IN THE COURT OF APPEAL OF NEW ZEALAND

CA642/2011
[2013] NZCA 509

BETWEEN	ADRIAN JAMES LEASON First Appellant	
	PETER REGINALD LEO MURNANE Second Appellant	
	SAMUEL PETER FREDERICK LAND Third Appellant	
AND	THE ATTORNEY-GENERAL Respondent	

Hearing:	8 - 9 May 2013 (further submissions received 5 June 2013)
Court:	Randerson, Stevens and White JJ
Counsel:	M J Knowles for First Appellant A Shaw and T A Cochrane for Second and Third Appellants A M Powell and L M Inverarity for Respondent
Judgment:	25 October 2013 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence contained in the affidavit of Theresa Catherine von Dadelszen is granted.

B The application for leave to adduce further evidence contained in the third affidavit of Treasa Moira Dunworth and the second and third affidavits of Nicolas Alfred Hager is dismissed.

C The appeal is dismissed.

D The appellants must pay the respondent one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] This is an appeal against a decision of Associate Judge Gendall granting summary judgment to the respondent on a claim for liability in trespass jointly and severally against the appellants.[1]

[2] On 30 April 2008 the appellants, Adrian Leason, Peter Murnane and Samuel Land, entered the Government Communications Security Bureau (GCSB) facility in Waihopai Valley and deflated a satellite dome cover by cutting it. The appellants say they were motivated by a desire to expose and prevent the harm caused by the second Iraq war, to which they believed the operation of GCSB Waihopai was contributing.

[3] The appellants accept they have no defence based on the elements of the cause of action in trespass to property. They did not assert one in the High Court.[2] Nor did they contend otherwise on appeal. Rather, they say that summary judgment should not have been entered because they have an arguable defence that:

(a) their actions were protected either through the doctrine of defence of another, or by the application of the defence of necessity; and/or

(b) relief should be withheld from the Crown on public policy grounds due to the principle *ex turpi causa non oritur actio*. Broadly speaking this means that a court may deny relief to a plaintiff whose cause of action is found upon illegal action.

[4] In the High Court judgment Associate Judge Gendall found that none of the proposed defences was seriously arguable. That decision is now challenged on appeal.

[5] For the purposes of the appeal the appellants applied under r 45 of the Court of Appeal (Civil) Rules 2005 for leave to adduce further evidence. This evidence is

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1 *Attorney-General v Leason* HC Wellington CIV-2010-485-1940, 31 August 2011 [High Court judgment].

2 At [36].

set out in four affidavits about which we heard argument at the start of the hearing. We granted leave in respect of one of the affidavits, that of Ms von Dadelszen, but reserved our decision on the remaining affidavits. We will address the balance of the application once we have outlined the relevant background to this appeal.

Background

[6] The broad context for the events in question is not in dispute. The function of the GCSB Waihopai communications facility is the collection of signals intelligence. The appellants believe that this intelligence is provided to agencies in the United States of America, the United Kingdom, Canada and Australia pursuant to an information sharing agreement known as "UKUSA".[3] They consider that this agreement facilitates military action against civilians in the course of overseas conflicts.

[7] The dominant physical features of GCSB Waihopai are two 18-metre parabolic antennae, each of which is protected by an inflated cover called a radome. Each radome is surrounded by a security fence, and the whole of the GCSB Waihopai facility is enclosed by a double fence. Prominent signs are posted outside the facility declaring that access is limited to authorised personnel only.

[8] On 30 April 2008, the appellants gained access to GCSB Waihopai by using bolt cutters to break through the two security fences. Using sickles and stanley knives, they made horizontal cuts in one of the radomes, causing it to deflate and collapse onto the antenna it was protecting. After they had finished, the appellants prayed and waited for the arrival of the police.

[9] The damaged radome had to be removed immediately to avoid damage to the antenna. The total cost of replacing the radome and repairing the fences was in excess of $1.2 million.

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[3] For the purposes of the summary judgment application, the respondent did not provide any evidence refuting this proposition: see High Court judgment at [27], quoted below at [14].

[10] Associate Judge Gendall identified the motivations of the appellants as follows:[4]

(a) an intention to disable GCSB Waihopai in order to stop it collecting information in a way they allege is illegal and which they claim supports wars overseas and which, in turn, allegedly leads to the deaths of thousands of innocent civilians;

(b) a wish to expose what kind of antenna was being used in order to determine the type of information GCSB Waihopai was obtaining; and

(c) a desire to draw attention to GCSB Waihopai, its alleged illegal activities and the claimed illegality of the Iraq war.

[11] The appellants were charged with intentional damage and burglary. Following a jury trial in the District Court at Wellington in March 2010 they were acquitted of those charges. Their position at the criminal trial was that they had a claim of right to enter GCSB Waihopai and to damage the property in question.

[12] The current civil proceeding was commenced in September 2010. The pleading was filed by the Crown on behalf of the GCSB as a department of State established by s 6 of the Government Communications Security Bureau Act 2003 (the GCSB Act). Ownership of the land and facilities at Waihopai was pleaded thus:

> The Crown is the registered proprietor of the land situated in the Waihopai Valley, Marlborough, having the legal description Property Number 196744, Lot 1 DP 7291 Pt 1 and DP 7050 Pt 1, Valuation Roll Number 203112360000, and the owner of satellite communications facilities situated on that land (together referred to as "GCSB Waihopai").

[13] The ownership by GCSB of the land and facilities at Waihopai, and the right of the GCSB to exclusive possession thereof, is not in dispute.[5] Rather, the appeal concerns the availability of positive defences the appellants wish to advance in

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4 High Court judgment at [26].

5 High Court judgment at [138]. The indefeasibility of the GCSB's title to the land was not challenged in either of the notices of opposition to the application for summary judgment dated 30 November 2010, or in the submissions on appeal.

answer to the respondent's claim in tort based on the ownership of GCSB Waihopai and the fixtures thereto.

Assumptions made in the High Court and on appeal

Assumptions in the High Court

[14] Associate Judge Gendall identified a number of assumptions that he was willing to make for the purposes of determining the summary judgment application:

> [27] While these propositions are far from proven, the plaintiff has not sought, for present purposes, to provide any evidence refuting the following matters relating to Waihopai and its operations. Only for the purposes of this present summary judgment application, therefore (and not necessarily otherwise) I accept that:
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> (a) The GCSB is a relatively, secretive organisation and little information is available in the public arena as to what it does (Affidavit of Mr Locke, a Green Party member of the New Zealand Parliament);
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> (b) The only real public oversight of the GCSB, as disclosed by Mr Locke, is the Intelligence and Security Committee. That Committee is established each parliamentary term by a sessional order of Parliament. It is comprised of the Prime Minister and two of his appointees, along with the Leader of the Opposition and one of his appointees. It meets rarely, only once or twice a year, and does so in secret;
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> (c) Methods such as petitioning, or asking written or oral questions and even requests under the Official Information Act 1982 are said to be relatively futile for obtaining information with regard to the GCSB (affidavit of Mr Locke);
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> (d) The intelligence obtained by Waihopai generally arises from monitoring satellite communications in and around the Pacific Rim and East Asia (affidavit of Mr Hager);
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> (e) New Zealand is a member of UKUSA and Waihopai is an ECHELON station. Members of UKUSA share intelligence which they have gathered amongst themselves. ECHELON is the system by which members of UKUSA share information (affidavit of Mr Hager);
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> (f) That intelligence obtained is shared with the United States of America and the United Kingdom (affidavits of Messrs Locke, Leonard and Hager);
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> (g) That intelligence is used by the United States of America and the United Kingdom in directing attacks in Iraq and Afghanistan (affidavits of Mr Leonard and Mr Hager);

(h) Civilians have been killed in Iraq and Afghanistan (affidavit of Ms Dunworth). The affidavit of Ms Dunworth (and also that of Mr Hager) sets out her opinion as to breaches of International Law and International Humanitarian Law involved in the conflict in Iraq. I certainly do not consider it is appropriate for me on the present summary judgment application to accept that the Iraq war is or may be illegal, but I do accept that it is seriously arguable that some attacks there may have been in breach of International Law and/or International Humanitarian Law;

(i) Mr Hager at paragraph 99 of his affidavit records (and this is not challenged):

> the GCSB has been involved in targeting in Afghanistan and has supported some of the most secret and controversial USA operations. It is almost certain that it has contributed to illegal activities, including detentions, assassinations and targeting of bombings.

Assumptions on appeal

[15] The appellants now submit that the assumptions reproduced above did not go far enough. They seek to enhance their position by extending the alleged features of the illegality.

[16] The first additional allegation advanced on appeal is that the acquisition, construction and use of facilities at GCSB Waihopai are in breach of regulatory requirements. It is alleged that the Waihopai facility, and specifically the parcel of land on which the radome sits, was acquired by the Crown in breach of the Public Works Act 1981 (PWA). Such land was never intended to be used for its stated public works purposes, "defence purposes", and has never been used for that purpose or any other public works purpose. The appellants allege that the GCSB is in continuous breach of the PWA by failing to determine whether the land should be offered back to its original owners (or their successors).

