Act 1906 and s 2 of the Prevention of Corruption Act 1916 included a benefit received by the defendant for which the Crown did not prove that he did not give full value.

Solicitors: H M Winocour, Scunthorpe (for the second appellant); *Director of Public Prosecutions.*

N P Metcalfe Esq Barrister.

Attorney General of New Zealand v Ortiz and others

HOUSE OF LORDS
LORD FRASER OF TULLYBELTON, LORD SCARMAN, LORD ROSKILL, LORD BRANDON OF OAKBROOK AND LORD BRIGHTMAN
7, 8, 9 MARCH, 21 APRIL 1983

Conflict of laws – Foreign law – New Zealand statute providing that historic articles unlawfully removed 'shall be forfeited' to Her Majesty – Whether goods so removed automatically forfeited on removal from New Zealand – Whether forfeiture dependent on seizure of goods – Whether Crown's title accruing only on seizure – Historic Articles Act 1962 (NZ), s 12(2).

New Zealand – Statute – Interpretation – Statute providing that historic articles unlawfully removed 'shall be forfeited' to Her Majesty – Whether goods so removed automatically forfeited on removal from New Zealand – Whether forfeiture dependent on seizure of goods – Whether Crown's title accruing only on seizure – Historic Articles Act 1962 (NZ), s 12(2).

In 1973 the third defendant, an art dealer, purchased a valuable Maori carving in New Zealand, which was a historic article within the meaning of the New Zealand Historic Articles Act 1962. By s 5(1)[a] of that Act, it was unlawful to remove such an article, knowing it to be a historic article, from New Zealand without a certificate of permission from the Minister of Internal Affairs. Section 12(2)[b] of that Act further provided that 'An historic article knowingly exported ... shall be forfeited to Her Majesty' and that the provisions of the New Zealand Customs Act 1913 relating to forfeited goods were to apply 'subject to the provisions' of the 1962 Act. Section 251[c] of the 1913 Act provided that 'forfeiture [was to] take effect' on seizure and was then 'for all purposes [to] relate back to the date' when the cause of forfeiture arose. Section 251 of the 1913 Act was replaced by s 274[d] of the Customs Act 1966, which provided that when any goods were forfeited and the goods were seized 'the forfeiture [was] for all purposes [to] relate back to the date of the act or event from which the forfeiture accrued'. The third defendant exported the carving from New Zealand without obtaining a certificate of permission and sold it to the first defendant, a collector of Polynesian art. In 1978 the first defendant placed the carving for sale by auction in England with the second defendant. The plaintiff, the Attorney General of New Zealand suing on behalf of Her Majesty in right of the government of New Zealand, applied in the Queen's Bench Division for an injunction restraining the sale of the carving and for an order for its delivery up on the ground that it had been forfeited automatically to Her Majesty by its removal from New Zealand in breach of s 5(1) of the 1962 Act. By an order of a master a preliminary issue was ordered to be determined, namely, inter alia, whether Her Majesty had become the

a Section 5(1) is set out at p 96 *b c*, post
b Section 12(2) is set out at p 96 *e f*, post
c Section 251 is set out at p 97 *j* to p 98 *a*, post
d Section 274 is set out at p 97 *e*, post

owner and was entitled to possession of the carving pursuant to the 1962 Act and the 1913 and 1966 Acts. The judge found for the plaintiff. The defendants successfully appealed to the Court of Appeal. On appeal to the House of Lords the plaintiff accepted that under the 1966 Act forfeiture did not normally occur until seizure but contended that, since the 1966 Act was subject to the provisions of the 1962 Act, s 12(2) of the 1962 Act had modified the forfeiture provisions in the 1966 Act so as to make forfeiture automatic at the point when a historic article was exported with knowledge that it was a historic article.

Held – Although the forfeiture provisions contained in the 1966 Act took effect subject to the 1962 Act, on its true construction there was nothing in the 1962 Act when taken as a whole to alter those provisions so as to render a historic article automatically forfeited at the moment it was exported with knowledge that it was a historic article. Instead the act of knowingly exporting a historic article merely made it liable to be forfeited on seizure and, since the carving had not been seized by the New Zealand customs or police, forfeiture had not occurred. Accordingly the Crown did not have title to the carving and the appeal would be therefore dismissed (see p 94 *j* to p 95 *b*, p 100 *g* to *j* and p 101 *a*, post).

