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Commercial Decisions in the Supreme Court of New Zealand—the Prominence of Agency Law in the First Ten Years

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It should not be regarded as derogatory to say of the first 10 years of the Supreme Court's commercial decisions that it has been business as usual for the most part. This is appropriate in a system where the top court has no special powers and is mostly a refining body of the output of legal solutions to everyday disputes (albeit ones where the parties have the resources to last the distance to the Supreme Court). This was also the case with the Privy Council. There is no doubt, however, that the Court's overall docket is very different to the business that went to New Zealand's former supreme tribunal, since in those days the Privy Council heard very few criminal law appeals from New Zealand, and relatively few public law appeals. This change in diet is likely to be reinforced by what may be a permanent shift in the balance between public law and private law litigation in the lower courts. It is possible that this shift will sooner or later manifest itself in the background of appointees to the courts, and in the lack of opportunities that judges get to continue refining their skills in ordinary disputes between one citizen against another. Were New Zealand to adopt a constitution that conferred judicial sovereignty (even if defeasible) we could expect this trend to be magnified still further.

The brief was to cover the Court's commercial decisions, apart from contract law and regulatory decisions. In order to keep this paper within workable length, the focus has been the Court's agency law decisions. Apart from being a subject in which the writer has special interest, agency law, perhaps by chance as much as anything, has occupied the Court's attention more than any other single commercial topic save general contract law. The Court has had surprisingly few company and insolvency law matters to contend with. Apart from *Elders New Zealand Ltd v PGG Wrightson Ltd*,[1] on the effect of company amalgamations, it has had one significant case on insolvency set-off, *Trans Otway Ltd v Shepard*,[2] and another on alienations to defeat creditors, *Regal Castings Ltd v Lightbody*.[3] *Regal Castings* has had considerable influence across the Tasman, including in the High Court of Australia.[4] I have elsewhere addressed in some detail the Court's decision in *BFSL 2007 Ltd (in liq) v Steigrad*,[5] on the subject of tort claimants' access to a tortfeasor's insurance policies.

I would finish this introduction by saying that the decision of the Court in *Graham v*

[1] [2008] NZSC 104, [2009] 1 NZLR 577.
[2] [2005] NZSC 76, [2006] 2 NZLR 289.
[3] [2008] NZSC 87, [2009] 2 NZLR 433.
[4] See *Marcolongo v Chen* [2011] HCA 3, (2011) 242 CLR 546 at [32]; *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157, (2012) 270 FLR 1 at [527]–[528]; *Federal Commissioner of Taxation v Oswal* [2012] FCA 1507 at [25]; *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26 at [86]; and *Ingram v Y Twelve Pty Ltd* [2013] NSWSC 1777 at [99].
[5] [2013] NZSC 156, [2014] 1 NZLR 304. See P Watts "Liability Insurance and the Law Reform Act 1936—A Brief Critique of *BFSL 2007 Ltd v Steigrad* in the Supreme Court" [2014] CSLB 33.

R,[6] a criminal appeal arising from a commercial setting, has itself vindicated the usefulness of a second tier of appeal. The Court with economy sent a strong signal that imprisonment should not be used to punish those whose errors of judgement have caused mere economic loss. Judges' own errors of judgement frequently cause economic loss. Losing life savings can undoubtedly be devastating, but we make a big mistake, it is suggested, if we let the frustration that naturally arises justify imprisonment for the types of error we all make in our everyday lives. That some get to handle much larger sums of money than others seems to me not very compelling in the deployment of the criminal law.

In reading the following commentary, it should be borne in mind that, to the extent that the criticisms occasionally made can be sustained, it is relatively easy to find fault when one has not had to do the basic thinking. I have also had the luxury, not afforded the Court, of being uninhibited by whether the points I make were pleaded or put to the Court.

Premium Real Estate Ltd v Stevens

Premium Real Estate Ltd v Stevens,[7] in 2009, is a case about a real estate agency that acted for the vendors of a residential property. An employee of the defendant agency was found to have prevaricated when asked by the plaintiff vendors what she knew about the purchaser, and to have misled the vendors into thinking that the purchaser wanted the relevant house as a private residence. She well knew that the purchaser was a property developer whose routine was to let it be understood that he was buying for personal use as a method of keeping the price down. The defendant did not formally have a double agency. However, it had frequently acted for the purchaser in the sale of other properties that he had acquired, through which its staff had developed a loyalty. And it did act as agent for him when he on-sold the plaintiffs' house some six months later (some work having been done on it) at a price 38% higher than the vendors had received.

All members of the Court accepted that there had been a breach of fiduciary duty on these facts, but the Chief Justice dissented on the measure of remedy, a dissent that essentially turned on factual findings. The majority held that the defendant had not established that, merely because the plaintiffs had counter-offered a figure some $250,000 more than the price they capitulated upon, they would have made that offer had the defendant (and its employee) met its duties of honesty and candour. The plaintiffs might have held out for the market price, which was found by the trial judge to be more. In circumstances where there had been a breach of fiduciary duty, factual uncertainties should be resolved against the defendant. Accordingly, the plaintiffs were entitled to the difference between the price they obtained on the sale and the market price at the date of sale, a figure found to be closer to $700,000. All members of the Court accepted that in addition to these damages, the defendant must forfeit its commission of some $67,000.

[6] [2014] NZSC 55.

[7] [2009] NZSC 15, [2009] 2 NZLR 384 (Elias CJ, Blanchard, Tipping, McGrath and Gault JJ). The author gave some paid advice to the solicitors for the successful plaintiff before the first instance hearing.

It is respectfully submitted that the majority's decisions are correct, although one might quibble with some parts of the reasoning. This was a case of actual disloyalty. Such conduct is likely to involve breaches of terms implied at common law, but equity in such circumstances has not held back from adding its responses to such conduct. The dishonesty of the defendant's employee as to the purchaser's intentions in respect of the land could have had no explanation other than a desire to promote the interests of the purchaser ahead of the client vendors'. The employee's prevarication as to the purchaser's background and modus operandi is also naturally explained by those motivations.

We should note that the mere facts that the purchaser had been a client of the defendant in the past and that the defendant did indeed act for the purchaser when he later on-sold the property would not have raised cognisable conflicts of interest. Only concurrent service for two principals could do that. But, such past and subsequent service might provide circumstantial evidence of a desire in the agent to promote its own interests, or those of the other party, at the expense of the principal. As seen, there was in any event hard evidence of such motivation. There was strong evidence of actual disloyalty. It should be accepted that equity has jurisdiction on these facts, concurrently with the common law, even where the remedies might be the same on the facts.

It is less clear, however, that equity would properly have had anything to say about the forfeiture of the commission. It is wrong, for instance, to assume, as Tipping J appears to have done in *Chirnside v Fay* (to be discussed next),[8] that there is a general rule of equity that treats any remuneration received by an agent as profiting by a fiduciary from his or her position in the absence of express provision for it. It is true that equity has not permitted trustees and company directors to pay themselves without express term, but this is not a rule applicable to ordinary agents. The default position is that the common law will imply a right to remuneration for professional agents,[9] and equity does nothing to undermine that position. It has also been a standard position of equity that it does not act punitively.[10] New Zealand courts, unlike their Australian counterparts, have now held that punitive damages are available for breaches of equitable duty,[11] but the blunt forfeiture of remuneration would undoubtedly have been outside the scope of that remedy.

Blanchard J (for himself, McGrath and Gault JJ) recognised that the agent's remuneration could not be forfeited simply on the basis of its being a profit.[12] However, he considered that "the double sanction of damages and forfeiture of moneys received or receivable by way of remuneration is equity's method of deterring disloyal behaviour by fiduciaries".[13] For this, his Honour relied on the recent decision of the Court of Appeal of England and Wales in *Imageview Management Ltd v Jack*.[14] This, however, is a most problematic decision (though not

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[8] [2007] 1 NZLR 433 at [133].
[9] *Bowstead & Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014), Article 55.
[10] *Vyse v Foster* (1872) LR 8 Ch App 309 at 333; *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 56 NSWLR 298 at [299] per Heydon JA.
[11] *Cook v Evatt (No 2)* [1992] 1 NZLR 676.
[12] [2009] NZSC 15 at [90].
[13] [2009] NZSC 15 at [89].
[14] [2009] EWCA Civ 63, [2009] 1 Lloyd's Rep 436.

alone), and I have attempted to show elsewhere that it is not possible to reconcile the holding and reasoning in it with principle.[15]

There is only one sound rationalisation for forfeiture available, and that is that the agent's deviation from duty has amounted to a failure of consideration. This reasoning matches the fact that the leading cases were claims at common law (inferentially, for money had and received), and accordingly are reported in the King's Bench reports.[16] In a case such as *Premium* where the plaintiffs would have preferred to disown the contract that the agent lumbered them with, there will indeed have been a failure of consideration. It may also be that where the agent's conduct was dishonest, as was again the case in *Premium* but certainly not in *Imageview*, the dishonesty is deemed to obliterate any value derived from the agent's services, a pragmatic line of thought. It is to be welcomed that the Court in *Premium* did accept that honest breaches of fiduciary duty would not lead to forfeiture (presuming, of course, that the services did conform to what was promised), a conclusion that was in fact inconsistent with the line adopted by the Court of Appeal in *Imageview*.

