

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2010-404-3074
[2012] NZHC 566**

BETWEEN	GODFREY WATERHOUSE First Plaintiff
AND	ROBERT WATERHOUSE Second Plaintiff
AND	CONTRACTORS BONDING LIMITED Defendant

Hearing: 2 December 2011

Counsel: S Grant for Plaintiffs
R E Harrison QC for Defendant

Judgment: 3 August 2012

**JUDGMENT OF POTTER
on defendant's applications for summary judgment
and striking out**

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 2.30 p.m. on 3 August 2012.

Solicitors: Harmos Horton Lusk Ltd, Auckland – www.hhl.co.nz
Fortune Manning, Auckland – admin@fmnlaw.co.nz

Copy to: S Grant, Auckland – sgrant@shortlandchambers.co.nz
R E Harrison QC, Auckland – rehqc@xtra.co.nz

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Introduction

[1] The first plaintiff owned a company, Phoenix Brokers Inc (Phoenix), registered in Georgia USA which carried on business in livery insurance. In December 2000 Phoenix entered into an agreement with the defendant Contractors Bonding Ltd (CBL), a New Zealand company, for the underwriting by CBL of insurance policies in Georgia.

[2] In about 2002, as a consequence of amendments to the Georgia Insurance Code, CBL became ineligible to issue insurance policies in Georgia.

[3] The plaintiffs allege that Mr Peter Harris of CBL advised the first plaintiff, Mr Godfrey Waterhouse, that CBL was acquiring, and subsequently, that CBL had acquired, Mark Solofa Insurance (MSI) located in American Samoa, which qualified as a foreign underwriter under the Georgia Insurance Code. The plaintiffs say that in reliance on this advice they arranged for Phoenix to transfer its underwriting business to MSI. However, CBL had not acquired MSI.

[4] In 2005 the second plaintiff was arrested. The plaintiffs were charged with numerous fraud-related charges arising from the issue of insurance policies in the name of MSI, a non-existent insurer, assets were seized and the first plaintiff's licence to operate as an insurance broker was revoked. Phoenix was dissolved in January 2009.¹

[5] The plaintiffs issued these proceedings on 21 May 2010 without protest to jurisdiction by CBL. They claim against CBL in deceit, negligent misstatement and breach of fiduciary duty. They seek to recover personal losses they claim to have suffered independently of Phoenix.

¹ The evidence of the first plaintiff, Godfrey (known as Geoff) Waterhouse is that Phoenix was liquidated in 2008. A "final judgment and order" of the Superior Court of Lamar County in the State of Georgia annexed to the affidavit of Peter Alan Harris a director of CBL orders that Phoenix and Mainstreet Brokerage be dissolved as at 15 January 2009. This final judgment and order is given in a civil action brought by the State of Georgia against Phoenix and states that "... all other matters associated with this case having been resolved by way of agreement in criminal action No 07C-143, the State only seeks in final judgment the dissolution of Phoenix Brokers Inc and Mainstreet Brokerage".

[6] CBL has applied for:

- a) Summary judgment against the plaintiffs; or in the alternative
- b) Striking out of the pleaded causes of action.

[7] The plaintiffs oppose CBL's applications. They say they have good causes of action in deceit, negligent misstatement and breach of fiduciary duty against CBL, and standing under New Zealand law to sue for their personal losses. They say that any defects in the pleadings (which they deny) can be remedied by filing an amended statement of claim: *Marshall Futures Ltd v Marshall*.²

Summary judgment principles

[8] Rule 12.2(2) of the High Court Rules provides that the Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiffs' statement of claim can succeed.

[9] The applicable principles are well settled and are not in dispute:

- a) The defendant must show on the balance of probabilities that none of the plaintiffs' causes of action can succeed: *Jones v Attorney-General*.³
- b) The Court must be left without any real doubt or uncertainty: *Krukziener v Hanover Finance Ltd*.⁴
- c) The test is exacting. The Privy Council said in *Attorney-General v Jones*:⁵

... summary judgment should not be given for the defendant unless he shows on the balance of probabilities that none of the plaintiff's claims can succeed. That is an exacting test,

² *Marshall Futures Ltd (in liq) v Marshall* [1992] 1 NZLR 316.

³ *Jones v Attorney-General* [2004] 1 NZLR 433.

⁴ *Krukziener v Hanover Finance Ltd* [2008] NZCA 187; (2008) 19 PRNZ 162.

⁵ *Attorney-General v Jones* [2003] UKPC 48; [2004] 1 NZLR 433 at [10].

and rightly so since it is a serious thing to stop a plaintiff bringing his claim to trial unless it is quite clearly hopeless.

- d) The procedure is not suitable where there are bona fide questions of fact or law which can be determined only after trial: *Westpac Banking Corp v M M Kembla NZ Ltd*;⁶ *Bernard v Space (2000) Ltd*.⁷
- e) Summary judgment will be unsuitable where the plaintiff is able to amend its claim to remedy the defects relied upon by the defendant: *Westpac Corp v M M Kembla NZ Ltd*.⁸
- f) The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents: *Krukziener v Hanover Finance Ltd*.⁹
- g) The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel*.¹⁰

Strike out principles

[10] Rule 15.1(1) of the High Court Rules provides for the Court to order the whole or any part of a statement of claim to be struck out where it discloses no reasonably arguable cause of action; is likely to cause prejudice or delay; is frivolous or vexatious; or is otherwise an abuse of the process of the Court. The criteria for striking out are well established: *Attorney-General v Prince & Gardner*;¹¹ *Couch v Attorney-General*.¹² In *Couch* Elias CJ and Anderson J said:¹³

It is inappropriate to strike out a claim summarily unless the Court can be certain that it cannot succeed. The case must be “so certainly or clearly bad” that it should be precluded from going forward.

⁶ *Westpac Banking Corp v M M Kembla NZ Ltd* [2001] 2 NZLR 298 (CA).

⁷ *Bernard v Space (2000) Ltd* (2001) 15 PRNZ 338 (CA).

⁸ *Westpac Banking Corp v M M Kembla NZ Ltd*.

⁹ *Krukziener v Hanover Finance Ltd*.

¹⁰ *Bilbie Dymock Corp Ltd v Patel & Bajai* (1987) 1 PRNZ 84 (CA).

¹¹ *Attorney-General v Prince and Gardner* [1988] 1 NZLR 262.

¹² *Couch v Attorney-General* [2008] NZSC 45; [2008] 3 NZLR 725.

¹³ *Ibid* at [33] citing *W v Essex County Council* [2001] 2 AC 592 at 601 per Lord Slynn (with whom the other members of the House agreed).

[11] The applicable criteria are:

- a) Pleadings facts, whether or not admitted, are assumed to be true;
- b) The cause of action must be clearly untenable, that is, it cannot succeed;
- c) The jurisdiction is to be exercised sparingly, and only in clear cases;
- d) In *Takaro Properties Ltd (In Receivership) v Rowling*,¹⁴ Richmond P referred with approval to the statement of Barwick CJ in *General Steel Industries Inc v Commissioner for Rails NSW*¹⁵ that this jurisdiction is to be “sparingly employed” and is not suitable for use:

... except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion.

- e) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument;
- f) The Court should be particularly slow to strike out a claim in any developing area of law;
- g) Defendants should not be subjected to substantial costs, often only partially recoverable, in defending untenable claims: *Attorney-General v Body Corporate 200200*,¹⁶ and
- h) The Court can and will strike out a cause of action when it is time-barred, doing so on the basis that the proceeding is frivolous or vexatious or an abuse of process: *Nathan v Smith*.¹⁷

¹⁴ *Takaro Properties Ltd (In Receivership) v Rowling* [1978] 2 NZLR 314 (CA) at 317.

¹⁵ *General Steel Industries Inc v Commissioner for Rails NSW* [1964] 112 CLR 125 at 129.

¹⁶ *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [51].

¹⁷ *Nathan v Smith* HC Auckland CIV-2007-404-253, 16 November 2009.

Pleadings

[12] While contending that the amended statement of claim dated 24 February 2011 is adequately pleaded and sufficiently particularised, at the hearing Ms Grant for the plaintiffs submitted with the synopsis of submissions in opposition to the defendant's interlocutory application, a draft second amended statement of claim.

[13] Mr Harrison QC, counsel for CBL, accepted that in this amended pleading the three causes of action are pleaded separately as to liability and damages in respect of each of the first and second plaintiff (submitted to be a crucial flaw in the amended statement of claim dated 24 February 2011). But he maintained that the draft pleading does not remedy other pleading inadequacies identified by the defendant, including that particulars of the damages claimed are still not provided.

[14] In summarising the pleadings I shall proceed on the basis that the draft second amended statement of claim submitted by the plaintiffs will be completed with missing detail such as dates where noted, and will be filed as an amended statement of claim (subject to this judgment). In relation to the defendant's application for striking out the plaintiffs' claims in whole or in part, I therefore proceed on the basis that the facts pleaded in the draft second amended statement of claim are true.

Statement of claim

[15] The plaintiffs plead in their draft statement of claim:

- a) The first plaintiff (whom I shall call Mr Geoff Waterhouse) owned 100 per cent of the shareholding in Phoenix which had its registered office in Georgia in the United States of America and carried on business in livery insurance. Mr Geoff Waterhouse has resided in New Zealand since 4 February 2003.
- b) The second plaintiff, Mr Robert Waterhouse, is a production manager who owns 100 per cent of the shareholding in Main Street Brokers

(Main Street) which had its registered office in Georgia and carried on business as an insurance broker.

