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JAMES JOSEPH KAPA

v

THE QUEEN

Hearing: 7 August 2012

Court: Elias CJ
McGrath J
William Young J
Chambers J
Glazebrook J

Appearances: M A Edgar for the Appellant
A Markham and P D Marshal for the Respondent

CRIMINAL APPEAL

MR EDGAR:

Yes, may it please the Court counsel's name is Edgar and I appear on behalf of the appellant.

ELIAS CJ:

Thank you Mr Edgar.

MS MARKHAM:

May it please the Court, Ms Markham together with Mr Marshal for the respondent.

ELIAS CJ:

Thank you Ms Markham, Mr Marshal. Mr Kapa, I understand that you can only see three of us, there are in fact five Judges sitting on the panel but the courtroom is only set up for leave hearings, for which we only sit three. So I'm sorry about that but further off to my, to my right – to your left I guess, is Chambers and Glazebrook JJ is to my left. Yes Mr Edgar?

MR EDGAR:

May it please your Honours. Tipping and Blanchard JJ.

ELIAS CJ:

I think Madam Registrar we might – can it be muted at the other end – they can do it themselves. Mr Kapa, you might like to mute at your end, then you can talk if you want to, thank you.

MR KAPA:

Okay.

MR EDGAR:

Yes Ma'am. This was a case where this honourable Court determined that there was a potential fundamental question of a significant importance in the administration of the criminal law and in the interests of justice for this Court to hear the appeal. It, broadly speaking, relates to an issue of statutory interpretation, in particular s 32 of the Sentencing Act 2002. And the approved ground for this Court to determine is whether that sentence of reparation indeed, in this case, complied with the requirements of that section.

The appellant's position is, broadly speaking, that the Courts at first instance and then the Court of Appeal who were later seized of the matter did not have the lawful power or jurisdiction in law under s 32 to impose an order for reparation in the particular circumstances of the case in relation to the reward payment and has been pleaded alternatively, s 32 cannot be complied with for the following reasons so it is unable to be invoked. It turns on the wording of the section as to whether or not the reward payment was caused through or by means of an offence of which the

offender was convicted. In that case it was burglary of the Waiouru RSA Clubrooms in Auckland and caused a person to suffer loss.

What the appellant maintains here is that the loss was from the taking of the medals and a third party put up or two, in fact, two parties put up sums of money to try and retrieve the medals, they being public benefactors and not from the public purse and it was a voluntary donation which eventually led to the medals being returned.

So the direct loss, the appellant maintains, was the theft of the medals which were in fact returned and so –

CHAMBERS J:

And the damage to the museum.

MR EDGAR:

Yes, yes Sir and the closure of the museum and the expenses caused which significantly were not reparation orders that the lower Courts were invited to entertain by way of orders. It was simply focused on the reward money and nothing else.

CHAMBERS J:

They were, the loss to the museum was in that reparation schedule though.

MR EDGAR:

Yes, yes it was.

CHAMBERS J:

But do you say the Crown did not seek reparation in respect of that?

MR EDGAR:

I understand that the lower Court was not invited by the Crown to seek reparation, no. It was referred to in the summary of facts Sir, as I understand it but the matter was not continued any further –

McGRATH J:

That's before Judge Hubble?

MR EDGAR:

Yes Sir. So the direct loss in terms of s 31(1)(a) of the Sentencing Act 2002 was not engaged in this particular case. Reading down the section, emotional harm similarly does not apply in respect of s 32(1)(b). And then perhaps the one that perhaps could be considered the most relevant, the issue of indirect loss in terms of s 32(1)(c). Sorry I'll just find the section.

ELIAS CJ:

Sorry, what was the indirect loss Mr Edgar?

MR EDGAR:

The – sorry I should say the consequential loss as s 32(1)(c) talks about loss of or damage consequential on any loss of or damage to property.

WILLIAM YOUNG J:

Well those words can be construed as encompassing loss being reward money paid as a result of theft or loss of property.

MR EDGAR:

Well I think I'm bound, Sir, with respect, to concede that that could be considered consequential loss but the argument in response to that is it is somewhat remote. There could be an issue of foreseeability if one extrapolates tortious principles.

ELIAS CJ:

Why would the Court go there as a matter of statutory interpretation. If you say that it is consequential loss within the meaning of the statute, why doesn't that establish the conditions for jurisdiction to make the reparation order?

MR EDGAR:

Well, your Honour because it's consequent, because it could be considered consequential loss, in some circumstances reward monies may be payable but there were two facts in this case which are somewhat specific to this case. One was of course the issue of the third party, it wasn't – it didn't come from the police directly. It came from a benefactor and that was something that the medal thieves in taking the medals could never have foreseen –

ELIAS CJ:

Well then but the, the statute refers to any person –

MR EDGAR:

Yes it does.

ELIAS CJ:

– how would you, are you seeking to confine that to victims?

MR EDGAR:

Well, your Honour it could be suggested that the only victims here directly, were the two men who put the money up and so whether the statute envisaged persons encompassing the two men from the United Kingdom that put the money up –

WILLIAM YOUNG J:

Well are you just – the Chief Justice’s question isn’t the one you’ve answered –

MR EDGAR:

Sorry.

WILLIAM YOUNG J:

– are you suggesting that “person” must mean victim and no one else?

MR EDGAR:

I have to concede that with regards to *R v Ebdell* [2009] NZCA 536 that person is construed more widely than simply victims. But I do submit that in facts of this case, it’s somewhat more remote when the person is a person from outside New Zealand who has no immediate connection with New Zealand.

WILLIAM YOUNG J:

What’s that got to do with it?

MR EDGAR:

Well I would argue, Sir –

WILLIAM YOUNG J:

When the insurance companies may be based outside New Zealand but surely they can obtain reparation?

MR EDGAR:

Well of course they have rights of subrogation under the contracts, Sir and I would argue that that could be a material difference.

McGRATH J:

You're really challenging are you Mr Edgar, whether there is the element of causation that s 32(1) requires?

MR EDGAR:

Yes, Sir, I'm saying that –

CHAMBERS J:

Well that's a much better way of putting it than trying to get into notions of foreseeability and the like. That's your best point.

MR EDGAR:

Yes Sir. Yes. For m – if I confine the argument more to a causation argument then we have the issue of the, the third party putting up the money.

WILLIAM YOUNG J:

Does it have to be a sole causative event? When here, as a matter of logic, two things caused the loss of the money: A, the burglary, and B, the decision of the two benefactors to put up money. Each were equally contributing to the payment over, weren't they?

MR EDGAR:

Yes, Sir. But then of course we have the, the next development, which is perhaps significant in the facts of this case, which is the decision by the police unilaterally to contract with Mr Comeskey who is seeking to act as agent on behalf of the, the burglars.

WILLIAM YOUNG J:

What does that matter? I mean, that's just mechanics, isn't it? You've got a reward being offered effectively by the police and Lord Ashcroft and Mr Sturgess on one hand, and you've got the people who've got the stolen property saying, "We'll hand it over if we get the money," and the money's paid over. I mean, what's the – why

does the minutiae of what passed between Lord Ashcroft and Mr Sturgess a police matter? Or the detail of how the money was handed over?

MR EDGAR:

I suppose, Sir, with respect, it comes back to the causation argument: whether in fact there is a loss. Because the money was put up –

WILLIAM YOUNG J:

Well there was a loss.

MR EDGAR:

There was a loss, Sir.

WILLIAM YOUNG J:

Someone's \$100,000 out of – two people are \$100,000 out of pocket.

MR EDGAR:

Yes.

WILLIAM YOUNG J:

Which they wouldn't have been if the burglary hadn't occurred.

MR EDGAR:

But they put the money up without any prompting from anyone. It wasn't a ransom or anything of that nature. There was nothing done by the burglars or their agent to precipitate this money being received.

GLAZEBROOK J:

Is that significant? Because if the burglary hadn't happened, then there would've been no need to try and recover the medals. The medals wouldn't have been recovered "but for" the money being paid over. So don't you have the causation linkage there?

MR EDGAR:

It could possibly be argued that way Ma'am, yes.

WILLIAM YOUNG J:

And if the – if they hadn't been recovered the loss would've been something like \$5 million.

MR EDGAR:

Yes. Well, ultimately it comes down to how widely this Court is prepared to widen the causation argument as to whether or not this particular case falls within its parameters.

GLAZEBROOK J:

Well, what you might want to discuss, because this is probably the difficult point of distinction, is the distinction between police investigations, because of course without police investigations money wouldn't be recovered or the medals wouldn't be recovered, so say there'd merely been a police investigation to find the medals as against the reward put up, and the distinction between those. Because there has been case law which I think is relatively persuasive to say that the reparation provisions are not decided to reimburse the state for what is its function of actually finding criminals and bringing criminals to justice. So do you have anything to say on that in particular? I.e. is there, is it a distinction without a difference to say it's money put up to recover medals and therefore consequential, as against police investigation which might've led to, in a different situation, to the recovery of medals and therefore a claim for reparation in the case of just ordinary criminal investigation costs?