There is less difficulty, but considerable interest, in the Court's finding that the plaintiffs could claim damages for their loss as well as forfeit the agent's remuneration. On this issue Tipping J wrote a separate judgment. On the analysis of the right to forfeit remuneration that has been taken here, it would not be possible to seek both expectation damages and forfeiture of agreed remuneration. But where claimants are seeking only to be returned to their pre-contract positions, as was the case here, there is no inconsistency involved. As a footnote, s9 of the Contractual Remedies Act 1979 might in New Zealand provide an alternative route for obtaining a refund in cases of this sort, but this possibility appears not to have been argued.

Premium, not surprisingly, has become a leading case within New Zealand on remedies for breach of fiduciary duty, and, as at end of February 2014, had been cited in some seven High Court and Court of Appeal decisions. It was also treated, along with *Imageview*, as a significant modern case on the forfeiture of remuneration by Newey J in the Chancery Division of the High Court of England and Wales in *Avrahami v Biran*.[17] Newey J did say that the principles found in *Imageview* and *Premium* would need to be qualified in relation to longterm agencies, so that, for instance, an isolated act of dishonesty by a senior employee would not result in a forfeiture of all remuneration (including even bonuses) for work unrelated to the dishonesty. In saying that, the judge approved the decision of his colleague, Vos J, in *Governor and Company of the Bank of Ireland v Jaffery*,[18] which was just such a case. Newey J's own case, however, was one where the manager had been regularly defrauding the company that employed him throughout his period of employment, and consequently the judge held that he forfeited all management fees paid, and payable to, him.

It was a different issue for which *Premium* was cited by the Court of Appeal of Victoria in *Watson v Ebsworth & Ebsworth (a firm)*.[19] This was the issue of proof of

[15] P Watts "Restitution and Conflicted Agents" (2009) 125 LQR 369.
[16] See, in particular, *Andrews v Ramsay & Co* [1903] 2 KB 635.
[17] [2013] EWHC 1776 (Ch).
[18] [2012] EWHC 1377 (Ch).
[19] [2010] VSCA 335.

loss in an equitable claim, and *Premium* was cited for the Supreme Court's rejection of unduly artificial approaches to issues of causation in this context, a failing sometimes attributed to *Brickenden v London Loan and Savings Co*.[20] The Court in *Watson* did not identify which judgment or judgments in *Premium* it was approving. On this issue, Elias CJ expressed herself more forcefully, although Blanchard J's joint judgment (with which Tipping J also agreed on this issue) also supported issues of causation being approached realistically. The two judgments divided over the application of the principles to the facts.

Chirnside v Fay

A case with much more local impact than *Premium*, even allowing for its earlier date, is *Chirnside v Fay*.[21] My research assistant turned up some 31 High Court cases referring to *Chirnside*, seven Court of Appeal cases, and two Supreme Court references (one of which was *Premium*) in the period to the end of February 2014. But it appears to have been considered in only one significant overseas case.

Chirnside is notable for two main points. First is its recognition that fiduciary duties between parties proposing to embark on a joint project can arise informally, and in advance of any formalisation of a contract between them. Indeed, the Supreme Court in *Amaltal Corp Ltd v Maruha Corp* was shortly to point out that formal arrangements, such as the formation of a co-owned company, may inhibit a court from implying equitable duties between such parties.[22] Second is the allowances given to the defendant in the calculation of the remedy of account of profits for skill and effort in bringing the project to completion, notwithstanding the wrongful exclusion of the plaintiff. A number of finer points were made in the calculation of remedies, which demonstrate the close attention that the judges gave to the facts of the case.

The parties were property developers who had previously undertaken a joint development project. They identified another possible project, a commercial property in Dunedin, the principal role of the plaintiff (the respondent) being to provide finance. No formal contract of joint venture or partnership was completed before the defendant (appellant) became disaffected with the plaintiff. At the same time as he was misleading the plaintiff as to the true situation, the defendant proceeded, through a company in which he held some 75% of the shares and new investors 25%, to complete both the purchase of the land and maturing opportunities to let large parts of the property. He thereby excluded the plaintiff altogether from the venture. There was some evidence that had the parties settled the terms of the joint venture, the plaintiff would have accepted less than a 50% share in the venture.

All members of the Court accepted that a fiduciary relationship existed between the parties and it had been broken. The majority (Elias CJ dissenting) was prepared in measuring the account of profits to acknowledge the skill and effort of the defendant in earning the profits. The joint judgment of Blanchard and Tipping JJ, delivered by Tipping J, was largely concurred in by Gault and Keith JJ. That judgment took the view that the more reprehensible the fiduciary's conduct the less inclined a court might be to make any allowance, or to be liberal in the amount awarded. Nonetheless,

[20] [1934] 3 DLR 465 (PC).
[21] [2006] NZSC 68, [2007] 1 NZLR 433 (Elias CJ, Gault, Keith, Blanchard and Tipping JJ).
[22] [2007] NZSC 40, [2007] 3 NZLR 192 at [19]–[20].

some moral turpitude was not a bar to the making of an allowance if, on the overall balance of the equities between the parties, it was fair to do so.[23]

On the first issue, the inception of fiduciary relationships, the Court undoubtedly rejected the need for an express undertaking of a duty of loyalty between the parties before one or more of them becomes subjected to fiduciary duties. *A fortiori* there need not be a contract between them. In their joint judgment, Blanchard and Tipping JJ stopped short of holding that even an implicit undertaking of loyalty is needed. They left open, and indeed indicated acceptance, that fiduciary obligations could be imposed *ab extra*.[24]

This remains a controversial issue amongst both judges and writers.[25] There are also subtleties to the debate; perhaps the fiduciary duties do not arise without the existence of the relationship between the parties being voluntary, yet the duties not to allow a conflict of interest nor to profit from position are imposed. A strong case can be made for the view that, at a minimum, fiduciary duties are terms implied in law, rather than terms implied in fact, whether as a simple matter of construction of the undertaking or under traditional necessary-for-business-efficacy tests.[26] That much being conceded, it does not seem unreal to me to see the duties and even the remedy of account of profits as founded in undertakings, in the same way as damages for breach of contract should be seen as based on implied undertaking rather than imposed *ab extra*.[27] There would remain high-water cases such as the fiduciary duties imposed on company promoters in favour of *future* shareholders in the company.[28]

If the law is to go further and see itself as *imposing* equitable duties, then I think we should not allow this conclusion to disguise itself through language usually associated with voluntary assumptions of responsibility. We should call these duties torts, and we should be thinking of the propriety of the common law imposing duties that are designed to protect the merely economic interests of others. Judges need to be conscious of preserving freedom for sui juris individuals in their interactions with one another, including those that cause economic loss, immorally or otherwise. It is not enough for the judges to see themselves as preserving freedom for individuals vis-à-vis the Executive, whilst leaving no room for moral fault for individuals in respect of

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[23] *O'Sullivan v Management Agency & Music Ltd* [1985] 1 QB 428 followed.

[24] [2006] NZSC 68 at [87] and [89]. One of the cases on which Tipping J relied, *M(K) v M(H)* [1992] 3 SCR 6 at [73] needs to be considered in the light of *Perez v Galambos* [2009] 3 SCR 247 at [66].

[25] See, e.g. the contrasting views of J Edelman "When do Fiduciary Duties Arise?" (2010) 126 LQR 302, and M Conaglen "Fiduciary Duties and Voluntary Undertakings" (2013) 7 J Eq 105. See also the important extra-judicial article of Lord Millett "Restitution and Constructive Trust" (1998) 114 LQR 399. As to commentary on *Chirnside* in this context, see G Brodie "The Fiduciary Obligation in the Context of the Joint Venture Relationship" (2008) 14 Canta LR 255; S Dorsett "Prospective Joint Venturers and Fiduciary Duties: A Comment on the SCNZ decision in *Chirnside v Fay*" (2010) 2 J Eq 221; J Knowler and C Rickett "The Fiduciary Duties of Joint Venture Parties—When Do They Arise and What Do They Comprise?" (2011) 42 VUWLR 117.

