IN THE SUPREME COURT OF NEW ZEALAND

SC 46/2006
[2007] NZSC 40

BETWEEN	MARUHA CORPORATION AND MARUHA (NZ) LIMITED Appellants
AND	AMALTAL CORPORATION LIMITED Respondent

Hearing: 20 February 2007

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: J G Miles QC, Z G Kennedy and O J Meech for Appellants
A R Galbraith QC, B R Latimour and R J Hollyman for Respondent

Judgment: 1 June 2007

JUDGMENT OF THE COURT

A The appeal is allowed. The respondent is found to have breached a fiduciary duty owed to the appellants.

B The judgment sum is increased to $5,832,214.92.

C The respondent is to pay the appellants' costs in this Court in the amount of $15,000 plus reasonable disbursements to be fixed if necessary by the Registrar.

D The award of costs to the appellants in the Court of Appeal is increased to $40,000.

REASONS

(Given by Blanchard J)

Introduction

[1] Maruha Corporation is a large Japanese fishing company. Its assets in New Zealand are held through its New Zealand subsidiary, Maruha (NZ) Limited. These two companies are the appellants in this Court. It is unnecessary to distinguish between them and we will simply refer to them as Maruha. Amaltal Corporation Limited is a New Zealand fishing company, at the time owned by two New Zealand entities, Amalgamated Marketing Limited and Talley's Fisheries Limited.

[2] Amaltal undertook the accounting and tax return functions of a company in which it and Maruha were the only shareholders. It inflated the level of certain payments Maruha was required to make to the company over a five-year period from 1986 to 1991. Judgment was entered against Amaltal in the High Court for $6,120,446, being the amount of Maruha's overpayments.[1] The primary question on this appeal is whether Amaltal was also guilty of breach of a fiduciary duty owed to Maruha. The High Court found that there was both deceit and breach of fiduciary duty. The Court of Appeal upheld the finding of deceit, which is not the subject of further appeal, but overturned the finding of breach of fiduciary duty.[2] Maruha wishes to argue at a forthcoming hearing in the Court of Appeal that the rate of interest payable on the judgment sum from the time of the overpayments to the date of the High Court judgment should be greater because there was a fiduciary breach. It seeks to have the High Court's finding restored.

[3] The overpayments related to the calculation of tax payable by the company jointly owned by Amaltal and Maruha. In particular, Maruha was led to believe that

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1 *Maruha Corporation v Amaltal Corporation* (High Court, Auckland, CIV 2003-404-001773, 19 October 2004, Priestley J).

2 *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608.

certain depreciation was not able to be claimed, whereas in fact the Inland Revenue Department allowed it. That should have reduced the amount of Maruha's payments but, in ignorance of the true position, it paid at a higher level. Amaltal removed the amounts from the company and kept them. When the operations of the company were terminated in 1991 and its assets transferred to its shareholders, Amaltal elected to pay the Department tax on depreciation recovered, again without revealing to Maruha that it had done so. The Court of Appeal considered that, to that extent, Amaltal conferred a benefit on Maruha which should be offset against the overpayments. It reduced the judgment sum by $1.2 million to $4,920,446. The second question for this Court is whether there was really any such benefit to Maruha justifying that reduction. Maruha says that, if it had known the truth, it could have organised its affairs so as to receive the assets without having to pay tax on the depreciation recovered.

Facts

[4] Because all factual determinations have been settled by the judgments below, no more than a brief summary is required. In 1985 Maruha and Amaltal together incorporated a company called Amaltal Taiyo Fishery Co Limited (ATL)[3] in which Maruha held fractionally less than 25% of the shares (thereby complying with restrictions on foreign ownership under the Fisheries Act 1983) and Amaltal held the rest.

[5] An agreement between the shareholders, called a "joint venture agreement", provided for the new company to conduct fisheries operations in New Zealand waters, charter and operate deep-sea trawlers, and sell or export the catch of the fishing operations. ATL was administered by a board comprising four directors, two nominated by each shareholder. Two of the directors (one from each side) were joint managing directors. The agreement between the shareholders also provided that ATL should keep books of account and other records required by the laws of New Zealand and conforming to internationally accepted sound accounting practices. Each shareholder had the right to inspect, at its own expense, such books and

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[3] At that time Maruha was using the name Taiyo.

records. The agreement further provided that the profits of ATL should be calculated in accordance with normal New Zealand accounting practices and would be distributed annually, or at shorter intervals by agreement of the parties. Amaltal provided office accommodation for ATL at its own expense.

