urging the desirability of affidavits from Ministers whose actions are under attack, it was said that the court should not allow a Minister to be cross-examined on an affidavit in judicial review proceedings unless this is clearly necessary to enable the case to be disposed of fairly. A High Court Judge did not apply this approach in the later case of *Butcher* v *Petrocorp Exploration Limited*[10] and the matter had to be put right on appeal. The Minister there had exercised statutory licensing powers so as to appropriate to the Crown the whole value of an oil field discovered by a joint venture to which the Crown was a party. He granted a sole licence to himself. In unambiguous, if sanitised, language he acknowledged in his affidavit that, as the Solicitor-General translated it in argument, he acted on the view that he had no duty to bother about any suggested obligation to the oil companies associated with the Crown in the joint venture. His candour was enough to exempt him from cross-examination. The substantive case has yet to be decided in the High Court and may not be easy. The present point is the express adoption of the fairness test to determine whether a Minister should be cross-examined.

IV EMPLOYMENT

The examples already given of the operation of the principle of fairness have been taken from the field often described as public law, although in New Zealand there is not, in my opinion, a sharp line of distinction between public and private law. The next example is from a subject which certainly straddles both areas, namely employment law. Typically the employment relationship arises from contract, but it may also arise from statute or, as the *Spycatcher* litigation[11] has reminded us, prerogative. The differences in the approaches of the English, Australian and New Zealand courts in *Spycatcher* reflects in an interesting way their different characteristics, but that subject is outside the scope of the present paper. What is now relevant is the point that employment, however created, is increasingly seen as a relationship involving status; and the parties to the relationship owe duties to each other reflecting the status of each, which are at least very largely summed up as duties of fairness.

It may turn out that, whenever a dismissal can be categorised as a deprivaton of status, the damages for that loss are not limited as in *Addis* v *Gramophone Co.*[11a]

10 CA 102/89, 6 June 1989.

11 For New Zealand, *Attorney-General (for England and Wales)* v *Wellington Newspapers Limited* [1988] 1 NZLR 129. The earlier overseas cases are reviewed there. Subsequent decisions include *Attorney-General* v *Heinemann Publishers Australia Pty Ltd* (1988) 78 ALR 449 (High Court of Australia) and *Attorney-General* v *Guardian Newspapers Ltd* (No 2) [1988] 3 All ER 54, (House of Lords).

11a [1909] AC 488.

In *Horsburgh* v *New Zealand Meat Processors Union*[11b] a worker wrongfully expelled from his union was awarded against the union, among other heads of damage, $7500 for deprivation of status. The possibility of taking this approach further is not to be dismissed out of hand.

An employee's duty of fair conduct towards the employer naturally includes loyalty or fidelity. An instance of its application in New Zealand is the 1976 case of *Schilling* v *Kidd Garrett Limited*[12] where it was held by a majority that an employee was not free, during a period before the expiry of notice given by him to determine the employment, to take steps to procure for himself an agency hitherto held by the employer.

As to the duties of employers, there have been significant modern developments. *Ridge* v *Baldwin*[13] firmly underlined that some form of hearing is normally required before dismissal for alleged misconduct, but in the industrial sphere statutory provisions commonly give wider rights to complain of the remedies for dismissal as unjustified or unjustifiable. In that context Somers J has said in the New Zealand Court of Appeal in *Auckland City Council* v *James Hennessey*:[14]

> [T]he word justifiably is not confined to matters of legal justification .... [W]e think the word 'unjustified' should have its ordinary accepted meaning. Its integral feature is the word 'unjust' - that is to say, not in accordance with justice or fairness. A course of action is unjustified when that which is done cannot be shown to be in accordance with justice or fairness. It follows that dismissal may be held unjustifiable when the circumstances are such that justice or fairness requires that the employee should have an opportunity which he has not been afforded for stating his case.

The rights of senior employees outside the purview of such legislation may be in a stage of evolution, but in *Marlborough Harbour Board* v *Goulden*[15] the opinion has been ventured that in New Zealand there are few, if any, relationships of employment to which the requirements of fairness have no application whatever.

