IN THE SUPREME COURT OF NEW ZEALAND SC 46/2006

IN THE MATTER of a Civil Appeal

BETWEEN **MARUHA CORPORATION LIMITED**

Appellant

AND **AMALTAL CORPORATION LIMITED**

Respondent

Hearing 20 February 2007

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel JG Miles QC, ZG Kennedy and OJ Meech for Appellant
AR Galbraith QC, BR Latimour and RJ Hollyman for Respondent

CIVIL APPEAL

10.06am

Miles Yes may it please Your Honours I appear for the appellant together with Mr Kennedy and Mr Meech.

Elias CJ Thank you Mr Miles, Mr Kennedy, Mr Meech.

Galbraith Yes may it please the Court I appear with Mr Latimour and Mr Hollyman for the respondent.

Elias CJ Thank you Mr Galbraith, Mr Latimour, Mr Hollyman. Mr Miles.

Miles Your Honours it's always a moot point where one starts on this sort of appeal, particularly as the two issues that are before Your Honours are quite discrete, but given that the respondents have continued in their

submissions to essentially attack a number of the factual findings that took place in the High Court and which were upheld in the Court of Appeal, I thought an appropriate start would be at least to go through the High Court judgment pointing out what His Honour Justice Priestley found

Elias CJ Well Mr Miles we've read the judgment. I don't think it is necessary, particularly given the fact that the finding of deceit is not challenged for us to get into the facts. If Mr Galbraith gets away with opening up the facts you can respond.

Miles Well I'm happy with that Your Honour with a couple of minor points that I would reserve if you like. One is that nevertheless you will find scattered throughout the written submissions a number of actual or oblique attacks on the various findings, particularly in the High Court, and I know Your Honours will be well aware of the temptation of counsel to continue to attack factual issues, particularly in a case like this where contrary really as you will have noticed in the Court of Appeal's judgment, contrary to my assessment of the position, the appellant in the Court of Appeal did have considerable latitude by that Court in attempting to re-open a whole series of factual findings by His Honour, including findings of credibility. Indeed there was a comment I think in the Court of Appeal judgment that I appeared a little perplexed at one stage at the extent of what I thought the latitude of the Court of Appeal extended to in allowing these issues to be effectively re-litigated. It went for four days in the Court of Appeal; five weeks in the High Court and I suppose I now, contrary to the view I took at about day 2 and a half in the appeal when my friend was still on his feet and still analysing attacking and generally criticising the various factual findings, but I now I suppose can take the benefit at least of what the Court of Appeal described as a very searching re-analysis by them of the factual findings in the High Court. So the likelihood of any further collateral attack of any sort on the findings of His Honour Justice Priestley in terms of factual finding could seem to be remote in this Court. The other rider I would add Ma'am is that one of the essential arguments which seems to be still raised by the respondent is this issue of the what we described as the 'side agreement' that between the parties where Amaltal took over the role of preparing the accounts for the Joint Venture; for negotiating with the Inland Revenue on issues of tax; with preparing and filing tax returns, and finally with paying the tax as assessed. Now one of the central arguments put forward by the respondents in this appeal is that no such agreement was ever

Elias CJ Does it matter?

Miles Your Honour's probably right so long as that function was taken over by Amaltal and the evidence is quite clear that it was taken over, it probably doesn't matters. In practical terms implicit in this is there was an agreement understanding, whatever one might call it that that

was the role that was going to be undertaken by Amaltal, and the reason was obvious. Amaltal Taiyo was a subsidiary. It was a 75/25 percent subsidiary. It was incorporated as it were into the Amaltal tax accounts and also Maruha accepted that Amaltal had a great deal of experience in fishing in New Zealand and in tax treatment of such matters. Now Justice Priestley Your Honour had no doubt about it at all and in my written submissions at page 9, and I won't take Your Honour through the various findings in the Courts for the reasons that Your Honour has suggested, but you will note just at para.3.1(b) where I set out the various findings, if you would just in that paragraph where His Honour found at para.277 and 300 that such an agreement existed, but it would be helpful when you were looking at this if you would really start at para.271 and continue through to I suppose para.300 because His Honour sets out the genesis of that agreement and the clear finding that it's in existence. The other paragraph where His Honour confirmed that as para.17 and at that paragraph His Honour specifically found that this was an agreement that existed and that essentially Amaltal didn't deny this at the hearing. What took place at the hearing was, in contrast I might say to all of the evidence in the witnesses briefs, but Mr Talley under cross-examination put forward alternative arguments and as to why Amaltal was entitled to take the notional tax amounts and to keep it and his argument varied during the cross-examination but it varied from 'we had a legal obligation to pay the tax. I know we filed these tax returns claiming that the quota should be amortised and that I know that after five years that was a saving of $5.6 million and I know that we just kept that and I know that we didn't mention that when we worked out the dissolution of the partnership in September 1991, no mention of that in any of the assets and I know that two years after that the Inland Revenue finally gave us a tick for entitling us to amortise the quota, but even then we were entitled nevertheless to hang on to the $5.6 million because that was the deal we did with Maruha, because we never knew during that period where it might be reassessed and we might have been liable for penalties and hence we were entitled to keep it. Now for all sorts of obvious reasons that argument was rejected by His Honour. It was looked at again in the Court of Appeal and they rejected it, and they rejected it on the grounds there wasn't a shred of evidence in the documents. There wasn't a shred of evidence in any of the brief of evidence by Mr Talley and Mr Holyoake and finally the commercial absurdity of such a proposition. A share nonsense indicating that Maruha would agree firstly to advancing $5.6 million on an indefinite basis and secondly that the profit guarantee calculations which were dependent on the actual tax being paid were grossly inflated because the notional tax was used in the calculation. None of that made the slightest commercial sense and Justice Priestley made findings of credibility on Michael Talley and Mr Holyoake which were entirely justified on the evidence. Now the reason that I have just, oh and perhaps while I'm on this, if there was one document which I suppose indicated in an entirely objective way the approach that Amaltal took to what they saw as a cash box just waiting to be looted by them at any particular time that

they felt like it, the one document I think that indicates that so clearly was a schedule of payments which Amaltal produced in January or February 1988 which indicated that they'd taken something like $3.5 million in unauthorised advances from Amaltal Taiyo, from early 1987 through to October 1987. I'll just take Your Honours to that document because

Elias CJ But why, I'm just struggling to see what you're taking it to.

Miles Yes, in respect of both of these issues Your Honour; the extent of the breach does have some relevance.

Elias CJ But you've got a finding of deceit. Why is the extent helpful?

Miles I suppose what I'm really saying is extensive deceit Your Honour.

Blanchard J Well we know that.

Tipping J The question is whether they had a fiduciary duty as well as whatever other duties have been found and the fact that there was, with respect to the contrary view, the fact that there was this agreement expressly found seems to me to be relevant to that as strongly supporting the argument that there was such a fiduciary duty.

Miles Quite Sir.

Tipping J The position may well have been the same without the agreement but if there is or was as has been found the agreement that can only assist.

Miles Exactly Sir, exactly.

Blanchard J Even if the agreement was in fact part of the original agreement.

Miles Quite.

Blanchard J I can't see it makes any difference.

Miles Well we don't and could I just give you the reference anyway Your Honours and you can then ignore it.

Elias CJ To the schedule.

Miles To the schedule. You'll find it in volume 13 and it's page 769.

Tipping J You'll forgive us we you don't pick the volume up then Mr Miles?

Miles Oh absolutely Your Honour. It's such an attractive document as far as I'm concerned and I just had to share it with Your Honours. Well let me then turn to the fiduciary issue. Of course we centre our appeal

Your Honour on *Chirnside* and for that reason we say that we come under both heads. Inherently fiduciary because of the Joint Venture

Tipping J What are you saying is inherently fiduciary Mr Miles? I find that just a little elusive. I don't think this point is actually going to matter much but what is inherently fiduciary – the relationship as a whole or an aspect of it or what?

Miles The relationship as a whole Sir. The Jointly sharing of a common goal and the sharing of profits. Picking up the distinction that I suppose was most obvious in Her Honour the Chief Justice's judgment where she compared the sharing of profits with what is essentially a Joint Venture where there were two businesses altogether.

Elias CJ But are you really complaining about breach in relation to the Joint Venture? Isn't the real harm the use of the funds advanced and used by Amaltal rather than by the Joint Venture?

Miles Oh absolutely Your Honour. The reason why I say that the Joint Venture is relevant is it was in the context of the Joint Venture, it was only within the framework of that Joint Venture that Amaltal were even to get hold of the money, because the understanding between the parties is that Amaltal would assist in the preparation of the accounts that was pursuant to the Joint Venture in the bigger picture or if you like with the understanding that was reached that within the context of the Joint Venture they had these further obligations.

Tipping J I'm not sure that the reasoning of the learned Chief Justice was that all Joint Ventures are per se inherently fiduciary. I thought it was more that this particular one between *Chirnside and Fay* was inherently fiduciary.

Miles I'm always reluctant to engage with the Judge who gave the judgment as to what the Judge meant in the judgment because I feel

Elias CJ But often the Judge doesn't know.

Miles Well I feel at a disadvantage but anyway the clear way I took is of course it's not automatically so, though not suggesting that for a second, but where the Joint Venture has the characteristics of a common objective and a sharing of profits, then in those circumstances one would expect to find fiduciary obligations.

Anderson J You don't need to go as wide as that though. You've got management of the money and the way that it's managed affects the extent of any potential benefit for one party at the expense of the other party. It imposes honesty in the dealings.

Miles I mean Your Honour is so right. It's just that I generally go for the maximum to start with and then wait for it to be whittled away

Blanchard J But you're making life difficult for yourself, possibly unnecessarily, and I'd be a little reluctant to accept the broader proposition anyway following on from *Chirnside*. *Chirnside* was about a vastly different situation, it was unincorporated. Here we have a corporate structure interposed. I'd be a little reluctant to see us making perhaps unnecessarily broad statements about the existence or otherwise of fiduciary relationships where there is a corporate structure interposed, where as you have a case, and it may be a better case, based on a particular aspect of the relationship.

Miles Yes, and of course Your Honour that's why we relied just as strongly on the second leg of *Chirnside* that there is a specific aspect of the Joint Venture which engages fiduciary obligations in those circumstances.

Tipping J I think the bone structure of the second leg is more promising than the bone structure of the first leg Mr Miles.

Miles Yes I'm clearly getting that message Your Honours and I understand why, although I just wasn't prepared to leave it just yet, but perhaps in a moment. His Honour Justice Blanchard pointed out this issue of the corporate structure and I understand that, but typically Joint Venture of the sort that become before the Courts are commercial Ventures between two separate companies that incorporate the Joint Venture if you like obviously into a company. Now my friend's submissions as they did in the High Court and as they did in the Court of Appeal went through the clause after clause of the Constitution, pointing out that how tightly it was all bound etc, and of course all companies are likely to have those sorts of provisions, Joint Venture or not. However if you come back to the essential purpose of this which was for two quite separate commercial organisations, each bringing different benefits and advantages to each other, use the corporate structure to define the nature of the Joint Venture. A Joint Venture that was clearly for a single purpose in the sense which was to catch fish and to utilise the quota and then sharing the profit albeit in a series of defined ways, but in those circumstances one would have thought inherently in between all the gaps that those requires in the Constitution set out involve trust, responsibility and all the usual sorts of obligations we're accustomed to. And one can understand how that can occur when you actually look at what happened despite the obligations of Joint cheque-sharing etc, and all of these, Amaltal because of the trust that Maruha had placed in it was able to take this money in the way it did. Now whether it was because of the bigger picture involved as a Joint Venture or whether it was because of the side deal, from my point of view I have the luxury of saying it's irrelevant to me which way I go. I do go for the first proposition as well largely because of the reasons I've advanced and because it seemed to me to come within the framework envisaged by each of the judgments in *Chirnside*. Well

McGrath J Mr Miles your client had separate dealings with the Joint Venture for which it would set prices that had to be paid.

Miles Correct Sir.

McGrath J Now I presume that you're not suggesting that the fiduciary obligations had any relevance to those?

Miles No Sir.

McGrath J So is the fiduciary duty being one that only applies to certain of their dealing, so it's a matter of sorting out which of those it's relevant to?

Miles I said yes initially Your Honour. These issues weren't explored at the hearing because we obviously concentrated on this express aspect.

McGrath J But you're contending as I understood it for a wide-ranging fiduciary duty and it seems to me you've got some difficulty just given the wider aspects of the transaction in arguing for that.

Miles Yes two points Sir. Firstly which I haven't mentioned up until now but which is in the submissions that the Joint Venture which we're talking about started life as a partnership and the

McGrath J Its previous existence was a partnership?

Miles Indeed, and a number of the partnership agreement were carried through to the Joint Venture vehicle and we've actually done an analysis of that and if Your Honours thought that that was another factor that would be significant in the first argument, then I would like to at least give that analysis to Your Honours. What it sets out is a reference to each of the paragraphs in the Constitution and the relevant paragraphs in the Partnership Agreement, and you'll see that a significant number of them are carried through either identically or substantially the same including a co-operation clause which is identical and when I said 'yes' to Your Honour Justice McGrath's point that when talking about the prices and those sorts of formalities that they've obviously clearly defined as nothing fiduciary about them, it's again not as clear-cut as that Your Honour because while these issues can almost certainly I suppose be objectively analysed, nevertheless each party trusts the other one to actually use market prices; to comply with whatever the formula they have developed to work out how the fish is sold or rather how the Surimi product is sold and that it's properly recorded when it's sold and so on. The flavour runs through the whole Joint Venture of trust within a framework of carefully structured formulae for working out what the parties' obligations were.

McGrath J Well there might be certain morals in the marketplace that have to be observed but a fiduciary obligation is something far stricter than that.

Miles I suppose it comes down Sir to trust and reliance I would say where you have Amaltal whose obligation were to supply quota and expertise and know-how; Maruha supplying the boats, the crew and processing the product and then on-selling it and then sharing the profit. Amaltal I suppose was putting all, I think I can legitimately say, was putting forward and accepting that the processors and the figures and the actions by Maruha, which meant that they took something like, I can't remember, 80 or 90 percent or whatever of the money for this, that it was all done honestly and in accordance with the format.

Blanchard J But there are many, probably all contractual relationships, relying on the honesty of the other side. That doesn't turn them into a fiduciary relationship.

Miles No I accept that Sir. Again I fall back I suppose to central characteristics that this was a defined common objective and a sharing of profits and a factor in, what was that gold mining case, whatever that gold mining case was where the Joint

Tipping J *Auag*.

Miles *Auag*, yes.

Blanchard J It's pronounced '*Org'*, I was on the Board.

Miles Right well that's helpful Your Honour, where there was a specific clause in the Joint Venture partnership and said there are no fiduciary duties owed and that I think was the defining reason why it was held there were no fiduciary obligations, as you don't have that here and you wouldn't expect that given the genesis of the Joint Venture being a partnership. Well Your Honour can I move on to the

Elias CJ Before you do can you just remind me because I think it's not in the material that was relevant to the appeal, but I think there was something in the leave application. Is the reason why the status of the relationship is fiduciary or not, is that relevant to the damages or to the interest or something like that?

Miles Relevant to interest Your Honour.

Elias CJ That's the reason why it's a live issue.

Miles Very live and very relevant.

Elias CJ It just seems intuitively a bit strange that the interest available for breach of fiduciary duty is so much more advantageous than where there's been a finding of deceit.

Miles And indeed it may not be but I would be reinforced in the interests argument if there had been a breach of fiduciary obligations.

Elias CJ I see.

Tipping J It might require some development from traditional deceit principles but you'd be more conventionally advantaged in equity?

Miles Exactly.

Blanchard J I have the impression without even looking it up that you could get compound interest in deceit, but I may be completely wrong about that.

Miles Your Honour may be right, we didn't actually seek it

Blanchard J No I noticed that.

Miles But Your Honour might be right.

Anderson J We were impressed by your restraint Mr Miles.

Miles Well I think it typified our approach of the whole litigation Your Honour.

Elias CJ Alright, we're going to move on.

Tipping J I'd rather stay where we are, it's quite amusing.

Miles Now I suppose we should deal with the second leg that there was a specific aspect of this Joint Venture where clearly there were fiduciary obligations and you find that really at pages 19 and 20 of my written submissions, and I probably sum it up Your Honours at paragraph, it really starts at 442 where I set out the findings of the trial Judge. The trial Judge Your Honours had no difficulty at all with this concept of the fiduciary obligations. You find that between paras.300 and 304 of His Honour's judgment, and one of the reasons I think why that those findings flowed naturally from His Honour's decision was his recognition and discussion about the agreement or the understanding that the parties had reached, and the problem with the Court of Appeal judgment which remarkably only deals with this in two or three paragraphs, and it doesn't refer to this understanding or agreement which is a remarkable failure because

Blanchard J I wondered whether they hadn't realised that it some flow-on effect on interest.

Miles It didn't say so Your Honour. My impression for what it was worth was that Their Honours had a clear view that the Joint Venture structure was essentially commercial and an arm's length deal and they

were so committed to that view that they overlooked this further understanding which was surprising because it played a crucial part in the argument before Justice Priestley and of course was discussed particularly by my friend who attacked it in the Court of Appeal. But the obvious flaw in the Court of Appeal judgment is their failure to deal with this further understanding at all, and had they done so then it seems almost inevitably to me that they would have recognised that those obligations of trust which had to come into play when you're handing over the responsibility of dealing with tax affairs with the Inland Revenue, because you have to trust them then that they are passing back to their Joint Venture partner what deals they struck with the Inland Revenue.

Tipping J There's a quasi agency concept here isn't there that they appointed one of them the agent of both to deal with this particular aspect of their affairs?

Miles And hence slotting nicely into the partnership analogy.

Elias CJ Well you just get there through agency don't you?

Miles Yes, well I just meant that one of the reason's why a partnership is often used because one's the agent of the other, but I accept that it's an agency.

Blanchard J I think it complicates things to try and characterise this as a partnership.

Miles Well the last thing I want to do Sir is to make it more complicated and I'm comfortable with the way I'm putting it at the moment and of course Amaltal recognised this responsibility because they argued throughout the High Court that they had disclosed this parallel set of tax accounts to Maruha and if they were going to comply with their duties of trust and not essentially rip off their partner, they had to say to the Court, to the High Court, of course we told Maruha that we were actually putting in accounts amortising the quota, and of course Maruha was aware of this and they let us do it for the various reasons that Mr Talley put forward. What the Court found and which is unchallenged, is that the very first set of accounts for March 1987, the tax accounts were disclosed and of course Your Honours will have picked this up in the judgment, in the management accounts for March 1987 they had that specific disclosure in there where applying effectively, and I'm just summarising Your Honours, but they had in the accounts themselves, 'we've applied to the Taxation Review Authority; we've applied to the Taxation Authority to amortise this; we think it is highly unlikely that it will happen, but there we go. And that's in the management accounts for March 1987 which were shown to Maruha in September/October 1987 with the advice that they were negotiating with the Inland Revenue; they expected a response in a few months, but nobody expected the Inland Revenue to agree.

Tipping J It's a very curious state of affairs that in Justice Priestley in 300 of his encapsulates very precisely the two crucial ingredients of agreement and assumption of responsibility for preparing the accounts. The Court of Appeal in 137 says 'it's possible for there to be fiduciary users to become Joint Ventures' and then they immediately cite from Lord Justice Millett in that well known case, where His Lordship talks expressly about undertaking to act which is exactly what on the fact of it is what happened.

Miles Exactly Sir.

Tipping J And then somehow or rather they got from that to the proposition there was no fiduciary duty.

