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**THE FINANCIAL MARKETS CONDUCT ACT
2013: HOW ACCESSIBLE IS ACCESSORY
LIABILITY**

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2015

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Abstract

With the enactment of the Financial Markets Conduct Act 2013, New Zealand's securities law has been revolutionised. This essay focuses on the introduction of accessory liability for any person "involved in a contravention" under s 533. Historically the standard for civil accessory liability has been unclear, with New Zealand currently using two different approaches. This article reviews relevant cases from Australia and New Zealand and forms a view on the appropriate standard for liability under s 533. To assess the reach of s 533, the conclusions are then tested by application to three previous cases.

Key words: "accessory liability", "involved in a contravention", "Financial Markets Conduct Act 2013"

I Introduction

The Financial Markets Conduct Act 2013 (FMCA) was introduced in the wake of the global financial crisis and the meltdown in the New Zealand finance sector, aiming to restore confidence in New Zealand financial markets.¹ One mechanism introduced is civil accessory liability for any person "involved in a contravention".² This broad language has worried many professionals who fear that innocent parties, such as senior executives and professional advisers, may be dragged into the firing range for another's wrong doing.³

This essay will explore the boundaries of civil accessory liability within the FMCA, and determine the appropriate threshold for liability under s 533. A low threshold could result in a larger number of parties being liable and therefore in theory being more effective at protecting investor interests. A higher threshold would protect fewer investors. However, this could result in cautiousness and therefore promote prudent and intelligent investing. This essay will demonstrate the appropriate threshold for liability under s 533. First, the accessory party must deliberately perform the actus reus of the offence.⁴ Secondly, the accessory party must have actual knowledge of the essential facts giving rise to the contravention. Thirdly, the accessory party must have intended the conduct constituting the actus reus to assist the principal to perform the conduct constituting the offence.

II Purpose of the FMCA

The purpose of the FMCA is fundamental when determining the types of parties Parliament intended to be liable under s 533. The scope of s 533 must be read in light

¹ Victoria Stace and others *Financial Markets Conduct Regulation: A Practitioners Guide* (1st ed, LexisNexis, Wellington, 2009) at 440.

² Financial Markets Conduct Act 2013, s 533.

³ Bryan Chapple *Financial Markets Conduct Bill: Officials Report to the Commerce Committee* (Ministry of Business Innovation and Employment, 24 July 2012) at 5.

⁴ With the actus reus being determined as the 'action' in each paragraph of s 533. For example under s 533(1)(a), the actus reus would be the conduct that aids, abets, counsels or procures the contravention.

of the stated purposes of the FMCA.⁵ This section will discuss how the FMCA has modernised the approach to securities law in New Zealand. In turn, this will shed light on the correct interpretation of s 533.

Prior to the enactment of the FMCA, the Securities Act 1978 (the SA) was New Zealand's primary securities law enactment. The leading case of *Re AIC Merchant Finances* recognised the principal purpose behind the SA as investor protection through the full disclosure of information.⁶ The philosophy being that full disclosure of information would assist investors to make informed investment decisions. Subsequent cases recognised investor protection as the principal purpose of the SA.⁷

The FMCA takes a broader approach to securities law through its dual primary purposes. First, to promote confident and informed participation in financial markets, and second, to promote and facilitate the development of fair, efficient and transparent financial markets.⁸ The FMCA's purposes recognise a balancing of objectives, including investor protection, but also recognising the importance of the development of financial markets.⁹ An additional purpose is the promotion of innovation and flexibility in financial markets.¹⁰ This approach appears to move away from the approach of the SA, which focused primarily on investor protection.

The development of securities law in New Zealand and the scope of the FMCA must be determined in light of its dual primary purposes. The breadth of liability under s 533 must be determined with the consideration that broader liability will result in stronger investor protection, but this could limit innovation and development, or create inefficiencies in financial markets. A balance must be struck ensuring investor and financial market participants' interests are given equal consideration.

III Section 533

The FMCA introduces accessory liability for any person involved in a contravention. Under Part 8, subpart 3, the court can make a variety of civil orders when a person has contravened a "civil liability provision" or when a person has been "involved in" a contravention.¹¹ Section 533 provides:¹²

⁵ Interpretation Act 1999, s 5.

⁶ *Re AIC Merchant Finances Ltd* [1990] 2 NZLR 385 (CA) at 391 per Richardson J.

⁷ *DFC Financial Services Ltd v Abel* [1991] 2 NZLR 619 (HC) at 629; and *Securities Commission v Kiwi Co-Operative Dairies Ltd* [1995] 3 NZLR 26 (CA) at 31.

⁸ Financial Markets Conduct Act, s 3.

⁹ Section 3.

¹⁰ Section 4.

¹¹ Part 8.

¹² Section 533.

533 Involvement in contraventions

- (1) In this Act, a person is involved in a contravention if the person:
 - (a) has aided, abetted, counselled, or procured the contravention; or
 - (b) has induced, whether by threats or promises or otherwise, the contravention; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in or party to, the contravention; or
 - (d) has conspired with others to effect the contravention.

A Function of s 533

The FMCA primarily focuses on liability for the principal offender. For example, Part 2 of the FMCA deals with matters of fair dealing. Section 19 imposes a general prohibition on misleading or deceptive conduct in relation to any dealing in a financial product (or supply of a financial service).¹³ The primary offender of such a section is likely to be the issuer, or an agent of the issuer, who provides misleading information in relation to a financial product. Section 533 broadens that liability, potentially extending it to senior executives, professional advisers or other third parties that were involved with the preparation of the misleading information.

B Concerns with s 533

A major concern with s 533, recognised in the course of the passage of the Bill through Parliament, is that it could make professional advisers, such as auditors, financial advisers, and lawyers, liable for conduct carried out in the ordinary course of business.¹⁴ However, it is arguable that there are circumstances where professional advisers should be held accountable under s 533. Attaching liability should in theory deter financial market participants from taking unnecessary risks and ensure professional advisers take care.