- c) CBL is a New Zealand company having its registered office in Auckland and carrying on various businesses including underwriting.
- d) The directors of CBL are Mr Peter Harris (Mr Harris), Mr Alistair Leighton and Mr Adam Massingham who are New Zealand nationals and reside in New Zealand. The shareholders of CBL are a number of companies associated with Mr Harris and Mr Nicolaas Francken (Mr Francken), a former director of CBL.
- e) In or about October 2000 the plaintiffs on behalf of Phoenix commenced negotiations with CBL for an underwriting agreement.
- f) CBL provided the plaintiffs with a proposal dated November 2000 which included, inter alia, references to Mr Robert Waterhouse and his role in the business of Phoenix.
- g) In or about 1 December 2000 Phoenix entered into an agreement with CBL (the agreement) for the underwriting of insurance policies in Georgia. The terms of the agreement included that:

Phoenix will obtain the business, and is authorised by CBL to issue policies to policy holders in the name of CBL under delegated authority within the limits set out in Schedule 1 to this agreement.

Premiums will be collected, and separately held by Phoenix. At the end of each month ...

Phoenix shall inform CBL of any alteration to the regulations that affect this licence, or underwriting risk, in order that CBL can ensure that [it] is aware of and continues to meet these requirements.
- h) In about 2002 the Georgia Insurance Code was amended with the effect that only alien insurers on the National Association of Insurance Commissioners' (NAIC) white list could issue insurance policies in

Georgia (the amendments). Consequently, CBL was no longer eligible to underwrite business in Georgia.

- i) In about 2002 Mr Geoff Waterhouse advised Mr Harris by telephone conversation of the amendments.
- j) Mr Harris during the telephone conversation, on behalf of CBL, represented that:
 - (i) The defendant was in the process of acquiring Mark Solofa Insurance (MSI), a property and casualty company located in American Samoa; and
 - (ii) MSI qualified as a foreign underwriter under the amendments as it was located in American Samoa.
- k) Shortly after Mr Harris, on behalf of CBL, further advised Mr Geoff Waterhouse by telephone conversation that:
 - (i) The acquisition of MSI by CBL was complete; and
 - (ii) CBL had put in place US\$3m in capital and surplus.
- l) Mr Geoff Waterhouse relayed these representations to Mr Robert Waterhouse.
- m) In or about 2002, the plaintiffs arranged for Phoenix to transfer its underwriting business to MSI.
- n) On or about 1 March 2005, Mr Robert Waterhouse was arrested in Georgia and a warrant for the arrest of Mr Geoff Waterhouse was issued. Subsequently the plaintiffs were charged with 40 counts of theft by deception, 40 counts of insurance fraud and one count of racketeering arising from the issue of fraudulent insurance policies in the name of MSI, which was a non-existent insurer.

- o) The authorities raided the local offices of Phoenix and Main Street seizing computer records and other files. The media were present.
- p) Investigators took steps to revoke all insurance licences held by the plaintiffs and Phoenix and also seized approximately \$US200,000 in assets of which \$US50,000 rightfully belonged to Phoenix.
- q) Phoenix was liquidated in 2008¹⁸ as the result of the inability of Mr Geoff Waterhouse to operate as an insurance broker.
- r) The publicity surrounding these events caused the plaintiffs significant stress and resulted in:
 - (i) Jeopardy for Mr Geoff Waterhouse's application for permanent residency in New Zealand;
 - (ii) Britannica Chauffeurs Services, an Atlanta limousine business, filing a class action complaint against Phoenix and CBL in Atlanta's Superior Court on or about 6 December 2007 alleging that from 2001 to 2004 Mr Geoff Waterhouse, trading as Phoenix, had collected more than \$US4m from the sale of false, non-existent commercial automobile insurance policies and transferred it to CBL.
 - (iii) The Insurance Commissioner in Georgia maintaining to the media, until 2006, that the plaintiffs had been selling fraudulent insurance policies through Phoenix and Main Street.
 - (iv) Television New Zealand covering the story in a way that was highly defamatory of Mr Geoff Waterhouse.

¹⁸ Refer footnote 1 above.

- (v) Air New Zealand cancelling its luggage contract with Paihia Taxis and Tours Limited, a company owned by Mr Geoff Waterhouse.

[16] Mr Geoff Waterhouse claims that as a consequence:

- a) He has been unable to renew his insurance licences in the United States and New Zealand and also his professional insurance cover.
- b) He has had to close his insurance brokerage company, Phoenix Brokers (NZ) Limited due to his inability to obtain a licence and insurance cover.
- c) He was refused membership of the New Zealand Mortgage Brokers Association.
- d) He has had to subsidise his loss of income by drawing on funds secured by a mortgage over his house, which he was intending to operate as an investment fund.

[17] Mr Robert Waterhouse claims that as a consequence:

- a) He was arrested and spent three weeks in jail in Georgia.
- b) He had to borrow money from family and friends in order to survive financially.
- c) He suffered loss of a future business opportunity for Main Street in Georgia which he had negotiated in late 2004.

[18] Arising out of those pleaded facts Mr Geoff Waterhouse and Mr Robert Waterhouse each plead causes of action against CBL in deceit, negligent misstatement and breach of fiduciary duty.

Deceit

[19] Each of the plaintiffs pleads that:

- CBL conceived the idea of acquiring MSI, a property and casualty insurance company located in American Samoa, which would allow CBL to qualify as an underwriter under the amendments so it could continue to underwrite Phoenix's insurance policies.
- In order to induce each of the plaintiffs to transfer Phoenix's business to MSI, Mr Harris on behalf of CBL made the following representations to Mr Geoff Waterhouse (which were repeated orally by him to Mr Robert Waterhouse) during two separate telephone conversations in about 2002, namely that:
 - (a) The acquisition of MSI by CBL was complete; and
 - (b) CBL had put in place \$US3m in capital and surplus (the representations)
- The representations were false. In particular CBL knew, by its directors and representatives Messrs Harris, Francken and Anthony Thomas that it had never purchased any shares in MSI and did not own such shares at any material time between 2002 and 2005.
- When it made the representations CBL knew them to be false, or made them recklessly not caring whether they were true or false.
- CBL made the representations in order to induce respectively the first plaintiff and the second plaintiff to transfer Phoenix's business to MSI.
- The first plaintiff and the second plaintiff respectively, acting in the belief that the representations were true, were induced to transfer Phoenix's business to MSI in about 2002.

- The first plaintiff and the second plaintiff respectively caused Phoenix to continue to sell insurance policies to Georgia based shuttle limousine and taxicab companies in the name of MSI. As a consequence the plaintiffs have suffered loss and damage and consequential loss, in the case of Mr Geoff Waterhouse of over NZ\$5m, and in the case of Mr Robert Waterhouse of over NZ\$2.5m.

[20] The losses are particularised in the case of Mr Geoff Waterhouse as follows:

- (i) Loss of the value of shares in Phoenix worth at least NZ\$1.4m in March 2005;
- (ii) Loss of income from Phoenix at US\$150,000 per annum for 18 years from 2005, from age 62 until age 80, amounting to a loss of NZ\$2.3m;
- (iii) Loss of the value of Phoenix Brokers (NZ) Limited which had a projected profit of at least NZ\$20,000 per annum and estimated worth of at least NZ\$75,000 as at March 2005;
- (iv) Loss of NZ\$14,000 being a retainer paid to Mr Geoff Waterhouse's solicitor in Georgia in March 2005;
- (v) Loss of Paihia Taxi's luggage contract with Air New Zealand with an estimated value of at least NZ\$75,000 as at March 2005;
- (vi) Loss of Mr Geoff Waterhouse's share of the seized funds being NZ\$68,493; and
- (vii) NZ\$50,000 for humiliation, stress, depression and loss of reputation in both New Zealand and the United States.

The relief claimed by Mr Geoff Waterhouse is:

- (a) Special damages of NZ\$3.9m, general damages of NZ\$50,000 and exemplary damages of NZ\$50,000; and
- (b) Interest pursuant to the Judicature Act 1908 totalling NZ\$1.7m from the date of filing of the claim.

[21] The losses are particularised in the case of Mr Robert Waterhouse as follows:

- (i) Loss of income for 18 years until Mr Robert Waterhouse would have inherited Phoenix, amounting to a loss of NZ\$801,370.
- (ii) NZ\$19,863 in legal fees following his arrest in March 2005.
- (iii) Loss of NZ\$700,000 being the future value of the Phoenix shares on inheriting them from his father, as a 50 per cent share of the value of NZ\$1.4m in March 2005.
- (iv) Loss of a future business opportunity for Main Street in Georgia which he had negotiated in late 2004 of at least NZ\$890,411.
- (v) NZ\$50,000 for humiliation, stress, depression and loss of reputation in both New Zealand and the United States.

The relief claimed by Mr Robert Waterhouse is:

- (a) Special damages in the sum of NZ\$2.4m, general damages of NZ\$50,000 and exemplary damages of NZ\$50,000.
- (b) Interest pursuant to the Judicature Act 1908 totalling NZ\$1.7m from the date of filing the claim.

Negligent misstatement

[22] As an alternative to the first cause of action each of the plaintiffs pleads that at the time of making the representations.¹⁹

- CBL:
 - a) Assumed responsibility to the first plaintiff/second plaintiff and intended him to rely on the representations;
 - b) Intended to induce him into transferring Phoenix's business to MSI; or
 - c) Ought to have foreseen that he would rely on the representations.
- As a consequence CBL was under a duty of care in making the representations.
- Acting on the faith of the representations the first plaintiff/second plaintiff transferred Phoenix's business from CBL to MSI and continued its relationship with CBL from 2002 until about March 2005.
- CBL, in breach of its duty of care, was negligent in making the representations, in that:
 - (i) CBL knew at the time of making the representations that it failed to meet the requirements of the Georgia Insurance Code;
 - (ii) By certifying that it met the requirements under the amendments when it knew this was not correct;
 - (iii) CBL had not entered into an agreement for the purchase of MSI and did not at any stage complete a share purchase in MSI;

¹⁹ See at [15](j) and (k) above as to the representations.

(iv) CBL was not in any way authorised by MSI to sell insurance policies on its behalf.