Miles Well something dropped down between, they lost sight of this issue that had been such an important one and was an essential plank, and just reverted back at 140 to the structure of the Joint Venture patently an arms-length commercial transaction.

Tipping J I presume it was drawn to Their Honours' attention that some aspects of a relationship could invoke fiduciary obligations but not all.

Miles Oh absolutely Your Honour. Yes we were four days.

Elias CJ Well that may have been the problem.

Miles Oh well quite, and to be fair and I'm doing my absolute best to be fair Your Honour, to be fair they had listened to my friend's eloquent analysis of where Justice Priestly got it hopelessly wrong on the facts, yes, and I suppose it did take a little while in the day or so that was left for me to correct that impression, but because there was such a concerted attack on the factual side of it the Court which noted in the judgment 'that we had a clear view when we left the bench' it just may have simply become such a major issue that they overlooked this fiduciary issue. But it was a crucial part of our argument. It was in the pleadings; it was just part of the debate.

Tipping J I suspect they simply didn't see the importance of it, having confirmed that there had been deceit.

Miles I think Your Honour might be right but I do have a very clear memory and in particular His Honour Justice O'Regan's view on the arm's-length nature of the Joint Venture vehicle.

Tipping J They do record at 141 in a passing reference which seems to underplay significantly the way it was presented. It appeared to be suggested, but even if that's the crucial paragraph

Miles Exactly Sir.

Tipping J They reject it anyway but they seems to be saying, because this just presumably was the primary plank of the case.

Miles It underpinned our central argument.

Tipping J Yes. So somehow or other Their Honours, and I'm not expressing a view of who's right or wrong, appear to have overlooked or lost sight of what was a crucial point in your case.

Miles And not only that Your Honour but when you go on to read the next two sentences on that we reject that proposition, Mr Kawata was in New Zealand precisely to monitor and safeguard those accounting and tax functions completely misunderstanding the problem that Mr Kawata had which he was entirely dependent on being given the correct information.

Tipping J Well that's tantamount to saying that if someone's there and capable of being vigilant you can cheat them regardless of your duties.

Miles Regardless of what information you've been given or to the extent to which you're being deceived.

Tipping J I find that last sentence a rather difficult one saying Mr Galbraith's eloquence will need to be focused to some extent on that to help me.

Miles Well it bears no relation either to Mr Kawata's evidence because what Mr Kawata said is 'I was there of course to check out

Tipping J They seem to have merged the questions of existence of duty with questions of breach. Now the fact that there's someone there looking over your shoulder may be relevant to breach but it can hardly be relevant to existence of duty.

Miles Quite so, and keep in mind Sir the other bit issue before Their Honours which again might have been a factor in reaching the decision they did, is that Amaltal always argued that we knew the real position or if we didn't we should have, and s.28 of the Limitation Act was one of the big issues, one of the big defence was Kawata was there to check all this out. He was given all the information and either he knew and he's being coy now or he should have picked it up, and Justice Priestley in the Court of Appeal rejected the proposition that Mr Kawata or Maruha could have done more to have checked out the position. So certainly that sentence could I think be taken word for word from Amaltal's submissions, that that's what Mr Kawata was there for, that's what he achieved, and hence we can't get over the limitation problem, but at the risk of thrashing the obvious, it misses the whole point of the further obligations that were placed upon Amaltal in respect of the tax obligations, and again Your Honours will have picked up from the judgments but the three areas I suppose which involve what I would

say is the sustained deception was firstly the series of letters and memos in January and February 1988; secondly the very specific deception by Mr Holyoake of Mr Kawata in February 1989 when Mr Kawata finally said 'have the returns been filed under Amaltal and what were the calculations' and he was lied to specifically by Mr Holyoake who said filed under Amaltal and the taxation go to note 5(a) of the financial statements and when you go to 5(a) that was the management accounts found as a fact and of course that said 'tax paid in the full amount' which was a lie. Plus the audited statements, the audited financial statements that came out for the five years, all of which had the thoroughly misleading statement in there that tax was being paid in full, and all four accountants who gave evidence – two for my client and two for Amaltal – all accepted that the accounts failed to comply with GAP I think is the acronym. It's the good accounting some principle

Blanchard J Generally accepted.

Miles Generally accepted, and that if the statements are going to record that the full amount of tax has been paid when it wasn't there should have been a note in the accounts pointing that $5.6 million is sitting advanced as it were to Amaltal. Anyway that's by the by.

Tipping J In the simplest possible terms they were representing weren't they that 'x' amount of tax had been paid when distinctly less than 'x' amount of tax had been paid.

Miles $5.7 million.

Tipping J Yes, I mean it's as simple as that.

Blanchard J And they were the people handling the function.

Tipping J They handle it and what's more they had that sum in their back pocket.

Miles Exactly, exactly.

McGrath J Mr Miles one thing that I find just mildly curious. Am I right in saying that the Joint Venture agreement gave your clients a right of access to the tax returns and the tax accounts for the Joint Venture?

Miles I think they may have gone that far Sir yes.

McGrath J And I'd just really like to clarify what your case is. There was a request I think at one stage for this information but it doesn't seem to have been pressed. It seems as though in the end Mr Kawata was prepared to accept the information he received and you've said what the consequence on your case are of that. Do you say well he was diverted or am I right in saying that there was certainly no pressing by your client to get the source information to which it was entitled?

Miles Yes and no Your Honour. Yes in the sense that there was one specific request and that was the February 89 one.

McGrath J Yes.

Miles And he was simply lied to in return, deflected to use the language of Justice Mahon in one of the earlier cases, but that is in the context of two other groups of documents. The first which I just mentioned, the series of letters and memos that they got in January and February 88. You'll remember that was triggered because in late 1987 they got the draft set of accounts for the six months from March 87 to September 87 and those draft accounts recorded first amortisation, but more importantly it recorded the advances of about $2.7 million and that really naturally caused an immediate reaction from Maruha. And the explanation, the lying explanation, which was in a whole series of memos and letters and whatever was that was monies held in advance to pay tax and in March 1988 the whole of that $2.7 million would be utilised in the payment of provisional and, I know so little about tax, the other tax that you have to pay, then it was about

Tipping J Terminal, it's got a horrible name.

Miles Your Honour's right. It was about $1.7 million for one and $1.7 million for the other. It came in fact as I recall it to about $3.4 million and not only did they have the gaul to say well we've already taken $2.7 so we've got a credit for that, but you owe us another $600,000 because tax notionally to be paid in March 1988 is $3.4, and then that was backed up by formal letters from Amaltal Taiyo by the Chairman of Amaltal Taiyo, Mr Scheefer specifically confirming all of these factors and that was in response to a letter, a very upset letter from Maruha saying this is unprecedented for us that a Joint Venture partner would take money from us without authorisation. So you have these series of assurances that tax was being paid at the full rate. On top of that which influenced Mr Kawata, and he said this on several occasions 'well you know there were hints that the quota was being amortised; the odd draft ledger, what do they call it? Ledger accounts, whatever accountants prepare, there were odd drafts that he was shown that indicated that the quota was being amortised, and he said well I got these assurances from Holyoake and Talley that they weren't and then I waited he said for the audited accounts, because I knew that would be the correct amount. And they got the audited accounts each year of course and they confirmed their amortisation. And then in February 89 when he was down in Nelson and he said 'give me the specific information. Are Amaltal tax returns filed under Amaltal and if so what tax is being paid' and he got that specific reply from Holyoake. And he said right I accepted that. That was the firm information I was getting from the man who was controlling all of this

Tipping J And was it being suggested to him that he should have been clever enough to realise that he was being cheated?

Miles Absolutely, because that's the point.

Anderson J If you send the burglar you don't expect to contribute to the negligence for leaving the window open.

Miles Absolutely, and we quoted a couple of cases Your Honour which are in the submissions. *Betjemann and Betjemann* 1880's, a partnership case, where exactly the same argument was put forward, and the Court of Appeal said equity doesn't buy into that proposition for a second. If you ask your partner what the position is and you're lied to, equity doesn't doesn't tolerate then the lying partner to say you should have done more. There was nothing by this stage to, well let's put it another way. The deceit had finally been successful and that was the finding of Justice Priestley and it was accepted in the Court of Appeal. Now the upshot of that was, and inevitable finding then, no, no, let me backtrack for a moment. The position in a sense was complicated because of the profit guarantee. Now again Your Honours will have no doubt had a look at that but it was an odd and very tax inefficient structure that was agreed to by the parties. The basis of it was that Amaltal wanted to be certain that the annual payments to the Bank of Japan which it had advanced $12 million New Zealand to buy the quota and it was being repaid over five years with roughly a couple of million a year, very very approximately.

Tipping J Oh you're speaking in New Zealand, yes.

Miles And Amaltal wanted to be satisfied that that payment would be made each year by the Joint Venture so the parties agreed that there would be a profit guarantee guaranteed by Maruha which would ensure whether the profit was reached or not by the Joint Venture each year, it would ensure that there was $220 million yen available each year, which was the very rough New Zealand equivalent of something under $2 million able to be repaid to the bank. Now the agreement which was about a four paragraph agreement made it clear that there were to be separate calculations each year and that there would be a net figure reached after payment of all expenses paid or payable and the expenses paid or payable included all the things you would expect, royalties and whatever, and income tax. And what His Honour Justice Priestley had no hesitation in coming to was a finding that what was understood by that clause was that when you're assessing what the guarantee would be, you'd produce a net figure after the payment of tax actually paid and if that didn't reach, and if I can just use $2 million in a broad term, if it didn't reach $2 million then it had to be added to by Maruha and that was the guarantee. But because it was a profit guarantee they had to add so much because it was taxable, so you then had to double the amount as it were if the tax was at 48%. So the net result was that the amount required from Maruha ensured that there would be an after tax profit of roughly $2 million New Zealand. Now what in fact happened is that Mr Holyoake, consistent of course with Amaltal's decision to

keep the notional tax that was being paid, calculated the profit guarantee not on the basis of actual tax paid but again on the assumption that the full tax was paid and you had to do that because that was consistent with hanging onto the money.

Tipping J And if he hadn't done that the gaff would have been great.

Miles Exactly Your Honour, and the result of including the full amount of tax produced of course a corresponding drop in profit and the drop in profit meant that there was coincidentally an almost identical amount that had to be paid in the profit guarantee as there was on the tax that was being kept.

Tipping J This was quite a clever scheme this because it in effect doubled the, or enhanced the deceit, or the fruits thereof.

Miles Exactly Your Honour.

Tipping J And where Justice Priestly said although less subtle minds might (laughter), it was quite nicely put I thought.

Miles Well it was, because Mr Holyoake did have some difficulties when he was being cross-examined as to the basis of this because the whole point of a profit guarantee of course is that it was based on actual cash. There had to be cash in the box at the end of each year and in that case actual tax being paid of course was crucial because that all went to cash flow, and all of the accountants agreed that what this profit guarantee was all about was cash flow, and putting in and doubling effectively the tax was simply not a runner. Now the implications from this in terms of damages made it inevitable then, and the acceptance by Justice Priestley of Mr Lucas, the Price Waterhouse expert who gave evidence on this, but it was inevitable that he would hold that Maruha was entitled to, what was it $6.1 million, that was the amount of the overpayment under the profit guarantee of about $5.6, I'm talking roughly here. And another $4 or $500,000 which was the profit that the Joint Venture should have earned if profit tax, if the actual tax had been built into the structure. Now logically the $6.1 was the appropriate amount and that figure is not being challenged. What the respondent said was, well I know $6.1 is our loss but nevertheless we go a benefit out of it of $1.2 and hence that should be taken into account and I'm moving here of course into the second issue and before I do so Your Honours and if there's anything more that you would like from me on the fiduciary obligations lets me know otherwise I think it's probably appropriate to move onto the second leg.

Elias CJ Well can you just summarise the basis upon which you're contending that there was a fiduciary obligation. You've gone through the background Joint Venture but you haven't really pressed that. What is the fallback position – how would you express that?

Miles I wouldn't put it as a fallback position Your Honour

Elias CJ No alright, sorry, the second position, yes.

Miles The summary is 4.26

Elias CJ It might be expressed as the step-up position if it's the more direct route.

Blanchard J 4.26.

Miles Yes.

Tipping J Entitled to repose, and did repose trust and confidence.

Miles Exactly.

Elias CJ Right, by reason of?

Miles The agreement to hand over to Amaltal responsibility to deal with the Inland Revenue on tax matters; to file tax returns and to advise Maruha as to what tax was being paid.

Tipping J Priestley, para.300 in the trial Judges

Miles And hence to also give accurate information on actual tax to be incorporated into the calculations for the profit guarantee. So those fiduciary flowed into the profit guarantee calculations as well.

McGrath J So is it really the nature of the function that gives rise to the fiduciary obligation on this argument? It seems to me it's not so much anything to do with an agreement it's the nature of what

Elias CJ Happened

Miles Yes.

McGrath J While it was discharged by Holyoake.

Miles I think that's correct Your Honour. I'm comfortable with that Sir because that is what happened.

Anderson J It's the implications of the arrangement.

Miles Exactly Sir and that's what Justice Priestley found as a fact was the case.

Anderson J If that had been accountants doing exactly the same work, or lawyers, there'd be no argument, but the status of the person doing it can't really affect the obligations imported by it.

Miles Quite Sir. Holyoake of course was the accountant.

Anderson J I mean a separate firm of accountants.

Miles Oh yes, I understand the point which Your Honour is making.

Elias CJ So the second point?

Miles Now this we deal with from pages 21 onwards in the written submissions. The Court of Appeal dealt with this also relatively briskly. Two paragraphs I think. You'll find it at 177 and 178 where Their Honours said 'We think there is however real force in the argument for the appellants that what was overlooked by the High Court Judge is Maruha obtained a benefit on the dissolution of the Surimi Joint Venture

Blanchard J Was the argument put to the High Court Judge?

Miles Oh yes Sir, yes it was.

Blanchard J And does he deal with it anywhere?

Miles No he doesn't Sir.

Blanchard J That's what I thought.

Anderson J Was the argument affected, this particular part of the argument affected by any question of whether it's a tort or an equitable obligation.

Miles We don't think so Sir and the traditional approach is the equitable approach and recognised in a number of judgments by His Honour Justice Tipping which we rely on, *BNZ and New Zealand Guardian Trust, the Everest*

Tipping J And the Court of Appeal in Gilbert and Shanahan.

Miles Exactly Your Honour.

Tipping J There wasn't just me there.

Miles Oh quite, quite.

Tipping J Just in case anyone starts getting anxious.

Miles Well I wasn't Sir. So there's a group of cases that deal with equitable considerations because the breach of fiduciaries but the clear implication we say from the House of Lords judgment in the *Smith New Court* is that similar considerations would be applicable as well. Now

Tipping J There might be onus issues depending on which you had but I doubt that that's going to matter much in this particular case.

Miles Well there's no doubt where the onus is under equity. The onus is on Amaltal.

Tipping J Yes, quite.

Miles Yes, and I rather suspect from Lord Steyn's judgment that he would agree with that but certainly there's no doubt in equity that's the case. Could I just take you to the second paragraph.

Elias CJ It's hard to believe that it isn't the same though on any basis

Tipping J You've got to show that there was in fact a benefit and what its true value was

Miles Exactly Sir, exactly.

Tipping J Yes.

Miles And I've introduced this incontrovertible benefit which is a useful concept because it seems to me what Your Honour was talking about in the *BNZ Guardian Trust* case, um, I'll come to that in a minute. But if I could just take you to 178 as well, which was the next paragraph in the judgment. Literally the next sentence is on this footing it ought to be a deduction of $1.2 million or more, I mean that's the amount of reasoning that's involved. Tax was paid on it by Amaltal of $1.2 and saw to the deduction. Now that is a very very simplistic approach and for the reasons that we have set out in our written submissions Your Honour it simply doesn't do justice to the law at all. There's also a slightly irritating next few sentences which I just mention for the record

Tipping J You use the word adroit Mr Miles.

Elias CJ It's the footwork.

Miles Well I've long since stopped being pleased when I'm being praised by the Court of Appeal because one always knows there'll be a sting in it somewhere, but it is simply not true. The footwork was neither adroit nor was it accurately stated. That's the irritating point. I don't mind it being described as adroit footwork if that's indeed what it was, but there's this very odd next phrase where they said 'and said in essence' and then puts a series of three lines in quotation marks. Well for a start you can't have quotation marks for something that is in essence because the impression that this is what I said. Now I'm going to hand up to Your Honours the transcript, because it's not what I said.

Tipping J You've even been benefited with internal quotes too Mr Miles I see.

Miles And they go on to say there are several difficulties with that general proposition and it would be if that was the proposition I was advancing. I suppose there would be, I don't know, I don't even quite know what it actually means, I've no idea what it means. But it's certainly not what I said and when I re-read the transcript there were two factors that surprised me. One is in fact how a short a period of time I was allowed to discuss this issue. It's really literally about a page and a half or two pages of transcript in four days. I mean obviously we had the written arguments on the point, but you will see from the responses of the Court that they simply weren't engaging in the debate.

Tipping J Do we have that transcript do we somewhere in our papers?

Miles You don't, but I'd like to hand it up to Your Honours. Your Honours are rising at 12 today, is that right?

Elias CJ No I've cancelled that. That's fine thank you.

Miles Alright. So we'll be having a break at 11.30am?

Elias CJ Yes.

Miles It's just I've four copies of the transcript only

Tipping J Well I'll share Mr Miles, don't worry.

Elias CJ Yes pass it up if it illustrates the point that you're making now.

Miles So long as Your Honours wouldn't mind that one of you is going to

Tipping J I will.

Miles You'll have the pleasure of perhaps reading it a little later.

Anderson J You're fortunate Mr Miles because the transcription system had only been in place for a few weeks at the time of the hearing.

Miles Oh really, yes, well I'm not even sure that the whole. I don't think the whole of the hearing was transcribed. Justice Hammond said to me half way through the hearing, 'I'm going to ask my secretary to take down the transcript'.

Anderson J Ah well, she uses one of these machines

Miles Was that it? So it was actually only in part. It starts at the bottom, page 110 and it's always a bit embarrassing reading a transcript. One realises just how hopelessly incoherent one is.

Blanchard J It applies to Judges as well.

Miles But I think the summary of that first extensive paragraph at 111 is that Maruha had no idea they'd been written down.

Tipping J The no choice point.

Miles The no choice, well no idea

Tipping J Oh no idea and therefore

Miles No choice is at the bottom of the paragraph.

Tipping J Oh sorry.

Miles Yes, you see we weren't given the opportunity what the law says is that there least has to be an obligation of power to be given the choice.

Elias CJ And Amaltal didn't treat its own quota in this way or its own tax

Miles No of course they didn't, no, no Ma'am of course they didn't. They have yet to pay any tax because they haven't sold it, nor have we. Seventeen years, sixteen years later the quota is still being utilised, still unsold

Tipping J I don't understand how someone with any commercial nous at all would voluntarily pay up front in these circumstances. I mean why would you?

Anderson J Altruism.

Miles Of which my client would be to the forefront but there are limits. Exactly, exactly and I just carry on I suppose and you can see more on page 112 but you don't need to go on. Now what we say on this point is that starting at the bottom of page 21, there are two issues here. Firstly we say that there is no benefit in the sense that it should be understood to Maruha as a result of this but secondly no allowance should be given to Amaltal for payment of the tax charge because Maruha wouldn't have paid it themselves.

Tipping J Is there a third implicit point that if one has to account for them one shouldn't do it on a face value basis?

Miles Ah, that's our last point Sir, yes.

Tipping J I mean that seems with great respect to be naïve. One would have to discount it surely.