[26] The basis of terms implied in fact in voluntary undertakings is itself a matter of controversy. See, e.g. the analysis of *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 in W Courtney and J Carter "Implied Terms: What is the Role of Construction?" (2014) 31 JCL 151; R Hooley "Implied Terms After *Belize Telecom*" [2014] CLJ 315. Cf D McLauchlan "Construction and Implication: In Defence of *Belize Telecom*" [2014] LMCLQ 203.

[27] See further P Watts "Restitution Claims Against a Contracting Party" in J Berryman, S Kós and P Watts *Contractual Remedies* (New Zealand Law Society, Wellington, 2005) at ch 5.

[28] The leading case is *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218.

each other. Judicial dictate is state dictate. Regulation is often supportable, indeed desirable, but it is a task for the Legislature.

The second focus of *Chirnside*, allowance for skill and effort, has also drawn contention.[29] It would be wrong to relegate as irrelevant to *Chirnside* the various debated points on this topic, but arguably a rather simpler analysis was available for reaching a similar conclusion to that the majority actually reached. The essence of the dispute in *Chirnside* was not, in my view, breach of fiduciary duty but breach of promise (whether strictly contractual or not). Equity has long enforced informal undertakings jointly to acquire assets. A leading New Zealand example is *Avondale Printers and Stationers Ltd v Haggie*,[30] which was not cited in the judgments in *Chirnside*, though admittedly it is only a first instance authority. There are a host of other cases; in England and Wales claims of this sort are often referred to as *Pallant v Morgan* claims after an illustrative case from the 1950s.[31] Often the remedy, where the defendant was meant to acquire an asset for both parties, will be to declare a constructive trust of the relevant asset. Where it is too late to do that, then the remedies in equity should still usually aim to give effect in monetary terms to what the parties agreed.

The evidence in *Chirnside* was that if the parties had formalised their arrangements, the defendant would have agreed to recognise the defendant's disproportionate contribution to bringing the project to completion, including inferentially by an unequal share in the fruits of the project. Tipping J was of the view that this understanding was not "a route of itself to the determination of this aspect of the case" and he noted that Mr Chirnside himself did not advance it as such.[32] Any failure on the part of the parties to plead and defend the case on the basis of informal agreement may have hamstrung the Court, but agreement seems to me the only rational basis for the plaintiff's claim, and it would be wrong to place the plaintiff in a better position than had been found to be agreed. Even on the basis that the defendant had misappropriated property as a fiduciary, the misappropriation could not be greater than the plaintiff's share of the relevant assets. This would be another case where it would not have been appropriate to have let the defendant's wrongdoing be the basis for obliterating his agreed entitlements (contrary to what happened in *Imageview*).

It should be accepted that the parties left the terms of their arrangements very vague, and the Chief Justice seems to have taken the view that the facts supported a prima facie agreement for equality of reward. But to the extent that both the majority and minority may have been influenced by the old equitable maxim "equity is equality",[33] there is no reason to let this maxim be more than a relatively weak presumption of fact. Certainly, it would be wrong to treat it is as a rule of law to which the courts might then offer some largesse through allowances for time and effort, which is rather how the judgments in *Chirnside* are structured. The question of allowances for time and effort might properly arise where the claim is not that the fiduciary has deviated

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[29] See J Palmer "Fiduciaries and Remedies" [2007] NZLJ 36 at 38.
[30] [1979] 2 NZLR 124.
[31] *Pallant v Morgan* [1953] Ch 43. See also *Rochefoucauld v Boustead* [1897] 1 Ch 196; *Neville v Wilson* [1997] Ch 144.
[32] See [2006] NZSC 68, [2007] 1 NZLR 433 at [132].
[33] *Burrough v Philcox* (1840) 5 My & Cr 72 at 92, 41 ER 299 at 306; *Lennan v Lennan* (1993) 4 NZBLC 103,095.

from express arrangements, but that he or she has incidentally profited from position. The law in this area remains generally problematic.[34]

Chirnside was cited by the Queensland Court of Appeal in *Bli Bli 1 Pty Ltd v Kimlin Investments Pty Ltd*[35] as supporting the idea that fiduciary duties can arise from the reposing of trust and confidence, as one of three sources for fiduciary duties. The other two were an undertaking to act in the interests of another, and dependency and vulnerability. While this is not an unwarranted use of *Chirnside*, it is not plain that the unilateral reposing of trust and confidence should justify the imposition of legal duties.

Amaltal Corp Ltd v Maruha Corp

Coming close on the heels of *Chirnside*, the judgment of Blanchard J for the Court in *Amaltal Corp Ltd v Maruha Corp*[36] is quietly notable on a number of points of agency law. First, as noted already, the Court held that there was generally no room for equity's background moderation of trusting relationships where the parties had formalised their relationship in a company structure. Company law has its own complex of rules, including equitable ones, for guiding the conduct of shareholders and managers. On this point the Court anticipated the like conclusion of the High Court of Australia in *Friend v Brooker*,[37] though news of the New Zealand case appears at that stage not to have travelled to Canberra.

Having so concluded, the Court nonetheless held that the presence of a company structure would not always preclude one shareholder owing fiduciary duties to another, and indeed this was such a case. Here, the two partners of a fishing business formed a company to conduct that business. One of the parties, Amaltal, agreed to second an employee to supply the company's need for accounting and tax services. But that employee's tasks were not confined to the company. His job was also to assess and calculate for the two shareholders the size of the subventions that the two had undertaken to pay the company in order that it could meet its loan obligations. In that respect Amaltal was held to have been acting on Maruha's behalf in determining for it what it owed the company, and that that undertaking was attended by the duties of candour and good faith required of a fiduciary. Unfortunately, Amaltal dishonestly exaggerated the size of the subventions Maruha was asked to make to the company, largely by suppressing the fact that, contrary to expectations, the tax authorities had been allowing depreciation against fishing quota held by the company. Some time later, in unwinding the venture, it became necessary for some of the depreciation to be written back and Amaltal had secretly to pay both its and Maruha's portions of the re-write lest its earlier dishonesty be revealed.

The dishonesty having come to light, Maruha sued Amaltal for the excess moneys it had paid the company. It claimed in deceit and for breach of fiduciary duty. It succeeded on both bases in the Supreme Court. The Court had also to deal, however, with an argument of Amaltal that Maruha could not claim back *all* the excess money it had paid the company, given that Amaltal had paid back to the Revenue more than

[34] See, e.g. P Watts "Restitution and Conflicted Agents" (2009) 125 LQR 369.
[35] [2010] QCA 136 at [12].
[36] [2007] NZSC 40, [2007] 3 NZLR 192 (Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ).
[37] [2009] HCA 21, (2009) 239 CLR 129.

its share of the rewrite of depreciation, thereby benefiting Maruha. This is where the finding that Amaltal had broken duties of loyalty, and not just that it had deceived Maruha, was seen as significant. Maruha argued that Amaltal had not adduced evidence to show that it was inevitable that Maruha would have been required to make the payments made to the Revenue, and Maruha put up plausible arguments that, had been it been aware all along of what Amaltal was doing, the company's or its affairs (including the winding up of the venture) might have been structured differently with different tax results. The onus was on the defaulting fiduciary to prove that the plaintiff's raw outgoings were not a total loss.

In principle, this all seems sound. One point that appears neither to have been made nor considered is the relevance of the fact that Maruha must have had a prima facie restitutionary claim against the company for the overpayment of the subventions. Should this claim have been valued, or even required to be pursued first, before the compensation figure was settled? Given, however, that the company had on-paid the overpayments to Amaltal, the company might have had a change of position defence, and if not it probably had its own restitutionary claim against Amaltal. Given also the fraud imputable to Amaltal, it was probably appropriate to ignore such a circle of rights. The point is made only because the short-circuiting of chains of claims is one of the banes of modern private law (witness New Zealand's leaky building cases). It is at least a useful exercise to pause to consider the possibilities.

The *Amaltal* case has been referred to in two Australian cases. For those interested in geopolitics, the case first made land in Tasmania, where Blow J (now Blow CJ) in *Eiszele v Hurburgh* cited as many as seven New Zealand cases in his judgment.[38] He relied upon *Amaltal* for the point that equity is inclined not to permit those in breach of fiduciary duty to assert that a claimant's prima facie loss, or part of it, might have occurred in any event. The second reference arose in *Craigcare Group Pty Ltd v Superkite Pty Ltd*.[39] Hallen J in the Equity Division of the New South Wales Supreme Court cited *Amaltal* for its finding that fiduciary duties can sometimes arise in relationships most aspects of which are free of fiduciary obligations.