[17] Further, it is also alleged that the initial construction of the Waihopai facility appears to have been carried out in breach of the (then operative) building regulations. Subsequent building works, including the installation and construction of the radome and the antenna beneath it, were allegedly carried out in breach of the Building Act 1991. Later building works are said to have breached the Building Act 2004.

[18] Finally, the appellants claim that the use of the Waihopai facility breached land use requirements under the (then operative) Town and Country Planning Act 1977 and the Resource Management Act 1991. It is alleged that the activities occurring at the Waihopai facility have not been lawfully authorised, either under the relevant district scheme or plan, or otherwise, by the local authority.

[19] The appellants contend that none of these breaches can be remedied by the ministerial exemptions purportedly issued under the above legislation. All such exemptions are allegedly void for uncertainty. Furthermore, the decision to issue each of these exemptions is said to be unlawful and an unreasonable exercise of statutory power. In any event, each of the exemptions is ineffective, both because the scope of the exemptions is limited and because the relevant exemptions have never taken effect as they have not been communicated to the relevant local authority (who is the party most directly affected by these exemptions).

[20] Second, we are asked on appeal to assume that the automatic supply of "raw" intelligence to the National Security Agency of the United States of America (NSA) breaches New Zealand law; that intelligence generated at GCSB Waihopai and supplied to the NSA and other countries assists with wrongful acts in breach of domestic and international law; and that spying on New Zealand permanent residents and citizens breaches the provisions of the GCSB Act.

[21] Elaborating on these intelligence matters, Mr Shaw submits that the evidence supports a number of propositions. The first is that New Zealand supplies raw intelligence to the NSA without restrictions; information is automatically passed on. GCSB Waihopai essentially acts as a NSA facility, albeit one owned and operated by New Zealanders. He contends that the subsequent use of this intelligence by the USA and others implicates New Zealand in significant additional wrongful conduct. By failing to exercise its control over information gathered at Waihopai and not limiting the flow of intelligence to the NSA, New Zealand becomes complicit in the wrongful conduct that this intelligence assists with.

[22] Mr Shaw argues further that the use of intelligence collected at Waihopai and supplied to the NSA and others implicates the respondent in the unlawful

prosecution of the Iraq War, and instances of torture, arbitrary detention, extraordinary rendition, and death in Iraq, Afghanistan and elsewhere. Accordingly, New Zealand may have contributed to a number of instances of wrongful conduct as a result of supplying intelligence to the USA. This follows from the "jigsaw" or "mosaic" effect of intelligence use.[6]

[23] The assumptions made by the Associate Judge are extensive in scope, particularly those outlined at [27](g), (h) and (i).[7] With respect to the material advanced in support of the additional allegations urged on us, there may be little satisfactory evidence or legal support for many of these propositions. Nevertheless for the purposes only of the appeal (and noting that they are only allegations which the respondent does not accept) we are prepared to assume the correctness of the additional allegations referred to at [16] and [20] above.

[24] The appellants submit that their arguments with respect to GCSB activities are strengthened by the recent discovery that the GCSB has unlawfully spied on Mr Kim Dotcom.[8] Given that we are, however, prepared to accept for the purposes of the appeal the very broad assumptions outlined above, we do not consider that this further consideration materially assists the appellants.

Application for leave to adduce further evidence

[25] As noted, the appellants have applied for leave to adduce further evidence in four affidavits filed on appeal. The further affidavit of Treasa Moira Dunworth sought to present further evidence about international law. Then there is an affidavit (the second) of Nicolas Alfred Hager providing further evidence about the intelligence-gathering activities undertaken at GCSB Waihopai. A third affidavit of Mr Hager dated 7 May 2013 provided further evidence about the timing of the availability of information contained in his book *Other People's Wars*. Then there is a third affidavit of Theresa Catherine von Dadelszen (for which we granted leave at

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6 Citing *Attorney-General v Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* 2007 FC 766 at [82]–[85] and *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at [23] and [30].

7 As set out at [14] above.

8 See, for example, Rebecca Kitteridge *Review of Compliance at the Government Communications Security Bureau* (Wellington, March 2013), available at <www.gcsb.govt.nz>. In any event, the point has not been judicially determined.

the hearing), which simply annexes documents relating to the fulfilment of regulatory requirements concerning land use at GCSB Waihopai.

Legal principles

[26] Rule 45(1)(b) of the Court of Appeal (Civil) Rules provides that the Court may, on the application of a party, grant leave for the admission of further evidence on questions of fact by affidavit. In general, evidence will only be admitted where it is fresh, credible and cogent.[9] However, this Court has previously indicated that where the appeal is from a summary judgment decision, greater emphasis will be placed on the need for finality.

[27] In *Urquhart v Spanbild Holdings Ltd*, this Court held:[10]

> [70] An application under r 45 of the Court of Appeal (Civil) Rules 2005 to adduce further evidence requires the applicant to demonstrate that the evidence is fresh, credible and cogent. ... Particular weight will be accorded in summary judgment proceedings to the need for finality. It will only be in exceptional circumstances that the court will permit further evidence to be filed on appeal.

[28] Similarly, in *Lawrence v Bank of New Zealand* the Court held:[11]

> [18] ... Litigation would never come to an end if the parties to cases were permitted to adduce further evidence in less than exceptional cases. Particular weight must be accorded to the need for finality in litigation in this context in summary judgment proceedings, whose purpose it is to permit unmeritorious claims and defences to be brought justly and efficiently to a swift end.

While this principle is not, of course, absolute,[12] it is important that it is kept in mind when considering applications for fresh evidence in summary judgment appeals.

Submissions on fresh evidence

[29] In their application for leave to adduce further evidence, the appellants submit that much of the evidence contained in the affidavits of Mr Hager and

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9 *Erceg v Balenia Ltd* [2008] NZCA 535; *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] NZSC 59, [2007] 2 NZLR 1.

10 *Urquhart v Spanbild Holdings Ltd* [2010] NZCA 435.

11 *Lawrence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

12 See for example *Napier Heights Holdings Ltd v Crown Health Financing Agency* [2009] NZCA 420. In that case the affidavit evidence was admitted on appeal.

Ms Dunworth simply updates evidence already before the High Court. The appellants rely on *McGechan on Procedure* as authority for the proposition that "the Court regularly receives evidence (usually by affidavit) updating relevant matters".[13] Further, the appellants submit that the additional evidence of Mr Hager and Ms Dunworth is fresh, credible, and cogent. Mr Hager's evidence has only been available since his research towards, and publication of, his recently published book about the GCSB. Likewise, Ms Dunworth's evidence is the result of research that took place after the High Court hearing. The evidence of Mr Hager and Ms Dunworth is credible because both are said to be acknowledged experts in their field. Finally, the affidavit evidence is said to be cogent because it supports the appellants' arguments on the *ex turpi causa* principle.

[30] The respondent opposes this application. First, Mr Powell submits that the affidavit of Mr Hager does not meet the standard of substantial helpfulness so as to be admissible as expert evidence under s 25 of the Evidence Act 2006. That is because: (i) the affidavit substantially repeats evidence that was put before the High Court, (ii) the opinions that Mr Hager seeks to provide are based on unproven assertions of fact, and (iii) the deponent is not an independent witness but an advocate for opposition to the operations of the GCSB.

[31] Second, the admission of Ms Dunworth's affidavit is opposed on the basis that the material contained in the affidavits is not fresh and that Ms Dunworth's opinion evidence could, with reasonable diligence, have been produced at the trial. The respondents submit that in any event the opinion evidence does not meet the standard of substantial helpfulness under s 25 as it represents a submission on the interpretation and application of international law, and is based on the opinion of Mr Hager which is itself inadmissible.

[32] The appellants responded in a document entitled "submissions in support of application for leave to adduce further evidence". They say that, as the respondent did not object to Mr Hager's evidence at any point prior to or during the High Court hearing, it is not now open to the respondents to challenge Mr Hager's expertise or

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[13] *McGechan on Procedure* (online looseleaf ed, Brookers) at [CR45.01].

impartiality. Further, there is authority for the proposition that the interpretation of international law by a Court may be assisted by expert evidence.

The von Dadelszen affidavit

[33] With respect to Ms von Dadelszen's affidavit, we accept that there is merit in the submission for the appellants that the material was not available at trial and it was not then known that the Marlborough District Council held relevant documents. Without opposition from the respondent, we ruled that the contents of the affidavit were admissible. This was because the evidence Ms von Dadelszen produces is documentary in nature and is essentially a matter of public record. We also granted leave to the parties to provide further submissions concerning the regulatory issues relating to the land and buildings arising from the documents annexed to Ms von Dadelszen's affidavit.[14] This evidence also assisted our understanding of the assumptions as to further alleged breaches of regulatory requirements discussed at [16]–[19] above.

The second and third Hager affidavits

[34] In light of the assumptions made by the Associate Judge and the additional assumptions referred to above, we are not satisfied that the matters referred to in these affidavits are material or relevant to the issues we have to decide. Moreover, the appellants have not established exceptional circumstances which would warrant the reception of these affidavits.

The third Dunworth affidavit

[35] Much of Ms Dunworth's third affidavit contains material that can only be regarded as submission rather than evidence. As such, we might have been prepared to accept the material as effectively counsel's submission (at least up to [57] of the affidavit). However, in view of the assumptions we have made (both factual and legal), the admission of this affidavit is neither material nor substantially helpful.