- Phoenix continued to sell insurance policies in Georgia to shuttle, limousine and taxicab companies in the name of MSI in breach of the Georgia Insurance Code until about 1 March 2005 when Mr Robert Waterhouse was arrested, a warrant for the arrest of Mr Geoff Waterhouse was issued and all insurance licences held by them and Phoenix were revoked.

[23] Losses and damages are claimed and relief sought as in the first cause of action.

Breach of fiduciary duty

[24] As a third cause of action each of the plaintiffs pleads that:

- Between November 2000 and March 2005 CBL was under a duty of trust and confidence to refrain from acting in its own self-interest.
- Between November 2000 and March 2005 the first plaintiff/second plaintiff relied on CBL's advice that Phoenix had the authority to issue insurance policies in Georgia under the name of MSI.
- CBL in breach of its duty of trust and confidence, acted in its own self-interest in conflict with the interests of the first plaintiff/second plaintiff by:
 - (i) Failing to disclose that it had not entered into an agreement with MSI;
 - (ii) Continuing to benefit financially from the sale of invalid insurance policies to shuttle limousine and taxicab companies in Georgia by Phoenix.

[25] Losses and damages are claimed and relief sought as in the first cause of action is claimed.

Statement of defence

[26] The statement of defence dated 12 April 2011 pleads to the amended statement of claim dated 24 February 2011. CBL admits some of the factual allegations but denies the pleading in deceit and that it was under any duty of care or fiduciary duty to either of the plaintiffs.

[27] CBL pleads three affirmative defences:

- (a) Georgia law applies: The law of Georgia is the applicable law to this proceeding on the basis of particulars set out in the statement of defence. Under Georgia law and in the factual circumstances pleaded:
 - (i) Where a corporation such as Phoenix has suffered loss a shareholder of that corporation such as Mr Geoff Waterhouse cannot sue personally for losses suffered by the corporation;
 - (ii) Where a corporation such as Phoenix has suffered loss, an employee of that corporation, such Mr Robert Waterhouse, cannot sue personally for losses suffered by the corporation.

Accordingly neither of the plaintiffs has standing to maintain any of the three causes of action pleaded by each of them against CBL under Georgia law or alternatively under New Zealand law (if held to be the applicable law, which is denied).²⁰

²⁰ Mr Harrison, for CBL, confirmed in submissions that this defence was not advanced in support of the summary judgment and strike out applications, although the point was not conceded. No evidence was adduced by either party as to the substantive law of Georgia relating to the plaintiffs' pleaded causes of action. The affidavit of Mr Jerald Hanks, sworn 15 April 2011, filed by the defendant, addresses only Georgia State statutory provisions relating to limitation periods.

- b) Claims statute barred: The law of Georgia is the applicable law to this proceeding. All the claims of the first and second plaintiffs arise out of a contractual underwriting agreement between CBL and Phoenix. The claims brought by the first and second plaintiffs as non-parties to the agreement are statute barred by the law of Georgia as not having been commenced within four years of 1 March 2005 when the alleged wrongs came to the notice of the plaintiffs (and the plaintiffs allegedly suffered loss or damage).
- c) No duties owed: CBL owes no legal duty and bears no legal responsibility to the plaintiffs or either of them because if CBL owed or breached any duty to refrain from deceit/fraudulent misrepresentation, or any duty of care in negligence, or any fiduciary duty, it did so only as against Phoenix with whom it was at all material times in a contractual relationship pursuant to the agreement.

CBL's interlocutory application

[28] CBL seeks orders for summary judgment against the first and second plaintiffs and in the alternative striking out all or any of the pleaded causes of action of the first and second plaintiff. CBL claims:

- a) As to the application for summary judgment that none of the causes of action asserted by the plaintiffs can succeed against CBL.
- b) As to the application to strike out, that the plaintiffs' statement of claim discloses no reasonably arguable cause of action or case appropriate to the nature of the pleading in respect of either of the plaintiffs.

[29] CBL also relies on non-compliance by the plaintiffs with specified High Court Rules which in some but not all respects, according to CBL, are remedied or mitigated in the draft second amended statement of claim.

Notice of opposition

[30] The plaintiffs oppose CBL's application for orders for summary judgment and/or striking out on a number of grounds. They say:

- (a) The defendant has not shown on the balance of probabilities that none of the plaintiffs' causes of action can succeed;
- (b) There are bona fide questions of fact or law which can be determined only after trial;
- (c) The plaintiffs have standing under New Zealand law to sue for personal losses suffered independently of any losses suffered by Phoenix;
- (d) The losses suffered by the plaintiffs are recoverable from CBL and are independent of the losses suffered by Phoenix;
- (e) Alternatively Phoenix was deregistered and cannot be resurrected under Georgia law and the situation is one in which the loss in value of the shares is claimable by the plaintiffs.
- (f) The conduct of third parties in closing down Phoenix was a direct result of CBL's unlawful conduct in underwriting insurance in Georgia when it had no lawful ability to do so;
- (g) There was a relationship of trust between the Messrs Waterhouse and CBL arising from a number of facts including the close relationship claimed between Mr Harris and Mr Geoff Waterhouse and the reliance placed by Mr Geoff Waterhouse on the assertions by Mr Harris that CBL had the ability to underwrite insurance in Georgia;

- (h) CBL owed a duty of care to the plaintiffs separate from the duty of care it owed to Phoenix. The plaintiffs allege close proximity between the Messrs Waterhouse and CBL and knowledge by CBL that Phoenix was a small family business run by the Messrs Waterhouse;
- (i) It was the responsibility of CBL to ensure that it was aware of, met and continued to meet, the Georgia Insurance Code requirements so that it could operate as an underwriter of insurance in Georgia;
- (j) As to the limitation defence:
 - (i) Matters of limitation are procedural bars only and are governed by the procedural law of the forum, in this case New Zealand law. The Limitation Act 1950 is the applicable law relating to limitation defences in New Zealand and the proceeding was brought in time under that Act;
 - (ii) The Georgia statute of limitation bars the remedy and not the right to bring a claim and does not prevent the bringing of proceedings out of the jurisdiction and within the applicable limitation period in the jurisdiction in which the suit is filed;
 - (iii) In the alternative, the English common law rule of double actionability does not apply, or should not be applied in New Zealand. The wrongs took place in New Zealand and therefore New Zealand law applies to the causes of action pleaded by the plaintiffs;
 - (iv) It is the acts of CBL, and not their consequences, that determine the law that applies to the wrongs. New Zealand law alone must determine all questions of liability arising out of these actions. Georgia law has no application;

(v) Alternatively if the common law rule of double actionability does apply in New Zealand then:

- CBL has not provided any evidence to support its claim that the plaintiffs have no standing under Georgia law to sue personally for losses suffered independently of the company; and
- There are flexible exceptions that can apply to the rule and the Court should apply a flexible exception to allow the plaintiffs' claims regardless of whether the claims may be statute barred in Georgia.

(vi) In relation to the claim for breach of fiduciary duty:

- As the New Zealand Courts have assumed jurisdiction over CBL, who has submitted to the jurisdiction, all principles of equity of the forum apply and are not subject to choice of law rules;
- Alternatively, if choice of law rules do apply to claims for breaches of fiduciary duties, the double actionability rule has no application, as equitable wrongs form a category distinct from torts for choice of law purposes.

(k) Any defects in the pleadings can be remedied by filing an amended statement of claim and it is not appropriate to order summary judgment or strike out.

Affirmative defences

[31] CBL pleads two defences on the basis of which it says summary judgment should be entered in favour of CBL against both plaintiffs or all causes of action struck out:²¹

- (a) The claims brought by the first and second plaintiffs are statute barred by the law of Georgia, which is the law applicable to this proceeding, as not having been commenced within four years of 1 March 2005.
- (b) As no duties were owed to the plaintiffs, they have no standing to sue CBL.

[32] I turn to consider the competing contentions under each of these headings.

Is the proceeding statute barred?

[33] The plaintiffs' claims against the defendant are in tort (deceit and negligent misstatement) and equity (breach of fiduciary duty).

[34] The causes of action all stem from the defendant's alleged representations that it met the requirements of the Georgia Insurance Code and was able to legally operate in Georgia as a "non-admitted alien insurer". The defendant is alleged to have made these representations over the phone to Mr Geoff Waterhouse. At the time the plaintiffs were based in Georgia and the defendant was based in New Zealand.

[35] The plaintiffs filed their proceeding in this Court and there has been no protest to jurisdiction. Therefore, New Zealand is the *lex fori* (the law of the forum) of this dispute. Accordingly, the procedural laws of New Zealand govern the procedural or administrative aspects of this proceeding (that is, the litigation machinery). This is not in dispute.

²¹ See at [27](b) and (c) above.

[36] There is a dispute as to the *lex causae*, the law which governs the matter in dispute (choice of law) and its content (characterisation), specifically whether the limitation period of the *lex causae* or the *lex fori* should apply. The applicable limitation periods in New Zealand and Georgia are six years and four years, respectively. The parties agree that the proceeding would be time-barred under the Georgia limitation period, but not the New Zealand limitation period.

[37] Applying the traditional approach to choice of law and characterisation, the plaintiffs submit that New Zealand law is the *lex causae* and therefore its limitation period applies. Applying the modern approach to choice of law and characterisation, the defendant submits that Georgia law is the *lex causae* and its limitation period should apply.

Approach to choice of law

[38] There are two approaches to choice of law in tort.²² The traditional approach is to apply the “double actionability” rule from *Baxter v RMC plc*.²³ However, recent statutory reforms in England and case law in Australia and Canada have abandoned double actionability in favour of a simple *lex loci delicti* rule (the law of the place of the wrong). I have concluded that the same result is reached under either approach for the reasons that follow.