Judicial willingness to give a realistic content to the requirements of fairness is illustrated by the 1985 Court of Appeal decision in *Auckland Shop Employees Union* v *Woolworths (NZ) Ltd*[16] extending the ambit of 'unjustifiable dismissal' in the legislation to constructive dismissal - where it is the employee who brings an end to the relationship by resigning but he or she has been led to do so by culpable, that is to say unfair, conduct on the part of the employer. The New Zealand statute does not expressly deal with constructive dismissal (unlike the United Kingdom legislation, for instance) so the decision can be seen as essentially an

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11b [1988] 1 NZLR 698.
12 [1977] 1 NZLR 243.
13 [1964] AC 40.
14 (1982) ACJ 699.
15 [1985] 2 NZLR 378.
16 [1985] 2 NZLR 372.

application of the idea of fairness in a case where statutory protection was not clearly provided.

But I must now confess to a failure. In *Actors Variety Industrial Union* v *Auckland Theatre Trust*[17] the Court of Appeal had to consider this year a case of refusal by an employer - an Auckland theatre - to renew a stage manager's fixed term employment. After a month's trial, she had been engaged for a term of eleven months. Apparently this type of contract was commonly entered into by the employer; it seems, however, that the engagements were commonly renewed and that the stage manager's job still had to be performed and she had performed it well. Her complaint was that the refusal to renew in these circumstances amounted to unjustifiable dismissal: it was literally a sending away. The United Kingdom again expressly makes non-renewal of a fixed term contract capable of being treated as dismissal. Not so the New Zealand one, but again it seemed to me that the modern industrial concept could be applied. The two other members of the Court jibbed at this, although the actual decision was to refer the matter back to the Labour Court for consideration of a narrower question, namely whether a fixed term contract was consistent with the relevant award.

The wording of one of the other judgments leaves room for the argument that the door has not been closed on the wider question. Insofar as the decision falls short of definitely extending the doctrine of fairness, and certainly it does fall short of that, I have to admit further that the composition of the court was the President's responsibility.

V CONSTRUCTIVE TRUSTS

The last example will be the very broad field of constructive trusts. At first sight it may seem to have little to do with this subject that an Oxford Law Dictionary is being compiled at the University of Texas at Austin. The connection arises in the following way. Such publications sometimes include a list long enough to be imposing of an advisory board or the like. A gracious invitation was received to allow my name to be added to the many already secured. That was readily accepted, partly because no duties are involved and partly because of a longstanding fascination with words, which enabled one to reply to the editor, Mr Garner, that to participate might not be mere ultracepidation. He showed his assiduity by replying that so far his researches could indicate the only writer to have used that word was Coleridge. Now there are two of us and that matter is what reminds me of McGechan J's recent statement in *Stratulatos* v *Stratulatos*[18], a constructive trust case, that rather than fashioning "phantoms of common intentions" it will suffice if he follows "Cooke P's podiatric approach in *Pasi* v *Kamana*".[19]

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17 CA 179/87, 28 April 1989.
18 [1988] 2 NZLR 424, 436.
19 [1986] 1 NZLR 603.

What the judge is talking about is that in a number of cases reference has been made, in deciding whether a constructive trust should be held to exist, to what would be understood by reasonable persons in the shoes of the parties. This applies but is not confined to de facto relationships. In *Pasi* v *Kamana* it was suggested that this test was substantially the same as unconscionability, constructive or equitable fraud, unjust entitlement, justice and good conscience, in all fairness, and other formulae used in well-known judgments in various jurisdictions.

One is much heartened by the fact that the High Court of Australia is independently following a similar line. The latest such case of which I have notice is *Baumgartner* v *Baumgartner*[20]. Two extracts from the judgment of Mason CJ, Wilson and Deane JJ make the point. The first is referring to an earlier judgment of Deane J. They read:

> His Honour pointed out (at 614) that the constructive trust serves as a remedy which equity imposes regardless of actual or presumed agreement or intention 'to preclude the retention or assertion of beneficial ownerhip of property to the extent that sùch retention or assertion would be contrary to equitable principle' .... In rejecting the notion that a constructive trust will be imposed in accordance with idiosyncratic notions of what is just and fair His Honour acknowledged (at 616) that general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct, this being a concept which underlies fundamental equitable concepts and doctrines, including the constructive trust.
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> The case is accordingly one in which the parties have pooled their earnings for the purposes of their joint relationship, one of the purposes of that relationship being to secure accommodation for themselves and their child. Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.
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> It therefore becomes necessary to determine the terms of that constructive trust. The facts that the Leumeah property was acquired and developed as a home for the parties and that, at least indirectly, it was largely financed out of money drawn from the pool of their earnings, this being one of the purposes which the pool was to serve, combine to support an equality of beneficial ownership at least as a starting point. Equity favours equality and, in circumstances where the parties have lived together for years and have pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants in common, subject to adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual

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20 (1987) 62 ALJR 29.

