IN THE COURT OF APPEAL OF NEW ZEALAND

CA232/04

	BETWEEN	AMALTAL CORPORATION LIMITED Appellant
	AND	MARUHA CORPORATION First Respondent
	AND	MARUHA (NZ) CORPORATION LIMITED Second Respondent

Hearing: 27 to 30 March 2006

Court: Hammond, O'Regan and Robertson JJ

Counsel: A R Galbraith QC, B R Latimour and R J Hollyman for Appellant
J G Miles QC, Z G Kennedy and C A Levermore for Respondents

Judgment: 1 June 2006

JUDGMENT OF THE COURT

A The appeal is allowed, in part. The judgment in favour of the respondents in the High Court is upheld. The judgment sum of $6,120,446 is set aside. We substitute instead a sum of $4,920,446.00.

B We award costs to the respondents of $30,000, plus usual disbursements. We certify for second counsel.

C We remit the proceeding to the High Court to determine costs in that Court, and interest on the judgment sum, those issues having been reserved in that Court.

REASONS

(Given by Hammond J)

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Introduction

[1] This is an appeal from a judgment of Priestley J in a commercial cause (HC AK CIV-2003-404-001773 19 October 2004). After a trial which occupied some five weeks in 2004 the Judge found that the appellant, Amaltal Corporation Limited, had acted inappropriately with respect to its dealings with the respondent, Maruha, almost 20 years ago. For the purpose of this judgment, nothing turns on the distinction between the two respondents, and we use the singular term "respondent"

to describe them in this judgment. The Judge entered judgment for the respondent in a sum of $6,120,446. Interest and costs were reserved.

[2] We use the term "inappropriate" advisedly. There were four issues before the High Court. First, what if any legal relationship(s) governed the affairs of the parties at the relevant times? Secondly, whether the appellant had acted in breach of such obligations as could be established to have existed. Thirdly, what was the extent of Maruha's loss? Fourthly, was the respondent time-barred in its endeavour to recover its losses?

[3] In the result, Priestley J held that the respondent could rely on causes of action grounded on fiduciary duties, implied terms of an agreement, and in deceit. The Judge found, in the simplest terms, that Amaltal had acted dishonestly, and in breach of those obligations, that Maruha had suffered extensive loss and that Maruha was not time-barred.

[4] Findings of commercial dishonesty always produce the legal equivalent of a bare-knuckle fist fight, and so it has proven in this case. Mr Galbraith QC has led a full frontal attack on the way the Judge went about finding the facts, his actual findings, and his legal conclusions. Hearings in this Court are formally rehearings, but in this appeal we were invited, over a period of some four days, to trawl through some 25 volumes of the case on appeal going to events arising close to two decades ago.

[5] Nevertheless by the end of the hearing we had come to a clear view, which an out-of-court review of the materials advanced to us has not altered.

[6] In our view:

- The only cause of action open to the respondent was the tort of deceit.

- The High Court Judge correctly concluded that the tort is, in this instance, made out, if that cause of action can now be relied upon.

- There are some issues as to the calculation of quantum, largely of an accounting nature. We take the view that the Judge was substantially correct as to the damages he awarded, but that certain adjustments need to be made thereto, which ultimately produces a net award of just under $5 million.

- The proceeding is not time-barred.

Overview

[7] At all relevant times Maruha was the second largest fishing company in Japan. It had annual revenues of around $NZ12 billion per annum. Maruha largely fished overseas, in offshore ventures with other companies.

[8] Amaltal was a New Zealand private company. It too operated as a fishing company.

[9] Amaltal was itself a joint venture, being 50% owned by Talley's Fisheries Limited and 50% by Amalgamated Dairies Limited.

[10] In 1985 Amaltal and Maruha (then named Taiyo) entered into a joint venture agreement, pursuant to which they formed a company, Amaltal Taiyo Fishery Company Ltd (Amaltal Taiyo).

[11] Rounded off, the shareholding in Amaltal Taiyo was held as to 75% by Amaltal and 25% by Maruha. It was necessary to limit Maruha's share to just under 25% so as to permit Amaltal Taiyo to own New Zealand fishing quota and comply with certain statutory restrictions on foreign ownership, although in all respects the two shareholders of Amaltal Taiyo had equal control of Amaltal Taiyo. The financial returns from its trading activities were by way of specific agreements which did not equate precisely with the unequal shareholding percentages.

[12] Amaltal Taiyo was involved in fishing in New Zealand waters. Under the joint venture agreement, Amaltal provided Amaltal Taiyo with certain administrative

support, and leased fishing quota to the company. Maruha provided Japanese fishing vessels and crew and attended to sales and marketing of the resultant catch in Japan.

[13] Amaltal Taiyo operated as the vehicle for this joint venture between Maruha and Amaltal until that joint venture was dissolved in September of 1991. As part of the agreed dissolution of that joint venture Amaltal Taiyo became a wholly owned subsidiary of Amaltal.

[14] A profit guarantee which is at the heart of the High Court proceeding arose in the context of a related, but separate joint venture. This profit guarantee came about this way. In mid-1987 Amaltal Taiyo entered into a separate joint venture with Maruha known as the Surimi Joint Venture (Surimi JV), for a term of five years. The purpose of the Surimi JV was to utilise hoki quota, including an extra 40,000 tonnes of quota which had been acquired by Amaltal Taiyo. The Ministry of Agriculture and Fisheries had offered this quota to Amaltal Taiyo in February of 1987 for a total sum of some $16 million under a five-year lease arrangement, at a fixed annual rental. At the end of the five-year term, this lease was to convert to full quota ownership.

[15] The catch was to be utilised for "surimi". This is a reconstituted fish product. The fish-catch is ground up and reconstituted into a fish protein product for use in "crab sticks" and the like, primarily in the Japanese market.

[16] The acquisition of this quota had to be funded. Amaltal Taiyo borrowed approximately ¥ 1.1 billion from the Industrial Bank of Japan. This bank loan was to be guaranteed by Maruha, and was to be repaid over a five-year period at the rate of ¥ 220 million (or approximately NZ $2.15 million) each year.

[17] If the Surimi JV had caught and processed all of the 40,000 tonnes of quota, the profit which would have been generated for Amaltal Taiyo would easily have covered its obligations to the Industrial Bank of Japan. In reality, the Surimi JV's ability to make sufficient profits was dependent on the performance of Maruha. Maruha controlled the operation of trawlers, the catching and processing at sea of the fish, imports into Japan, and marketing and sales in Japan. Maruha was also setting

the prices at which the surimi was sold through its internal divisions. There was a profit margin at each stage which in turn impacted on the return paid to Amaltal Taiyo.

[18] There was some discussion before us as to just how much exposure Amaltal actually had in respect of the Industrial Bank of Japan loan but that is of no real consequence for our purposes. Undoubtedly Amaltal thought that it did have some potential exposure. Hence the Amaltal-appointed directors of Amaltal Taiyo initially sought a guarantee of fish-catch to cover the company's position. Maruha refused. As an alternative Maruha agreed to give Amaltal Taiyo a guarantee of the minimum annual net profit from the Surimi JV.

[19] The parties then entered into a written memorandum in these terms:

> MEMORANDUM
>
> Amaltal Taiyo Fishery Company Limited and Taiyo Fishery Company Limited agree notwithstanding the provisions of the Surimi Joint Venture agreement between them and of the Supplementary Charter Party that:-
>
> 1. Amaltal Taiyo shall cause books of account to be kept in respect of its interest in the Surimi Venture based on years to end 30th September. The first period will end 30 September 1987 and the last 30 September 1991.
>
> 2. Those books of account shall be kept as if Amaltal Taiyo's interest in the Surimi Joint Venture were a separate entity and shall show the net profit to Amaltal Taiyo after all expenses in connection with the Joint Venture paid or payable by Amaltal Taiyo have been charged including charter fees royalties cost of leasing 7000 MT Hoki quota from Amaltal Coolstore & Exporters Limited and income tax at standard company rates.
>
> 3. If that profit shall be less than 220 million Japanese Yen in each year then provided Hoki quota available does not fall below 40,000 tonnes each year Taiyo will by reducing its charter fees or otherwise, ensure that the net profit of Amaltal Taiyo from the Surimi venture after all expenses and tax provision is not less than 220 million Japanese Yen in each year. If Hoki quota available falls below 40,000 MT for any year, the parties shall consult with each other to fix the amount of net profit ensured by Taiyo to Amaltal Taiyo.
>
> 4. Termination of the Surimi Venture by reason of default on the part of either party shall not excuse Taiyo from its obligations under this Memorandum.
>
> 1987, 10TH June

For Amaltal Taiyo Fishery Company Limited	for Taiyo Fishery Company Limited
"Signature" "Signature"	"Signature"

[20] The practical purpose of the profit guarantee was to ensure that Amaltal Taiyo could meet all of its Surimi JV obligations - including the repayments on the Industrial Bank of Japan loan - without recourse to Amaltal or Maruha, both of which companies had guaranteed the Industrial Bank of Japan loan.

[21] The profit guarantee was to be calculated on the basis of a profit and loss account which was to be prepared as if Amaltal Taiyo's interest in the Surimi JV was a stand-alone entity. This was to be a "notional" set of accounts. This notional calculation of profit and loss was necessary because Amaltal Taiyo's total business activities involved more than its participation in the Surimi JV. Amaltal Taiyo's "normal" accounts would not therefore have indicated the profitability of its interest in the Surimi JV venture alone.

[22] During the period of the Surimi JV the profit guarantee calculations which were in fact carried out by Amaltal Taiyo were done in the following way: the gross profit of the Surimi JV was calculated by subtracting expenses from revenue. Then, in relation to the tax provision, the method was to apply the standard company rate, which at that time was 48%, to the guaranteed net profit after tax to render it the equivalent of a guaranteed "gross profit". This was necessary because any profit guarantee payment received by Amaltal Taiyo was itself a taxable receipt. If there was a short-fall between those two gross profit figures that was the amount which in Amaltal Taiyo's view Maruha was liable to pay under its profit guarantee.

[23] The difficulties which arose between the parties came out of something which is not expressly covered by the profit guarantee: whether the cost of the hoki quota lease could be amortised for tax purposes.

[24] Maruha had taken professional advice at the time the Surimi JV was entered into as to whether the capital cost of purchasing the hoki quota could be amortised

for tax purposes. It was advised that the prospect of the Inland Revenue Department accepting such an amortisation claim was "extremely doubtful". That was also the view of all the experts who gave evidence, for both sides, in the High Court. Nevertheless Amaltal decided that Amaltal Taiyo should attempt to amortise the quota purchase price for tax purposes. In the colloquial terms in which it was described in the hearing before us, Amaltal Taiyo decided to "take a punt".