Decision of the Court of Appeal [1982] 3 All ER 432 affirmed.

Notes

For the general rights of the Crown in relation to property, see 8 Halsbury's Laws (4th edn) paras 1076–1082, and for cases on the subject, see 11 Digest (Reissue) 776–777, 891–900.

Appeal

The plaintiff, the Attorney General of New Zealand suing on behalf of Her Majesty the Queen in right of the government of New Zealand, appealed with leave of the Court of Appeal against the decision of the Court of Appeal (Lord Denning MR, Ackner and O'Connor LJJ) ([1982] 3 All ER 432, [1982] 3 WLR 570) on 21 May 1982 allowing the appeal by the first defendant, George Ortiz, and the third defendant, Lance Entwistle, from the decision of Staughton J ([1982] 3 All ER 432, [1982] QB 349) given on 1 July 1981 holding, on the trial of two preliminary issues, that on the assumed facts (1) Her Majesty the Queen had become the owner and was entitled to possession of a Maori artifact pursuant to the provisions of the New Zealand Historic Articles Act 1962 and the Customs Acts 1913 and 1966 and (2) that the provisions of those Acts, although enactments of the New Zealand Parliament, were none the less enforceable in England. Pursuant to a consent order the second defendants, Sotheby Parke Bernet & Co, retained possession of the artifact pending the outcome of the action and proceedings against them were stayed. The facts are set out in the opinion of Lord Brightman.

Andrew Morritt QC and *Charles Gray* for the New Zealand government.
Paul V Baker QC and *Nicholas Patten* for Mr Ortiz.
Colin Ross-Munro QC and *Gerald Levy* for Mr Entwistle.

Their Lordships took time for consideration.

21 April. The following opinions were delivered.

LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Brightman and I agree with it. For the reasons there stated I would dismiss this appeal.

LORD SCARMAN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Brightman. I agree with it. For the reasons he gives I would dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Brightman. For the reasons he gives I too would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Brightman. I agree with it, and for the reasons which he gives would dismiss the appeal.

LORD BRIGHTMAN. My Lords, this appeal arises out of the trial of a preliminary issue in a suit brought by the New Zealand government against the exporter and purchaser of a tribal antiquity. The facts as pleaded in the amended statement of claim, on the basis of which the issue fell to be tried, are as follows. In or about 1972 one Manukonga found in a swamp in the province of Taranaki a valuable Maori relic, described as a series of five carved wood panels that formed the front of a food store. In 1973 Manukonga sold the carving to the third defendant, Mr Entwistle, who was a dealer in primitive works of art. The carving was to the knowledge of Mr Entwistle a historic article within the meaning of the Historic Articles Act 1962 of New Zealand. Later in the same year the carving was exported from New Zealand by or on behalf of Mr Entwistle. No permission under the Historic Articles Act 1962 authorising the removal of the carving from New Zealand had been obtained by him. In the same year Mr Entwistle sold the carving to the first defendant, Mr Ortiz, for $65,000. In 1978 Mr Ortiz consigned the carving to Messrs Sotheby Parke Bernet & Co (Sothebys) in England for sale by auction.

In June 1978 the Attorney General of New Zealand (suing on behalf of Her Majesty the Queen in right of the government of New Zealand) issued proceedings against Mr Ortiz and Sothebys and (by amendment) Mr Entwistle. The New Zealand government claims a declaration that the carving is the property of Her Majesty the Queen, as against Mr Ortiz and Sothebys an order for delivery up of the carving, and as against Mr Entwistle damages for conversion.

Under a consent order Sothebys retain possession of the carving pending the outcome of the action, and proceedings against them have been stayed.

In 1980 the Queen's Bench master, whose decision was upheld on appeal, ordered the trial of two preliminary issues, first, whether on the facts pleaded—

> 'Her Majesty the Queen has become the owner and is entitled to possession of the carving ... pursuant to the provisions of the Historic Articles Act 1962 and the Customs Acts 1913 and 1966.'

And, second—

> 'whether in any event the provisions of the said Acts are unenforceable in England as being foreign penal, revenue and/or public laws.'

