COMMENTS

Illegally Tainted Transfers and Resulting Trusts: *Nelson v Nelson*

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Introduction

The consequences of a conclusion by a court that a contract or transaction is unlawful are drastic. They are said to stem from a basic principle of the general law stated in the judgment of Lord Mansfield in *Holman v Johnson* (1775),[1] that a court will not lend its aid to a claimant who founds a cause of action upon an immoral or illegal act: *ex turpi causa non oritur actio*. One particularly rigid consequence pertaining to contracts is that neither party can enforce an executory or partially performed contract irrespective of whether either or both did not know it to be illegal. The result may be that one party is presented quite arbitrarily with an unmerited and technical defence to an action for breach of contract, and the other party may be unfairly prejudiced, with no attempt to examine the relative guilt of the parties.[2] Recognition of the injustice caused by such a blunt approach has heightened the courts' insistence on rigorous interpretation of the intention of the legislature, and has led the courts to pursue methods to avoid injustice by focussing on the knowledge and intentions of the parties,[3] and by refusing to enforce a transaction with a fraudulent or immoral purpose.[4] Hitherto the epitome for Australian developments has been *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978).[5]

Another consequence of the *Holman* principle is that the courts will not actively assist the recovery of money paid or property which has been transferred pursuant to an illegal transaction.[6] Where both parties are equally at fault the position of the defendant is stronger: *in pari delicto, potior est conditio defendentis* (the *in pari delicto* defence).[7] In a parallel development in equity concerned with an issue of illegality in relation to a trust by reason of a contravention of the policy of a particular statute, Lord Eldon in *Muckleston v Brown* (1801) enunciated a principle in wide terms 'Let the estate lie, where it falls'.[8] However, it came to be recognised that the mere fact that a transaction is illegal does not

1 (1775) Cowp 341; 98 ER 1120.
2 *Re Mahmoud and Ispahani* [1921] 2 KB 716; *St John Shipping Corp v Joseph Rank Ltd* [1961] 1 QB 267, 283 (Devlin J); cf P S Atiyah, *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 5th ed, 1995), 345-346.
3 *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, 387 (Pearce LJ); *Shaw v Groom* [1970] 2 QB 504, 521-522 (Sachs LJ).
4 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 429-430 (Mason J).
5 (1978) 139 CLR 410.
6 *Taylor v Chester* (1869) LR 4 QB 309; *Thomas Brown & Sons Ltd v Fazal Deen* (1962) 108 CLR 391.
7 See eg, *Harse v Pearl Life Assurance Co* [1904] 1 KB 558; *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91, 100, 102, 104. See also, K Mason and J W Carter, *Restitution Law in Australia* (Sydney: Butterworths, 1995), [2625]; *Chitty on Contracts: General Principles* (D D Prentice ed), (London: Sweet & Maxwell, 27th ed, 1994), s 16-150, following the approach of G H Treitel, *The Law of Contract* (London: Sweet & Maxwell, 8th ed, 1991), 427-454.
8 (1801) 6 Ves 52, 69; 31 ER 934, 942.

have the effect of preventing property from passing under or pursuant to it. It was held that a person will not be prevented from recovering his or her own property, even though it may have been acquired from, or transferred to, another in connection with an illegal transaction or in association with or furtherance of an illegal purpose, provided that that person does not have to rely on the illegality to assist his or her cause of action (the *Bowmakers* rule).[9]

Exceptionally, despite the presence of illegality, a transferor may recover what has been transferred in pursuance of an unlawful purpose, where the unlawful purpose has not been carried out.[10] Again, restitution may be claimed, where the transferor is considered to be less guilty than the transferee, by reason of being a member of a class of persons deserving of protection from another class,[11] or by reason of having been induced by the transferee's fraud, oppression, or undue influence.[12] Also, the courts will not deny relief where the transferor was ignorant or mistaken as to the state of affairs which renders the transaction illegal.[13]