[6] Each of the shareholders transferred to ATL fishing quota previously held separately. In November 1986 ATL tendered successfully to the Ministry of Agriculture and Fisheries for further quota for hoki. The cost, net of GST, was about $14.76 million. ATL funded it by borrowing in Japanese yen from the Industrial Bank of Japan. The loan was repayable over a five-year period and was guaranteed by both shareholders.

[7] The parties were concerned about ATL's ability to meet the loan repayments and interest. That would depend upon the fortunes of ATL's fishing operations. An agreement, called the Surimi Venture agreement, was signed on 10 June 1987 between ATL and Maruha. It provided for Maruha to make available each fishing season for five years, backdated to 1 October 1986, sufficient suitable trawlers and equipment to catch and process hoki and southern blue whiting into surimi. ATL and Maruha supplemented the Surimi Venture agreement with a memorandum as follows:

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

> 4. Termination of the Surimi Venture by reason of default on the part of either party shall not excuse Taiyo from its obligations under this Memorandum.

[8] The minimum profit figure of 220 million yen roughly equalled ATL's annual payments on the loan. The trial Judge, Priestley J, found that the only purpose of the arrangement recorded in the memorandum was to ensure that the loan obligation to the bank was met. Certainly, he said, it was not designed or intended as a mechanism whereby money could be extracted from Maruha for other purposes. There was no intention that Amaltal should personally benefit from it.[4]

[9] The calculations showing the payments Maruha was obliged to make to ATL under the profit guarantee were done by Mr Clive Holyoake, an accountant employed by Amaltal whose services were made available to ATL. He prepared ATL's accounts and its tax returns, the latter being grouped in Amaltal's returns. It is unnecessary to set out the detail of the calculations as the figures are not in dispute. ATL sent Maruha debit notes for the amounts claimed by Mr Holyoake and these were paid.

[10] In the tax returns which Mr Holyoake filed for ATL with the Inland Revenue Department, however, deductions were claimed for depreciation on ATL's fishing quota. The Department assessed the tax payable by ATL on that amortised basis so that ATL's tax bills were considerably lower than they would have been if depreciation had not been claimed. The Department accepted the returns and they were never reopened.

[11] Maruha had been made aware in 1987 of ATL's intention to claim depreciation but, on advice, both parties expected that the claim for depreciation would be disallowed by the Department. Accordingly, the financial accounts of ATL, on which Maruha's profit guarantee was calculated, were prepared on the basis that the quota was not being amortised. The taxation expense shown in the financial accounts was therefore higher than the actual payments of tax. The Amaltal personnel who were responsible for the accounting/tax functions never told Maruha that the deductions for depreciation had actually been accepted by the Department.

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4 At para [99].

The overpayments were transferred by ATL to Amaltal. When Maruha noticed that this had been done, Amaltal told them that these were temporary loans, on which it paid ATL interest, pending the payment of the tax as part of the Amaltal group's tax obligations. Maruha accepted that false explanation.

[12] At no stage were the tax returns shown to Maruha's representatives. Mr Kawata of Maruha, who was an accountant, spent time at Amaltal's premises each year checking the calculations in ATL's financial statements. On the only occasion when he made a request to see the tax returns, or a copy of the calculations contained in them, and specifically asked about the possibility of depreciation having been claimed, he was fobbed off with reference to a note in the financial accounts which showed the higher level of taxation.

[13] In 1991 the parties decided to cease their joint operations through ATL and agreed that each should take their proportions of the fishing quota held in that company. By that time, unbeknown to Maruha, the quota had for tax purposes, but not in the books of ATL, been written down to zero. Maruha requested that its share be transferred at cost, plainly doing so in ignorance of the taxation problem this would create. The Department would seek to tax the depreciation recovered by ATL. That would make it likely that Maruha would discover that it had been overpaying ATL and Amaltal would have to give up the moneys which it had, in fraud of Maruha, been retaining. Amaltal elected not to disclose what had occurred. Indeed the Judge found that in response to a question from Coopers and Lybrand, which acted for Maruha, asking whether there had been any depreciation for tax purposes, Mr Holyoake advised that there had been none.[5] Amaltal's solution to the dilemma in which it found itself was to concur in the transfer of Maruha's share of the quota to a nominee of Maruha at cost and then, secretly, to pay the resulting tax itself. It is this payment which is said to have conferred a benefit on Maruha.