Dollars & Sense Finance Ltd v Nathan

Dollars & Sense Finance Ltd v Nathan[40] is a case with fairly simple facts but significant implications. The plaintiff's son forged her signature on a mortgage document to support a loan that was being made to him. The mortgage was registered under the Land Transfer Act 1952 which meant that the son's dishonesty had to be brought home to the defendant mortgagee if it were to be successfully challenged. The plaintiff asserted that her son was acting as the agent of the defendant in obtaining the mortgage, and that on that basis the son's dishonesty was imputable to the defendant. The judge at first instance, Winkelmann J, held that although borrowers, in procuring someone to go guarantor for them, would normally be acting in their own interests and not as agent for the lender, on the facts the defendant had used the borrower as its agent. This finding was upheld both in the Court of Appeal and the Supreme Court.

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[38] [2011] TasSC 65.
[39] [2014] NSWSC 326.
[40] [2008] NZSC 20, [2008] 1 NZLR 557 (Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ).

Although the Supreme Court did not expressly treat the following points as crucial, two things, it is submitted, were compelling on the issue of agency. First, the pseudo-statutory rules that courts in England and New Zealand adopted in the 1990s, applicable to guarantors who had no obvious business connection to the loan,[41] placed a positive duty on lenders to urge guarantors to take independent legal advice. Since the lender in *Dollars & Sense* attempted to fulfil this duty only through the son, he must have been acting as an agent. Secondly, the Credit Contracts Act 1981, then in force, placed a parallel set of duties on lenders, and the carriage of these was also delegated to the son.

The Court's next step was to burden the lender with the fact that the son had forged the mortgage. Given its finding of agency and that existing Privy Council authority from New Zealand had confirmed that the fraud of an agent was sufficient to trigger the fraud exception to the Torrens system,[42] it was fairly straightforward for the Court to impute to the lender the forgery of the son. However, the appellant attempted to argue that the forgery was a fraud on the lender as much as the plaintiff, and that on that basis the conduct should be treated as occurring outside the agency. The Court rejected this argument relying on the fact that within the law of tort the fact that an employee is acting contrary to the interests of the employer does not preclude the employer being vicariously responsible for the employee's acts.

It is respectfully suggested that this part of the judgment is a little problematic. In particular, the judgment assumes that the principles of vicarious liability extend to agents as a class. The Court reinforces this assumption by pointing out that the son could not be regarded as an independent contractor.[43] In general, the principles of vicarious liability apply only to employees, and cognate categories such as directors of companies and partners in a partnership. Some agents are, of course, employees, but they need not be. Particular agents can be employees, directors, partners, independent contractors, or none of these things. Only the first three of these categories are axiomatically capable of triggering vicarious liability. It follows that the concepts of agent and independent contractor are not mutually exclusive categories. Where the agent acts gratuitously, as the son did in *Dollars & Sense*, the agent will be neither employee nor independent contractor. Recent cases have in very particular circumstances extended vicarious liability outside the traditional categories,[44] but none has gone as far as to suggest that merely being an agent triggers it.[45] The drive to expand the common law may be inexorable, but it should not be encouraged.

The better explanation for why the lender was responsible for the son's fraud was that the plaintiff's action was not tortious but restitutionary. While a principal is not normally vicariously liable for the torts of an agent who is not an employee (unless authorised, actually or, in the case of statements, apparently), it is reasonably well

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[41] See *Barclays Bank plc v O'Brien* [1994] 1 AC 180; and *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674. This development was aberrational in terms of common law methodology.

[42] *Assets Co Ltd v Mere Roihi* [1905] AC 176.

[43] See [2008] NZSC 20, [2008] 1 NZLR 557 at fn 35.

[44] See e.g. *S v Att-Gen* [2003] 3 NZLR 450; *Various Claimants v The Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1.

[45] Neither *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 (involving partners) nor *Mattis v Pollock* [2003] 1 WLR 2158 (employee) relied upon by the Court support the proposition for which they are cited.

established that a principal cannot retain property, including receipts of money, that have been obtained through the wrongful conduct of an agent, of whatever type. And this is so even if the agent is at the same time as he or she is acquiring the property for the principal intent on defrauding the principal as well. The traditional phrase is that "the principal cannot approbate and reprobate".[46] The Court in *Dollars & Sense* did recognise the force in the point that the defendant was trying to take the benefit of the agent's acts at the same time as disowning his misconduct.[47] The Court also, in obiter, accepted that this rationale would extend to circumstances where the agent merely knew of the wrongful acts of another party that led to the principal obtaining an interest in property rather than being the actual author of the wrong.[48] It is probably not necessary to regard the approbation as the same thing as ratification in the strict sense.

The approbation-and-reprobation rationale, therefore, was the key to the case. It follows that if the lender in *Dollars & Sense* had simply conceded that it was not entitled to the mortgage, it could not have been pursued in tort for any (other) losses suffered by the plaintiff at the hands of the agent, her son. In other words, the lender's only legal duty was to surrender what it had wrongly obtained. The reasoning of the Court, however, has opened the possibility of an extension of vicarious liability to principals who are not employers (or cognates). This is potentially a development with far-reaching consequences.

GE Custodians v Bartle

Another case concerned with agents and a party wishing to disown contracts, and in that sense invoking restitution, came before the Court in *GE Custodians v Bartle*.[49] This time the claimant was not successful. The case was effectively a test case for hundreds of similar disputes, spawned by an overheated market for investment in apartments, a market in which lenders were as much part of a feeding frenzy as the promoters and investors. Naturally, when the market collapsed it became a fight to determine who should bear the losses. It became public knowledge following the collapse that many retired people with very low ongoing incomes, who would never have initiated making an investment of this sort, had been sucked into the vortex by some very hard selling, accompanied by offers to arrange loans to buy the properties.

This has been a worldwide problem, and some jurisdictions have enacted legislation to deal with "forced-credit" or "predatory lending"; situations where lenders and associates provoke borrowing by vulnerable persons who would not otherwise be in the market for loans.[50] New Zealand has, in the Credit Contracts and Consumer Finance Amendment Act 2014, introduced into the principal Act of 2003 a regime of

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[46] *Lloyd v Grace, Smith and Co* [1912] AC 716 at 738 per Lord Macnaghten. *Lloyd v Grace Smith* was, however, a case where the agent was also an employee, which justified tortious liability and not just restitutionary liability.
[47] [2008] NZSC 20, [2008] 1 NZLR 557 at [48]–[49].
[48] Ibid at [43].
[49] [2010] NZSC 146, [2011] 2 NZLR 31 (Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ). This is a case in which the author gave some assistance to counsel for the unsuccessful parties.
[50] See e.g. Truth in Lending Act (15 US Code, Chapter 41, §§1631–1639). Many US States have state legislation as well: see e.g. High Risk Home Loan Act (Illinois, 815 ILCS 137). See too the use of the Contracts Review Act 1980 (NSW) in *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389. Cf. New Zealand's Fair Trading Act 1986, ss 46H–46M (unfair contract terms), not yet in force.

"lender responsibilities". This new legislation could well mean that the Court's decision in *Bartle* has become a dead letter, although one would have wished for clearer signals on this in the text of the Amendment. It remains useful to say something as to the Court's reasoning.

It was indeed one of the purposes of *Bartle*, thrown up by the collapse of the Blue Chip group of companies, to test the extent to which the 2003 Act in its original form could deal with hard selling of loan-assisted investments. To this bow was added the second string of the common law. It was unlikely that the common law could attack a commercial lender without proof of knowledge of the vulnerability of the borrower. Certainly, if mental incapacity is no defence where the other party is, reasonably, unaware of the incapacity, as *O'Connor v Hart* holds,[51] then mere naivety, even if coupled with old age, is not going to provide a defence. For this reason, the concept of agency assumed considerable importance, since it is accepted that the acts and knowledge of an agent acquired within the agency are imputable to the principal in restitutionary situations, as *Dollars & Sense* illustrates. Knowledge and agency are both fact-dependent concepts, and, as the reported arguments of counsel and the Court's judgment alone show, the facts of *Bartle* were complex.

What was clear-cut was Mr and Mrs Bartle's financial position. Before the relevant transactions, their only income was $21,726 national superannuation per annum, plus the interest on a term deposit of $65,000. They ultimately were left exposed with liabilities in the many $100,000s secured against their home. It is also clear that, even if there had not been a collapse in the property market, the deal they entered into was a rotten one; apart from a relatively small fortnightly payment (funded from their borrowing but enuring to them if the property increased in value sufficiently), they also funded substantial payments to the promoter (including a 15% commission), overpaid for the property even at a time of buoyant prices, and were destined to receive only $10.1% of any capital gain on the property.