Double actionability

[39] Choice of law based on double actionability is described in *Baxter v RMC Group plc* as follows:

[58] The rule for determining choice of law in a case where a tort is committed outside New Zealand is that set out in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190. Applying the rule as outlined in that case to the facts here, the propositions which apply are:

- (a) A tort is actionable in New Zealand only if it is actionable both in New Zealand and England. If this rule (the double actionability rule) is satisfied, then the substantive law to be applied is the law of New Zealand.

²² The choice of law for the cause of action for breach of fiduciary duty is addressed below at [77].

²³ *Baxter v RMC Group plc* [2003] 1 NZLR 304.

- (b) However, if one country has the most significant relationship with the occurrence and with the parties, the substantive law of that country is to be applied.

[40] This involves a two-step inquiry:

- i. Is there a conflict of laws?

- ii. What is the *lex causae*?

- (a) Double actionability: can the causes of action be litigated in Georgia and New Zealand?

- (b) Exception: which country has the strongest links to the occurrence/parties?

[41] If there is a conflict of laws, then having identified the *lex causae* under the second step, it is necessary to identify the matters that are governed by the *lex causae*. In the context of limitation periods, this concerns whether the applicable limitation period is a matter of procedure (governed by the *lex fori*) or of substance (governed by the *lex causae*).

Step one: is there a conflict of laws?

[42] The threshold requirement for the application of the rule in *Baxter* is that the tort was committed outside New Zealand. This requires identification of where the alleged causes of action arose.

[43] The essential factual disputes in this case relate to whether or not the elements of the pleaded causes of action in deceit and negligent misstatement are made out. There does not seem to be a dispute as to the location in which the elements of the tort, if proven, arose.

[44] The plaintiffs do not specifically address this step, but their submissions assume there is a conflict of laws.

[45] CBL submits that though it was physically present in New Zealand when the alleged misrepresentations which are at the heart of the plaintiffs' claims, occurred, all of the events complained of occurred outside New Zealand, including in particular, reliance by the plaintiffs on the alleged misrepresentations. The defendant cites *Baxter* as authority for the proposition that the causes of action in tort arose where the representations were relied on, rather than where they were made.²⁴

[46] I agree with the defendant's approach in accordance with *Baxter*, which states that the tort of deceit "is committed at the place where reliance on the fraudulent misrepresentation occurs".²⁵ The same may be said by analogy for negligent misstatement, as reliance (and hence damage) is also an element of that tort. There is support in the following New Zealand cases: *University of Newlands v Nationwide News Pty Ltd*, which held that the tort of defamation occurred where the plaintiff downloaded the damaging information;²⁶ and *Lovett v Crown Worldwide (NZ) Ltd*, where it was held that a negligence claim arises in the jurisdiction where the damage was suffered (though this part of the decision related to a dispute as to service).²⁷

[47] Here, as reliance by the plaintiffs on the alleged representations occurred in Georgia for both of the alleged torts, there is a strong argument that the torts were committed in Georgia. Following *Baxter*, "[t]he rule for determining choice of law in a case where a tort is committed outside New Zealand" may therefore be applied.

Step two: what is the lex causae?

[48] Under the double actionability rule, a tort committed outside New Zealand is actionable in New Zealand under New Zealand law if it is actionable in both New Zealand and the country in which the tort was committed, in this case Georgia. However, under the exception in *Baxter*, if one country has the most significant

²⁴ *Baxter v RMC Group plc* at [53]-[54], citing *Diamond v Bank of London and Montreal* [1979] 1 QB 333.

²⁵ At [54].

²⁶ *University of Newlands v Nationwide News Pty Ltd* (2004) 17 PRNZ 206 at [30] and [35], citing *Dow Jones & Co Inc v Gutnick* [2002] 210 CLR 575.

²⁷ *Lovett v Crown Worldwide (NZ) Ltd* HC Auckland CP373-SD02, 10 June 2004 at [38]-[41], citing *Biddulph v Wyeth Australia Pty Ltd* [1994] 3 NZLR 49 and *Longbeach Holdings Limited v Bhanabhai & Co Ltd* [1994] 2 NZLR 28.

relationship with the occurrence and with the parties, the substantive law of that country is to be applied.

[49] The plaintiffs submit that under the double actionability rule the *lex causae* is New Zealand law:

- (a) Both plaintiffs have standing under New Zealand law to sue.
- (b) There are equivalent causes of action in Georgia for each of the causes of action pleaded by the plaintiffs under New Zealand law.²⁸

[50] The plaintiffs also submit that the acts of CBL, not the consequences, determine the law that applies to the wrongs, and that New Zealand has the most significant relationship to CBL's actions and the parties:²⁹

- (a) The alleged representations were made in New Zealand.
- (b) The defendant and the first plaintiff reside in New Zealand.
- (c) The first plaintiff suffered losses while in New Zealand.
- (d) There was no provision that the agreement be governed by the law of Georgia nor that the parties submitted to the exclusive jurisdiction of the United States.

[51] CBL submits that the governing law is Georgia law. The defendant notes that as the plaintiffs have not proven the relevant Georgia law, it is not possible to assess double actionability, as it is either doubtful or unclear whether the tort claims would be actionable in Georgia. However, applying the exception in *Baxter* the Court may consider which country has a more substantial connection with the subject matter of the plaintiffs' pleaded claims. The defendant submits this is Georgia because:

²⁸ No evidence was adduced as to the applicable law of Georgia. See at footnote 20 above.

²⁹ Though these submissions were made in the context of the plaintiffs' submissions on *lex loci delicti*, they may also apply in respect of the *Baxter* exception.

- (a) The alleged misrepresentations were communicated to Mr Geoff Waterhouse in Georgia by Mr Peter Harris in New Zealand. The two country connections effectively cancel one another out.
- (b) As a matter of principle, torts based on misrepresentation arise and are committed at the place where the recipient relies on the representation.³⁰
- (c) There is no suggestion that CBL undertook specific action in New Zealand in response to the individual placements of insurance. The policy administration, assessment of claims under the policies and payment of claims were all transacted in Georgia, with a local assessor engaged and payments out of funds retained by Phoenix for those purposes.
- (d) The assertion that an alleged “failure ... to inform” on the part of CBL “took place in New Zealand” cannot be sustained, because an omission cannot take place anywhere (though the consequences of the omission arose in Georgia).³¹ The Court in *Voth v Manildra Flour Mills* stated as follows:

[i]t makes no sense to speak of the place of the omission. However, it is possible to speak of the place of the act or acts of the defendant in the context of which the omission assumes significance and to identify that place as the place of the “cause of complaint”.
- (e) The fact that CBL is registered in New Zealand is of little consequence in this context and is counterbalanced by the fact that Phoenix and the plaintiffs were resident in Georgia at the time of the alleged misrepresentations.
- (f) The plaintiffs’ claim that funds were remitted to New Zealand by Phoenix for CBL’s profit share is disputed, but in any event is peripheral.

³⁰ *Baxter v RMC Group plc* at [54]-[55], citing *Diamond v Bank of London and Montreal*.

³¹ *Voth v Manildra Flour Mills* (1990) 171 CLR 538 at 567.

- (g) If Phoenix had a claim in contract and tort, it would arise in Georgia. Therefore, the plaintiffs' secondary claim could not arise elsewhere.

Application

[52] *Baxter* is naturally read as requiring double actionability to be assessed first, before turning to the exception. However, I agree with counsel for the defendant, that it is difficult to assess double actionability, as the plaintiffs have not provided evidence to establish that the plaintiffs would have a cause of action in Georgia.³²

The exception in Baxter

[53] Turning to the exception in *Baxter*, I agree with the analysis based list of factors provided by the defendant. None of the factors relied on by the plaintiffs to relate the torts to New Zealand is particularly strong:

- (a) Though the alleged representations were made in New Zealand, they were relied on in Georgia, and it is likely that the tort thereby arose in Georgia,³³ or was at least complete in Georgia.
- (b) The respective domiciles of the parties arguably cancel each other out. As the first plaintiff moved to New Zealand after the representations were made, his current domicile cannot be granted significant weight in interpreting the relationship between the parties at the relevant time.
- (c) Though there was no provision in the underwriting agreement that it be governed by the law of Georgia, there was also no provision that

³² This was also the situation in *Baxter*. O'Regan J said at [59]: "In the present case the plaintiff did not produce evidence of the law of England and there is therefore nothing before me to establish that the double actionability rule applies in relation to the tortious claims. The obligation of a plaintiff to prove foreign law by expert evidence is clear, and that has simply not happened here."

³³ See *Baxter*; *Diamond v Bank of London and Montreal*, *University of Newlands v Nationwide News Pty Ltd* and cases cited therein and *Lovett v Crown Worldwide (NZ) Ltd* and cases cited therein.

it be governed by New Zealand law. The only relevant reference in the agreement is that the currency specified was US dollars.

[54] The links to New Zealand relied on by the plaintiffs are properly seen as relevant to a *forum non conveniens* assessment, rather than to the identification of the *lex causae*, as they are based on convenience, rather than a connection with the New Zealand legal system. Further, some of the factors are fortuitous. For example, as the representations made in New Zealand were made over the telephone, they therefore could have occurred anywhere and do not necessarily invoke the New Zealand legal system. In comparison, the defendant's list of factors strongly link these proceedings to Georgian law.

[55] Applying the *Baxter* exception, I conclude that Georgia is the *lex causae*.

Lex loci delicti

[56] The plaintiffs suggest, in the alternative, that the *lex loci delicti* rule be applied in these proceedings. This is the choice of law rule followed in Australia, England and Canada. Under this rule, the governing law should be the law of the place of the wrong. The plaintiffs submit that the defendant's wrongful actions occurred in New Zealand, as the acts of the defendant occurred in New Zealand.³⁴ This inquiry mirrors the threshold question in *Baxter* (which was not addressed in the plaintiffs' submissions). The analysis above³⁵ therefore applies. However, for completeness, I briefly address the submissions.