> contributions either financially or in kind. The question is whether any such adjustment is necessary in the circumstances of the present case to avoid any injustice which would otherwise result by reason of disparity between individual financial contributions. The conclusion to which we have come is that some such adjustment is necessary.
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> Although the present case is close to the borderline, we do not consider that it is possible to treat the respective financial contributions of the parties as being approximately equal. Even after crediting the respondent with the amount she would have earned during the period of three months during which the respondent was precluded from working by reason of having and caring for their child, it is agreed that the respective contributions were approximately 55 per cent as to the appellant and 45 per cent as to the respondent, that is to say, the appellant contributed almost quarter more than the respondent. The Court should, where possible, strive to give effect to the notion of practical equality, rather than pursue complicated factual inquiries which will result in relatively insignificant differences in contributions and consequential beneficial interests. We do not think, however, that the difference in the present case can be regarded as relatively insignificant. Nor has it been suggested that the difference in the amount of the financial contributions was offset by the greater worth of the respondent's contribution in other areas. In these circumstances, though acknowledging that the case is close to the borderline, we consider that the constructive trust to be imposed should declare the beneficial interests of the parties in the proportions 55 per cent to the appellant and 45 per cent to the respondent.

What is particularly significant, I respectfully suggest, is not only the recognition that general notions of fairness are relevant, but also the recognition, as in the New Zealand cases, that non-financial contributions may be taken in account.

As already mentioned, constructive trusts dictated by fairness are not limited to de facto or other family relationships. The last case I will mention is *Elders Pastoral Limited* v *Bank of New Zealand*,[21] decided by the Court of Appeal in May. At the pressing request of a farmer's stock agents the bank had advanced money to him on the security of a first charge over his stock. The chattel security provided that in the event of a sale the proceeds were to be paid to the bank unless the bank otherwise directed. As agents for the farmer the stock agents sold some of the stock in the ordinary course of his business. From the proceeds they deducted the full amount of his indebtedness to them, some $58,000, and paid to the bank only the balance of $3,000. The issue was whether this was merely a breach of the farmer's contract with the bank, for which the bank could obtain perhaps theoretical redress from the farmer only, or whether the bank had a cause of action against the stock agents.

It seemed that reasonable persons in the shoes of all three parties would naturally have thought that the agents must hold the proceeds for the bank to the extent of the farmer's indebtedness to the bank unless the bank directed or agreed otherwise. As a matter of fair commercial dealing it was difficult to see that there could be any reasonable doubt on that point. In holding that there was indeed a

21 CA 133/88, 29 May 1989.

constructive trust both Somers J and I drew help from a passage in *Goff and Jones on Restitution*:[22]

> Equity's traditional rules suggest that it is necessary to discover a fiduciary relationship before a plaintiff can trace his property. Now that law and equity are fused this requirement makes little sense, and it has been recently accepted that 'the receiving of money which consistently with conscience cannot be retained is, in equity, sufficient to raise a trust in favour of the party for whom or in whose account it was received': see *Neste Oy* v *Lloyds Bank plc*[1983] 2 Lloyd's Rep 658, 665-666, per Bingham J, citing Justice Story's Commentaries on Equity Jurisprudence (2nd ed, 1983), Vol 2 p 1225. Indeed, as cases like *Sinclair* v *Brougham* [1914] AC 398 and *Chase-Manhattan Bank NA* v *Israel-British Bank (London) Ltd* [1981] Ch 105, (particularly at 117-8) demonstrate, English courts have never allowed a just claim to fail and have found a fiduciary relationship between the parties because it was necessary to do so. As we have seen, equity's rules and presumptions to identify property have also been moulded to satisfy the equities of the plaintiff's claim.

The third member of our Court, Richardson J, agreed generally with the two judgments. I venture to submit this case as quite strong evidence that we are ready to do what we reasonably can to allow fairness to have decisive weight in what the organisers of this session call New Zealand jurisprudence.

The term 'jurisprudence' perhaps suggests a profoundity or reconditeness which is totally absent from both what I have said this morning and the New Zealand judgments that I have mentioned. I only hope that those who miss such qualities may nevertheless see it as serving the purpose of a brief stroll round part of the garden of present-day New Zealand case law.

22 3rd ed 77.