MR EDGAR:

Well, Ma'am, it could be argued that the – this was – was it an aid to the investigation? It was, it possibly – well, primarily the money was extended by the two persons in the United Kingdom to obtain the medals, not necessarily to catch the thieves. It could be seen to be part of the investigation, and if that was the case then you could argue that the, the state then can't expect to receive that money back through the vehicle of a reparation order.

CHAMBERS J:

I don't quite see your hesitation in putting that submission. That has to be your best point.

MR EDGAR:

Yes.

CHAMBERS J:

It's the Commissioner who actually paid the reward. He chose to go about it this particular way, whereas Glazebrook J says he could've adopted other investigatory, investigative means to recover the medals which may or may not have been successful but which would also have cost the police money. Now, in one sense those other costs are also consequential upon the theft. Would they be recoverable? And I think the answer is reasonably clear that they wouldn't have been. So does it make a difference that it was a reward as opposed to other investigative means?

MR EDGAR:

Well, I would obviously seek to argue, Sir, that the reward was a tool of investigation. It was certainly precipitated by the unilateral action of the two gentlemen who put the money, and when the police became aware of that fact they then decided to adopt that under the nexus of a reward, but in effect really also you could argue it was a tool of the investigation to try and also catch the actual thieves themselves and of course to reap the, the proceeds of the burglary, which of course were the medals. So you could argue that, Sir.

CHAMBERS J:

There's one aspect that neither side has really focused on but which may provide some assistance to the correct interpretation of subs (1), and that is s 32(3), which says that, "In determining whether a sentence of reparation is appropriate ... for any consequential loss ... the court must take into account whether there is or may be, under the provisions of any enactment or rule of law, a right available to the person who suffered the loss or damage to bring proceedings ... in relation to that loss". Now in this case, could Lord Ashcroft and Mr Sturgess have brought a claim against Mr Kapa for the return of their money, and if so, what would the cause of action have been?

WILLIAM YOUNG J:

Well the answer is they might, but it would be very hard to know what the outcome would be. They could say that they paid the money under duress of goods, that the burglars have stolen goods that they wouldn't have back unless they were paid the money; money was recovered along that basis as money had and received. But it would be debatable.

MR EDGAR:

Yes, I'm not sure what I can add to that answer, Sir, in terms of what civil redress may've been available. Certainly there was a loss, in terms of the money that was put up, but one could argue equally that they put that money up to get the medals back. They weren't, they didn't have a gun to their head, so to speak. There was nothing that –

CHAMBERS J:

Well, all of that's beside the point. The true question is whether what William Young J's put to you is correct, and it may very well be, because if there is a cause of action, then it may well be that section, subs (1) should be read as encompassing that, because the whole point of this section is to enable those who have suffered loss to get it back easily without having to sue in the civil courts.

MR EDGAR:

Yes Sir.

CHAMBERS J:

Do you – is this a matter you've researched, or do you accept what the proposition William Young J has put to you?

MR EDGAR:

Well, Sir, I have to adopt his Honour's submission to the extent that there may have been a cause of action if it could be argued that there was duress in terms of the, the, the fact that the medals had been taken, that they were icons. These gentlemen obviously respected those, that history, and –

McGRATH J:

I thought your argument, Mr Edgar, was that this was very much a voluntary payment?

MR EDGAR:

Well, yes Sir. Yes.

McGRATH J:

I think you may be better to stand on that much.

MR EDGAR:

Yes Sir.

WILLIAM YOUNG J:

But how could it be voluntary if they weren't going to hand the money back otherwise, hand the medals back otherwise?

MR EDGAR:

Well, that seems to be a matter of dispute, Sir. It was certainly indicated earlier that if the medals weren't going to be handed back, but I'm not sure whether that's something that Mr Kapa, the appellant, that was his position.

WILLIAM YOUNG J:

Well, what's the point of stealing them if you're just going to give them back?

MR EDGAR:

The purpose of stealing them apparently, on my instructions, was to broker an arrangement on other outstanding charges.

ELIAS CJ:

Well, then the purpose was extortion.

MR EDGAR:

Yes. That would have to be the case.

ELIAS CJ:

Well, then how to you maintain – if that's right, how do you maintain your distinction between the ransom cases, because as I understand it you say that in those cases the crime, say the kidnapping cases were to extort money?

MR EDGAR:

Well the only material difference would be then that the money was put up unilaterally and without, without any cause and effect, so to speak in terms of Mr Kapa other than the fact that he committed an offence in New Zealand.

ELIAS CJ:

You mean that the people who supplied the money were busy-bodies or something like that, they weren't themselves –

MR EDGAR:

Intricately involved in the outcome but peripherally so.

ELIAS CJ:

So if parents, for example, pay a ransom to get a child back, that is a payment for which reparation can be obtained?

MR EDGAR:

That's more direct connections Ma'am, yes.

GLAZEBROOK J:

Well what say someone who feels terribly sorry for the parents just as the – somebody recently brought some – paid to bring somebody back from a hospital voluntarily because he felt sorry for the parents, one can imagine in a ransom situation you could have something very similar couldn't you? So you're saying that third party busy-body couldn't recover because they were less –

MR EDGAR:

Or be –

GLAZEBROOK J:

– or are you, is the distinction you're making that there wasn't a specific, we'll return these as money is paid on behalf of your client as against on behalf of his co-offender?

MR EDGAR:

I would submit, Ma'am, that the relationship between the parents and a child who'd been abducted and persons who felt some sympathy for that plight, there is a difference in terms of remoteness to the Act.

GLAZEBROOK J:

So the parents – you – they would get the money back under reparation but somebody who felt sorry for the parents, who weren't able to pay the money and pay the money on behalf would not?

MR EDGAR:

Well I would argue Ma'am that in the latter case they'd been more remote, that there's a, there's less of a causal connection.

CHAMBERS J:

Well that's a hopeless distinction, with respect. You've either got, well – no, you carry on.

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ELIAS CJ:

But your argument is that this is subsequent and not connect, not directly connected with the offence which was burglary, is that right?

MR EDGAR:

Yes Ma'am.

ELIAS CJ:

Now we've read your submissions Mr Edgar, is there anything that you particularly want to emphasise in those?

MR EDGAR:

Just returning to the issue of the Medals Return Agreement Ma'am under point seven of my précis of argument, I made the note that the purpose of the agreement was for the return of the medals, that there was no fraud in the sense that the police knew who they were dealing with. And of course it was reduced to writing and largely kept from the public, possibly for reasons of policy.

WILLIAM YOUNG J:

What do you, did – what do you mean by, "They knew who they were dealing with"?

MR EDGAR:

It's clear from the lower Court taking of evidence Sir, that the Commissioner had a very good idea that Mr Comeskey was in fact acting for the burglars and not persons who were somewhat more removed from that role.

WILLIAM YOUNG J:

But did he know who they were, their identities?

MR EDGAR:

No, no the identity was not known.

WILLIAM YOUNG J:

Right.

MR EDGAR:

But that they were the burglars.

ELIAS CJ:

But don't you just have to keep hammering the words at s 32(1), because your point is that this loss did not happen by means or through or by means of the offence of burglary for which Mr Kapa was convicted?

MR EDGAR:

Yes, that's the central theme Ma'am but of course, as I read the development of the case law and having regard to the liberal statutory interpretation issue and the later cases that give effect to that, it's the consequential loss issues that seem to have become more important. It's widened the net and one can well see that Courts want to put victims in a wide context, the word victim being used, back to its original position and it all depends ultimately, on how widely the Court wants to adopt the issue of statutory interpretation with regard to consequential loss over and above the strict wording of subs (1).

McGRATH J:

Well, perhaps how widely we think Parliament wanted to express itself.

MR EDGAR:

Yes, Sir.

ELIAS CJ:

Or did express itself.

MR EDGAR:

It's certainly the, the inclusion of consequential loss in the Sentencing Act which wasn't part of its predecessors, maybe a interpretive guide to this Court as to looking further afield than a strict –

McGRATH J:

Well the logical type of consequential loss is presumably, is regularly covered, is where a person is injured and loses wages as a result. Now it, the question really is whether Parliament, how much further than that Parliament intended to go, in particular in the sort of situation where a reward is financed by a completely independent party.

MR EDGAR:

Yes.

McGRATH J:

That's the, you know the real issue isn't it?

MR EDGAR:

Yes, Sir.

CHAMBERS J:

Perhaps if it's all right with my colleagues and suitable to you Mr Edgar –

MR EDGAR:

Sir.

CHAMBERS J:

– I could ask you on a downstream question.

MR EDGAR:

Yes Sir.

CHAMBERS J:

And there a number of downstream questions in this case but they're mainly for Ms Markham, but there's one in particular I'd like your submission on.