Miles Exactly.

Anderson J I guess the possibility for the quota would never be sold.

Tipping J Well we knew it hadn't been sold for 16 years.

Miles And there's not a shred of evidence indicating that

Tipping J So it's a very very speculative assessment?

Miles Well it's some contingency.

Anderson J The quota's only ever been sold by MAF hasn't it? Everybody else leases it.

Miles Yes, exactly, everyone. Particularly when they were given it at the attractive price that they got it for.

Anderson J $400.

Tipping J Yes. So it's three points really- is there a benefit at all law - should it be allowed and if so at what value?

Miles Exactly Sir and we made all those points and on the value issue not only have we lost the benefit of $1.21 which we ought to have had at the time which notionally we would have invested back and were entitled to interest and all the usual issues are there, but $1.2 million now just on inflationary terms is 36% less valuable now than what it was, but because of the strength as we perceive it of our first two arguments, this third one is very much if we've lost on all the others then we'll stay with that and I'd have bee very comfortable arguing that third argument on its own if we hadn't had the other two which seem

Tipping J But you say hypothetically you'll go down on your first two arguments, in heaps, in other words fully down. You are asking us to consider the profit value of the allowance I take it?

Miles Absolutely and for all the usual reasons Your Honour we'd be reluctant to have it remitted back.

Tipping J Oh of course, yes.

Miles Yes, exactly.

Elias CJ But there are two bases aren't there? You seem to slide into a second one. The first one is the discount against the probability of sale which is when the benefit would have been realised so you'd have to do that but then you also have mounted an argument based on the value. You've indicated that inflation would require

Miles Well that's a third proposition Your Honour.

Elias CJ Yes but don't you run into problems with principles of nominalism and all of that sort of thing there?

Miles Well I'll get into that a little later if I may Your Honour. It's the first two points – whether this is an incontrovertible benefit rather than just a contingency benefit, but secondly we would say in the circumstances of a defaulting fiduciary they ought not to have the benefit in any event of having advanced its $1.2 million without our knowledge and in order to continue to conceal the fraud.

Anderson J They volunteered it in effect.

Miles Quite Sir.

Anderson J Yes but he doesn't assist a volunteer

Elias CJ Isn't it all on whether there is a benefit, whether it really was an expense because if it is I would have thought that the principal sum of which we discussed in *Chirnside and Fay* would make that something that should be deducted from the amount that the fiduciary has to pay? So doesn't it really all turn on whether there was an incontrovertible benefit?

Miles One does perhaps

Elias CJ I wonder really about whether it's, well I know the case laws to discuss benefit but it's really whether it's a necessary expense isn't it?

Miles Yes Ma'am they do allied a little these points but it did seem that conceptually the first issue is whether it was a benefit or just a, because it's a contingent benefit, and that's unarguable, is that the sort of benefit that equity relies on when it says that we should have damages reduced because of contingence benefit?

Tipping J The simplest possible way of putting the point is that it's not a benefit because it didn't have to be paid.

Miles Yes that's, yes exactly Sir.

Tipping J But I think there could be downstream points, assuming that proposition is not accepted, but I'm not expressing a view.

Miles No.

Tipping J I think there could be discretionary points and there also I'm sure could be valuation points.

Miles The discretionary issue think becomes an issue when assessing the seriousness of the breach and

Elias CJ Well isn't it assessing the loss? I mean isn't it really rather the other way around that the nominal amount of the loss would actually have to be discounted against the contingency that you have an asset that can't be sold without incurring tax?

Miles Yes that's one way of putting it Ma'am but what the cases tend to talk about is freedom of choice obviously that somebody who's getting a benefit of which they no nothing normally aren't then obliged to have the damages that they are justly entitled to discounted, particularly if there is no evidence that they would have accepted the gift. But also, and while one allies into the other it did seem that the issue of whether a contingency benefit is a benefit at all. It did seem to me a separate issue but if that analysis seems overly complicated I'm perfectly content just to concentrate on the contingency nature of it and secondly whether it was a benefit that they would ever have relied on or wanted and hence this is not the sort of benefit that a defaulting fiduciary ought to be allowed to hang on to.

Tipping J Or ought to be allowed to have a credit for in the accounting if you like?

Miles Yes, and with the effect that we are out of pocket for $1.2 million.

Tipping J Well you're out of pocket for $6.something million.

Miles $6.1 million exactly Sir.

Tipping J They are trying to say well actually whether you wanted it or not and whether you knew or not, we confer the benefit on you of $1.2 million ergo, your net loss is

Miles $4.9 million.

Tipping J Yes.

Miles Exactly Sir.

Blanchard J I think they're really saying this was tax that was unavoidable so therefore it is fair in the reckoning that it be brought into account and if it was unavoidable I think that's probably right.

Miles If it was unavoidable it would be more difficult for us, but

Blanchard J But if there's a breach of fiduciary duty it's for them to show that it was unavoidable.

Miles Exactly Your Honour and

Blanchard J And if it's a matter of deceit only the burden of proof may be the other way around.

Miles But unquestionably the burden is on the defaulting fiduciary in terms of equity. But even

Elias CJ I would have thought it has to be on the defaulting cheat also.

Blanchard J Well that may be right

Elias CJ Yes, yes.

Tipping J Traditional law would say that the plaintiff even in deceit has to prove their lot and the cross credit allegation has to be disproved but I daresay we might well want to revisit that

Blanchard J Do you think we might get a few benefits of doubts?

Tipping J Yes.

Blanchard J In favour of the person who's been cheated?

Tipping J Quite. But I can't see how this tax was unavoidable in other than in the most ultimate sense and on a timeframe that is entirely speculative.

Miles Totally and determinate, exactly. And that was the evidence in fact.

Blanchard J Well we can only go on the evidence. We're not entitled to go off and look up tax rules I would have thought even if we could be sure that we understood them.

Miles Well the good news Your Honour is that there was some evidence, evidence from Mr Takuma and from Mr Lucas and I'll give you the references to that.

Blanchard J Well they're in your submissions.

Miles They're in the submissions. They weren't cross-examined as I recall it on this point and there was no evidence called by any of the accountants for Amaltal on the issue. It just seems sort of

Tipping J Well you don't have to pay for tax deprecation recovered until you dispose of the assets. I mean I can't really understand what all the who-ha's about.

Miles Well quite, well nor could we at the time and Amaltal has never paid it and for obvious reasons and we wouldn't have either and that's what our evidence was.

Blanchard J Was it easier for Amaltal though because they were a 75% shareholder?

Miles Yes they kept the subsidiary structure. Exactly Your Honour, it was.

Tipping J Was there some suggestion that on dissolution the tax came to charge against you? Presumably not, because that you say

Miles Well it never arose because

Tipping J It never arose.

Blanchard J Wasn't Mr Takuma's suggesting that the solution might have been for Maruha to keep the subsidiary structure?

Miles Quite right Sir, yes.

Elias CJ Well does that mean the tax was not avoidable if the quota were subdivided

Miles No, no Ma'am, that's what Lucas says. Lucas says, I mean it's awkward because nobody turned their mind to it and by the way just to emphasise this point, dotted through the submissions of the respondent is the claim that Maruha required the quota to be transferred at cost.

Blanchard J Well so it did but it thought that there'd be no right down.

Miles Exactly Your Honour, but they relied

Blanchard J So you can't take anything much from that.

Miles What they attempt to do is that they seize on a letter written by Buddle Findlay to Amaltal's solicitors. A letter that just sat in the case on the agreed bundle; was never referred to and I've asked this to be checked and my friends will tell me if I'm wrong. A copy of this letter went to Mr Barry Brown of Coopers and Lybrand, who was advising Maruha at the time and a copy to Mr Takuma. Neither of them were cross-examined on this letter. Nobody was cross-examined that I'm aware of on this letter and in the final submissions this letter was seized on for a proposition that has nothing to do with the issue involved. That the latter is not tort**,** my friends will have to discuss it with you, because it runs through their submissions. It is not dealing with amortisation, it is dealing with an internal decision that Amaltal reached after they'd taken over the subsidiary, it was now a fully-owned subsidiary, and for internal reasons they did various things – they netted off some company advances against the value of the quota and these are just different issues altogether and Maruha was concerned that this might in the transfer of the quota, this might involve them in some form of deemed dividend or some other issue. It's a complete red herring. What Maruha understood as His Honour Justice Blanchard pointed out

and Barry Brown's evidence is quite explicit on this point. They believed consistent with what they'd been told the previous four or five years that the quota hadn't been written down - they took it on that basis. Lucas says there would have been way of avoiding having to repay the depreciation and he sets out a way in which it could have been done and that's in his evidence. And what I began to say a few minutes ago and when I'm dealing with this, it's difficult now, it's awkward for Maruha to say this is what we would have done because they never turned their minds to it at the time. All we needed to do, which is what we did, was produce evidence that there were ways of avoiding the tax charge on the transfer and obviously that's what would have been done because who in their right minds would have wanted to pay $1.2 million on quota which they had not the slightest intention of on-selling.

Blanchard J Would the way that Mr Lucas suggests have involved co-operation from Amaltal?

Miles I don't think so Sir, but I'm assuming that Amaltal would have done everything they could to have co-operated.

Blanchard J Presumably they would have had to have brought everything out in the open and they would have been interested in mitigating as well.

Miles Yes quite Sir, quite. I discuss and I'm just getting on to this incontrovertible benefit – would this be a time to break Ma'am or

Elias CJ Yes we'll take the morning adjournment now thank you.

11.30am Court adjourned
11.49am Court resumed

Elias CJ Yes thank you Mr Miles.

Miles Your Honours at page 22 of my written submissions I set out the argument as to why there's no benefit and that really just covers the issues that I've been discussing with Yours Honours before the break, that had they known, each party would have accepted the fully written down quota; no tangible benefits; Maruha still owns the quota etc; best speculative and contingent benefit; the reduction in value of $1.2 million now compared with what it would have been worth back in 1992; further losses; the commercial unreality of it all set out at 5.6; why no company in Maruha's possession would pay the tax charge if there was a way out, and at 5.8 I discuss this concept of incontrovertible benefit and it did seem to me that the concept was of assistance and the way they defined an incontrovertible benefit as an unquestionable benefit; a benefit which is demonstrably apparent and not subject to debate and conjecture. Where the benefit is not clear and

manifest, it would be wrong to make the defendant pay, since he or she might well have preferred to decline the benefit if given the choice. While the principle of freedom of choice is ordinarily important, it loses its force if the benefit is an incontrovertible benefit, because it only makes sense that the defendant would not have realistically declined the enrichment. This of course is in the concept of a defaulting fiduciary. It got a benefit, an unexpected benefit that it didn't ask for as a result of its default and the issue of course in equity is whether the defaulting beneficiary in those circumstances should disgorge the benefit, and the answer is 'yes' but only if it's certain, and it would have been paid in any event to put it another way. But the concept seems appropriate here where if one is assessing a benefit to a fiduciary who has been defrauded, that beneficiary should only have its damages reduced if the benefit was certain a benefit it would have asked for and required and pay and taken the benefit of it without conjecture or debate. Now at 5.12 I just discuss the theoretical possible differences between equitable compensation for breach of fiduciary duty and common law damages for deceit. We say that in practical terms it's unlikely that the Courts would require any distinction because the deterrence rationale which the House of Lords talked about in *Smith City*. Is it *Smith City*? It doesn't sound quite right. In *Smith New Court*, yes, which was common law deceit but where we say that it would have reached the same result as it would have if it was equitable compensation. But dealing with equitable compensation we cite those cases that I've already briefly referred Your Honours to. Firstly the *BNZ and Guardian Trust* where we refer initially to a reference to Justice Gault and it might be helpful if I just take Your Honours to that case. I know Your Honours know it well but if I could

Elias CJ Which case?

Miles This is the *BNZ and Guardian Trust* which I referred at 5.16 Ma'am and you find that at tab 15 in volume 2 and again that was a case where there was breach of fiduciary obligations but fraud wasn't involved, it was negligence and the issue was whether there was a distinction in equitable compensation between a breach of fiduciary obligations that just involved negligence as it were and one that involved fraud, and at the Court of Appeal Their Honours held that the damages ought to be similar. At page 681 His Honour Justice Gault said at the top of the page 'the issue then is whether the breach of duty by Guardian to act with reasonable diligence is to attract liability on a restitutionary basis by analogy with breaches of trust causing loss to the trust estate or breaches of fiduciary duties of loyalty and fidelity. The rationale for a restitutionary approach in those situations is the need to deter breaches of trust and confidence by those in a position to take advantage of the vulnerable by using powers to be exercised solely for their benefit', and I obviously adopt that as being relevant here, and at line 16 'only where good reasons exist is differentiation warranted. They do exist where breaches of trust dissipate trust property, where there is abuse of fiduciary duties of fidelity and loyalty or where there is dishonesty in

the commission of certain intentional torts such as fraudulent misrepresentation' and citing *Smith New Court* again. I'd adopt that Your Honours. Then staying with that authority, if we could go to page 687, dealing with His Honour Justice Tipping's judgment, but really I think the most relevant part is that paragraph on page 687 starting at line 39. 'In the second kind of case, the trustee or other fiduciary has committed a breach of duty which involves an element of infidelity or disloyalty engaging the fiduciary's conscience – what might be called a true breach of fiduciary duty. In this situation the law applies the approach recently outlined by the Court in *Gilbert and Shanahan*. In short, in such a case one the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary upon whom is the onus shows that the loss or damage would have occurred in any event, i.e. without any breach on the fiduciary's part. Questions of foreseeability and remoteness don't arise in this case either. Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach' and that seems directly on point with our argument. The emphasis of deterrence; the onus and the narrow escape route only on the basis of showing that the loss or damage would have occurred even if there had been no breach, which seems to me just another way of describing the concept of incontrovertible benefit. At 5.23 I give Your Honours the references to Mr Takuma and Mr Lucas that there were various ways in which Maruha share of the quota could have been transferred on a tax neutral basis. I said witnesses weren't cross-examined and Amaltal didn't lead any evidence on it. It has to be accepted given the onus I would have thought that was the end of the matter.

Blanchard J Are you going to take us to Mr Lucas's evidence on that?

Miles Yes by all means Sir. You'll find it at volume 4, page 669.

Elias CJ Sorry, was it 269?

Miles Ah, 669 Ma'am, para.70 and 71 which Your Honours can read.

Blanchard J So it's a new subsidiary of Amaltal Taiyo and they're the preference shares along the lines of Ceebay?

Miles Exactly Sir. And Mr Takuma's is 629. Now Mr Takuma is not an accountant. Mr Takuma was the managing director, effectively the New Zealand managing director of Maruha and he says at para.5 'had Maruha been aware of the tax structure it would have explored the possibility of adopting a different structure such as utilising

Tipping J Sorry, what page are you at now?

Miles I'm sorry Sir, 629.

Tipping J Thank you.

Miles Which was Mr Takuma's evidence in chief in reply.

Elias CJ If this was evidence in reply, what was it in reply to? You said there was no evidence

Miles There was a one sentence. I think I have this right. There was a one sentence comment by Mr Michael Talley in his evidence in chief which to the effect Maruha needed this to be at cost because of tax implications in Japan and I think that's literally it. Now Mr Talley had no knowledge of what the tax implications would be in Japan but he nevertheless made that comment and so if you go back to, oh yes, just go back to the start of his evidence in reply, just the previous page – 628, at para.2. At para.115 Mr Talley states Maruha required a share of the Joint Venture to be distributed at cost in order to avoid paying tax in Japan. It was literally that one sentence and that's what he's dealing with. And at para.3 he refers to the letter of advice from Buddle Findlay to Maruha on 18th March 1992 which specifically records their understanding that the quota had not been written down and then at para.5 he just adds the paragraph I've just referred to. What the evidence of Mr Takuma and Mr Lucas really shows Your Honours is that had they been aware that this was an issue they would have sought ways and would have achieved ways of ensuring that they would have taken the quota without having to write back the depreciation, hence it's not a benefit in getting it paid for them.

Elias CJ If they'd taken it back on a written-down basis would that have affected the amount of quota they would have received?

Miles No Ma'am, it wouldn't have, no.

Elias CJ No.

Tipping J It was the same amount of quota

Elias CJ But it was done not on value, it was done on the quota?

Miles Quite.

Elias CJ Yes.

Miles Well yes it was, it was a quarter of the quota transferred at book value.

Elias CJ Yes.

Miles Because by the time the writing down had been so successful – they wrote it down by 20% I think each year – so it was actually written down to nil value by the time, and at that stage it was worth Amaltal's

75% was worth something like $60 million. They did very well out of this.

Anderson J Is the alleged motive of Amaltal than paying the tax relevant to anything?

Miles What I'm indicating Your Honour is that equity takes into account the circumstances not only surrounding the breach but also surrounding the so-called benefit. Secondly if you link the deterrence factor into this then it does become a matter of some significance because we say the Courts ought not to allow an erring fiduciary to cover up the fraud and then seek the benefit from

Anderson J The argument is that they shouldn't get taken advantage from a device to cover up their iniquity.

Miles Exactly Your Honour.

Anderson J The factual position is that if they had transferred as they did at full value, the probabilities were that in due course when Maruha's books were looked at by the IRD, the IRD would say well hang on a minute, you've recovered value here

Miles Yes, quite.

Anderson J Pay the tax on it. And on your hypothesis then the penny would have dropped.

Miles Of course, exactly Sir.

Anderson J So it was to avoid the risk of disclosure by IRD?

Miles Well and possibly Maruha would have realised it.

Anderson J Well if that's the consequence of the process, does that extrapolate to fraud?

Miles It became an essential part of the fraud.

Tipping J I don't imagine they'd have done it unless they had a very good reason for wanting to confer a benefit on Amaltal.

Miles Exactly Your Honour, what

Anderson J Without shouting it from the rooftop.

Miles What the process must have been is we're sitting on $5.6 million here. We've actually had the benefit of this; it's been steadily mounting since 1987; it's now becoming increasingly clear that we're going to

get away with it as far as the Inland Revenue is concerned and Maruha is unaware of it.

Anderson J Or at least we might get away with it. I mean that's why they adopted aggressive accounting techniques as it's euphemistically put.

Miles Exactly. Now if we can continue to keep the benefit of this fraud, we might have to pay $1.2 million to solve the tax problem because otherwise if we transfer the quota at written down value then it will raise the very issues that we've been trying to keep secret. So presumably the process went 5.6, that's a big help, but if we have to hang on the bulk of that at the cost of 1.2 or whatever, it's still worth it.

Elias CJ Mr Miles I think you might have answered this already but I can't remember but could Amaltal Taiyo I guess it is have transferred the quota to Maruha without paying tax on it?

Miles Yes Ma'am, that's the evidence of Lucas and Takuma.

Elias CJ No, but they could have structured it differently, but if the arrangement was simply to transfer the quota, didn't they

Miles Oh they would have paid tax.

Elias CJ Yes, so it's not necessarily part of, although it's consistent with a cover-up, it was required in any event by the form of the transaction?

Miles No Ma'am, I don't think so.

Elias CJ I'm not seeking to doubt the main thrust of your argument which is that this was not a benefit sought by, and it's a bit like perhaps somebody who steals a car and paints it to avoid detection, as far as your clients are concerned they can bill for the paint job, so I understand looking at it from your client's point of view, but looking at it as a matter of tax obligation, did that tax have to be paid on transfer to Maruha?

Miles Yes

Elias CJ Yes.

Miles Yes, it did, because they would have immediately been liable to write back the depreciation.

Elias CJ Yes, so the real problem is the non-disclosure

Miles Exactly.

Elias CJ Yes.