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[14] The appellants filed such submissions on 22 May 2013 and the respondent's reply was filed on 5 June 2013.

[36] Further, we are not satisfied that it was substantially helpful or material to have Ms Dunworth's views on the facts, particularly having regard to the assumptions made. In any event, this material is beyond the proper role of an expert.

[37] For completeness we note that the contents of [68] of Ms Dunworth's affidavit were withdrawn by counsel, as well as the final sentence of [64]. To the extent that [58]–[60] of Ms Dunworth's affidavit comments on Mr Hager's evidence, we see no reason to treat it differently from Mr Hager's evidence.

[38] Accordingly, we dismiss the application to adduce further evidence save that of Ms von Dadelszen.

Summary judgment principles

[39] Under r 12.2(1) of the High Court Rules, the Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[40] The principles relevant to summary judgment were summarised by this Court in *Krukziener v Hanover Finance Ltd*:[15]

> The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it. *Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84 (CA).

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15 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

[41] Where the defence is a clear-cut question of law and findings are not required on disputed facts, a court may decide the issue on summary judgment.[16] However, caution is required. The appellants place particular emphasis on the approach taken by Elias CJ and Anderson J in *Couch v Attorney-General*.[17] At [33] Elias CJ said:[18]

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.

Defence of another

[42] The first defence raised by the appellants was defence of another, under either s 48 of the Crimes Act 1961 or the common law. We will address both possibilities separately.

Section 48

(a) High Court decision

[43] The first hurdle faced by the appellants is the fact that the force in question was directed against physical property (the radome) rather than against a person. In the High Court the appellants argued that "force" under s 48 of the Crimes Act refers to any strength exerted on an object, and includes damage to property. This was rejected by the Associate Judge, who relied on a decision of this Court in *R v Hutchinson*.[19] In that case the appellant had been charged with burglary and wilful destruction or damage after he broke into a Department of Conservation shed and contaminated 1080 pellets intended to be used for the purposes of possum control. One of the issues in the case concerned the availability of defence of another under s 48 of the Crimes Act.

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16 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4.

17 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

18 Although these comments were made in the context of a strike out application, the appellants submit that they are equally applicable in the context of summary judgment: see *Gulf Corp Ltd (in rec) v CFL (NZ) Ltd* HC Auckland CIV-2010-404-5466, 3 November 2011 at [27].

19 *R v Hutchinson* [2004] NZAR 303 (CA).

[44] This Court held that the trial Judge was entitled to remove the defence from the jury, there being no evidence of use of force as contemplated by s 48. Delivering the judgment of the Court, Heath J stated:

> [71] While the term, "force" has been held to include the threat of violence we are not aware of any case in which the term "force" has been held to include breaking and entering premises and destruction of property. In our view it is inapt to speak of breaking and entering premises and destroying property as "force" for the purposes of a s 48 defence based on defence of another. The case cited by Mr Zindel for the contrary proposition (*Sheehan v Police*)[20] is not in point. That case dealt with a defence of "lawful justification or excuse or colour of right" in response to a charge of intentional damage to property brought under s 11(1)(a) of the Summary Offences Act 1981. ...
>
> [72] We are content, for present purposes, to dispose of this ground of appeal by holding that the Judge was entitled to remove the defence from the jury on the grounds that there was no evidence of the use of "force" as contemplated by s 48. In determining this issue on that narrow ground we should not be taken to suggest that Mr Hutchinson's actions would, otherwise, come within the defence. We cannot envisage a case such as this (where a pesticide is being used after proper regulatory processes have been followed and there is no actual immediate threat to another person) justifying invocation of the s 48 defence.

[45] Associate Judge Gendall considered that this case involved "precisely the situation" referred to in *Hutchinson*.[21] Accordingly, the s 48 defence was not reasonably arguable.

[46] The Associate Judge went on to record that even if he was wrong on this point, he was nevertheless satisfied that s 48 was not arguable. That is because the appellants' conduct was not reasonable "in the circumstances [as they] believed them to be".[22] The Associate Judge held:[23]

> … [F]or the s 48 defence of defence of another to apply, the use of force must be "necessary" in the circumstances [as] the defendants believed them to be. In the present case, no danger was imminent. The defendants had no idea when another civilian death overseas may have been caused. Further, even if the defendants thought that their actions might have some positive impact on the ground in Iraq or Afghanistan, they could not have known when, where or how that impact might have occurred. The reasonable approach, in a democratic nation, is not to destroy public property and to take steps leading toward anarchy, but to prepare and engage in reasoned

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20 *Sheehan v Police* [1994] 3 NZLR 592 (HC).
21 High Court judgment, above n 1, at [59].
22 At [66].
23 Ibid.

> debate. Captivating the public's attention to bring about change through debate and freedom of expression, a freedom which democracies strive so hard to protect, without impinging on the property rights of others, is fundamental to the way of life in this country. Self-help of the kind undertaken by the defendants in the present case, in a democracy, no matter how genuine their beliefs might seem to be, cannot be reasonable.

(b) Appellants' submissions

[47] The appellants[24] submit that the High Court erred in finding that s 48 requires force against a person, and in concluding that the force used was unreasonable without the benefit of a full trial.

[48] First, it is submitted that *Hutchinson* is incorrect and ought to be revisited by this Court. That decision is said to be inconsistent with other New Zealand[25] and overseas[26] authorities. Further, it is submitted that the approach taken in *Hutchinson* is incompatible with the plain meaning of s 48, with the New Zealand Bill of Rights Act 1990, and with the Summary Offences Act 1981.[27] Restricting s 48 to situations involving force against a person will produce results which are "illogical and manifestly absurd". In the alternative, if the Court finds that the outcome in *Hutchinson* is correct, the appellants submit that this approach ought to be limited to those cases involving criminal charges. In civil matters, the principles from contrary cases such as *Sheehan* ought to apply.[28]

[49] Second, the appellants submit that s 48 involves a subjective test, as the question of reasonable force must be assessed in light of the circumstances as the defender "believed them to be". This belief can be incorrect, rash or unreasonable. Given this, Associate Judge Gendall was wrong to conclude that defence of another was inarguable.

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[24] The first appellant has provided submissions on defence of another and necessity, while the second and third appellants have provided submissions on *ex turpi causa*. However, the appellants each adopt the others' submissions.

[25] Citing *Sheehan v Police*; *R v Terewi* (1985) 1 CRNZ 623 (CA); and *Jenkins v Police* (1986) 2 CRNZ 196 (HC).

[26] Citing *Department of Public Prosecutions v Bayer* [2003] EWHC 2567 (Admin), [2004] 1 WLR 2856; *Sears v Broome* [1986] Crim LR 461 (DC); and *R v Burgess* [2005] NSWCCA 52.

[27] Counsel submits that ss 8 and 9 of the New Zealand Bill of Rights Act 1990 give profound protection of life and freedom from torture and cruel and degrading treatment. An artificially restricted definition of force which restricts the right of defence is said to be inconsistent with these provisions.

[28] Citing Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [12.7.01].

(c) Discussion

[50] Section 48 provides:

> **48 Self-defence and defence of another**
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> Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[51] We accept that the s 48 defence may have application in the context of civil proceedings. This is because the word "justified" as used in s 48 is a defined term in the Crimes Act and provides:[29]

> **justified**, in relation to any person, means not guilty of an offence *and not liable to any civil proceeding*
>
> (Emphasis added.)

[52] The inclusion of the words "or another" in s 48 allows force to be used for the protection of a third person. Such person may be related to the person relying on the defence or not.[30] Thus a person is justified in using by way of defence of another such force as, in the circumstances as that person believes them to be, it is reasonable to use.

[53] We accept it is arguable that, in some contexts, damage to property might properly amount to force and so come within the provisions of s 48. However, we see no need to revisit *Hutchinson* in this case. That is because we agree with the Associate Judge that, viewed objectively, it is not arguable that the actions of the appellants were a reasonable or proportionate response.

[54] In *R v Wang*, the accused stabbed her husband to death while he was asleep in a drunken state after he had threatened to kill the accused and her sister.[31] This Court held that what is reasonable must depend on the imminence and seriousness of the threat, and upon the opportunity to seek protection without recourse to the use of force. [32] If a person has alternative causes of action other than the use of force, and

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29 Crimes Act 1961, s 2.
30 *R v Portelli* [2004] VSCA 178, (2004) 10 VR 259.
31 *R v Wang* [1990] 2 NZLR 529 (CA).
32 *R v Wang* at 536.

the threat in question cannot be carried out immediately, it is unacceptable to make a pre-emptive attack. The Court added "there may well be a number of alternative courses of action open, other than the use of force, to a person subjected to a threat which cannot be carried out immediately".[33] Accordingly, self-defence was not open to the appellant.