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[5] High Court judgment at para [189].

Fiduciary duty

[14] There can be no doubt on these facts that if any fiduciary duty of loyalty was owed by Amaltal to Maruha it was breached. The only question is therefore whether any such duty did exist in the particular circumstances.

[15] In his careful judgment, Priestley J referred to an allegation by Maruha in its statement of claim that Amaltal had agreed that it would keep the accounts of ATL, conduct its dealings with the Inland Revenue Department and pay on ATL's behalf such tax as was assessed to be payable.[6] The Judge said that the statement of defence from Amaltal had effectively admitted those allegations. The admission was that because ATL was a subsidiary of Amaltal it was required by New Zealand law to maintain books of account for ATL and to file tax returns which included ATL's assessable income and was required to pay the tax as assessed. The allegations were otherwise denied. Priestley J said that the standard "out of an abundance of caution" denial did not, on the evidence, detract from the thrust of the pleading that Maruha and Amaltal, in the context of their joint venture agreement, had agreed that Amaltal would assume responsibility for ATL's tax affairs. The Judge said that the evidence clearly established that was the agreement.[7]

[16] The Judge considered that the 1985 agreement under which Maruha and Amaltal incorporated ATL did not in itself create fiduciary obligations on the parties. But he said that the agreement needed to be examined closely "to scrutinise whether there were obligations of mutual loyalty".[8] He said that what he called the various articles of the agreement indicated an intention to repose mutual trust and confidence in each other for the purposes of the joint venture.[9] Amaltal was authorised by Maruha to act on behalf of both parties in the area of acquiring quotas and keeping accounting records for ATL. There had been agreement on Amaltal's responsibility

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6 At para [276].
7 At para [277].
8 At para [298].
9 At para [299].

for ATL's taxation and accounting matters and an assumption by Amaltal of the responsibility of preparing the surimi accounts and calculating Maruha's obligation under the profit guarantee. He found that Maruha could reasonably have expected that Amaltal would act in Maruha's best interests in those areas.[10] The Judge was satisfied that "in the context of the commercial relationship as a joint venturer, the specific responsibilities undertaken by Amaltal, relating to both [ATL's] taxation affairs and to the profit guarantee calculations, imposed a fiduciary obligation".[11] He observed that Amaltal could legitimately claim familiarity with the taxation affairs of fishing companies and New Zealand taxation matters (which was the specific area of Mr Holyoake's responsibility), whereas Maruha was a foreign entity and Maruha's representatives in New Zealand did not have English as their first language:[12]

> It is no answer to the obligations which Amaltal assumed on Maruha's behalf to say that Maruha could, if it had so chosen, engaged [sic] independent or outside advice. On the facts it reposed trust and confidence in Amaltal and was reliant on Amaltal's conduct.

The Judge was satisfied that Amaltal had breached its fiduciary obligations to Maruha.

[17] Priestley J also found that Maruha's claim succeeded in deceit.[13] The Court of Appeal dealt with that claim first and upheld Priestley J's judgment on that ground. Only then did it proceed, very briefly, to consider whether there had been a breach of fiduciary duty.[14] Hammond J said in his judgment for the Court that it was sufficient to say that, although in some circumstances it might be possible for there to be fiduciary duties between joint venturers, this was not such a case. The Court stated its conclusion in the following way:

> [140] This is a case where the parties were patently in an arm's length commercial transaction. There were none of the distinguishing features of a fiduciary relationship. Each party had significant commercial clout and their own independent advisors; and perhaps most importantly of all, the very purpose of Mr Kawata being in New Zealand as Deputy-General Manager was precisely to look to the state of accounts between Maruha and Amaltal.

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10 At para [301].
11 At para [304].
12 At para [306].
13 At paras [317] – [326].
14 At paras [137] – [141].