[25] This was going to make for some problems. Amaltal Taiyo would have to include amortisation as a deduction in its tax accounts. But it would not include amortisation in its internal, or "management" accounts, because of the doubtful "state-of-the-play" on tax liability. It was likely (but not inevitable) that the tax would have to be paid, and so provision needed to be made for it.

[26] It was common ground that, at the outset of the Surimi JV, Maruha knew that an attempt was to be made to secure this tax advantage, and that the management accounts and the tax accounts would reflect two different sets of assumptions. Hence this is not a case in which it could be, or indeed is, alleged that there was a "deception" right from the outset.

[27] The practical consequences of proceeding in this manner were that if the hoki quota could be expensed for tax purposes, Amaltal Taiyo's tax liability would reduce significantly. But in the meantime, on the basis of the management accounts and the flow-on effect for the profit guarantee memorandum, the monies flowing from Maruha to Amaltal Taiyo would be greater than if amortisation was possible. To put this at it shortest, Maruha would be proceeding on the basis in relation to payments to Amaltal Taiyo that the hoki quota lease could not be amortised, whereas at the end of the day in fact it might be, and in the meantime, Maruha would have been making or potentially making greater payments under the profit guarantee than would be required if Amaltal Taiyo's tax payments were calculated on the basis that amortisation was permitted.

[28] Maruha claims that there were a series of written and false reassurances from the CEO of Amaltal Taiyo (Mr Scheffer), Mr Michael Talley, and Mr Holyoake (the accountant to Amaltal Taiyo) to the effect that the payments made by Amaltal Taiyo

to Amaltal were necessary to meet tax payments calculated on the basis that no amortisation of the hoki lease was permitted. Maruha's case is that this tax liability was fictional: the amounts actually being paid in tax by Amaltal on behalf of Amaltal Taiyo were significantly lower by reason of the amortisation of the hoki quota lease. All of this was greatly to Amaltal's advantage, in the view of Maruha, because Amaltal Taiyo was getting what amounted to overpayments with respect to the profit guarantee memorandum which it advanced to Amaltal which used the advanced sums in its own day-to-day operations.

[29] Ultimately, to the surprise of all concerned, and contrary to all the professional advice which had been taken, the IRD did accept amortisation of the hoki quota. But in the meantime, Maruha had become concerned that what it now perceived to be substantial advances had been made, which were unsecured. It was largely this concern about apparent unsecured advances that set Mr Kawata, who, as will become apparent was Maruha's executive officer "on the ground" in New Zealand, into making, or endeavouring to make, further inquiries into what the real position was.

[30] Maruha's case turns on the proposition that a number of false representations were made to Maruha which were distinctly calculated to keep Maruha in the dark about Amaltal Taiyo's actual tax liability. The result was higher than necessary payments by Maruha to Amaltal Taiyo under the profit guarantee, and significant advances from Amaltal Taiyo to Amaltal which were, for the most part, interest-free and unsecured, and were not approved by Maruha.

[31] In fact the Surimi JV, which was to operate for five years terminating on 30 September 1991, did not go well. In two of the first three years of its life Maruha had to make payments to Amaltal Taiyo under the profit guarantee memorandum. This was because the surimi vessels did not catch anything like the tonnage of hoki quota available to them. The price of surimi dropped, and Maruha had to make further payments under the profit guarantee memorandum in both of the last two years of the Surimi JV. In the fifth (and last year) of the Surimi JV Maruha simply gave up fishing or producing surimi altogether. All of the Surimi JV quota ended up

being leased back by Amaltal Taiyo to its shareholders, and each of them used quota for their own purposes.

[32] In 1991, by agreement, this unsatisfactory Surimi JV was dissolved. The Amaltal Taiyo joint venture was itself dissolved at about the same time. The dissolution involved Amaltal buying Maruha's shares in Amaltal Taiyo. Maruha was entitled to, and took directly or indirectly, a transfer of one quarter of the Amaltal Taiyo assets. This dissolution was done on the basis of the position shown in the audited management accounts of Amaltal Taiyo, which did not reflect the fact that tax was paid on the basis of amortisation being permitted, and no objection to this had been received from the IRD. This dissolution agreement, dated 25 September 1991, provided for assets and liabilities to be divided or compensated in proportion to the respective shareholdings of Maruha and Amaltal. It did not make any specific provision in respect of the $5.2 million which had been advanced by Amaltal Taiyo to meet Amaltal's contingent liability for meeting tax on the assumed basis that the quota could not be amortised. Maruha received its share of the hoki quota held by Amaltal Taiyo on an unamortised basis, and in order for that to occur, Amaltal made a significant payment to the IRD.

[33] This tax win was not apparent at the time of the 1991 agreement. It was only confirmed after an IRD audit which commenced in 1992, but which was only completed in 1994, at which time the IRD failed to disallow the amortisation claim. That audit did make some adjustment to the timing of those claims.

[34] The result of all of this was an unexpected and substantial benefit to Amaltal Taiyo, and through Amaltal's then ownership of Amaltal Taiyo to Amaltal, albeit this was subject to those companies never seeking to realise the capital value of the remaining quota (that is, Amaltal's share) at which time tax would have had to have been paid on the written-back amortised amount.

[35] The unexpected success of the tax deduction claim came well after the dissolution of the joint venture in September of 1991. But given the payment made to the IRD in respect of Maruha's 25% interest, the benefit which had accrued to

Amaltal Taiyo and indirectly to Amaltal was not a matter in respect of which Maruha had any legal claim.

[36] There matters may very well have rested, but for the fact that in the year 2000, some nine years after the dissolution of the joint venture, Amaltal and Maruha became embroiled in a dispute which related to the subsequent holding and ownership by Maruha of its share of the fishing quota. That dispute gave rise to litigation which is not related to this dispute. Further, Mr Scheffer, a former director of Amaltal and a former director of Amalgamated Dairies Limited, had left his employment with Amalgamated Dairies Limited on bad terms. There was unrelated litigation over that matter.

[37] Amaltal claims that in late 2000, by way of retribution, Mr Scheffer suggested to Maruha that the Amaltal directors of Amaltal Taiyo, and the Amaltal Board as a whole, had dishonestly cheated Maruha out of two entitlements.

[38] Mr Scheffer claimed that in 1986 the Amaltal appointed directors of Amaltal Taiyo (that is, Mr Peter Talley and himself) had deliberately and secretly taken advantage of a mistake by MAF in the allocation of fishing quota so that Amaltal took for itself quota which properly belonged to Amaltal Taiyo, and that thereby Maruha had been deprived of 25% of that quota. This was referred to in this proceeding as "the quota claim".

[39] Mr Scheffer also suggested that in 1987 the whole of the Board of Directors of Amaltal (excepting Mr Scheffer himself) had decided secretly to obtain tax benefits by amortising the hoki quota lease over the next five years, concealing that claim from Maruha, and keeping all the benefit of those tax savings. This was referred to by counsel as the "tax savings claim", and rests on the broad background to which we have already referred.

[40] It was against that background that Maruha filed its originating statement of claim in this proceeding, dated 25 January 2002. This was approximately 15 years after the events of 1987. The claim as filed covered both the quota claim and the tax savings claim.

[41] We can set the quota claim entirely to one side. It was rejected entirely by Priestley J, and there is no appeal by Maruha against the dismissal of that claim.

[42] Maruha's claim - at least as we are concerned with it - is in essence a claim to recover back something over $6 million, on the footing that it was "cheated" out of those monies by Amaltal and Amaltal Taiyo (through Amaltal's management). Maruha paid over the monies thinking this was "tax money", when it was not in fact so employed. The causes of action relied on are alleged implied terms in the profit guarantee memorandum, breach of fiduciary duties arising out of the relationship between Amaltal/Amaltal Taiyo and Maruha; and deceit.

[43] At heart, the defence was run on two bases. First, that Maruha knew (through Mr Kawata, its "man in New Zealand") what was being done in accounting terms, and never objected; and that in any event, this historic claim is now hopelessly out of time.

Deceit: liability

(i) Introduction

[44] Maruha can not succeed on a claim of breach of fiduciary duty, or on its claim of breach of implied terms of the profit guarantee memorandum, for reasons we provide later in this judgment.

[45] It is better to proceed directly to the cause of action on which the outcome of the proceeding must necessarily turn, that of deceit.

(ii) The law

[46] The tort of deceit is summarised in *Clerk & Lindsell on Torts* (18th ed 2000) at [15-01] in these terms:

> The tort involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the claimant should act in reliance on

> such a representation and the claimant in fact does so, the defendant will be liable in deceit for the damage caused.

[47] The misrepresentation which is relied on to found an action of deceit must be a representation as to a past or existing fact. It may be either express or implied from conduct. In most instances, non-disclosure of the truth does not ground the tort; "mere silence, however morally wrong, will not support an action for deceit" (*Bradford Third Equitable Benefit Society v Borders* [1941] 2 All ER 205 at 211 per Viscount Maugham). Exceptions to this most often arise where the failure to speak may distort the truth of previous statements (see generally, Todd (ed) *The Law of Torts in New Zealand* (4th ed 2005) at 630), or where there is active concealment (*Schneider v Heath* (1813) 3 Camp 506; 170 ER 1462), or where a true representation is rendered false by a subsequent and known change of circumstances (*Brownlie v Campbell* (1880) 5 App Cas 925 at 950 per Lord Blackburn (HL)).

[48] As to the state of the defendant's mind, the leading authority is still *Derry v Peek* (1889) 14 App Cas 337 at 374 per Lord Herschell:

> First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false … [T]o prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth .

[49] It follows that a statement honestly believed to be true - even if implausible - is not capable of amounting to fraud. But if the defendant knows the statement to be untrue that defendant will be responsible, irrespective of his or her motives. "If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made" (*Bradford v Borders* at 211 per Viscount Maugham; and see generally Carty *An Analysis of the Economic Torts* (2000) ch 6).

[50] The critical features of the tort are therefore that the representor must have lacked an honest belief in the truth of his statement; "carelessness" is not to be equated with "dishonesty"; and even recklessness in the sense of gross negligence will not suffice, unless there is a conscious indifference to the truth.

[51] Each case turns on its own facts. Two illustrations of the application of these principles are instructive.