MR EDGAR:

Yes Sir.

CHAMBERS J:

Under s 12, “The sentencing Judge must make an order of reparation unless the Court is satisfied that the sentence would result in undue hardship.” Does that mean it is for the offender to put forward evidence as to undue hardship if he or she wants to rely on that, that’s my first question. And the second follows from it. If there is a dispute on that, which is in effect a mitigating fact on sentencing, is it possible to resolve such a dispute under s 24 of the Sentencing Act? So those are two questions on which I’d like your help.

MR EDGAR:

Sir, in relation to the first, because there is a statutory presumption under s 12 that reparation be ordered unless otherwise to be the case, it is incumbent on a person such as Mr Kapa to, to indicate that they are not able to satisfy the terms of the order. In this case Mr Kapa, as I understand it in the memorandum to the Court of Appeal, did put forward his position, which essentially was that he had no direct involvement with the handover and receipt of the money, that this was done by a third party, and that he had no involvement in terms of any control over that and never received any of the money. I know that that was something that the Court looked at with a very jaundiced eye in the Court of Appeal, but certainly, as far as a general proposition is concerned, it would be incumbent on a person in Mr Kapa’s position to, to move that statutory presumption and to provide evidence of some sort as to why an order should not be made. In Mr Kapa’s case he has done as much, as I understand it, that he can do to put that position before the Court.

WILLIAM YOUNG J:

What do you mean by that? He could give a full account, couldn't he? He could give it on oath.

MR EDGAR:

Well it, it could be argued that he – yes. He could give an account on oath.

WILLIAM YOUNG J:

Name names.

MR EDGAR:

Yes.

WILLIAM YOUNG J:

Go into details.

MR EDGAR:

Yes.

WILLIAM YOUNG J:

But is he likely to want to do that?

MR EDGAR:

On the present history of the matter, Sir, I have no particular instructions, but I don't believe that there will be any utility in that.

CHAMBERS J:

Well he had to do more than that. If he wanted to say, "I can't pay it," as William Young J has said, not only would he have to explain everything he knew about his, the \$100,000 dedicated towards him, but also what his other assets, if any, were. I mean, he did nothing of that.

MR EDGAR:

Well of course the Court didn't go down the, the property statutory framework, didn't respect the proper statutory framework.

CHAMBERS J:

That may be.

MR EDGAR:

Yes.

CHAMBERS J:

That's another question, but we still have the basic proposition you've accepted that he had the onus of showing that he should not have to pay reparation. We're assuming for the moment that the money was payable to those that provided the reward.

MR EDGAR:

Yes Sir. I think you your Honour had a second point.

CHAMBERS J:

Well it was s 24. Do you consider that could be utilised to resolve disputes that there might be?

MR EDGAR:

Well certainly –

CHAMBERS J:

It may be if you haven't thought about it there's not much help you can give us on the topic ahead, but you may have thought about that.

MR EDGAR:

Yes. Well, there could have been a, could have been an argument in, in terms of a disputed facts hearing there could have been embarked upon by the Judge at first instance, Sir. But it would appear that Judge Hubble's mind was largely galvanised and governed by the fact that he had a very firm belief that Mr Kapa knew more than what he was saying, which was really –

ELIAS CJ:

Well that's, that's a –

WILLIAM YOUNG J:

Well, isn't it obvious that he knows more than he was saying?

ELIAS CJ:

Yes. And indeed, subs (1) of s 24 requires the Judge to accept as proved all facts expressed or implied essential to a plea of guilty, so there' the, in the plea of guilty there is the acceptance of control over the medals at the time they were stolen. So the trail stops there.

MR EDGAR:

Yes it does.

ELIAS CJ:

Unless he's forthcoming.

MR EDGAR:

Yes. Yes, I don't believe I can be of any further assistance to this Court. Unless there's any specific questions that the members have?

ELIAS CJ:

No, thank you Mr Edgar.

MR EDGAR:

Thank you Ma'am, members.

ELIAS CJ:

Yes, Ms Markham.

MS MARKHAM:

May it please the Court, the issue in this appeal is, is compliance in, in a broader sense with the procedural provisions governing reparation under Subpart 2 of the Sentencing Act, and it is common ground in, in the respondent's submission that the reparation has to be seen as a key provision in the Sentencing Act, and that's reflected in the imperative terms of s 12 and the fact that reparation is now an object of sentencing in itself. And it is well-established that these reparation provisions are to be given a broad and non-technical interpretation consistent with the legislative objective of enhancing the ability of Courts to compensate for losses.

On the question of s 32 –

CHAMBERS J:

Would you accept though, Ms Markham, that that the structure of the section appears to be not to widen rights that people would have under the civil law? For instance, you can't recover money which would be compensated under the accident compensation scheme.

MS MARKHAM:

Well the, the interface between the Sentencing Act and the accident compensation scheme is obviously expressly provided for so that's in a, in a separate category, in

my submission. But in general terms the respondent would submit that there is no prerequisite that the victim or person claiming reparation has rights of, of redress under the, the civil law before –

CHAMBERS J:

What's the point of subs (3) then?

MS MARKHAM:

Well, that is exclusively on the question of consequential loss of course, but the section doesn't preclude an order of reparation where the person has rights of redress in the civil Courts. The, the interface –

WILLIAM YOUNG J:

Nor does it exclude reparation where there isn't a right of restitution in the civil Courts.

MS MARKHAM:

Indeed. And –

GLAZEBROOK J:

So what's the point of the section, I suppose is the question that's –

MS MARKHAM:

Well – yes.

ELIAS CJ:

Well, it's where – what is more convenient in a particular case, presumably. In some cases it may be more convenient for recovery to be obtained through the civil processes; in others, and one would have thought this case was a prime example, it won't.

MS MARKHAM:

Yes. Exactly, Ma'am. And I think that point was made by this Court in the *Davies (Peter) v Police* [2009] NZSC 47, [2009] 3 NZLR 189 decision, dealing with the ACC question, and that's at tab 1 of the bundle of authorities.

If I can briefly refer your Honours to the relevant passage, it's paragraph 10 of the judgment.

ELIAS CJ:

Sorry, which bundle?

MS MARKHAM:

Sorry, it's the bundle of authorities provided by my learned friend, tab 1.

Yes, so if I can take your Honours to paragraph 10 of the reasons of your Honour the Chief Justice and Blanchard and Anderson JJ, the Court, although it's dealing with the question of ACC certainly makes the point that the Court, having considered the potential availability of civil proceedings, may consider that compensation is not appropriately dealt with through the summary criminal procedure for ordering reparation.

ELIAS CJ:

Is this judgment not reported?

MS MARKHAM:

I can't answer that, Ma'am. It's – I'm assuming –

ELIAS CJ:

Well, I think it will be reported –

UNKNOWN MALE SPEAKER:

It certainly is.

ELIAS CJ:

– and we should really have the reported version. But anyway, sorry.

MS MARKHAM:

Yes, I'm sorry. This... And it's really sort of near the end of that paragraph where it says...

McGRATH J:

Just, what paragraph are you at?

MS MARKHAM:

Ten. And it's really sort of, near the end of that paragraph where it says, "Under section 32(3), the Court must take into account other such remedies available to the victim where there is a substantial dispute as to causation or as to measure of loss, the Court may take the view that compensation is not appropriately dealt with through the summary criminal procedure." So it's recognising that there may be parallel routes through which the person can be compensated and it's really a question of the Court balancing up which is the most practical in the circumstances, given that the Court in a criminal context certainly doesn't want to be detained with lengthy arguments about causation and quantum and so on.

So in terms of the argument –

ELIAS CJ:

Sorry, did the minority differ from that, no?

MS MARKHAM:

No Ma'am I –

ELIAS CJ:

That's why it would have been useful to have had the reported version; I could've found it from the head note.

MS MARKHAM:

So if I can move on then to the argument about s 32.

GLAZEBROOK J:

Paragraph 69 I think is where they make the point and they make the point about our purposes avoiding double recovery, which is a different purpose or a slightly purpose but the point is that it's not to preclude payment if there isn't a civil remedy, it's probably implicit, it's not mentioned by other than the majority of the minority, on a quick reading I have to say.

MS MARKHAM:

Yes, so on the issue of s 32, the respondent's submission is that the reward payment qualified either as direct loss or perhaps more properly, as consequential loss. It was

loss that arose only as a result of the theft, obviously on a sort of “but for” basis. It was foreseeable and, indeed, the prospect of a reward was the very reason that these iconic medals were targeted by the thieves –

WILLIAM YOUNG J:

What do you mean by that? I thought they were saying they stole them, that they medals – to get some leverage in relation to criminal charges?