[55] Similarly, in *R v Savage*, this Court found that for s 48 to apply, the accused must have seen himself as under a real threat of danger; it was not sufficient that he considered that there might be some future danger to him.[34]

[56] The appellants allege that the advent of daily killings in Iraq and Afghanistan gave rise to proper justification for their conduct in damaging the fixtures and property at Waihopai. We consider, however, that the Associate Judge was correct to conclude that there was no imminent danger, particularly as the appellants had no idea when another civilian death overseas might have been caused and accept that they could not link intelligence gained through Waihopai to any particular death.[35] Even if the appellants genuinely believed that inflicting damage to Waihopai would positively impact upon the situation in remote foreign countries such as Iraq or Afghanistan, they did not know what form that impact would have had. In this context we also agree with the related findings of the Associate Judge applicable to the defence of necessity described at [74] below.

[57] Moreover, lawful methods of protest were clearly open to the appellants. We agree with Mr Powell that the decision of the House of Lords in *Regina v Jones (Margaret)* is apposite.[36] In that case, their Lordships made it clear that defences such as s 48 are intended to be strict exceptions to the general rule that citizens cannot use force in our society. Lord Hoffmann provided the following general guidance on this issue which we find helpful:

(a) The reasonableness of a defendant's actions must be judged "in its actual social setting, in a democratic society with its own appointed

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33 Ibid.
34 *R v Savage* [1991] 3 NZLR 155 (CA) at 158.
35 High Court judgment at [66].
36 *Regina v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136.

agents of the enforcement of the law", not "as if he was the sheriff in a Western, the only law man in town".[37]

(b) The state determines the legitimate use of physical force within its territory. A tight control of the use of force is necessary to prevent society sliding into anarchy. Ordinary citizens who apprehend breaches of the law are normally expected to call in the police and not to take the law into their own hands.[38]

(c) While there are exceptions for emergencies, even then the proper course will usually be to enlist the assistance of the public authority responsible for the protection of the relevant interests.[39]

(d) The right of the citizen to use force of his own initiative is even more circumscribed when he is not defending his own person or property but simply wishes to see the law enforced in the interests of the community at large. The law will not tolerate vigilantes.[40]

(e) If the relevant public authority will not act because of a differing interpretation of the law, the rule of law requires that such a dispute be resolved by the courts. If that legal challenge fails, the citizen should seek to have the law changed, by legal means. Whatever the honest apprehension of danger to the community, it is not reasonable to resort to force.[41]

(f) These principles do not conflict with the right to protest. It is a mark of a civilised community that it can accommodate protests and demonstrations. But there are generally accepted conventions – protestors must behave with a sense of proportion and not cause

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37 At [74]–[75].
38 At [76]–[78].
39 At [80].
40 At [83].
41 At [85].

> excessive damage or inconvenience, and police and prosecutors must behave with restraint.[42]

[58] Mr Powell also referred us to *Monsanto v Tilly*,[43] where the English Court of Appeal considered whether the defendants had an arguable defence to a claim in trespass in circumstances where the defendants entered on one of Monsanto's trial sites for genetically modified crops and uprooted a number of GM crops as a symbolic gesture. The proposed defence – that the trespassers were acting in the public interest and to protect third parties from health and environmental harm – was rejected by the Court. Stuart-Smith LJ held:[44]

> … the individual has no right to destroy the property of another in the public interest in the sense of protecting others from danger, save in very restricted circumstances; still less ... may he do so to attract publicity to what is alleged to be a good cause or to persuade government to legislate against a perceived danger.

[59] In a democratic society changes in government policy must be effected by lawful and not unlawful means. Those who suffer infringement of their lawful rights are entitled to the protection of the law; if others deliberately infringe those rights in order to attract publicity to their cause, however sincerely they believe in its correctness, they must bear the consequences of their lawbreaking. This is fundamental to the rule of law in a civilised and democratic society.

[60] Finally, we refer to the appellants' belief that lawful means of challenging the activities at GCSB Waihopai are not available. This Court in *Bayer v Police* has previously rejected such an approach in the context of an anti-abortion protest:[45]

> Any change [to the legislation] could only be a matter for Parliament. Strong and sincerely felt views are held on both sides of the abortion issue, but it is the duty of the courts to ensure that action expressing such views is kept within lawful bounds.

[61] The same approach applies here. The appellants have not persuaded us that the Associate Judge erred when considering the application of s 48. We uphold his reasoning and conclusions.

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42 At [89]–[93].
43 *Monsanto v Tilly* [2000] Env LR 313 (CA).
44 At [30].
45 *Bayer v Police* [1994] 2 NZLR 48 (CA) at 52.

The common law defence

[62] The appellants also rely on the common law defence of defence of another. They submit that the common law defence might be left alive in civil proceedings relating to force against property. This was rejected by the Associate Judge, who held that as the appellants' conduct was objectively unreasonable, any argument based on common law defence of another was not arguable. [46]

[63] We doubt the utility in the present context of the common law defence. It is unlikely to have survived the enactment of s 48.[47] A parallel may be drawn with the recent decision of the Supreme Court in *Akulue v R*, where it was held that the enactment of s 24 of the Crimes Act in relation to the defence of compulsion meant that no common law defence of necessity was available in circumstances involving threats of harm from another person.[48]

[64] Even if the common law defence subsists, it is axiomatic that under the common law, as under s 48, a person is justified in using force only if it is reasonable in the circumstances. In a civil law context, an objectively unreasonable belief, no matter how genuinely held, would not be sufficient to establish self-defence or defence of another.[49] Given our conclusion that the appellants' actions were not reasonable, we are satisfied the common law defence (even if available) is not arguable. The defence of another, in either its statutory or common law form, is properly to be treated as a strict exception to the rule that citizens cannot take the law into their own hands and use force in our society. The first ground of appeal therefore fails.

The defence of necessity or duress of circumstances

[65] The second category of defence raised by the appellants was that of necessity or duress of circumstances.

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46 High Court judgment, above n 1, at [67]–[68].

47 Section 20 of the Crimes Act provides that "all rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, *except so far as they are altered by or are inconsistent with this Act or any other enactment*".

48 *Akulue v R* [2013] NZSC 88.

49 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962 at [18].

High Court decision

[66] Associate Judge Gendall began by noting that the defence of necessity: [50]

> ... is a carefully guarded exception to the general principle of law that rights of property are respected. It allows for the true emergency; where there is imminent peril to human safety that overwhelms the desire of a reasonable person to respect property and compels them to act.

[67] The Associate Judge then outlined the two varieties of necessity under the common law.[51] The first, "duress of circumstances", concerns the difficulty of compliance with the law in emergencies. The second, necessity "proper", also known as "lesser-evils" necessity, is concerned with the avoidance of the greater harm or the pursuit of some greater good.

[68] Duress of circumstances applies where the defendant's will has been overborne, whereas necessity "proper" applies where there is no crisis but the defendant makes a considered and rational decision which involves deliberately committing what would usually be an offence in order to prevent the future occurrence of a greater harm.[52]

[69] The specific elements of the defence of duress of circumstances were described by the Associate Judge as follows:[53]

> i. A genuine belief, formed on reasonable grounds, of imminent peril of death or serious injury;
>
> ii. Circumstances in which the accused has no realistic choice but to break the law;
>
> iii. A breach of the law proportionate to the peril involved; and
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> iv. A nexus between the imminent peril of death or serious injury and the choice to respond to the threat by unlawful means.

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50 High Court judgment at [69].

51 At [75] referring to AP Simester and WJ Brookbanks *Principles of Criminal Law* (3rd ed, Brookers, Wellington, 2007) at [13.1].

52 High Court judgment at [76].

53 At [78], citing *R v Hutchinson*, above n 19, at [34] and *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA) at 57.

[70] The Associate Judge noted that the temporal proximity required (whether "immediacy" or "imminence") is not clear. That is because the Court of Appeal in *Hutchinson* expressly declined to resolve that issue.[54]

[71] In the circumstances of the present case, the Associate Judge considered that the key aspect of the test was that set out at (ii). He concluded:[55]

> I am satisfied that the defendants' will was not so overborne such that they could not undertake other, more democratic, means of aid. The defendants, by their own evidence, were not concerned as to the date on which they had to proceed with their activities at Waihopai. That factor alone, in the present case, I am satisfied, denies them the use of the defence of duress of circumstances.

[72] Associate Judge Gendall then turned to consider the elements of the defence of necessity "proper". He was satisfied that, in cases of trespass, those elements were as set out in *Dehn v Attorney-General*:[56]

> A person may enter the land or building of another in circumstances which would otherwise amount to a trespass if he believes in good faith and upon grounds which are objectively reasonable that it is necessary to do so in order (1) to preserve human life, or (2) to prevent serious physical harm arising to the person of another, or (3) to render assistance to another after that other has suffered serious physical harm.

[73] The Associate Judge also had regard to the findings of Edmund Davies LJ in *Southwark London Borough Council v Williams*:[57]

> But when and how far is the plea of necessity made available to one who is prima facie guilty of tort? Well, one thing emerges with clarity from the decisions, and that is that the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. *The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy*. As far as my reading goes, it appears that all the cases where a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril.
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> (Emphasis added).