[52] In *Derry v Peek* itself, the directors of a tramway company had issued a prospectus claiming that they were empowered by statute to use steam-powered cars. The authorisation was actually conditional on governmental consent, which the directors honestly believed would be given as a matter of course. It was however withheld. In consequence, the company went into liquidation. The plaintiff had become a shareholder on the faith of the prospectus and instituted an action against the directors for deceit. He succeeded in persuading the Court of Appeal that negligence was sufficient to support liability. That decision was reversed by the House of Lords since fraud in the sense set out in [48] above had not been established.

[53] A more modern instance is *Jaffray & Ors v Society of Lloyds* [2002] EWCA Civ 1101. This case was at the heart of the "Names" litigation in the United Kingdom. It was held that there was a representation in a 1981 brochure produced by Lloyds that a rigorous system of auditing existed that involved the making of a reasonable estimate of outstanding liabilities, including unknown and unnoted losses. Subsequent brochures contained essentially the same representation, although the word "rigorous" no longer appeared. The 1981 brochure also contained a representation that Lloyds believed that such a system was in place, as did subsequent brochures. There are features of this litigation which have some similarities to the instant case not just because the action was cast in deceit; but because there were also allegations of implied terms.

[54] The Court of Appeal held that the representations, during the relevant period, were untrue. The Court said that, "In each case it is necessary to ask the question … what would the reasonable person in the position of the representee understand by the words used in the document … [T]hat meaning might either be explicit in the words used or implicit (and in that sense implied) from the words used" (at [59]). The Names had, however, failed to prove that the relevant individuals at Lloyds did not believe the representations to be true or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue. Lloyds was

accordingly not liable to the Names under the tort of deceit. Permission to appeal under the (now) English appellate procedure was declined.

[55] Since deceit is descended from the old form of an action on the case, damage is a fundamental requirement. Accordingly the usual distinction between the measure of damages based on tort principles, and the measure of damages based on contract principles, must be applied.

[56] The correct measure of damages in tort is an award which serves to put the claimant in the position he or she would have been in if the representation had not been made. That is subject to the usual rules of remoteness, mitigation and the like.

[57] The position as to damages was explained by Lord Collins MR in *McConnel v Wright* [1903] 1 Ch 546 at 554-555 (CA):

> It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect to come in, but it is an action in tort - it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss.

[58] In New Zealand, there is authority for the proposition that contributory negligence may apply in deceit (*Dairy Containers Ltd v NZI Bank Ltd & the Auditor-General* [1995] 2 NZLR 30 (HC); a decision of Thomas J). In *Gloken Holdings Ltd v The CDE Co. Ltd* (1997) 6 NZBLC 102, 272, Hammond J took a contrary view. The House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corporation* [2003] 1 AC 959 has since held that contributory negligence does not apply to this tort, for the same sort of reasons as were given by Hammond J.

[59] We will make some observations as to the standard of proof and the proper approach of an appellate court to the onus of proof in a case of deceit later in this judgment.

(iii) The claim as pleaded

[60] The pleadings as to deceit on which this case went to trial are in the third amended statement of claim, which we now set out.

> 79. During the term of the joint venture the defendant made the following representations in respect of the tax savings to the first plaintiff:
>
> (a) Amaltal Taiyo's tax liability to the IRD in each financial year was as set out in the audited financial statements;
>
> (b) the quota lease was not amortised for tax purposes;
>
> (c) the defendant had paid, or was obliged to pay, to the IRD the tax liability of Amaltal Taiyo as disclosed in the audited financial statements; and
>
> (d) Amaltal Taiyo's profit after paying actual cash expenses was as set out in the profit and loss statements.
>
> 80. Particulars of the representations pleaded in paragraph 79 above include:
>
> (a) the defendant prepared financial statements which disclosed a notional tax liability for Amaltal Taiyo which was significantly higher than the actual tax liability of that company;
>
> (b) the defendant arranged for those financial statements to be audited;
>
> (c) the defendant prepared profit and loss statements for the surimi venture and attached debit notes which required payment by the first plaintiff under the terms of the profit guarantee calculated on the basis that the quota lease was not amortised.
>
> (d) the defendant advised the first plaintiff in writing that the defendant had paid, or was obliged to pay, to the IRD the tax liability of Amaltal Taiyo as disclosed in the audited statements by, inter alia;
>
> (i) letter dated 12 January 1988 from the defendant to the first plaintiff advising that advances from Amaltal Taiyo to the defendant were on account of tax and would be payable by the defendant to the IRD. The defendant advised that tax of $1,700,145 was payable on 7 February 1988;
>
> (ii) facsimile dated 13 January 1988 exchanged by the shareholders of the defendant (forwarded to the first plaintiff) advising that advances by Amaltal Taiyo to

the defendant were for the purpose of meeting Amaltal Taiyo's taxation;

(iii) letter dated 22 January 1988 from the defendant to the first plaintiff advising that all advances from Amaltal Taiyo to the defendant would be eliminated by taxation assessed against the defendant on behalf of Amaltal Taiyo;

(iv) letter dated 7 February 1988 signed by Michael Scheffer on behalf of Amaltal Taiyo advising that:

(aa) Amaltal Taiyo had advanced $2.75 million to the defendant;

(bb) on behalf of Amaltal Taiyo, the defendant would pay $1.7 million in terminal tax on 7 February 1988;

(cc) on behalf of Amaltal Taiyo, the defendant would pay provisional tax of a further $1.7 million on 7 March 1988;

(dd) Amaltal Taiyo was obliged to advance a further $.65 million to the defendant in order to enable it to meet Amaltal Taiyo's provisional tax due on 7 March 1988.

(e) the defendant confirmed on 2 February 1989 that the tax returns filed by the defendant for Amaltal Taiyo were based on the quota lease not being amortised.

81. The representations were made by the defendant in the knowledge that they were false.

82. The representations were made by the defendant with the intention that they be relied upon by the first and/or second plaintiffs.

83. The first and/or second plaintiffs relied upon the representations in:

(a) accepting that Amaltal Taiyo should advance the sum of NZ$9,964,446 as set out in paragraph 56 above, to the defendant for the purpose of satisfying Amaltal Taiyo's tax expense;

(b) making payment of the sum of NZ$6,120,446, as set out in paragraph 61 above, to Amaltal Taiyo pursuant to the profit guarantee.

84. The plaintiffs have suffered loss as a result of relying on the representations, particulars whereof are contained in paragraph 69 above.

(iv) The Judge's findings

[61] Priestley J found that:

- Amaltal falsely represented to Maruha that the quota lease was not being amortised and that the payments under the profit guarantee memorandum were required to meet an actual (as opposed to a notional or even contingent) tax liability of Amaltal Taiyo.

- Amaltal knew the representation was false.

- Maruha had no knowledge that Amaltal Taiyo (through Amaltal) was making tax payments to the IRD calculated on the basis that the hoki quota lease was being amortised.

- Maruha had no knowledge that Amaltal had amassed an asset of several million dollars (being the money paid over from Amaltal Taiyo to Amaltal to meet Amaltal Taiyo's purported tax liability, as part of Amaltal's group tax payment, but not actually utilised for that purpose).

[62] As to the profit guarantee memorandum, the Judge concluded that the proper interpretation of that document did not require Maruha to make payment calculated on the basis of a tax liability which was not an expense paid or payable.

(v) The challenge to the Judge's findings

[63] Amaltal's central contention on the appeal is that the High Court Judge was wrong to conclude that Maruha and Mr Kawata did not know that Amaltal Taiyo's tax returns were on the basis of amortisation of the hoki quota lease.

[64] This proposition requires some qualification at the outset, which also narrows the field of inquiry. The Judge said at [220]:

> There is no doubt that Maruha's representatives knew, at an early stage, that Amaltal Taiyo would endeavour to amortise the quota lease for tax purposes.

[65] Mr Miles QC very properly said that "Maruha … accepts that it was aware at this [earlier] time of the attempt to amortise to quota lease".

[66] The issue is thus, as the Judge put it at [223]:

> What is critical on this issue of knowledge is not whether Maruha knew about amortisation at the outset, but whether it was kept abreast of developments and in particular whether it appreciated that amortisation would be the basis for successive deduction claims for Amaltal Taiyo's taxation years beyond March 1986 and that the company would continue to pay tax on that basis.

[67] The Judge set out the basis on which he had concluded that Maruha (through Mr Kawata) did not have such "continuing knowledge", indeed that the converse was true, as follows:

> [224] In an endeavour to establish Maruha had continuing knowledge, Mr Latimour relies on certain evidence. He points to various handwritten calculations made by Mr Kawata during 1988 after his request to Mr Holyoake, through Mr Scheffer, for an explanation of various differences between the management accounts and trial balances. (Supra para [156] and ABD 919). He refers to Mr Holyoake's computer system whereby management accounts were created from taxation accounts permanently stored in it. He also refers to Mr Kawata's report to Tokyo (ABD 958) in August 1988 which contains under the heading "Quota lease" a clear reference to the figures relating to amortisation contained in the March 1987 accounts.
>
> [225] Mr Latimour placed particular emphasis on the discussions involving Mr Kawata in Nelson in early February 1989. He submits that Mr Holyoake's reference to note 5A in ABD 1039 (refer supra paras [167] to [170] for more detailed examination of this aspect) can only refer to note 5A of the tax accounts (ABD 965).
>
> [226] But as is clear from my findings on this matter, I do not accept that Mr Kawata was shown the tax accounts of Amaltal Taiyo on that occasion. The significance of the two different taxation treatments was fully appreciated by Mr Kawata. Had he read note 5A of the taxation accounts, he would have been fully aware that Amaltal Taiyo was paying tax at a lesser figure than that shown in the management accounts. This awareness would immediately have given the lie to representations made earlier that year (supra paras [125] to [132]) that the unauthorised loan by Amaltal Taiyo to Amaltal would be used for approximately $3.4 million taxation payments in February and March 1988.
>
> [227] Finally, it would doubtless have occurred to Mr Kawata that the profit guarantee payments, to which he was privy, were using a tax payment component higher than the payment Amaltal Taiyo was actually making.