Professional advisers have an important role in upholding the legitimacy of and confidence in our financial markets. They are entrusted with the responsibility of assisting in reducing the informational asymmetry between issuers and investors, and ensuring information put forward by issuers is well founded.¹⁵ This should result in the investor and issuer being on a level playing field, as the investor can be confident the information put forward by the issuer is reliable. Imposition of liability on professional advisers must be balanced between creating greater diligence of advisers, and therefore increased investor protection, with the other purposes of the FMCA,

¹³ Financial Markets Conduct Act, s 19.

¹⁴ Chapple, above n 3, at 5.

¹⁵ SM Soloiman "Statutory Civil Liabilities of Corporate Gatekeepers for Defective Prospectuses in Australia, the United States, the United Kingdom and Canada: A Comparison" (2014) 35(4) Co Law 100 at 101.

such as the promotion of efficient and innovative financial markets. This requires advisers not to be overly cautious.¹⁶

C Interpretation of s 533

The language of s 533 is not novel, being used in civil and criminal jurisdictions in both Australia and New Zealand. Upon introducing s 533 the Commerce Committee stressed that the threshold for liability is such that it would not apply to professional advisers during the ordinary course of business.¹⁷ It was believed that for a person to be ‘involved in’ a contravention it was necessary for them to be an intentional participant of such a contravention, with knowledge of the essential facts.¹⁸ This was seen as being consistent with the approach to accessory liability within the Australian Corporations Act 2001 (ACA), the NZ Commerce Act 1986 (CA), the NZ Fair Trading Act 1986 (FTA) and criminal law rules for party liability.¹⁹ However, the standard for liability under s 533 has not been decided in New Zealand courts.

1 Australian approach to civil accessory liability

Yorke v Lucas (Yorke) is the leading authority for the approach to civil accessory liability in Australia, under both s 75B of the Australian Trade Practices Act 1974 (TPA) and s 79 of the ACA.²⁰ Both of these provisions are equivalent in wording to s 533. New Zealand is not obliged to follow the Australian approach, however the, Commerce Committee’s intention was that s 533 would be consistent with the accessory liability provisions within the ACA.²¹ Therefore the Australian approach is likely to be highly persuasive.

In *Yorke*, a company, Treasureway, was sold to the appellants. Mr Lucas, the respondent, was an agent acting for Treasureway in the sale of the company.²² The appellants claimed, following s 75B of the TPA that Mr Lucas was ‘involved in’ a contravention, in relation to false representations made by a director of Treasureway. The representations related to the average turnover of the business. The High Court of Australia ruled that to be liable as an accessory under s 75B, one must have been an intentional participant in the contravention. The wording of s 75B was imported, said the Court, from an existing criminal law concept. The Court decided that since Parliament had not stated otherwise, the provision should carry with it the ordinary criminal law meaning.²³ Therefore for liability to be attached to an accessory, a party must have the appropriate actus reus and mens rea. The prerequisite mens rea for each

¹⁶ Soloiman, above n 15, at 102.

¹⁷ Commerce Committee *Financial Markets Conduct Bill* (7 September 2012), at 4.

¹⁸ At 4.

¹⁹ At 4.

²⁰ *Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited* [2011] FCAFC 166 at [234].

²¹ Commerce Committee, above n 17, at 4.

²² *Yorke v Lucas* [1985] HCA 65, (1985) 158 CLR 661 at 2.

²³ At 6.

paragraph in s 75B is intent based upon knowledge of the material elements of the contravention.²⁴ Since s 75B and s 533 are virtually identical, the paragraphs within s 533 that are identical to those at issue in *Yorke* are likely to require the same mens rea.

Yorke involved false representations that were found to be misleading or deceiving.²⁵ The material elements of the offence were therefore that the statements made were misleading or deceiving. Mr Lucas had no knowledge that the representations made were false, and therefore misleading or deceiving, as a result he was not an intentional participant.²⁶ He was accordingly not 'involved in' the contravention.

The approach to accessory liability arising from *Yorke* first requires the accessory party to intend to participate in the contravention, and second they must have knowledge of the essential matters of the contravention.

Yorke left open the possibility of making an argument that constructive knowledge of the essential matters of the contravention will be sufficient for accessory liability. In *Yorke* Mr Lucas had made all the appropriate inquiries expected of him, he had not acted recklessly or negligently and therefore a reasonable person in his position ought not to have known the falsity of the representations (no constructive knowledge).²⁷ A potential issue is whether liability would be found had a reasonable person in Mr Lucas's shoes been aware of the material elements of the contravention. Thus imposing liability through constructive knowledge. This interpretation would broaden the scope of s 533, opening accessory liability to claims of negligence.

This was clarified in the recent Australian decision of *ASIC v Active Super Pty Ltd (Active Super)*. In *Active Super* the Federal Court of Australia affirmed the approach set out by *Yorke* to accessory liability,²⁸ and in doing so clarified several points. First, knowledge of the unlawful nature of the act is not required; all that is required is knowledge of the facts that make up the essential matters of the contravention.²⁹ Second, for accessory liability to attach, actual knowledge of the essential matters of the contravention is required, constructive knowledge is not sufficient.³⁰ However, actual knowledge may be inferred from the circumstances. The inference of actual knowledge is appropriate when the defendant has knowledge of matters that raise a suspicion, combined with a deliberate failure to make enquiries that may have

²⁴ *Yorke v Lucas*, above n 22, at 8.

²⁵ Trade Practices Act 1974 (AU), s 52.

²⁶ *Yorke v Lucas*, above n 22, at 6.

²⁷ At 5.

²⁸ *ASIC v Active Super Pty* [2015] FCA 342 at [398].

²⁹ At [398].

³⁰ At [399].

confirmed such suspicions.³¹ This state of deliberate ignorance, or wilful blindness, is distinct from honest ignorance.³² An honestly ignorant party would lack actual knowledge.

Following this decision, a negligent party is likely to escape liability. However, a party who is wilfully blind will not. Wilful blindness is not equivalent to recklessness;³³ it is where there is a suspicion, yet the party stays deliberately blind, therefore imputing actual knowledge is the only rational inference available. In many instances a professional adviser may be negligent, but lack actual knowledge, and therefore will not be liable. This is the case, even if the loss suffered may have been prevented had the third party's negligence not occurred, such as in *Boyd Knight v Purdue*, (discussed below).