> There were joint managing directors, so each was actively involved in the administration of the Surimi JV - to the extent that both parties had to sign every cheque. Maruha was not in any way dependent upon Amaltal.
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> [141] It appeared to be suggested that even if, overall, there was not a fiduciary duty, there was nevertheless one in relation to the tax and accounting functions which Amaltal undertook on behalf of the Surimi JV, and in respect of which Maruha was reliant on Amaltal. We reject that proposition; Mr Kawata was in New Zealand precisely to monitor and safeguard these accounting and tax functions.

[18] Counsel for Maruha, Mr Miles QC, advanced the appeal on two bases. He argued, first, that the whole relationship between Maruha and Amaltal was fiduciary. This seems to have been the major plank of the argument on this cause of action in the courts below. Then, experiencing some resistance to his first proposition from the Bench, he submitted that Amaltal owed Maruha an obligation of loyalty at least in relation to the accounting and tax functions for which Amaltal's personnel were responsible.

[19] The broader view of the relationship as fiduciary was said to be tenable because the joint company had been incorporated to replace a partnership which had formerly existed between Maruha and Amaltal and some of the partnership agreement terms had been carried over into the company's structure and the shareholders' agreement. We do not accept this argument. These were commercial companies who had elected not to continue as partners and, instead, to frame their relationship by internal and external rules applicable to a company, supplemented by a contract between them in their capacity as shareholders. There is no warrant then for imposing upon them generally obligations not found in the company's own constitution, in companies legislation or in the terms of the contract. As partners they would have owed fiduciary duties to one another, but their relationship no longer took that unincorporated form. They had deliberately substituted the Companies Act regime for that of the Partnership Act. Mr Miles helpfully provided the Court with a table which compared the provisions of the partnership agreement and the shareholders' "joint venture agreement" but it merely demonstrated the great differences between the two structures, which perusal of the documentation itself confirms.

[20] The characterisation of a commercial arrangement as a joint venture can be unhelpful as a guide to whether the parties owe each other fiduciary obligations.[15] In our view, when commercial parties elect to use an incorporated vehicle for a venture that can only loosely be called a joint venture, it is unlikely that their relationship as a whole will be fiduciary in nature. To that extent we agree with the Court of Appeal.

[21] We respectfully differ from that Court, however, when it comes to the accounting and tax functions of the relationship. It is well-settled that, even in a commercial relationship of a generally non-fiduciary kind, there may be aspects which engage fiduciary obligations of loyalty.[16] That is because in the nature of that particular aspect of the relationship one party is entitled to rely upon the other, not just for adherence to contractual arrangements between them, but also for loyal performance of some function which the latter has either agreed to perform for the other or for both or has, perhaps less formally, even by conduct, assumed.

[22] In this case it is plain that Amaltal and Maruha came to an understanding that Amaltal would provide ATL with personnel and facilities for undertaking its accounting and tax returns, including dealings with the Inland Revenue Department. Amaltal seconded its employee and agent Mr Holyoake to ATL for this purpose. In one sense, of course, Mr Holyoake was carrying out his tasks for ATL. But in the context of the arrangements between Amaltal and Maruha he was also engaged on behalf of both of them. In short, Mr Holyoake was the agent of Amaltal which was in turn, in relation to the accounting functions, the agent of Maruha. The way in which the parties allocated responsibility for these functions created a situation of principal and agent, an inherently fiduciary relationship, in that aspect of their arrangements. Maruha as principal was entitled to expect that Mr Holyoake would behave even-handedly and impartially as between the two shareholder companies;

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15 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26 at para [31].

16 *New Zealand Netherlands Society "Oranje" Inc v Kuys and The Windmill Post Ltd* [1973] 2 NZLR 163 at p 166 (PC). "[The plaintiff]'s capacity to make decisions and take action in some matters by reference to its own interests is inconsistent with the existence of a general fiduciary relationship. However, it does not exclude the existence of a more limited fiduciary relationship for it is well settled that a person may be a fiduciary in some activities but not in others": *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at p 98 (HCA) per Mason J.

that he would be loyal to both. Instead, encouraged by Amaltal, Mr Holyoake was disloyal to Maruha. He misrepresented the position regarding the requirements under the profit guarantee, procured overpayments and was complicit in their transfer to his employer, Amaltal. When Maruha's representative attempted to check his work he deflected the inquiry about taxation, thereby preserving the advantage which Amaltal was unlawfully enjoying.