In relation to the 2003 Act, the Court accepted that the Act furnished broader grounds for curial intervention than the common law (including that the contract is "harsh" or "unjustly burdensome").[52] However, it also concluded, in accordance with earlier lower level authority, that the statutory concept of oppression required knowledge on the part of the lender of the facts that made the particular lending oppressive, unless the terms of the loan were on their face oppressive (which was not the case). In this respect the 2003 Act operated similarly to the common law.

This conclusion has been severely criticised by Sir Edmund Thomas in an article in the *New Zealand Business Law Quarterly*.[53] It may sell this article short to say that much of its argument is powerful. There are too many strings to the bow to reiterate them here, but if I may be permitted to embellish parts of the argument a little, the following seems to me the most compelling way of putting things: (1) the wording of the concept of oppression in the Act does not expressly require knowledge of what makes a particular loan oppressive; (2) in these circumstances it is enough to look to the systemic nature of "factdoc" loans, in that they are deliberately aimed at people

[51] *O'Connor v Hart* [1985] 1 NZLR 159.
[52] [2010] NZSC 146, [2011] 2 NZLR 31 at [37].
[53] EW Thomas "A Critique of the Reasoning of the Supreme Court in *GE Custodians v Bartle*" (2011) 17 NZBLQ 97.

who cannot meet the traditional criterion of sufficient regular income to service a loan but whose assets are sufficient to cover the lender's risk of borrower default; (3) the evidence was that more than 50% (perhaps well in excess of that figure) of the lenders' (there was more than one related party) New Zealand business related to fastdoc loans; (4) whilst fastdoc loans are not per se oppressive since, for instance, there may be investors with no regular income whose living is made by erratic capital gains and whose asset position is capable of weathering dry periods, the number of people in a community of that sort is relatively small; (5) the very large numbers of fastdoc loans must have been known to the lenders to be out of proportion to the numbers of self-employed people with large means in the country;[54] (6) given the almost certain position that there were most unsuitable people taking on fastdoc obligations, the onus was on the lenders to show that the particular borrower was able to sustain the risks involved rather than the onus being on the borrower to show that the lender had knowledge or his or her particular vulnerability; and (7) the systemic oppressiveness of the lending was reinforced by lenders deliberately distancing themselves from any knowledge of the position of particular borrowers by placing mortgage brokers between them and the borrowers, giving riding instructions to those brokers and formally remunerating them, but expressly providing that they were not to be their agents. To this chain, can be added in relation to the Bartles, the fact that the lender had been informed of their ages (both national superannuitants), contradictory information had been received as to whether they were "self-employed", and by the time the two later tranches of the lending took place, one of the GE companies received information showing the modest nature of the Bartles' assets (the actual value of their assets was in fact even smaller).[55]

This leaves the question of agency as a means of sheeting home knowledge of the particulars of individual transactions to the lenders. The first point to note here is that, as a generalisation, agency has traditionally been a facilitative rather than a regulatory device in the common law. In other words, it is a status that is granted and voluntarily assumed, not one that is imposed. In these circumstances, a lot of weight is given to what the parties themselves expressly provide as to their status vis-à-vis one another. It is indeed a very common feature of agencies that the agent spends more time conversing and communicating with the third party than with the principal, but the law will still give overriding effect to how the parties themselves categorise their relationships. Hence, many real estate agents will form stronger personal bonds with their buyers, showing them a range of houses, than they do with their vendors, yet in the standard arrangement their agency will be for the vendor since that is what their contracts provide for. Similarly, with mortgage brokers, the starting point seems to be that such brokers are agents of the borrower rather than the lender, even though over time they are likely to have more contact with the lender than an individual borrower.[56] Nor is the fact that the lender formally pays their remuneration enough to negative an express disavowal of agency.

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[54] Such arguments are not unknown to the common law. See, e.g. *Westpac Banking Corp v Savin* [1985] 2 NZLR 41, where the bank knew that 75% of its customer's sales were as agent, but that most of the proceeds of sales were being placed in the customer's general account when agency sales should have been separated out. It was not necessary in such circumstances for the plaintiff to show that the bank knew that the sale of his asset was made as agent.

[55] See [2010] NZSC 146, [2011] 2 NZLR 31 at [15].

[56] Similar issues to the Blue Chip litigation have occupied many hours of court time in Australia. For one affirmation that normally brokers are agents of borrowers not lenders, see *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389.

That said, a strong case can be made for an argument that, while the common law is rightly slow to make people legally responsible for damage that they did not themselves directly commit, it is rather different where the third party is asserting a right to destroy a pre-existing property entitlement of the complainant or actively to assert a contract *against* the complainant. In such cases, it may be right to accept that a more tenuous connection between the third party and intermediaries whose actions resulted in the transfer of property, or the creation of a contract, will result in the third party having to surrender the rights that it is asserting against the complainant. This is one of the points made in the discussion above of *Dollars & Sense*. A relatively confined degree of actual authority in the intermediary might be sufficient to impute to a third party the intermediary's knowledge of defects in the complainant's decision to transfer property or make a contract with the third party.

There is little direct authority for such an idea, but it has surfaced as a possibility in a long line of cases.[57] It may even be that the label agent need not be applied at all to the intermediary. As along ago as *Merry v Abner*,[58] in 1663, a son was burdened with his father's knowledge of a stranger's adverse interest when the father acted as his go-between in the purchase of a rural property, although admittedly the label agent was probably appropriate there.[59] Although without reference to these cases, William Young P used reasoning of this sort in the Court of Appeal in *Bartle*.[60] Such reasoning plainly did not appeal to the Supreme Court, even in a case where the intermediary brokers undoubtedly had some agency status in the arrangements, arguably extending to their job of obtaining insurance for the lenders in relation to the transactions.

As indicated, New Zealand's experience of forced-credit in real estate markets is but part of an international phenomenon. Australia, in particular, has produced a large body of litigation on this topic. In the leading case (a hearing of three appeals simultaneously), *Tonto Home Loans Australia Pty Ltd v Tavares*,[61] the New South Wales Court of Appeal rejected an argument that an extended concept of agency could be applied to make the lenders responsible for the state of knowledge of the mortgage brokers involved. Nonetheless, the Court felt able to use the Contracts Review Act 1980 (NSW) to set aside the relevant obligations of the borrowers, in a way in which the Supreme Court felt unable to do using the 2003 Act in its then unamended form.

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[57] See *Swift v Jewsbury* (1874) LR 9 QB 301 at 312–313; *Weir v Bell* (1878) 3 ExD 238 at 245; *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394 at 416; *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243 at 244; *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482 at 493–494; *Briess v Woolley* [1954] AC 333 at 348–349; *Bradford Third Equitable Building Society v Borders* [1941] 2 All ER 205 at 228; *Armagas Ltd v Mundogas SA* [1986] AC 717 at 745 per Robert Goff LJ (CA); and *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 972.
[58] (1663) 1 Ch Cas 38, 22 ER 682.
[59] Contrast the approach of the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89. See further, P Watts "Imputed Knowledge in Restitutionary Claims-Rationales and Rationes" in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters, Sydney, 2008) at 429.
[60] *Bartle v GE Custodians Ltd* [2010] NZCA 174, [2010] 3 NZLR 601 at [235]–[250].
[61] [2011] NSWCA 389.