2 New Zealand approach to civil accessory liability

(a) Knowledge-based approach

Yorke was affirmed as the correct approach to accessory liability in New Zealand with respect to s 43 of the FTA in *Megavitamin Laboratories Ltd v Commerce Commission (Megavitamin)*.³⁴ Section 43 is almost identical to s 533 and the approach to each section ought to be consistent.³⁵ In *Megavitamin*, secondary liability was not extended to a doctor for the contravention of falsely representing the composition of vitamin tablets. Tipping J stated that when the principal contravention is one of strict liability, the secondary party must have the requisite mens rea. To establish the mens rea they must:³⁶

- i) perform the actus reus deliberately
- ii) have knowledge of the essential factual features of the offence, whether or not they knew they constituted an offence; and
- iii) intend the conduct constituting the actus reus to assist the principal to perform the conduct constituting the offence.

The approach from *Yorke* and *Megavitamin*, will be titled the 'knowledge-based approach'.

(b) Dishonest participation approach

A different approach was taken in relation to the interpretation of s 83 of the CA in *New Zealand Bus Ltd v Commerce Commission (NZ Bus)*.³⁷ In *NZ Bus*, Hammond J saw difficulties with applying the knowledge-based approach to s 83 of the CA. Section 83 attaches accessory liability to a person involved in the contravention of s

³¹ *ASIC v Active Super Pty*, above n 28, at [402].

³² At [401].

³³ At [92].

³⁴ *Megavitamin Laboratories (NZ) Ltd v Commerce Commission*, (1995) 6 TCLR 231 (HC) at 245; and *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [66].

³⁵ Commerce Committee, above n 17, at 4.

³⁶ *Megavitamin Laboratories (NZ) Ltd v Commerce Commission*, above n 34, at 250.

³⁷ *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 at [160] per Hammond J.

47 of the CA.³⁸ Section 47 concerns business acquisitions resulting in a substantial lessening of competition in the relevant market.³⁹ In *NZ Bus*, NZ Bus Ltd acquired 74 per cent of Mana Coach Services; and the Court of Appeal held that the acquisition resulted in a substantial reduction of competition within the relevant market. For a contravention of s 47 to be found a range of facts need to be known,⁴⁰ an evaluative assessment is needed.⁴¹ Difficulty arose when applying the knowledge-based approach, in particular when attempting to articulate what essential facts the accessory party needed to know to deem them accessorially liable.⁴²

The Court of Appeal said injustice could arise if a person knew the essential facts to the contravention, but they may not have concluded that such facts would lead to a substantial reduction of competition, and therefore would not be regarded as morally culpable.⁴³ This was likely to occur when an evaluative assessment was required, because different people were likely to conclude different things. Consequently, the rigid application of criminal provisions could result in pecuniary penalties being imposed on a balance of probabilities test rather than a beyond reasonable doubt test. This may result in the provision being overreaching, and therefore disturbing commercial practice.⁴⁴

In order to avoid potential injustice Hammond J analysed the policy behind civil accessory liability in respect to s 83. His reasoning was as follows:

- A necessary factor in all cases is that there first must be an underlying infraction. For s 83 of the CA, accessory liability is only extended to a person ‘involved in’ the contravention of s 47.⁴⁵
- Accessory liability under s 83 is discretionary, after finding an underlying infraction the court “may” find a party accessory to the contravention.⁴⁶
- The actus reus subsections of s 83 do not require an in depth analysis. There is little difficulty in determining whether the party aided, induced, or conspired the contravention.
- Section 83 attaches liability to a contravention of s 47, which requires a context specific evaluation. There is ‘no one size fits all’ solution.⁴⁷
- The last question is the level of liability demanded by the statutory framework. At this point it is necessary to assess the purpose of the CA to determine the level of knowledge or culpability required to attach liability.

³⁸ Commerce Act 1986, s 83.

³⁹ Section 47.

⁴⁰ *New Zealand Bus Ltd v Commerce Commission*, above n 37, at [262] per Arnold J.

⁴¹ At [262] per Arnold J.

⁴² At [141] per Hammond J.

⁴³ At [265] per Arnold J.

⁴⁴ At [133]-[134] per Hammond J.

⁴⁵ At [143] per Hammond J.

⁴⁶ At [144] per Hammond J.

⁴⁷ At [150] per Hammond J.

With these policies in mind, Hammond J ruled that the knowledge-based approach was unworkable in the context of s 47. The fact that a knowledge-based approach does not account for reasonable divergences of views, or for the difference between knowledge and dishonesty,⁴⁸ means even if a person has knowledge of the essential matters to the contravention, they may not be morally culpable. This is unfavourable as the primary goal for any approach is to ensure a party's participation in the contravention was dishonest; are they culpable for the infraction.⁴⁹

Section 83, a stand-alone provision, applies solely to s 47. It has the purpose of punishing unacceptable commercial behaviour in respect to conduct that substantially lessens the competition in the relevant market.⁵⁰ Due to reasonable divergences in views, the appropriate moral culpability necessary to fit the purpose of that section is not met with the knowledge-based approach.

These concerns in relation to applying the knowledge-based approach to s 83 were shared unanimously by the three judges in *NZ Bus*. However, Hammond and Arnold JJ disagreed on an alternative approach.

Hammond J proposed that first there must be a principal contravention and second, the accessory party must have “dishonestly partaken in that contravention”.⁵¹ An objective approach is taken; the question is whether an honest person in the circumstances would see the involvement as being dishonest,⁵² with dishonesty being equivalent to commercially unacceptable conduct.⁵³ In this approach knowledge is relevant to the inquiry, however, it must be paired with dishonest participation.

The “dishonest participation” approach had the support from Wilson J,⁵⁴ however Arnold J had his doubts.⁵⁵ Arnold J agreed that the knowledge-based approach is difficult to apply to circumstances that involve an evaluative assessment, and that in these instances it is appropriate to look to the statutory framework. However, he considered that Hammond J's approach substitutes one set of difficulties for another, as it relies on the court's intuitive judgment.⁵⁶ Arnold J believed that when the knowledge-based approach is inappropriate, an alternative is to require knowledge of a “real risk of a contravention”.⁵⁷

⁴⁸ *New Zealand Bus Ltd v Commerce Commission*, above n 37, at [148]-[155] per Hammond J.