> [228] It is inconceivable that Mr Kawata, had he been shown Amaltal Taiyo's tax accounts prepared by Mr Holyoake, would have overlooked these matters. It is equally inconceivable that their significance would have passed him by. Mr Kawata impressed me as a credible and straight-forward witness. In cross-examination he made no attempt to justify anything or go beyond what he could actually remember.
>
> [229] That he was aware of the significance of amortising the quota lease is undisputed. I am, however, satisfied that he neither realised nor knew that taxation returns and tax payments were being lodged and made on Amaltal Taiyo's behalf which continued to amortise the lease beyond the March 1986 year.
>
> [230] There is additionally a coincidence of the parties' evidence on the issue of Maruha being provided with Amaltal Taiyo's tax statements between 1988 and 1991. Mr Holyoake surmises from ABD 1039 (supra) that he did provide these, but has no personal recollection of doing so. Nor does Mr Michael Talley have any knowledge of giving any tax statements to Maruha. For their part, Messrs Honda, Kawata and Takuma, gave evidence that they received no tax statements for Amaltal Taiyo other than the draft statements for the March 1987 year.
>
> [231] Finally, there are the clear and unequivocal representations made to Maruha in January and February 1988 that the unauthorised loan to Amaltal, which clearly caused Maruha great concern, would be used to meet specific tax payments due from Amaltal Taiyo in February and March 1988.
>
> [232] Being fully aware of Mr Latimour's proper submission of the need to exercise great caution in respect of the recall of witnesses and discovery difficulties after all these years, I am nonetheless satisfied that Maruha had no knowledge that Amaltal Taiyo was continuing to make tax payments calculated on the basis of the amortisation of the quota lease.

[68] Maruha's proposition is that, in the simplest terms, initially Mr Kawata had a correct appreciation of the true situation, but his appreciation changed by reason of particular events. Amaltal's position, on the other hand, is that nothing was lost by way of understanding and that, in a sense, both parties were really proceeding all along on a distinct understanding as to what was being done, in an accounting sense, and about which complaint cannot now be appropriately made.

(vi) The burden of proof

[69] The onus lies on the plaintiff to prove the necessary fraudulent intent.

[70] As to the standard of proof, in *Continental Insurance Co v Dalton Cartage Co Ltd* [1982] 1 SCR 164 Laskin CJ at 171 cited with approval the words of Lord Denning in *Bater v Bater* [1950] 2 All ER 458, where His Lordship said at 459:

> Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. … A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established.

Laskin CJ continued:

> I do not regard such an approach as departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that proof on a balance of probabilities has been established.

[71] A similar approach is apparent in *Smith New Court Securities Ltd v Citibank NZ* [1997] AC 254 at 274 (HL), *Jaffray*, above at [53], and *In Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 where Lord Nicholls of Birkenhead said at 586:

> [T]he more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence.

(vii) Appellate review

[72] Once a trial Court has found deceit, an appeal may (as here) follow. Mr Miles appeared mildly perplexed that we were prepared to allow Mr Galbraith to revisit the facts as closely as we did in this case; indeed he seemed to consider that was somehow wrong in principle, and that this case was close to what, in earlier days, was sometimes called a "heard and saw" approach.

[73] There are appellate authorities in cases of deceit where there has been reference to what MacPherson JA has referred to as "the thorny issue of [the] standard of review [of factual matters]" (*Amertek Inc v Canadian Commercial Corp* (2005) 76 OR (3d) 241 at [65]). In that instance the Ontario Court of Appeal held at

[68] that the trial Judge's "conclusions should be upheld unless they constitute a palpable and over-riding error, or are 'clearly wrong', 'unreasonable' or 'unsupported by the evidence'" (referring to *HL v Canada (Attorney-General)* [2005] 1 SCR 401 at [55]-[56]). We agree, in principle, with this standard, which is consistent with the general approach taken in this Court in civil matters.

[74] That said, if regard is had to what appellate courts actually do, it is noticeable that plaintiffs who are successful at trial have not found it altogether easy to hold judgments in their favour in claims of deceit. *Derry v Peek*, *Jaffray* and *Amertek* are only three instances of successful High Court awards having been set aside on appeal. Where that has occurred it is usually on the basis that there *were* misrepresentations, but the appellate court has concluded that dishonesty has not been established.

[75] The practical difficulty is that, to reach a view on that issue, it is necessary to pay close regard to the facts of the impugned transaction. This necessarily means that appellate courts are often faced with the arduous task of re-tracing the evidence. That concern was heightened in this case by the features that a very long period of years had passed since the events complained of, there are language and cultural complications, and patently incomplete (in the sense that some files were missing) disclosure. This was not therefore a case on which a successful plaintiff could sit with total equanimity on a High Court judgment. A searching review was called for, in fairness to the appellants. But it is not our function to retry the case.

(viii) The representations

[76] It is convenient to begin with an overview as to how Maruha says the misleading and dishonest statements came about. To do so it is necessary to introduce some further factual material as to the central figures in this case.

[77] Mr Kawata was trained as an accountant and began working for Maruha as long ago as 1960 in a position equivalent to that of an accounts clerk. He received regular promotions over the years and became a section manager in Maruha's head office in Tokyo. In September 1986 he was posted to New Zealand. His official

position was as Deputy-General Manager of Maruha's New Zealand interests. His distinct responsibility lay with the collation, preparation and book-keeping of Maruha's financial records and data. That information in turn was provided to Maruha's external accountants and auditors (Coopers and Lybrand) to enable that firm to prepare final accounts and tax returns. Mr Kawata held the position of Deputy-General Manager of Maruha in New Zealand until he was transferred back to Japan in April of 1990.

[78] Mr Kawata worked closely with Mr Mark Honda, who was the joint Managing Director of Amaltal Taiyo, and the head of Maruha's New Zealand operations. At the relevant times the other joint Managing Director of Amaltal Taiyo was Mr Scheffer, who was an Amaltal appointee.

[79] Mr Honda had been a fisherman all his life. He has a degree from Tokyo University ("in fisheries"). Mr Honda was in New Zealand from 1985 to March 1989 when he transferred back to Tokyo.

[80] Mr Kawata's role involved him checking and confirming the accuracy of financial reports for the various joint ventures in which Maruha was involved. One of these was with Amaltal Taiyo.

[81] In carrying out his functions, Mr Kawata dealt principally with Mr Holyoake, who was the in-house accountant at Amaltal.

[82] Mr Kawata's English was "not very good" (as he put it). Consequently he would have queries recorded in writing and sent to Mr Holyoake for reply. Mr Kawata's own calculations on many of the accounts produced at trial were recorded in Japanese. These in turn had to be translated for the purposes of the trial.

[83] The context and terms of the joint venture have been set out in [19], above.

[84] Given Maruha's interests, and Mr Kawata's responsibilities, the methodology he employed was generally as follows. Every six months or so Mr Holyoake would provide Mr Kawata with a copy of Amaltal Taiyo's draft financial statements.

Routinely, Mr Kawata made hand-written notes (in Japanese) on the accounts as he went through them to endeavour to ensure that there were no obvious errors on the accounts. Mr Kawata's ability to read accounts seems to have been unencumbered. Typically Mr Kawata would then fly to Nelson to see Mr Holyoake, who would provide him with the trial balance statement for the relevant period.

[85] Mr Kawata did not perform an "audit" as such. He would cross-reference the trial balance statement against the draft financial statements. By way of checking, he would select an extract from the accounts to be checked against the source material or vouchers (such as invoice receipts and statements). But Mr Kawata was distinctly keeping an eye on things, and he was what was colloquially referred to during the hearing as a "$2 man". We mean nothing unkind by that, nor do we mean any disrespect. There were items where there was as little as $2 involved which Mr Kawata queried. This indicates the level of detail to which he was wont to go.

[86] As soon as the hoki lease was successfully tendered for, the question of the tax treatment of the cost of the quota lease assumed real significance for Maruha. There were significant tax savings to the joint venture if the quota lease could be amortised and the cost of the lease validly treated as an expense rather than an item of capital expenditure. It was common ground that all the experts who were consulted, including Maruha's own accountants (Coopers and Lybrand) thought the prospect of "expensing" the quota cost was not on. The word "expensing" is an unattractive one, but was commonly used by witnesses in the proceeding. It is common ground however that Mr Scheffer advised that an attempt would be made to get IRD approval to treat the quota leased as a cost rather than a capital item.

[87] In the result, two sets of accounts were prepared, the management accounts and the tax accounts.

[88] The management accounts provided:

(a) [At Note 1(B)(IV)]:

> "QUOTA: A FIVE YEAR QUOTA LEASE FOR 40,000 TONNE OF HOKI HAS BEEN CAPITALISED UNDER FIXED ASSETS.

> NO AMOUNT OF THIS HAS BEEN AMORTALISED (sic) ALTHOUGH THIS IS SUBJECT TO TAXATION AUTHOITIES REVIEW".

(b) [At Note 5 under the heading "ESTIMATED TAXATION"]:

> "THIS REFLECTS THE MOST LIKELY TAXATION POSITION AS THE ANSWER TO WHETHER THE HOKI LEASE OF 14,763,636 BEING DEDUCTIBLE OVER THE FIVE YEAR PERIOD IS EXTREMELY DOUBTFUL HENCE AS STATED IN NOTE 1 NO PART O THIS HAS BEEN AMORTALISED (sic)". (From 1988 on, this was not noted anymore.)

[89] The tax accounts on the other hand showed quota being amortised at 20% per annum. We refer to Notes 1(B)(IV) and 5 of those accounts.

(a) [At Note 1(B)(IV)]:

> "QUOTA: A FIVE YEAR QUOTA TENDER IS AMORTISED IN EQUAL YEARLY INSTALMENTS OVER THE STATED PERIOD. THE BALANCE TO BE WRITTEN OFF HAS BEEN DEFERRED UNDER NON-CURRENT ASSETS".

(b) [At Note 5 under the heading "ESTIMATED TAXATION" no reference is made to amortisation, unlike the equivalent note 5 to the management accounts, above.]

[90] Mr Kawata received these "parallel" accounts for the year ending 31 March 1987 in September 1987. He sent them to the accounting department at Maruha, in Japan.

[91] The audited financial statements of Amaltal Taiyo for the year ended 31 March 1987 were received by Mr Kawata in October 1987. They were consistent with the notes which we have just set out.

[92] In December 1987 Mr Kawata received a draft of the financial statements of Amaltal Taiyo for the period ended 30 September 1987 (ie, the next six months). These statements recorded that the lease cost of the quota was not amortised and that tax was payable by the joint venture in full. Mr Kawata said that he took it from this that the attempt to claim a deduction in respect of the leased costs of the quota had

been unsuccessful. If that were not the case he would have expected the financial statements to reflect amortisation of the quota lease along with a significant reduction in the tax due to be paid by Amaltal Taiyo or at least a statement that the issue was still subject to a response from the IRD.

[93] In December 1987 Mr Holyoake also prepared a first calculation of Maruha's liability under the profit guarantee. This profit and loss statement was prepared on the assumption that the quota was not amortised, and tax payments were being made on that premise by Amaltal Taiyo. The case for Maruha was that the profit of the Surimi JV calculated on that basis was lower than it would have been if the amortisation of quota was reflected in the profit and loss statement. The calculation resulted in an obligation by Maruha to pay NZ$2.875 million to Amaltal Taiyo under the profit guarantee.