[74] After considering the application of these principles in the context of the present case, the Associate Judge was satisfied that the defence of necessity was not

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54 At [54].
55 At [83].
56 *Dehn v Attorney-General* [1988] 2 NZLR 564 (HC) at 580.
57 *Southwark London Borough Council v Williams* [1971] Ch 734 (CA) at 745–746.

reasonably arguable. First, he considered that the appellants could not establish any element of immediate peril. That was because the evidence before the Court led to the "inevitable conclusion" that the appellants' actions were "an act of symbolic protest, not an act of rescue".[58] There was no person in any immediate peril at GCSB Waihopai, nor did the appellants suggest that there was. The Associate Judge considered that the "symbolic" nature of the appellants' actions was made clear by the fact that the date chosen for the action was described as being "of no real consequence" or as being timed to coincide with a date on the Christian calendar.[59] He concluded that this was inconsistent with any suggestion of immediate threat. Second, the Associate Judge held that on the facts of the case there was "no basis" upon which the appellants could assert that any belief they had in the necessity of their actions at Waihopai – even if honestly and sincerely held – was objectively reasonable. The Associate Judge held:[60]

> I accept that the defendants may have considered that they were at a loss as to what other democratic means of protest they could undertake, and I assume that they each had a genuine belief that what they were doing was undertaken in the hope that ultimately lives would be saved. However, those steps which were taken here are not the steps of a reasonable person in a democratic nation attempting to save lives in countries afar. The defendants had no idea whether the damage caused (and I repeat it was only damage to one of the two radome covers with no attempts made to disable the satellite dish it covered, the other radome and satellite dish or Waihopai's operational workings) would achieve the (purported) result sought: prevention of New Zealand providing intelligence to the United States of America which would, in turn, hamper the United States of America's (or United Kingdom's) ability to carry out attacks which could cause a loss of life to civilians. There is simply no evidence to support that.

[75] Accordingly, the Associate Judge concluded that neither necessity "proper" nor duress of circumstances was reasonably arguable.

Appellants' submissions

[76] The appellants first submit that, although the Associate Judge purported to leave open the question of "imminence" versus "immediacy", he went on incorrectly to apply a test of *immediate* peril.[61] It is submitted that it was incorrect for the

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58 At [94].
59 At [99].
60 At [104].
61 At [94], [95], [99] and [103].

Associate Judge to adopt the more restrictive of the two approaches. Furthermore, the appellants submit that neither "imminence" nor "immediacy" is an entirely appropriate standard. That is because "desperate, tragic situations [can] build up and develop over a period of time". In this case, the appellants were confronting a state of affairs which had built up over a period of years to the point where, on any given day, a death in Iraq was "imminent".

[77] Second, the appellants submit that the Associate Judge erred in forming the view that the appellants had simply engaged in an act of symbolic protest. The aims of protest and saving lives were not necessarily exclusive of each other; a motivation to save a life is not necessarily inconsistent with some degree of symbolism. The appellants emphasise that similar attacks were made (without apparent success) at their criminal trial.

[78] Finally, the appellants argued that it was inappropriate for cases involving "complicated and unsettled areas of the law" to be resolved by summary judgment. It is submitted that a full trial is needed to do justice to the defence of necessity.

Discussion

[79] We are satisfied that the Associate Judge correctly identified the elements of necessity "proper" and duress of circumstances. We note that both defences require an element of reasonableness: in the context of an action in trespass, necessity is available only where the individual believes in good faith and upon grounds which are objectively reasonable that their actions are necessary to preserve life, prevent serious harm, or render assistance to another.[62] Similarly, duress of circumstances is only available "if *from an objective standpoint* the defendant can be said to be acting in order to avoid a threat of death or serious injury".[63]

[80] Once again, we agree with Mr Powell that this issue must be considered in the context of the case law concerning the legal limits of civil disobedience or direct action protest. We refer to the principles set out by Lord Hoffmann in *R v Jones*

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62 *Dehn v Attorney-General* at 580.
63 *R v Conway* [1989] QB 290 (CA) at 298 per Woolf LJ.

(Margaret), summarised at [57] above, and those articulated by Stuart-Smith LJ in *Monsanto v Tilly*.[64] We do not consider it is necessary to engage with the claimed distinction as to whether the relevant peril ought to be "immediate" or "imminent". That is because, regardless of which test is applied, the appellants need to establish that the illegality was proportionate to the peril involved. We consider that this test cannot be satisfied for the reasons already discussed at [53]–[61]. Further, we are satisfied that there is no apparent error in the Associate Judge's approach to the question of immediacy versus imminence.

[81] We are satisfied that on the material before us the appellants had no way of knowing whether any imminent or immediate peril existed. Further, they had no way of knowing whether their actions in damaging the radome would impact on that supposed peril. Accordingly we conclude that the appellants cannot demonstrate that their actions were proportionate to the damage caused.

[82] We agree with the Associate Judge that the defence of necessity in either of its common law forms is a "carefully guarded exception to the principle that rights of property are respected". The defences of necessity and duress of circumstances are not arguable in the circumstances of this case. This second ground of appeal therefore fails.

The principle of *ex turpi causa*

[83] The third possible defence raised by the appellants and dismissed by the High Court was that of *ex turpi causa non oritur actio* (no cause of action should arise from illegal acts). Mr Powell urged us to accept that there was settled law on this defence particularly when the case involves damage to property. For the appellants, Mr Cochrane submitted that the law was in a state of flux, was uncertain and clearly in a state of development and that entry of summary judgment was therefore inappropriate.[65] We address these competing positions in our discussion.

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64 Above n 43.

65 We have already referred at [41] above to the appellants' reliance on the judgment of the Supreme Court in *Couch v Attorney-General*. We also address the detail of the appellants' submissions at [126] below.

High Court decision

[84] In the High Court, the appellants submitted that it was reasonably arguable that the principle of *ex turpi causa* applied. Counsel suggested various ways in which the respondent's conduct with regard to GCSB Waihopai was wrongful. These were:[66]

(a) the operation of Waihopai is said to be wrongful due to its role in providing intelligence to the USA;

(b) the use of that intelligence by the USA is said to implicate Waihopai, and the GCSB, in the wrongful conduct of the USA; and

(c) Waihopai allegedly does not adhere to regulatory requirements such as the Building Acts 1991 and 2004, the Resource Management Act and the Defence Act 1990.

[85] The High Court judgment focussed largely on the first and second categories of illegality.[67] In so doing the Associate Judge referred to the relevant authorities from the New Zealand and English jurisdictions,[68] and concluded that, even if it were accepted that the respondent was undertaking activities which may be considered unlawful, the *ex turpi causa* defence could not apply.

[86] First, the respondent could assert its claim to property without recourse to illegality:[69]

> ... the plaintiff's present claim for damages arises out of a trespass. Illegality need not be pleaded. The plaintiff has full legal, indefeasible title to the parcel of land on which Waihopai is situated. Accordingly, prima facie, the defence cannot succeed. That prima facie must mean that strong policy reasons must be found in order to displace that position.

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66 High Court judgment, above n 1, at [42].

67 See High Court judgment at [27]; this paragraph makes no reference to the claimed regulatory illegalities. We note the passing reference later in the judgment to the Associate Judge's reservations as to whether "trifling conduct" can qualify as wrongful conduct for the purpose of *ex turpi causa*: see fn 111 of the High Court judgment.

68 Discussed in detail below.

69 At [132].

[87] Second, there was no "nexus" between the unlawful act and the damage suffered:

> [129] Dealing first with the alleged administrative breaches, I accept that it might be arguable that the approach to a nexus may be more flexible than that put forward by Lord Hoffmann in *Gray*. ... [However] there must be, in some sense, a link between the wrongdoing and the defendant's tortious breach.
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> [130] I accept that knowledge of illegality is not necessarily required on the part of the defendants, for the focus is on the plaintiff's actions. *However, it cannot be said in any sense here that the plaintiff's administrative breaches caused the damage. Even on a broader interpretation ... I am not satisfied that the administrative illegalities provide a sufficient nexus to the plaintiff's damage.* This fact distinguishes the present case from *Brown v Dunsmuir*. ... Here, as I see it, the alleged illegality is merely a part of the background.
>
> (Emphasis added.)

[88] Third, the interests of public policy were very strongly against the defendants. This was primarily because:

> [136] The illegality alleged here is inextricably intertwined with the decision of the executive arm of Government in this country to either engage in armed combat or to assist another state, in that state's sovereign decision to engage in armed combat. ... [I]f I was to accept that the defence of ex turpi causa was reasonably arguable on the facts of this case, it would follow that the Crown could never recover the cost of repairing any damage caused by a person against its armed forces, or any body involved with the armed forces, in a cause which that person considers is unjust.

[89] Fourth, the Associate Judge found that, in these circumstances, compensation would not undermine the integrity of the justice system:

> [141] ... I do not consider that even with the Court being further informed as to the matters which Mr Shaw alleged that it needs to know on a fuller investigation that it could become reasonably arguable that compensation ordered to the plaintiff here would undermine the integrity of the justice system.

Legal principles

[90] We start by referring to the general principles of the *ex turpi causa* defence as they emerge from both English and New Zealand case law. First, we examine the broad approaches to this area of the law. Second, we summarise the authorities concerning *ex turpi causa* and property claims.

(a) General principles

[91] Possibly the most important English judgment on *ex turpi causa* is that given in 1775 by Lord Mansfield CJ in *Holman v Johnson*:[70]

> No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. ...