⁴⁹ At [155] per Hammond J.

⁵⁰ At [153] per Hammond J.

⁵¹ At [156] per Hammond J.

⁵² At [156] per Hammond J.

⁵³ At [154] per Hammond J.

⁵⁴ At [269] per Wilson J.

⁵⁵ At [266] per Arnold J.

⁵⁶ At [266] per Arnold J.

⁵⁷ At [267] per Arnold J.

For the purposes of this essay, Arnold and Hammond JJ's approaches will be treated equivalent. They both set a higher threshold of liability, introducing a further requirement to ensure moral culpability. However, the means of establishing such culpability is different.

D Appropriate Approach to s 533

Following this analysis New Zealand currently uses two approaches to accessory liability, and consequently there are two potential approaches a court could take when applying s 533.

Under the "knowledge-based" approach:⁵⁸

- i. the accessory party must perform the actus reus deliberately;
- ii. they must have actual knowledge (or at least be wilfully blind) of the essential facts giving rise to the contravention; and
- iii. they must have intended the conduct constituting the actus reus to assist the principal to perform the conduct constituting the offence.

Under the "dishonest participation" approach:⁵⁹

- i. the accessory party must perform the actus reus deliberately;
- ii. they must have actual knowledge (or at least be wilfully blind) of the essential facts of the contravention;
- iii. they must have intended the conduct constituting the actus reus to assist the principal to perform the conduct constituting the offence; and
- iv. a person with such knowledge would be considered objectively, to have acted dishonestly (Hammond J); or
- v. they also had knowledge of facts that meant there was a real risk of a contravention (Arnold J).

As noted above, the Commerce Committee outlined that the approach taken to s 533 is similar to the accessory liability approach in Australia, the CA and FTA.⁶⁰ Since the CA and FTA take different approaches, the Commerce Committee's statements are conflicting.

1 Policy factors

The approach adopted by the court will largely depend on policy considerations. It is apparent from the courts' decisions that the purpose for accessory liability appears not

⁵⁸ Used in relation to the Fair Trading Act, Australian accessory liability, and applied in *Yorke, Megavitamins* and *Body Corporate*.

⁵⁹ Used in relation to the Commerce Act, and applied in *NZ Bus*.

⁶⁰ Commerce Committee, above n 17, at 4.

to be consistent across every enactment. As noted, *NZ Bus* was influenced by a range of policy considerations that were particular to the context of the CA. In the FMCA context, application of policy considerations might lead to a different interpretation of the accessory liability provision. It is useful to look to the policy considerations outlined in *NZ Bus* and use them to determine the correct interpretation of s 533.

First, unlike s 83, s 533 does not require a principal contravention. Similarly to the Australian provisions it is not a precondition that a claim be brought against the principal offender. However, a principal infraction is still necessary.⁶¹ Second, similar to s 83, pecuniary penalties are also discretionary. Under s 484 of the FMCA, pecuniary penalties for accessories found liable under s 533 are only available upon an application of the Financial Markets Authority and are at the court's discretion under s 489.⁶² The paragraphs of s 533 are almost identical to s 83 with respect to how a party may participate in the contravention. Each paragraph contains actus reus terms that are commonplace legal terms and are easily applied.⁶³

The primary concern in *NZ Bus* was that in the case of evaluative assessments, extending accessory liability using the knowledge-based approach might result in injustice, due to the possibility of reasonable diverging views. Consequently, knowledge of the essential facts may not result in a culpable accessory. To combat this Hammond J introduced a further requirement for liability. As outlined in the Officials Report to the Commerce Committee, it is of prime importance that accessory liability catches those who are engaged in wrongful conduct.⁶⁴ Therefore when determining what approach to apply, an appropriate question is the level of culpability each approach catches.

2 *FMCA and evaluative assessments*

Unlike s 83 of the CA, which attaches accessory liability solely to s 47, s 533 attaches accessory liability to any contravention within the FMCA. Consequently, there is a range of prohibited behaviour to which accessory liability can attach, some of which may require an evaluative assessment. *Yorke* outlined that in order for a party to have knowledge that representations made were misleading, they need to also have knowledge of their falsity.⁶⁵ However in a FMCA setting, circumstances may arise where, although the party did not know of a statement's falsity, they knew information surrounding the statement resulting in awareness that it was likely to mislead. Therefore instances may arise where although a party knew all the relevant

⁶¹ *New Zealand Bus Ltd v Commerce Commission*, above n 37, at [143] per Hammond J.

⁶² Financial Markets Conduct Act, ss 484 and 489. Note that no pecuniary penalty order can be made for a breach of s 19, but can be made for a breach of the more specific misleading conduct prohibitions in ss 20-22.

⁶³ *Megavitamin Laboratories (NZ) Ltd v Commerce Commission*, above n 34, at 248.

⁶⁴ *Chapple*, above n 3, at [39].

⁶⁵ *Yorke v Lucas*, above n 22, at 13.

facts to the contravention, they may not have comprehended such actions to be misleading. Applying the knowledge-based test, accessory liability will be attached. The issue then becomes whether a party can be considered morally culpable when they lack knowledge that the statement was misleading, and if not, is that fatal to accessory liability attaching.

Australian authorities are split on whether knowledge that the statement was likely to mislead is a material element to the contravention. *Heydon v NRMA Ltd* found that accessory liability is attached even if the accessory did not know the statements were misleading,⁶⁶ this view was supported in *Yorke*.⁶⁷ In *Medical Benefits Fund of Australia Ltd v Cassidy (Cassidy)*,⁶⁸ the Court was split. Stone J ruled that knowledge of the misleading nature of the representation was an essential fact of the contravention, and necessary for accessory liability. In the absence of wilful blindness, the accessory party will not be liable.⁶⁹ Moore J, although agreeing with the outcome of Stone J, differed with the approach. Moore J believed that knowledge that the representation was misleading or deceiving was unnecessary. All that is necessary is that they knew the facts that allowed the representation to be characterised as misleading.⁷⁰ Therefore the approach of Australian case law is unsettled.