MS MARKHAM:

I think that was certainly probably the primary purpose of the theft, but there was also the prospect of financial reward and that was, indeed, seized upon when Mr Comeskey was instructed to negotiate with the police. And if I can take your Honour to the background ... Prior to the Medals Agreement, there was of course that episode with the Hudson set of medals where Mr Crichton who was, I think, in a cell adjacent to that of Mr Van Wakeren in prison, managed to secure the Hudson Set of the medals that were stolen in exchange for payment of a valuable motor vehicle it's understood and so that payment went to the thieves and Mr Crichton then used the Hudson Medals to negotiate favourable terms in relation to the charges that he was facing. So it's a bit of both in answer to your Honour's question. The two weren't, certainly weren't mutually exclusive. There was the potential to use them as bargaining chips in the criminal process but there was also the potential for substantial financial reward and in a case such as this where iconic objects that are of national significance are targeted, it certainly is foreseeable that there would be reward payments offered.

McGRATH J:

I suppose, Ms Markham, what worries me a little is that merely because the reward is a result of a theft, it doesn't necessarily mean that the theft caused a payment to be made by the donors. That there seems to me that there is an element of breaking of the chain of causation in all of this, that comes from them, as outsiders, not persons directly involved in any way in the items concerned, through their own private generosity come in and offer to make this payment in the hope it will get the money back, isn't there – isn't that really a new intervening factor if you want to use it – I don't want to get into tort and that, if we could either accept that we've got to interpret legislation and I don't disagree with your opening remarks in that but it does – I do wonder whether there is, whether the word “caused” is really satisfied here.

MS MARKHAM:

Well the respondent would certainly accept that a crude “but for” test is not apposite in that you do need to find a substantial connection between the loss and that of the offence. My submission would be that that connection is satisfied and that the fact that we have a “voluntary” payment by third parties doesn’t detract from that. It is in reality no different to a ransom situation. The police, while they may not have known as a fact that they were dealing with the burglars, certainly had a very strong suspicion that that was the case. They wanted to secure the return of the medals; they were essentially over a barrel. [Part of transcript redacted.] So one can characterise as a voluntary payment in a broad sense but in reality it was a ransom situation and I know that my friend draws a distinction between the classic kidnapping ransom situation and says, well look the reward payment was offered first and this was simply a case of the offenders making the most of that offer. But one can readily envisage a kidnapping situation where something similar occurs. A child goes missing and the desperate parents and family put up a reward prior to any ransom being offered by the offenders so –

[Part of transcript redacted.]

MR KAPA:

It included the return of the medals.

WILLIAM YOUNG J:

Just –

CHAMBERS J:

– if we look at the actual reward is in the – at the back of the last page we have the reward.

McGRATH J:

Tab 5 – tab B is the –

MS MARKHAM:

Yes I’m looking at tab B.

CHAMBERS J:

Well it’s also at tab 13. The actual reward that the Commissioner announced.

WILLIAM YOUNG J:

No, no, yes I see.

GLAZEBROOK J:

And/or the recovery of the stolen medals.

CHAMBERS J:

The advertisement of it. The offers of the –

McGRATH J:

It's in two places, yes.

WILLIAM YOUNG J:

Sorry where's the second one?

GLAZEBROOK J:

In B.

WILLIAM YOUNG J:

I've got B.

ELIAS CJ:

But where's the second one?

CHAMBERS J:

Back page of Mr Edgar's index.

[Part of transcript redacted.]

McGRATH J:

I see sorry. What the reward is payable for seems to be expressed in a sort of separate way doesn't it than –

MS MARKHAM:

Yes, can I just add Sir that there is –

WILLIAM YOUNG J:

Sorry, I've actually lost this. [Part of transcript redacted.]

MS MARKHAM:

Yes Sir.

[Part of transcript redacted.]

McGRATH J:

It's really for any of three things –

WILLIAM YOUNG J:

Yes.

McGRATH J:

That's the way it's expressed.

CHAMBERS J:

Now Ms Markham, following on from McGrath J's question, the reward here is offered by the Commissioner and one would have thought it was irrelevant where the Commissioner got the money from, whether he got it from individuals or from ordinary police funds. Does your argument mean that say it had come from ordinary police funds and exactly the same agreement were made between the Commissioner and Mr Comeskey, could the Commissioner have got this money back under s 32, the – his own money as it were, he put up?

MS MARKHAM:

In my submission yes, Sir.

CHAMBERS J:

And how does that differ then from other money the Commissioner expended by way of investigative techniques?

MS MARKHAM:

Well, I, I think it comes back, Sir, to the, the approach of the Court of Appeal in *R v Donaldson* [2006] BCL 1008, which indicated that the terms of s 32 are, on their face,

extremely broad: any loss or damage caused to any person through or by means of the offence, and that of necessity there has to be a line drawn somewhere, and that notions of causation and remoteness and foreseeability and so forth may provide useful tools in determining causation. So my submission would be that, that certainly I'm not suggesting, for example, that the police could recover the cost of a surveillance operation that, that resulted in the apprehension of these offenders, or the cost of, of operational equipment or, or any of, of, anything of that nature. I think there that questions of remoteness would certainly come into play.

ELIAS CJ:

Well, that – they're not – I'm not sure that it's very helpful to talk in terms of remoteness. It's just that they don't fit the language of the statute. They're not accurately described as loss or damage by or through the offence. And, indeed, they're directed at detection of the offence, whereas the focus here is the recovery of property taken.

MS MARKHAM:

Yes. Well I, I would accept that, Ma'am, that applying the natural and ordinary language used in the section, that it isn't apt to cover operational expenditure on, on the part of the police in, in the broader sense, but the distinction here is that this was a lump sum expended for the objective of obtaining the medals, putting the victims back in the position they were in before the offence was committed, and any investigative purpose was very much incidental. But the police had two objectives in this operation: one was the recovery of the medals and, and two was the conviction of, of those responsible. And in fact, although the reward negotiation and so forth was reasonably fruitful in terms of evidence, it wasn't critical in the prosecution case against the, the two accused.

CHAMBERS J:

Is it essential or even relevant to your argument that the \$100,000 went to Mr Kapa and not to some third party?

MS MARKHAM:

Well, in my submission it makes the causal connection stronger in that it was the very offenders who were negotiating for the reward payment if that's what your Honour is, is getting at.

WILLIAM YOUNG J:

It's relevant on the other sort of downstream issue as to whether the order ought to be made in terms of whether there were funds available to meet it.

MS MARKHAM:

Yes, that's, that's the secondary issue.

CHAMBERS J:

No, my point is, assume Mr Kapa did have \$100,000 from completely other means. He, on your argument he'd still be up for repaying the reward, even though he himself hadn't got it?

MS MARKHAM:

That would certainly be consistent with the approach of authorities in, in this area, yes. I mean, the Courts have accepted that receivers are liable for the full loss, even where their contribution has been secondary to that thief, and where there are co-offenders, each is liable for the full amount regardless of, of the particular contributions of the two, if, if your Honour follows that. The –

CHAMBERS J:

Well, you see, why this may have some bearing is because I was throwing out this proposition earlier about the relevance of subs (3). Now, on that argument, would William Young J's suggestion of an action for money had and received, does that work against Mr Kapa if he himself hadn't received the money but it had gone to a third party who provided information which led to their conviction?

MS MARKHAM:

Can I just preface my response by referring your Honour to the, the US authorities which the Crown has included in its bundle, which certainly have taken the position that where a reward payment is made to an innocent third party who's assisted in the recovery of stolen goods, then that is subject to the reparation regime, being something that was reasonably foreseeable by the offenders.

To deal with your Honour's question more specifically, I think again it comes back to the point that I, that the Crown make earlier, that is, that the fact that there may or may not be a civil remedy available, yes, is relevant, but not determinative in, in this exercise.

And just to come back to your Honour –

ELIAS CJ:

Perhaps you should – perhaps finish your answer, but perhaps you should take us to those US authorities. I'd like to see them. But were you still finishing that question?

MS MARKHAM:

I can, I can take your Honours to those now. They're in the –

GLAZEBROOK J:

And when you – just finishing on this point before we go to the actual authorities on the innocence, your submission is that it actually is if there isn't a civil remedy available, clearly that doesn't mean that reparation can't be ordered if there has been a loss or consequential loss, that the purpose of having that in there is to say – where there is subs (3) in there is to say that where there is a civil remedy available, then, well, one, to prevent double recovery, but also just to work out which is the most convenient means of – either the summary criminal proceedings or the civil proceedings. Is that the submission?

MS MARKHAM:

That, that is exactly the submission, Ma'am. Thank you.

Yes, and the, the US decisions I referred to, admittedly they're, they're reasonably obscure. They are in the respondent's bundle of authorities at tabs 6 and 7. I think the, the case at tab 6 is perhaps more directly on point. That was a case of some stolen tools, where the victim offered a \$1000 reward to anyone that would help in the recovery of the tools, and the thief was held liable for that reward payment, as it was considered a reasonable action taken by the victim to mitigate his loss. There was, I should point out, a dissenting judgment on which my friend relies, and that's on the, the last page, but the majority decision, yes, essentially concludes, and I'm reading here from the –

ELIAS CJ:

Sorry, this is tab 6?

