1 of 1 DOCUMENT: Unreported Judgments NSW

389 Pages

DAVIS and ORS v MORTGAGE ACCEPTANCE NOMINEES LTD and ORS - BC9402679

SUPREME COURT OF NEW SOUTH WALES COMMERCIAL DIVISION
ROLFE J

50173 of 1993

29-30 November, 1-3, 6-10, 13-17 December 1993, 14-18, 21-22 February; 1994, 20 April 1994

BC9402679 at 1

Claim by the plaintiffs, who were borrowers from the first defendant, to avoid certain contracts or alternatively for damages. Proceedings dismissed.

Cross Claim by the first defendant to recover the amount lent and interest thereon. Judgment for the Cross Claimant.

The cases considered in relation to the various legal issues raised are set out hereunder under specific headings.

Held that a third party financier, unaware of any statutory illegality and not involved in the setting up of the transaction affected by illegality, does not owe a fiduciary or common law duty to the borrower and is not affected by illegality: the obiter dicta in Hurst and Ors v Vestcorp Ltd (1988) 12 NSWLR 394 in relation to innocent third parties not followed. Principles of unjust enrichment considered if recovery under the contracts not permitted.

Construction and severability of acts done under a Power of Attorney.

FIDUCIARY DUTY

Emma Silver Mining Co v Lewis (1879) 4 CPD 396 at p.407
Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218
United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1
Traces and Ors v Mandalay Pty Ltd (1953) 88 CLR 215
Hospital Products Ltd v United States Surgical Corporation and Ors (1984) 156 CLR 41
Weinberger v Kendrich (1892) 34 Fed Rules Serv (2nd) 450
Catt and Ors v Marac Australia Ltd and Ors (1987) 9 NSWLR 639

THE COMMON LAW DUTY

Beneficial Finance Corporation Ltd v Karavas and Ors (1991) 23 NSWLR 256
Commonwealth Bank of Australia v Smith and Anor (1991) 102 ALR 453 at 475 and 476
NIAA Corporation Ltd v Brophy (Rolfe J, 15 March 1994)

ILLEGALITY

Hurst and Ors v Vestcorp Ltd (1988) 12 NSWLR 394
Giorgianni v The Queen (1985) 156 CLR 473
Johnson v Youden [1950] 1 KB 544 at 546
Yango Pastoral Co Pty Ltd and Ors v First Chicago

Australia Ltd and Ors (1978) 139 CLR 410
Troja v Troja (Court of Appeal - 29 March 1994 - unreported - per Mahoney JA at 16 of his Honour's reasons)
Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221
Carney v Herbert [1985] AC 301
Kearney v Whitehaven Colliery Co [1893] 1 QB 700 at 713
Lee v Evans (1964) 112 CLR 276
Australian Softwood Forests Pty Ltd and Ors v Attorney General for the State of New South Wales ex Rel Corporate Affairs Commission (1982) 148 CLR 121
Mutual Home Loans Fund of Australia Ltd v Attorney General (NSW) (1973) 130 CLR 103 at 118, 120
Van Reesema v Flavel, Australian Growth Resources Corporation Pty Ltd v Flavel (1987) 11 ACLR 463
Corporate Affairs Commission (South Australia) and
Anor v Australian Central Credit Union (1985) 61 ALR 236 at 240
WA Pines Pty Ltd and Ors v National Co and Securities Commission (1987) 11 ACLR 545 Burt CJ, at 548
Kirton v Venture Acceptance Corporation (1986) 5 NSLWR 274

UNJUST ENRICHMENT

Pavey and Matthews Pty Ltd v Paul (1986) 162 CLR 221
Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation (1987 and 1988) 164 CLR 662
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353

ALLEGED BREACH BY MANL OF S75B OF THE TRADE PRACTICES ACT

Yorke and Anor v Lucas (1983 and 1984) 158 CLR 661

THE VALIDITY OF THE POWER OF ATTORNEY

Blake v Lane (1876) 2 VLR (L) 54
Doe de Ellis v Sandham (1787) 1 TLR 705
Alexander v Alexander (1755) 2 Ves Sem 640 at 644
Attorney General v Teece (1904) 4 SR (NSW) 347
Marriott v The General Electric Co Ltd (1935) 53 CLR 409
Crabtree Vickers v Australian Direct Mail [1975] VR 607 at 617
Lamshed v Lamshed 109 CLR 440
Australian Blue Metal Ltd v Hughes [1962] NSWR 904 at 925

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Rolfe J

INTRODUCTION In 1985 the Federal Government announced its intention to amend the Income Tax Assessment Act 1936 to provide taxation benefits for those minded to invest in thoroughbred horses for racing and/or breeding. Shortly thereafter it did. The availability of such benefits was not lost on initiators and planners of taxation minimisation arrangements or schemes, or on the investing public. Various companies became promoters of vehicles, which were normally referred to as syndicates, through which such an investment could be made.

Generally speaking the promoter put together a band of horses. Some bands were comprised of race horses or colts and fillies thought to be likely to race, some were comprised of brood mares, and some combined both types. The horses were purchased either by the promoter and on sold to a financier, or by the financier after being selected by the promoter. The syndicate was promoted on the basis that a designated entity would manage the horses on behalf of the investors. After purchase by a financier, the horses were leased to investors of syndicates for a period, usually, of three or four years. The financier lent the investors money to finance the operation of each syndicate. The investors derived substantial taxation benefits on the obligations and liabilities thus created.