Now in a significant decision, *Nelson v Nelson*,[14] involving a transfer of property for an illegal purpose, the High Court of Australia, consonant with the approach in *Yango*, has emphatically affirmed the crucial, interpretative task of identifying the scope and intention of the particular statute in order to determine the impact of illegality on the impugned transaction. In its judgments the High Court has ruled that a presumption of advancement applies alike to a mother, as well as a father, in respect of gifts to a child; has declined to follow both the majority and minority approaches applied in a closely similar case in the House of Lords in *Tinsley v Milligan*[15]; has stressed the relevance of the prescription of penalties for offences and remedies contained in a statute as indicative that the purpose of the statute will thereby be sufficiently served; and has demonstrated equity's power to avoid harsh results through appropriate and novel equitable conditional relief.

A British preludial foil: *Tinsley v Milligan*

In the recent House of Lords' decision in *Tinsley v Milligan* the question arose whether the wide principle stated by Lord Eldon or the narrower rule expressed in 'the *Bowmakers* rule' applied where the claimant seeks to vindicate equitable title. There two women jointly bought a house, each contributing to the purchase price. It was registered in the sole name of the plaintiff so as to enable the defendant to make false claims for benefits on the Department of Social Security. Later the parties quarrelled and the plaintiff claimed possession; the defendant counterclaimed. Lord Browne-Wilkinson, for a bare majority, thought that later cases had departed from Lord Eldon's absolute rule, following the fusion of law and equity, and that the majority of those cases turned on the crucial point that a plaintiff cannot lead evidence rebutting the presumption of advancement applicable in those cases.[16] The narrower view was thus held to apply: '[T]he rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover it if he is not

9 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65; *Singh v Ali* [1960] AC 167; *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210, where property was deemed to pass despite there having been no delivery.

10 *Payne v McDonald* (1908) 6 CLR 208, 211-212; *Perpetual Executors and Trustees Assoc of Australia Ltd v Wright* (1917) 23 CLR 185, 193-194; *Martin v Martin* (1964) 110 CLR 297.

11 *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192.

12 *Clarke v Shee* (1774) Cowp 197; 98 ER 1041; *Smith v Cuff* (1817) 6 M & S 160; 105 ER 1203; *Williams v Bayley* (1886) LR 1 HL 200; *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91; *Weston v Beaufils (No 2)* (1994) 122 ALR 240.

13 *Oom v Bruce* (1810) 12 East 225; 104 ER 87.

14 (1995) 132 ALR 133.

15 [1993] 3 WLR 126.

16 [1993] 3 WLR 126, 151; Lords Jauncey and Lowry agreed.

forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction'. It was upheld that the plaintiff held the house on trust for both. The issue was stated to be not substantive, but procedural, turning on the necessary reliance on evidence of the illegality to found the claim. Thus, in the majority view, a claimant who has contributed part of the price of a property could rely upon a resulting trust without the need to rely upon the underlying illegal transaction in circumstances of a transfer of property not giving rise to a presumption of advancement. It would be otherwise, however, where a claimant transferred property in circumstances giving arise to a presumption of advancement, and it was necessary to rebut that presumption by adducing evidence of the fraudulent purpose.[17]

Lord Goff, for the minority, regarded Lord Eldon's principle as controlling authority as to the attitude of equity to trust law. That principle, more broadly based than the *Bowmakers* rule, was said to be founded on the equitable maxim that he who comes to equity must come with clean hands, and that 'what is required to invoke the maxim is no more than that the alleged misconduct has "an immediate and necessary relation to the equity sued for": see *Dering v Earl of Winchelsea*[18]'.[19] In Lord Goff's view, it did not matter that the claimant did not need to rely on or plead the illegality in order to establish a case. By whatever means 'it comes to the attention of a court of equity that the claimant has not come to the court with clean hands, the court will refuse to assist the claimant'.[20] His Lordship was not prepared to develop the law by qualifying the wide principle by the application to it of the *Bowmakers* rule. He acknowledged that it seemed particularly harsh not to recognise the defendant's interest in the house where the plaintiff was not only implicated in the same social security fraud, but the fraud was relatively minor, and the defendant had confessed and made amends to the department. However, in dissenting, he argued that the majority decision would enable terrorists to recover a house which they had put into an unknowing third party's name to facilitate their activities, and that he found it difficult to see how, in the context, it was possible to distinguish between degrees of iniquity.[21]