MS MARKHAM:

I'm sorry Ma'am, yes. Tab 6 of the respondent's authorities. The paragraphs aren't numbered, but towards the bottom of the, page 441, it notes that the trial Court had found that the payment of the reward was a reasonable action taken by the victim to mitigate his loss. Over to the next page, the Court at paragraph 5 in the middle of the page adopts a "but for" analysis and notes that certainly the payment would not have been incurred but for the actions of the defendant and that the Court could not perceive any use of discretion in, in the trial Court's finding. He goes on to note, and I'm reading here from the second column, second paragraph on page 442 that, "The trial Court's order did not result in a windfall to the victim or lead to an unjust result. Rather, it fulfilled the statutory purpose of making the victim whole to the extent practicable. Also, under the circumstances here, the amount of the reward was reasonable." And the Court went on to note, skipping a paragraph, "The trial Court is not bound by the strict rules of civil damages in fixing the amount of restitution." So the governing statute in that case is somewhat different. It refers to –

ELIAS CJ:

Victims. It's a victim reparation, whereas ours is an –

MS MARKHAM:

Yes.

ELIAS CJ:

– in-person reparation.

MS MARKHAM:

Yes.

McGRATH J:

And the fact it was a reasonable action taken by the victim to mitigate his loss was a crucial factor too, wasn't it?

MS MARKHAM:

Yes, exactly. But similarly the museum in this case could well have put up the reward money if it was in a position to do so and in my submission the fact that the –

McGRATH J:

Well that would be a different case wouldn't it?

MS MARKHAM:

Well –

CHAMBERS J:

Why didn't you seek reparation actually –

McGRATH J:

Well would it – I'm not so sure it would be actually.

CHAMBERS J:

– for the museum, why didn't the Crown seek reparation for the museum?

MS MARKHAM:

Well I'm not so sure, with respect to you, that we didn't. Certainly the Crown submissions which the Court has included in the supplementary case on appeal refers to the fact that the Crown did seek reparation in the full sum for about 150,000 I think –

CHAMBERS J:

Yes.

MS MARKHAM:

Now I understand my friend has a different understanding and I'm not sure where that comes from.

CHAMBERS J:

Well when I read those submissions, I thought you had sought it, but of course it provides downstream consequences for you there because the Judge didn't actually say who the money was to be paid to and I mean there can't be any dispute that the museum suffered some loss. There may be a dispute about quantum, I don't know, and yet it's – that does seem to be a downstream difficulty at the moment but –

MS MARKHAM:

Yes although the decision in *R v Johnstone* CA14/85, 15 April 1986 which the respondent seeks to distinguish on other grounds, on this very question of a failure

on the part of a sentencing Judge to identify the recipient and the terms of the payment and so forth, made the point that that simply, they're simply process errors or defects of form that can be remedied and in an appellate.

ELIAS CJ:

Contextually it couldn't have been anyone but those who put up the money because it was tied to that amount?

MS MARKHAM:

Exactly, yes, and my submission would be that it's certainly implicit in his Honour's remarks that he was focused on the \$100,000 reward payment and it could be inferred exactly that the recipients, and I think the registry seems to have interpreted the sentencing notes in that way.

WILLIAM YOUNG J:

Not very mathematically soundly because they seem to say, they've split it two-thirds, one-third but then 25,000 and 75,000.

MS MARKHAM:

I hadn't cross-checked the maths.

ELIAS CJ:

Sounds like my sort of maths.

MS MARKHAM:

And mine.

CHAMBERS J:

There is that confusion. If you look at the email correspondence which seems to occur without any judicial input, it's not at all clear even what administratively was later worked out.

MS MARKHAM:

Well I, yes I suppose that his Honour's sentencing remarks could be criticised for not having made things clear but my submission would be that that is a defect of form only and it can be remedied and the way in which the police dealt with this matter

was that because Lord Ashcroft had put up more money than Mr Sturgess that it was apportioned on a pro rata basis in terms of what was paid and what was to be paid back.

CHAMBERS J:

Well where did the 75/25 come from?

WILLIAM YOUNG J:

Bad maths I think, because the notation says one-third, two-thirds, it's just they've miscalculated it.

ELIAS CJ:

While you're on that, there's reference in the submissions to the Crown and the Court of Appeal having acknowledged that the matter should be sent back to the District Court. I didn't check the Crown submissions on that point in the Court of Appeal – do we have that?

MS MARKHAM:

They are included Ma'am –

ELIAS CJ:

And does it appear in the written submissions?

MS MARKHAM:

Yes it does.

ELIAS CJ:

Could you just take us to that quickly?

MS MARKHAM:

I think it's tab 7 of the index document –

ELIAS CJ:

Yes.

MS MARKHAM:

– and page, the last page, 17, and paragraph 6.40. “The Crown accepted that Judge Hubble did not provide for the administration of the sentence of reparation as required. The order for reparation could be remitted to the District Court for reconsideration.” So that was something that the Crown accepted was open to the Court to do but the Court of Appeal, inferentially, didn’t see the need for that to occur.

ELIAS CJ:

That authority, *R v Wonnacott* [2009] NZCA 414 do we have that?

MS MARKHAM:

I’ve certainly read it, but whether it’s in the –

ELIAS CJ:

No that’s all right.

MS MARKHAM:

I don’t think so Ma’am. But that was –

ELIAS CJ:

No, well it’s said in the submissions to support that outcome.

MS MARKHAM:

That was a case where there were quite substantial failings in the original order and there was concern that the offender did not have the means to make it so it was quite a fact specific decision but certainly the upshot was, in that case, that it was remitted.

ELIAS CJ:

And what’s your position here because it’s common ground that s 36 hasn’t been complied with?

MS MARKHAM:

Well if the Court is minded to that, to remit it, then the Crown wouldn’t resist that. My submission –

ELIAS CJ:

Well what do you say is the correct thing for us to do?

WILLIAM YOUNG J:

It's not non-compliance is it? At 36(1), "The Court may," and if the Court doesn't, then it's lump sum.

CHAMBERS J:

No, no there's no default position under the law –

MS MARKHAM:

As it stood.

WILLIAM YOUNG J:

I see, so this is the current provision, sorry.

ELIAS CJ:

Yes.

MS MARKHAM:

Yes. As I said the Crown certainly wouldn't stand in the way –

ELIAS CJ:

I mean s 36 could conceivably, as it stood, could conceivably be read to suggest that lump sum was the default position I suppose but the Crown seems to have accepted in the Court of Appeal that wasn't its interpretation and that the matter would have to go back.

MS MARKHAM:

I – well –

CHAMBERS J:

I think that may have flowed from the language of Judge Hubble where he said, "If the money comes back to you then we would expect it to be paid," which seems to have been a rather unusual conditional order of reparation.

MS MARKHAM:

I'm not sure, with respect, that the Crown accepted that the Court had to remit it, it was simply that that was an option that was open and the Crown wouldn't object to that course. And a similar position is adopted by the respondent here. It is submitted that although it's common ground that he didn't go through the hoops and specify the

conditions of the order, it is clear in the context that the Judge was contemplating a lump sum, obviously there's been no suggestion of instalments and the focus was very much on the reward payment. His Honour didn't specify the date that the payment was to be made but, again, as a matter of inference, it would fall to be payable under the default provisions of the Summary of Proceedings Act, which both then and now allow a period of 28 days for payment, and that follows through the slightly tortuous route of s 145 of the Sentencing Act, then in force which provided that reparation orders are enforceable as fines and s 80 of the Summary of Proceedings Act in turn, provides that fines are generally payable within 28 days. And that default position, as your Honours have noted, is now expressly adopted into the Sentencing Act so there's no need to go through that tortuous route of two statutes to get to that position.

ELIAS CJ:

That leads onto a further loose thread, that there is – some of the authorities that I have read suggest that reparation can be ordered to hang over an offender's head when they come out from serving a term of imprisonment. There's one of those Court of Appeal cases, I think, where the sentence was about two years' imprisonment. What you're suggesting is really that's inconsistent with the statutory scheme which is that the offender must be in the position to pay immediately, that a contingent order is bad, should you come into the money as Judge Hubble said.

MS MARKHAM:

Well there is, there is an ability under the Act to set payment at a future date and some orders do specifically say that it's going to fall due upon your release from prison or any other date could be selected. Now it's accepted that the Judge didn't do that here so my submission is that it's, as a matter of inference, it would appear that the Judge intended an order to be payable in the normal way which is the 28 day rule knowing –

ELIAS CJ:

28 days.

CHAMBERS J:

But that would have been in breach of s 35 which requires you to take into account the needs as to, and what's to happen if the person hasn't got sufficient needs.