[94] In that month, Mr Kawata raised a number of issues with Mr Holyoake in relation to the profit and loss statement. He did not raise tax issues because (he said) he took the accounts at face value on that point. What he was concerned about however was that the 30 September 1987 accounts revealed an unsecured advance to Amaltal of $2.15 million. Mr Kawata could not understand this, and he and Mr Honda both said this had not been authorised.

[95] We have Mr Holyoake's written response dated 12 January 1988, to this query. Mr Holyoake explained that this advance was on account of tax payable by Amaltal Taiyo which was to be met by Amaltal as parent company. He enclosed some amended statements, but they continued to show advances to Amaltal of $2.15 million and in Note 17 he explained that the advances would be "contraed" against taxation payable by Amaltal Taiyo, through Amaltal, to the IRD. On the same day, Mr Holyoake sent a note to Mr Michael Talley which said that there was no tax to pay and hence nothing to contra against the cash advances made to the parent company. This note is a clear acknowledgement that what had been said to Maruha was untrue.

[96] Mr Kawata was still not satisfied. He asked for (and received) a memorandum from Mr Holyoake detailing the various cash advances which had

been made by Amaltal Taiyo to Amaltal. In general terms, Maruha was still concerned that substantial cash advances appeared to be being made to Amaltal by Amaltal Taiyo, but without Maruha's knowledge, or what it saw to be without its authority. There was further correspondence on this issue culminating, on 29 January 1988, in a formal letter of complaint from Maruha's head office to Amaltal, about those advances.

[97] Mr Scheffer formally replied to this letter on 4 February 1988 on behalf of Amaltal Taiyo. That letter confirmed that the advances made by Amaltal Taiyo to Amaltal were for the purpose of meeting Amaltal Taiyo's tax obligations, which, by 7 March 1988, would total $3.4 million. Indeed the letter went further, and advised that Amaltal Taiyo would need to advance a further $650,000 to Amaltal to pay this tax prior to 7 March 1988. That sum was in fact paid to Amaltal.

[98] Mr Kawata received the draft financial statements for Amaltal Taiyo for the year ended 31 March 1988 in May 1988. Consistent with the accounts for the prior six-month period (ending 30 September 1987) these accounts stated that the quota lease was not amortised. We refer in particular to Notes 13 and 14 recording Amaltal Taiyo's tax liability on this basis. And Note 17 referred to the cash advances from Amaltal Taiyo to Amaltal as "pre-payment of taxes".

[99] Mr Kawata behaved as he had previously. He made notes on the accounts (but not going to tax treatment) and then in late May 1988 he again travelled to Nelson to check the financial statements. Mr Kawata said that to his surprise the trial balance he received in Nelson showed a depreciated figure for the quota lease. He made his own hand-written notes calculating the depreciation. He also received draft income and balance sheet statements which appeared to reflect the amortisation of the quota. The short point is that these accounts were obviously inconsistent with what Mr Kawata had previously seen.

[100] Mr Kawata made some notes (which were produced at trial) which he proposed to put to Mr Holyoake, for an explanation. This request went forward. Apparently it went along a chain from Mr Kawata to Mr Honda to Mr Scheffer, who in turn sent it to Mr Holyoake.

[101] On 8 June 1988 there was a response from Amaltal Taiyo again confirming that the tax liability was calculated on the basis that the quota was not amortised, and indicating that provisional tax of just over $1.7 million had actually been paid.

[102] Mr Kawata also received from Mr Holyoake a page of journal entries correcting discrepancies between the trial balance and the draft financial statements for the period ended 31 March 1988. It also contained an entry under a heading, "quota lease":

> $2,952,727 retained earnings (being non-deductibility of lease written back for taxation purposes for the year ended 31/3/87 ie has to go against r/earnings as written back against r/rentals last year).

The amended trial balance provided by Mr Holyoake also confirmed that the quota lease was not amortised.

[103] There were a set of tax accounts for the year ended 31 March 1988, but Mr Kawata denied receiving them.

[104] Mr Kawata also provided Maruha in Tokyo with a copy of the draft management accounts for the year ended 31 March 1988. He had made a hand-written note in Japanese on those accounts indicating some concern as to whether the quota lease had been amortised for tax purposes, or not. However he expected this issue to be made clear in the auditor's report on the accounts.

[105] On 31 January 1989 Mr Kawata wrote again to Mr Holyoake requesting final financial statements as at 31 March 1988 and the auditor's report. He made requests for other financial material. He visited Nelson in early February 1989.

[106] The context of this visit and what came out of it are of distinct importance. Mr Kawata thought there were a number of differences between the final statements for 31 March 1988 and the May 1988 documents. He was trying to come to grips with the differences. He put his points up, in writing.

[107] Question 3 of Mr Kawata's memorandum of concern (as translated by Mr Honda) bears setting out in full:

> Would you give us a copy of company tax return, if return is done under Amaltal, please give us a copy of calculation for Amaltal Taiyo company. *This return has been done under final f/s or with quota depreciated?* (Emphasis added.)

[108] Mr Holyoake's response could not have been briefer, and it is convenient to set it out here in full:

> RE: A/TAIYO F/S Y/E 31.3.88 02-Feb-89
>
> 02:54 PM
>
> IN ANSWER TO MR KAWATAS QUESTIONS
>
> 1 PLEASE REFER TO THE ATTACHED JOURNALS
>
> 2 AUDITORS REPORT IS AWAITING SIGNATURES BY BOTH AUDITOR AND M.SCHEFFER
>
> 3 THE RETURN IS UNDER AMALTAL CORPORATION LTD
>
> FOR CALCULATION OF AMALTAL TAIYO TAXATION REFER NOTE 5.A.
>
> 4 DEFERRED TAXATION IS CORRECT AS STATED IN NOTE 14 & 6 REFER TO SECTION 64.M. OF THE INCOME TAX ACT 1976. THERE HAS BEEN A CHANGE IN THE TAX LAW SINCE Y/E 31.3.87

[109] Note 5A in the final financial statements plainly indicated that the quota lease had not been amortised. Mr Holyoake said that the Note 5A that he was referring to was a note to the tax accounts which frankly disclosed the amortisation position. Mr Holyoake could not remember giving the tax accounts for the year ended 31 March 1988 to Mr Kawata, but said that he would have given them to him. The Judge did not believe that Mr Kawata had the 1988 tax accounts, and thought it was much more likely that the document was in fact referring to the management accounts. We agree.

[110] Mr Kawata did not receive final audited financial statements of Amaltal Taiyo for the year ended 31 March 1989 until probably October 1989. Those statements continued to record that the quota lease was not amortised. Notes 5, 13 and 14 record that tax was payable in full. Note 17 recorded that the advances made to Amaltal were on account of tax, which was payable by Amaltal on behalf of Amaltal Taiyo.

[111] Mr Kawata's position was that the provision of these financial records (which had been verified by external auditors) indicated to him as Maruha's financial representative in New Zealand that the quota lease had not been amortised; and that this was reinforced by the way in which the full amount of Amaltal Taiyo's tax liability (as it was shown in the financial statements) was being transferred to it for payment at the requisite times throughout the currency of the Surimi JV . It was his view that the May 1988 documents were simply what he described as "the remnants of an attempt" to persuade the IRD to permit the amortisation of quota. He thought they had been generated in error, as part of that attempt. His specific questions had been put to Mr Holyoake, and answered directly in a way that indicated that the lease was not being amortised (when in fact, he knew it was).

[112] It will be apparent from the foregoing that the Judge fundamentally accepted the thrust of this evidence: that Amaltal represented that tax was being paid on a non-amortised basis, and that Maruha so understood and acted on that representation, to Amaltal's knowledge.

[113] The appellant assumed a difficult burden in this case. The Judge - who had properly apprised himself as to the burden and nature of the proof which is required in a case such as this - had found material representations which were not true, and which were relied on by Maruha, causing it substantial loss. We will deal with the dishonesty issue later in this judgment.

[114] The case was an inherently difficult and complex one, relating to events which occurred years ago. Full records (particularly from Maruha, in Japan) were no longer available. Personal recollections were inevitably blunted by time. Nevertheless, the High Court was required to determine the case on what evidence was actually before it.

[115] Mr Galbraith submitted that the Judge had got it very badly wrong. In essence, he suggested that the Judge had proceeded on a somewhat intuitive basis, believing that what looked on its face like a "rip off" by Amaltal was in fact just that. He said that the Judge had paid far too much attention to his in-court assessments of

witnesses - particularly Mr Kawata - and not nearly close enough attention to contemporary documents.

[116] Mr Galbraith endeavoured to persuade us that a close traverse of the contemporary material shows that, at all material times Mr Kawata, and through him Maruha, actually appreciated and went along with the course which was being taken, namely, that the hoki quota lease was being amortised. This amounted, on Mr Galbraith's argument, to a sort of parallel understanding, or even something akin to an estoppel in the circumstances of the case. Even more fundamentally, for the purposes of the tort of deceit, the respondent could not now be heard to complain, if it really did appreciate the basis on which accounts were being prepared, and monies "advanced" from Maruha. And if Maruha did not "know", then at the very least it should have known or appreciated the position, and it is in Amaltal's submission time-barred in this proceeding.

[117] We are not persuaded that we should interfere with the Judge's findings of fact. The judgment under appeal did not, as was suggested to us, turn mainly on an "intuitive" in-court assessment of witnesses. For whatever it was worth, the Judge was entitled to assess what weight he would give to particularly Mr Kawata's evidence, and he clearly formed a favourable view of Mr Kawata. It is difficult to isolate out any distinctive weight the Judge gave to that factor - clearly it was more than minimal - but that factor was at least relevant.

[118] That said, the Judge had due regard to those other elements which are standard components of the weighing of evidence. The Judge did have close regard to the contemporary documentation. In particular, and this weighs heavily with us, once Mr Kawata became uneasy he put very direct and unequivocal questions to Mr Holyoake, and he received equally unequivocal answers. There is a great deal of force in Mr Miles' criticism that Mr Holyoake was coy, to say the least, in the brevity of the answers he gave. Brief and unequivocal as they were, the answers he gave were also misleading, and in the respects found by the Judge.

[119] The Judge also had regard, as he was perfectly entitled to, to the probabilities in this particular case. The Judge's term that it is "inconceivable" that Maruha

would have acted as it did, if it had known of the truth of the situation must, with respect, be entirely correct. It beggars belief that Maruha would have gone on paying over millions of dollars of money, for a particular purpose, if that purpose was not in fact being followed. Maruha was paying large sums to Amaltal Taiyo intended to facilitate Amaltal Taiyo's meeting its obligations to the Industrial Bank of Japan, when much of this money was being advanced on an unsecured basis by Amaltal Taiyo to Amaltal, to Amaltal's distinct advantage.