It is not in dispute for the purposes of the preliminary issues that the carving was exported in breach of the 1962 Act. The resolution of the first issue depends on whether, on the true construction of s 12 of the 1962 Act, incorporating certain provisions of the Customs Act, the carving was forfeited immediately it was unlawfully exported, so that it thereupon became vested in the Crown, or whether the unlawful export of the carving merely rendered it liable to forfeiture in the future, the forfeiture taking effect only on the seizure by the New Zealand customs or police, which has not taken place. There is an express provision in the Customs Act 1913, and it is a necessary implication from a provision in the Customs Act 1966, that forfeiture under those Acts is not complete until seizure.

I turn in more detail to the statutory provisions. The Historic Articles Act 1962 repealed the Maori Antiquities Act 1908, which itself consolidated earlier enactments. The 1962 Act is described in the long title as 'An Act to provide for the protection of historic articles and to control their removal from New Zealand'. Section 2 contains a

definition of 'historic article'. It is not in dispute that the carving falls within this definition. The definition is a wide one, and includes not only artifacts but also documentary matter and certain specimens of animals, plants and minerals. Section 4 enables the Minister of Internal Affairs to acquire a historic article by purchase or gift. Section 5 describes what acts are unlawful in particular relation to a historic article, and it is the only section to do so. Unless a person transgresses s 5, he is at liberty to dispose of or deal with a historic article in the same manner as he may dispose of or deal with any other article. This section, which is crucial to the construction of s 12, reads as follows, so far as relevant:

> '(1) It shall not be lawful after the commencement of this Act for any person to remove or attempt to remove any historic article from New Zealand, knowing it to be an historic article, otherwise than pursuant to the authority and in conformity with the terms and conditions of a written certificate of permission given by the Minister under this Act.
>
> (2) Every person who contrary to the provisions of this section removes or attempts to remove any article from New Zealand, knowing it to be an historic article, commits an offence, and shall be liable on summary conviction to a fine not exceeding two hundred pounds . . .'

Sections 6 to 11 deal with applications for permission to remove a historic article from New Zealand and incidental matters. Section 12, which is the section that falls to be construed, reads as follows:

> '(1) Subject to the provisions of this Act, the provisions of the Customs Act 1913 shall apply to any historic article the removal from New Zealand of which is prohibited by this Act in all respects as if the article were an article the export of which had been prohibited pursuant to an Order in Council under section 47 of the Customs Act 1913.
>
> (2) An historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty and, subject to the provisions of this Act, the provisions of the Customs Act 1913 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1913.
>
> (3) Where any historic article is forfeited to Her Majesty pursuant to this section, it shall be delivered to the Minister and retained in safe custody in accordance with his directions: Provided that the Minister may, in his discretion, direct that the article be returned to the person who was the owner thereof immediately before forfeiture subject to such conditions (if any) as the Minister may think fit to impose.'

Section 16 empowered the Governor General by Order in Council to make regulations for certain purposes, including regulations providing for such matters as are contemplated by or necessary for giving full effect to the provisions of the Act. Your Lordships have not been made aware of any relevant regulations.

The 1962 Act is no longer in force. It was repealed by the Antiquities Act 1975 as from 1 April 1976. However, the New Zealand government do not claim that they are able to base the Crown's claim to ownership on any provision of the 1975 Act, which therefore can be disregarded.

Section 12 of the 1962 Act was expressed to operate by reference to the Customs Act 1913. The provisions of that Act are to apply to a historic article the removal from New Zealand of which is prohibited by the 1962 Act as if the article were an article the export of which had been prohibited pursuant to an Order in Council under s 47 of the 1913 Act. The 1913 Act was repealed by the Customs Act 1966, which came into operation for all relevant purposes on 1 January 1967. Section 70 of the 1966 Act is the section which corresponds to s 47 of the 1913 Act. It is common ground (although at one time disputed) that, in consequence of s 21 of the Acts Interpretation Act 1924, s 12 of the 1962 Act must for present purposes be read as referring to the Customs Act 1966, and in particular to s 70 thereof.