BC9402679 at 2

To take advantage of those benefits it was highly desirable, if not essential, that the financial arrangements should be consummated prior to midnight on 30 June. Notwithstanding that this may occur on or very close to the time on that date, provided the arrangements were in place, the investor would obtain a taxation advantage for that financial year on the basis, as I understand it, that obligations were incurred in that year. Accordingly an investment on, e.g. 30 June 1989, provided taxation benefits in respect of that financial year.

Investment in the syndicates was described frequently as "speculative". The documents urging people to invest did not seek to hide the speculative or risky nature of the investment. The brochures and other literature emanating from promoters, generally speaking, made this very clear. One appreciates that any form of investment has a speculative element and events of recent years have shown that no investment is immune from adverse economic conditions.

But investments in horse syndicates had particular risk elements, which were well recognised. Race horses had to perform successfully on the track to return reasonable prize money, which, whilst they were racing, provided the only form of income they produced. Therefore, they had to overcome the misfortunes of injury, illness, lack of form, unfortunate racing conditions, meeting horses of superior speed and the other vagaries of the race track. As was apparent from the evidence in the present case the percentage of prize winners to the number of horses racing is not high.

BC9402679 at 3

Brood mares had to go into foal and produce live foals of good confirmation and health, which in turn proved attractive, ultimately, to purchasers of yearlings. It is helpful to understand the breeding and selling timetable. All horses have their birthday on 1 August each year. A foal, irrespective of the date of its birth, turns one year old on the first 1 August after its birth. The studmaster's aim is to have mares, the gestation period for which is about eleven months, foaling as soon after 1 August as possible. Whilst it is detrimental to have a foal born shortly before that date, it is undesirable that the foal should be born too long after it because, come the first 1 August in its life, it is younger than foals born nearer to but after 1 August. Hence, usually, it is less well developed than foals born earlier, and the mare's breeding pattern, of necessity, becomes later.

The foal, after its birthday on 1 August in the year after it is born, becomes a yearling and, if of desirable quality, health and confirmation, is entered for sale early in the following year. Thus a mare served in 1989, all being well, should foal after 1 August 1990. The progeny becomes a yearling on 1 August 1991 and is available for sale in early 1992, the major yearling sales being held on the Gold Coast in January and in Sydney at Easter each year. Thus a syndicate would have to wait some two and a half years before deriving any income from the progeny of a brood mare, which was not in foal at the time of introduction. The brood mares in the present case were not in foal when the syndicates were formed.

BC9402679 at 4

Some syndicates, to generate a cash flow one year earlier, had within the band of horses weanling colts and fillies, ie colts and fillies born, on the example to which I have just referred, after 1 August 1988 and, therefore, once again on the assumption that all goes well, available for sale in early 1991. Apart from the obvious exigencies of breeding livestock to which this operation is subject, the ultimate success is dependent upon the market for yearlings several years later. Potential race horses, for that is all a yearling is, are not a necessity and a downturn in economic conditions not only makes yearlings difficult to sell but, generally, depreciates their value as against that expected at the time of entry into the syndicate.

It is for these, inter alia, reasons that the promotional material warned that there were risks in the investment and characterised it as speculative.

The investors, as the present case demonstrates, ranged from those with a real interest in and understanding of the industry, such as Mr **Beatty** and Mr **McConnell,** to those with no particular interest at all, save that they were able to obtain a taxation advantage. Whilst the investment in such an enterprise is not susceptible of any reasonable criticism for the latter reason, the assertion that investors regarded the investment as "sound" must, frequently, be viewed with a healthy scepticism having regard to the types of problems to which I have referred.

BC9402679 at 5

THE PARTIES Baker and McKenzie is, and was at all material times, an international law firm with offices throughout the world. The Sydney office was founded by one of the plaintiffs, Mr JK Connor, in about 1964. The first and second plaintiffs were, at all material times, and still are, with one exception, partners in that firm based mainly in Sydney. The exception is Miss Jennifer Primrose Wilson, who ceased to be a partner on 30 March 1992. The fourth plaintiff, Mr Keith Stevens **McConnell,** was, at all material times, a senior partner in the firm. He ceased to be a partner in about 1991 It is reasonable to infer this occurred, at least substantially, by reason of his involvement in recommending certain syndicates, to which I shall refer in more detail shortly, to the first and second plaintiffs in early June 1989. All the plaintiffs were, at all material times, experienced commercial law solicitors. Whilst their expertise, within that description, varied eg Mr Fraser specialised in taxation law, Mr Blessington in insolvency law and Mr Taperell in trade practices law, the general description is sufficient.

Because, I infer, of the international nature of the practice, the first and second plaintiffs spent quite considerable periods out of Australia. This made meetings between all of them difficult. There was evidence that when a partner introduced a commercial transaction to other partners for their consideration as a private investment, the introducing partner, generally speaking, had the carriage of and took basic responsibility for the matter. The impression, and I think the proper inference from the evidence, is that the other partners would rely on the introducing partner's assessment of the investment to a considerable extent. This, coupled with the matter to which I have already referred, would account for the tensions which developed between Mr **McConnell** on the one hand and the first and second plaintiffs on the other.

BC9402679 at 6

The third plaintiffs did not participate in the proceedings.