[92] The rationale for the public policy principle of *ex turpi causa* has been variously stated in the common law authorities. The first modern English case of relevance is *Euro-Diam Ltd v Bathurst*, a decision of the Court of Appeal.[71] Kerr LJ[72] reviewed a number of previous authorities on *ex turpi causa* and extracted the following principle:[73]

> (1) The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts …
>
> The problem is not only to apply this principle, but also to respect its limits, in relation to the facts of particular cases in the light of the authorities.

[93] Kerr LJ identified three main categories of cases where the *ex turpi causa* defence would prima facie succeed. These were:

(i) Where the plaintiff sought, or was obliged, to found his claim on an illegal contract or to plead its illegality in order to support his claim.

(ii) Where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct.

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70 *Holman v Johnson* (1775) 1 Cowp 341 at 343, 98 ER 1120 (KB) at 1121.
71 *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 (CA).
72 With whom Russell LJ and Sir Denys Buckley concurred.
73 At 35.

(iii) A residual category covered by the general principle in the terms we have cited above.

Kerr LJ added that the defence must be approached "pragmatically and with caution, depending on the circumstances".[74]

[94] The focus of the Court of Appeal in *Euro-Diam* was therefore on whether, in light of all the surrounding circumstances, it would be an affront to the public conscience to grant the plaintiff relief. This has since become known as the "conscience test".

[95] The conscience test was subsequently rejected by the House of Lords in *Tinsley v Milligan*.[75] In that case, the parties contributed to the purchase of a home together, but fraudulently had the legal title conveyed to Miss Tinsley solely in order to enable Miss Milligan to claim social security benefits. The majority found that because Miss Milligan could make out her claim without reference to her illegal acts, *ex turpi causa* did not apply. This rationale has its origin in Lord Mansfield's words in *Holman v Johnson* to the effect that the court will not lend its assistance to someone who "founds his cause of action upon an immoral or an illegal act". But it is also reflected in cases in the contractual field such as *Bowmakers Ltd v Barnet Instruments Ltd* which we discuss at [119] below.

[96] Lord Goff outlined his reasons for rejecting the conscience test as follows:[76]

> Nicholls LJ [in the Court of Appeal] in particular invoked a line of recent cases, largely developed in the Court of Appeal, from which he deduced the proposition that, in cases of illegality, the underlying principle is the so-called public conscience test, under which the court must weigh, or balance, the adverse consequences of respectively granting or refusing relief. This is little different, if at all, from stating that the court has a discretion whether to grant or refuse relief. It is very difficult to reconcile such a test with the principle of policy stated by Lord Mansfield CJ in *Holman v Johnson* ... or with the established principles ... .

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74 At 35.

75 *Tinsley v Milligan* [1994] 1 AC 340 (HL).

76 At 358. See also the remarks of Lord Browne-Wilkinson at 369.

[97] The next case considered by the House of Lords is *Gray v Thames Trains*.[77] It is perhaps best categorised as falling within the second principle discussed by Kerr LJ (referred to at [93] above) whereby a grant of relief would enable the plaintiff to benefit from his criminal conduct.

[98] Mr Gray was seriously injured in a rail crash. While suffering from Post-Traumatic Stress Disorder, he killed a man. Mr Gray pleaded guilty to manslaughter and was detained under the provisions of the Mental Health Act 1983. He then claimed damages from Thames Trains Ltd for loss of earnings after his detention, loss of liberty, damage to reputation, and grief and remorse, and sought an indemnity against any liability to the victim's dependants. The House of Lords unanimously rejected all of Mr Gray's claims.

[99] In the course of his speech Lord Hoffmann opined that the maxim *ex turpi causa* expresses not so much a principle as a policy.[78] He added: "that policy is not based upon a single justification but on a group of reasons, which vary in different situations".[79] Lord Hoffmann went on to consider various expressions of such reasons. These differed depending upon whether one was applying the policy to property or contract rights between two parties who are both parties to an illegal contract,[80] or a case such as the claim by Mr Gray.

[100] In that context Lord Hoffmann drew attention to the role of causation. If the causation principle were applied, there is an important distinction to be drawn between cases where the claim is inextricably linked to the illegality and those where the illegality merely gives occasion for the tortious conduct of the defendant.

[101] Expanding on the issue of causation, Lord Hoffmann noted:[81]

> [The] distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the defendant is not liable if the immediate cause was the

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77 *Gray v Thames Trains* [2009] UKHL 33, [2009] 1 AC 1339.
78 At [30].
79 Ibid.
80 See for example, the approach of the House of Lords in *Tinsley v Milligan*, supra.
81 At [54].

> deliberate act of another individual. … It might be better to avoid metaphors like "inextricably linked" or "integral part" and to treat the question as simply one of causation.

[102] The final English decision of relevance is *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)*[82] in the House of Lords. That case concerned a claim by the liquidators of a company against auditors who had negligently failed to detect that the company's revenues were derived from a director's frauds against third parties. The claim failed because to allow it would have been to say that what was recoverable from the company in the action against it for fraud was damage to it for the purposes of its claim against the auditor.[83] It is difficult to establish the ratio of the case, however, as each of their Lordships approached the case slightly differently.[84] Generally speaking, Lords Walker and Brown considered the reliance test to be one of general application, whereas Lord Phillips indicated that the principle may be more flexible. Lords Scott and Mance in the minority disagreed that the defence of *ex turpi causa* applied, and therefore did not consider the principle in detail.

[103] In other jurisdictions different policy reasons for the defence of *ex turpi causa* have been adopted, namely, the need for consistency, coherence of the law and the integrity of the legal system. For example in the Canadian Supreme Court in the case of *Hall v Hebert* McLachlin J on behalf of the majority stated: [85]

> A more satisfactory explanation for [the case law], I would venture, is that to allow recovery in these cases would be allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. *It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony.* For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web".[86] We see thus that the concern, put at its most fundamental, is with the integrity of the legal system.

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82 *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 1 AC 1391.

83 See WVH Rogers *Winfield and Jolowicz on Tort* (18th ed, Sweet & Maxwell, London, 2010) at [25–21].

84 See discussion in Law Commission (England and Wales) *The Illegality Defence* (Report No 320, 2010) at [3.27]–[3.32]; Po Jen Yap "Rethinking the illegality defence in tort law" (2010) 18 Tort L Rev 52 at 58–59; and Lord Sumption "Reflexions on the Law of Illegality" (speech to the Chancery Bar Association, 23 April 2012) at 9 (available at <www.supremecourt.gov.uk>).

85 *Hall v Hebert* [1993] 2 SCR 159 at 176. See also Yap, above n 84, at 62.

86 Ernest J Weinrib "Illegality as a tort defence" (1976) 26 UTLJ 28 at 42.

(Emphasis added.)

[104] This statement has been expressly adopted by the High Court of Australia in *Miller v Miller*,[87] where the majority remarked that "the central policy consideration at stake is the coherence of the law".[88] It has also been endorsed by Lord Sumption, who has stated extrajudicially that "if the law stigmatises the conduct of the Claimant as illegal or criminal, it is inconsistent for it to allow legal rights to be founded on that conduct".[89]

[105] In the New Zealand context the *ex turpi causa* defence has only infrequently been invoked. This is likely to be in part a result of the Illegal Contracts Act 1970, which covers most contractual situations in which *ex turpi causa* would otherwise be relevant. In contrast to the all-or-nothing approach of the *ex turpi causa* defence, the Illegal Contracts Act provides for an "open-ended discretionary approach".[90]

[106] Similarly, the existence of the New Zealand accident compensation scheme removes the potential for personal injury cases involving *ex turpi causa* arguments. Should the factual situation arising in *Gray v Thames Trains* have occurred in New Zealand, for example, the Accident Compensation Act 2001 would apply and it is likely that both the claimant and the family of the deceased would have received compensation. In *Accident Compensation Corporation v Curtis* Fisher J observed the relationship between *ex turpi causa* and the accident compensation scheme.[91] That case involved two claimants who had separately been convicted of dangerous driving causing death. The Corporation sought to withhold compensation on the basis that payment would be "repugnant to justice" and therefore contrary to the Act. Fisher J held that the Act was intended to be a departure from the common law relating to *ex turpi causa*, and that there would have to be an exceptional reason for departing from the dominant statutory objective of providing comprehensive no-fault

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87 *Miller v Miller* [2011] HCA 9, (2011) 242 CLR 446.

88 At [15]. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

89 Lord Sumption, above n 84, at 17.

90 Law Commission (England and Wales) *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Consultation Paper No 154, 1999) at [7.77]. See also the discussion of the Illegal Contracts Act in *Tinsley v Milligan*, above n 75, at 363–364 per Lord Goff.

91 *Accident Compensation Corporation v Curtis* [1994] 2 NZLR 519 (CA). For further discussion see Law Commission (England and Wales) *The Illegality Defence in Tort* (Consultation Paper No 160, 2001) at [3.48]–[3.52].

cover.[92] Given the purpose of the statute, it was not repugnant to justice to award compensation.

[107] Despite the effect of these statutes, however, there are a handful of New Zealand cases addressing the applicability of the *ex turpi causa* defence.