[57] *Voth v Manildra Flour Mills* and the cases cited therein demonstrate a divide in the case law. In *Voth*, it was noted that it did not make sense to speak of the place of the omission, and the Court instead looked at the "substance" of the cause of action,³⁶ considering that there is no generally applicable rule for determining the place of the tort. *Diamond v Bank of London and Montreal* was cited as an example

³⁴ Citing *Voth v Manildra Flour Mills*; *Phillips v Eyre* (1870) 6 LR QB 1 at 28-29; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 447; *Szalatney-Stacho v Fink* [1947] KB 1, [1946] 2 All ER 231.

³⁵ At [43] to [48].

³⁶ At 567 and see at footnote 31 above.

of a case in which the substance of the cause of action was dictated by the place of damage.³⁷

[58] There are two ways in which the available case law may be interpreted:

- (a) *Voth* has been impliedly overruled by recent New Zealand case law, which indicates a trend towards identifying the place of the damage as the *lex loci delicti*,³⁸ or
- (b) In terms of *Voth* the substance of the cause of action is the determining factor. The analysis would be materially similar to the analysis under the *Baxter* exception.

[59] Thus, whichever way this line of authority is applied, the end result is the same as that reached by applying the *Baxter* exception.

Conclusion

[60] For these reasons, I conclude that the *lex causae* for the tortious causes of action is Georgia law.

Is the limitation period governed by the lex fori or the lex causae?

[61] The traditional approach to characterisation (which the plaintiffs submit should be followed), is explained as follows (citations omitted):³⁹

At common law, statutory limitation provisions that bar the remedy and not the right are procedural and not substantive, and consequently the provisions of the Limitation Act 1950, which under this principle are procedural, will be applied by the New Zealand Courts in conflict of law cases as part of the law of the forum (the *lex fori*). Thus, where a proceeding is brought in New

³⁷ At 568.

³⁸ See *Baxter*; *Diamond v Bank of London and Montreal*, *University of Newlands v Nationwide News Pty Ltd* and cases cited therein and *Lovett v Crown Worldwide (NZ) Ltd* and cases cited therein.

³⁹ *The Laws of New Zealand (conflict of laws: choice of law)* (online looseleaf ed, LexisNexis) at [269], citing *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591; [1975] 1 All ER 810, *Harris v Quine* (1869) LR 4 QB 653, and *British Linen Co v Drummond* (1830) 10 B & C 903; 109 ER 683.

Zealand, wherever the cause of action arose, the period of limitation is governed by the relevant New Zealand provision, unless the limitation law of the *lex causae* (the law applicable to substantive issues under New Zealand choice of law rules) has extinguished the right as well as the remedy.

[62] It is accepted by both parties that the limitation periods under New Zealand and Georgia law bar the remedy without extinguishing the right, and would, under the traditional approach, be classified as a procedural bar governed by the law of the forum.⁴⁰

[63] The defendant acknowledges that there are no New Zealand cases directly on point and submits that the characterisation of a foreign limitation statute is an open question.⁴¹ The defendant identifies a very strong trend towards classifying limitation period as substantive and refers to the principles driving this trend.⁴² It urges the Court to follow this modern approach for all pleaded causes of action. It notes that such a characterisation would avoid the need to classify the limitation period as barring the remedy or extinguishing the right.

[64] The philosophical basis for this trend is centred on the following, interrelated, reasons:

⁴⁰ *Davies v Public Trustee* [1957] 1021 at 1023. See also *The Laws of New Zealand (conflict of laws: choice of law)* (online looseleaf ed, LexisNexis) at [269], citing *Davies v Public Trustee* [1957] NZLR 1021, *Inspector of Awards and Agreements v Malcolm Furlong Ltd* [1977] 1 NZLR 36.

⁴¹ However, the defendant cites the case of *SHC v O'Brien* (1991) 3 PRNZ 1 at 31 in which the parties agreed that limitation laws are procedural and thus governed by the law of the forum.

⁴² *The Abidin Dayer* [1984] 1 AC 398 at 411 (“judicial chauvinism has been replaced by judicial comity”), *Tolofson v Jensen* (1994) 120 DLR (4th ed) 289, affirmed in *Castello v Castello* (2005) 260 DLR (4th ed) 349 at [7], [11], [28] and [36]; the minority decision in *McKain v Miller & Co* (1991) 174 CLR 1, which was approved in a slightly different context (in relation to a monetary cap on damages rather than a limitation period) in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, which in turn has been applied in relation to foreign limitation periods: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [75]-[76], *Fleming v Marshall* [2011] NSWCA 86 at [46], *Garsec v His Majesty the Sultan of Brunei* (2008) 250 ALR 682 at [98]-[135]. The latter authority considered that these cases were of general applicability beyond tort actions.

- (a) Limitation periods are inherently substantive: they determine whether the parties can pursue their rights. For this reason, the same law that gives rise to the right of claim should be the law that determines when that claim is barred.⁴³ Further, limitation periods entail assumptions about procedures which, if not consistently applied, result in an over or under-enforcement of the substantive mandate. The application of the limitation period of the *lex causae* is therefore consistent with the principle that private international law exists to give effect to foreign rights as fully as possible.
- (b) The application of this rule is procedurally efficient: it prevents “forum shopping” — bringing a case in the forum with the longest limitation period. It is also simple and certain to apply.

[65] Although it does not apply to this case I note that the classification of limitation periods has been addressed in s 55 of the Limitation Act 2010, which applies to a civil proceeding in a New Zealand court where the substantive law of a foreign country is to be applied, that is, where the foreign law is the *lex causae*. Section 55(2) deems the limitation law of the foreign country to be part of its substantive law which must be applied accordingly in that proceeding. Similar legislation has been enacted in comparable jurisdictions, consistent with the trend towards classifying limitation periods as substantive, identified by the defendant.

[66] Neither party had referred in submissions to the potential for a “gap” that may arise where limitation periods are classified as substantive by the *lex fori* and procedural by the *lex causae*. This was identified in *Society of Lloyd’s v Price; Society of Lloyd’s v Lee*,⁴⁴ a judgment of the Supreme Court of Appeal of South Africa. I therefore sought further submissions on the potential “gap” that could arise if Georgia law was identified as the *lex causae* (which I have found it to be) but under Georgia law the applicable limitation period does not form part of the substantive law (being characterised as procedural).

⁴³ John McEvoy “Characterisation of Limitation Statutes in Canadian Private International Law: the Rocky Road of Change” (1996) 19 Dalhousie L J 425 at 428.

⁴⁴ *Society of Lloyd’s v Price; Society of Lloyd’s v Lee* [2006] SCA 87 (RSA).

[67] In response, both parties submitted for different reasons that no “gap” arises in this case and therefore the “via media” approach described and applied in *Lloyd’s*, has no application. In *Lloyd’s* the Court summarised the “via media” approach in its judgment as follows:⁴⁵

It follows that, in my view, considerations of policy, international harmony of decisions, justice and convenience require the dilemma of the ‘gap’ in the present case to be resolved by dealing with the issue of prescription in terms of the relevant limitation provisions of the *lex causae*, the English law ...

[68] The plaintiffs submit that no “gap” arises because under the traditional approach, which they contend applies in this case, the limitation period is characterised as a rule of procedure under both New Zealand and Georgia law. (It bars the remedy, but does not extinguish the right). They argue in the alternative, that the “via media” approach supports the application of the six year limitation period in the Limitation Act 1950 on public policy grounds as plaintiffs in New Zealand have always had the benefit of a full six year period for civil claims.

[69] The defendant submits that no “gap” arises under the traditional approach (for the reasons identified by the plaintiffs) and further submits that no “gap” arises under the modern approach advocated by the defendant. This is because the statutory limitation periods in both jurisdictions, New Zealand and Georgia, should be treated as substantive, being “rules of substance” or “substantive in effect”. The characterisation or categorisation is to be made according to New Zealand choice of law principles, not by a categorisation under Georgia law that draws a distinction between limitation statutes that bar the remedy but do not remove the right.

[70] Further, even if there were a “gap”, the defendant submits that the approach in *Lloyd’s* should not be followed. If the Court has determined that Georgia law is properly to be regarded as the *lex causae* because it has “the most significant relationship with the occurrence and with the parties” in terms of *Baxter*, it is “incongruous to ask and answer much the same question [to] bridge a conceptually unnecessary gap”.

⁴⁵ At [31].

[71] These submissions must be considered in the light of the Court's jurisdiction in strike out proceedings. The Court has inherent jurisdiction and jurisdiction under r 15.1 of the High Court Rules to strike out all or part of a pleading. The criteria are well established and are set out above.⁴⁶

[72] The Court can and will strike out a cause of action which is time barred. It does so on the ground that the proceeding is frivolous or vexatious or an abuse of process of the Court.⁴⁷ But as Tipping J said in *Murray v Morel & Co Ltd*:⁴⁸

I consider the proper approach ... is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process.

[73] The defendant urges that I should apply the modern approach and characterise the Georgia limitation law as substantive, thereby clearly barring the plaintiffs' claims because they are outside the statutory limitation period under Georgia law. It acknowledges there are no New Zealand cases directly on point and that the characterisation of a foreign limitation statute is an open question. Nevertheless it submits that in exercise of its strike-out jurisdiction the Court may be required to decide difficult questions of law, and the Court should determine that the approach advocated by the defendant is the correct one.

[74] I acknowledge there is merit in the defendant's approach. This cannot be viewed as a developing area of the law where the Court should be particularly slow to strike out a claim.⁴⁹ Rather it is an area where in respect of proceedings commenced prior to the coming into force of the Limitation Act 2010, the law is unclear.

[75] However, importantly in my view, when Parliament passed the Limitation Act 2010, the stated purpose of which is "... to encourage claimants to make claims

⁴⁶ At [11].