[120] The judgment under review accordingly rested on a very traditional basis of a review of contemporary documents; whether the critical testimony of witnesses was accepted; and the probabilities, in the particular commercial context.

[121] To overcome this formidable hurdle, an attempt was made in this Court to emphasise a somewhat ephemeral "parallel understanding" by the parties.

[122] What Mr Galbraith endeavoured to advance in this Court was that it was entirely plausible that there was a sort of collateral agreement (the full legal status of which was not explored). In Mr Galbraith's submission, this purported agreement proceeded along the lines that the full amount of the tax would be advanced because Amaltal would take it on itself to be responsible for any penalties, including use of money interest (which at that time amounted to 20%).

[123] We reject this argument. First, and most importantly, there is no reference in any contemporary document from any party referring to any such agreement. By contrast Maruha's documentation clearly indicates concern - Mr Miles rightly termed it "shock" - that the money should have been taken at all, which gives a quite contrary impression. Secondly, there was no reference in Mr Michael Talley's evidence-in-chief as to what the terms of this agreement might be. There was force in Mr Miles' submission that various versions of the arrangement then seemed to be put forward in cross-examination. Thirdly, on the probabilities, as we have already observed, why would Amaltal Taiyo advance more than $5 million in five years, when there was no legal obligation for it to do so? Fourthly, the Judge did consider all this evidence (see judgment [281] to [287]) and he found no such "agreement".

[124] In the result, we are not disposed to interfere with the Judge's findings of fact that misrepresentations of the character identified by the Judge were made by Amaltal to Maruha, that they were intended to be acted upon by Maruha, and that Maruha did in fact so act, to its detriment. It has not been shown the Judge was wrong.

[125] At this point it may be as well to return to the judgment under appeal. At [321] Priestley J said:

> There are a number of representations which Amaltal made to Maruha of a factual nature which it knew to be false. These were :
>
> - Amaltal Taiyo's taxation payments in the calculation of the profit guarantee statements.
>
> - The unamortised value of the quota lease in the management accounts and audited accounts of Amaltal Taiyo.
>
> - The representations made in January/February 1988 that the loan owing by Amaltal to Amaltal Taiyo would be contra'ed against Amaltal Taiyo's tax payments in February/March 1988.
>
> - Various assurances and notes in the Amaltal Taiyo accounts to the effect that the quota lease was not being amortised when in fact it was.
>
> - Representations that Amaltal Taiyo's tax returns were being filed on the basis that the quota lease was not being amortised.
>
> - Representing in its letter of 7 June 1991, giving notice that it wished to dissolve the joint venture agreement, that Amaltal Taiyo's assets were as set out in that letter, with a total failure to disclose the $5.6 million loan owing to Amaltal Taiyo by Amaltal.
>
> - Representing to Coopers & Lybrand in 1992 that the quota lease had not been amortised.

[126] It will be observed that that paragraph goes beyond the matters which were raised in the pleadings. However, for present purposes it is clear that on any view of the matter there were serious material misrepresentations, and in particular the central representation that Amaltal Taiyo's tax returns were being filed on the basis that the quota lease was not being amortised.

[127] That leads naturally enough to two other features of the tort of deceit which we must deal with. That is that Maruha must have been induced to act by these

misrepresentations, and relied upon them. The Judge found that it was "abundantly clear" that Maruha had indeed relied on these representations "by paying the sums demanded of it under the profit guarantee calculations each year" ([323]). To put it another way, but for these representations, which were incorrect, Maruha would not have gone on paying over substantial sums supposedly meant to meet taxation liabilities. We are not persuaded that the trial Judge was wrong on these points.

(ix) Dishonesty?

[128] The most striking feature of the High Court judgment is that there does not appear to be a distinctive finding of dishonesty. Yet this is the absolute core of the action for deceit. Perhaps the Judge thought that it was sufficiently implicit in what he had set out in his judgment that there was dishonesty in the relevant sense. The judgment is marked by a somewhat surprising paragraph, at [325]:

> The *fiduciary relationship* between Maruha and Amaltal in this area strongly suggests that Amaltal's representations were made with the intention that Maruha would rely on them. Maruha did rely on them. (Emphasis added.)

[129] Mr Galbraith dealt with this central concern in this way. In his written submissions (which were enlarged upon in oral argument) he said:

> The Judge's conclusion that the statements in January/February 1988 were a deliberate and necessarily pre-planned (ie conspiratorial) deception of Maruha is illogical and wholly improbable given the earlier disclosure of amortisation and of the separate tax accounts. Having made such disclosure, if there was subsequently a dishonest plan to deceive Maruha, then Amaltal would surely have simply told Maruha directly that the IRD had disallowed the claim, and hidden thereafter all evidence of the separate tax accounts, whereas there was no evidence of such a subsequent plan, and after January/February 1988 [Mr Holyoake] continued to provide financial and accounting information to Maruha which disclosed the different position in the tax accounts (amortisation, tax liability, and advances) and both parties continued to reconcile that information with the different position shown in the audited management accounts. … But in any event, the remaining available evidence shows that thereafter, Maruha still knew that [Amaltal] had separate accounts for tax purposes, that the quota was amortised in those tax accounts but not in the management accounts.

And further:

> The Judge was wrong to conclude that there were dishonest misrepresentations and breaches of fiduciary duty for the additional reasons

that such findings were patently improbable, not logically based on correct factual findings, and based on wrong inferences, having regard in particular to the following:

(a) the subsequent and sustained deception of Maruha would necessarily have required an agreement (conspiracy) between all Amaltal personnel at Amaltal or ATFC who knew of the amortisation and the separate tax accounts, and subsequently dealt with Maruha representatives (M Talley, P Talley, Scheffer, Holyoake);

(b) the only evidence (Scheffer) which asserted that such an agreement was reached at the December 1987 Board meeting was rejected by the Judge [199], and all relevant Amaltal people gave evidence that there was no such agreement as alleged; nor was one put to them in cross-examination;

(c) Scheffer also gave oral evidence that he was never part of any subsequent agreement to deceive Maruha, and he was the joint managing director appointed by Amaltal who dealt on the most regular basis with Maruha representatives throughout the whole of the ATFC joint venture and the SJV. Such a plan of deception could not possibly have been carried out unless he was complicit.

(d) both before and after May 1988 Maruha was given information reflecting the separate and different treatment of the quota in the tax accounts;

(e) as to the finding of a continued deliberate deception of Maruha at dissolution in 1991, the evidence was that the Amaltal representative with primary responsibility for the legal dissolution of the joint venture was Scheffer; he was the plaintiffs' witness yet he gave no evidence that he was involved in deliberate deception of Maruha at that time; and such an inference is inconsistent with the evidence which he did give;

(f) the contemporary documents and evidence also indicated that the lawyers acting for Amaltal on the dissolution were aware that the quota had been treated differently in separate tax accounts as opposed to the management accounts;

(g) the contemporary documents indicated that on dissolution Maruha elected to take its share of the quota at cost value in the knowledge that Amaltal was taking its share of the quota at nil value.

[130] The thrust of these submissions proceeds on the assumption that there is an allegation that there was a deliberate, concerted understanding amongst Amaltal's executives which could fairly be described as an "agreement". There are two points to make about that.

[131] First, we agree with Mr Miles that there is no evidence of any such "agreement". This argument has echoes of Mr Scheffer's embittered assertion that

there was a conspiracy, which was rejected by the trial Judge. But as Mr Miles forcefully expostulated, that was not really what is being said.

[132] Secondly, and this is the real point for dishonesty in this case, having knowingly misled Maruha in the early part of 1988, Amaltal did nothing to disabuse Maruha, indeed continued deflecting the respondent, and Amaltal just went on taking advantage of Maruha's incorrect understanding of where things were at.

[133] As we have emphasised, there has to be a distinct finding of dishonesty in the sense conveyed by the House of Lords in *Derry v Peek* (above at [48]). The judgment under appeal did not make such an explicit finding, and it is open to criticism on that basis.

[134] In the absence of an explicit finding by the Judge, it is necessary for this Court to make a finding. This is not a case in which there is what North Americans would call a "smoking gun" - that is, a single document which explicitly states: "we can rip X off, this way". Cases in which there is such hard evidence do not get to trial, for obvious reasons. A Court has to draw an inference. As to that process, one of the best statements of principle is still that of Lord Wright in *Caswell v Powell Duffyrn Associated Collieries Ltd* [1940] AC 152 at 169-170:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[135] In our view, an inference of dishonesty of the requisite kind can properly be drawn (as we do) in this instance. In particular, we note the following:

- Mr Holyoake declined to give Maruha the relevant tax returns.

- Instead, he referred to those notes in the accounts which he knew that Mr Kawata had previously misunderstood.

- The profit guarantee calculation was never made provisional on the outcome of the claim for amortisation.

- There were a number of opportunities for Amaltal to explain the true situation - in a context where Mr Kawata was plainly struggling to get clear and unequivocal answers - but this was not done.

- The amortisation effect was not factored into the termination payments at the end of the Surimi JV.

- Then too, a Court is entitled to have regard to what Karl Llewellyn once referred to as its "situation sense". Here there was no logical or commercial reason at all why Amaltal Taiyo should be paying this money over to Amaltal. There was no interest payable on it (except at the very beginning), and no security at all. The only possible basis was the supposed agreement Mr Galbraith suggested before us (which appears not to have been referred to in the High Court) which we have rejected.

- Finally, even after the "tax win" - admittedly after the distribution of the Surimi JV - Amaltal did not "come clean", and draw that fact to the attention of Maruha. This reinforces the fact that Amaltal closely guarded the gains it had made from the prospective tax monies it in fact received.

(x) Conclusion on liability

[136] In our view, the cause of action in deceit was made out.

Other causes of action

(i) Fiduciary duty

[137] We do not propose to dwell on this issue at any length. We think it sufficient to say that although in some circumstances it may be possible for there to be fiduciary duties between joint venturers, this is not such a case.

[138] In delivering the reasons of the Judicial Committee of the Privy Council in *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 at 5, Henry J referred, with approval, to a dictum of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18:

> … A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977), p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

[139] For the Board, Henry J said at 4-5:

> … equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principle. …The existence and the extent of the duty will be governed by the particular circumstances. It is therefore essential at the outset to turn to the circumstances which it is said gave rise to FAR's duty of loyalty.