The immediate effect of notionally including, without qualification, a historic article as a prohibited export under s 70 of the 1966 Act is that a contravention of the prohibition would render the exporter liable to a fine and would render the article subject to forfeiture, in the terms of sub-ss (6) and (7), which read as follows:

> '(6) If any person exports, or ships with intent to export, or conspires with any other person (whether within New Zealand or not) to export any goods contrary to the terms of any such prohibition in force with respect thereto he commits an offence and shall be liable to a fine not exceeding five hundred pounds or three times the value of the goods, whichever sum is the greater.
>
> (7) All goods shipped on board any ship or aircraft for the purpose of being exported contrary to the terms of any such prohibition in force with respect thereto, and all goods waterborne for the purpose of being so shipped and exported, shall be forfeited.'

A further effect of notionally including without qualification a historic article in s 70 would be to bring into operation in relation thereto all the other provisions of the Customs Act 1966 which are incidental to sub-ss (1), (6) and (7). For instance, s 69 defines the time at which goods on board a ship or aircraft are deemed to be exported. Section 212 confers on a person in the employment of the customs the right to question a person who is on board a ship or aircraft whether he has in his possession restricted or forfeited goods; 'restricted goods' includes prohibited exports. Sections 213 to 218 confer rights of search and discovery of documents. Section 225 regulates the sale of forfeited goods. Section 254 prescribes a penalty for concealing restricted goods on a ship or aircraft. Of particular significance are ss 274 and 275, which read as follows, so far as material:

> '274. When it is provided by this Act or any other of the Customs Acts that any goods are forfeited, and the goods are seized in accordance with this Act or with the Act under which the forfeiture has accrued, the forfeiture shall for all purposes relate back to the date of the act or event from which the forfeiture accrued.
>
> 275. (1) Any officer of Customs or member of the Police may seize any forfeited goods or any goods which he has reasonable and probable cause for suspecting to be forfeited . . .
>
> (4) No goods shall be so seized at any time except within two years after the cause of forfeiture has arisen.'

Section 278 requires immediate notice of seizure to be given to a person known or believed to have an interest in the goods. Section 279 provides that goods seized as forfeited shall be deemed to be condemned unless forfeiture is disputed in the prescribed manner. Section 280 deals with proceedings instituted in the Supreme Court for the condemnation of goods seized as forfeited. Section 282 is to the like effect in relation to a magistrate's court. Section 283 provides that conviction of an offence which gives rise to forfeiture shall have effect as condemnation, without suit or judgment, of any goods that have been seized and in respect of which the offence was committed. Section 286 provides that 'all forfeited goods shall, on forfeiture, become the property of the Crown . . .' Section 287 empowers the Governor General to waive a forfeiture.

It follows from the wording of s 274 of the 1966 Act, and from the definition of 'forfeited goods' in s 2 as goods 'in respect of which a cause of forfeiture has arisen', that goods which are declared by the Act to be forfeited are in most instances more accurately described as 'liable to forfeiture', and that no actual forfeiture takes place and there is accordingly no transfer of ownership until the goods have been seized. This was, perhaps, more clearly expressed in the corresponding section of the 1913 Act, which reads as follows:

> '251. When it is provided by this Act or any other Customs Act that any goods are forfeited, the forfeiture shall take effect without suit or judgment of condemnation so soon as the goods have been seized in accordance with this Act or with the Act under which the forfeiture has accrued, and any such forfeiture so

completed by seizure shall for all purposes relate back to the date of the act or event from which the forfeiture accrued.' a

Counsel for the New Zealand government conceded before your Lordships (although it was at one time disputed) that there is no relevant distinction between these two sections.

The two preliminary issues were tried by Staughton J ([1982] 3 All ER 432, [1982] QB 349). The first issue raised a question of foreign law. A question of foreign law is a question of fact on which the trial judge requires the assistance of evidence from foreign b lawyers. The judge had the advantage of expert evidence from Dr Inglis QC on behalf of the New Zealand government and Mr Thomas QC on behalf of Mr Ortiz. The witnesses were divided whether the Customs Act 1966 provided for automatic forfeiture or whether seizure was a necessary preliminary. On this issue the judge accepted the evidence of Mr Thomas that the Act did not provide for automatic forfeiture. That view of the effect of the Act is no longer challenged. There was a similar divergence of view c between the experts whether or not there was automatic forfeiture under s 12(2) of the 1962 Act. On that aspect, the judge expressed himself as follows ([1982] 3 All ER 432 at 443, [1982] QB 349 at 362):

'My conclusions on this issue are therefore as follows: (1) the words "shall be forfeited" are equally capable of meaning shall be forfeited automatically or shall be d liable to forfeiture; (2) the reference to the Customs Act 1913 and now to the Customs Act 1966 where the same words mean "shall be liable to be forfeited", points to the words having that meaning in the 1962 Act; (3) that is not conclusive because s 12 of the Historic Articles Act 1962, when it refers to the Customs Act, does so "subject to the provisions of this Act"; (4) the purpose of the 1962 Act may properly be taken into account by a New Zealand court and points firmly in favour e of automatic forfeiture. On these grounds I accept the evidence of Dr Inglis that it does so provide.'