[23] It is true that Maruha employed its own watchdog, Mr Kawata, who attempted from time to time to do what was in effect an audit of the position. But, contrary to the view of the Court of Appeal, the fact that Maruha elected to have Mr Kawata check Mr Holyoake's work does not indicate any lack of an entitlement to rely upon his faithful performance, any more than the carrying out of a routine audit of the affairs of a company would be an indication of lack of its expectation of faithful performance by its employees. And, although Mr Kawata should probably have gone further and insisted on inspecting the tax returns, it is no excuse for someone guilty of fraud to say that the victim should have been more careful and should not have been deceived.[17]

[24] We conclude that Amaltal owed Maruha a fiduciary obligation in connection with the arrangements made for it to undertake ATL's accounting and taxation functions. Accordingly, Amaltal was in breach of that fiduciary duty as well as being guilty of the tort of deceit. The appeal on this ground succeeds.

The tax payment in 1991

[25] This was a matter not dealt with in the High Court judgment. The Court of Appeal covered it in two paragraphs.[18] They said that ATL had paid tax on Maruha's share of the quota so that Maruha received that share at "a full and capitalised rate, instead of a written down rate". On this footing, the Court of Appeal said, there ought to be a deduction of $1.2 million. They rejected an argument from

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[17] The carelessness of the victim of fraud does not provide a defence of contributory negligence: *Standard Chartered Bank v Pakistan National Shipping Corpn* [2003] 1 AC 959. It can be no different when the claim is put forward on the basis of fiduciary duty, assuming without deciding that contributory negligence can be a factor in equitable claims.

[18] At paras [177] and [178].

Mr Miles that Maruha might, if aware of what was occurring, have been able to avoid paying the tax on the recovered depreciation. Plainly the Court considered that it was for Maruha to establish how this might have been done and there was, the Court said, no evidence of this.

[26] In this Court, Mr Miles took us to what was said by witnesses for Maruha about how the transaction might have been structured in New Zealand, noting that their evidence was actually not controverted. First, Mr Takuma of Maruha's office in New Zealand said that because the tax liability was hidden by Amaltal, Maruha had been deprived of the opportunity "to explore ownership structures which might have avoided it". He said that one such structure might have involved the use of ATL itself as the shareholdings of the parties were virtually identical to those in the company to which Maruha's quota was transferred, Ceebay Holdings Limited.[19] He was under the impression that Amaltal had transferred its own quota out of ATL in 1991, effectively leaving it a shell company which was subsequently struck off the register. Mr Lucas, a corporate finance partner of PricewaterhouseCoopers, gave evidence that one way of avoiding the tax clawback on the amortisation could have been:

> (a) Amaltal Taiyo creating a wholly owned subsidiary ("NewSub");
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> (b) "NewSub" acquiring the 25% quota from Amaltal Taiyo;
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> (c) 24.9995% ordinary shares in NewSub being transferred to Maruha or its nominee in consideration for Maruha selling its shares in Amaltal Taiyo; and
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> (d) NewSub issuing preference shares in the same manner as Ceebay did subsequently.

Neither witness was cross-examined on these statements. The only evidence from Amaltal which was at all on point was from Mr Michael Talley who suggested that the price at which the quota was transferred was set as a cost price "as Maruha required it to be at cost to avoid paying tax back in Japan". He did not explain the basis for this statement and, if it was in fact based on something said by a Maruha representative, it has to be remembered that Maruha was proceeding at the time in

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[19] That structure is described in the judgment of the Court of Appeal in earlier litigation between these parties reported as *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 at para [10].

ignorance of the tax problem in New Zealand. It is also of significance that Amaltal itself found a means of taking its share of the quota without having to pay tax on written back depreciation.

[27] For Amaltal, Mr Galbraith QC pointed out that Maruha had asked to receive its share of the quota at cost price. That, he said, suited Maruha. Counsel accepted, as he was bound to do, that if Maruha had known the true position and appreciated the tax consequences of taking the quota on that basis, it might have looked at the matter quite differently. Counsel's submission was, however, that Maruha could not have achieved its objective of taking its share of the quota without paying the tax on the written-back depreciation. It could not therefore have the benefit of its primary claim for its loss without giving credit for the tax paid on its behalf. The one followed from the other; Maruha, it was submitted, could not have it both ways.