Miles Well yes but also Amaltal presumably realising that and realising that once that became apparent then the whole device would have been disclosed

Elias CJ Yes, yes

Miles Had no alternative but to pay the tax for them and keep quiet.

Tipping J But isn't the evidence simply this that if they had known the true position they would not inevitably have had to pay the tax?

Miles Exactly Sir and indeed the evidence says that there were alternative ways of doing it, so not only was it not inevitable, there was in fact positive evidence.

Tipping J Positive evidence, yes.

Miles Yes, unchallenged, not cross-examined on and accepted by the trial Judge. Now my friends say in their reply brief, well there's no evidence that this tax was paid over as part of a fraud avoidance. My comment is there was simply no other commercial explanation for it. It is inconceivable that a company like Talleys would pay tax for someone else, particularly that someone else who they'd been defrauding for the previous five years. It makes no commercial sense other than it was payment to disguise the fraud. I set out at 5.30 the factors that we've been talking about Your Honours. Damages in tort for deceit, well we just make the obvious point that the correct measure is putting the plaintiff in a position that it would have had if the misrepresentations hadn't been made. That would have given us the $6.1 million. At 5.3, the point *Smith New Court* was making. A defendant liable in deceit will be bound to make reparation for all damage directly flowing from the transaction. It needn't have been foreseeable; it must have been directly caused. But the plaintiff must give credit for any benefits he'd received but we come back to the incontrovertible argument, and I cite Lord Steyn at 5.35, oh by the way at 5.34 where I'm talking about *Smith New Court* on the second line I refer to Lord Wilberforce. It's not Lord Wilberforce of course, it was Lord Brown-Wilkinson. But it was Lord Steyn's analysis that was of particular interest which I set out at 5.35. 'It may be said that logical symmetry and a policy of not punishing intentional wrongdoers by civil remedies favour a uniform rule. On the other hand it is a rational defensible strategy to impose wider liability on an intentional wrongdoer. As *Hart and Honore in Causation Law* etc observed, and innocent plaintiff may, not without reason, call on a morally reprehensible defendant to pay the whole of the loss he caused. The exclusion of heads of loss in the law of negligence which reflects considerations of legal policy, doesn't necessarily avail the intention wrongdoer. Such a policy of imposing more stringent remedies on an intentional wrongdoer serves two purposes. First it serves a deterrence purpose in discouraging fraud. Counsel for *Citibank* argues that the

sole purpose of the law of tort generally was to compensate but that's far too narrow. Professor Glanville Williams identified four possible purposes – appeasement, justice, deterrence and compensation. Where possible the law seems to like to ride two or three horses at once; but occasionally a situation occurs where one must be selected. The tendency is then to choose the deterrent purpose for tort of intention, the compensatory purpose for other torts, and the battle against fraud civil remedies can play a useful and beneficial role. Secondly, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud etc', and I just note that that was recently cited in England in *Standard Chartered Bank* and again for the reasons we set out at 5.37 we say that we ought to be entitled to the full extent of our damages. Just going back for a second Your Honours to 5.30 where I've set out the reasons why no allowance should be given for the tax charge, and I've set out five reasons there. Could you just add the ones that I've been discussing? It goes without saying that these further factors were there but I just noticed that they weren't specifically amongst those. The first is the onus issue, not discharged of course to show that Maruha would have paid the depreciation inevitably and secondly, which I suppose is the same point but expressed slightly differently, the dictum from His Honour Justice Tipping in the *Bank of New Zealand Guardian Trust* case that the policy dictating that fiduciary should only be allowed that narrow escape route – proof that the damage would have occurred in any event.

Tipping J So here you would equate that with proof that the liability would have come to charge in any event?

Miles Exactly Sir, and I just conferred Your Honour at 5.39, I just say that 'such a result, apart from being patently unfair to Maruha as the innocent victim of Amaltal's dishonesty, will have the effect of encouraging fraud as it would seem that similar payments made in order to conceal the fraud may ultimately be to the account of the innocent party and this must be contrary to public policy. Against this background and the authorities, the stringent approach to damages adopted in the case of deliberate tortfeasors requires that Amaltal's liability for damages shouldn't be reduced by the payment it chose to make on Maruha's behalf to conceal its fraud'. And I just conclude once again with a dictum from His Honour Justice Tipping. 'If it is a wrong engaging the conscience of the wrongdoer, what has sometimes been called a fraud in equity, a stricter approach is justified that corresponds with the position when there is fraud in the common law sense, at least as far as some of the more recent authorities are concerned. In some cases the greater moral turpitude of the wrongdoers supports a restitutionary "but for" approach, at least on a prima facie basis'. So again if I understand what Your Honour is saying there, there is a move from the common law position in those circumstances to take into account, to produce the same effect in

Tipping J I think I probably had the new whatever that case prior in mind

Miles It's cited

Tipping J It's cited is it?

Miles It's cited Sir. Whether Your Honour cited it or not

Tipping J No I don't think I cited it

Miles Justice Gault cites it

Tipping J Yes, yes

Miles So it was obviously before Your Honours at the time.

Tipping J Yes.

Miles Those are my submissions Your Honours. I did say

Elias CJ Sorry, I'm just not quite sure why if you got common law fraud here

Miles Yes, it's the question of taking into account the so-called benefit and I think what Justice Tipping is saying here, is that in cases of moral turpitude, the common laws increasing moving towards the position that a plaintiff shouldn't have its damages reduced unless it would have said 'we would have paid this inevitably'. I put it a little more strongly, but

Elias CJ Well it must be that the on if you have dishonesty.

Miles Well I concur Ma'am

Tipping J Well that was not necessarily perceived to be the case

Miles Classically.

Tipping J Classically, that's why I made that observation

Miles Exactly, exactly, but the clear impression I have is that Your Honours in that case found the approach by the House of Lords and Lord Steyn an attractive approach conceptually and had it in mind when making comments such as that.

Tipping J This also had causation overtones to this observation Mr Miles

Miles Yes.

Tipping J I'm not suggesting it was confined to that.

Miles No, no, and I think that's the point that Justice Gault was making which I referred Your Honours to a little earlier as well.

Elias CJ Thank you Mr Miles.

Miles Could I just hand out the fifth copy of the

Elias CJ Oh thank you that will be helpful.

Miles And at the risk of Your Honours saying don't bother could I nevertheless hand up also that analysis of the partnership agreement and the corporate structure of the Joint Venture vehicle which was part of that argument that seems a long time ago now but where I was indicating to Your Honours that the first leg of *Chirnside* as it were was applicable here; that the Joint Venture partnership itself gave rise and was inherently capable of fiduciary obligations and it may be that this schedule is a of little assistance to Your Honours, but all it does show is that a number of clauses in the partnership agreement were taken on board on Amaltal Taiyo, either identically or substantially similar, and hence the analogy the partnership becomes that much more attractive, and I don't want to say anything more Your Honours because I've said enough on that topic.

Elias CJ Right, thank you Mr Miles.

Miles As Your Honours please.

Elias CJ Thank you Mr Galbraith.

Galbraith Yes, as Your Honours please. I think the first point I just want to make, which I think is accepted by my learned friend and by the Court is that the decision in relation to whether there's a fiduciary relationship or not doesn't have any bearing on the second question as to what quantum of damages should be awarded. I don't see any difference between deceit and damages awarded, if it's equitable damages, damages awarded for breach of fiduciary obligation as

Blanchard J You accept there'd be a reverse onus?

Galbraith Well it depends what you mean by reverse onus Sir and what you have the reverse onus about, what it's about. To start with the plaintiff has to prove that they've suffered loss as a consequence of whatever the breach is. I mean that's the first thing. It doesn't matter whether you're in fraud or in fiduciary or whatever, the Courts have consistently said in a common-sense way there's got to be a causative link between the breach and loss, so there is an initial onus on the plaintiff. There will then be an onus on the defendant to say well this loss would have occurred in any event for example is one of the ways that you can escape liability. Well you might be liable for breach but

not liable with any consequences, so I'm sorry I wasn't try to duck it when I said well it depends what you mean by onus, but

Blanchard J Yes, no I understand what you're saying.

Galbraith So in my respectful submission I don't think it makes any difference whether it fiduciary obligation here or not and indeed the nature of the recovery which was ordered by the High Court Judge and with amendment by the Court of Appeal was compensatory and it was for an overpayment made by Maruha because of the finding that Amaltal hadn't made, had misled them; I simply put it that way, and so what Maruha had to establish was as a result of being misled in that way, it had paid some money that it otherwise wouldn't have paid over and it was a calculation and I'll come to the issue of quantum in due course, but the issue so far as Amaltal is concerned is that the so-called credit is in fact part of the calculation of the loss. It is an expense that was necessarily incurred for Maruha to take as it did, quota, which it received on an amortised basis. You can't have both. You can't have a tax advantage and have an amortised quota, fullstop. But I'll come to that in due course. The first issue however is the fiduciary obligation, the fiduciary relation issue, and I must confess I don't know if Your Honours are aware but an article on *Chirnside and Fay* appeared in the February New Zealand Law Journal which referred to this decision and speculated that in the light of *Chirnside and Fay* my learned friend wouldn't necessarily succeed in relation to the fiduciary obligation, generally in relation to the Joint Venture because the article took the view that in effect Joint Ventures had now moved into first category of

Tipping J Who is the author of this piece Mr Galbraith?

Galbraith Jessica Palmer from the University of Otago Sir. Now I read and naturally to some extent had geared up to try and persuade Your Honours that Joint Venture per se doesn't mean fiduciary obligations, but I apprehend that, I don't want to

Elias CJ You don't need to flog that as far as I'm concerned anyway.

Galbraith No I don't want to flog that one. Perhaps

Blanchard J You've got plenty to flog without that.

Galbraith Yes, or I'm going to be flogged is probably more like it, but could I just say a couple of things about it because it seems in my respectful submission that it's relevant to see whether the overall relationship is one of fiduciary obviously, because if it well that's the end of the argument. If it's not then there comes a question well is there some separate part of the relationship, which is the issue which Your Honours have raised here with my learned friend, that has fiduciary obligations, but my respectful submission is that that decision may be in informed by what is the nature of the overall relationship that they

have, and in respect to the Joint Venture between Maruha and Amaltal, it's distinguished of course by the fact of a Joint Venture company, by the fact of a Joint Venture agreement with extensive terms which could have been a shareholders' agreement for use of another term on it, but it's distinguished also, not just by those formal aspects, but by the fact that these two parties were in fact competitors outside the Joint Venture. Maruha, as you would have seen from our submissions, is a major fishing company. Amaltal is a Joint Venture company itself, or was a Joint Venture company itself, between the Goodfellow interests and the Talley interests and they were both engaged in fishing activities beyond those under the Joint Venture. So you have a situation where they are competitors. For example as the documentation shows, Maruha were parties to another Joint Venture with Watties at the same time.

Tipping J I can't quite follow why that has relevance Mr Galbraith.

Galbraith It has relevance Your Honour if one was to contemplate the idea that there were fiduciary obligations in relation to the overall conduct of the relationship, because

Tipping J Oh I thought we'd moved off that.

Galbraith I'm just saying I think with respect Your Honours can be informed when one goes to the, perhaps a smaller issue, by looking at the nature of the relationship.

Elias CJ Yes, absolutely.

Tipping J Oh yes, the overall position. I'm sorry I'd rather put that point behind.

Galbraith Yes, and all I was saying Your Honour as Your Honour said in *Chirnside and Fay* 'well you've got to look at all those factors when you decide whether or not there's a fiduciary obligation. In any event the issue which has been put and which my learned friend which has been put and which my learned friend as I understand is now relying on and well I'm not sure whether it was adroit footwork or not. I mean and it's fair to say in respect to the submissions made to the Court of Appeal that the submission was similar to the one that my learned friend started off with today that it was a Joint Venture, therefore ergo fiduciary obligations and it was only when my learned friend struck some pretty heavy resistance from Justice O'Regan particularly, but also Justice Hammond, that there was a fallback position taken of and it was the secondary arrangement about the taxation affairs of the company. We've dealt with this, and if I could just take Your Honours to the written submissions, because there is in my respectful submission, that issue's got to be looked at in relation to what the plaintiff was claiming, because what the plaintiff was claiming here was not that there were unauthorised advances made from one company to the other, but that the plaintiff hadn't been told that

amortisation was going on and therefore in the profit guarantee calculations that had been induced to pay more money than it should have. That was the plaintiff's claim that succeeded. It had alternative claim that it was to get 25% of the benefit of the tax savings because it was only a 25% sharehold of ATFC and of course that wasn't so attractive to it, so it was focusing on 'we paid too much under the profit guarantee calculation'.

Elias CJ Mr Galbraith I just because I have a question in my mind, I don't want to interrupt you but it occurs to me that if there has been an overpayment in these circumstances then your client was a constructive trustee for the amount of the overpayment and would be required to repay it in equity. Isn't the issue therefore the value of the quota received?

Galbraith If we put aside fiduciary obligations at the moment and just accept that we're in deceit, yes

Elias CJ You made the point that this is compensation for overpayment and

Galbraith Your Honour's correct in the sense that always when you're trying to assess loss of compensation one takes into account what have they got and what haven't they got, what have they actually lost, because it may be out of your pocket and what you've been left is not worth as much, so yes in a, I mean Your Honour's obviously correct, in the sense it is a question of valuing both what they lost and what they've still got, but in these circumstances it's relevant that they couldn't have what they've now got and have all the tax deductions. You can't have it both ways. You can't have unamortised quota, which is what they've got, and tax deductions from writing if off. They're inconsistent, one with the other.

Tipping J But it doesn't come to charge does it until you dispose?

Galbraith No, but you just can't have it Sir. You can't have in your books, quota of book value and at the same time have the benefit of tax deductions because you haven't written off. It's in your books at full. It's nothing to do with whether you're paying tax or not paying tax. I mean that used to be a song you know 'can't have one without the other' and that's the reality of it. I don't want to leap to the second argument. What the plaintiff is trying to do is have in a sense the benefit of the breach, which is the quota at an amortised value or the benefit of the tax deductions that would be achieved, if the quota was unamortised but have the quota – sorry, I've got that wrong. The benefit of the tax deductions as if the quota was amortised but have the quota on the basis that it's unamortised and then say oh well we're entitled to, we're entitled to both even though we can never have achieved that position without

Blanchrd J Well your client did.

Galbraith But we paid the tax.

Blanchard J You paid our tax, you didn't pay your tax.

Galbraith Well no, we did pay our tax too Sir. At the end of the day Amaltal's out

Blanchard J But you've paid tax on a written down basis and you've never written back.

Galbraith No, that's correct Sir.

Tipping J You haven't had any depreciation recovered have you on which you become liable as if it were income?

Galbraith No we'll become liable if we sell the quota, that's right.

Tipping J Exactly.

Blanchard J So what they're seeking is to be in the same position as you're in.

Galbraith But we paid them back Your Honour with respect, we paid them back whatever the tax deduction was we got

Anderson J This is a question really I think of whether it's opened to your clients to say this because if they'd been completely frank they would have said well we're owning up, we've done you for $5 or $6 million or thereabouts, in fact the quota's been amortised and we're going to, we have to transfer it to you on an amortised basis and we'll pay back everything you've paid us by way of overpayment, and that would have then left the appellants in the same position as your clients, which one presumes if a better position because they're not jumping in to pay it themselves for their own benefit.

Galbraith I would have liked to have got to the question of quantum by going through a few of the steps. I was actually trying to talk about fiduciary, but if we want to move to that can I go back and go through the steps

Blanchard J Well it's not a matter of wanting to move to that, you seemed to have moved to it somehow, but

Galbraith Oh I got asked a question, I got asked a question.

Elias CJ Sorry Mr Galbraith.

Tipping J I think this if I may say so was sparked by the Chief Justice's proposition that your client undoubtedly held these overpayments on constructive trust. With respect that begs the question as to whether they owe the fiduciary duty?

Galbraith Yes.

Tipping J Surely the primary liability which you have. You don't think that?

Elias CJ No I don't. If they've got dishonestly obtained funds, they must hold them on a constructive trust.

Anderson J Even if they didn't, because if they were holding them on a contingent basis and ultimately the figures had to be re-calculated, in a completely honest situation, they would still be holding them on a constructive trust.

Tipping J Fraud leads to money having received traditionally

Blanchard J But even a constructive trustee is entitled to say if the Tax Department requires a payment and it's unavoidable then there's a deduction for that.

Galbraith Well of course. The overpayments which were made were taxable. Tax was paid on the overpayments. We've refunded the overpayments, so as Your Honour Justice Blanchard rightly says, tax was unavoidable on the overpayments so it was paid.

Blanchard J I didn't say it was unavoidable, I said if it's unavoidable. I'm far from convinced that it was unavoidable.

Galbraith No, no, no, on the overpayments which were received by Amaltal from Maruha under the profit guarantee calculation, sorry, and ATFC from Maruha under the profit guarantee calculation, tax was paid. I think everyone agrees with that.

Blanchard J Yes, I understand that.

Galbraith And that's what the recovery was in respect to was in respect to the overpayments under the profit guarantee calculation. It's a different matter the amortised amount, the tax benefit from the amortised quota, that wasn't what the claim was about. The claim was about the profit guarantee made under the separate Joint Venture between Maruha and ATFC, and that's what the recovery's been in respect

Tipping J Well if there was nothing more than that, there could be no argument on quantum could there? Your client is seeking to offset that undoubted liability with a suggestion that you've provided a collateral benefit in relation to this tax plan

Galbraith Well we do seem to be into this don't we?

Elias CJ Do you want to go back Mr Galbraith?

Galbraith Well I would like to do the other first and then come to this without starting at the sort of end, because we're

Tipping J I don't mind how you do it, it's just while we're in it I think we have to be quite clear as to what's going on.

Galbraith Well in my respectful submissions it's not a collateral benefit, the first question is what's the loss suffered by the plaintiff

Tipping J $6. something million

Galbraith Well

Tipping J That's what they overpaid isn't it, plus that $500 whatever Mr Miles was, for the $500 one.

Galbraith At the end of the day for whatever loss they've got, you take into account whatever they've got left in their hands. What they've got left in their hands is unamortised quota and what in my respectful submission they should receive in money terms is effectively that the overpayment value that Amaltal received as a consequence of the claim, or of misleading Maruha to believe that they weren't amortising the quota, which led Maruha to make those overpayments.

Tipping J I thought that as against the Tax Department what they were left with was amortised quota, not unamortised. If they were left with unamortised quota they wouldn't have a problem. There would be no capacity to be liable for depreciation recover.

Galbraith Well Maruha has been left with unamortised quota.

Tipping J I'm sorry but I must be completely on the wrong track.

Blanchard J We might be better to go back to the first issue.

Galbraith Yes. Where I was directing Your Honours' attention in relation to this question of whether there's a separate agreement or whether there's a separate function which was being carried out in the overall context of the Joint Venture to which fiduciary obligations should be imposed and Your Honours will recall that this was said to be in respect to Amaltal's conduct of the tax affairs of ATFC, and what we've set out in para.47 is that under the Joint Venture agreement, ATFC have the obligation to keep the books of account and Amaltal also had the obligation to provide services as we've said in 47 little (b) to ATFC in areas that aren't defined in the agreement but they were services pursuant to the agreement, and so for example Mr Potter, ATFCs Quota Manager and Mr Preston, both of whom were employees of Amalgamated, their services were provided to ATFC and similarly Mr Holyoake who is the Amaltal accountant. Amaltal provided his services to ATFC, but when he's doing the ATFC accounts, he's doing that on the basis that he has

been his service having been provided to ATFC to do the ATFC accounts. He's doing it for ATFC under the direction of the ATFC directors who first check the accounts and sign the accounts off etc. he's not doing it as a function of Amaltal, he's doing it as a function of ATFC, and so under the, as we've also said in little (d), under the Joint Venture agreement all the directors and both Amaltal and and Maruha, who were the parties to the Joint Venture, and their appointed representatives, have the right to inspect the ATFC books any time and the evidence was that they do on a regular basis. This is the sort of point that His Honour Justice McGrath earlier on. As we've said all the accounting material which Mr Holyoake prepared was always checked by representatives of Maruha and Amaltal and the final sign-off of the accounts was required and there were independent auditors, and again the Joint Venture agreement provided for the auditors to be appointed by Maruha and Amaltal and they were. So that's how the books of accounting were provided to be prepared in terms of the Joint Venture agreement

Blanchard J Does this mean that the fraud was committed by ATFC rather than Amaltal?