Consequently there are two issues that must be decided when applying accessory liability in NZ. Is actual knowledge of the misleading or deceiving nature of the representation required (Stone J) and, does participation in the contravention have to be dishonest (Hammond J). The core policy behind both of these issues is that a higher level of moral culpability is demanded. Therefore for the purpose of this essay Hammond and Stone JJ's approaches can be subsumed. If a party made representations with knowledge that they are false, they would be acting dishonestly, therefore satisfying both approaches.

3 *Appropriate threshold for liability*

Analysing the purpose and policy behind the CA and contrasting with the FMCA will help shed light on the appropriate threshold for liability under s 533. Section 83 of the CA is aimed at deterring and punishing seriously offensive commercial behaviour.⁷¹ The threshold for accessory liability must reflect such purpose. Too low a threshold may result in advisers or vendors involved in the transaction being liable even though they may not be considered morally culpable, this would diminish the flow of

⁶⁶ *Heydon v NRMA Ltd* [2000] NSWCA 374 at [436].

⁶⁷ *Yorke v Lucas*, above n 22, at 13.

⁶⁸ *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289, (2003) 135 FCR 1 at [94] per Stone J.

⁶⁹ At [94] per Stone J.

⁷⁰ At [15] per Moore J.

⁷¹ *New Zealand Bus Ltd v Commerce Commission*, above n 37, at [153] per Hammond J.

commercial advice. An excessively high threshold may result in effectively neutering the provision.⁷² Such concerns overlap with those in the financial markets setting.

The ‘dishonest participation’ approach outlined in *NZ Bus* provides a higher standard for liability. Such an approach will result in fewer parties being pulled within the provision, preventing undue liability for accessories. Alternatively, a lower threshold approach would be more of a deterrent, as a larger number of parties are likely to be liable. As a result conservative advice would be given and fewer risks taken, consequently creating greater investor protection. However, such a deterrent has the potential to reduce growth in financial markets through a decrease in innovation.

Another concern is excessive liability against professional advisers. Professional advisers supply an important service and should not be pushed out of the market by fears of excessive liability. A balance must be struck between a standard that reduces the provision of poor financial advice or products, with liability that is unwarranted. Such concerns must be analysed in light of the appropriate contravened provision to determine which approach should be applied, the knowledge-based approach or the dishonest participation approach.

4 Conclusion on preferred approach for the purposes of the FMCA

It is submitted that the prima facie test for s 533 should be the knowledge-based approach. As outlined below, this standard of liability best achieves the dual purposes of the FMCA. The standard of knowledge required should be actual knowledge, however, such knowledge can be inferred if it is the only rational conclusion in the circumstances.

Due to the broad nature of the provisions within the FMCA, circumstances may arise where applying the knowledge-based approach could result in injustice, with the accessory party not truly considered morally culpable for the offence. In such instances it is appropriate to determine whether the purpose of the FMCA would best be achieved through applying the dishonest participation approach. However, this should only occur in the rare instances where the party caught within the provision could not be considered morally culpable. This is likely to occur when the contravention requires an evaluative assessment, or potentially when there was no knowledge of the misleading nature (as outlined above with *Cassidy*). Thus the moral culpability of the accessory must be weighed alongside the purposes of the FMCA to determine whether the dishonest participation approach ought to be applied. Any approach taken should only catch those parties considered morally culpable.

⁷² *New Zealand Bus Ltd v Commerce Commission*, above n 37, at [114] per Hammond J.

IV Defences to Accessory Liability

Section 503 provides two general defences for a person ‘involved in’ a contravention of the FMCA. Section 503(2)(a) exempts a person from liability if their involvement was due to the reasonable reliance on information provided by another party.⁷³ Section 503(2)(b) provides a defence to accessory liability if the person took all reasonable steps to ensure that the principal offender complied with the provision.⁷⁴ The existence of these defences is important for determining the scope of s 533. It is unnecessary to construe the test in a limiting way where defences already exist to exempt liability.

Having these defences may mean it is appropriate to allow liability, and then put the onus on the accessory party to disprove liability. It is submitted that following the case examples below, it is unlikely that circumstances will exist where a party is found liable under the knowledge-based approach, with no defences applying, but cannot be considered morally culpable for the contravention. The defences are such that they will relieve any injustice. However, if circumstances do exist where a party is not considered culpable, and therefore imposing liability would be unfair, the dishonest participation may be useful. If this approach fails to relieve any further injustice, then its application is unnecessary.

V Tort Law

Accessory liability has an inevitable overlap with the tort of negligence. Those who might be caught as accessories also potentially face a claim in tort for breach of a duty of care. To establish liability in negligence there must be a duty of care owed to the relevant party and a breach of that duty. In New Zealand a two-stage approach is taken when determining whether a duty of care is owed. First, there must be sufficient proximity between the parties, such that the nature of the relationship justifies the imposition of a duty of care.⁷⁵ Second, any relevant external policy factors must be analysed as to whether they negate or justify the imposition of a duty of care.⁷⁶ There will inevitably be instances where s 533 goes further than the tort of negligence and imposes liability upon a party who would not have been liable under a duty of care analysis. Furthermore, the mere fact that the FMCA exists is likely to be a policy consideration for extending or mitigating the imposition of a duty of care. Due to the complexity of such arguments, although they are relevant to the scope of s 533, they will not be analysed in this essay.

⁷³ Financial Markets Conduct Act, s 503(2)(a).

⁷⁴ Section 503(2)(b).

⁷⁵ *South Pacific Manufacturing v New Zealand Security Consultants and Investigations* [1992] 2 NZLR 282 (CA) at 305 per Richardson J.

⁷⁶ At 305 per Richardson J.

For present purposes it is enough to state that the test for accessory liability is not the same as the test for establishing a duty of care. While there might be overlapping policy considerations, the negligence issue involves a close consideration of previous case law and both specific and broad policy issues. Whether the defendant is within the accessory liability net will be one of the policy considerations. Conversely, situations might arise where accessory liability catches a third party but no tortious duty would be found.