The judge then turned to the second issue, which he decided in favour of the New Zealand government for reasons which need not be recounted.

Mr Ortiz and Mr Entwistle appealed. In reserved judgments the Court of Appeal f unanimously decided that there was no ambiguity in s 12(2) of the 1962 Act, that forfeiture under that section took effect only on seizure, and that, since the carving had not been forfeited, the Crown was neither the owner nor entitled to possession of the carving (see [1982] 3 All ER 432, [1982] 3 WLR 570).

That decision was sufficient to dispose of the preliminary issues. If the first issue were decided against the New Zealand government, there was no need to discuss and decide g the second issue, as O'Connor LJ pointed out. The court did, however, deal with the second issue, and expressed opinions thereon. I imagine that this course was taken for the assistance of your Lordships' House, in case your Lordships should form a contrary view on the first issue, in which event it would have been helpful to have had the opinions of the Court of Appeal. It was perhaps with this sort of consideration in mind that the order made by the master directed a trial of the second issue 'in any event'. My h Lords, I take the view that the opinions expressed by the Lords Justices on the second issue were, in truth, obiter. Indeed, that would also seem to have been the view of the Lords Justices themselves, because in the report of the case in the Weekly Law Reports, which, as your Lordships know, will have been seen in proof by the Lords Justices, the appeal is treated in the headnote as disposed of on the first issue alone. Your Lordships have heard no argument on the second issue, and I venture to think that, in any event, j your Lordships would not wish to be taken as expressing any conclusion on the correctness or otherwise of the opinions so expressed.

My Lords, I am in respectful agreement with the decision on the first issue reached by the Court of Appeal, although I express my reasons differently.

Section 12(1)of the 1962 Act says: 'Subject to the provisions of this Act, the provisions

of the Customs Act 1913 shall apply to any historic article the removal from New Zealand of which is prohibited by this Act . . .' That raises the question: what articles are forbidden to be removed from New Zealand by the Act? In my opinion, the answer is those articles defined by s 2 the removal of which is not authorised by a certificate of permission given by the Minister of Internal Affairs, although there is no offence unless the removal is done knowingly. I shall refer to a historic article the removal of which is forbidden by s 5(1) as a 'protected chattel'.

Continuing with my analysis of s 12(1), I find that the provisions of the Customs Act 1913 are to apply to a protected chattel 'in all respects as if the article were an article the export of which had been prohibited pursuant to an Order in Council under section 47 of the Customs Act 1913'. This formula, if unqualified, would have the effect of applying to a protected chattel all the provisions of the 1966 Act which are appropriate. I have already suggested a number of provisions of the 1966 Act which are thus introduced, notably s 69 (time of exportation), sub-ss (4) and (5) of s 70 (fine and forfeiture for contravention) and s 274 (relation back of forfeiture and necessity for seizure). The interpretation section is also introduced, the most important definition being that of 'forfeited goods—goods in respect of which a cause of forfeiture has arisen under the Customs Acts'. The definition of 'restricted goods', as inclusive of goods the exportation of which is prohibited by the Customs Acts, is also important as it provides the lead-in to a number of sections of the 1966 Act.

However, this application of the 1966 Act takes effect 'Subject to the provisions of this Act'. The provisions of the 1962 Act are, therefore, paramount, and in consequence the incorporated provisions of the 1966 Act are subject to the provisions of ss 5 and 12(2) and (3) of the 1962 Act.