Galbraith Well yes is actually the truth of that because the profit guarantee calculations under this Joint Venture were to be prepared by ATFC and were prepared in this manner which I have described by ATFC, or by Mr Holyoake, who's services had been given to the ATFC by Amaltal. And perhaps so Your Honours can identify that

Tipping J So the Joint Venture in effect defrauded itself?

Galbraith No there's two Joint Ventures, there's two Joint Ventures, and this is a point that His Honour in the High Court got confused from time-to-time. There was a Joint Venture which is the one that we've been generally talking about which is the Joint Venture that had the Joint Venture company ATFC and there was a separate Joint Venture called the Surimi Joint Venture under which the profit guarantee arose. Volume 12, page 540 is where it starts. What happened was that they had their Joint Venture company and they had their Joint Venture agreement. They also entered into a second Joint Venture. When I say they, this is a Joint Venture between ATFC, the Joint Venture company, and Taiyo Fishing Company, which was a subsidiary of Maruha. Sorry Maruha changed its name, that's right. Under that Joint Venture there were specific agreements in relation to the catching of certain fish types for the purpose of Surimi which I understand is some sort of kind of fish meat type of product to be sold in Japan, and that Joint Venture

Anderson J I think it's the fish equivalent of lunch and sausage.

Galbraith Yes, I call it crabmeat but I mean it's the same sort of thing, yes Your Honour's quite right, and that Joint Venture had very specific

provisions as to who absorbed what charges etc etc, and what payments were to be made. It was very different from a partnership sharing profits and it had its provision saying it wasn't a partnership as well. But it's under that Joint Venture that the profit guarantee that we're talking about, the calculation arises, because the profit guarantee under this Joint Venture was intended to provide the funds to pay for the borrowings that had been utilised by the quota which this Joint Venture was going to in part use. And so you find at 549 in volume 12 a memorandum which sets out the terms of profit guarantee and it quite specifically requires ATFC to cause the books of account to be kept in respect of its interest in the Surimi Venture. No volume 12 Your Honour.

Blanchard J 12?

Elias CJ It may be in two places.

Blanchard J Are there two 549s?

Elias CJ No, it is in volume 12 at 549.

Galbraith The short answer is yes Your Honour and there's a longer answer but I don't know the answer to it I'm sorry. I think it relates to the evidence as against the – Oh ok, I don't understand the full answer but at volume 12, page 549, you will see the profit guarantee. What it required was for ATFC to keep books of account in relation to this Joint Venture as if it was a stand-alone, and the reason for that was ATFC, which was the Joint Venture company between Maruha and Amaltal, had other fishing business apart from the Surimi Joint adVenture, and so you will see that it's an obligation on ATFC. It says how the books of account are to be kept in (2) as if it's a separate entity. Shall show the net profit to Amaltal Taiyo after all expenses have been charging including charter fees royalties cost etc. Now can I just point out those aren't all the expenses of running the Joint Venture Agreement provided that Maruha bore the expenses of running the vessels etc and these were expenses relating only to the contribution which ATFC made to the Joint Venture, particularly in relation to supplying quota, but also including some costs of leasing etc. So it was a special set of books that were used for the purpose of calculating the profit guarantee and then you'll see in para.3 if the profit's less than a certain amount of Japanese Yen then provided the Hoki quota doesn't fall below 40,000 tonnes Taiyo would ensure the net profit is not less than that of the Hoki quota if Hoki falls below 40,000 tonnes the parties shall consult etc. And this is the profit guarantee under which the recovery was made, so it's a profit guarantee prepared by Mr Holyoake, seconded for this purpose from Amaltal to ATFC and prepared as a contract required by ATFC and presented to Maruha and which the Court has held because Maruha didn't appreciate that the quota was being amortised, it overpaid under the profit guarantee.

Tipping J Is this argument essentially that the breach of duty that led to the overpayments was a breach committed by ATFC, not by Amaltal, the present party?

Galbraith Well the argument at the moment Your Honour is simply about where a fiduciary may lay.

Tipping J Yes but there's a deeper question underlying that, because

Galbraith We're not arguing about

Elias CJ Well you can't.

Galbraith Well we're not, we're not. I'm not trying to get drawn into that because we're not arguing that. We've accepted the basis on which the compensation has been awarded subject to the $1.2 million that we are arguing about, we've accepted.

Tipping J But there's an illogical disjunction here. I mean if Amaltal's liable in deceit on the basis that it was in breach of the duties that led to the deceit, I have some difficulty with the proposition that the duties actually were owed by ATFC.

Galbraith Well Your Honour I think there are some disjunctive issues about the damages but as I say we're not arguing that and I think conceptually that there are some difficulties about it.

Tipping J I must confess, it's probably my fault Mr Galbraith, but this point didn't shine very strongly to me through the written submissions.

Galbraith Well it's because

Elias CJ It's been overtaken by the findings of fact.

Galbraith Yes, yes.

Tipping J No, I mean the written submissions in this Court.

Elias CJ Well that's why they haven't been addressed in the written submissions in this Court.

Galbraith Yes, yes, I mean we accepted rightly or wrongly that we'd lost on the facts twice and this Court wasn't going to entertain us a third time

Tipping J No well quite right, but, alright well I just signal some disquiet here.

Galbraith Well the point that we just go back to 46 is that

Elias CJ 46 what?

Galbraith Sorry, para.46 of the written submission, and you'll see this from the transcript which is now being handed up that in effect what His Honour Justice O'Regan in particular was saying to my learned friend was it's not an issue about carrying out the tax and accounting functions. I mean those were carried out. That's not the issue here. The issue is that they gave you a false profit guarantee calculation; that's the issue; that's what you recovered under. All the stuff about tax and accounting functions and separate agreements to the tax and accounting functions with great respect I was going to say hasn't got anything to do with the price of fish, and Justice O'Regan didn't put it quite as colloquially as that but you'll see from the transcript that was the point he was making and so that's why we say in 46 there isn't any separate agreement between Amaltal and Maruha in relation of tax and accounting functions to which it's necessary for the Court to attach fiduciary obligations, and where does it lead to in any event. There was no separate agreement we say in (b) between Amaltal and Maruha in relation to the calculation of Maruha's profit guarantee obligations. There wasn't a need for one because ATFC did those calculations. We never admitted to there being such a separate agreement

McGrath J Well then you go to the pleadings but what do you say Mr Galbraith to the point that it's not a question of whether or not there was a separate agreement, it's a question of whether the nature of the function that was taken on gives rise to fiduciary liability.

Galbraith Well it can. Obviously I accept that Your Honour, it can, but what I'm saying is in the context of this particular Joint Venture Agreement, with all the obligations which ATFC had to keep accounts, the entitlement which parties had to inspect accounts, for the same reasons that it didn't apply to the overall Joint Venture, it didn't apply specifically to this function. Now I mean it could in some circumstances

McGrath J It seems to me that's the central issue.

Galbraith Yes.

McGrath J And it seems to me it doesn't matter whether there were separate Joint Venture Agreements or not, it's really a question of whether the nature of the function in the context of what you say was a highly prescriptive formulation.

Galbraith Yes Your Honour's quite right, I'm sorry and I've confused things, Your Honour is absolutely right in terms of was there a fiduciary obligation here or not. It's just what Your Honour's said, but assume there was for a moment, have they recovered because of a breach of that fiduciary obligation in relation to preparing tax accounts, and in my respectful submission they've recovered because of effectively a fib told to them in relation to the preparation of the profit guarantee calculation. That's how they've recovered in deceit.

Tipping J Isn't the crucial question here what legal party committed the fraud, because if the legal party that committed the fraud and I go back to my brother Blanchard's point which frankly I was going to raise to you the second afterwards if he hadn't got in first. You seem to be saying that the fraud was done by someone other than Amaltal, or the fraud was perpetrated on Maruha by ATFC Ltd – the first Joint Venture vehicle. That seems to me to be what you're saying in substance.

Galbraith Yes well that's where the deceit took place Your Honour.

Blanchard J Yes well the deceit took place via the Amaltal people who were seconded into ATFC.

Elias CJ Yes.

Galbraith Yes.

Blanchard J And therefore Amaltal must be taken to be responsible for the breaches by those agents that they put in. You come back to fiduciary duty by another route.

Galbraith Well you come back to deceit or fraud or whatever.

Blanchard J No, fiduciary.

Elias CJ They were agents.

Blanchard J It was just a means of fulfilling the function.

Tipping J They must have owed fiduciary duties to Maruha surely in the calculations that were made and the advice that was given as to what the position was.

Galbraith Well they certainly owed fiduciary duties to ATFC. There's no doubt about that.

Tipping J Are you saying that it was all contractual, vis a vis, Maruha?

Galbraith Well I think Your Honours are putting it on a different basis to that which my learned friend's put it now and I'm in more difficulty I think with the way Your Honours are putting it.

Elias CJ I'm not putting it on that basis.

Tipping J I'm not conscious of putting it on any different basis from the essence of Mr Miles unless we're going to get extraordinarily astute as to identifying precise separate parties and so on, which seems to be your client's present purpose.

Galbraith No, the present purpose Your Honour

Elias CJ You're giving us background really aren't you Mr Galbraith?

Galbraith Well yes. The present purpose was simply to say that as I've said that in the circumstances this Joint Venture, given which existed there, it doesn't simply arise out of the Joint Venture or the separate activity that fiduciary obligations arise. Given a finding of deceit in relation to an individual who might be seconded then I can understand how you can say that that person owed a fiduciary obligation – I can see that. I don't think that was quite the way my friend was putting it

Tipping J If, take Holyoake as an example, he deceived Maruha, no question about that. Now are you saying when he did that Amaltal wasn't responsible for his deceiving?

Galbraith No I don't think I can say that Sir.

Blanchard J Well and the same with the others, including Mr Talley.

Galbraith Yes, as I say Amaltal's accepted it's responsible for their deceit hasn't it?

Tipping J Well surely when those various people did what they did they owed fiduciary duties to Maruha? However you precisely analyse it as part of the Joint Venture or side issue from the Joint Venture or the simple fact that they did it.

Galbraith I'm hesitating on that one Your Honour because I mean that seems to be an extrapolation from the fact that somebody should have been honest which would be typical of any relationship, I mean the parties have to be honest. I don't think it follows from that the parties are expected to be honest they therefore have a fiduciary obligation. And that's where my hesitation

Elias CJ Fiduciary obligations arise out of particular vulnerability

Galbraith Agreed

Elias CJ And if you have, I mean if you have somebody who's simply being dishonest without there being circumstances of particular vulnerability, you don't have a fiduciary obligation, but where you have people who are acting as the means, who are the agents, you do have vulnerability. Maruha was vulnerable to their dishonesty.

Galbraith Well I mean, I'm not trying to duck the question. A party will always be vulnerable to dishonesty

McGrath J We can take out the character of the conduct can't we, whether it's fraudulent or dishonest. If we take that out for the moment and I

understand it you have now accepted that nothing turns on who these people legally may have been acting on behalf of. I gather that whatever may have been raised by that, it's not now an issue, so it still seems to me it comes back at that stage we look at whether the nature of the particular functions in relation to the tax returns and the rest of it are such as have that element of vulnerability that gives rise to a fiduciary liability, and if that's the question you are saying that for various reasons that's no so, including the opportunity that the other side had to verify matters, and I think we really should be focusing on that.

Galbraith Yes well that is what we say in 47 and 46, but 47 in particular that this wasn't an arrangement between the parties where they were content to rely upon a fiduciary or rely upon ATFC/seconded Amaltal personnel. They had all the management powers - the joint management powers, which they had under the ATFC Joint Venture and the rights of inspection, independent auditors and indeed the Japanese auditors, internal auditors, came down, a fact which I thought was of some importance, but the Court of Appeal didn't, subsequently to examine and look at the books and affairs of ATFC and the Surimi Joint Venture, so it's in that context you've got to decide whether there's a fiduciary obligation or not.

Tipping J Is the argument that whether they did or not they weren't entitled in all the circumstances to repose trust and confidence in the relevant sense in the people who actually did them down?

Galbraith No, because you'll always impose trust and confidence in that sense that somebody's not going to mislead you. I think that you can never

Tipping J The question's sometimes been put 'are you entitled to lower your guard' as against the normal standard of self-preservation that one has to have in commercial matters.

Galbraith Well my respectful submission here is that it's quite clear from the Joint Venture Agreement they didn't lower their guard, they in fact had all the safeguards which both sides contracted to put in place against each other, so you can't sign cheques individually and etc, etc, etc. We detail them in our submission.

Tipping J But were they entitled to expect that Amaltal's employees would not prefer the position of Amaltal in conducting what was after all a formal accounting type function?

Galbraith The short answer is I'm not sure of the answer to that Your Honour because I suppose if one looks at it objectively, which is how one I guess should look at this whether objectively, I guess my answer at the end of the day is that they didn't rely upon that expectation because they preserved their rights to have access to all the financial information and of course no accounts could be signed off without the

joint managing directors signing them off and they employed a structure in New Zealand, including Mr Kawata, to carry out those functions. I mean Mr Kawata wasn't a fisherman, he was an accountant.

McGrath J I think the first question we have to look at is whether there was a fiduciary duty.

Galbraith Yes.

McGrath J And it seems to me that the character of the function they had was a very administrative one which on the face of it would readily give rise to duties not to prefer their own employer who seconded you and that that is indication that there was a fiduciary duty.

Galbraith Though the evidence about what was involved in accounts etc was that there was at best about half a volume of eastlite at the end of a year and that Mr Kawata would come and check the whole lot and you will have seen from the judgment, it got down to issues about $2 one way or the other. So in the accounting function which as you say I think correctly Your Honour was simply an administrative function, it doesn't appear to me from the terms of the Joint Venture or the manner in which each company was set up to deal with this Joint Venture, but there was an expectation that one had to rely upon whoever was seconded from Amaltat to ATFC, that one was going to go and check this to see if it was correct or not.

McGrath J But checking is a rather unreliable way isn't it of finding out whether someone's preferred their own employer's position in this administrative exercise? I mean that's a sort of a backstop.

Galbraith Well it seems with my respectful submission that seems to be the expectation and that's what did in fact take place, subject to the fact that when Mr Kawata was confused as the Court of Appeal held in late 1988, and then made that inquiry in January 1989 he didn't utilise the opportunities opened to him or Maruha under the agreement but was satisfied with an answer which the Court of Appeal held was misleading.

Blanchard J The very fact that there was a secondment arrangement involving agencies suggests to me that there is a fiduciary obligation arising in relation to the function that will be performed.

Galbraith Well is that necessary I guess is a question

Blanchard J Is might be necessary I suppose for every secondment but a secondment to do critical things like accounting and preparation of tax returns and so on seems to have that sort of overlay.

Galbraith Is it fiduciary though Your Honour. I mean I can well understand

Blanchard J Well there's an obligation of loyalty to the Joint Venture.

Tipping J And there's an obligation of even-handedness I would have thought between the Joint Venture partners but could we just perhaps put that on hold.

Galbraith Yes, can I just say this, I wouldn't have thought the accountant should have been exercising that sort of decision if you want to put it that way, I mean if you're accounting for expenses and that it's

Tipping J He did didn't he?

Galbraith Well did he?

Tipping J Anyway.

Elias CJ Alright I think we'll take the adjournment now and we'll resume at 2.15pm thank you.

1.07pm Court adjourned
2.15pm Court resumed

Elias CJ Yes Mr Galbraith.

Galbraith If I can very briefly just try and get myself out of the muddle before lunch. There's no argument with the factual finding that Mr Holyoake deceived Mr Kawata and Amaltal are responsible for that. That's not an issue at all in this but that's with respect a different proposition to saying that Amaltal owed fiduciary obligations in relation to accounting and taxation functions. Just perhaps to supplement what I said before about how these functions were in fact carried out. Paragraph 36 of our written submission at page 11 refers to the evidence on this and you'll see there what it says is 'in relation to the separate Surimi Joint Venture accounts, which ATFC was also obliged to keep, they were prepared as follows. ATFC Ltd's accountant, Mr Holyoake seconded from Amaltal, would during the course of the year, and then following 30 September, prepare drafts of the Surimi profit guarantee calculation and forward it to the joint managing directors of ATFC Ltd, Messrs Honda and Scheffer. They would direct Mr Holyoake as to what income or expenses should be included because as I said to Your Honours before it's not all the expenses of the Joint Venture. They were defined expenses in terms of the Joint Venture Agreement, and would come back to him with additions and alterations, which he would incorporate. The final profit guarantee calculation and the information supporting it was checked and reviewed by Maruha representatives both in New Zealand and in the accounting division in Maruha's head office in Tokyo. At least one of

them was reviewed by Coopers & Lybrand. Once they were happy with it, it would be finalised and signed off by representatives of the parties - that's ATFC Ltd and Maruha'. Now it's obviously correct that when Mr Holyoake is acting as accountant for ATFC Ltd he owes fiduciary obligations to ATFC Ltd, but that's a different question from whether the shareholder who seconded him owes fiduciary obligations to either ATFC Ltd or even more indirectly to the other shareholder in that company, and in my respectful submission that question can't be answered by asking whether Mr Holyoake owes fiduciary obligations, it's got to be answered by asking whether Amaltal itself in the nature of the relationship owes some fiduciary obligation which arises from the relationship, and in our submission it doesn't for the reasons that I referred to previously, and because of the terms of the Joint Venture Agreement, and nor does it owe fiduciary obligations simply because it took the separate tax accounts of ATFC Ltd, which have to be prepared for AFTC Ltd, and filed them with its group accounts, as part of its group accounts with the Inland Revenue Department and as I said you'll see from the transcript as Justice O'Regan said that there's no issue that those accounts weren't correctly prepared and filed etc, the issue was that Maruha were told something different from what in fact occurred. I can pass from

Tipping J Would the fact that Holyoake and Co. were doing this obviously in the interests of Amaltal? I mean there can't be any logical

Galbraith Well that in fact may give rise to a liability but it doesn't create the fiduciary relationship. The fiduciary relationship has to exist independent. You can't construct it in hindsight, and *Tito v Wardell* and other cases say that. It either exists because that's the nature of the relationship, or it doesn't. Then what people do is

Tipping J Yes that may be a fair point Mr Galbraith, in fact there may be an element of reasoning backwards in my observation.

Galbraith Well it's awfully tempting to do it Your Honour of course because you say oh well that shows what might happen and therefore it would be nice to have some

Tipping J But to use my previous metaphor, are you saying that in all the circumstances Maruha had to have their guard fully up? They weren't entitled to lower their guard at all, vis a vis, the activities of these people who were doing the accounts and doing the taxation and making these statements of what was owed under the subsidy agreement and so on?