VI Application of s 533

The final issue for determination for the scope of liability under s 533 is to look at the application of the section. This will determine whether it applies unfairly, or in a way that hinders commercial practice. Alternatively, the approach may be set at a level where it fails to catch culpable accessories. This essay will focus on the facts in three cases, where in each case a disgruntled investor attempted to impose liability on someone one step away from the primary offender. In each of the cases considered, if the facts had arisen in a New Zealand context, the primary offender could have faced liability for breach of the fair dealing provisions of the FMCA, because false or misleading representations were made in the course of trade. In each case there were also more specific prohibitions that might have been breached, (such as ss 82, 270 or 460 of the FMCA or financial adviser regulation) but for the purposes of the analysis in this essay the focus is on the fair dealing prohibitions.

The following process will be used to determine the appropriate approach to s 533:

- (1) Apply the knowledge-based approach (and defences).
- (2) Is the result just?
 - Moral culpability of the accessory?
 - Purpose of the FMCA?
- (3) If no, does the dishonest participation approach or the approach by Moore J (in *Cassidy*) relieve any further injustice?
 - Yes, the dishonest participation approach may be appropriate.
 - No, the knowledge-based approach is appropriate.

A *Shafron v Australian Securities and Investments Commission*
*Shafron v Australian Securities and Investments Commission (Shafron)*⁷⁷ involved a draft announcement given by James Hardie Industries Ltd (JHIL) to the Australian Stock Exchange (ASX) in regards to the creation of the Medical Research and Compensation Foundation (the Foundation). The announcement was a disclosure to the market by the directors of JHIL regarding their satisfaction with the Foundation's

⁷⁷ *Morley and others v Australian Securities and Investments Commission* [2010] NSWCA 331 at [10]-[16].

ability to meet present and future asbestos claims.⁷⁸ The announcement was made following a proposal put forward to the JHIL board meeting by Mr Shafron, a senior executive of JHIL. The proposal was developed under the supervision of Mr Shafron; however, the board made the ultimate decision about what information ought to be announced to ASX.⁷⁹

In *Shafron*, Mr Shafron was found liable for failing to exercise with reasonable care his responsibilities as an officer of JHIL.⁸⁰ Were the facts to arise in New Zealand today, JHIL could potentially be liable under Part 2 (ss 19, 20 or 22) of the FMCA. JHIL's conduct of making the draft announcement to ASX or the representations within the draft announcement, was misleading to the market by creating the impression that a huge contingent liability had been removed from JHIL's books, where in fact it had not.⁸¹

1 Knowledge-based approach

Following *Yorke*, for Mr Shafron to be liable as an accessory under s 533, it would have to be shown that he had knowledge of the essential matters to the contravention, and intentionally participated in the contravention. Here the essential matters of the contravention are knowledge that the announcement was misleading.

In *Shafron* the High Court of Australia outlined that Mr Shafron did participate in the decision of the Board when determining what to disclose to the ASX.⁸² In terms of s 533(1)(a) it can be said that Mr Shafron aided the contravention through his slide presentations at the February board meeting,⁸³ therefore satisfying the actus reus requirement.

Mr Shafron failed to outline the inherent limitations in the Trowbridge Report, which his presentation relied on, and there was no mention of the model's reliance on the estimations when issuing the draft announcement to ASX.⁸⁴ The misleading nature of the representations is due to the fact that the limitations were not brought to the attention of the Board. Therefore, liability is not founded on knowledge of the falsity of the information, rather on knowledge of the facts that make the representation misleading or likely to mislead.

The Court held that Mr Shafron must have known of the potential impact the superimposed inflation had on the cash flow estimates. Mr Shafron knew from JHIL's

⁷⁸ *Morley and others v Australian Securities Investments Commission*, above n 77, at [190].

⁷⁹ *Shafron v Australian Securities and Investments Commission* [2012] HCA 18 at [30].

⁸⁰ At [36].

⁸¹ At [34].

⁸² At [31].

⁸³ Financial Markets Conduct Act, s 533(1)(a).

⁸⁴ *Morley and others v Australian Securities Investments Commission*, above n 77, at [1061].

experience that the cost of claims was increasing higher than the general inflation rate. Since he presented the report, he knew that the limitations had not been raised.⁸⁵ Consequently, Mr Shafron had knowledge that material in the report could be misleading, and knew that the draft announcement did not address such limitations. It can therefore be concluded that he knew of the essential matters of the contravention. Therefore Mr Shafron, a senior executive of JHIL, would likely be liable for being an accessory to the contravention made by JHIL under the knowledge-based approach.

Such a finding is similar to the result in *Shafron*, where Mr Shafron was found liable for failing to exercise his responsibilities as an officer. A reasonable party with Mr Shafron's knowledge would have advised the Board of the limitations prior to the draft announcement being made.⁸⁶ No defences in the FMCA would have applied. There was no reasonable reliance on information provided by another person, and reasonable steps were not taken by Mr Shafron to ensure compliance.

2 *Moral culpability*

Mr Shafron should be considered morally culpable. He was a senior executive and had a duty to ensure that JHIL was fully informed. His failure to advise the Board of the limitations are causally linked to the contravention. Therefore accessory liability is appropriate.

Attaching liability in these circumstances is consistent with the purpose of the FMCA, it ensures investors are protected from misleading statements and also assists the production of an efficient market through attaching liability to parties that make misleading representations.

3 *Dishonest participation approach*

For liability to be attached under this approach a further requirement of dishonest participation would need to be established. Objectively, did Mr Shafron act dishonestly? Due to Mr Shafron's level of culpability and his duties as a senior executive, such commercially unacceptable behaviour is likely to be present.

Following Moore J (in *Cassidy*) it could be argued that it must be shown that Mr Shafron had knowledge that the announcement was misleading, rather than mere knowledge of the facts that made it misleading. As outlined above, Mr Shafron was culpable; he ought to have raised such limitations. It is submitted that allowing this higher threshold approach will go against the purpose of the FMCA, as it doesn't protect investors, nor promote an efficient market. Nevertheless due to Mr Shafron's

⁸⁵ *Morley and others v Australian Securities Investments Commission*, above n 77, at [1073].