Nelson: the facts and issues

The facts

Mrs Nelson and her deceased husband provided the money to purchase a house which was transferred into the names of her adult son and daughter. Her purpose in doing so was to enable her, should she subsequently wish to purchase another house for herself, to obtain a subsidised advance under the *Defence Service Homes Act* 1918 (Cth). Under that Act she would not have been eligible for the subsidised advance if she were the owner of another house. Some time later she did purchase another house for herself. She applied for and received a subsidised advance under the Act, falsely declaring that she did not own or have a financial interest in a house other than the one for which the advance was sought. She later claimed, supported by the son, that the children held the proceeds of the sale of the house for which she had provided the purchase money on a resulting trust for her as beneficial owner. The daughter, having fallen out with her mother, cross-claimed for half the proceeds, asserting that her mother had provided the original fund by way of advancement for her children. A Master in the Equity Division of the Supreme Court

17 *Id* 152-153; the Ontario Court of Appeal in *Gorog v Kiss* (1977) 78 DLR (3d) 690 had earlier adopted this process of reasoning.
18 (1787) 1 Cox Eq 318, 319-320.
19 [1993] 3 WLR 126, 139; Lord Keith agreed.
20 *Id* 135.
21 *Id* 140.

found that the relationship of mother and child gave rise to a presumption of advancement. Although Mrs Nelson had no intention to confer any beneficial interest in the property or its proceeds on her children, that presumption could not be rebutted because of her unlawful purpose which had been effected when, having later purchased the other house, she fraudulently applied for and obtained a subsidised advance. The Master found in favour of the daughter, and refused to declare that the proceeds of sale were held on resulting trust for the mother. Having appealed without success to the New South Wales Court of Appeal,[22] she appealed to the High Court.

The issues

The first issue related to the interaction between the presumptions of a resulting trust and advancement. Under the former, equity presumes in favour of the transferor of property without consideration or the provider of purchase moneys for the purchase of property which is transferred to another person, by recognising that the transferee holds the property on a resulting trust for the transferor. Under the countervailing presumption of advancement arising out of certain relationships, equity infers that any benefit transferred without consideration to a transferee at the cost of the transferor has been provided for the 'advancement' of the transferee's interests. In that event, the equitable estate follows the legal estate; there is an absence of any reason for assuming that a trust arose. The presumptions may be rebutted by evidence of the actual intention of the transferor. The presumption of advancement assumes practical importance only if the evidence does not enable the court to make a positive finding of intention. Mrs Nelson contended that, if the presumption of advancement continues as a legal principle, it should be restricted to cases in which the inference of advancement would be drawn in the absence of evidence of intention. In other words, the presumption of advancement would operate only where the surrounding circumstances were consistent with it. That would mean that no presumption of advancement would arise where a mother, such as in Mrs Nelson's position, was under no moral obligation to give her assets to her adult and able-bodied children. Mrs Nelson, then, might be able to succeed without having to rebut the presumption and without, in so doing, disclosing her illegal purpose.[23] This argument was rejected. It was accepted that the presumptions are interrelated and entrenched 'land-marks' in the law of property. All five justices approached the appeal on the footing that the existence of a presumption of advancement of her children by Mrs Nelson was established and should continue to apply.[24] It was, therefore, necessary for her to establish, and she did so, that she had no intention to confer on her children any beneficial interest in the property or in the proceeds of sale.

The second issue, then, was whether the mother was precluded from recovering the proceeds because of the illegal purpose of the arrangement whereby the house was placed in the names of the son and daughter. Counsel for the daughter sought to rely on both the majority and minority approaches in *Tinsley* in support of her case.