Galbraith I would simply say Sir that under the terms of the Joint Venture and the rights which they had in the structure which when you go through the Joint Venture Agreement, you will see it's very prescriptive, that that's what they were relying on and of course the general thing that we always rely on, that the people are going to act honestly. I mean of

course they're relying on that. That's in the nature of it. But they weren't relying on the fact that somewhere hovering over this was a beneficent fiduciary obligation that might deceive.

Tipping J And you were saying I think implicitly that there was no vulnerability per se and that there's nothing else beyond the contractual relationship that they were entitled to rely on? I think that's the essence of what you're saying.

Galbraith Yes, there's always vulnerability in any contractual

Tipping J Well vulnerability in the sense of the words used in this field?

Galbraith Yes, I'm sorry, yes. They had the means available through the contractual relationship to protect themselves except against somebody who straight out told them a fib because I think

McGrath J Were these functions being done on behalf of Maruha as much as its Joint Venture partner?

Galbraith Well the functions were being done strictly speaking in terms of the Joint Venture Company on behalf of ATFC, but obviously because they're the two shareholders in the company

McGrath J It's been done on behalf of each of them though really isn't it in the ultimate and doesn't that give rise to some expectation that their own employer's position won't be given any priority or won't be taken advantage of somewhere?

Galbraith I struggle with that term in the sense that Mr Holyoake is simply seconded to do what he's meant to be doing and directed by the joint managing directors, I mean that's where he should be getting his direction from. If in some way wrongfully, Amaltal intervenes or that then they should be liable for that wrong but it doesn't seem to me with respect that it was necessary to impose or to envisage fiduciary obligations on the shareholders in relation to what His Honour Justice Blanchard I think correctly said on the face of it an administrative function, because that's all the accounting function should have been and in fact was, it just went awry as we now know. As I said before in my respectful submission, whatever way Your Honours decide that issue and obviously it has got some more general significance doesn't in my respectful submission appear to me to have any bearing on the answer to the subsequent question which is what's

Elias CJ What bearing does it have?

Galbraith I understand that my learned friends for Maruha rely upon it in some aspect of the interest claim which is due to come to the Court of Appeal sometime in August, late August I think.

Blanchard J And was interest awarded in the High Court on a higher basis because of fiduciary relationship?

Galbraith No, no, but I believe that's the core of the argument which

Tipping J But it should have been?

Galbraith But it should have been, yes. That's the core of the argument so far as Maruha is concerned I think.

Blanchard J A higher basis than for deceit?

Galbraith I wasn't involved in the interest so

Blanchard J Oh I see, well it's unfair to ask you the question

Galbraith So I'm looking anxiously at my learned friend to make sure I don't mislead you.

Blanchard J Yes.

Tipping J Well one must assume they wouldn't be going to all this trouble on this point unless they thought it had some bearing on the downstream issues.

Galbraith They think it has a bearing and we don't.

Tipping J And you don't, oh well you wouldn't you Mr Galbraith?

Galbraith No, I just do what I'm told Sir. But to turn to quantum, which is before Your Honours, Your Honours have already been told that the High Court Judge didn't deal with this issue. It was argued before him. He mentions the argument in his judgment but then doesn't come to a conclusion on it. It was argued in the Court of Appeal and the Court of Appeal made an allowance, and as Your Honours are also aware, the plaintiff's claim which succeeded wasn't for an account of profits, it was for compensatory damages. Obviously in my submission whether you've got common law or equitable damages it doesn't matter, the principle is that the base of damage is compensatory but not punitive. It's obviously correct that when you're into equitable damages there may be differences in relation to force the ability or causation of remoteness and all the cases say that and there's no quarrel with that. It's also a fact that the Courts will when they're looking into situations of a fraud, be it common law or equitable damages arising out of fraud or other breaches of ethical obligations, may look on the plaintiffs more benevolently, and the defendants more harshly when it comes to line calling in respect of quantum of damages or offsets against damages and one can see that through all the cases too and one accepts that. *Smith New Court*, again Your Honours I won't take Your Honours to it, but Your Honours are familiar with Lord Brown-

Wilkinsons' judgment in there. Pages 266 and 267 probably summarises. The position there is, Your Honours will recall, there was an issue about what date do you assess loss at and His Lordship decided that a form of rigid rule that would be at the date of breach wasn't appropriate and one's seen that in other areas to and because one was in the equitable area therefore His Lordship said you assess it at the appropriate time that fairly compensates or puts the innocent party back in a position it should have been. But Lord Brown-Wilkinson emphasised that you do have to give credit, and credit for benefits was specifically identified. *Target and Redfern* is a similar authority. What's made clear is that the principles that underlie both the award of common law damages and equitable damages are the same under both systems and that what the Court is seeking to do is put the plaintiff, or to make good to the plaintiff, the damage caused by the wrongs. I said to Your Honours before there has got to be a causative link between the loss and the damages. And this isn't in my respectful submission that this sort of discretionary area that Your Honours were in *Chirnside* where on an account of profits the Court does have a discretion whether or not to award, or to allow for cost of special skills, or for that matter a profit claim which one party may have but not otherwise be entitled to because you're not entitled to profit out of a fiduciary obligation unless you've got express authority, but we're not in, in my respectful submission, into that discretionary type area. In our submission what one does have here in terms of the $1.2 million is an actual expense that was incurred by ATFC/Amaltal in respect to the asset which Maruha holds. Now what Maruha has, and has had since 1991/92, is its 25% share of the quota at book value – in its books at book value. It has had also a tax free benefit of a compensation payment of $800-odd thousand dollars and para.90 gives the information on that, and a tax free benefit of a compensation payment which was paid by the Government for a reduction in quota; that was paid

Tipping J Could you just go back a step Mr Galbraith? I'm sorry to do this but I fear if I don't I'll miss the thread. You say the $1.2 million payment was an expense incurred by Amaltal?

Galbraith Yes.

Tipping J Could you just elaborate on that? Why was it something that Amaltal had to pay other than choosing to pay for reasons that we needn't go into?

Galbraith Well Maruha requested, or required for various reasons, that its quota, it knew that Amaltal was taking its quota at a written down value. It didn't know how this had occurred, but it knew that. It requested it required its quota at cost and so for it to get its quota at cost, at book value, necessarily because it had been written down through the tax accounts of ATFC, ATFC had to pay the tax on it. You can't have

quota at cost and at the same time, well you can't have quota at cost and have a tax deduction.

Tipping J Are you saying that Maruha was insisting that it get its quota at cost?

Galbraith Maruha didn't know that it had been written down. I'm not trying to pretend that Maruha knew that at all, but I'm saying yes Maruha did require its quota at cost and

Blanchard J Well it required it because it thought that was the state of its quota.

Tipping J Exactly.

Galbraith Well that with respect isn't the, I mean undoubtedly I think, did think that was the state of its quota but

Elias CJ Well what was the alternative, that it be revalued?

Galbraith No, that it could have done what it understood Amaltal was doing

Blanchard J But are you saying that it knew that Amaltal was treating its quota as written down?

Galbraith It's my understanding of the evidence. There's a letter from Buddle Findlay to Earl Kent on 8 April 1992 which says 'the impression that we have

Elias CJ Sorry, what reference?

Galbraith Im sorry, sorry

Tipping J Is this the same letter that Mr Miles referred to?

Elias CJ Can we see it again? What's the reference?

Galbraith Volume 15, page 1321. Can I perhaps give you a bit of background which I'm not fully on top of but Mr Hollyman will correct me that one of the problems in Maruha in that this Joint Venture being dissolved and Maruha taking its share of the quote was that it wasn't able under the New Zealand Fisheries Regulations to have 100% ownership of quota, and so it had to set up a structure in which it had to have Amaltal participate to while in effect getting its 25% quota and having control of it, it had to have Amaltal as a participating party to keep itself in this percentage of 25%.

Blanchard J This is the Ceebay Bay structure?

Galbraith Yes, so there was a complicated, well it depends how complicated you think these structure are, but there was a complication of a structure Your Honour, and it needed Amaltal's co-operation. Further down the

track the parties fell out and I'm not quite sure how it was then done. In any case in para.2 you will see the, this is written from Buddle Findlay, Maruha's solicitors 'The impression that we have of the transaction whereby ATFC transferred quota to Amaltal Corporation Ltd is that it was done at a nil consideration so that the corresponding 'shareholders funds' attributable to Amaltal's shareholding were written off. Both Mr Jewel and Mr Brown are concerned that the transfer quota to Ceebay is for valuable consideration' and then they talk about a circular transaction which they wish to undertake to do that and if one looks at, you'll recall that my learned friend Mr Miles said that the evidence given by Mr Lucas about how had they known the quota was written off, they could have set some other structure up, he said that was in response some evidence of Mr Talley's and you'll find that evidence at volume 5 at two places – volume 5 at page 882. I'm sorry Mr Lucas but it's Mr whatever his name was

Elias CJ There doesn't seem to be 82.

Galbraith No, 882 Your Honour, 882, para.59. 'The main difficulties arose around Maruha's desire to nominate a company to receive the specified quota (the shareholders of which would not include Amaltal, and Maruha's insistence that it could only receive $49,999 for its interest in Amaltal Taiyo as it would have to declare

Tipping J This is heady stuff Mr Galbraith. Would you mind just slowing down a bit? I really do want to try and follow this because at the moment I have no idea whether it's totally correct or a smokescreen.

Galbraith All I'm trying to explain is that there was some apparent reason why Maruha said they wanted the quota at cost, at book value

Tipping J But that pre-supposes that they had every reason to think didn't they that it was at cost?

Galbraith Yes they did, I'm not

Tipping J Well why would they go rushing in saying they wanted it at cost if they

Galbraith Well if Your Honour would just

Tipping J Well that's why I want you to go nice and slowly just for my benefit Mr Galbraith.

Galbraith 'The main difficulties arose around Maruha's desire to nominate a company to receive the specified quota (the shareholders of which would not include Amaltal) and Maruha's insistence that it could only receive $49,999 for its interest in Amaltal Taiyo as it would have to declare any excess above that sum and pay tax on it at 57& or 59% (see

letter), which is the letter we've just looked at where it said Mr Jewel and Mr Brown, and I think Mr Jewel was their taxation advisor

Tipping J Who's this speaking in para.59?

Galbraith This is Mr Talley giving evidence, and you'll see if you go across to page 897 at para.115 'as it happened, Maruha existed the Joint Venture prior to the audit being completed. As a part of the dissolution of the Joint Venture and pursuant to the Variation Agreement, Amaltal paid $3 million etc to Maruha NZ for Maruha's share of the quote and Amaltal on-sold equivalent quota for the same price to Ceebay. The price was set at cost price – book in other words – as Maruha required it to be at cost to avoid paying tax back in Japan. Now you'll recall also the Court of Appeal comment. I want to come to Mr Lucas's evidence in a moment, but you will just recall from my learned friend said critically of the Court of Appeal comment about some adroit footwork and netting off against, the possibility of netting off in relation to Japanese tax and the Court of Appeal coming to the conclusion that Mr Lucas's evidence dealt only with the potential New Zealand tax position and not the Japanese tax position as you will see. So that what Mr Talley's understanding at the time which he gave evidence on and I don't believe that was challenged.

Tipping J Well it seems inherently strange that Maruha would be requiring it in quotes 'requiring it' if that's what it thought it was. You'd only require it if you had an idea that it could be one of two things.

Galbraith Well there were other ways that they could have taken it at

Tipping J Well I'm just saying that just because this wasn't challenged I wouldn't swallow hook, line and sinker Mr Galbraith, if I may a slightly inappropriate metaphor.

Galbraith Well it's the evidence and it wasn't as I say challenged

Tipping J It seems inherently an odd way of putting it if all the time that's what they understood to be the position.

Galbraith No, but there were ways that you could have taken the quota at a written down value. As you see back in 1321 they thought Amaltal, I mean as it was Amaltal were taken at a written down value by another route but there were ways that it could have been taken at a written down value by the sort of route they assumed Amaltal was adopting here, so they had a choice at the time. They could have said we prefer to have our quota at a written down value, forgetting about what had gone on in the background, just forget about that for a moment. But just assume that everything had been according to Hoyle**;** it had all been book value; they could have decided if it had suited them did they want a written down value and then other things would have had to happen to achieve that and they didn't get that chance.

Anderson J Can you point us to the letter for example that says 'we want our quota at unamortised value rather than amortised'? Is there anything in writing to that effect, because otherwise the proposition must be well we want our quota.

Galbraith Well no because the whole transaction was structured and they had to do checks etc to make it work, so you had to have a, there was no question you could have a, you know pick a value off the wall. It either had to be book value or some other value and for some other value then you had to structure it one way or the other in any case.

Tipping J So the point is thinking that it was unamortised they didn't request otherwise?

Galbraith Yes.

Tipping J It's no more than that?

Galbraith Well it is slightly more than that Your Honour but there are reasons why it best suited them, knowing what they knew at the time, which wasn't the full picture, I accept that.

Blanchard J It suited them because it didn't seem to have any tax consequences.

Galbraith Yes.

Blanchard J If they'd known of the tax consequences they would have looked at it quite differently perhaps.

Galbraith Yes that's right. I'm not quarrelling with that at all Your Honour, but it suited them as it was and the tax consequences in Japan was an issue which they had had from day one and

Tipping J Well why should they have to account for a benefit that on this premise they clearly didn't have their minds directed to?

Galbraith Well they're not accounting for a benefit, but they, well it depends which way you'd like to – I think it's chicken and eggs myself. They got their quota a book value which they couldn't get and have a tax deduction. You can't have it both ways, unless you go through some other rigmarole but I mean you can't both have book value quota and a tax deduction on the basis it's been written down, and their compensation has been calculated on the basis has been written down and so that's why I say, I mean one can describe it as a credit or it seems to me it's a function of calculating the loss because when you come to weighing up, if I can put it that way, what they've lost, they've got quota at book value and they've had tax free compensation, $800 and something odd thousand tax free, which they couldn't get if the quota had been written down. They would have had to pay tax on that.

So in their books now they've got quota at whatever the dollar, I don't know, whatever the book value is, and that's part of their balance sheets assets. They've had tax-free compensation and in the future if they come to realise it they won't pay tax on it.

Tipping J Are you saying there's a necessary link between the way in which their primary loss is calculated and for consistency sake if they're going to have their primary loss on that premise they must give this credit which you are urging?

Galbraith Yes.

Tipping J So the one is the necessary corollary of the other, not so much in practical terms, but in conceptual terms, is that the essence of the argument?

Galbraith Well that's the way I see it Your Honour that if there was no breach they couldn't get all this money plus the quota of book value and what we're trying to put them back into is where they'd be if there hadn't been a breach.

Tipping J So it's a necessary corollary of the way their primary loss has been calculated, the $6 million, the amount by which they were defrauded in relation to the top up profit arrangement, that if they're going to have that loss calculated on that premise they must give credit for this $1.2 million. I'll need some further help on why but I'm beginning to get a glimmer of why you say the one necessarily requires the other, because it has to be I think at that level.

Galbraith Well that is the submission which I prefer but I would still argue that you have to give credit for a benefit, so even if you see it as a credit for a benefit the fact is that they have got a benefit, they have got book value quotas sitting in their books at a value and they've got a tax free

Tipping J I think what you're trying to say is that they can't have the benefit of the way they've had their primary loss calculated and disavow that if you like in order to reject this credit.

Galbraith Yes Your Honour.

Tipping J And I'd like some help as to how that actually works. I can see it conceptually but I'd like some help on how it actually works on the ground here.

Galbraith Well it seems to me it arises because, well there are a number of issues that come out of this because of course one of the things which Maruha say is 'well we lost the opportunity of structuring to take the quota on an amortised basis, written down basis, and avoiding having to pay tax in due course'. Now it seems to me in doing that that that's to in effect adopt the breach because it's only as a consequence of the breach that

it ever got to the stage of being amortised and yet their claim for damages is on the basis that that's wrongful and we overpaid profit guarantee calculations and we should get all the money back, and then in any event, look we'll have to come to this, but I would say that the evidence before the Court that they did lose an opportunity is of no probative weight whatever, despite what my learned friend has said to you this morning. Mr Lucas didn't say that they would have been able to avoid tax and my learned friend used the term 'would', Mr Lucas used the term 'could' and Mr Lucas also acknowledged to His Honour that he wasn't a tax expert, so there actually wasn't any evidence before the Court of any value, any probative value, in the sort that one cross-examines a non-expert on a subject he shouldn't be giving opinion evidence on, is one which I don't think can get off the ground.

Anderson J If Amaltal had in fact done what they were pretending to do, then Maruha would have not paid out the top-up and it would have got the quota with a contingent possibility that one day it might have to pay tax on it.

Galbraith It wouldn't have been contingent Your Honour because it would have had to pay tax immediately on the compensation amount which it didn't, it got the compensation amount tax free, so

Blanchard J That's the tax on the $873,000?

Galbraith Yes.

Blanchard J What at 45 cents in the dollar?

Galbraith Or whatever it was then Sir, I'm not sure.

Blanchard J Yes. I can actually understand a better argument in relation to that than the primary argument that's being made, but this seems to be something brand new. I don't know if it was ever run below?

Galbraith Yes it was Sir.

Blanchard J Because they do seem to have picked up the advantage of not having to pay the tax on the $873,000. But I say that not having any real understanding of the nature of that payment and its tax ability. I'm just taking what you're saying in para.90 at face value.

Galbraith Well that was the evidence Sir. Amaltal paid tax on the compensation it got and it paid a sum of over $800,000 in tax because it had taken its quota at the written down amount.

Anderson J Does that mean then that Maruha would have had a tax bill of what, $350,000 or something?

Galbraith Or whatever, I don't know, I just don't have the precise figure at my fingertips.

Anderson J Well I can understand that aspect of it but as far as the remainder of the quota was concerned, they would have to pay tax one day if they sold it.

Galbraith One day if they sold it.

Anderson J Well that's quite different from taking it with tax already paid and then told well you're got to get the benefit of that tax now.

Galbraith Well

Anderson J There's a different quality in the

Galbraith Well no more than the quality Your Honour in valuing, you have a house which has got some value in it which you're not going to realise until the time you sell it, it doesn't mean you therefore say it isn't worth anything, it doesn't work that way.

Anderson J They can use it in the meantime just as you can use the quota without selling it.

Galbraith Sure.

Anderson J You can use it.

Galbraith Yes I mean you do use it in the meantime and as I say it stays in your books at book value and is part of the assets of the company and when you go and borrow against it there you've got a book value in the books of the company so it's just the same as using the house with great respect. It's an asset you have at a value and it seems to me difficult to see why a Court would adjust it from the value which it actually has and which Maruha have adopted, and it also seems to me with respect that if one's looking at this sort of expansive type equitable remedy, where you're meant to be put back in a position that you would have been and had all this not been done to you, that Maruha might be able to float a claim that well it lost something in losing the opportunity to put a structure in place but then it would have to prove that and there'd be a loss of a chance type of claim and it would be highly speculative if put that way. But at the moment it's in the position that it has to pay in my respectful submission for what it's got or it can't claim as a loss for something which it's actually got and it has got quota book value and a

Tipping J In cash terms it paid out well $5 and a half million more than it would have had to have done if it had been given the proper information. That's a secure first step.

Galbraith Yes.

Tipping J So what has it got that it must account for on the basis of this $1.2 million? I think that's all we're concerned with. I don't think we're concerned with the $800, I don't think you've got leave to raise that point. I thought we were here to discuss the way

Galbraith I'm not claiming any money in relation to that, I am just saying that that's part of the fact that they've got quota of book value, that they got a tax-free

Blanchard J I'm saying maybe you should have, but you didn't.

Galbraith Oh well we didn't.

Blanchard J I think it's a better argument that the one being made now.