Allsop P gave the leading judgment for the Court. He appears to have been unaware of the Supreme Court's judgment, given a year earlier. It is worth quoting some extended passages from the judgment. In relation to agency, his Honour stated:[62] "Agency is to be determined by an analysis of the consensual legal relations between the parties, it is not merely a conclusion drawn from the performance by A of a function important, even necessary, to the operation or functioning of the business enterprise of P in question." But when he turned to the Contracts Review Act, the judge made the following remarks (strongly paralleling Sir Edmund's article):

> [226] … Tonto HL [the lender] had chased and finally won a property development group to act through its finance broking arm as a loan introducer. The commercial risks (and rewards) involved in that choice have been adverted to and will be the subject of further consideration in the re-exercise of power. ..
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> [255] That S Loans was not in law the agent of Tonto HL does not mean that for the purpose of evaluating the operation of the *CRA*, the position of Streetwise [subcontractor of S Loans], how it came to take its place in the overall enterprises of the lending programmes and the objective perceptible risk of fraud arising from its position, should not be considered.
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> [256] The perpetrator of the fraud was not a stranger to Tonto HL. It was a retained introducer. It was a sought-after commercial counterparty put in place by Tonto HL for the purpose of hoped for introduction of business. It was part of the "shopfront" of the retail business of the enterprise, albeit sub-contracted, and branded as Streetwise. Its role was to introduce business, obtain information in respect of suitable products and bring forward applications… As a broking arm of a group engaging in property development it had the attraction to Tonto HL of members of the public as customers engaging in property development or buying property from the group and seeking money so to do…
>
> [265] In all the circumstances, these considerations are relevant to conclude that the unjustness of the contracts can be seen as unjustness affecting Tonto HL and the lenders. This conclusion is relevant to the assessment of unjustness and the extent to which the lenders should be viewed as bearing responsibility for what happened and in applying the broad considerations contained in the *CRA*, founded as they are in justice and fairness. Looking at these events as brought about primarily by the fraud of Streetwise, a fair assessment is that the business structure put in place by the lenders in how it operated was significantly responsible for the preying upon these people by Streetwise. That is not to ignore the basis upon which the trial and appeal proceeded, that "Lo Doc Lending" per se was not unjust. Nor is it to introduce an enterprise concept of agency; rather it is to recognise that a sub-contracted lending structure of the kind here, in which persons such as Streetwise are "chased" to become the introductory agents, should have guidelines enforced with real vigour to deal with the obvious objective risks of fraud and deception. No one criticised these guidelines… It is only fair and just to recognise the significant responsibility of the lenders in these circumstances.

Hickman v Turn & Wave Ltd

When the next case to arise out of the Blue Chip collapse came before the Supreme Court, the investors were successful. This time, however, the parties wishing to enforce contracts against the hapless investors were not the lenders but the vendors of the apartments that had been marketed by the Blue Chip companies. Some aspects of *Hickman v Turn & Wave Ltd*[63] were as boundary pushing as *Bartle* was conservative. The panel was the same, except that Blanchard J had been replaced by William

[62] [2011] NSWCA 389 at [194].

[63] [2012] NZSC 72, [2013] 1 NZLR 741 (Elias CJ, Tipping, McGrath, William Young and Anderson JJ). The author gave some advice to the appellants in this matter, including at earlier stages of the litigation.

Young J, a member of the Court of Appeal panel that had been reversed in *Bartle*. It was William Young J who gave the judgment of the Court. In a significant degree, the case was decided on the construction of various provisions of the Securities Act 1978, many of which are not carried forward into the Financial Markets Conduct Act 2013, or if carried forward are in different terms. This reduces much of the case's ongoing commercial significance. Some observations are still in order.

Approximately half of William Young J's judgment was absorbed with the reasoning that led to his conclusion that the three types of contract made between the investors and the Blue Chip companies, collateral to the purchase contracts for the various apartments, were "securities" within the 1978 Act. In so doing, the judge endorsed the broad approach to the concept of "debt security" taken by the Privy Council in *Culverden Retirement Village Ltd v Registrar of Companies*.[64] For what it is worth, I was, as the judge noted, one of a number of critics of *Culverden*. I have little doubt, however, that the contracts with the Blue Chip companies in this case were properly designated securities.

In relation to the joint-venture category of contract (into which category, incidentally, the Bartles' contracts fell), shares were issued, which undoubtedly created an "equity security" within the 1978 Act. Oddly enough, however, the Court thought that fact in itself may not have provided a sufficient link for impeaching the sale and purchase agreements. As for the other two types of contract, they were much more money-based (less land-based) than those in *Culverden*. In that respect, *Hickman* is not as problematic as *Culverden* was. We should note that the concept of debt securities is carried forward into the 2013 Act, so *Hickman* remains an important authority on this topic,[65] although slight changes in wording will have to be heeded.

Somewhat more difficult was connecting the Blue Chip contracts to the contracts to purchase the apartments. Two of the three main vendors were companies independent of Blue Chip. One technique for recognising that in law collateral contracts, in *Hickman* the purchase contracts, are connected to illegal contracts (in the broad sense), the Blue-Chip-contracts, is tainting. Tainting usually turns on the promisee's degree of knowledge of the illegality of the other contract. Another is that, in any event, the contracts are so interdependent that the one cannot stand without the other. Both techniques were invoked by the investors in this case. A third method, suggested by the Court itself and not at all obvious, namely that the vendors were themselves "issuers" of securities will not be addressed here, since the Court's reasoning on this score appears to be no longer available under the 2013 Act. At least, the definition of "issuer" is different in the new legislation.

In relation to the analysis based on interdependence, as a matter of form, the sale agreements were capable of standing alone. But that was not true of the Blue-Chip-contracts; they had no meaning independent of the sale contracts. It was argued, and accepted by William Young J, that this meant that the invalidity of the Blue-Chip-contracts also caught the sales contracts. I confess to being not wholly convinced that one-way dependence of this sort should be sufficient to catch the contract that is capable of standing alone. If one puts to one side tainting for the moment, the

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[64] [1997] 1 NZLR 257.
[65] The concept of "managed investment scheme" has been substituted for the "participatory security".

question is one of intention of all the parties as to whether the relevant contracts stand and fall together. There is a certain ambiguity to the reasoning of the New South Wales Court of Appeal in *Hurst v Vestcorp*[66], the case which was relied upon for the reasoning in *Hickman*, as to whether it was dependence (possibly a stronger case on the facts than *Hickman*) or tainting that was doing the work. Tipping J, in contrast, appears to have taken the view that the interdependence analysis was available only when combined with the (controversial) conclusion that the vendors were themselves issuers under the 1978 Act.[67]

Tainting, in contrast, was a viable, perhaps compelling, reason for striking down the sale agreements. Two points coalesce to support this conclusion. First, it does seem relevant in this context to consider the *factual* interdependence of the two sets of contract. This was not a case of a landowner who simply owned apartments it wanted to sell and used agents to do so. This was a landowner that could not even build the apartments unless it met a bank stipulation for a number of pre-sales of apartments; these sales were a pre-condition to the bank advancing the debt capital to build the apartments. The landowner appointed a particular agent for that purpose, knowing that that agent was to achieve its sales using investment products of the agent's own devising. The argument discussed above in respect of *Dollars & Sense* and the *Bartle* side of the Blue Chip litigation was equally applicable here; the vendors were approbating and reprobating. Again, it was more than a case of its agents knowing of someone else's wrongdoing (or at least of the facts constituting the wrong), it was a case of the agents *committing* the wrong. Secondly, there was considerable evidence that internal representatives of each of the vendors knew something of at least one or other of the forms of offending investment product, either from meetings or attendance at presentations.[68]

As it happens, Tipping J in *Hickman* took a much broader view of tainting than that just argued for. In his Honour's view strong factual interdependence of two or more transactions could of itself be enough, without needing to show that the promisee of the collateral contract knew enough of the facts constituting the illegality, let alone that those facts constituted an illegality. The mere connection between the two contracts here was sufficiently strong, in his view. In the alternative, the judge accepted that constructive knowledge of the facts constituting the illegality was enough, and that that test was also established on the facts. The first approach is a far-reaching extension of the general understanding of tainting. It appears not even to require a degree of knowledge acquired through agency. Can one extend the approbate-and-reprobate principle to embrace the misconduct of non-agents? Given that such an approach was not necessary on the facts of *Hickman*, one might be permitted some reserve on this score.

Westpac New Zealand Ltd v MAP & Associates Ltd

[66] (1988) 12 NSWLR 394.
[67] [2012] NZSC 72, [2013] 1 NZLR 741 at [126].
[68] See [2012] NZSC 72, [2013] 1 NZLR 741 at [87]–[90].

As its name might suggest, *Westpac New Zealand Ltd v MAP & Associates Ltd*[69] is a case about banks. It turns on a bank's duties as agent for its customer, but there is room for doubt as to the extent to which the case provides a model for agents in general. The case was concerned with an agent's duties to comply with his or her principal's directions. There can, of course, be no doubt that all agents are expected to follow their principals' instructions when, and to the extent that, they have undertaken to do so. But what is the scope for declining to follow directions when an agent believes that doing so will involve the commission of a wrong against a third party? Plainly, the agent's dilemma will be more trying when doing what the principal asks involves the agent becoming personally liable to the third party. And things are worse still when the agent cannot be certain that the directions involve the commission of a wrong.