Section 5(1) of the 1962 Act creates the one and only offence which is peculiar to a historic article, namely the removal of it or an attempt to remove it from New Zealand, with knowledge that it is a historic article, otherwise than pursuant to a written certificate of permission. For that offence s 5(2) imposes a liability on summary conviction to a fine not exceeding £200. It is at that point that we find the first qualification on the general application of the provisions of the 1966 Act to a protected chattel. Under s 70(6) of the 1966 Act, the pecuniary penalty for exporting, or shipping with intent to export, any goods contrary to the prohibition in s 70(1) is a fine not exceeding £500 or three times the value of the goods if greater. Only the lesser penalty prescribed by the 1962 Act can be imposed for the unlawful removal or attempted removal from New Zealand of a protected chattel.

The application of the 1966 Act is also subject to s 12(2) of the 1962 Act. There are two limbs to this subsection. The first limb provides that a historic article 'knowingly' exported or attempted to be exported in breach of the 1962 Act shall be forfeited to the Crown. It is clear from s 5 that the adverb 'knowingly' applies not to knowledge of the fact of export or attempt thereat, but to knowledge that the article is a historic article as defined. What the first limb of sub-s (2) does is to introduce the penalty of forfeiture for committing an offence under s 5(1), as a penalty which is additional to the fine that can be imposed under s 5(2). But, as in the case of the fine, there is no penalty of forfeiture unless it can be said of the exporter (remover) that he knew at the time the offence was committed that the article was a historic article.

The second limb of s 12(2) provides, again subject to the provisions of the 1962 Act, that 'the provisions of the Customs Act 1966 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1966'. The effect is to apply to a historic article, known to be such, which is exported or attempted to be exported in breach of s 5(1), the whole range of provisions of the Customs Act 1966 relating to 'forfeited goods', but subject again to the paramountcy of the 1962 Act. These provisions include, most importantly, s 274, which implies that forfeiture takes effect only on seizure and provides that the forfeiture then relates back to the date when the cause of forfeiture arose.

Since the application of such forfeiture provisions is expressed to be 'Subject to the

provisions of this Act', and since s 12(2) of the 1962 Act is the enactment which imposes forfeiture for an offence under s 5(1) of the 1962 Act, it seems to me that sub-s (7) of s 70 of the 1966 Act is overridden by s 12(2) of the 1962 Act. A further minor result of the paramountcy of the 1962 Act is that the power conferred on the Governor General by s 287 of the Customs Act 1966 to waive a forfeiture will not apply in the case of the forfeiture of a historic article; such power is vested by s 12(3) of the 1962 Act in the Minister of Internal Affairs.

So, as it seems to me, the position of the Crown and the wrongdoer under the 1962 Act is clear. The offence is created by s 5(1). The pecuniary penalty is defined by s 5(2). The penalty 'in rem' is created by s 12(2). The process of forfeiture is regulated in accordance with the provisions of the 1966 Act, in particular, the necessity of seizure (to be followed by actual or deemed condemnation) before the forfeiture is completed, at which stage it relates back to the accrual of the right to forfeit. There being no seizure in the instant case, the conclusion is inescapable that the ownership of the carving and the right to possession thereof have not become vested in the Crown.

Counsel for the New Zealand government sought to argue that sub-s (2) of s 12 imposed automatic forfeiture for a 'knowing' export of a historic article, as a remedy additional to conditional forfeiture for an 'unknowing' but illegal export under the Customs Act 1966 as applied by sub-s (1). He accepted that there could be no forfeiture without seizure in the case of an 'unknowing' export or attempted export, but he argued that there was no reason in the case of a 'knowing' export or attempted export to introduce into a sub-s (2) forfeiture the requirement of seizure before the forfeiture takes effect. He sought to bolster the argument by reference to the supposed effect of the earlier Maori Antiquities Act 1908, which was said by both expert witnesses to have had the result of imposing immediate forfeiture without seizure if a Maori antiquity were 'entered for export' contrary to the Act. It was said that it would be unlikely that the repealing Act, with its stated object of protecting historic articles and controlling their removal from New Zealand, would have deliberately reduced that protection, and lessened the chances of reversing an unlawful removal by requiring seizure before forfeiture. I am, however, by no means convinced that the 1908 Act on its true construction did provide for forfeiture without seizure, which would be quite contrary to the general pattern of a Customs Act. Reference to the 1908 Act is of limited value in this case, and I express no opinion on the point. Counsel also referred to s 5(*j*) of the Acts Interpretation Act 1924, which bids the court to give to a statute 'such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act ... according to its true intent, meaning and spirit'. Counsel submitted, and I am disposed to agree, that the recovery of unlawfully exported historic articles would be best ensured if title thereto were to vest in the Crown independently of seizure.