⁸⁶ *Shafron v Australian Securities Investments Commission*, above n 79, at [35].

level of knowledge (outlined above), actual knowledge is likely to be imputed through wilful blindness.

4 Conclusion

This example outlines that the knowledge-based approach sets an appropriate threshold for accessory liability when looking to the purposes of the FMCA and the level of moral culpability.

B Boyd Knight v Purdue

Next the facts of *Boyd Knight v Purdue (Boyd Knight)* will be analysed in light of s 533. Boyd Knight was an auditor for a company, Burberry, and issued a report stating that the financial statements gave a true and fair view of the state of affairs of the company.⁸⁷ This statement was false, one of the directors created fictitious accounts, resulting in the total liabilities exceeding the credit limit. The financial statements were inaccurate, as they did not reveal the true state of affairs of the company. Had reasonable care been taken, such fraud would have been noticed, no report issued,⁸⁸ and consequently no loss suffered. In *Boyd Knight* a negligent misstatement claim failed due to a lack of specific reliance on the financial statements.⁸⁹

Were the facts of *Boyd Knight* to arise in New Zealand today, the company's actions of issuing disclosure documents with inaccurate accounts could constitute a contravention of Part 2 (ss 19 or 22). Burberry's conduct in including fictitious accounts in the disclosure documents is misleading as it suggested the shareholder funds were positive, when in fact they exceeded the limit imposed by the trust deed by approximately \$15 million.⁹⁰

1 Knowledge-based approach

The actus reus is likely satisfied under either ss 533(1)(a) or 533(1)(b). The contravention was aided through the publication of the false or misleading statements or alternatively such publication made Boyd Knight knowingly concerned in the contravention.

Next it is necessary to prove the mens rea of the offence, that being knowledge of the essential matters of the contravention. An essential element of the contravention is that the representation is false or misleading. Following *Yorke*, to have knowledge that a statement is misleading, when that misleading nature is due to the falsity of

⁸⁷ *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA) at 3.

⁸⁸ At 3.

⁸⁹ At 9.

⁹⁰ At 3.

information, you must know of such falsity.⁹¹ Since Boyd Knight did not have knowledge of the fictitious accounts they could not be liable as an accessory under the FMCA. No defences are applicable.

2 *Moral culpability*

Boyd Knight having no knowledge of the fictitious accounts would not be considered culpable for the primary contravention. Sections 19 and 22 aim to remove deceptive conduct or representations from financial markets. A lower threshold for liability under these sections is more likely to achieve both investor protection and the promotion of a fair and efficient financial market.

3 *Dishonest participation approach*

None of the concerns outlined in *NZ Bus* in relation to evaluative assessments, or in *Cassidy* in relation to knowledge that the statement is misleading, are present. The contravention is due to the falsity of information, such as in *Yorke*. This suggests that a higher threshold approach is inappropriate. Nevertheless, Boyd Knight would not be considered to have acted dishonestly and therefore would not be liable under the dishonest participation approach.

4 *Conclusion*

Following this analysis, due to the requirement that a party needs knowledge of the essential matters of the contravention, it is unlikely that a negligent professional adviser, such as the auditor in *Boyd Knight*, would be caught within the scope of s 533 in regards to misleading or deceptive reports. For them to be caught it would have to be shown that they were more than negligent and actively involved in the misrepresentation. Such as in *Genocanna Nominees Pty Ltd v Thirsty Point Pty Ltd*, where liability was imposed on an accessory for creating a brochure with knowledge that material facts had been omitted, and that the brochure appeared as if an accountant created it.⁹² Thus supporting the conclusion that the correct threshold for accessory liability is set by the knowledge-based approach.

C *Seymour v Caroline Ockwell & Co*

Lastly the facts of *Seymour v Caroline Ockwell & Co (Seymour)* will be applied to s 533. *Seymour* involved a financial advisor, Miss Ockwell, who gave investment advice to Mr and Mrs Seymour (the Seymours). The Seymours were after a low risk, high return investment where their money was easily accessible.⁹³ Zurich IFA Limited (ZIFA) was a financial product provider. Miss Ockwell approached Mrs Clarke, an agent of ZIFA, to help select an appropriate financial product for the

⁹¹ *Yorke v Lucas*, above n 22, at 6.

⁹² *Genocanna Nominees Pty Ltd v Thirsty Point Pty Ltd* [2006] FCA 1268, at [303].

⁹³ *Seymour v Caroline Ockwell & Co* [2005] EWHC 1137 (QB) at [11].

Seymours. Mrs Clarke recommended the Imperial Consolidated Alpha Fund (AF) as a suitable investment. After personally looking into the AF, Miss Ockwell formed the opinion that the investment was appropriate for the Seymours. Consequently they invested in the AF. Imperial Loan Consolidated went into liquidation and the Seymours lost all money invested. The three parties that could be found liable under the FMCA would be Miss Ockwell, Mrs Clarke and ZIFA.

Miss Ockwell could be liable under the general prohibition in ss 19, 20, and 22, due to her misleading statements about the AF. She stated that it was a low risk investment and was suitable for an inexperienced conservative investor who required access to their cash. The investment was not low risk, and was wholly unsuitable for the Seymours, and Miss Ockwell did not have good grounds for believing that it was.⁹⁴

1 Knowledge-based approach

The relevant conduct of Mrs Clarke making her party to the contravention includes her recommendation of the AF to Miss Ockwell, as a low risk, cash accessible investment, and that favourable consideration should be given. Further, Mrs Clarke (or ZIFA) gave Miss Ockwell a brochure implying that the AF was a statutory authorised scheme, when in fact it was not.⁹⁵ Such actions aided the principal contravention through misleading the nature and suitability of the AF to Miss Ockwell. It was clearly an unsuitable investment.⁹⁶

Lastly, ZIFA failed to pass on to Mrs Clarke and Miss Ockwell that ZIFA suspended dealings with the AF due to concerns about the high-risk nature of the investment. The failure to correct their prior misleading conduct resulted in the Seymours being unable to withdraw their investment.⁹⁷ As a result ZIFA was indirectly knowingly concerned in the contravention; they knew information had been provided to Miss Ockwell that misleads the nature of the financial product.