Tipping J I can see the force

Galbraith But it's part of the 1.2. The 1.2 was paid so they had quota of book value and it's a consequence of that that they got the tax-free compensation. So it's not a separate claim it's just

Tipping J Alright.

Galbraith But the compensation payments were for a reduction if you had a quota for how many tonnes it was reduced and the Government paid you back, and because if you'd depreciated it then you had to write it back in your books and you had to pay tax on it. If you hadn't appreciated it, which on the basis that Maruha received quota at book value, they hadn't depreciated it so they therefore got the compensation without having to write anything back in the books because there was nothing to write back, but if they'd taken the quota at, well if they'd taken the quota at written down value they would have been in the same boat as Amaltal and had to pay tax on that amount which Amaltal did. And that's why as I was saying this morning Amaltal ended up paying tax on the profit guarantee payments. It's not as if Amaltal walked away with a great bucket of money out of this. Maruha has got its money back. It's got the quota at book value; it got the compensation payments tax-free. Amaltal paid tax on the profit guarantee payments, which has now had to refund; it's paid tax on the compensation allowance which it got and it paid the $1.2 million out. So it's sitting there with not very much. I'm not looking for sympathy but I'm just saying it's not a situation where Amaltal is sitting on a large pot of gold out of all this.

Elias CJ If this had been a simple claim. Forget about the subsequent transfer of quota, a simple claim that there overpayment which is the way it all started, on the face of it they'd be entitled to full restitution of the overpayment unless you could demonstrate that the adjustment should

be deducted, in other words it reduced the overpayment, but isn't the cause of which you say is a benefit, isn't that really because of the deal that was struck in terms of the transfer of the quota, and it's not really related, I mean it is related, I'm just thinking about the sequencing and the causation, and if your client has a loss in this I'm not sure that it really arises out of the claim.

Galbraith Well, say the whistle had been blown before the dissolution ever happened, just let's say that for a moment, so the merry-go-round stopped at that stage. At that stage what you would have had is the quota fully written down say it was the fifth year, fully written down and the overpayments being whatever that sum of money was tied up to that, but that's what Maruha would then have got. It would have got quota fully written down and a refund of

Elias CJ But that's at the subsequent stage of the dissolution. I'm asking you to unwind it.

Galbraith Well no because it owned 25% at that stage. I mean it's 25% of the quota. It would have been written down so if subsequently there was a compensation payment, it would have had to pay tax on that. If it had sold it would have had to pay tax on that and in its books it would have a zero, so it wouldn't show as an asset, it wouldn't have a number alongside it in the books and that's where it would have been. But it wouldn't have had quota

Elias CJ Well it might have been and therefore the dissolution might have taken place on a different basis, but I'm wondering how you credit the write down against the overpayment?

Galbraith Well because the other scenario is the one I've just described that they would have had written down quota. That's not when the Court has come to decide what loss there is. That's not the position. They actually have quota at book value, not written down. That's what they've got. When the merry-go-round finally has stopped you've got at what they've got then. I mean there's no claim. The plaintiffs didn't bring a claim relating to the date of dissolution, or saying they were misled on dissolution or anything like that at all. All, with great respect my learned friend said this morning about concealment and that there's no findings about that in the Courts because it wasn't an issue. I mean that's just, with great respect, my friend making pejorative submissions to the Court.

Elias CJ But they may have got a windfall on the basis that you're putting forward but how does that arise from the overpayment and its correction? That's the issue, it's

Tipping J Yes exactly right.

Galbraith Well because in the conceptual basis that the claim has been allowed to proceed or the judgment's been given, which is that there was an overpayment under the profit guarantee, assumes that there has been a 100% write off of the quota, which there hasn't been because Marua have got quota unwritten off. So that's how it arises. The point that His Honour Justice Tipping made before, they're inconsistent, so if they're going to consistent there's got to be an allowance for the fact that that 25% wasn't written off and that the mechanism that happened is in my view completely irrelevant. The fact that it happened later with a $1.2 million payment and so forth is in my respectful submission completely irrelevant.

Elias CJ Is it, I mean it may well be but

Galbraith Well Maruha can't show a loss in that respect because they can only if you look at it generically as it is when we finally end up in Court, because they could never have ended up with quota, book value, an 100% benefit through the profit guarantee calculation. It's not a direct link but through the profit guarantee calculation they couldn't have ended up with 100% benefit of the profit guarantee calculation which was then carried out by a double accounting type method that Mr Lucas invented 20 odd years later, or 18 years later, which credited the tax savings to the profit guarantee calculation.

Anderson J What troubles me is the feeling I have that they're being asked to pay the tax at a particular point of time, or carry the value of that tax at a particular point of time, which they wouldn't otherwise have had to do if it had been above board.

Galbraith But why, sorry I can't answer the question Your Honour but otherwise they're getting in damages for something they haven't lost. I mean they've still got quota at book value. They haven't

Elias CJ At the time of the deceit the loss they, well at the time they made the overpayments which were over the course of time, those overpayments couldn't have been diminished by the fact that tax had been paid, sorry, that the, well you know

Galbraith Right Amaltal had only written down 75% of that jolly quota then we'd be in a position that we're asserting to today.

Blanchard J I think where we're getting away from reality here is that the writing down is only a tax process. It doesn't affect real values. The underlying value is in fact rocketing upwards so this is only a question of how the tax shakes out and because of the concealment the tax shook out early. That's the argument you're facing. Instead of coming out at some indeterminate later time when they elected to sell and then would definitely have had to pay the tax.

Galbraith Well Maruha couldn't run the argument they're running at the moment if they'd sold the quota in the meantime, or it seems to me it would be very difficult for them to run that.

Blanchard J Well it depends on the circumstances.

Galbraith Well sure, sure, but instinctively it would be much more difficult to run that argument. But how the profit guarantee calculation has been done is by crediting the tax savings that were made at the time into the profit guarantee calculation and in effect giving Maruha the benefit of those as reducing the amounts they would have paid under the profit guarantee calculation. So it's not really that they're paying tax in advance. That just happens to be how the whole thing washed out at the end of the day. It's that they couldn't both have got all that money credited in the profit guarantee calculation and hence the overpayment which was credited, and at the same time have the quota not depreciated. It could never be, I say with some confidence, it could never be that that was the consequence

Blanchard J Well that was what they were told they were getting. They were told it was not being depreciated

Galbraith On the Judge's finding that's exactly right, but they couldn't have achieved that position, well as I say I'm not going to repeat myself, they couldn't achieve that position and the credits, the full credits, which have led to the overpayment calculation.

Blanchard J Well I don't know that we're going to get any further thrashing this around but I could see an argument in relation to the $873,000 and the tax on that, but if that argument isn't being run.

Galbraith Well it's part of the argument Your Honour because, it's because they've got quota book value they didn't have to pay the tax. They've had a benefit.

Blanchard J Yes. No, no, I can follow that part of the argument. It's nice and simple.

Galbraith Well it even matches my learned friend's incontrovertible. It's incontrovertible that they had that benefit. I don't think incontrovertible

Blanchard J But are you entitled to put that arguing up now? I mean I'm putting that up in order that Mr Miles will know that he might have something to answer.

Galbraith Well certainly in the Court of Appeal it was put up not as a claim to credit the, whatever the tax was on it but as part of the fact that they in getting the quota unamortised, it was a benefit. And as I keep repeating myself Sir, the other side of that same coin is that accepting

that Maruha didn't know that in fact the quote had been written down, there were other reasons why they wanted quota at cost in 1991 when this tax was paid.

Blanchard J Well there were other reasons, but whether those reasons would have been swept into the background had they known the true situation, that's another question.

Galbraith Yes, and if I could just talk about that briefly, we set out at the back of our submissions the two extracts from the evidence on which this suggestion is made that Maruha would have and could have done something differently had they known that. The first extract is para.95 of our written submission which is the one that my learned friend took Your Honours to for Mr Takuma, and all that Mr Takuma, who said he had no financial tax expertise and they were quick to say that they were relying upon Amaltal for all that, was that Maruha was deprived the opportunity to explore other ownership structures which may have avoided this tax liability. One such structure might have involved, would have explored the possibility and if you go across to 96 there's the extract from Mr Lucas's evidence and Mr Lucas said it could have sought, not that it would have achieved, but it could have sought to structure the dissolution in a manner, and an initial review of taxation rules applicable suggest that one way could have been, and Mr Lucas, and I've just lost the reference for a moment, the reference we've given you is incorrect there about Mr Lucas acknowledging he's not a tax expert, but the answer to one of His Honour's questions, Mr Lucas said, and it's at volume 7, page 1199, His Honour asked him do you know anything about tax law, his answer was I don't claim to be a tax expert Your Honour

Blanchard J Sorry, volume 7. What's the number again?

Galbraith 1199 of the bottom righthand.

Elias CJ No

Tipping J Or 199?

Blanchard J No, there's no numbers at the bottom righthand corner.

Elias CJ We've only got the pages of the notes

Galbraith Oh sorry, page 194. It's behind tab 45, page 194, line 4.

Tipping J Well whether he's a tax expert or not, he's put this up as a responsible possibility. I would have thought it was for you to show that it was not possible.

Galbraith Well with great respect Your Honour, only experts can volunteer opinion evidence.

Tipping J Well forget the question of any evidence. If there's no evidence at all on the point, isn't the onus on you to demonstrate that this was unequivocally and inevitably going to come to charge and could not have been avoided?

Galbraith Well in my respectful submission, no, sorry are you basing this on there being some evidence or there being no evidence by the plaintiff?

Tipping J I'm hypothesising that the onus is on you to demonstrate the inevitably of this benefit, leaving aside all issues of time value of money and all those sort of discounting issues.

Galbraith Well they don't come into it.

Tipping J Well I'm not so sure, but anyway we may well not reach that point.

Galbraith Well I do think that the Court's apply nominalism and

Tipping J Well it's pretty unreal.

Galbraith If one ignores this evidence for the moment, if Your Honour's proposition is that in a vacuum where Maruha have requested and have taken in fact, that's the situation the Court faces, have got quota at book value, then there is no obligation whatsoever on the defendant to start producing evidence against

Tipping J Is that because it's more valuable to them than written off quota from a taxation point of view? Is that the thesis, because I agree entirely with my brother Blanchard that we're dealing here aren't we in relation to taxation consequences, not real values? There's nothing that your clients have done that have altered the real value of this quota is there? I mean you're not suggesting that?

Galbraith No, no, no, that's right, but

Tipping J So some how or other you're saying that you've given them a tax advantage.

Galbraith But the point that I was labouring to make is that the manner of calculation of the overpayment that was done by the plaintiff's expert Mr Lucas, and rightly or wrongly we're not quarrelling with, but I think we might have but any case we're not, was on the basis of a crediting of the taxation advantage gained from the write down in the profit guarantee calculation. If you go back and look at the profit guarantee agreement that I took Your Honours to before, you won't see any reference to crediting tax, and in fact I'm sorry to belabour this, but if I can take Your Honours to

Tipping J No don't apologise for belabouring it. I wanted to make sure I've got a firm grip of what your argument is Mr Galbraith. At the moment it's perhaps slightly less than firm.

Galbraith If Your Honours wouldn't mind finding volume 13, and I'll just take you to a couple of documents. Page 656 if I could just take you to, and a bit more background. It's in our written submissions but I haven't gone through our written submissions in detail. At the time they were setting up this Joint Venture with this quota, Maruha had expert taxation advice that you couldn't depreciate the quota and there were four accountants who gave expert evidence before the High Court Judge and all four accountants agreed that you couldn't and that was the advice that Maruha had been given way way back was correct that you couldn't depreciate the quota. It didn't meet the requirements for depreciation. What happened back in these early days of the Joint Venture was that Amaltal, and Mr Talley in particular, wanted to have a go at depreciating, despite all the expert advice there was. Now the reason I'm taking you to these couple of documents is that this is contemporaneous at time that the Joint Venture was entered into and you will see that this first one is a communication from Mr Kawata back to Tokyo and he's saying 'you'll see accounts for year ending March 1987, you will see the revised accounts, then towards the foot of the page 1 'as you are probably aware we carried out the purchase of quota by tender. As regards the treatment of the cost of this acquisition, as we advised last year we understand that it is an asset that cannot be written off for tax purposes, but A/T, that's Amaltal, in their tax return plan to write if off over five years in equal instalments. It is not clear whether the tax authorities will accept this treatment of the matter, but they A/T indicate that they will act on the basis of guidance from Mr Talley'. Across the page. 'If this write-off were unrelated to this company we would simply sit by and watch it happen, but it is conceivable that our company may be faced with a demand to acknowledge the cost as being a part of the Surimi Joint Venture process. Since this company's minimum indemnity in respect of the Surimi Joint Venture is guaranteed, our indemnity will be increased by an amount equivalent'. What Mr Kawata was saying at this stage and I'll take you to another document where he has revised his view, was that gosh if they write off quota and they've got a depreciation charge in their financial statements, they can add that into the expenses column and we'll have to pay more money out of the profit guarantee. That's what he's worrying about here. And so you'll see in para.3 he says 'additional compensation' and he's got a little calculation where he's put the depreciation and he says that. Then he says at (5), 'if TGK approves the write-off and if after the additional money has been paid, but if this accounting arrangement by A/T is disallowed in an IRD inspection at the end of some later business period ..'. Now my learned friend talked about it's all going to be done in some months, that's what Mr Scheffer is recorded as having told them and Mr Kawata fully understood that the risk was some later business period and we all know as a matter of reality that's what happens because the Tax

Department only audit things every so often. 'IRD inspection at the end of some later business period and is reconstructed the additional money will naturally be an amount repayable to TGK. We must consider how that subsequent return of money should be treated in the accounts'. And then if you go across to 658(A), what he's here saying is, you will see the second line 'response to request for an increased amount of compensation as a result of depreciation claimed. In the memorandum there is no mention of the quota depreciation' and he means the memorandum of how you can't have a profit guarantee ' but a profit for A/T's Surimi operation is clearly stated as being a total after deducting all expenses and therefore there is no reason to decline a request from A/T if one is received. However in item 2 of the memorandum it says that "A/T's net profit includes charterage, etc, etc. The basis behind the minimum guaranteed amount is that at least the annual repayments should be covered by the profit. Accordingly, because depreciation is not an expense that involves expenditure, in other words not a cash item, the above is not relevant and even if we do not provide compensation for the amount of the depreciation, it will not result in a cash flow shortage'. So what he's saying is because it's a non-depreciable, sorry, it's a non-cash item that his argument would have been you don't put it into the profit guarantee calculation. Now what happened after that is best described in the Court of Appeal judgment rather than with great respect Maruha's submissions today. The Court of Appeal came to the conclusion that there were to-ings and fro-ings and in late 1988 Mr Kawata was still confused as to where the tax accounts were being filed, claimed depreciation or not and he asked the question in January 1989 and got a misleading answer and that's

Tipping J But the whole point of this underwriting was so that there should be enough cash to pay the Bank of Japan wasn't it? It was a cash exercise, not a taxation?

Galbraith I don't want to get into an argument about whether it was a profit guarantee or a cash guarantee

Tipping J No, but that seems to be pretty self-evident.

Galbraith Well if you can say that a document which is a profit guarantee and talks of profit should be read as cash, then it's self-evident, but for myself I wouldn't have thought it was, but His Honour did decide it was, he decided that and I'm not quarrelling with that but I'm not sure it was quite so self-evident, and the purpose of it was that but the document expressed something different. The point I'm just trying to make in a very belated fashion is that the issue of depreciation and write-off and difficulties and problems it might cause was seen by, was a concern to Maruha way back here in 1987. They've now recovered on the basis, not that the depreciation increased the amount of their profit guarantee, but on the basis that the depreciation and the tax saving decreased their obligation. Never anything which they contemplated at that time, but which surfaced in a double-deduction

calculation of Mr Lucas's through evidence I think given by Mr Isaac long after the Maruha fact witnesses had completed their evidence.

Blanchard J I think you've lost me with that last sentence.

Galbraith Sorry, I've lost myself a bit with that. All I'm trying to say is that what we're talking about now is what happened in 1991, that's what we're arguing about. What would have happened is, is it appropriate that there be this deduction or isn't it appropriate in 1991? Leading into the beginning of the Joint Venture, what I've just taken Your Honours to was the way that Maruha were thinking about the prospects of depreciation and its impact on the profit guarantee calculation. They've now recovered, as a result of Mr Lucas's inputs some 17 or 18 years later on a basis that wasn't contemplated at the time, but on a basis where the tax benefit of the depreciation became a credit in the profit guarantee calculation, whereas you'll see here Mr Kawata was worried about being in debit, became a credit in the profit guarantee calculation and as a consequence of adopting that calculation it is an overpayment. And I've now forgotten what

Tipping J Tax payment became a credit in the profit guarantee calculation.

Galbraith Well the

Tipping J I'm lost. I thought it exacerbated them and caused them to overpay.

Galbraith No the fact that it wasn't in was what caused them to overpay. Mr Lucas's position was it should have been in, there should have been a credit in the profit guarantee payment, in the profit guarantee calculation

Tipping J Yes but the fact that it wasn't in is what caused them to overpay?

Galbraith Yes, that's the position

Tipping J Because they were claiming to have paid more tax than they actually were paid.

Galbraith Yes.

Tipping J Is that not the position?

Galbraith Yes, yes, that's right.

Tipping J It's really simple really.

Galbraith Well it's

Tipping J They were pretending that they had paid more tax that they actually paid by dint of being allowed this depreciation amount which reduced the tax that they actually paid.

Galbraith That's correct, that's absolutely correct, but that, what I'm trying to point out was that's an interpretation of how the profit guarantee calculation should be made which arose 17 years later and certainly didn't arise at the time - way past 1991 that that ever first got thought about and the concern of Maruha at the time wasn't that they were not going to get a credit for it. There's not a skeerick of mention about the credit for it there. Their concern was that they could avoid having it being an expense adding, increasing the profit guarantee. So what with great respect is happening now is a reconstruction of, and it's a reconstruction dependent upon what some accountants and some lawyers no doubt thought about in the context of a case brought umpteen years later. It's not a reconstruction of the position as actually at that time and in 1991

Elias CJ But not those fears were realised. I'm sorry, I'm a little lost as to why you're placing emphasis on that and I still am worried about the dissonance in time between when the overpayment if made and when your client took it upon itself to make this tax payment.

Galbraith Well I'm not sure I can answer it better than I have to date Your Honour, but at the end of the day what the Court ends up doing, it doesn't give judgments in relation to things in various times over the sequence. It looks at the position as at the date that the loss is claimed and the date the loss is claimed and calculated Maruha had quota at book value. The fact that it went through hoops along the way

Tipping J The only relationship I can see between this tax payment and the fraudulent procuring of overpayments was that the one was done in order to try and conceal the other.

Galbraith Well no that's not right Sir because the quantum with great respect, the quantum of the overpayment depends upon the depreciation.

Tipping J That's the point I'm struggling with.

Galbraith Well it does, I mean I can't say much more than that. It does because that's how the calculation is done.

Tipping J In cash terms it doesn't. The only way you can offset the cash position surely is to show that your client gave Mr Miles' client a taxation advantage that it can't deny and can properly be valued at $1.2 million.

Galbraith No but the claim is with great respect not for a taxation advantage, the claim isn't, they've recovered and it's nothing to do directly with the taxation advantage

Tipping J But they're claiming, the loss they're claiming is a cash loss. They paid out hard cash, more than they had to/

Galbraith Yes but you've got to have a method of calculating the dollar number of the cash

Elias CJ Of the loss they suffered.