[140] This is a case where the parties were patently in an arm's length commercial transaction. There were none of the distinguishing features of a fiduciary relationship. Each party had significant commercial clout; their own independent advisors; and perhaps most importantly of all, the very purpose of Mr Kawata being in New Zealand as Deputy-General Manager was precisely to look to the state of accounts between Maruha and Amaltal. There were joint managing directors, so each was actively involved in the administration of the Surimi JV - to the extent that both parties had to sign every cheque. Maruha was not in any way dependent upon Amaltal.

[141] It appeared to be suggested that even if, overall, there was not a fiduciary duty, there was nevertheless one in relation to the tax and accounting functions which Amaltal undertook on behalf of the Surimi JV, and in respect of which

Maruha was reliant on Amaltal. We reject that proposition; Mr Kawata was in New Zealand precisely to monitor and safeguard these accounting and tax functions.

(ii) Implied terms

[142] Maruha pleaded the following implied terms between the parties in their 10 August 1985 joint venture agreement:

- the parties were to carry out the objects of Amaltal Taiyo with mutual confidence in each other;

- the parties were required to act fairly, honestly and in good faith towards each other;

- neither party would receive an undisclosed benefit from Amaltal Taiyo;

- each party would disclose to the other all relevant material information relating to benefits properly due to Amaltal Taiyo.

[143] The Judge said at [313]-[314]:

> … it is strictly unnecessary for me to decide the cause of action in contract since I am satisfied that Maruha's claim under the head of breach of fiduciary obligation has succeeded. … Were I nonetheless required to make a decision I would find in Maruha's favour for precisely the same reasons and on the basis as the same evidence that led me to find against Amaltal in Maruha's claim for breach of fiduciary duty.

And at [315]:

> … I have no difficulty at all in implying the pleaded contractual terms into the joint venture agreement … Nor … would I have any difficulty finding that Amaltal had breached those terms.

[144] In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376 the Judicial Committee of the Privy Council laid down a five-point test for the implication of terms in a contract:

> In [their Lordships'] view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[145] This case is a far cry from the position where additional terms can be appropriately implied in a commercial agreement. None of the tests laid down by the Judicial Committee are met.

Limitations

(i) Introduction

[146] Deceit is a tort. The period of limitation for the commencement of a proceeding of this character is therefore six years from the accrual of the cause of action (Limitation Act 1950, s 4(1)(a)).

[147] Limitations principles embody a tension between competing policies of:

- finality in civil litigation and that defendants should have the opportunity to avoid meeting stale claims as secured by the imposition of limitation periods; and

- justice being done in the individual case, which is secured by the facility for extension or postponement of the limitations periods. (See generally, Alberta Law Reform Institute *Limitations* (Report for Discussion No. 4, September 1986); and for a recent judicial discussion see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553 where McHugh J said, "A limitation period should not be seen … as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this

> background, I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case").

[148] In New Zealand, one such exception, and on which the respondents rely here, is s 28 of the Limitations Act 1950 which provides:

> **28. Postponement of limitation period in case of fraud or mistake** - Where, in the case of any action for which a period of limitation is prescribed by this Act, either -
>
> (a) The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) The right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) The action is for relief from the consequences of a mistake, -
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

[149] "Deceit" is a species of fraud which comes within s 28. We record that no argument was addressed to us that it does not, which means that the six-year period of limitation in this case did not begin to run until Maruha discovered the fraud (most likely, in late 2000 when Mr Scheffer made his allegations) or, could, with reasonable diligence, have discovered it.

[150] In this instance, Amaltal asserts that with reasonable diligence Maruha could have discovered this fraud as long ago as 1989, and that this proceeding is therefore hopelessly out of time.

[151] As to the law with respect to "reasonable diligence", 28 *Halsbury's Laws of England* (4th ed) states at [1122]:

> **1122. Diligence in discovery of fraud, deliberate concealment or mistake.** The standard of diligence which the plaintiff needs to prove is high, except where he is entitled to rely on the other person; however, the meaning of 'reasonable diligence' varies according to the particular context. In order to prove that a person might have discovered a fraud, deliberate concealment or mistake with reasonable diligence at a particular time, it is not, it seems, sufficient to show that he might have discovered the fraud by pursuing an inquiry in some collateral matter; it must be shown that there has been something to put him on inquiry in respect of the matter itself and that if inquiry had been made it would have led to the discovery of the real facts. If, however, a considerable interval of time has elapsed between the alleged fraud, concealment or mistake and its discovery, that of itself may be a reason for inferring that it might with reasonable diligence have been discovered much earlier.

[152] *Laws NZ,* Limitations of Civil Proceedings states at [306]:

> **306. Diligence in discovery of fraud.** The standard of diligence which the defrauded person needs to prove is high. This is so, except where he is entitled to rely on the other person. In order to prove that a person might have discovered a fraud with reasonable diligence at a particular time, it is not, it seems, sufficient to show that he might have discovered the fraud by pursuing an enquiry in some collateral matter, it must be shown that there has been something to put him on enquiry in respect of the matter itself, and that if enquiry had been made it would have led to the discovery of the real facts.

[153] The authority to which Halsbury refers for the proposition that the meaning of "reasonable diligence" varies according to the particular context is *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 3 All ER 193 (QB) (a so-called "art fraud" case). Webster J held at 199 that:

> … the precise meaning to be given to [the words "reasonable diligence"] must vary with the particular context in which they are to be applied. In the context [of this plaintiff's action] reasonable diligence means not the doing of everything possible, not necessarily the using of any means at the plaintiff's disposal, not even necessarily the doing of anything at all, but that it means the doing of that which an ordinary prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase.

[154] The authority referred to in *Laws NZ* for the propositions as stated by that treatise is *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (Mahon J). That was a commercial cause. In 1960 the parties entered into a stationery contract. The plaintiff manufactured and supplied the defendant with stationery at current wholesale prices less the usual trade discount granted by the plaintiff to recognised wholesalers. When the trading arrangement terminated in 1973 the defendant

discovered that while it had been getting a trade discount of 25% the plaintiff had been supplying three other wholesalers at a discount of $33^{1}/_{3}\%$. Hence the plaintiff claimed that it had been paying a greater price than was provided for in the 1960 contract, and had suffered a loss. Mahon J held that the claim was not statute barred. There was a special duty of disclosure inherent in the supply contract between the plaintiff and the defendant, and the plaintiff had not complied with that duty of disclosure. The defendant's rights of action for breach of contract, which would successively arise on each delivery of goods, were concealed fraud within the meaning of s 28(b) of the Limitation Act 1950. For the reasons given at pages 712 and 713 Mahon J found it impossible to say that the plaintiff ought reasonably to have discovered the breach of contract in 1968 if he had exercised due diligence. This was in part because the plaintiff had been "deflected", to use the Judge's expression (at 712, line 52) by what the defendant had said. *Inca Ltd v Autoscript* was referred to with approval by this Court in *Official Assignee of Collier v Creighton* [1993] 2 NZLR 534 at 538.

[155] There was a good deal of argument before us as to what *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 (CA), stands for. This was a case in which there was an application to amend the pleadings after the expiration of the limitation period. The plaintiffs were seeking, in what had started out as a claim for negligence, to add allegations of fraud, and where the plaintiffs contended that an extended limitation period was available to them. Millett LJ (with whom the other members of the Court appear to have concurred on this point) said at 418:

> The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree. (Emphasis in original.)

[156] Shortly after *Paragon Finance* this issue was back before the English Court of Appeal in *Clef Aquitaine SARL and another v Laporte Materials (Barrow) Ltd*

and another [2000] 3 All ER 493 (CA). The claim in that case was one for fraudulent misrepresentation. The proceeding is reported principally on the question of the measure of damages in that respect. However there was also an issue as to limitations. The claimant's cause of action arose in 1979, and therefore would have become statute barred in 1985 (the limitation period being the same as in New Zealand). The fraud was only discovered in 1996, at which time the writ was issued. We interpolate that, so far as the present case is concerned, s 32 of the English statute is in the same terms as the position in New Zealand. That is, the period of limitation "shall not begin to run until the plaintiff has discovered the fraud … or could with reasonable diligence have discovered it.".

[157] Senior counsel for the defendant/appellants in *Clef Aquitaine* submitted that with reasonable diligence the claimants could have discovered this fraud before 1990.

[158] Simon Brown LJ said at 504:

> [Senior counsel] relies in particular on Mr Gwyer's acknowledgement in evidence that he could have asked Sovereign's United Kingdom customers what prices they were paying or perhaps found that out from someone he knew at Palace Chemicals … .

And, at 505:

> In [*Paragon*] … the plaintiffs were aware that they had suffered a loss which could be the result of fraud and, instead of making enquiries, had waited while they took other proceedings. Here, by contrast, Mr Gwyer had no suspicion whatever that he was being defrauded. On the contrary, the parties' relationship proceeded on trust. On 30 August 1984 Mr Dent wrote to Mr Gwyer speaking of:
>
> > '… not only the good business which we do together but the excellent way in which it is done. It is most rare to conduct business with someone where honesty and truth are never doubted and it is even more rare for me to admit it.'
>
> When, moreover, in November 1991 Mr Gwyer did enquire of Mr Dent's successor, Mr Dodds, whether he was getting the best prices, Mr Dodds lied, reassuring Mr Gwyer that he was.
>
> As Mr Bannister came to recognise, his argument could only succeed if the principle to be applied is: never trust anyone in business; always make enquiries. I utterly reject any such principle. Such an attitude in my judgment involves exceptional measures, not reasonable diligence.

[159] We have set this law out because Mr Miles sought to make something of what he thought to be differences between *Paragon Finance* and *Clef Aquitaine*. But at least on the point which is squarely before us, we can see no difference between the approach in the two cases. That is, what is required is reasonable diligence - not exceptional diligence - and the test suggested by May LJ and approved by Millett LJ is simply an articulation of a "reasonableness" standard.

[160] For completeness - counsel did not mention them - in *UCB Home Loans Corp v Carr* [2000] Lloyds Rep PN 754 at 757, Crane J suggested that the word "exceptional" should be omitted from Millet LJ's formulation. But subsequently, in *Bigg v Sotnicks (a firm)* [2002] Lloyds Rep PN 331 the Court of Appeal declined to support any modification of Millett LJ's formulation in *Paragon*.

[161] We propose therefore to proceed on the basis of the formulation of the test in the England and Wales Court of Appeal, on statutory material which is the same terms as that in New Zealand, and which has been consistently confirmed by appellate courts.