MS MARKHAM:

Well, the, the requirement as to satisfaction of means applies, I think, only in, in the case of immediate payment. It's perhaps arguable whether the 28-days rule would, would fall within that description, but s 35 is itself expressed in discretionary terms. When read together with s 12, which requires the Court to impose an order unless satisfied of undue hardship, in my submission the order that the Judge made is good, on those grounds. And that's in reliance on the Court of Appeal decision that the Crown cited in *R v Thompson* [2005] BCL 1039.

ELIAS CJ:

But I'm just wondering about the whole statutory scheme which you've just adverted to, which suggests that if the Judge doesn't take the option of ordering payment by instalments, then there must be, there must be something on which the Judge believes that reparation can be made within the 28 days.

MS MARKHAM:

And again that comes back to the appellant's quite cynical, enigmatic comments about what happens to the, the proceeds of –

ELIAS CJ:

Well, no, I understand how it arose, but I'm just really wondering what we – if you don't pay within 28 days, what – are there further consequences? Is there penalty?

MS MARKHAM:

Well, yes, there's certainly – there, there can be an assumption that when a reparation order is made that that's the end of the story, and that if it's not perfectly calibrated to an offender's means then all sorts of draconian results follow. That isn't the case. There is, of course, as your Honours know, quite an extensive machinery under the Summary Proceedings Act which enables the District Court to revisit the question of means, to vary the terms of the order, to make it from a lump sum to an instalment arrangement and, indeed, to remit the order altogether. There's also an ability on the part of –

CHAMBERS J:

There wasn't at that time, was there?

MS MARKHAM:

Most of those –

CHAMBERS J:

That's been introduced since, hasn't it?

MS MARKHAM:

No, there –

GLAZEBROOK J:

If they're related to fines. It probably just related – did those provisions as to fines and remission of fines relate to reparation then?

MS MARKHAM:

Yes.

GLAZEBROOK J:

Before?

MS MARKHAM:

The fines provisions were adopted – fines are enforced – sorry, reparation is enforced as a fine under the Summary Proceedings Act, and –

CHAMBERS J:

What's the prima facie position though, in answer to the Chief Justice's question? If you don't pay reparation, that's another offence, isn't it?

MS MARKHAM:

Not if you don't have the means to do so. The registrar – all of the registrar's powers of enforcement, which include attachment orders and so forth, are expressed in discretionary terms. So if an offender is the subject of a reparation order which in fact he or she doesn't have the means to pay, there is no obligation on the registrar to undertake enforcement action. Rather, there is an obligation I think to, to bring the offender to the Court and to, to get it sorted out.

CHAMBERS J:

Well doesn't all that just prove that Judges at sentencing ought to satisfy themselves before imposing a sentence of reparation that the offender can pay? If all that's going to happen downstream, that points to being satisfied at the time of sentencing.

MS MARKHAM:

I would certainly accept that, Sir. But on the other hand it also means that it's not the end of the world if, if things aren't done perfectly the first time round, because there is this ability to revisit the whole question of means under the auspices of collections.

ELIAS CJ:

Is there provision though for further penalty if you haven't paid within 28 days?

MS MARKHAM:

Only in the case of someone who has the means. And the only way that you can be imprisoned for non-payment of final reparations is if the Court is satisfied that you have the means but are essentially refusing to pay.

GLAZEBROOK J:

This probably brings up the point of whether – or the fact that there wasn't a reparation order, a reparation report ordered in this case. Because in fact, was there sufficient material – well, first of all, it's compulsory to order a reparation report unless it comes within s 33(2). And the Judge doesn't seem to have considered whether it came under s 33(2) in any event.

MS MARKHAM:

There are, Ma'am, in the respondent's respectful submission, there, there is certainly an argument that it's not quite as mandatory as your Honour may have indicated, because – I'm looking at the wording of s 33, subs (1) is expressed in discretionary terms: "the court may order ... a reparation report". It doesn't say that the Court must order a reparation report unless the, the conditions of subs (2) are satisfied.

GLAZEBROOK J:

No. No, that's true, but it seems odd that you have an ability to – you may decline to order one. It does suggest that "may" actually means "must" in the first section unless the conditions –

WILLIAM YOUNG J:

Sorry, have I...

GLAZEBROOK J:

33(1) says, “may order ... a reparation report”.

WILLIAM YOUNG J:

Yes. And 33(2), “the court must not”.

GLAZEBROOK J:

It says, “may decline”.

WILLIAM YOUNG J:

“Must not impose”, according to my version.

CHAMBERS J:

No, you’re reading the wrong version.

GLAZEBROOK J:

Oh, I think you’ve got the – you’re on the new...

WILLIAM YOUNG J:

I’m on the new version again, am I?

WILLIAM YOUNG J:

Yes.

MS MARKHAM:

You’re ahead of everyone else.

ELIAS CJ:

I’ve got the new version in Court too.

GLAZEBROOK J:

If you go to the respondent’s bundle of authorities, tab 4. I’m assuming, Ms Markham, that that’s the right version we should be looking at? Your tab 4 in

your bundle of authorities? I'd sort of assumed that was the case, which was why I was operating off it.

CHAMBERS J:

It's the one reprinted 7 July 2010 that's the relevant one.

GLAZEBROOK J:

Oh, well this one is a different version.

CHAMBERS J:

Well, it says at that time, 33(2), "the court may decline to seek a report".

GLAZEBROOK J:

Well, I've got 2002 number 9 –

CHAMBERS J:

Not "must not".

GLAZEBROOK J:

– at the top of your version, which I've got from your authorities –

MS MARKHAM:

Yes.

GLAZEBROOK J:

– tab 4. Respondent's authorities, tab 4.

MS MARKHAM:

Yes. And it's certainly my understanding that the section applicable at the time, subs (2), is premised, "the Court may decline".

CHAMBERS J:

If you go onto the New Zealand legislation site you can get the relevant one at the right date.

ELIAS CJ:

Yes. The history. But should we be – are counsel in agreement that we should be looking at the version under tab 4?

WILLIAM YOUNG J:

Well, it – because the one I've got in the 2010, reprinted at 1 July 2010, which preceded the sentencing, is different.

ELIAS CJ:

Yes.

MS MARKHAM:

And does that state, Sir, that the Court “must decline”?

WILLIAM YOUNG J:

No. No, it says, subs (1), “may”, subs (2), must not order reparations for emotional harm without –

CHAMBERS J:

That's not the correct one.

GLAZEBROOK J:

No, no, no.

ELIAS CJ:

What?

WILLIAM YOUNG J:

Oh, 33(2)? Sorry. Sorry. Sorry.

GLAZEBROOK J:

I think we're right now.

ELIAS CJ:

So it is – subs (2) is –

GLAZEBROOK J:

It was probably my fault.

ELIAS CJ:

– “may decline”?

GLAZEBROOK J:

I was probably getting the section wrong.

ELIAS CJ:

“May decline”?

MS MARKHAM:

Yes. Both subs (1) and subs (2) are expressed in discretionary terms.

GLAZEBROOK J:

Well, your submission then is that it is actually discretionary whether you order one if you don't – other than for the reasons in s 33(2)?

MS MARKHAM:

Yes, but, but my submission would also be that, that because the amount of reparation was not disputed there was no need for the sentencing report to, to go through the, the process of ordering a full reparation report.

GLAZEBROOK J:

Well, that may be the case, but we're still looking at the financial capacity of the offender. Because certainly in terms of the amount I can understand that submission

–

MS MARKHAM:

Yes.

GLAZEBROOK J:

– but not in terms of the financial capacity of the offender.

MS MARKHAM:

Yes. Well, my submission there is, as I think my friend quite fairly indicated, that certainly the Court could've ordered a financial capacity report in conjunction with a limited reparation report, but there was no utility in doing that given that the appellant is unwilling to co-operate and to indicate what became of the proceeds. Not only in relation to the reward payment, but also in relation to the other police operations that he was sentenced in relation to, Operation Prince and Operation Pokie, which, both of which involved unrecovered proceeds in tens of thousands of dollars, I think totalling between about \$130,000 of proceeds.

MR KAPA:

There was a full reparation report for Operation Prince.

MS MARKHAM:

So –

ELIAS CJ:

Ms Markham, I'm wondering though, really, whether what you have just told us means that we have to be careful to make sure that our interpretation of these provisions is contextual in the context of the whole statutory scheme. And if I'm understanding you correctly, what you're saying is that the Judge made a reparation order without any basis for believing that it could be met immediately, which was the consequence and leaving it to be sorted out downstream? Because it would have to be sorted out downstream as an extant order of the Court.

MS MARKHAM:

In terms of identifying who it was payable to and the precise terms, then yes it would need to be either sorted out administratively or on appeal.

ELIAS CJ:

No I mean in terms of varying the reparation order should it become clear that there was a defence to the subsequent offence that was being committed if payment wasn't made within 28 days.