This is a complex topic. In relation to the agent's potential liability to third parties, something is likely to turn on the nature of the wrong. If all that is involved is that the act will involve a breach of contractual duties owed by the principal to the third party, the law has taken the view that, in general anyway, the agent's first loyalty is to his or her principal, and the agent cannot therefore be sued by the third party for procuring a breach of contract (or, to the extent a broader tort exists, the tort of interference with contractual relations).[70] Such immunity may not be available for other types of wrong. In respect of liability to the principal, there are two ways in which an agent might legitimately resist instructions, namely on the basis of an implied limitation in the contract of agency, and, in some circumstances, on the basis that the duty is unenforceable for illegality. *Westpac v MAP* was concerned with the bank's duties to its principal and had to address the situation where a bank cannot be certain whether a wrong is being done to a third party.

The position in which Westpac found itself, or from another point of view, placed itself, was certainly remarkable. It may be an inexcusable slight on that august city to labour the fact that the plaintiff was a Hamilton-based firm of accountants that asked a Hamilton branch of the defendant bank to hold interest-free some US$49.3 million that the plaintiff was receiving on behalf of a South American client relating to the sale of the majority shareholding in a private Bolivian bank to a state-owned bank in Venezuela. Apparently, the explanation was that the President of Venezuela was "not very fond of the USA and he would like to use an independent bank". Well and good, you might think; "let's use a Hamilton branch of a New Zealand bank".

Westpac agreed to act on its customer's instructions, which were given the bank in a sealed envelope with a command not to open it until instructed. Westpac was also told that it was likely that it would receive those instructions within a week or so. As it happened it took 13 months or more for the instructions to arrive. In the course of that period "Westpac's Compliance Department had received a notice alerting the banking community to large payments being made from Bolivia and the need to treat these with caution," and the plaintiff had asked the defendant to act in another transaction for the same South American client in the sum of US$1.3 billion, which the defendant

[69] [2011] NZSC 89, [2011] 3 NZLR 751 (Elias CJ, Blanchard, Tipping, McGrath and William Young JJ). For more detailed discussion, see A McDonald "Withholding Client Funds on the Basis of Potential Liability in Dishonest Assistance" (2013) 19 NZBLQ 344.
[70] See *Bowstead & Reynolds on Agency* (20th ed) at para 9–121.

declined to do.[71] Towards the end of the 13 months, the defendant was informed that the Venezuelan bank had assigned its rights to another state-owned bank and a fresh set of instructions were supplied again in a sealed envelope. But then, shortly before the instruction to disburse was given, the original Venezuelan bank, which was not the defendant's customer, commenced to communicate with the defendant and indicated that the sale agreement had been cancelled and that the moneys in the account should not be paid out. The defendant started to make inquiries of its own about some of the individuals in the Americas, which did not give it any comfort. When the instructions finally came, the defendant declined to follow them and invited its customer to get a court order. This the plaintiff duly did claiming interest and indemnity costs.

The Supreme Court, in a judgment given by Tipping J, upheld orders that the defendant was in breach of contract by failing to comply with its customer's instructions. The Court held that if at trial a bank cannot establish that its customer was in fact acting in breach of trust it will, in the absence of contractual licence, be in breach of contract. Reasonable belief that obeying the instruction would involve it in dishonest assistance is not sufficient. The Court accepted that its ruling put banks "in an awkward position. … The bank has to anticipate the view a court may later take after a much fuller consideration of the circumstances than is usually possible when the bank is faced with an immediate demand from a customer."[72] I interpolate that this must particularly be the case when, as has now been held: (a) it is not necessary for liability for assisting a breach of trust that the breach itself be dishonest, so long as the assister knows that there is a breach;[73] and (b) dishonest conduct is to be judged by what reasonable people regard as dishonest.[74] One hopes, perhaps trusts, that even under these tests dishonesty will not be found where the assister knows most of the facts but there is also reason for thinking that the person assisted has some colour of right to be doing what it is doing.

As foreshadowed, *Westpac v MAP* does not purport to establish a duty of obedience applicable to all agents. The Court's reasoning is directed to the position of banks, and there is reason there to expect very narrow exceptions to the prima facie duty of obedience. Customers need to know that money in a current account is immediately available to them. That is true of the common law, but money-laundering legislation needs also to be taken into account, in imposing both duties on and protections for banks in handling their customers' accounts.[75] The Court did not discuss the circumstances in which a bank might interplead using High Court procedures,[76] but one infers that there may be an implicit qualification on this procedure as far as banks are concerned, at least when the other party making a claim has no contract with the bank.

As far as actions brought by third parties are concerned, it seems clear that, prima facie, the one test of dishonest assistance applies to all agents. The desirability of

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[71] See judgment of the Court of Appeal: [2010] NZCA 404, [2011] 2 NZLR 90 at [12].
[72] [2011] NZSC 89, [2011] 3 NZLR 751 at [15].
[73] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378.
[74] See *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, as discussed in *Westpac v MAP* itself: [2011] NZSC 89, [2011] 3 NZLR 751 at [26]–[28].
[75] Financial Transactions Reporting Act 1996.
[76] High Court Rules, r 4.58.

agents not being compromised in their duty of loyalty that led to a complete block on liability for procuring a breach of contract applies also in some measure to the prospect of more serious breaches of duty by the principal. But, it is suggested that there is likely to be more flexibility of action accorded agents other than banks in their relations with their principals. This flexibility may vary with the type of agency, and indeed with the particular agency, but we could anticipate some degree of generalisation.

So, agents of most types are entitled to interplead where there is notification by a third party of a claim on moneys in the agent's possession.[77] Then, solicitors, in part because of the duties they owe the courts, may be able to insist that more information be supplied by a client and that in appropriate cases that a ruling be sought from the court before instructions are carried out, especially where there are strong reasons for thinking that the instructions may infringe a particular court order.[78] Where instructions relate to the disposition of moneys, the moral of the story for clients is that they may be wise to retain or obtain control of the funds in a bank account in their own name if instantaneity of payment is needed.

Stiassny v Commissioner of Inland Revenue

Appellate litigation is seldom clearcut, but that tends not to be how one sees things when one has been retained as an adviser, even less so when one has appeared before the court. The writer was one of the counsel in *Stiassny v Commissioner of Inland Revenue*.[79] That is a good reason for not saying anything about the case. Another is that the facts of the case were quite messy, matching the proverbial lament of the academic that the facts tend to get in the way of a good argument. These good reasons have not, however, been sufficient to overcome the urge to post some markers for the day when the perfect case does come along. Many of the points connect to the agency theme of this paper.

Put very briefly, the partners of a large forestry partnership had each been put into receivership as a result of intervention by a consortium of lenders. The receivers caused the partners to sell the forestry assets of the partnership for US$621m plus NZ$127.5m in respect of goods and services tax. It was accepted for the purposes of the litigation that the Commissioner of Inland Revenue did not have automatic priority of payment for the GST ahead of the rights of the secured lenders to treat all cash received from the sale as charged by their securities. However, other provisions of the GST legislation could be read as imposing a duty and a right in the receivers, as "specified agents", personally to ensure that the GST was paid over. The receivers were so nervous about these provisions, not only because the sum involved was extremely large but immodest tax penalties could be levied on top, that they caused the payment of $127.5 million to be made to the CIR. The CIR had not demanded payment from the receivers, but right up to the Supreme Court the CIR maintained

[77] See *Bowstead & Reynolds on Agency* (20th ed), Article 70.
[78] See, e.g. *Fletcher v Eden Refuge Trust* [2012] NZCA 124, [2012] 2 NZLR 227 (solicitor may decline to disburse moneys if a "sufficiently strong suspicion" that to do so would involve the client in a breach of trust); and *Guardian Trust and Executors Co of New Zealand Ltd v Public Trustee of New Zealand* [1942] NZLR 294.
[79] [2012] NZSC 106, [2013] 1 NZLR 453 (McGrath, William Young, Chambers, Gault and Blanchard JJ).

that indeed the receivers were personally responsible for ensuring that the tax was paid over. The revenue lost on that point.

Shortly after making the payment, and before any assertion to the contrary by the CIR, the receivers signalled that they were wanting to reserve their rights by filing a "notice of proposed adjustment", a "NOPA", a formal method used to signal that the payer believed tax had been paid that need not have been paid. Two of the lenders had earlier sent a communication to the CIR protesting the payment that the receivers were making and claiming that they had a prior right to the moneys. Could the moneys be claimed back from the CIR in these circumstances? It was argued that the payments had been made under a mistake of law by the receivers, or had been made as a result of the silent (illegitimate) threat of tax penalties.