The first defendant, ("MANL"), was, at all material times, a financier. Shortly before 30 June 1989, and after the promotional material in respect of the syndicates had been issued, it was approached to provide finance for them, which it agreed to do. Much of the case has focused on the role of MANL, its contention being that it was nothing more nor less than an arm's length financier. The plaintiffs assert that it was a promoter of the scheme, that it was guilty of conduct proscribed by s52 and s75B(a) and s75B(c) of the Trade Practices Act 1974, that it owed and was in breach of a fiduciary duty to the plaintiffs, and that it was guilty of negligence in lending money to them.

The second defendant, which went into liquidation in May 1990, was the promoter of both syndicates the subject of these proceedings and the original manager of one. The directors of the second defendant, to which I shall refer as "B and T", were Mr Bell, the third defendant, and Mr Tonkes. They were the original managers of the other syndicate. No relief is sought against B and T or the third defendant. The fourth defendant was a finance broker against which, at the end of the hearing, it was announced the only claim was for six tenths, in respect of one syndicate, and two tenths, in respect of another syndicate, of $10,000. It was also announced that a claim for alleged criminal conduct against the fourth defendant was abandoned. I shall say more about a party being involved in proceedings in this Court, leaving aside the interlocutory proceedings, for twenty days against which very serious allegations are made but not pressed, and against which such limited relief is ultimately sought. It is unnecessary to consider any case against the fifth, sixth and seventh defendants.

BC9402679 at 7

THE FORMATION OF THE SYNDICATES By early June 1989 B and T had gathered together, to use a neutral term, a number of horses. It was seeking to promote three syndicates, in which both prospective race horses and brood mares were to be included, referred to as the B and T Racing and Breeding Syndicates No 1, No 2 and No 3. The No 2 Syndicate was not formed. I shall refer to the others as "the No 1 Syndicate", of which B and T was the original manager, and "the No 3 Syndicate", of which Messrs Bell and Tonkes were the original managers. Each had ten shares or units and for them to go ahead all ten shares or units in each syndicate had to be taken up. The first and fourth plaintiffs each took one share or unit in the No 1 Syndicate. Mr Connor took one and Messrs Logaraj and Blessington took one jointly in the No 3 Syndicate.

The entry into the syndicates was financed by MANL. It entered into various agreements, including lease and loan agreements, with the first and fourth plaintiffs on 30 June 1989, and it seems to be accepted, notwithstanding the evidence of Mr Cross which appears to be to the contrary, with the second plaintiffs on 12 July 1989. That is the date the documents bear and on which "settlement" took place. It has always been asserted by the second plaintiffs that they were entitled to derive taxation benefits for the financial year ended 30 June 1989 and they claimed and were allowed such benefits. All plaintiffs claimed deductions consequent upon the agreements and additionally the second plaintiffs claimed deductions consequent upon the asserted arrangements for the financial year ended 30 June 1989, and consequent upon the agreements for various subsequent financial years.

BC9402679 at 8

All the lease and loan documents were signed by Mr Bell on behalf of the plaintiffs. The plaintiffs, notwithstanding that they had not met Mr Bell and that they were aware he was a promoter, who would have been anxious for the agreements and arrangements to go ahead, gave him a Power of Attorney authorising him to enter into documentation on their behalf. There is a dispute as to the documentation into which he was entitled to enter in conformity with the Power of Attorney.

Not only did none of the plaintiffs sign the documents personally, but none attended on settlement nor called for copies of the documents until late in 1989 or early in 1990. Various complaints are made about the execution under the Power. Firstly, it is said that the documents signed did not reflect the arrangement into which the plaintiffs thought that Mr Bell would enter on their behalf. Secondly, it is said that the lease documents in respect of the No 1 Syndicate contained cross guarantees, whereby each plaintiff member of that syndicate was liable for the loan obligations of all other plaintiff members. Thirdly, it is said that the documents contained terms and conditions to which the plaintiffs did not agree or of which they were not aware. Fourthly, it is said that the documents in respect of the No 3 Syndicate were not executed until 12 July 1989 such that there was never any contract between MANL and the third plaintiffs. The reason for this assertion is that the Power of Attorney, on its face, expired on 30 June 1989. Notwithstanding, this may seem a somewhat surprising submission in view of the fact that the money was undoubtedly lent to the third plaintiffs and used by them for the contemplated purposes and, further, gave rise to the taxation deductions claimed, including those for the year ended 30 June 1989. The complaint about the terms of the contractual documentation is also surprising as it was produced to and executed by the plaintiffs' attorney.

BC9402679 at 9

The syndicates went ahead, although not without a fair degree of commercial excitement. B and T's financial difficulties, upon the state of which as at 30 June 1989 much was made in evidence and submissions, were exposed in about September 1989. One may be forgiven for thinking that if B and T's financial viability had been a matter of the high significance placed upon it by the plaintiffs in this litigation, they would have sought to terminate such arrangements as then existed when they became aware of that. They did not but "soldiered on", to adopt the words of the submission, with another manager. Problems arose with the running of the syndicates, most of which seem to have flowed from the failure of the horses, with the notable exceptions of "Mountain Rule", who features quite large in the case, and "Civil Law", to live up to expectations.

BC9402679 at 10

Problems arose amongst the plaintiffs about the financing of the venture and, as Mr **Beatty** said, one reason for the failure of the horses to live up to their potential or expectation may well have been the failure by the plaintiffs to provide the finance to give them the chance to do so. The other plaintiffs took the view that the source of their problems was, at least to a large extent, the failure of Mr **McConnell** to tell them various matters.