MS MARKHAM:

On the question of means Ma'am, the respondent's submission is not that the Judge could not be satisfied. Plainly the Judge was focused on this reward payment.

There's no question that it was received by the respondent. The information that the police have suggests that it was uplifted by the respondent's partner or at least by a female who was believed to be his partner and he has been silent as to what happened to it after that point. The trail goes cold. In those circumstances, bearing in mind that s 12 requires an order unless the Court is satisfied of undue hardship, the Judge's approach which essentially casts the evidential onus on the appellant to establish that he didn't have the means to pay is supportable and that it is supportable by reference to the decision in *Thompson* where the Court of Appeal, in very similar circumstances, took exactly that approach. That was a fraudster who had made off with tens of thousands of dollars and refused to co-operate in the sentencing process by giving a declaration of means and the Court of Appeal concluded that in those circumstances there was an evidential onus on him. The reparation order would stand.

WILLIAM YOUNG J:

Can I just – there may be something of a tension – if you look at s 12, it rather suggests that it's for Mr Kapa to show that he didn't have the money because that would be the undue hardship. But if you look at sections, s 36 and perhaps s 35, there's at least an indication that the reparation order should be realistic in terms of the funds available. Now expressed in a rather more affirmative way, that it's the Court saying, well can the person pay or not? And it can't be, the Judge can't have been intending to rely on s 36(2) because that's not the way his sentencing remarks read. Although perhaps it's just a form of words he used that he was being euphemistic.

MS MARKHAM:

Well his Honour did say at paragraph 17 of the sentencing notes, "I have no reasons why that money could not be given back," with reference to the reward payment. So –

WILLIAM YOUNG J:

So you say he was satisfied that it could have been paid?

MS MARKHAM:

He doesn't express himself in those terms but inferentially it was open to his Honour to take the view because the whereabouts of the money was unexplained and we know that the respondent had it initially, that there was sufficient means. It may not

be an order that is likely to be honoured, in the sense that we're dealing with a sophisticated career criminal who isn't prepared to co-operate and so forth but that doesn't mean that the Court has to throw in the towel at the sentencing stage and decline to order reparation. There is always the prospect that the money may surface and be used to purchase an asset or something that the Court could attach.

GLAZEBROOK J:

Do you think that – are you submitting that the Judge was just saying, well you've obviously hidden it somewhere, that you know where it is and if it surfaces in the future and comes back into your hands, but not suggesting there was insufficient means, just that it wasn't necessarily as a practical matter going to be able to be traced immediately?

MS MARKHAM:

That would be the respondent's interpretation of his Honour's remarks. And it does bear emphasis that the appellant is a sophisticated offender, there are many thousands of dollars which, prima facie, have been in his possession and which, and the whereabouts are currently unknown. It's certainly a reasonable assumption that some or indeed all of that money may have been spirited away and concealed. And it would be a travesty if the reparation order were quashed and then the appellant purchased an asset with money which had been hitherto concealed.

ELIAS CJ:

I suppose then there could be the prospect of a civil claim, if that were so. Can you just help me – s 36(2) is quite different of course than the current version, but I take it that it's the former version that was in effect, is that right – when – at the time of sentencing?

MS MARKHAM:

Yes

ELIAS CJ:

So that it's – "The Court may not impose a condition of payment in one lump sum unless satisfied the offender has sufficient means to pay it immediately"?

MS MARKHAM:

Yes, that was in force at the time of the sentencing Ma'am and I've just realised that it's not in –

GLAZEBROOK J:

Section 36, that's not in the – yes

MS MARKHAM:

Yes Ma'am, it's not in the copy, in the respondent's bundle. And my apologies for that.

CHAMBERS J:

Yes this is not the correct version in the bundle –

MS MARKHAM:

No. My apologies.

CHAMBERS J:

– there are other sections I've noticed that are wrong.

GLAZEBROOK J:

Yes, that's slightly unhelpful, so what did it say at the time, just so I can make a note in here?

CHAMBERS J:

“May not impose a condition that an amount to be paid in one lump sum must be paid immediately unless the Court is satisfied the offender has sufficient means to pay it immediately.”

ELIAS CJ:

Which again, rather suggests that you can't not either make one of the conditions available to you because it's got to be one thing or the other.

WILLIAM YOUNG J:

What would happen if it was sent back? Presumably it would fall to be determined under the old section or not?

MS MARKHAM:

The machinery provisions of the Summary of Proceedings Act apply regardless of when the order was made but whether –

ELIAS CJ:

But it's a sentence, reparation is a sentence –

MS MARKHAM:

Yes.

ELIAS CJ:

– and surely they're entitled to the Bill of Rights Act.

MS MARKHAM:

Whether it's a penalty retroactive.

ELIAS CJ:

Well it is a penalty.

WILLIAM YOUNG J:

It's deemed to be –

MS MARKHAM:

But the change in the terms of the, the change in the statutory criteria may not –

ELIAS CJ:

I see what you mean.

MS MARKHAM:

– be the same thing as a penalty.

ELIAS CJ:

Well it's more pro the defendant than the current one so...

MS MARKHAM:

Well in fact the current one I think refers to the Summary of Proceedings Act which in turn requires the Court to be satisfied that the offender has the sufficient means if the order is made immediately.

ELIAS CJ:

Well, before making it an offence you suggested. Not as a condition –

MS MARKHAM:

Sorry, that's a different issue.

ELIAS CJ:

– for imposing the sentence of reparation in the first place.

MS MARKHAM:

My apologies Ma'am, that's a slightly different issue.

ELIAS CJ:

I see.

MS MARKHAM:

My understanding is that for current wording of s 36 and I'm afraid these provisions are an impenetrable mass of amendments and changes but the current s 36 refers to the Court making an order under the Summary of Proceedings Act and when you go to the relevant provisions in the Summary of Proceedings Act, they in turn require the Court to be satisfied that the offender has the means to pay if –

ELIAS CJ:

No I don't think that's right because the current provision is that, "If the Court doesn't make an order or give a direction, reparation must be paid in one lump sum within the time allowed for the payment of fines generally by section 80," –

MS MARKHAM:

Yes.

ELIAS CJ:

– so you don't go to s 80 except for the time in which you have to pay.

MS MARKHAM:

That's the default provision. But I – sorry Ma'am – we're at cross purposes, I was referring to –

ELIAS CJ:

I see, there are more references to the Summary of Proceedings Act?

MS MARKHAM:

– yes and subs (1).

GLAZEBROOK J:

A relatively unhelpful way of legislating it has to be said.

MS MARKHAM:

But it think –

CHAMBERS J:

Yes we, we now have of s 36 the tab 4 version, the actual version that applied at the time and the completely different version which is the current version.

ELIAS CJ:

In which we're not quite clear on your submission whether it applies in this respect or not. If it's, if he goes back for re-sentencing on this.

MS MARKHAM:

My submission would be that it does because it doesn't involve a change in penalty.

ELIAS CJ:

I think you, I think after the adjournment perhaps you might give us the transitional provisions which lead to that conclusion –

MS MARKHAM:

Yes.

ELIAS CJ:

– I mean just give us the reference to them.

CHAMBERS J:

I don't think there are any specific transitional provisions unfortunately but can I just also just ask you on the remission question to think about, I'm still rather concerned

that one of the victims in this case and the one who indisputably did suffer a loss, seems to have been cut out of the picture altogether and is it entirely permissible for the Judge, for a sentencing Judge to just pick and choose between defendants as to who is to get the reparation? It may be the Judge can pick and choose but isn't there some principle of equity that should apply, that if there's insufficient money, it's to be done on a pro rata basis?

ELIAS CJ:

Well that might be so if it were the accused's possessions that were available for reparation but the tenor of the Judge's remarks is that this is restoration of money hadn't received which emanated from one victim, well not one victim but one person only I assume.

CHAMBERS J:

That may be the answer.

ELIAS CJ:

Perhaps we'll take the morning adjournment now, we'll resume in 15 minutes.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.50 AM

MS MARKHAM:

Just before the break, your Honour Chambers J enquired as to the transitional provisions for the recent amendments that took effect from February this year. I can point to the transitional provision on the Summary Proceedings Act side, and that is s 47 of the Summary Proceedings Amendment Act of 2011, and that is in terms that I outlined earlier: that the, the new regime applies irrespective of when the original order was made.

ELIAS CJ:

When was the amendment act?

MS MARKHAM:

2011, with effect from 13 February 2012.

CHAMBERS J:

But there isn't one, from memory, with respect of the Sentencing Act ones, is there?