[108] In the 1961 decision of *Green v Costello* the parties were the participants in a bar-room brawl.[93] It was common ground that the defendant had struck the plaintiff, causing a fractured jaw. The plaintiff then brought an action for damages for assault. On appeal, the defendant sought to argue *ex turpi causa* on the basis that the plaintiff had also participated in the fight. Barrowclough CJ dismissed the appeal, noting:[94]

> Neither in the three cases which Mr Cooke cited to me nor in any other case which I have read do I find authority for the very wide proposition that the mere fact that the plaintiff was a wrongdoer is in general a defence to an action in tort.

[109] In *Brown v Dunsmuir*, Penlington J upheld a District Court Judge's decision to exercise his discretion to allow the defence of *ex turpi causa*.[95] In that case a developer illegally excavated and encroached on his neighbour's land. In response, the neighbour entered the developer's property to place soil on the area which had been excavated in order to avoid further damage. Penlington J found that the principle of *ex turpi causa* barred the developer from bringing an action in trespass. He held:[96]

> The learned [District Court] Judge found that there was a sufficiency of connection between the appellants' illegal conduct and the respondent's trespass. On one view the illegality could be regarded as a minor transgression; but that is to ignore its actual and potential consequences. If the appellants had not acted illegally the probabilities are that there would have been no trespass. I agree with Mr Gotlieb that an ordinary citizen would be shocked if a landowner and developer could ignore the bylaws and illegally excavate on his own land and encroach on his neighbour's land and then obtain a judgment for trespass against that neighbour when the latter had placed some soil on the owner developer's land as a protective measure and when there was no proper fill available in any event. To grant relief in these circumstances would be to encourage unlawful conduct and to make a

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92 At 524–525.
93 *Green v Costello* [1961] NZLR 1010 (SC).
94 At 1011.
95 *Brown v Dunsmuir* [1994] 3 NZLR 485 (HC).
96 At 491–492.

> mockery of a local authority's right to control excavation work within its territory.

[110] Penlington J also adopted the statements of Kerr LJ in *Euro-Diam*, as set out above at [92].

[111] In *R v Collis* the Court of Appeal considered *ex turpi causa* in the circumstances of the forfeiture of illegally obtained money.[97] Following his conviction on drugs charges, Mr Collis applied to the District Court for an order that $103,000 in cash found during the police search of his property be returned to him. The District Court ordered that the money be returned to Mr Collis. On appeal, the Crown asked this Court to decline to return the money in reliance on the principle of *ex turpi causa*.

[112] Casey and Hardie Boys JJ adopted the summary of principles set out by Kerr LJ in *Euro-Diam*. While both Judges expressed reservations about the subjectiveness of a "conscience test", each appears to have concluded that the restrictions summarised by Kerr LJ provided a sufficient limitation to this test. Ultimately, the majority found that the appellant was entitled to the money in question because (i) his claim rested only on his ownership of the money, and (ii) refusing the request would extend police powers of confiscation beyond those contemplated by parliament.

[113] Wylie J, in the minority, favoured a stronger version of the conscience test. He held:[98]

> In my opinion the issue of public policy should be dominant. The test, elastic though it may be in its application, and being in every case a matter of degree, should in my view, be the extent of the affront to the public conscience should the Court lends its assistance to the wrongdoer.

[114] New Zealand authorities following *Collis* are of limited assistance.[99] To date there are no New Zealand cases which consider in detail the effect of the decisions of

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97 *R v Collis* [1990] 2 NZLR 287 (CA).

98 At 306.

99 See *ABB Ltd v New Zealand Insulators Ltd* (2007) 74 IPR 172 (HC) and *Bliss v Attorney-General* [2009] NZAR 672 (HC).

the House of Lords in *Thames Trains* and *Stone & Rolls*, or the Canadian Supreme Court in *Hall v Hebert*, or the High Court of Australia in *Miller v Miller*.

[115] While no single formulation for the defence of *ex turpi causa* has so far emerged (and we do not offer one) the different expressions of, and reasons for the defence are as follows:

(a) A reliance test was endorsed by at least two of the Law Lords in *Stone & Rolls v Moore Stephens*.

(b) The conscience approach was rejected by the House of Lords in *Tinsley v Milligan*.

(c) A causation approach was used by Lord Hoffmann in *Gray v Thames Trains*.

[116] In Commonwealth jurisdictions a consistency or coherence of the law approach was endorsed by the Supreme Court of Canada and the High Court of Australia. We see merit in Lord Hoffmann's observation that the basis for, and application of the defence of *ex turpi causa* will depend on the particular situations in which it is sought to be applied. One of those is in the context of property claims to which we now turn.

(b) *Ex turpi causa* and property claims

[117] Within the general rubric of the *ex turpi causa* defence there is an established line of authority to the effect that the courts will not on grounds of public policy or *ex turpi causa* refuse to enforce the rights of an owner of property where the claim rests solely on ownership.

[118] In *Gordon v Chief Commissioner of Metropolitan Police*, the police seized from Mr Gordon money obtained via unlawful betting activities.[100] The English

[100] *Gordon v Chief Commissioner of Metropolitan Police* [1910] 2 KB 1080 (CA).

Court of Appeal was unanimous in its view that Mr Gordon's claim in detinue was not defeated by the principle of *ex turpi causa*. Fletcher Moulton LJ held:[101]

> Here the plaintiff became possessed of the money under circumstances which did not prevent the property passing to him with the possession. He is, therefore, simply in the position of a man suing for money belonging to him which has been taken and is being retained by a person who has no right to it. There is no turpis causa in the matter. *The money is admittedly money of the plaintiff, and his action to obtain the repayment of it from the defendant rests on nothing but that fact*. He is not asking the Court to enforce any illegal contract or to grant relief dependent in any way on any illegal transaction on his part, but solely on the unjustifiable detention by the defendant of his money.
>
> ...
>
> I know of no principle of law, or decision, or even dictum, which renders money which has become the property of an individual liable to be taken and kept with impunity by any person who chances to get hold of it, merely because it has been acquired by some wrongful or prohibited act ... .
>
> (Emphasis added).

[119] A similar theme is seen in *Bowmakers Ltd v Barnet Instruments Ltd*.[102] That case concerned a claim for conversion of machine tools by their hirer in circumstances where the contracts for hire were tainted by illegality. Once again, the Court of Appeal declined to apply the principle of *ex turpi causa*. Du Parcq LJ found:[103]

> In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim.

[120] However, the Court recognised that there was at least one exception to this rule:[104]

> It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of cases in which the goods claimed are of such a kind that it is unlawful to

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101 At 1096–1097.
102 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 (CA).
103 At 71.
104 At 72.

> deal in them at all, as for example, obscene books. No doubt, there are others, but it is unnecessary, and would we think be unwise, to seek to name them all or to forecast the decisions which would be given in a variety of circumstances which may hereafter arise.

[121] Similarly, *Singh v Ali* concerned the illegal sale of a vehicle from the defendant, who was a permit holder, to the plaintiff, who was to use the vehicle without a permit.[105] When the plaintiff later brought proceedings against the defendant in detinue, the defendant was not entitled to rely on this illegality as a defence. That was because the claim was founded on the plaintiff's right to possession of the vehicle.

[122] This concept was also referred to in the decision of the Court of Appeal in *Euro-Diam*.[106] In the course of his judgment, Kerr LJ outlined a number of principles relating to the *ex turpi causa* defence, including the following:[107]

> … the *ex turpi causa* defence will also fail if the plaintiff's claim is for the delivery up of his goods, or for damages for their wrongful conversion, and if he is able to assert a proprietary or possessory title to them even if this is derived from an illegal contract: see e.g., *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. 65, *Belvoir Finance Co. Ltd. v. Stapleton* [1971] 1 Q.B. 210 and *Singh v. Ali* [1960] A.C. 167.

[123] The first New Zealand case to adopt this line of authority was *R v Collis*, outlined above at [111]. Casey and Hardie Boys JJ, in the majority, approved the statement of Kerr LJ set out above.[108] Casey J added the following qualification to the general principle:[109]

> The only qualification I would add is that the Court should not lend its aid to recover the claimant's goods if it appears they are wanted to further an illegal purpose – eg returning his jemmy to a burglar. In those circumstances it would be seen to be assisting him in a very direct way in his illegal conduct.

[124] The majority were agreed that the appellant was entitled to succeed in his claim. First, following the authorities outlined above, the fact that the money had been obtained illegally was not sufficient to invoke *ex turpi causa*. That was because

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105 *Singh v Ali* [1960] AC 167 (PC). See also *Malone v Metropolitan Police Commissioner* [1980] 1 QB 49 (CA) and *Alexander v Rayson* [1936] 1 KB 169 (CA).

106 *Euro-Diam*, above n 71.

107 At 36.

108 *R v Collis*, above n 97, at 293 per Casey J and 299 per Hardie Boys J.

109 At 293.

in order to recover the money from the police, the accused needed only to assert and rely on his ownership. Second, refusing the appellant's request would amount to confiscation or forfeiture beyond the scope of the statutory powers conferred on police.