MR **MCCONNELL** AS A PLAINTIFF Notwithstanding that by 1991 it must have been obvious that the interests of Mr **McConnell** and the other plaintiffs were severely at odds all joined together to commence these proceedings as plaintiffs. Whilst the plaintiffs, as experienced commercial lawyers, took independent legal advice, I find it extraordi-

nary that the potential problems in joining Mr **McConnell** as a plaintiff were not considered and appreciated. Nonetheless Mr **McConnell** became and remained a plaintiff in the same interest as the other plaintiffs. When it became apparent that he had a direct conflict with the others an application was made for him to be separately represented. The Chief Judge, in the exceptional circumstances of this case, made an order to that effect, so that when the hearing commenced there was the highly unusual situation of plaintiffs being represented by separate legal representatives. Mr White, Solicitor, appeared for all plaintiffs other than Mr **McConnell,** for whom Mr Svehla of counsel appeared. Mr Grieve of Queen's Counsel and Mr Skinner of counsel appeared for MANL and Ms Goddard of counsel appeared for the fourth defendant.

BC9402679 at 11

The situation was made the more intriguing when, during the hearing, Mr **McConnell** compromised his action with MANL, whereupon Mr White said he wished to make an application that Mr **McConnell** be joined as a defendant. He desisted in this when it was made clear that the settlement did not have the effect that Mr **McConnell** was no longer a plaintiff, which confronted Mr White with the seemingly insurmountable obstacle, which he accepted as insurmountable, of establishing that a party could be both a plaintiff and a defendant in the same proceedings.

After Mr **McConnell** and MANL settled their differences Mr Svehla withdrew and Mr **McConnell** took no further part in the proceedings and was not called to give evidence by any party.

THE OPERATION OF THE SYNDICATES Whilst the impression may be given that the syndicates were a financial disaster that is not necessarily so. As Mr Grieve pointed out the plaintiffs claimed taxation deductions for the financial years ended 30 June 1989, 1990, 1991 and 1992 totalling $1,457,817; and the gross prize money won, of which none was accounted for to MANL, was $278,805, of which $212,940 was attributable to the No 1 Syndicate and $65,865 was attributable to the No 3 Syndicate. The syndicates sold horses for a total price of $357,681. This was done, so it is alleged, without MANL's consent or approval, notwithstanding MANL was the owner of the horses, and there was no accounting to MANL for the proceeds.

BC9402679 at 12

THE "MOUNTAIN RULE" PROCEEDINGS The sale of horses generated, both in these proceedings and in some previous proceedings, to which I shall refer in a moment, fair heat. The No 1 Syndicate purported to sell a half share in "Mountain Rule" for $50,000 in 1991. As I have said this horse performed to or perhaps above expectations, which can be measured not only by the fact that he ran third in an AJC Derby, but also by the fact that that placing contributed approximately $100,000 to the earnings of the No 1 Syndicate from prize money. In August 1991 MANL instituted proceedings against the first plaintiffs for declaratory relief that they had no title to "Mountain Rule" and, in effect, for a declaration that a sale of the horse was unlawful. The first plaintiffs defended the proceedings asserting, inter alia, that notwithstanding they were lessees of "Mountain Rule" from MANL they were nonetheless entitled to sell the horse. Prima facie this may seem a somewhat strange assertion and Cohen J rejected it.

The warmth arose because it was said against the plaintiffs that they, as experienced commercial lawyers, must have been aware that they had no right to sell "Mountain Rule". It was increased by the fact that after the decision of Cohen J, in respect of which an appeal was instituted but not prosecuted, another three horses, one from the No 1 Syndicate and two from the No 3 Syndicate, were sold. It was submitted that whatever may have been the view of the plaintiffs before Cohen J gave his judgment, they could have been under no doubt that it was impermissible for them to sell horses, the subject of the same arrangements, after that judgment had been given and that, notwithstanding, not only were horses sold but there was no accounting to MANL for the proceeds. It was agreed that I could have regard to his Honour's decision.

BC9402679 at 13

The plaintiffs, who were cross examined about this matter, sought to meet the suggestion that their conduct was highly questionable and fell far short of that expected of solicitors by stating that they were not aware of the actions taken by the manager, who was their agent. It will be necessary for me to deal with this in more detail subsequently.

THE CLAIMS AGAINST AND BY MANL The Amended Statement of Claim seeks, as against MANL, a declaration that the first and second plaintiffs are not bound by the agreements, alternatively an order declaring them void in whole, an order that MANL repay to them all moneys paid to MANL under the agreements, damages, equitable compensation and consequential relief.

In addition to defending the proceedings MANL has cross claimed against the plaintiffs seeking to recover under the agreements $3,469,770.91 together with interest as from 22 February 1994. It will be necessary to dissect this figure in

due course. MANL claims, in the alternative, certain other amounts and submits that, if for any other of the reasons asserted by the plaintiffs, the agreements are unenforceable, it has a remedy by reference to the principles of unjust enrichment. MANL complains that having lent money it has not been repaid and that there has been no accounting for prize money or the proceeds of the sale of horses. This it submits must be viewed in the light of the financial benefits the plaintiffs obtained.