Non-adoption of *Tinsley v Milligan* by the High Court

The High Court of Australia rejected the approaches of both the majority and minority in *Tinsley v Milligan*. Deane and Gummow JJ noted that the case at hand fell within that class of case of contracts or trusts 'associated with or in furtherance of illegal purposes', where the courts act not in response to a direct legislative prohibition but from 'the policy of the law', which involves consideration of the scope and purpose of the particular statute.

22 (1994) 33 NSWLR 740.
23 (1995) 132 ALR 133, 140-141 (Deane, Gummow JJ), 182-185 (McHugh J).
24 *Id* 141 (Deane, Gummow JJ), 163 (Dawson J), 171 (Toohey J), 183, 185 (McHugh J).

In such class of case 'the formulation of the appropriate public policy . . . may more readily accommodate equitable doctrine and remedies and restitutionary money claims than is possible where the making of the contract offends an express or implied statutory prohibition'.[25] The class could be seen as a survival of an earlier school of statutory interpretation in which effect was given to what the courts perceived to be 'the equity of the statute'. The notion operated in two ways. First, the policy of the statute, as so perceived, might operate upon additional facts, matters and circumstances beyond the apparent reach of the terms of the statute. In addition, cases within the terms of the statute but not within its mischief might be placed outside its operation.[26] The decisions of Lord Mansfield in *Holman v Johnson* and Lord Eldon in *Muckleston v Brown* needed to be understood with that background in mind.[27]

Rejection of 'the triumph of procedure over substance'[28]

All five justices were unanimous that the majority approach in *Tinsley v Milligan* could not be accepted. That approach lacked any basis in principle; it was artificial and depended on the form in which a particular proceeding was cast, and achieved its result at the expense of substance. Such an approach may operate indiscriminately and thus lead to harsh consequences as between particular parties. It can produce windfall gains as well as losses, even when the parties are equally at fault.[29] It was lacking in policy. As Dawson J put it, 'The distinction can hardly be based upon a policy of discouraging the transfer of property for an illegal purpose because a knowledgeable transferor would choose a transferee other than one who could take advantage of the presumption of advancement. Moreover, where a presumption of advancement applied, the distinction would be such as to lead the transferee to encourage the carrying out of the illegal purpose so as to acquire a benefit for himself'.[30] Furthermore, it encourages a quest for mitigation by the drawing of further fine distinctions and exceptions whereby recovery will be permitted.[31] Finally, it has no regard to the policy of the legislation and the effect of the transaction in undermining that policy, or to the question whether the sanctions imposed by the legislation sufficiently protect the purpose of the legislation. Indeed, it may often defeat the intention of the legislature.[32]

As an additional reason for rejecting the narrower view adopted by the *Tinsley* majority, Dawson J thought that a party could rebut the presumption of advancement without being forced to rely upon his or her own illegality, because, while the illegal purpose might be evidentiary as bearing upon the question of intention, it is not 'the foundation of a claim' to rebut the presumption.[33] Rebuttal is effected by showing the actual intention. In Dawson J's view, the relevant principle to be applied is that 'illegal conduct on the part of a person claiming equitable relief does not in every instance disentitle that person to the relief. The illegality must have "an immediate and necessary relation to the equity sued for". Where reliance is not placed upon the illegality — where the court is not asked to effectuate the illegal purpose but merely to recognise an interest admittedly in existence — there is not . . . an immediate and necessary relation between the illegality and the claim'.[34]

25 *Id* 144.
26 *Id* 144.
27 *Id* 145.
28 The expression is that of Toohey J: (1995) 132 ALR 133, 176.
29 (1995) 132 ALR 133, 148, 190.
30 *Id* 165.
31 *Id* 148.
32 *Id* 190-191.
33 *Id* 166.
34 *Id* 166-167.