MS MARKHAM:

I haven't been able to exhaustively check that, Sir, but that is my understanding. So that, the question of whether the current Sentencing Act provisions or the former Sentencing Act provisions apply would fall to be determined in light of all of those authorities about the, the scope of the retroactive penalty provisions, the tenor of which, and this is all from recollection, is that the protection in the Bill of Rights and in the Sentencing Act applies to changes in the maximum penalty for the particular offence and not necessarily to the criteria that govern sentencing matters, and there was a relatively recent Court of Appeal decision on this general area. I think your Honour Glazebrook J may be familiar with it. It was *Davies v R* [2011] NZCA 546, [2012] 1 NZLR 364, to do with the minimum periods of imprisonment provision. So –

CHAMBERS J:

My impression was, from looking at the amendment act, that nearly all the changes were just administrative.

MS MARKHAM:

Yes.

CHAMBERS J:

Actually designed to sort of put in place default provisions. If Judges did shortcuts –

MS MARKHAM:

Yes.

CHAMBERS J:

– as the Judge here did, so that sort of validating, as it were, mistakes. That seemed to me –

MS MARKHAM:

Exactly.

CHAMBERS J:

– to be the gist of it, but...

MS MARKHAM:

Yes. I would endorse that entirely, with respect, Sir. The, some of the authorities under the old provisions were concerned when sentencing Judges effectively delegated their function to administrative staff in the collections unit, and orders have been quashed on, on those grounds. But now we have, of course, an ability under the Sentencing Act for the Court to simply leave everything up to the, the registrar to sort out. That's actually expressly included in, in the section, as well as the, the default provision having been incorporated, the 28-day default provision. So –

ELIAS CJ:

So – but what's the position, what's your submission in relation to s 36? Is that a provision that you say – in respect of which the amendment applies?

MS MARKHAM:

That would be –

ELIAS CJ:

And if so, what's the submission based on?

MS MARKHAM:

That submission would be based on, Ma'am, the, the line of authorities I alluded to in rather vague terms about the, the scope of the retroactive penalty provisions. This, in my submission –

ELIAS CJ:

So, is that the *Davies* case you mentioned?

MS MARKHAM:

Yes. Among *Mist v R* [2005] NZSC 77, [2006] 3 NZLR 145 in this Court, and others, yes.

ELIAS CJ:

All right.

MS MARKHAM:

But it may not make that much difference, Ma'am, because under the Summary Proceedings Act as amended, the Court has to be satisfied that the offender has sufficient means before making an order for immediate payment of, of reparations. So it's the same provision, it's just moved from the Sentencing Act to the, the Summary Proceedings Act.

ELIAS CJ:

And that's the Court, not the registrar?

MS MARKHAM:

Yes.

ELIAS CJ:

Well on any view, that wasn't enquired into here.

MS MARKHAM:

It wasn't enquired into. Yes, I accept that, Ma'am, but the respondent's submission is that, inferentially, the Court must have been satisfied that he had the means. It may not have been satisfied that, that the order would be honoured, but his Honour Judge Hubble and, and the Court of Appeal in its turn certainly did not accept the submission put forward from counsel that, that the money was in the, the hands of a third party and no longer subject to the appellant's control. No, I accept that there were –

MCGRATH J:

Why do you say that? What is the – because Judge Hubble just said it's out there somewhere.

MS MARKHAM:

His Honour put forward the two possibilities, which were that there were the gang involvement, which, in my submission, can be discounted on the grounds that the appellant quite strongly contends that he has no affiliations at all. And secondly, that it was somehow spirited away. Where, nobody knows, but that it, that it's out there somewhere. So – and certainly –

WILLIAM YOUNG J:

But out there, i.e. able to be laid hands on if necessary.

MS MARKHAM:

Yes.

MCGRATH J:

But did Judge Hubble say he still had control over it?

MS MARKHAM:

Not in so many words, Sir, no, he didn't. But that was obviously the concern that, that, that drove the order, both in the sentencing Court and in the Court of Appeal.

WILLIAM YOUNG J:

Well that's based on the view that the money's come in and nothing has been put up to suggest it's still not available.

MS MARKHAM:

Exactly.

WILLIAM YOUNG J:

Except unsubstantiated assertions.

MS MARKHAM:

Exactly, Sir, yes.

On the other matter raised by your Honour Chambers J, the question of parity as between the victims, the Crown would certainly agree with your Honour's statement that, that the general rule is, principle is, that these orders should be managed in, in an equitable fashion, but, but, I think it's as your Honour the Chief Justice indicated, this order was aimed at returning the, the stolen apple, as it were, to, to the rightful owner, rather than an order that was depleting the appellant's assets as such, and on that basis the, the Judge made the order.

Unless your Honours have any further questions, there's not much I can add to the written material.

ELIAS CJ:

The Crown isn't pursuing the matter that was subject to the supplementary submissions we received today from the appellant? Because I think you are in difficulties on that, Ms Markham.

MS MARKHAM:

I'm sorry Ma'am, you might have to...

ELIAS CJ:

Sorry, I'm trying to remember what –

MS MARKHAM:

The cost of criminal cases.

GLAZEBROOK J:

The cost of criminal cases.

CHAMBERS J:

The cost of criminal cases.

ELIAS CJ:

Yes, the – yes. Costs.

MS MARKHAM:

No. I mean, that was, that was included simply to draw your Honours' attention to its potential application, but certainly it's not something I would be seeking to pursue.

ELIAS CJ:

All right. Thank you.

WILLIAM YOUNG J:

Just one thing that occurred to me in the course of argument, the Proceeds of Crime Act, would that – that would be applicable, presumably, if, if the fund could be identified. If there was \$100,000 sitting in a bank account.

MS MARKHAM:

Yes, potentially, but I think – again, from memory, the provisions wouldn't enable the payment to go to the victims. I think the, the proceeds legislation...

WILLIAM YOUNG J:

I see. But there could be, perhaps, a pecuniary penalty order or something of that sort?

MS MARKHAM:

Potentially, yes Sir.

WILLIAM YOUNG J:

But not to the – okay.

ELIAS CJ:

All right, thank you Ms Markham.

ELIAS CJ:

Mr Edgar, is there anything on which you wish to be heard in reply?

MR EDGAR:

Thank you Ma'am. Just on the issue that I've been following the Court's concern about downstream issues as it relates to Mr Kapa's capacity to satisfy this order. Assuming that it's a legitimate order that the Judge was entitled to make, and given that there was no enquiry into Mr Kapa's ability to pay and that s 35 wasn't adhered to and there was no reparation report, and that he was sentenced on the basis that Mr Kapa had the ability to pay based on the suspicion or ability – well, upon the, the idea that Mr Kapa either had the money within the confines of an interested party that he had given the money to or had buried it somewhere or disposed of it somewhere that was in his control. This – the problem that Mr Kapa raises for this Court is, what is, is he to do if he actually doesn't have the money? Is, is he to wait till he can get out of prison and then go back to the registrar and fill out a declaration of means and, and basically in a statutory declaration format indicate that he doesn't have the money?

WILLIAM YOUNG J:

Well he might have to do more than that. I mean, just to say, "I haven't got the money," wouldn't, probably, cut them mustard with me.

MR EDGAR:

Yes. Because I, I've – just in terms of what Mr Kapa's position has always been, if this Court was of a mind to remit this case back to the District Court for further consideration on that issue, one wonders whether or not we'd get any further.

CHAMBERS J:

Well we would, wouldn't we? Because a Judge could order a reparation report, he could require a declaration as to means to be completed, which either would be or wouldn't be if it wasn't. Inferences could be drawn from that. If it was and if it was disputed, that's why I was raising the prospect of the ability to cross-examine on that, either under s 24 or otherwise, one could get to the bottom of exactly what assets he'd got and exactly what happened to the \$100,000. So there are means. That's what I'm putting to you.

WILLIAM YOUNG J:

You're suggesting that the statement of assets might be rather generalised?

MR EDGAR:

Yes. Yes, it's going to come back to the issue of, who was this third party that apparently took the money on Mr Kapa's behalf? Was he acting as an agent of Mr Kapa or not? Those would be issues, I imagine, that further downstream maybe asked. But whether they get answers that would satisfy the Court such that an order could then be made one way or the other, or confirmed or, or quashed rather, is a matter I'm not quite sure whether –

WILLIAM YOUNG J:

But the point that I suppose concerns me is that the Judge seems to have made an immediate order but he hasn't unequivocally made a finding of ability to pay.

MR EDGAR:

Yes.

WILLIAM YOUNG J:

Now, I suppose if a Judge said, "Well, he had \$100,000, you haven't explained what happened to it, I'm therefore satisfied you've still got it," that would probably alleviate my concerns if that was a finding that was broadly consistent with the evidence. But that would resolve that problem. It might not resolve the case from your point of view, but it would actually address the s 36 problem.

MR EDGAR:

Nothing further, thank you.

ELIAS CJ:

Right. We'll time to consider our decision in this matter. Thank you, counsel, for your assistance. Thank you, Mr Kapa, for your submissions. The Crown hasn't pursued the matter that you were concerned about.

COURT ADJOURNS:12.03 PM