BC9402679 at 14

THE AMENDED STATEMENT OF CLAIM It is desirable, in my opinion, to analyse the Amended Statement of Claim to identify the matters in issue and the case put by the plaintiffs. The Amended Statement of Claim is a composite document, in the sense that it represents the claims made by the first, second, third and fourth plaintiffs. It has been signed by Mr White on behalf of his clients, the solicitor for the third plaintiffs and Mr **McConnell,** who, by the time it was filed, was acting on his own behalf. There are a number of paragraphs in it, which have beside them the letter "(G)". This is a reference to Messrs Gadens, the solicitors acting on behalf of the third plaintiffs. As I have said the third plaintiffs took no part in the proceedings and the allegations made in the paragraphs so designated are not relied upon by the first and second plaintiffs. I shall, accordingly, ignore them.

The matters pleaded in para1 to para15 are not, as matters of fact, in issue. They allege, put shortly, that B and T was duly incorporated, that from 1988 until June 1989 it engaged in the business of promoting and managing thoroughbred racing and breeding syndicates and was a trading corporation within the meaning of the Trade Practices Act 1974, that in late 1988 and at all material times thereafter it was in serious financial difficulties, and that on 1 May 1990 it was wound up.

It is alleged that to fund the formation and promotion of the syndicates B and T procured the agreement of the fourth plaintiff and Mr Robert Gray Logan to act as underwriters in a sum of up to $2m in consideration of an up front payment of commission of 2% of the total loans underwritten and further commissions of 12.5% of total gross income generated from the facility being underwritten by Mr **McConnell.** Mr Logan was an insurance broker, who was well known to the plaintiffs.

BC9402679 at 15

In early 1989 B and T purchased at auction thoroughbred horses, which, together with other horses, were to be placed in three syndicates, including the No 1 and No 3 Syndicates, and to fund the acquisition it secured finance from Excel Finance Corporation Ltd, ("Excel"), and caused Excel, after the purchase of the horses, to lease them not to B and T but to Mr Bell, Mr Tonkes, Mr **McConnell** and Mr Logan, the latter two being either directors of B and T or purporting to act as such. The terms of the lease from Excel are pleaded as is the relationship between Excel and Beneficial Finance Corporation Ltd, ("BFC").

It is alleged that in or about April 1989 Mr Bell, on behalf of B and T, agreed with Mr **McConnell** and Mr Logan that in consideration of their agreeing to act as guarantors for the purchase price of the horses acquired at auction to a maximum amount of $2m, B and T would pay an underwriting fee and promote and use its best endeavours to secure that all ownership units were placed in the three racing and breeding syndicates and that Mr **McConnell** and Mr Logan agreed to take responsibility for placing any units remaining unsold as at 30 June 1989, and to establish and guarantee a facility with the Australia and New Zealand Banking Corporation to meet all holding costs in respect of the horses acquired between the date of their acquisition and when they were sold into the syndicates. B and T obtained an overdraft facility from the Bank on terms pleaded in para12 and, in para13, it is pleaded that these various arrangements were entered into because B and T was in serious financial difficulty.

BC9402679 at 16

In para15 it is pleaded:

"In or about June 1989 Bell and Tonkes, by its agent the fourth plaintiff, published to each of the first and second plaintiffs the following documents ..."

The documents specified were a memorandum from Mr **McConnell** dated 5 June 1989, the brochure for the No 1 Syndicate, and a letter dated 4 June 1989 written by B and T and addressed to "Dear Fellow Investor" to which were attached several documents. It is not suggested that the plaintiffs who entered into the No 3 Syndicate saw a promotional brochure for it. They assumed the terms were the same as the brochure for the No 1 Syndicate, which they saw.

The brochure, as I have said, is Exhibit A, and the letter and the other documents are Exhibit B. Much time was devoted during the hearing to what the plaintiffs gleaned from reading Exhibit B. This was, quite correctly in my opinion, the subject of extensive cross examination on behalf of MANL. In final addresses, and to be precise at 12.48 pm on 18

February 1994, Mr White conceded, for the first time, that there was no evidence that MANL had ever seen Exhibit B. The effect of this concession was, as Mr White accepted, that he could not submit that any of the representations contained in Exhibit B could be brought home, in any relevant way and in the way in which he suggested the representations in Exhibit A could be, to MANL. In the result much time was spent on a topic, which should never have been an issue.

BC9402679 at 17

Whilst the plaintiffs do not seek any relief against B and T they submit that it is open to the Court to make a finding that B and T engaged in conduct in contravention of s52 with a view to then inviting the Court to find that MANL did the same, either by an adoption of the representations made or, alternatively, by itself being held to have made the representations, and for the purpose of seeking to make MANL liable pursuant to s75B(a) and s75B(c).

In a submission directed to the matters pleaded in para4 to para8 and para10 to para13 it is stated:

"These paragraphs relate to the financial difficulties in which" B and T "found itself from late 1988. This is the foundation stone of all causes of action to which this section of the plaintiff's submissions relates. The plaintiffs had no idea. MANL, however, knew of or turned a blind eye to" B and T's "financial plight and permitted it to participate in the syndicates as a lessee and manager (No 1) and a unit holder (No 3); this, notwithstanding that" B and T's "viability was crucial to the success of the syndicates." B and T "was not even appointed manager of the No 3 Syndicate but its principals were, no doubt because" B and T "was an investor."