Avoidance of 'the threat of a sharp and broad sword'[35]

The minority approach in *Tinsley*, advocating a 'wide principle' of 'let the loss lie where it falls' founded on the clean hands doctrine, also did not find favour with the High Court. Deane and Gummow JJ and also McHugh J pointed to the distinction which has been drawn between the operation of the equity maxim, he who comes to equity must come with clean hands, as a discretionary defence to a claim to equitable relief, and the notion of illegality which operates both at law and in equity as a substantive defence.[36] In addition, McHugh J observed that the rationale for the two doctrines is distinct: the clean hands doctrine arises from the relationship between the parties, while the illegality doctrine derives from public policy considerations.[37] McHugh J also questioned as debatable the policy justification ascribed to the 'wide principle' that the harsh and indiscriminate nature of the rule will deter people from entering into unlawful agreements and trusts because they know that the courts will not provide them with equitable relief.[38] It could not be said that the early cases cited by the *Tinsley* minority in support of such a wide principle, *Cottington v Fletcher*,[39] *Muckleston v Brown*[40] and *Curtis v Perry*,[41] provided 'authority for any general proposition as to the attitude taken by equity in any case where an issue of illegality in relation to a trust arises by reason of a contravention of the policy of a particular statute . . . [E]quity eschews any broad generalisations in favour of concentrating upon the specific situation which has arisen, in the light of the relevant statutory provisions'.[42] Furthermore, the range and flexibility of equitable remedial intervention, including the attachment of conditions where necessary, assist in achieving an appropriate result. Unlike the old common law approach of all or nothing, equity, Deane and Gummow JJ stressed, has not subscribed to any absolute proposition that the consequences of illegality, particularly where what is involved is contravention of public policy manifested by statute, is that neither side may obtain any relief, so that the matter lies where it falls.[43]

Identifying and upholding the policy of the statute

Both Deane and Gummow JJ and McHugh J pointed to the wane of the doctrine of illegality expounded in *Holman*. Deane and Gummow JJ, after noting the exceptional developments set out in the introduction to this commentary, referred to a further principle of equitable intervention identified by Jacobs J in *Money v Money (No 2)*[44] that, even though a transaction might be tainted with illegality on the ground that its performance is contrary to public policy, equity will interfere on further grounds of public policy if the transaction ought not to be allowed to stand even where the plaintiff is *particeps criminis*.[45] The cases in equity on marriage brokage contracts, and borrowers seeking relief on terms in respect of contracts to which the usury laws applied, provided examples of such principle. Deane and Gummow JJ cited a recent decision of the United States Federal Court of Appeals, *Re Torrez*,[46] as being consistent with older English authorities, *Ex parte*

35 The expression is that of Deane and Gummow JJ: (1995) 132 ALR 133, 148-149.
36 (1995) 132 ALR 133, 142-143, 189.
37 *Id* 189.
38 *Id* 190.
39 (1740) 2 Atk 155; 26 ER 498.
40 (1801) 6 Ves Jun 52; 31 ER 934.
41 (1802) 6 Ves Jun 739; 31 ER 1285.
42 *Id* 151.
43 *Id* 149.
44 [1966] 1 NSWR 348.
45 (1995) 132 ALR 133, 152.
46 (1987) 827 F 2d 1299 (9th Cir).

Yallop[47] and *Worthington v Curtis*,[48] which hold that the crucial question is the impact of the statute upon the resulting trust. Their Honours noted that in *Re Torrez*, the court, in holding that the resulting trust was enforceable, referred to various relevant factors. These factors include the completed nature of the transaction, such that the public can no longer be protected by invocation of the rule that illegal agreements are not to be enforced; the absence of serious moral turpitude on the part of the party against whom the defence is asserted; the likelihood that invocation of the rule will permit the party asserting the illegality to be unjustly enriched at the expense of the other party; and disproportionality of forfeiture as weighed against the nature of the illegality.[49]

McHugh J expressed the view that the *Holman* rule is too extreme and inflexible to represent sound legal policy in the changed, highly regulated environment of the late twentieth century, even when account is taken of the recognised exceptions. In his Honour's judgment, a significant reason for adopting a less rigid approach to illegality is that statutory illegality can arise in a number of different forms: direct prohibition of the contract or trust; prohibition of the doing of some act essential for carrying it out; a contract or trust associated with or made in furtherance of a purpose of frustrating the operation of the statute; and the unlawfulness of the manner in which a contract or trust is carried out. It would be surprising if sound legal policy required each form to be treated in the same way.[50]