[28] When an asset is written off for tax purposes but in reality has a value greater than zero, the owner will not face the prospect of paying tax on recovered depreciation until it disposes of the asset. In this case Maruha still retains the quota, some 16 years after the unwinding of the ATL venture, and it appears that Maruha has no present intention of selling. It can if it wishes hold the quota indefinitely. It argues that, but for Amaltal's concealment of the depreciation claims in the ATL tax returns, it would by either of the means outlined by its witnesses have avoided the writing back of the depreciation in 1991 and would not to this day, or for the foreseeable future, need to have paid the tax. Maruha says that Amaltal's payment of the tax to conceal the fraud was accordingly of no benefit to Maruha.

[29] We accept the submissions of Mr Miles that where a defaulting fiduciary seeks an offset against the compensation payable for its default, it must show that what is to be offset was an incontrovertible benefit to the person to whom the fiduciary duty was owed; and that it is for the defaulting fiduciary to establish that such a benefit has been gained. Counsel derived the first of these propositions from

the law of restitution.[20] Mr Miles cited to us from the judgment of McLachlin J for the Supreme Court of Canada in *Peel (Regional Municipality) v Canada*:[21]

> An "incontrovertible benefit" is 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.

[30] In a context like the present it would be wrong to make the party which has suffered from a fiduciary breach allow the errant fiduciary a deduction unless it is for a clear and manifest benefit conferred by the fiduciary. And when the fiduciary alleges that it has conferred such a countervailing benefit, it should be for the fiduciary to establish that this is so. The correct approach is that suggested in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*.[22] Tipping J said in his concurring judgment that where a trustee or fiduciary has committed a breach of duty which involves an element of infidelity or disloyalty engaging the fiduciary's conscience:[23]

> [O]nce 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, ie without any breach on the fiduciary's part. … 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.

[31] Amaltal has not discharged this onus. It needed to show that in 1991, in order to take its share of the quota, Maruha must have paid the tax if Amaltal had not itself done so (out of the overpayments). It called no evidence to support its assertion. Such evidence as exists is in fact to the contrary.[24] Amaltal has therefore failed to show that Maruha received an incontrovertible benefit of $1.2 million. It is not entitled to a deduction in that amount.

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20 See Goff and Jones, *The Law of Restitution* (5th ed, 1998), pp 23 – 25 and *Halsbury's Laws of England* (4th ed) Restitution, para [1316].

21 [1992] 3 SCR 762 at p 795.

22 [1999] 1 NZLR 664 (CA).

23 At p 687.

24 It would therefore have made no difference if the claim were restricted to one in deceit and if Maruha had borne the onus of proof. The inclination of the common law is to impose a wide liability on an intentional wrongdoer in order to deter such conduct by making the wrongdoer bear the risk of misfortunes directly caused by the wrongdoing: *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at pp 279 – 280 per Lord Steyn.

[32] During oral argument, however, it emerged that there was a somewhat lesser benefit which has not previously been brought to account. Counsel were agreed that there should be a deduction in respect of it. It seems that the Crown paid Maruha compensation of $800,000 for loss of part of its quota when the total allowable catch was adjusted after 1991. But Maruha could not have received this amount in relation to written-down quota. There was therefore a benefit to that extent because the quota had been written back and tax paid on it. Counsel have since the hearing advised the Court that it has been agreed between them that the benefit to Maruha was $288,231.08.

[33] Maruha's appeal on the question of the deduction is therefore allowed to the extent of $1.2 million less $288,231.08, being $911,768.92.

Result

[34] The appeal is allowed. The judgment sum is increased to $5,832,214.92. Amaltal is to pay Maruha's costs in this Court in the amount of $15,000 plus reasonable disbursements to be fixed if necessary by the Registrar. The Court of Appeal reduced the costs in that Court to $30,000 because Amaltal succeeded in relation to the deduction. It would otherwise have awarded Maruha $40,000. The award of costs in the Court of Appeal is therefore increased to $40,000.

Solicitors:
Minter Ellison Rudd Watts, Auckland for Appellants
Bell Gully, Auckland for Respondent