(ii) The High Court holding on limitations

[162] The High Court judgment in this case was necessarily complicated by the fact that the Judge had held that both equitable causes of action and common law causes of action were in play before him. Hence he necessarily had to consider the state of the authorities relating to limitations and fiduciary duties, which on our holdings are not now relevant.

[163] In the result, however, after considering the authorities referred to him the Judge held at [339]:

> The correct approach appears to be that the concept of "reasonable diligence" involves a party not being able to discover fraud without taking measures which they could not reasonably be expected to take … What must be discovered with reasonable diligence are all the facts which constitute the cause of action. [Authorities given].

[164] The Judge then dealt with this issue quite shortly.

At [340] he said:

> Mr Latimour's submission was that Maruha could have discovered its cause of action and fraud with reasonable diligence if they had obtained copies of Amaltal Taiyo's tax accounts; if they had inspected Amaltal Taiyo's accounts and accounting records as they are entitled to do under Article 21 of the joint venture agreement; or had they made separate inquiries of the auditors.

At [341]:

> Given events as they unfolded between 1989 and 2000, and in the light of Amaltal's fiduciary obligations and the dissolution of the joint venture agreement in 1991, I am not persuaded by that submission.

At [344]:

> It seems to me, as a matter of both equity and common sense, that where there is a fiduciary relationship, a person relying on a fiduciary is entitled to rely on the truth of a fiduciary's representations and is not bound to make further inquiry unless there is something to put him or her on inquiry.

At [345]:

> There is absolutely no evidence to suggest there was anything to put Maruha on inquiry either in the 1991/1992 period, or in the eight year period between implementing the dissolution and Mr Scheffer's revelations.

[165] For these reasons, the Judge held that both Maruha's equity and common law causes of action were not statute-barred.

(iii) The argument in this Court

[166] Before us Mr Latimour, who argued this part of the case, submitted:

> The Judge rejected without good reason those things which, with reasonable diligence, Maruha could easily have done at any time during the period of the joint venture. In particular:
>
> (a) Maruha could with reasonable diligence have requested copies of ATFC's tax accounts pursuant to their contractual right under article 21 of the 1985 JV agreement. The very purpose of that provision is to enable each shareholder to check for itself. The test is objectively whether Maruha could with reasonable diligence have done this, and plainly they could. Indeed, that is put beyond doubt by Maruha's own evidence (Kawata), which was that in practice <u>all</u>

> ATFC financial and account information/records which he asked for were made available to him.
>
> (b) Additionally, Maruha could with reasonable diligence have obtained copies of AFTC's tax accounts and explanations of the tax position from the independent auditors of ATFC, who were appointed jointly by Maruha and Amaltal (article 22). Indeed, the Judge received independent expert evidence that, certainly at the time of dissolution, a competent advisor would have asked for full disclosure of *inter alia* the taxation accounts. …

[167] Mr Miles' submission was:

> Amaltal's submissions cannot succeed in circumstances where Maruha and its advisors expressly asked Amaltal whether the quota lease was being amortised and were told that it was not and further that tax was being paid on the basis of no amortisation. Maruha was entitled to accept Amaltal's assurances and Amaltal cannot now argue that Maruha should not have trusted it.

(iv) Conclusion on limitations

[168] We do not consider that, with "reasonable diligence" in the sense comprehended by the authorities we have rehearsed, Maruha could have discovered this deceit until it surfaced out of a collateral matter, namely Mr Scheffer's defection.

[169] In the earlier dealings between the parties Maruha had acknowledged that an attempt was to be made to amortise the lease. Subsequently however it became concerned to establish much more closely what the then position was. Its reasons for making inquiry may initially have been driven by concerns over what were "advances" of quite substantial sums of money which were unsecured, but Mr Kawata appreciated that this in turn was tied up with the question of whether tax was being paid on the footing that the hoki quota lease was amortised. He made specific inquiries of a character we have already detailed, the purpose of which were perfectly apparent: to establish what the real position was. He got responses which, on their face, and to Amaltal's knowledge, were false. We have determined that those responses were "dishonest" in a *Derry v Peek* sense. The inference is fairly open that Amaltal had found it very convenient indeed for Mr Kawata not to appreciate the real position.

[170] It is correct, as Mr Latimour suggested, that Maruha could have made further inquiries of the kind he has pointed to. But the question is: as a matter of reasonable diligence, should it have done so? We think not. The question is whether what Mr Kawata did constituted reasonable diligence in ordinary circumstances and with due regard to expense and difficulty. It is true that the difficulty would not have been great. It is also correct (as we have found) that there was not the particular relationship of trust or confidence between the parties which seems to have distinctly influenced the trial Judge's views. However, Mr Kawata had asked specific questions, and the importance of them was well understood by the parties, as to consequences, and he got false answers. That is the very sort of thing that the law of deceit guards against. We do not think further steps were required of Maruha. What happened here was the kind of "deflection" which concerned Mahon J in *Inca Ltd v Autoscript* (above at [154]).

Deceit: quantum

(i) Introduction - the High Court Award

[171] The Judge awarded Maruha a sum of $6,120,446. That figure was taken from the calculation of one of Maruha's expert witnesses, Mr Lucas, which is contained in Appendix C of his brief:

a)	Reduction in payments made by Maruha under the profit guarantee	$5,388,404
b)	Maruha's share (24.99%) of increased Amaltal Taiyo's retained profits at 30 September 1991 of $2,928,277	732,042
		$6,120,446

[172] This calculation rested on these propositions:

1. firstly, as to (a), an arithmetical calculation of "the overpayments" on the assumption that Maruha's obligation under the profit

guarantee should have been calculated by the double calculation method [ie assuming amortisation];

2. secondly, as to (b), the theoretical additional profit after tax that Amaltal Taiyo would have earned in the five years of the joint venture if:

   (i) ATFC had amortised the quota for tax purposes only;

   (ii) ATFC had thus calculated and in fact paid its tax liabilities on the basis of that amortisation; and

   (iii) Maruha's payments under the profit guarantee in those years was required to be calculated and was in fact paid to ATFC on the basis of (i) and (ii) - ie, in total $5,388,404 less than the amount actually calculated and in fact paid over; and

   (iv) the resulting notional increase in retained earnings (profit) earned compound interest at 90-day bill rates on yearly rests.

[173] What the Judge said about this was as follows:

> [354] There is in my judgment conceptual integrity in such an approach. The actual loss sustained by Maruha as a result of Amaltal's breach of its fiduciary obligation is clearly the overpayments made by it under the profit guarantee as a result of the tax paid because of the amortisation not being included in the calculation. As to Maruha's share of the additional retained profit, it is hard to see how Amaltal can resist such a claim given that it is notionally entitled to three times that figure which would not have been available to either party had the profit guarantee calculations been limited to their true purpose.
>
> [355] The approach suggested by Mr Lucas also appeals to me since, had the larger sum of $5,610,182 been disclosed in 1991, a fair and equitable division of Amaltal Taiyo's assets on dissolution, given the clear purpose of the Profit Guarantee Memorandum, ought to have included reimbursing Maruha its overpayments.
>
> [356] Accordingly, and for all the reasons expressed in earlier sections of this judgment, I am satisfied that Maruha is entitled to judgment against Amaltal in respect of its cause of action alleging breach of fiduciary duty and its cause of action alleging deceit. The sum of that judgment is fixed at $6,120,446. The issue of interest is still at large.

[174] We intrude the point here that the Judge seems to have assumed in the passages just cited that damages for a breach of fiduciary obligation would be calculated on the same basis as common law damages on the tortious measure which we have already referred to above. That may not necessarily be the case. We do not need to determine the point in this case.

(ii) No loss at all?

[175] Mr Latimour suggested that there was no loss at all in this case. As we apprehend the argument, it is that the claim for amortisation did not require any change in the approach adopted for the calculation of the amounts payable under the profit guarantee. As Mr Galbraith put it, it was correct to calculate the profit guarantee on the basis of the more likely tax outcome (no amortisation) even though a claim for amortisation was being pursued. He criticised the Judge's finding (adopting the position suggested by an expert for Maruha at trial) that the profit guarantee figures would have been lower if amortisation had been factored into the calculation. We do not consider that the Judge's conclusion was in error: he was entitled to accept the expert evidence before him as he did. In any event, even if Mr Galbraith's submission were correct, the calculation on an unamortised basis should surely have been treated as a contingent calculation, with the overt possibility of later adjustment if amortisation was allowed by the IRD.

[176] Mr Latimour took the argument further. He suggested that if amortisation were factored into the profit guarantee calculation, the amounts Maruha would have been required to pay could have been higher than the amounts it actually paid. That relies on a particular interpretation of the profit guarantee memorandum which the Judge rejected. We consider the Judge was entitled to do so.

(iii) A missing element?

[177] We think there is however real force in the argument for the appellants that what was overlooked by the High Court Judge is that Maruha obtained a benefit on the dissolution of the Surimi JV, by virtue of the fact that Amaltal Taiyo paid tax on Maruha's 24.9% share of the quota. Hence Maruha got that share at a full and capitalised rate, instead of a written down rate. That figure was $1.2 million. The $5,388,404 is, as Mr Galbraith said, completely predicated on amortisation down to a figure of 0.

[178] On this footing, there ought to be a deduction of $1.2 million from the sum awarded by the Judge. Faced with this proposition, Mr Miles adopted some adroit footwork before us, and said - in essence - "well yes, but Maruha might have been able to take these monies at a written down value, and then by some means 'net it off' in its own tax position in Japan." There are several difficulties with that general proposition. First, there was no evidence as to whether, and if so, how far, that stratagem might have been possible in Japan. More particularly, in New Zealand - which is the forum of this dispute - this was a benefit to Maruha which has not been accounted for.

(iv) Conclusion on quantum

[179] The principles to be applied in a case of deceit are as set out by Lord Collins MR (above, at [57]). Essentially, these look to actual loss - the money which "changed hands", as a result of the deceit.

[180] Here, in our view, that sum is the sum of $6,120,446.00 found by the High Court Judge, less a sum of $1.2 million, giving rise to a total of $4,920,446.00.

Conclusion

[181] The appeal is allowed, in part. The judgment against the appellant will stand. However the judgment sum of $6,120,446 is set aside and we substitute instead a judgment sum of $4,920,446.00.

[182] The appellant has been successful, in part, on quantum but has failed to overturn the liability judgment. We would normally have allowed a successful respondent a sum of $40,000 in a case of this complexity, and usual disbursements. Here, we allow a sum of $30,000, and usual disbursements, being three quarters of the norm, to reflect the overall outcome in this case. We certify for second counsel.

[183] We remit the proceeding to the High Court to determine the costs in that Court, and interest on the judgment sum, those issues having been reserved in that Court.

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