A principled approach rather than an unstructured discretion

In *Tinsley v Milligan* a majority of the English Court of Appeal sought a less rigid approach to illegality by invoking as the underlying principle the so-called 'public conscience' test. Under that test the court must weigh, or balance, the adverse consequences of respectively granting or refusing relief.[51] The House of Lords held that it was not appropriate to introduce what was described by Lord Browne-Wilkinson as an 'imponderable factor' as the correct principle to be applied.[52] McHugh J, likewise, rejected such an approach as 'a vague standard' which left the matter at large.[53] Instead McHugh J advocated the adoption, consistent with the duty of the courts not to condone or encourage breaches of the statute, of the following principles:

> Courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless:
>
> (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or
>
> (b) (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;
>
> (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and
>
> (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.[54]

47 (1808) 15 Ves Jun 60, 66-7; 33 ER 677, 680.
48 (1875) 1 Ch D 419.
49 (1987) 827 F 2d 1299, 1301 (9th Cir).
50 (1995) 132 ALR 133, 191.
51 [1992] Ch 310, 319 per Nicholls LJ, following *Saunders v Edwards* [1987] 1 WLR 1116 and *Euro-Diam Ltd v Shirlstar Container Transport Ltd* [1990] 1 WLR 1292.
52 [1993] 3 WLR 126, 146 (Lord Browne-Wilkinson), 141 (Lord Goff).
53 (1995) 132 ALR 133, 192.
54 *Id* 193; McHugh J noted that elements (ii) and (iii) may often overlap.

Application: scheme of the Act and result

The High Court Justices, apart from Dawson J, considered closely the question which escaped the attention of the New South Wales Court of Appeal and the English judges in *Tinsley*; that is, whether public policy, deriving from the provisions of the *Defence Service Homes Act* before and after its amendment, required that transactions, other than those provided for in the statute itself, should be impugned by denying the operation of the resulting trust that would otherwise arise in favour of Mrs Nelson as provider of the purchase moneys for the property in question. It was noted that under the Act, the Secretary could cancel a subsidy which was gained as a result of a false statement made by the person to whom it was issued, and could recover, write off or waive recovery of the amount of a subsidy to which a payee was not entitled. Although no penalty was imposed for a breach of the Act, reference was also made to provisions of the *Crimes Act* 1914 (Cth) under which penalties could be imposed for fraudulent imposition upon the Commonwealth. The existence of such criminal sanctions together with the omission of a provision that makes unenforceable any agreement made in breach of or to evade the Act was accepted as, to quote McHugh J, 'a powerful indication' that no other sanctions were needed. Furthermore, the refusal to enforce legal or equitable rights of applicants under the Act would result in the imposition of a penalty out of all proportion to the seriousness of an applicant's conduct, and would result in a windfall benefit to the other party to the transaction.[55]

Dawson J, for his part, was satisfied that the mother in her claim for equitable relief had not 'placed reliance upon her fraudulent conduct in any direct or necessary way'. The purchase of the house did not of itself involve any fraud, and the relevance of the illegal purpose, which was at the time of the purchase, yet to be carried into effect, was at most to explain why the purchase did not constitute a gift to the children. In Dawson J's view, any policy revealed by the *Defence Services Homes Act* threw no light on the illegality in the case arising from the mother's fraudulent conduct.[56]

The High Court, allowing the appeal, held that the mother could enforce an equitable proprietary right to the proceeds of the sale of the house property. However, the court divided on the extent to which the discerned policy of the statute required that the parent's equitable right should be qualified. A narrow majority ordered that an amount equal to the value of the benefit derived by the mother by her unlawful conduct be paid or held in trust for payment to the Commonwealth as a condition of recovery of the value of her property right. Deane and Gummow JJ considered that 'as the price of obtaining the relief she seeks . . . good conscience calls for the taking by Mrs Nelson of steps sufficient to satisfy the demands of the underlying policy of the Act'.[57] McHugh J likewise thought that, because equity cannot condone Mrs Nelson's unlawful purpose or encourage it, it would grant relief 'on condition that the wrongdoer take all lawful steps to overcome the consequences of that conduct'.[58]