In my opinion there is a fatal flaw in the argument of counsel. There is no offence committed under the 1962 Act by the export of a historic article unless it is done 'knowingly'. No cause of forfeiture is capable of arising by reason of an 'unknowing' export of a historic article, apart from a forfeiture for an offence under the Customs Act which has nothing to do with the fact that the subject matter of the export is a historic article. There are not two possible causes of forfeiture of a historic article, one cause arising under the Customs Act 1966 based on an 'unknowing' export or attempt thereat and the other arising under s 12(2) of the 1962 Act based on a 'knowing' export or attempt thereat. It is only to s 12(2) of the 1962 Act that one can look in order to find a cause of forfeiture of a historic article as such. Then, to ascertain the process of forfeiture, one turns to the 1966 Act. There one finds that s 274 requires seizure as a preliminary to forfeiture. The contingent nature of the forfeiture is underlined by the reference in s 12(2) to 'the provisions of the Customs Act 1913 relating to forfeited goods', which must inevitably be read as 'the provisions of the Customs Act 1966 relating to goods in respect of which a cause of forfeiture has arisen under the Customs Act'. It is not in my opinion possible to reach any conclusion save that (a) the penalty of forfeiture of a historic article as such is imposed only for an offence under s 5(1) of the 1962 Act and (b) such forfeiture is not complete until seizure.

I have every sympathy with the New Zealand government's claim. If the statement of claim is correct, New Zealand has been deprived of an article of value to its artistic heritage in consequence of an unlawful act committed by the second respondent. I do not, however, see any way in which, on a proper construction of the 1962 Act and in the events which here happened, the Crown is able to claim ownership thereof.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Allen & Overy* (for the New Zealand government); *Joelson Wilson & Co* (for Mr Ortiz); *Samuels & Green* (for Mr Entwistle).

Mary Rose Plummer Barrister.

Fraser and others v Thames Television Ltd and others

QUEEN'S BENCH DIVISION
HIRST J
14–17, 21–25, 28–30 JUNE, 1, 2, 5–9, 12–16, 19–23, 26–29 JULY, 4–8, 11, 12, 20, 21 OCTOBER 1982

Equity – Breach of confidence – Damages – Use of information obtained in confidence – Actresses developing idea for television series in which they proposed to appear – Actresses disclosing idea orally and in confidence to defendants – Defendants using idea to create television series with other actresses – Test to be applied to determine whether a breach of confidence – Whether law relating to protection of confidential information extending to protection of an idea communicated orally.

Contract – Implied term – First refusal – Agreement giving defendants option to use plaintiffs' idea for television series in which plaintiffs wished to appear – Agreement providing that if plaintiffs unable to appear in series defendants entitled to produce series with other actresses – Defendants using other actresses to produce series without first offering parts to plaintiffs – Whether negative covenant to be implied into agreement that if plaintiffs willing to appear defendants would not use plaintiffs' idea for series without using plaintiffs as actresses – Whether defendants' failure to offer parts to plaintiffs a breach of contract.

In 1973 the second plaintiffs, three female actresses, formed a rock group with the assistance of the first plaintiff, who was their manager and also their composer. The actresses and the manager developed an idea for a television series which was to portray the formation of a three-girl rock group and the members' subsequent experiences. The series was to be part fact and part fiction, the factual part being based on the actresses' own experiences, and was to focus on both the group and the individual members' lives to contrast their collective character with their individual characters. The three actresses intended that they would appear in the series as the three singers and that their manager would compose music for the series. Oral discussions took place between the actresses, the manager, a representative of the first defendant, a television company (Thames), the second defendant, the scriptwriter, and the third defendant, the producer, in which the idea for the series was disclosed to the defendants in confidence with a view to its realisation. As a result of those discussions and in consideration of a payment by Thames of £500 the actresses and the manager granted Thames an oral option which was later confirmed in writing. The confirming letter stated that Thames was to 'acquire an option on your services in connection with a possible new series', that the actresses were to have first refusal should the series be proceeded with, and that if they declined the offer