Therefore both Mrs Clarke and ZIFA would have participated in the contravention under s 533.

Knowledge of the essential matters to the contravention requires knowledge that Miss Ockwell's conduct or representations were false or misleading. In other words that the accessory party knew that the AF was not low risk and was therefore unsuitable for the Seymours.

⁹⁴ *Seymour v Caroline Ockwell & Co*, above n 93, at [75].

⁹⁵ At [154].

⁹⁶ At [120].

⁹⁷ At [154].

The Court found that Mrs Clarke believed that the AF was a low risk, suitable investment.⁹⁸ She therefore lacked knowledge of the essential elements of the contravention. Furthermore, actual knowledge is unlikely to be imputed through wilful blindness. Here imputing knowledge of the unsuitability of the AF would not be the only rational inference available. This is evident due to both Mrs Clarke and Miss Ockwell, two professionals, forming the opinion that AF was a suitable product.

ZIFA did have such knowledge. Following the investigation of the AF, ZIFA knew the investment was not a low risk one, and therefore unsuitable. A contentious point here is whether the knowledge occurred prior to or after the contravention occurred. The latter will not attract liability. Since the investment was in a cooling off period, the transaction was not complete. Had ZIFA passed their concerns on to Miss Ockwell, either the investment would not have gone ahead, or an extension of the cooling period could have been requested. Thus resulting in no principal contravention.⁹⁹ Following this analysis ZIFA could be liable. No defences are applicable.

2 Moral culpability

The imposition of liability on financial advisers, such as in these circumstances, should be viewed as appropriate. It is consistent with the purpose of the FMCA; it ensures both investor protection, and the development of efficient, fair and innovative financial markets. Investor protection is achieved by holding those involved in the contravention accountable, thus acting as deterrent, and encouraging parties to be more stringent. Financial markets are developed through demanding transparency, and through party liability not being overly encompassing. If financial advisers are able to give financial advice, while knowingly aware (or where they are wilfully blind) that such advice is misleading this will not promote an efficient and transparent financial market. Therefore due to ZIFA's knowledge, they can be considered culpable for the contravention.

3 Dishonest participation approach

As aforementioned, it may be appropriate to apply the dishonest participation approach when the contravention requires an evaluative assessment of the facts. Here there are multiple factors that would go to misleading nature of the statement. However, in this particular instance the knowledge of the misleading nature of the statements can be found due to the fact that an inquiry had been commissioned by ZIFA. The inquiry outlined that the AF was a high-risk investment.¹⁰⁰

⁹⁸ *Seymour v Caroline Ockwell & Co*, above n 93, at [155].

⁹⁹ At [157].

¹⁰⁰ At [157].

The fact that ZIFA had recommended the product as a low risk one, paired with their omission to correct that statement, means participation would be dishonest. It is not in the interests of commerce for organisations to advertise investments as having a certain quality, and then fail to inform the investor otherwise when they gain contradicting knowledge. Therefore, ZIFA would satisfy the dishonest participation approach.

4 Conclusion

In *Seymour*, the Seymours could not directly claim in statute against ZIFA. Both statutory and negligence claims were successfully made against Miss Ockwell. Miss Ockwell then successfully claimed against ZIFA for their contributory negligence, with ZIFA being found liable for two thirds of the damages. The Seymours claim in tort against ZIFA was unsuccessful.

However, following the above analysis, the Seymours would potentially be able to bring a direct claim against ZIFA under s 533, irrespective of whether they pursued a claim against Miss Ockwell. This could succeed regardless of the fact that there was no contractual relationship between ZIFA and the Seymours, and that ZIFA did not owe the Seymours a duty of care.¹⁰¹ For the Seymours to claim damages they would seek a compensation order under s 495.¹⁰² This analysis demonstrates that s 533 potentially allows statutory liability under the FMCA to attach where there is no contractual or tortious liability. Furthermore, the fact that both approaches are satisfied signifies that the knowledge-based approach does set an appropriate threshold, the dishonest participation adding nothing extra. Liability is appropriate. ZIFA is morally culpable under both approaches. Illustrating that the dishonest participation approach is unnecessary, as it relieves no further injustice.

VII Conclusion

When Parliament introduced civil accessory liability into the Financial Markets Conduct Bill, the Commerce Committee believed that the test for accessory liability was clear. The above analysis outlines that this is not necessarily the case. The knowledge-based approach, which has been applied in New Zealand in the context of accessory liability under FTA, has inherent limitations within it, primarily being that knowledge of certain facts does not necessarily equal moral culpability.

In instances where a party is liable as an accessory, but cannot be considered to be morally culpable, the “dishonest participation” approach proposed by Hammond J (in the context of accessory liability under the CA) may be useful. This approach, having

¹⁰¹ *Seymour v Caroline Ockwell & Co*, above n 93, at [143].

¹⁰² Financial Markets Conduct Act, s 495.

a higher threshold, is more likely to attach liability to parties who are culpable versus those who were merely incidental to the contravention occurring.

To determine which approach is appropriate in a given situation, the purpose of the FMCA must be analysed with respect to the relevant section, alongside the culpability of the party. If it appears that moral culpability to the primary contravention is not present then it may be necessary to look to the dishonest participation approach.

As outlined in the instances above and in view of the defences available under the FMCA, it will be very rare for circumstances to exist where the dishonest participation approach is needed to relieve injustice to a non-culpable accessory. It is proposed that the knowledge-based approach, paired with the defences to accessory liability, set an appropriate standard for the FMCA. As demonstrated with reference to *Shafron*, *Boyd Knight* and *Seymour* this standard meets the dual primary purposes of the FMCA, protecting the investor and ensuring the promotion of fair, efficient and transparent financial markets.

Word Count

The text of this paper (excluding the cover page, abstract, contextual footnotes, and bibliography) consists of exactly 7919 words.

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