In contrast, a minority, Dawson and Toohey JJ, saw no reason to place conditions upon granting relief. It was a matter for the Commonwealth whether it may or may not wish to recover the amount of the subsidy from the mother, and to do so wholly or in part or upon terms. Dawson J thought it not part of the court's function to assist the Commonwealth in proceedings to which it was not a party, and where the policy of the Act threw no light on the illegality arising from the mother's fraud. Toohey J similarly felt that the imposition

55 *Id* 156-158 (Deane and Gummow JJ), 174-175, 180 (Toohey J), 195-196 (McHugh J).
56 *Id* 167 (Dawson J).
57 *Id* 159.
58 *Id* 196.

of such a condition would be 'to require more than that a plaintiff do equity between the parties', but that the Commonwealth should be told of the false declaration.[59]

Traditionally the courts, in the exercise of their discretionary equitable jurisdiction, in accord with the maxim 'he who seeks equity must do equity', have assumed the power to impose conditions on plaintiffs that they fulfil their own legal and equitable duties arising out of the subject matter of the dispute, but, it would seem, to defendants only.[60] In requiring the fraudulent plaintiff, as a condition of relief, to do equity to the Commonwealth, which was not a party to the proceedings, the court has taken an innovative[61] step in the implementation of public policy requirements, and in the administration of civil corrective justice, which creates a welcome and important precedent. The *ordinary function* of civil remedies is to restore the abstract spontaneous order which is disturbed by breach of a primary duty; that is, to restore an injured party as nearly as possible, by an appropriate award, to the position in which that person would be if there had been no breach of duty.[62] It ordinarily is not to go further than that, to punish or deter.[63] The fraudulent plaintiff ought not to be able to enjoy the benefit of her conduct at the expense of the Commonwealth. To require her to restore that benefit to the Commonwealth is in accord with the policy of the *Defence Service Homes Act* 1918 (Cth), and restores the breach of general duty constituted by her fraudulent conduct. Such an approach is a cost-efficient method of upholding public policy by effecting recovery and thereby also restoring disorder. It would be a far simpler matter for the Commonwealth, if it was so minded, to waive claim to the money which was ordered to be set aside for its use, than to have to institute recovery proceedings from scratch.

Conclusion

The effects of illegally tainted transactions upon restitutionary claims has long been a vexed question. Calls have been made to replace the existing law with a statutory discretionary power in the courts to award restitution if the justice of the case demands.[64] Such a statutory discretion exists in New Zealand[65] and Israel.[66] In England the Law Commission has been suggested by Lord Goff in *Tinsley*[67] as the appropriate body to formulate statutory reforms, and has undertaken that task.[68] In the writer's view such approach for this area is less appropriate and acceptable than a principled development of

59 *Id* 167 (Dawson J), 180 (Toohey J).

60 See R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (Sydney: Butterworths, 3rd ed, 1992), 76-82. See also *Farrow Mortgage Services Pty Ltd (in liq) v Edgar* (1993) 114 ALR 1; [1994] RLR § 12, for a recent example of a court acting, not in response to an express or implied legislative prohibition, but from the policy of the statute: held, in such a case, that the reasoning by which, in *Kasumu v Baba-Egbe* [1956] AC 539, the power in equity to impose terms was excluded, will not apply.

61 In *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Limited* (1994) 182 CLR 51, 75-79 Mason CJ stated that, if Royal, which had mistakenly overpaid tax, had charged the tax as a separate item to its policy holders, it would have become a constructive trustee of the moneys representing that separate charge when it made payments to the Commissioner, and would have been entitled to recover from the Commissioner, provided that it satisfied the court that it would account to its policy holders.

62 M Polanyi, *The Logic of Liberty* (Chicago: University of Chicago Press, 1951), 154-165; F A Hayek, *Law, Legislation and Liberty* (London: Routledge & Kegan Paul, 1982) vols 1, 2.