The Supreme Court held that it was open to the receivers to argue that they were mistaken in making the payment even though they had adverted to the point of law, and had strong reservations about whether they were personally liable. This is a point in the law of restitution that has caused much difficulty over the years, but, it is submitted correctly, the Court took the view that there is no rule that a payment made by a person in doubt as to liability is deemed a "voluntary" one. In this respect the Court followed the line taken by Lord Hoffmann in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners*:[80] "Contestants in quiz shows may have doubts about the answer ('it sounds like Haydn, but then it may be Mozart') but if they then give the wrong answer, they have made a mistake." Generally speaking, however, if the recipient has initiated the payment as a result of a demand, then ordinarily the demand should be resisted, or at least if a payment is made it should be expressed to be made without prejudice to its recovery.

In *Stiassny*, as noted, the CIR had not demanded the payment, and moreover the NOPA filed by the receivers might, depending on when it was actually filed, have been taken as an express reservation of the right to recover the payment. Why then did the receivers' claim fail? The Court held that the receivers had not made the payment personally, but had done nothing more than make a payment on behalf of the partnership out of assets the partnership owned at law. Since the partnership did in fact owe the CIR the amount of the GST and the receivers were acting only as its agents, the Court concluded that no right to restitution could arise in favour of a mistaken payer who did owe the amount paid. The Court went on to hold that in these circumstances, the NOPA was ineffective.

It must be accepted that such authority as discusses the issue has concluded that no restitutionary action lies where a mistaken payer nonetheless owes the money to the payee. Equally, a truly voluntary payment made when a debt is unenforceable is irrecoverable.[81] An alternative analysis, however, might permit recovery but allow the payee to raise a set-off. This alternative could be important in the payer's insolvency; a restitutionary action would effectively act as a common law parallel to a voidable preference regime. The Supreme Court in *Stiassny* can be taken to have rejected such an analysis.

There is, nonetheless, some authority that where the ground of restitution is duress, or at least certain types of duress, a payer *can* recover a payment in money had and

[80] [2006] UKHL 49, [2007] 1 AC 558 at [26].

[81] See *Moses v Macferlan* (1760) 2 Burr 1007, 97 ER 676.

received even though the payer was indebted to the payee in the same amount.[82] The idea seems to be that we should discourage coercion as a form of self-help debt recovery and place the creditor back at square one. The moral wrongdoing of the coercing party would, of course, furnish a rationale for this model, which a unilateral mistake could not do. It was on the basis of analogy with the duress cases that the plaintiffs in *Stiassny* pleaded that the penalties that the receivers faced if it turned out that the CIR did have a personal claim against the receivers were coercive, even though no actual threat to apply them had been made. The Court gave this argument short shrift, pointing out that dicta in *Woolwich Equitable Building Society v IRC*,[83] referring to the inherently coercive nature of statutory penalties (not available to the ordinary creditor), were made in a case where the relevant tax was not ultimately due to the Crown.[84]

This conclusion, with respect, was not inevitable. It is true that where the penalties are to be applied to the taxpayer, it cannot lead to actionable duress for the taxpayer to pay tax that is in fact due; that would undermine the purpose of the penalty, which has the sanction of Parliament. But in *Stiassny*, the penalties in question would have applied only to an *agent* of the taxpayer, who it was ultimately accepted was not in fact personally liable for the tax and therefore could not have been liable for the penalties. Until the ruling made by the Supreme Court, the receivers could not have been sure. In such circumstances, the statutory purpose of the penalty would not have been undermined by allowing recovery even when the agent simply used the taxpayer's money to make the payment.

We should proceed to note that the Court accepted that the position might have been different if the receivers, as agents, had made the payment out of their own assets, or from assets belonging to someone other than their principals. Of course, this latter possibility was a live issue in the case, since the assets used to make the payment were beneficially charged in favour of the secured lenders. How the Court got round this fact will be addressed shortly. In the meanwhile, it is respectfully suggested that the Court over-generalised when it gave as its reason for rejecting the argument that the receivers had used their own moneys:[85] "it is well-settled law that a privately appointed receiver is not entitled to have the assets over which the appointment is made transferred into the receiver's name." The Court cited for this *Re Scottish Properties Ltd*.[86]

Scottish Properties does not, however, establish any general rule at common law. In the absence of any express statutory provision, and none was suggested, the common law leaves it to freedom of contract to determine whether an agent is entitled to take into its own accounts moneys derived from operating the principal's business. Particularly where agents want to ensure that their remuneration is paid, it is actually quite common for agents to insist that moneys due to the principal go through their

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[82] See *Clark v Woods* (1845) 2 Exch 395, 154 ER 545. That the money was owed is also no defence to a criminal charge of blackmail: see *R v Cargill* [1995] 3 NZLR 263 (still relevant under changed provisions of the Crimes Act 1961).
[83] [1993] AC 70. See also *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337 at [75] per Lord Walker and at [173] per Lord Sumption.
[84] See [2012] NZSC 106, [2013] 1 NZLR 453 at [67].
[85] [2012] NZSC 106, [2013] 1 NZLR 453 at [43].
[86] (1977) 2 ACLR 264.

own books and accounts.[87] In some jurisdictions anyway, this practice is sometimes adopted by receivers;[88] where this occurs the receivers have legal ownership of the bank deposit as contracting party, and usually the debentureholders, but not the debtor company, beneficial ownership. This is not to say that this is what happened in *Stiassny*.

What of the argument that the payment made by the receivers came from moneys beneficially belonging to the secured creditors? The Court's answer to this was that the CIR was a good faith purchaser of the moneys under s95 of the Personal Property Securities Act 1999, which protects creditors who receive payment out of moneys secured to a third party. Section 95(2) expressly says that the mere fact that the creditor knows of the security interest makes no difference. Very importantly, the Court accepted that s95 was, nonetheless, qualified by s25 which requires that all rights conferred by the Act: "must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice". The Court also accepted that ordinarily "a creditor with actual knowledge or notice at the time of receipt that a payment is being received in breach of the security agreement" would not act in good faith.[89] But the Court concluded that the CIR met the good-faith test.

It is helpful to set out the Court's reasoning on this issue:

> [58] In this case, however, when the matter is correctly approached by asking what, objectively, the Commissioner must have understood at the time of receipt of the GST payment, it is not shown, even arguably, that he knew of anything more than that there were security interests of BNZ and CNI under which they were each claiming a priority and were thus asserting that he was not entitled to receive the payment ahead of them. But it is not to be inferred that the Commissioner consequently knew that the payment was a breach of those security interests. It is not said that he had seen their terms and there is nothing to suggest - indeed it is not pleaded - that he did not honestly believe at that time that he had the priority under s 58 (or s 57) for which he has consistently argued all the way up to this Court, or honestly believe that what was paid to him was anything other than a payment of partnership funds from a partnership account to discharge a GST debt owing by the partnership to the Crown (and for which, as he believed, the receivers had personal liability) as a consequence of the taxable supply made when its forestry assets were sold.

In short, there could be no imputation of dishonesty, and the CIR had colour of right in thinking that the receivers' duties overrode any entitlement of the secured creditors.

As a matter of the wording of s95, even when read against s25, the Court's reasoning is certainly sustainable. There is room for thinking, however, that if the matter could have been left to the common law, a more subtle approach might have been available. Honesty even when coupled with colour of right ought not, it is suggested, to be sufficient to defeat a clear claim made by a third party that a payment or sale is being made in breach of property rights. What more can the asserter of property rights do than give clear notice, pending court action for a declaration that it is correct in its assertion? The law does not require the third party, in *Stiassny* the CIR, to accede to the notice and surrender the assets, but the notice should be effective to freeze things pending determination of where the rights lie. No comment is made here as to

[87] See *Bowstead & Reynolds on Agency* (20th ed) at para 6-041.

[88] See G Lightman and G Moss *The Law of Receivers and Administrators of Companies* (2007, Sweet & Maxwell, London) at para 14-018; and *Sheahan v Carrier Air Conditioning Pty Ltd* (1996) 189 CLR 407 at 428.

[89] [2012] NZSC 106, [2013] 1 NZLR 453 at [57].

whether the notices actually served in *Stiassny* would have been sufficiently unequivocal for this purpose. It should be admitted too that the case law at common law is currently somewhat indeterminate on the efficacy of the service of notices of claim as precluding the defence of bona fide purchase.[90]

[90] Compare *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 with *Public Trustee v Guardian Trust and Executors Co of New Zealand Ltd* [1939] NZLR 613 (CA), affd [1942] NZLR 294 (PC). As to *Carl Zeiss*, see the criticism in D M Gordon "Notice of Knowledge of a Trust - A Critique of the Carl Zeiss Case" (1970) 44 ALJ 261, and C Harpum "The Stranger as Constructive Trustee: Part II" (1986) 102 LQR 267 at 283–287.