It is convenient to consider this submission immediately. It is not submitted that the financial difficulties of B and T in any way prejudiced the conduct of the syndicates. It is not said that but for its financial difficulties the syndicates would not have failed. Nor is it said that although B and T allegedly failed to acquire title to the horses this had any detrimental effect on the operation or success of the syndicates. The submission is that MANL failed in its asserted obligations to the plaintiffs by allowing the last shares in the syndicates to be taken up by B and T and, therefore, bringing about the taking up of all the shares or units in each syndicate, which was essential if the syndicates were to proceed. It is submitted that had MANL applied its lending policy to a consideration of B and T's application for membership of the syndicates it would not have approved of it, with the result that the syndicates would never have been completed, with the further result that the plaintiffs would never have suffered any damage.

BC9402679 at 18

Notwithstanding the written submission that B and T's "viability was crucial to the success of the syndicates" I did not understand any submission to be put to support this, if what is meant is that it was crucial to the successful operation of the syndicates. Rather, it was conceded that B and T's lack of financial viability did not have a detrimental effect on the syndicates, and that the gravamen of the submission was as I have just stated it, namely that if it had been appreciated the syndicates would not have proceeded because B and T would not have been accepted as a participant.

The inappropriateness of a submission to this effect is demonstrated by the fact that after B and T's financial problems were disclosed in about September 1989 the first and second plaintiffs took no action to terminate the syndicates but appointed another manager to the No 1 Syndicate, and after B and T was wound up on 1 May 1990 the first and second plaintiffs continued with the syndicates.

The financial problems of B and T are dealt with in the written submissions at some length. The plaintiff's submissions then turn to MANL's knowledge of B and T's financial position. The evidentiary high watermark of any such knowledge is a letter from B and T to MANL dated 30 June 1989, Exhibit E208, enclosing a cheque for $100,000, Exhibit E209, which was not presented. The letter bears a note by Mr Campbell, MANL's secretary:

"No funds in the account to cover the $100,000 - as advised by Greg Trigg at B and T."

BC9402679 at 19

It is said this cheque was sent to ensure a tenth participant in the syndicate was funded by MANL, that being a Mr Grattich. He either did not become a lessee or, if he did, the lease was collapsed. A lease, Exhibit AL, was prepared showing him as a lessee. His name was deleted and that of B and T inserted. This, so MANL submits, begs the question as to the effect of this transaction. Whether that is so it seems to me the proper answer to this matter is the one suggested earlier, namely that the financial problems of this investor did not contribute to or cause the failure of the syndicate.

MANL submits that para1 to para15, with the exception of para1, contain no allegations against it and, further, that there is no evidence that on or prior to 30 June 1989, when the No 1 Syndicate was formed, or on or prior to 12 July

1989, when the No 3 Syndicate was formed, MANL knew of the matters alleged, save that the plaintiffs were partners of Baker and McKenzie.

Para16 alleges that by the documents referred to in para15 B and T, or alternatively Mr Bell, Mr Tonkes and Mr **McConnell,** or alternatively Mr Bell, Mr Tonkes, Mr **McConnell** and Mr Logan, made written representations to the plaintiffs "and each of them". All the documents are referred to although, as I have noted, it was conceded that Exhibit B did not come to the attention of MANL until after 30 June 1989. In para17 it is pleaded that in or about June 1989 B and T, by its agent Mr **McConnell,** made oral and written representations to the first and second plaintiffs.

BC9402679 at 20

Para18 alleges the representations were made for the purpose of inducing the plaintiffs to apply for shares in the syndicates, and para19 alleges that in reliance on the representations and induced thereby the plaintiffs did so and paid the first payment of interest. The incongruity of the pleading alleging that Mr **McConnell,** inter alios, made a representation and in reliance thereon and induced thereby acted in the manner pleaded, is pointed up in MANL's submissions.

It is submitted on behalf of the plaintiffs that I should infer that the applications by them on the application forms in the brochure were "without more" induced by the representations in Exhibit A. The parties have helpfully documented the evidence said to constitute reliance by the plaintiffs and, in due course, it will be necessary to turn to that in some more detail. Additionally the plaintiffs rely upon the inference flowing from the making of the representation followed by the applications to invest: Gould v Vaggelas (1985) 157 CLR 215. The plaintiffs accept, correctly in my view, that they must establish reliance.

It is submitted on behalf of MANL that there is no evidence that the representations pleaded in para16(a)(i) to para16(a)(iii) or in subpara(v) were not true. It is submitted that in relation to the representations pleaded in subpara(iv) and subpara(vi) "it must have been obvious to the plaintiffs, when they read the brochure Exhibit A (if they did) that the statements made in it to that effect were, at that time, inaccurate". The submission notes that none of them received the brochure before, at the earliest, 4 June 1989. Notwithstanding that Mr White submitted that there was no issue taken by MANL about reliance Mr Grieve's submissions state:

"In the light of the evidence given by the plaintiffs, it is impossible for them to say that they were misled by anything in the brochure."

BC9402679 at 21

The issue of reliance was quite obviously seriously in issue.

It is necessary to note that to this stage there is no allegation that the representations were made by or on behalf of MANL.

In para22 it is alleged that in making the representations B and T engaged in conduct in contravention of s52 and, in para23, insofar as the representations were as to future matters, reliance is placed upon s51A(1).