63 Cf *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 115.

64 See Grodecki (1955) 75 LQR 254, 268; Higgins (1962) 25 MLR 149, 161; Merkin (1981) 97 LQR 420, 444; Dickson in A Burrows (ed), *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1993) 125; R Goff and G Jones, *The Law of Restitution* (London: Sweet & Maxwell, 4th ed, 1993), 519-522.

65 *The Illegal Contracts Act 1970*, s 7. Relevant factors in exercising a discretion to grant relief, including restitutionary relief, include the conduct of the parties, the object of the enactment, the gravity of the penalty, and the plaintiff's knowledge of the facts and law.

66 *Contract Law* (General Part) 1973, s 31.

67 [1993] 2 WLR 126, 141.

68 Law Commission, *Law Under Review*, No 35, para 16.

the law, which the High Court has continued to forge by its scholarly and illuminating judgments in *Nelson*.

As a matter of principle the court has recognised that there are no sound reasons of morality, or of deterrence or other public policy why restitution should be denied simply because of the taint of illegality at large, and that the seriousness of the illegality must be judged not in a vacuum, but by reference to the statute whose provisions or policies are contravened. By way of judicial technique the court has emphasised that the procedures and sanctions prescribed by a statute, supported by other penalties potentially applicable by a law of general application, such as the *Crimes Act* and the *Criminal Code*, may be regarded as sufficiently serving the purposes of the statute. In this way, Lord Goff's expressed concerns in *Tinsley*, previously referred to, that more iniquitous terrorists may be able to recover their house which has been concealed in another's name, could be met by legislation which allows for the discretionary forfeiture, having regard to prescribed criteria, of property used in, or in connection with, or derived or realised, directly or indirectly, by any person as the result of, the commission of an offence.[69] Consequently, it is submitted, such penalties, procedures and other expressly prescribed sanctions, should be regarded as impliedly exclusive of other sanctions. Two important rules of statutory interpretation, which would be of significance for parliament in the drafting of legislation, may then be drawn. Both would be conducive to greater certainty and fairness. The first was expressed by McHugh J:

> If a particular enactment does not contain such a provision, [that is, a provision that makes unlawful and unenforceable an agreement that defeats or evades the operation of the relevant law], *the prima facie conclusion to be drawn* is that parliament regarded the sanctions and remedies contained in the enactment as sufficient to deter illegal conduct and saw no need to take the drastic step of making unenforceable an agreement or trust that defeats the purpose of the enactment.[70]

The second arguable rule relates to money paid or property transferred in connection with, or in furtherance of, an illegal activity. Subject to a law of general application relating to confiscation and forfeiture of property,[71] if it is not expressly prescribed as a legal consequence of a statutory contravention that such money paid or property transferred is irrecoverable, then that money or other property, which has been transferred in circumstances in which it ordinarily would be recoverable on general grounds,[72] will be recoverable.[73] That latter rule, of course, would run counter to the present *in pari delicto* defence which denies recovery. In such a conflict, systematic development by the High Court to attempt an appropriate reconciliation will be required. That in turn will necessarily raise consideration of whether the existing exceptions to the *in pari delicto* defence should be retained.

69 See eg, ***Proceeds of Crime Act*** 1987 (Cth), ss 4, 19; *Crimes (Confisication) Act* 1989 (Qld), ss 3, 8; *Drugs Misuse Act* 1986 (Qld), ss 33, 34; and see generally National Crime Authority, *Proceeds of Crime Conference*, Sydney 18-20 June 1993 (Canberra: AGPS, 1995); cf Atiyah, *supra* note 2, 349 n 14.

70 (1995) 132 ALR 133, 191 (emphasis added).

71 See eg, note 69.

72 For example, mistake, duress or other exploitative conduct, failure of condition or basis.

73 Compare, D W Greig and J L R Davis, *The Law of Contract* (Sydney: Law Book Co, 1987), 1165-1166; A Burrows, *The Law of Restitution* (London: Butterworths, 1993), 461-468.