[125] These authorities support the proposition that the courts will not on the basis of the *ex turpi causa* defence refuse to enforce the rights of any owner of property where the claim rests solely on ownership. Provided an individual is able to assert a proprietary or possessory title, it is not relevant that that title may be derived from an illegal contract. The cases cited have been concerned with the manner in which the property was originally acquired or derived. In *Gordon* and *Collis* the money was obtained via illegal activities (namely gambling and drugs), and in *Bowmakers* and *Singh* the property in question was obtained via an illegal contract. But, as we later find, the defence of *ex turpi causa* is not available to the appellants in the circumstances of this case either in relation to the acquisition of the facility or in respect of the alleged ongoing illegal activity at Waihopai.

Appellants' submissions

[126] The appellants submit that it was inappropriate for the Associate Judge to assess *ex turpi causa* prior to a full trial. First, it is said *ex turpi causa* is in a state of development. The decision in *R v Collis* is not a sufficient precedent because: it is distinguishable on its facts; academic and judicial commentary on *ex turpi causa* in New Zealand does not refer to that case; and there have been significant developments in this area in overseas jurisprudence. In situations where the law is developing it will often be necessary for a principle to be properly articulated following a full trial, in order to ensure justice between the parties. Thus, summary determination of the ambit of *ex turpi causa* risks stultifying the development of the law.

[127] Second, the appellants submit that, even if its application is settled as a matter of law, issues relating to the *ex turpi causa* defence are inappropriate for determination prior to a full trial because it requires an "intensive assessment" of complex issues of facts, mixed issues of fact and law, and public policy

considerations. This case raises complex factual issues including the extent of the respondent's involvement in wrongful acts, and whether a connection has arisen. The public policy considerations arising include the accountability of a public agency and its complicity in wrongful conduct. Moreover there are various factual aspects of the alleged breaches of regulatory requirements[110] that will need to be explored at a full trial.

[128] The appellants contend that the *ex turpi causa* defence will be reasonably arguable at trial. There is evidence before the Court that the GCSB has committed, or contributed to, or is otherwise complicit in a range of wrongful conduct. This conduct is relevant because each instance of wrongful conduct, taken together or separately, is sufficiently serious to trigger the application of *ex turpi causa*. The appellants accept that any wrongdoing must be connected to the claim but emphasise that here there is a relevant connection between the plaintiff's wrongful conduct and the plaintiff's civil claim. Further, at this stage strict causation is not required - rather, a very low threshold should be required to establish potential connections prior to a full trial.

Our evaluation

[129] We now apply the above principles to this case. First, as we have held at [125] above, the defence is not available to property claims where the alleged illegality relates to the acquisition or derivation of the property. This presents a coherent approach to this variety of the defence and is well supported by authority. It is also consistent with the original formulation of the defence in *Holman v Johnson*.[111]

[130] To the extent that the appellants' defence of *ex turpi causa* rests on the argument that the land and facilities at GCSB Waihopai were acquired illegally,[112] the defence cannot succeed. That is because the respondent's claim for trespass to

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110 Summarised at [16]–[19] above.

111 *Holman v Johnson* quoted at [91] above.

112 For example, the appellants have alleged that the acquisition of the land on which GCSB Waihopai sits was acquired in breach of the Public Works Act 1981, and that the GCSB Waihopai facilities were constructed in breach of the Building Act 1991 and the Building Act 2004.

the facilities on the land at Waihopai is based on the GCSB's ownership of the land, the radome and the satellite communications equipment.[113] The appellants have not, and cannot, dispute the fact of such ownership.[114]

[131] In this case, however, part of the alleged illegality goes beyond how the property in question was originally acquired and instead relates to the ongoing *use* of the land and the GCSB Waihopai facilities. For example, the appellants submit that the activities carried out at GSCB Waihopai were in breach of both New Zealand law (including the Resource Management Act), and international law. For this reason, it is necessary to consider the application of the broader principles of the *ex turpi causa* defence.

[132] We accept the appellants' submission that aspects of the New Zealand law on *ex turpi causa* are in a state of development. Commentaries on the law of *ex turpi causa* often begin by noting the uncertainty surrounding the limits of the doctrine and the unpredictability of its application,[115] and, as we have seen, overseas authorities have resulted in a number of different formulations. Nevertheless, we are satisfied that, regardless of which formulation is adopted, the appellants cannot succeed for the reasons that follow.

[133] If a "reliance" approach were adopted, the respondent will be entitled to succeed in its claim unless that claim can only be made in reliance on the illegal acts.[116] Here, the respondent's claim against the appellants is in trespass. This claim rests solely on the ownership of the Waihopai land and facilities which is not challenged by the appellants. In other words, the respondent does not need to rely on any aspect of the alleged illegality contended for by the appellants to make out its claim in trespass. Hence, under the reliance test, it will not be possible for appellants to rely successfully on the *ex turpi causa* defence.

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113 The pleading is set out at [12] above.

114 We note that such an approach is consistent with s 75(1) of the Land Transfer Act 1952, which provides for indefeasibility of title. Neither the alleged breaches of resource management and building legislation, nor any other form of regulatory illegality, are sufficient to defeat an indefeasible title.

115 See Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [21.7.01]; Law Commission (England and Wales) *The Illegality Defence*, above n 84 at [1.3]; Lord Sumption above at n 84 at 1; WVH Rogers, above n 83, at [25–18].

116 *Tinsley v Milligan*, above n 75.

[134] If a "conscience" test were adopted, it would be necessary to consider whether allowing the respondent to succeed in its claim for trespass will be an affront to the public conscience.[117] We are satisfied that allowing the respondent's claim to succeed would not amount to an affront to the public conscience. As already discussed, legal methods of protest were available to the appellants, and declining to allow recovery in this case would be akin to condoning vigilante behaviour. The principles discussed at [57]–[59] above are apposite.

[135] If the principles of causation as set out in *Thames Trains* are applied, the issue will be whether it is possible to say that, although the damage would not have happened without the actions of the appellants, it was caused by the acts of the respondent.[118] A distinction is drawn between cases where the illegal act was the effective cause of the claimant's loss, and cases where it merely provided the occasion for the defendant to commit an actionable wrong.[119] We consider that the present case falls firmly into the latter camp. It cannot be said that the allegedly illegal activities of the GCSB were the relevant cause of the damage to the radome. Instead, those activities merely provided the motive for the actions the appellants chose to take, in order to make and publicise their protest. The real and effective cause of the loss was the appellants' own actions in trespassing onto the respondent's land and inflicting the damage to the GCSB's facilities.

[136] The analogy of "returning [a] jemmy to a burglar"[120] relied upon by the appellants has no application in the context of this case. That is because the radome has already been repaired, and the GCSB is now simply seeking to recover the cost of such repairs to its property. Furthermore, we have assumed for the purposes of this appeal that the appellants' allegations of unlawful activity are correct: the assumptions made are just that. If the appellants (or anyone else) wish to restrain the respondents from future activities at Waihopai, it will be necessary for the alleged illegality to be established through the courts and for appropriate relief to be sought in respect of any such illegal activity, if proved.

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117 *Euro-Diam*, above n 71, at 35.
118 *Thames Trains*, above n 77, at [54].
119 See Lord Sumption, above n 84, at 13.
120 See above at [123]. The limited exception mentioned in *Bowmakers* for obscene items also has no application on the facts of this case (see [120] above).

[137] The conclusion reached by the Associate Judge is entirely consistent with the authorities extending as far back as Lord Mansfield's formulation of the principle in 1775. Simply put, the respondent's claim to recover the cost of repair to the GCSB Waihopai facility is not founded upon any immoral or illegal act. Rather, it is founded upon the respondent's ownership of the facility and the damage which the appellants unlawfully inflicted on it by their admitted trespass. The property rights limitation to the defence of *ex turpi causa* has long been a feature of the common law, dating back to at least 1910. That limitation has consistently been applied where the plaintiff's claim is based on ownership rights. If the appellants wish to do so, they may pursue separate proceedings against the respondent in respect of the allegedly illegal activities carried out at GCSB Waihopai but they cannot rely on such alleged illegality as a defence to the respondent's claim in trespass for damages.[121]

Conclusions

[138] We are conscious of the need for caution in summary judgment cases to ensure that possible defences to a claim are not cut off prematurely where the law is in an uncertain state or where clarifying issues of disputed fact would benefit from further ventilation at trial. But we are satisfied here, for the reasons given, that the appellants do not have an arguable defence and that there was no impediment to the entry of summary judgment against them. That is because there is strong support in the authorities for the Associate Judge's conclusion that the defence of *ex turpi causa* is not available in the circumstances of this case. Despite the different policy reasons that have been put forward for the defence, it cannot succeed on the facts of this case whatever rationale is adopted.

[139] Moreover, the High Court's assumption that the facts relied upon by the appellants are correct means that the approach taken in the High Court (and by us on appeal) is the most favourable from the appellants' perspective. There is therefore no issue of disputed fact for present purposes and there could be no utility in having a trial to resolve any such issue.

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[121] We note that due to our conclusions on this point it is not necessary to go on to consider the respondent's submission that the challenge to executive actions in the context of a private law claim for trespass constitutes a collateral challenge.

[140] We are satisfied that the Associate Judge was right to conclude that the respondent had established there was no arguable defence to the claim against the appellants.

[141] The third ground of appeal must therefore fail.

Result

[142] All grounds of appeal have failed. The appeal must be dismissed.

[143] The appellants must pay the respondent one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

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