It is submitted that the concession that MANL never received or sighted Exhibit B destroys the totality of the case said to arise therefrom as pleaded in para16(b), para16(c) and para16(d), para18, para19, para20, para21, para22, para23, para64 and para65. I do not understand the plaintiffs to dispute this.

Para24 alleges that prior to 30 June 1989 B and T, by its agent Mr **McConnell,** represented to the first and second plaintiffs, except for Miss Wilson, that it was necessary to sign a Power of Attorney appointing Mr Bell to sign the necessary contractual documents and that a Power of Attorney, in the terms of a document provided by Mr **McConnell,** should be signed. Para24 to para35 concern themselves with allegations about the execution of the documents. I find it convenient to set out the terms of the Power of Attorney, which were in identical terms, save that the Power of Attorney given by the second plaintiffs identified the No 3 Syndicate and Mr Connor's was limited to an amount not in excess of $210,000 in CL3:

"I appoint MURRAY RAYMOND BELL of 121M Darling Point Road Darling Point NSW 2027 to do any of the following on my behalf on or before but not later than midnight June 30, 1989 the following documents with respect to: Bell and Tonkes 1989 Racing and Breeding Syndicate (No 1) 1. To execute the Thoroughbred Investment agreement. 2. To take a lease or sub lease of any livestock or interest therein pursuant to the carrying on of the B and T 1989 Racing and Breeding Syndicate (No 1). 3. To borrow money for my own benefit in respect of the B and T 1989 Racing and Breeding Syndicate (No 1) . 4. To execute any documents ancillary to the powers referred to in CL1, CL2 and CL3 above."

BC9402679 at 22

The position with Miss Wilson was different. A document, Exhibit P, was signed by Mr **McConnell.** It was in the following terms:

"I, Keith Stevens **McConnell** authorise Murray Bell to execute on behalf of Jennifer Primrose Wilson, the identical documents to the ones that he is executing on my behalf for participation in the Bell and Tonkes 1989 Racing and Breeding Syndicate (No 1). I warrant that I have authority to authorise Murray Bell to execute the said documents on behalf of Jennifer Primrose Wilson."

Para30 of the Amended Statement of Claim pleads CL10.1 and CL10.2 of the Deeds of Loan and Guarantee executed on behalf of the first and fourth plaintiffs. In effect each of those plaintiffs gave a guarantee in support of the loans of all the other first and fourth plaintiffs. It is submitted on behalf of the first plaintiffs that the Powers signed by them did not authorise a loan document containing the guarantee pleaded in para30 which, it is submitted, is established by a plain reading of the terms of the Power. Emphasis is placed upon the authority being limited to the borrowing of money for the benefit of the donor of the Power, such that "on no view could it be said that a joint and several guarantee is an incident of the borrowing of money for the borrower's benefit. By definition such a guarantee must concern the borrowing of money for the benefit of somebody else." On behalf of MANL it is submitted that is not the proper construction of the Power of Attorney.

BC9402679 at 23

In relation to Miss Wilson it is contended that, on the assumption that certain evidence she ultimately gave established that she authorised Mr **McConnell** to authorise Mr Bell to execute documents identical to those he was executing on behalf of Mr **McConnell,** a limit to such authority was that it did not exceed that conferred by Mr **McConnell.** Consistently with the submissions made on behalf of the first plaintiffs it is submitted that the Power of Attorney did not authorise the giving of the guarantee and, in addition, reliance was placed on behalf of Mr **Beatty** upon an allegation that Mr Bell did not execute any document pursuant to the authority before midnight on 30 June 1989, although not eventually pressed.

In relation to the second plaintiffs the submission is made that as the Power of Attorney expired on 30 June 1989, and that as the contractual documents in relation to the No 3 Syndicate were not executed until 12 July 1989 the Power had expired, with the consequence that no agreements ever came into existence and nothing Mr Bell did, in his capacity as agent, had the effect of bringing into existence a contract on 12 July 1989.

BC9402679 at 24

In the alternative it is submitted that the purported use of the Power by Mr Bell was in breach of s162A of the Conveyancing Act, that MANL knew of the breach "since the expiry of the Power was manifest on the face of the document" and "therefore aided, abetted, counselled or procured the contravention of s162A". In these circumstances the submission is that the execution of the documents pursuant to the expired Powers was "illegal and void".

MANL submits that these arguments are met by ratification and estoppel. In particular reference is made to the fact that the second plaintiffs knew that the No 3 Syndicate did not settle by the deadline provided in the Power of Attorney. It is obvious the second plaintiffs were aware of this because, on 5 July 1989, Mr Fraser, on their behalf, wrote to Mr Bell, Exhibit 2, in the following terms:

"B and T 1989 Racing and Breeding Syndicate (No 3) We refer to our recent telephone conversation in which you requested our advice in relation to certain agreements entered into by the B and T 1989 Racing and Breeding Syndicate (No 3) ('the Syndicate'). We are instructed that each member of the Syndicate had appointed you as attorney to contract on their behalf in relation to the affairs of the Syndicate. We are further instructed that on June 30, 1989 you agreed on behalf of each member of the Syndicate to accept the terms and conditions under which various parties had offered to provide services to the Syndicate. This acceptance was communicated on June 30, 1989. We understand that the terms and conditions under which the services were to be provided had been fully negotiated and agreed and that they had been incorporated into draft agreements. We are further instructed that on June 30 cheques were drawn in favour of each of the parties that had agreed to provide services to the Syndicate. By your accepting the terms and conditions as set out in the draft agreements as attorney, each member of the Syndicate became contractually bound at that time to meet the fees and expenses agreed in respect of the services to be provided. Accordingly, in our opinion, each member commenced to carry on the business of thoroughbred racing and breeding on June 30 1989 and therefore should be entitled to tax deductions in respect of fees incurred on that date."