⁴⁷ *Nathan v Smith* HC Auckland CIV-2007-404-253, 16 November 2009, citing *Stuart v Australian Guarantee Corporation (NZ) Ltd* (2002) 16 PRNZ 139 and *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398.

⁴⁸ *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC) at [33].

⁴⁹ *Couch v Attorney-General* [2008] 3 NZLR 725.

for monetary or other relief without undue delay by providing defendants with defences to stale claims”, it did not make s 55(2) retrospective.

[76] Accordingly, I accept the plaintiffs’ submission that the traditional approach under which at common law the limitation period is governed by New Zealand law as the *lex fori*, should govern the plaintiffs’ claims in this case. The defendant has failed to establish that the plaintiffs’ causes of action in tort are so clearly statute-barred that they can properly be regarded as frivolous, vexatious or an abuse of process.

[77] Given the above conclusion it is unnecessary for me to consider in any detail the issue raised in the plaintiffs’ notice of opposition that in relation to the claim for breach of fiduciary duty all principles of equity of the forum apply and are not subject to choice of law rules.⁵⁰ Application of this principle results in an outcome consistent with the conclusion I have reached in respect of the tortious causes of action. Thus the limitation period for all the plaintiffs’ causes of action is governed by New Zealand law.

Do the plaintiffs have standing to sue CBL?

[78] The plaintiffs submit that they have standing to sue for losses they have suffered personally, independently of any losses suffered by Phoenix. They rely significantly on the authority of *Christensen v Scott*⁵¹ to say that :

- (a) CBL knew that the Waterhouses were insurance agents independently of their roles with Phoenix. A proposal for business by CBL dated 7 November 2000 refers to “Phoenix and its agents” being able to sell into their markets and refers to Mr Geoff Waterhouse as a licensed Surplus Lines broker and his son “who oversees administration”. It knew that policies were being written pursuant to the Surplus Lines Broker Licence of Mr Geoff Waterhouse, referred to in the underwriting agreement in the section headed “Regulations”.

⁵⁰ See at [30](j)(vi) above.

⁵¹ *Christensen v Scott* [1996] 1 NZLR 273.

- (b) The plaintiffs' claims do not arise directly out of the underwriting agreement. The plaintiffs, not Phoenix, suffered losses as the result of representations to them by CBL about its ownership of MSI and its ability lawfully to underwrite insurance in Georgia. Although the plaintiffs' claims arise from the factual background of the contractual relationship between Phoenix and CBL, the claims do not arise directly out of the underwriting contract.
- (c) The losses suffered by the plaintiffs, particularised in the draft second amended statement of claim, were reasonably foreseeable and were independent of the losses suffered by Phoenix.⁵²

[79] CBL submits that it was to Phoenix that the alleged misrepresentation was made and against Phoenix that the alleged non-disclosure operated. Therefore, the claims as pleaded by the plaintiffs personally are misconceived.

[80] CBL submits:

- (a) It cannot be disputed that those controlling CBL and Phoenix (in the case of Phoenix, being Mr Geoff Waterhouse who, on the basis of the pleadings and the evidence, was the sole director and sole shareholder of Phoenix at all material times), elected to create and operate their ongoing commercial and contractual relationship through their respective corporate entities. This is evidenced by the underwriting agreement concluded between CBL and Phoenix dated 1 December 2000.
- (b) On the evidence, all negotiations leading to the underwriting agreement and all ongoing dealings concerning the contractual and business relationship were between Mr Geoff Waterhouse on behalf of Phoenix and Mr Harris on behalf of CBL. It is not in dispute that although he was first appointed a director of CBL on 13 December 2006, Mr Harris represented and had authority to bind CBL in its

⁵² See at [20]-[22] above.

dealings with Phoenix and its officers and agents. Likewise, in dealing with CBL, Mr Geoff Waterhouse was the agent for or *alter ego* of Phoenix. The business dealings between Mr Geoff Waterhouse and Mr Harris, acting in those respective capacities cannot, without more, be subsequently categorised as dealings of the one with the other in his personal capacity, non-representative of the corporate entity of which he was the agent or *alter ego*.

- (c) The plaintiffs' contention that the alleged representation was made to one or both plaintiffs in a personal capacity, and the plaintiffs each personally placed reliance on and acted on the basis of the alleged misrepresentation needs to be assessed in the overall context of the legal and commercial relationships which existed at the material time:
 - (i) The ongoing contractual and business relationship, which had been operating for in excess of a year at the time of the alleged misrepresentation early in 2002, was between the two corporate entities, CBL and Phoenix;
 - (ii) In relation to that contractual and business relationship and prior to the events of early 2002 there is, and can be, no suggestion that the ongoing dealings between Mr Geoff Waterhouse (or, indeed, Mr Robert Waterhouse, if any) and Mr Harris were anything other than dealings on behalf of and between Phoenix and CBL respectively;
 - (iii) The subject matter of the dealings in early 2002 between Mr Geoff Waterhouse and Mr Harris went to the heart of the existing contractual and business relationship between CBL and Phoenix and was directly and explicitly referable to the underwriting agreement. That is so on whatever version of events is accepted. It is common ground that Mr Geoff Waterhouse drew to the attention of Mr Harris the pending change in Georgia State insurance law, the potential impact on

CBL and the implications for the future of the business relationship. This exchange of information was directly referable to the performance of Phoenix's contractual obligations under the underwriting contract.

- (iv) The communications early in 2000 and, in particular, the alleged misrepresentations at the heart of this proceeding, directly concerned the mutually agreed basis of carrying out the insurance underwriting arrangement. The alleged misrepresentations, once accepted by Phoenix (through its agent, Mr Geoff Waterhouse) brought about an agreed variation to the underwriting contract by interposing MSI between Phoenix and CBL (which, on the basis of the evidence in the affidavits of Mr Harris and Mr Geoff Waterhouse, is not in dispute).

[81] CBL submits, therefore, that whatever the content of the representation by Mr Harris in early 2002 and whether it is ultimately found to have been true, false, innocent, negligent or deceitful, it cannot be regarded as anything other than a representation made to Phoenix through Mr Geoff Waterhouse as its agent and/or physical *alter ego*.

[82] CBL also refers to an earlier affidavit of Mr Geoff Waterhouse in this proceeding, sworn on 5 July 2010, in which he says:

All of the issues raised in this proceeding relate to the commercial relationship between [CBL] and Phoenix ... At the time the transactions took place I was the sole shareholder and director of Phoenix, but the underlying transactions that took place were not personal to Robert and I, they arose out of the contractual relationship between Phoenix and [CBL] ... In reliance on [CBL's] representations about its ability to carry on underwriting Phoenix's insurance policies, Phoenix arranged to transfer the underwriting business to [MSI].

[83] CBL says this accurately describes the capacities of the parties and the commercial relationship between CBL and Phoenix, rather than the characterisation adopted in the statement of claim that "the plaintiffs arranged" for Phoenix to transfer the underwriting business from CBL to MSI.

[84] CBL submits that while the plaintiffs may conceivably formulate claims to impose liability in their favour on some other basis, they cannot formulate their claims on the basis that either of them in their personal capacities were the representee or representees of the alleged misrepresentation and entitled to sue for damage in that capacity or capacities. That contention effectively involves an attempt to “lift the corporate veil” of the corporate entity, Phoenix, for the purpose of advantaging its sole director/shareholder, Mr Geoff Waterhouse as well as Mr Robert Waterhouse, a mere employee. Crucially, Phoenix has never sued for the alleged misrepresentation and is no longer in existence.

The underwriting agreement

[85] It is relevant at this point to analyse the underwriting agreement made between CBL and Phoenix.

[86] The effective date of the agreement is stated to be 1 December 2000. It is signed by CBL by Mr Alistair Hutchison and Mr Harris, pursuant to power of attorney, and by Phoenix by Mr Geoff Waterhouse, as a duly authorised officer.

[87] The agreement states by way of background that Phoenix is an incorporated insurance broker with offices in Washington and Georgia; and that amongst other risks, it writes motor vehicle insurance for vehicles carrying fare-paying passengers in Georgia (more commonly known as a Livery Insurance). It states that CBL is a New Zealand insurance company based in Auckland with specialist expertise in financial risk and surety and bonding business; and that CBL and Phoenix wish to enter into an agreement for the underwriting of Livery Insurance business for clients introduced by Phoenix.

[88] The agreement states that all of the figures mentioned in the agreement refer to United States currency.

[89] Authority is provided to Phoenix to obtain the business and to issue policies to policyholders in the name of CBL within the limits set out in a schedule to the agreement.

[90] Premiums are to be collected and separately held by Phoenix with a monthly schedule and accounting by cheque to a bank account termed the CBL Premium Reserve. The monthly payment is to equate to the amount of premiums collected during the month, less brokerage at the agreed rate.

[91] There is provision for a monthly fee payable to CBL of 25 per cent of the monthly collected and paid premiums (net of Phoenix brokerage). CBL is to be entitled to receive the entire monthly premiums (net of Phoenix brokerage) once the balance in the CBL Premium Reserve reaches US\$65,000.

[92] Premium rates are set out in a schedule to the agreement with provision for annual reviews or more frequently by CBL, at its sole discretion. CBL is to consult with Phoenix before making any change.

[93] Phoenix is entitled to brokerage at rates specified in a schedule to the agreement.

[94] Phoenix is also entitled to a profit share as set out in a schedule to the agreement to be paid out after 12 months of operation under the agreement, and quarterly thereafter.

[95] Phoenix is required to advise by email or fax of any claims received. CBL is then promptly to engage a Loss Adjuster to whom Phoenix is to give all reasonable assistance. CBL is to promptly settle claims after consideration of the report of the Loss Adjuster.