Galbraith Well yes, sorry, the loss they suffered and the calculation of the loss they suffered depends upon the fact that there was a tax saving then incorporated, subsequently incorporated into the profit guaranteed calculation. That's what it depends upon and you'll see it if you go to volume 9

Elias CJ Did you originally, I'm just trying to look at the pleas, did you originally plead this as a counter-claim, this tax payment?

Galbraith I don't think so. I wasn't involved in the High Court so I'm sorry I'm a bit rusty on that.

Tipping J The real question is, is it so integral to the calculation of the loss that it must be brought to account?

Galbraith Well if you just look at volume 9, behind tab 5. These were two profit guarantee re-calculations put to Mr Holyoake I think.

Elias CJ Sorry, put to who?

Galbraith Mr Holyoake I think to comment on.

Tipping J This is volume 9

Galbraith Sorry, volume 9, tab 5.

Tipping J Thank you.

Galbraith So this isn't a profit guarantee calculation as was paid on, this is what it is said should have been paid on. And so you'll see revenue less expenditure equals gross profit and as I've told Your Honours umpteen times, the expenditure isn't all the expenditure of the Joint Venture. Now you will see then in the box there's another calculation done to determine tax charge of standard company rates, so Mr Lucas or Isaac, whoever did it, takes the gross profit, deducts the amortisation - $2.9 million equals a taxable profit of minus -$790,000.00 – so the tax rate on that is, doesn't matter what the tax rate is, the answer's zero. So he then takes the gross profit, deducts the tax charge of zero and ends up with the gross profit and again converts it to yen, because this is all meant to be in yen. The minimum profit guarantee was $220,000 yen, so if you take 181 million-odd yen off the 220 million-odd yen you've got 38 million-odd yen and you convert that back to New Zealand dollars. The reason that there's nil tax payable on the profit guarantee payment, because otherwise there's be tax payable on the profit guarantee payment, is because there's available tax losses being carried

forward, so otherwise you'd be paying tax on the $457,668. And down below there's another calculation where in fact there was a taxable profit instead of a loss. You'll see in the box, a taxable profit of $1.2-odd million and so there's a tax payable in the same calculation consequence of that. So with great respect, and those numbers, there's then a complicated calculation with Mr Lucas has as an appendix to his evidence which is reproduced very badly so it's hard to read at volume 4, page 703 I got it as. But he goes through then and does effectively an exercise of comparing with what they actually paid under the profit guarantee calculations was what he says they should have paid and I'm simplifying the whole exercise but the answer is whatever the number was. So with respect it's clear that the profit guarantee calculation which is being used for the purpose of quantifying the damages does take into account amortisation; does take into account the tax on that, and that's why I say that you can't have it on the one hand and not on the other. It depends upon the fact that the quota has been fully amortised, whereas in fact the quota, which Maruha have received, is not amortised, it's book value and so, oh I'm repeating myself.

Tipping J Is the value the capacity to amortise in the future from a book value down to nil.

Galbraith No you can't amortise this quota.

Tipping J No, well what is so good about having book value quota if you can't amortise?

Galbraith Because if you've got it at, well it's the other way around. If they'd got it at zero, at amortised written down value and they then would have had to pay tax on the compensation payments and if they ever realise it they'd have to pay tax on, they'd have to write back to depreciation and they'd have to carry it in their books at nought.

Tipping J So it's the value of not having to account for depreciation recovered?

Galbraith Well I must admit I see it at the other end of the scale. I see it that they haven't suffered a loss because they can't point in relation to this quota to it being amortised, so they couldn't have a profit guarantee calculation of the full amount under here and the quota at book value at the same time. This calculation depends upon it being amortised and they've got it unamortised. Rightly or wrongly, pink or indifferent, that's what has happened and I with great respect believe the Court should be going down all the loops by which that position ended up. That is how it has ended up.

Elias CJ So it's not a sufficient question to ask whether the tax payment was a necessary reduction of the overpayment?

Galbraith In my submission, no, but it's another way of looking at it, but in my submission, no. And to the extent that this is all being influenced by

this proposition that somehow or other Maruha, if they had got it amortised, which they didn't, they could then have avoided any future tax liability and my respectful submission is the evidence simply doesn't get you started on that and the other aspect which with respect I think needs to be recognised is that at the time the dissolution took place, in respect to which I said there are no allegations at all and no findings about concealment or anything like that. At the time this took place all the experts agree that this jolly quota still couldn't be amortised and the dollars to donuts if the tax department had done their job they would have had to pay this money over to the tax department.

McGrath J So is that just an irrelevancy?

Galbraith Well no it's not an irrelevancy Your Honour if one's taking seriously this proposition that they were then going to go into some elaborate structuring to try and avoid the consequences of in due course selling and having to pay tax, because if they'd gone to their expert tax accountant at that date, the tax accountant would have said what a waste of time because the tax department's going to disallow this in any even so you aren't going to have written quota because you can't do it. I mean the only basis that couldn't happen on, according to the expert evidence, was that the tax department drop the ball and in 1994 the tax department dropped the ball.

Anderson J Well obviously Amaltal was counting on it having slippery fingers otherwise why would it have gone through the process?

Galbraith I know but I mean Amaltal may have been hoping or praying or whatever else they were doing on that

Anderson J Taking a punt

Galbraith But all I'm saying is that this idea that you got off to your expert advisers and they would set up some expensive and elaborate structure when their short answer to you would have been look it isn't going to work.

Anderson J That what makes it more difficult to understand why Amaltal was so coy about it. They should have said look we're going to try it on but we've got to cover ourselves against the likelihood that we'll have to pay it up. We'll give you two sets of accounts; we'll keep you posted; we'll work out some sort of stakeholder or guarantee save one or other?? a risk and get what we want off the other and let's see how it pans out. That would have been the honest way of doing it.

Galbraith Well I obviously accept that Your Honour. I could speculate that the reason has got little to do with the amortisation that was attempted and more to do with the fact of the advances made from ATFC to Amaltal.

Anderson J Free money for however long it went?

Galbraith Yes, and that was the issue which had caused the furore at the beginning of 1988 and admittedly I'm speculating so please don't take that as gospel, but

Blanchard J When was the tax audit done?

Galbraith The tax audit was started in 1992 I think and finished in 1994. The IRD did note the amortisation of the quota and extraordinarily what they did was they disallowed it as being claimed in a year prior to when they said it should have been claimed, so moved it all back a year but didn't disallow it which is what they should have done, and in our written submissions you will see we've set out a circular from the tax department I think in 1991 wasn't it, a circular from the tax department in 1991 which made it abundantly clear that this quote could not be amortised. I mean apart from hope, and I don't suppose faith or charity, but just pure hope, when this all happened in 1991 a dissolution, there was no objectively sound basis for believing that this amortisation was going to succeed. I fear I delayed Your Honours too long, I'm sorry. Just really on that point about distance and timing if I may, when one comes to assess the loss, as I said it's not about stopping the clock at some particular date, and certainly not the date of breach, one has to look at the position the date the loss is claimed and we can't, I mean at the date the loss is being assessed, we can't reinstate the position of the quota being depreciated 25% and Maruha having paid back the tax it saved on the compensation payments etc. The Court has with great respect deal with the position as it in fact turned out for right or for wrong. Unless Your Honours have any questions?

Elias CJ No thank you Mr Galbraith. Yes Mr Miles.

Miles Could I start Your Honour at the end as it were rather than at the beginning because my friend spent the last hour or so dealing with this of the contingent benefit and how it can be avoided from his point of view, and at the heart of his submission was this suggestion that it was unnecessary correlation between the $6.1 million that we were able to get and then the inevitability that the quota when transferred to us would have to be transferred on the basis that the depreciation had been paid back. Now can I go back to the Surimi Agreement itself, which defined the basis on which the calculation had to be made, and the key phrase at para.2 I think it is of the agreement is that you have to deduct all expenses paid or payable and expenses included tax. Consequently one of the key points that had to be determined in the High Court was what that agreement meant, because by the time we got to trial it was patently clear that that went to the heart of our claim for compensation. It was argued at the trial that expenses paid or payable, including income tax didn't mean tax actually paid, it just meant tax that was notionally payable apart from amortisation. Tax at standard rates I think was the phrase and that meant the full amount of tax regardless of

what was actually paid. If I had trouble explaining that viewpoint in a more attractive way it's because it was hard to do so and for obvious reasons the trial Judge held against Amaltal on that point. It said that what should have been done from day 1 in the calculations is actual tax used because it was basically a cash flow exercise. As Justice Tipping pointed out it was sort of cash in the box at the end of the day because they had to be sure each year there was 220 million yen available to repay the bank. Depreciation of course has nothing to do with cash flow, so depreciation was never going to be deducted because it wasn't an expense paid or payable – tax however was. So the net result of that is that if the calculation had been done in terms of the Surimi Agreement, the actual tax would have been used; the profit would have been that much higher and $5.6 million in overpayments would never have been made. Now my friend said to you a few minutes ago, he said all this argument about the reconstruction of the profit guarantee is reconstruction by accountants and lawyers. With respect that is simply wrong. The reason why it wasn't picked up at the time goes directly back to the basic fraud. Maruha always believed that the tax figure in the guarantee was the tax paid or payable, hence they accepted the calculation on its face value. Of course they checked the methodology; they did the arithmetic. They went into my friend's eastlite folder, the one he told you which was full of invoices and payments and whatever, and of course they did cheque the expenses but that eastlite folder not contain the parallel set of tax accounts. There was nothing about tax paid or payable in that metaphorical or actual eastlite. So they checked the calculations for the profit guarantee. They checked the income, they checked the expenses, they checked the current tax rate, 48% in one year, 33% in another, but accepted as they always did because of the constant reassurances and the representations to the contrary, that tax paid or payable was the full amount. So whether the Surimi Agreement is a separate agreement to the Joint Venture or not is completely irrelevant. The fraud was carried through to go to the heart of the Surimi Agreement calculations, and that moves on to precisely why it is that our $6.1 million is an unarguable proposition and the only issue then is whether there was some incontrovertible benefit achieved as an overall result or some other expense that would necessarily have followed on the part of Maruha which would justify those actual losses of $6.1 million being reduced by $1.2 million. And the answer comes back to the proposition that I discussed with Your Honours this morning, that the onus goes on the defaulting fiduciary to produce evidence that that benefit, the contingent benefit, of having the depreciation paid back is something which Maruha would inevitably have required and which would inevitably give it a benefit valued at $1.2 million, and the evidence before Your Honours is that that was not the case. They were never in a position to consider that proposition. Had they done so as Mr Takuma said and Mr Lucas the expert accounting witness confirming that, they would have looked at alternative structures and it could be achieved. And as one of Your Honours pointed out at some stage during the discussion, why wouldn't they, because what is the commercial point of paying tax earlier than

you ever need to do so. Not just earlier but in the 16 or 17 years that have taken place since then neither Amaltal hasn't felt the need to pay it because it hasn't sold the quota and Maruha hasn't sold the quota – this so-called benefit has yet to turn into something that is valuable.

Tipping J The quota was simply divided in specie was it subject to that compensation?

Miles Quite so.

Tipping J Yes.

Miles The compensation argument, if it were available to my friend, I would accept is in a different category. That was money that was received from the Crown as a result of the taking of the quota and in those circumstances one would expect depreciation to be paid.

Tipping J Pro tanto.

Miles Exactly.

Anderson J Why is it not available?

Miles Well I think it probably is available. Logically on the arguments I've put forward the tax

Anderson J It's an actual cash benefit isn't it?

Miles Absolutely.

Anderson J Which you've had.

Blanchard J What was the tax rate?

Miles I can even give Your Honours I think a figure as a matter of fact.

Anderson J The ace up the sleeve Mr Miles.

Miles Now my friends may disagree with this figure. We think it's about $243.000.

Blanchard J At what tax rate?

Miles It's not strictly the tax rate Your Honour, they took 20% of the quota, so we'd say the appropriate figure is 20% of the tax liability which is the $880-odd isn't is? Of course the total is $1.2 and that was the compensation for the full quota. If 20% was taken it comes to $243,000. Mr Kennedy could explain it to you more clearly if you wish.

Blanchard J I wonder whether since this point appears to be conceded whether counsel should get their heads together and give us an agreed figure.

Miles I was going to suggest that Your Honour. The tax rate at the time was 30%, or 33% I believe.

Blanchard J Yes so the 33% showed up for 1991 in one of those things that Mr Galbraith was showing us.

Miles But my junior who's much more reliable than me on this says it's not just strictly 33% of $1.2, a more appropriate one is 20%.

Blanchard J Well I don't pretend to follow why that is

Miles No I don't either Sir. Can I suggest

Blanchard J I simply hope and pray that counsel are able to agree.

Miles What I would suggest and what I was going to suggest if Your Honours force me into this serious concession that the respective firms get together and agree on a figure. It must be somewhere around about $230/ $240/ $250,000, so that's the sort of figure we're talking about. But it's an interesting

Tipping J That is an incontrovertible benefit.

Miles Precisely Your Honour, because the Crown took it and

Tipping J It was a forced sale and there's no way out of that. There was no clever corporate reconstruction that could avoid it and Amaltal paid it themselves as well, and if Amaltal was forced to pay it one would be reasonably confident there was no other possible way out. And hence one comes back squarely into the incontrovertible benefit argument.

Tipping J So the contest between the parties as to whether it should be this approximate figure or the whole $1.2 is what it really amounts to?

Miles I can be taken to that position, yes. There's nothing in the 'Lucas isn't an expert argument' Your Honours that I'm not sure you'd want me to discuss in detail. Lucas, when being questioned by the trial Judge dealing actually with issues of depreciation and tax depreciation and whatever, and he said 'well I'm not a tax expert'. But that had nothing to do with the views he expressed on whether some corporate structure of the sort he was putting forward was one that could realistically be produced. He gave that evidence as somebody who had looked at the tax position. He was a very experienced accountant in corporate matters and he gave that evidence on that basis. But as it readily apparent from all the discussion we've had the onus is not on me to produce that evidence, the onus is squarely on Amaltal to produce evidence that such an expense was an inevitable correlation from the

Tipping J Does this sentence encapsulate your position on the balance of the argument that this was a premature payment of what was at best a contingent liability?

Miles Yes, indeed, indeed Sir.

Anderson J Choate liability really is it?

Tipping J Well I don't know whether you can defer these things

Miles Well you can defer never, you can defer it forever.

Tipping J Well choate might be better then as my brother

Miles Yes, because it literally can be deferred, there is just no finite necessary, finite ends.

Tipping J Well it's contingent on disposition but as long as it's understood in that sense it's probably more convention to

Miles Hence we say it's not a benefit of the sort that the law has recognised as being one that

Tipping J What do you say about Mr Galbraith's argument to the extent I followed it that if you're going to get your primary loss calculated in this way, you've got to recognise the whole 1.2. I'm putting it in a fairly compressed way, but

Miles It didn't follow at all. Amaltal had a choice. When the time came to actually transfer the quota in 1992 or 1993, whenever they finally got around to it, they could have transferred it on the basis they could have said by the way depreciation's been paid on this and you've got your quota at nil value. There's absolutely no reason why they shouldn't have said that. It would have blown the fraud but there had been no decision made legal, corporate or otherwise that required any other result other than it would have just blown the fraud. Or the choice they made to cover the fraud was well the only way we can do that is to make a separate decision altogether and we'll pay the tax on their behalf and we still clean out $4.9 million or whatever the difference between $6.1 and $1.2. They're not apples with apples. You're not comparing apples with apples at all. One is actual cash, another is a potential tax that may or may not be payable sometime in the future. And as His Honour Justice Anderson put it, well what should have been the position in September 1991 when the dissolution of the agreement took place, $5.6 million should have been, $6.1 million should have been paid back and they should have got the quota depreciated in exactly the same as Amaltal got theirs, and the net result would have been that Maruha would be $6.1 better off, rather than the $4.9, and they just carry the contingent risk or possibility that some day

they might have to pay some tax, at a much reduced rate because $1.2 million now bears little relation to $1.2 million 15 years ago. But it may never occur. So there is no necessary connection at all. I'm not sure that Your Honours wish to hear me on the first issue of whether or not there's a fiduciary relationship. The only points if you did that I would ask Your Honours to look at is perhaps the discussion at the paragraph in Justice Priestley's judgment at para.17 where he neatly recorded this issue of what in fact was the position of the two companies in respect of the tax arrangements which said 'throughout this five year period Amaltal Taiyo's financial statements, taxation accounts, were the responsibility of Amaltal. Amaltal also assumed the responsibility for filing Amaltal Taiyo's taxations returns and making its tax payments. Amaltal performed this taxation function by furnishing Amaltal Taiyo's returns as part of the Amaltal group of companies. Nothing Specific in the Joint Venture agreement between Maruha and Amaltal which imposed these accounting and taxation responsibilities on Amaltal. Nevertheless with Maruha's consent, that was the role Amaltal performed. That role was pleaded by Maruha. At trial Amaltal didn't contest it'. Well that's in the nutshell it seems to me Your Honours. The relevant paragraphs in the pleadings, well if you needed to go that far, and I've jotted them down, and the statement of claim is para.15, and you'll find it at volume 1, page 5, in the statement of defence where virtually all of those issues are admitted. You will find it at para.13, at page 44, and His Honour continued the discussion at paras.271 to 300, but that paragraph quite neatly sums up the functional argument which Your Honours have raised as well as the extent of the agreement between the parties.

Tipping J Where you say it's an agreement or with someone's consent doesn't really matter very much in this context I would have thought.

Miles Not in the slightest. And my friend's response to that, which is both pages and pages in his written submissions – he spent some time on his feet talking about it – is that of course Maruha was entitled under the Joint Venture Agreement to check, re-check, ask for all the vouchers and whatever, and he talked about the eastlite folder full of these documents which he said were there for Mr Kawata to look at hence no reliance and no vulnerability and Your Honours have already had my response to that. That's fine except that the eastlite contained nothing about tax. It misses the whole point of this arrangement that was at the heart of the fraud.

Blanchard J What do you say about the argument that Mr Holyoake was performing his duties for ATFC?

Miles I think that paragraph that I just read Your Honours is the factual response to that. He wasn't. The part that counted which gave rise to the fiduciary obligations was the side arrangement reached between the parties that Amaltal would take over the tax functions, and at that time, at that stage on that issue Maruha was utterly reliant on Mr Holloake

and Mr Talley's honesty in informing them as to what the tax position was. And the trial Judge has found as a fact at 17 and at 271 through to 300 that that was essentially the arrangement reached between the parties.

Tipping J Well there cannot then, because the Judge's judgment is a very careful detailed analytical one, there can't then have been a suggestion I would have thought that Mr Holyoake was acting with his Joint Venture hat on if you like.

Miles Not at all. Not in the slightest Sir, and as I pointed out earlier on when I was on my feet, I got increasingly restive during the Court of Appeal as findings of fact and findings of credibility in this extensive and careful judgment of Justice Priestly was challenged in the Court of Appeal, to an extent that I thought was inappropriate, but after the two and a half days or whatever that my friend took to launch this attack, the result was as Their Honours said in the Court of Appeal, we had a clear view as we left the Courtroom and after a searching review of the facts upheld all of the factual findings of the trial Judge. So I was unhappy during that particular period at what took place, I'm entitled now to actually get the benefit I suppose of that searching exercise in whether or not those

Tipping J Your unhappiness is assuaged, if not overtaken.

Miles Absolutely. I'm now very comfortable, however, it was a sustained attacked and it went through document after document and so on. Well that is all I propose to say subject to any other concerns that Your Honours might have.

Elias CJ No thank you Mr Miles. Thank you counsel for your assistance. We'll take time to consider our decision.

4.00pm Court adjourned