[96] Phoenix is to keep accurate records of all policies issued, all details of policyholders, vehicles covered, driver detail licences, addresses, premiums payable paid and outstanding, claims records and any other records relevant to the policy and risk of this class of insurance. Phoenix is to make those records available to CBL and to provide copies of any records required by CBL.

[97] Under the heading "Regulations" the agreement provides:

It is agreed between the Parties that the basis of carrying out this insurance shall be CBL acting in the capacity of a non-admitted alien insurer in conforming to the requirements allowing it to underwrite this risk in Georgia, pursuant to the Surplus Lines Broker Licence of Mr Godfrey Waterhouse, principal of Phoenix.

Phoenix shall inform CBL of any alteration to the regulations that affect this licence, or underwriting risk, in order that CBL can ensure that [it] is aware of and continues to meet these requirements.

The term of the agreement is three years from 1 November 2000 renewable for a further term of three years on both Parties being satisfied with the performance of the other.

Authorities

[98] CBL refers to *Yogi Superette Ltd v Pacific Fresh Ltd*.⁵³ The plaintiffs in that case were both the company (the equivalent of Phoenix) and its shareholders, Mr and Mrs Ramanandi. They claimed to have suffered loss as the result of pre-contractual misrepresentations about the business. The Court held that it was the same loss, the company's loss, which loss could not be recovered both by the corporate plaintiff and the shareholders. Their claims were struck out.

[99] Allan J said:

[45] beyond that, there is nothing in the evidence which takes the case out of the ordinary run of cases, in which representations made to a negotiator in advance of a contract entered into by a corporate purchaser, must be taken to have been made to a negotiator in his capacity as agent for the ultimate purchaser or indeed in this case as the alter ego of Yogi. There is nothing in the evidence to suggest that Mr Govind's alleged representations were made to Mr Ramanandi personally, as distinct from Mr Ramanandi in his capacity as the alter ego of Yogi.

...

[47] That being so, it is a proper inference that from the outset Mr Ramanandi intended that Yogi would be the purchaser from Pacific Fresh, and that in his negotiations with Mr Govind, he was acting as Yogi's alter ego. In those circumstances, and on the material available to the Court, it does not appear possible for Mr and Mrs Ramanandi to mount a claim against the defendants based on a claimed duty owed to them by the defendants as distinct from duties owed to Yogi. Moreover, the losses claimed in the statement of claim as it stands appear to be those of Yogi. If they are recoverable then Mr Ramanandi will automatically benefit, given that he is the sole shareholder of Yogi. The position is different from that in

⁵³ *Yogi Superette Ltd v Pacific Fresh Ltd* HC Auckland CIV-2004-404-4033, 11 November 2005.

Christensen v Scott where a quite distinct and independent duty claimed to be owed to the shareholders was identified. Even if the approach in *Christensen v Scott* is correct, in that a shareholder may sue for loss of share value independently of a claim by the company concerned, no relevant independent duty to the shareholders is discernible in this case.

[100] The plaintiffs submit that *Yogi* is distinguishable from the circumstances of this case. They submit that here there was a dual duty, and that the duty to the Waterhouses arises outside the underwriting agreement and the contractual relationship it created between CBL and Phoenix. This case, they contend, is not within the “ordinary run of cases”. It does not concern pre-contractual misrepresentations, but fraudulent representations made outside the contract, which occurred two years after the underwriting agreement was entered into. The plaintiffs refer in this context to *Christensen v Scott*, which involved claims in negligence and breach of fiduciary duty. It provides support for an arguable position that if the plaintiffs are able to establish a duty of care owed to them personally, independently of the company, they may sue for personal loss which may include the diminution in the value of their shares in the company.⁵⁴ In that case there was no problem of double recovery (as there is not in this case because Phoenix has been dissolved and cannot sue CBL to recover its loss).

[101] Leaving aside the matter of a duty of care (which would need to be established in this case under the negligence cause of action), *Christensen v Scott* provides limited support for the plaintiffs. The factual situation is different. Mr and Mrs Christensen relied on a duty of care they claimed Peat Marwick owed to them personally in respect of professional accountancy services provided to them as individuals, as distinct from any duty of care owed to their company, which was also represented by Peat Marwick.

[102] Observations of the Court of Appeal on the double recovery point were doubted by Lord Bingham in *Johnson v Gore Wood & Co.*⁵⁵ But Ms Grant notes that *Christensen* was determined by a five-person Court in 1996 and has not been overturned. She submits that, as a policy statement, it is a fair recognition of an independent duty and wrong.

⁵⁴ See particularly at 280.

⁵⁵ *Johnson v Gore Wood & Co* [2002] 2 AC 1. See also the discussion in *Yogi Superette Ltd v Pacific Fresh Ltd* at [36]-[39].

Conclusions

[103] I consider that it cannot be excluded on the pleadings and the evidence that Mr Geoff Waterhouse could establish independent duties owed to him by CBL and that the alleged misrepresentation was made to him and relied upon by him in his personal capacity, as distinct from his position as the *alter ego* of Phoenix. But I do not consider this is so for Mr Robert Waterhouse.

[104] The matters that point to Mr Geoff Waterhouse potentially being able to establish that there were duties owed to him personally outside and independently of the contractual relationship between CBL and Phoenix, are as follows:

- (a) Mr Geoff Waterhouse held the Surplus Lines Broker's Licence. This is referred to and specifically acknowledged under the heading "Regulations" in the underwriting agreement.⁵⁶ Without it, Phoenix could not carry on the business it contracted with CBL to perform.
- (b) CBL (Mr Harris) knew that Mr Geoff Waterhouse was the sole director and shareholder of Phoenix and that he held the Surplus Lines Broker's Licence, pursuant to which the policies for the Livery Insurance business were written.
- (c) If Geoff Waterhouse was to continue to make available to Phoenix (which had a separate Agency Insurance Licence), his personal Surplus Lines Broker's Licence so Phoenix could transact business under the CBL underwriting agreement, he was entitled to be assured (and hence to rely on CBL's assurance) that CBL could comply with the changed criteria of the Georgia Insurance Commissioner in 2002, as notified to Mr Harris by Mr Geoff Waterhouse.
- (d) The alleged representation or representations were made by CBL to Mr Geoff Waterhouse in person.

⁵⁶ See at [97] above.

- (e) Mr Geoff Waterhouse was the sole director and shareholder of Phoenix and therefore he had the capability to “arrange for Phoenix to transfer its underwriting business to MSI” as is pleaded in the statement of claim.

[105] However, in the case of Robert Waterhouse:

- (a) He apparently held an Agency Licence but there is no mention of this in the underwriting contract, nor is there any suggestion in the pleadings or the evidence that it was critical, or even a contributor, to the Livery Insurance business the subject of the underwriting agreement.
- (b) He was not a director or a shareholder of Phoenix.
- (c) He appears only to have performed administrative functions within Phoenix and had no direct contact with Mr Harris or CBL. It seems that Robert Waterhouse was simply an employee of, or possibly a contractor to, Phoenix.
- (d) There is no evidence that Mr Robert Waterhouse was the recipient of the alleged misrepresentation by Mr Harris to Mr Geoff Waterhouse.
- (e) There is no evidence that Mr Robert Waterhouse personally had any form of interest in the “goodwill” of the business of Phoenix. He simply asserts that he would inherit an interest from his father (which would have been unknown to CBL in 2002).
- (f) There does not seem to be any dispute about Mr Harris’s evidence that he and CBL were unaware of the existence of Main Street Brokers or any other business of Robert Waterhouse.
- (g) I do not consider significant the fact that in CBL’s proposal for business dated 7 November 2000 there is reference to “Phoenix and its agents” being able to sell other products into their markets. This

recognises no more than typical sales practice for insurance brokers. Further, two references in the proposal to Mr Robert Waterhouse having “a good accounting and administration background” do not support the proposition that Mr Robert Waterhouse had any standing or capacity independent of Phoenix which would support independent causes of action against CBL.

[106] Therefore, while Mr Geoff Waterhouse may be able to establish that he has personal capacity to sue CBL on the basis of the alleged misrepresentation (which underpins each of the three causes of action), I do not consider there is any basis upon which Mr Robert Waterhouse could do so. In summary, I accept the submissions of CBL set out above in respect of Mr Robert Waterhouse. I find on the balance of probabilities that none of his claims against CBL can succeed. I therefore grant summary judgment in favour of CBL in respect of the claims of Robert Waterhouse.

Causes of action

[107] Given these conclusions, I turn to consider the three causes of action in the draft second amended statement of claim in relation to Mr Geoff Waterhouse only.

Deceit

[108] The components to sustain the tort of deceit are well established.⁵⁷ There must be proof of fraud. Fraud is proved where there is proved: (1) a representation of fact; (2) that is false; (3) that is made knowingly or without belief in its truth; or (4) recklessly, careless as to whether it be true or false. Further, the representor must have intended the representation to be relied upon; the representee must have relied upon the representation; and the representee must have suffered damage.

⁵⁷ *Derry v Peek* (1889) 14 App Cas 337 at 374; *Peek v Gurney* (1873) LR 6 HL 377; *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 2015; *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608. The result in the Court of Appeal was reversed in part by *Maruha Corporation v Amaltal Corporation Ltd* [2007] NZSC 40; [2007] 3 NZLR 192, but the reversal related to the Court’s interpretation of the facts of the case, not the principles expressed.

[109] Whether and to what extent these essential elements are established by the evidence in the case will be matters for trial. But, on the basis of the pleadings and the affidavit evidence, it cannot, in my view, be excluded that Mr Geoff Waterhouse can establish that the alleged representation by Mr Harris was made to him personally as distinct from being made to him as the alter ego of Phoenix (as CBL maintains), such that the elements of the tort of deceit can be proved.

[110] I do not accept the submission of CBL that “on the evidence before the Court in relation to the summary judgment application, the possibility that the alleged representation (if made) was made by CBL knowing it was untrue or without belief in its truth, or recklessly to its truth, can safely be rejected”. Essentially, Mr Harris asserts that he did not know the purchase of MSI by CBL had not been completed; that while the MSI agreement provides that it is effective upon execution, because of problems with the bond required, which arose subsequently, the agreement was not completed and the sum of \$40,000 paid by CBL to a lawyer in Western Samoa was refunded. These are all matters which must be determined after full evidence at trial.

[111] The plaintiffs submit that issues arise as to whether there were continuing misrepresentations because of the failure by CBL to advise Mr Geoff Waterhouse of developments that followed from the allegedly concluded contract with MSI.

[112] There are limited circumstances when non-disclosure, as distinct from a false representation as to a past or existing fact, can amount to a false representation for the tort of deceit. In *Amaltal Corporation Ltd v Maruha Corporation* the Court of Appeal said:⁵⁸

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

⁵⁸ *Amaltal Corporation Ltd v Maruha Corporation* at [47].

circumstances (*Brownlie v Campbell* (1880) 5 App Cas 925 at 950 per Lord Blackburn (HL)).

[113] This aspect was raised in submissions by the plaintiffs but there is no pleading to this effect. The pleadings, including the draft second amended statement of claim, plead a one-off representation that:

- (a) The acquisition of MSI by CBL was complete; and
- (b) CBL had put in place US\$3m in capital and surplus.

[114] In the absence of a specific pleading I make no further comment on this issue.

[115] CBL has not made out a case for summary judgment or striking out of this cause of action in relation to the first plaintiff, Mr Geoff Waterhouse.

Negligent misstatement

[116] The claim in negligence is founded in the tort of negligent misstatement. The first plaintiff pleads that the representation set out above,⁵⁹ made to him by Mr Harris in about 2002, was false and was made negligently in breach of a duty of care owed to him by CBL.

[117] The critical issue in imposing a duty of care on a statement-maker is whether the statement-maker assumed responsibility to the person to whom it is made to take reasonable care in making the statement.⁶⁰

[118] The first plaintiff alleges that CBL assumed responsibility to him for its statements regarding its acquisition of MSI and its capital increase, as CBL would have foreseen or ought to have foreseen, that he was relying on what was said. CBL was aware of the fact that Phoenix no longer complied with the Georgia Insurance Code and that as a consequence Phoenix was not in a position to issue valid insurance policies.

⁵⁹ At [114].

⁶⁰ *Attorney-General v Carter* [2003] 2 NZLR 160.

[119] The plaintiffs refer to the following statement by Tipping J in *Carter*:⁶¹

The law will, however, deem the defendant to have assumed responsibility and find proximity accordingly if, when making the statement in question, the defendant foresees or ought to foresee that the plaintiff will reasonably place reliance on what is said. Whether it is reasonable for the plaintiff to place reliance on what the defendant says will depend on the purpose for which the statement is made and the purpose for which the plaintiff relies on it.

[120] Referring to *Christensen v Scott*,⁶² the plaintiffs allege that the duty owed to them by CBL was owed to them in their capacity as insurance agents not only (in the case of Mr Geoff Waterhouse) as shareholder and contractor of Phoenix.

[121] CBL says that there can be no dispute that it owed Phoenix a duty of care in contract as well as other related duties; and that if the alleged misrepresentation constituted a breach of that duty, then Phoenix, if it suffered loss, was entitled to sue CBL in damages. The submission focuses on the absence of any separate duty of care owed by CBL to Mr Geoff Waterhouse on the basis that there was no separate relationship between him and CBL, he being merely the agent of Phoenix.

[122] These issues will require determination of the nature of the relationship between CBL and Phoenix and CBL and Mr Geoff Waterhouse. These are factual matters requiring full evidence at trial.

[123] Likewise whether the subsequent actions taken by the Georgia State authorities were reasonably foreseeable consequences of the alleged negligent misstatement will need to be determined on the basis of full evidence at trial.

[124] Mr Geoff Waterhouse will also need to establish (if he is successful in proving a duty of care owed to him by CBL and breach of that duty of care by negligent misstatement) that the claimed losses are losses suffered by him rather than by Phoenix.

⁶¹ At [26].

⁶² *Christensen v Scott*.

[125] However difficult this may be, CBL has not made out a case for summary judgment or striking out of this cause of action in relation to the first plaintiff, Mr Geoff Waterhouse.

Breach of fiduciary duty

[126] The first plaintiff pleads that he relied on CBL's advice regarding the transfer of CBL's underwriting business to MSI, and that he was entitled to place trust and confidence in CBL. This, he submits, is the "essential determinative characteristic of a fiduciary duty". He pleads that CBL breached its duty by preferring its financial interest over that of the plaintiffs and by failing to disclose that it had not entered into an agreement with MSI.

[127] Counsel referred to the following statement by Tipping J in *Chirnside v Fay*:⁶³

[80] It is clear from the authorities that relationships which are inherently fiduciary all possess the feature which justifies the imposition of fiduciary duties in a case which falls outside the traditional categories; all fiduciary relationships, whether inherent or particular, are marked by the entitlement ... of one party to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.

[128] The first plaintiff submits that the relationship here, while not inherently fiduciary, is fiduciary in the particular circumstances of the case. Because of the close relationship between him and CBL, he was entitled to place trust and confidence in CBL, represented by Mr Harris.

[129] CBL says that the concept of a breach of fiduciary duty is inapt to deal with claims of misrepresentation arising in a business context. It submits that outside the context of partnerships and joint ventures, it is inappropriate to impose duties of loyalty, trust and confidence on arm's length commercial parties, particularly duties

⁶³ *Chirnside v Fay* [2007] 1 NZLR 433 at [80].

to refrain from conflicts of interest. It submits that on the basis of the authorities,⁶⁴ it cannot be said that the relationship between CBL and Phoenix was inherently fiduciary. Phoenix was not entitled to repose and did not repose trust and confidence in CBL in respect of any aspects of CBL's obligations to Phoenix. In any event, even if duties of good faith and truth arose between CBL and Phoenix as implied terms under the underwriting agreement, it does not follow that CBL owed comparable duties to Mr Geoff Waterhouse (let alone Mr Robert Waterhouse).

[130] Butler notes that the presumptions regarding the non-fiduciary nature of "arm's length" commercial transactions are unhelpful, as many fundamental fiduciary relationships are commercial in character.⁶⁵ He observes that the abstract presumption that all commercial transactions are made at arm's length may preclude a critical analysis of the facts of a given case.⁶⁶ These comments are reflected in case law, where it has been held that the fact that actions in contract and tort exist concurrently or that parties are in a commercial relationship, do not prevent the Court from investigating fiduciary claims.⁶⁷ A better approach is to carefully weigh the facts of a given case to ascertain whether the relationship was fiduciary.⁶⁸

[131] In ascertaining the nature of the relationship, the Court may have regard to the course of dealing, including the express agreement between the parties, in this case being the underwriting agreement dated 1 December 2000. Fiduciary law will not apply if the alleged fiduciary is able to act completely in its own interests.⁶⁹ An expectation that a commercial party will honestly and conscientiously carry out its contractual obligations does not render the relationship fiduciary.⁷⁰

⁶⁴ *Chirnside v Fay* at [72]-[90], *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 3 NZLR 169 at [30]-[33], *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 1192 at [18]-[24], *March v Attorney-General* [2010] 2 NZLR 683 at [14]-[25] and *Taylor v Attorney-General* HC Auckland CIV-2010-404-6985, 11 November 2011 at [72]-[74].

⁶⁵ *A Butler Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009).

⁶⁶ At [17.2.14].

⁶⁷ See for example *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 at 321 and the comments made in *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 at 22.

⁶⁸ *Chirnside v Fay* at [80].

⁶⁹ *Maruha Corp v Amaltal Corp Ltd*.

⁷⁰ *Re Goldcorp Exchange Ltd (in rec)* [1994] 3 NZLR 385 at 400.

[132] In this case CBL and Phoenix were involved in a commercial contractual relationship. The reasoning process by which fiduciary duties are said to be owed to Mr Geoff Waterhouse is tenuous. This claim strains to attach fiduciary duties to the factual situation that appears to arise. However, there are factors such as the geographical separation between Mr Geoff Waterhouse and Mr Harris, and that the arrangements involving MSI and all knowledge about them were in the control of CBL alone, which may indicate the existence of such a duty. I cannot be satisfied that the claim by Mr Geoff Waterhouse for breach of fiduciary duty is so certainly or clearly bad that it should be precluded from going forward. Determination will require resolution of the factual situation after full evidence.

Result

[133] For the reasons given above:

- a) There will be summary judgment for the defendant in respect of the claims by the second plaintiff Mr Robert Waterhouse.
- b) Otherwise, the defendant's application for summary judgment or for striking out of the plaintiffs' claims fails.

Next steps

[134] I direct:


- (a) The first plaintiff, Mr Godfrey Waterhouse is to file and serve an amended statement of claim within 21 days of the date of this judgment.
- (b) Any interlocutory applications by the defendant (including but not limited to further particulars and particulars of damages to the extent these are not adequately particularised in the amended statement of claim to be filed) together with any supporting affidavits are to be

filed and served within 21 days of the filing of the amended statement of claim by the first plaintiff.

- (c) Any notices of opposition and supporting affidavits by the first plaintiff are to be filed and served within a further 14 days.
- (d) The proceeding is to be called for further mention in the Commercial List at 9.15 a.m. on Friday 28 September 2012 with leave reserved to either party to seek an earlier mention if further or alternative directions are required from the Court.⁷¹

Costs

[135] Both parties have had some measure of success. I consider costs should lie as they fall. However, I have not heard from the parties on costs. If the parties are unable to agree costs with the benefit of that indication, memoranda may be filed. I consider costs category 2B to be appropriate



⁷¹ The judgment of the Court of Appeal pursuant to leave granted by Allan J on 15 March 2011 may impact the above directions.