BC9402679 at 25

A copy of Exhibit 2 was sent by Mr Cross, an employee of the fourth defendant, to Mr Lock of MANL on 6 July 1989: Exhibit 80 at 406. The awareness of the second plaintiffs was thus drawn to the attention of MANL before settlement. It will be remembered that Mr Fraser's area of expertise was in taxation law.

By a letter bearing date 5 January 1989, which it was agreed should read 5 January 1990, Exhibit 6, Mr Fraser wrote to Mr Petherbridge, a director of the accountants employed by the plaintiffs to investigate the syndicates, concerning the execution of documents on 12 July 1989. The letter gave advice as to whether certain payments made by or on behalf of a Mr Kennedy, who was a member of the No 3 Syndicate, were allowable deductions pursuant to the Income Tax Assessment Act 1936 for the year ended 30 June 1989. Under the heading "Background" it was noted that Mr Kennedy had given a Power of Attorney limited to expire at midnight on 30 June 1989, and that Mr Bell, as the attorney for Mr Kennedy and a number of other members of the syndicate, held discussions on 30 June 1989 with MANL "regarding arrangements under which syndicate members would each borrow $100,000 from MANL ('the Loan') and would also enter into an agreement with MANL to lease an interest in the horses which would be committed to the Syndicate ('the Lease')."

BC9402679 at 26

The letter set out various matters alleged to have been done, on the instructions furnished to Mr Fraser, on 30 June 1989 and:

"Documentation regarding the Loan and the Lease were subsequently prepared. The documentation was signed by Bell and by MANL on July 12, 1989 and in each case the documents purported to take effect from the date on which they were signed. Further, in the case of the Loan, we understand that the facility was not drawn down until July 12, 1989. We also note the Thoroughbred Investor Agreement prepared by MANL was signed by Mr Bell (again apparently on behalf of Kennedy) on July 12, 1989."

There is then a consideration of the law in relation to deductions for the financial year ended 30 June 1989. At 4 it is stated:

"It seems to us that there are factors present in this case which would allow a court to look behind the express terms of the Loan and the Lease. Both of these agreements were executed by Bell on behalf of Kennedy and, as the Power of Attorney executed by Kennedy on July (sic) 30, 1989 was limited to acts to be done in relation to the Syndicate prior to June 30, 1989, Bell clearly acted outside his authority in signing the documents. In our view, therefore, the Loan and Lease are ineffective to bind Kennedy and can therefore be ignored. The fact remains, however, that moneys were advanced by MANL and it is therefore necessary to determine the contractual basis on which this was done."

It will be noted, immediately, that Mr Fraser, at least impliedly, acknowledges that the moneys were lent on a "contractual basis".

He referred to two alternatives and continued:

"We also note that both Bell and MANL, an experienced financier, were aware that the Power of Attorney given by Kennedy would not extend to agreements which could only be concluded after June 30 1989. Thus, it is fair to conclude that the parties would have asked Kennedy to sign the documents himself or to extend the Power of Attorney. Taking these factors into account, we have concluded the better view is that the payments were made pursuant to contracts in place as of June 30 1989. Further, the amounts payable under those contracts was (sic) certain as at June 30, 1989 and the funds were available through the overdraft facility arranged by the Syndicate, to meet these payments."

BC9402679 at 27

Mr Fraser opined that "on balance" a deduction should be available to Mr Kennedy and continued:

"As we advised in our letter of July 5 1989 to Bell and Tonkes Thoroughbred Consultants Pty Ltd, we are of the view that as at June 30 1989 each member of the Syndicate had commenced to carry on the business of thoroughbred racing and breeding. The Syndicate agreement was signed on that date, the horses had been identified, as had their trainers and written commitments had been made to the respective trainers with respect to payment of their fees."

On behalf of MANL it is submitted that ratification and adoption defeat any attempt by the plaintiffs to assert that the execution of the contractual documents was illegal or rendered them void, it being noted, in particular, that after the plaintiffs received the documents in February 1990 not only did they take no steps to avoid them on the grounds now put forward, but they continued to take all the benefits from the agreements. It is further submitted that Mr Bell was still

held out as having authority, although not pursuant to the Power of Attorney, to execute the documents on behalf of the plaintiffs.

In para36 it is pleaded that at all material times prior to June 1989 MANL was a trading or financial corporation within the meaning of the Trade Practices Act; was engaged in the business of a bloodstock financier, which formed a significant part of its loan portfolio; purported to have expertise in the financing of bloodstock syndicates including thoroughbred racing and breeding syndicates, and had adopted a bloodstock lending policy. The particulars of those allegations are a discussion paper dated 21 March 1989, Exhibit E12, and a bloodstock lending policy dated 20 June 1989, Exhibit E20.

BC9402679 at 28

The submissions are made that the lending policy was only, apparently, formulated on 20 June 1989, that its requirements were ignored by Mr Lock when he considered the request for funding, and that this "evinces that, far from being an expert bloodstock financier, MANL chose not to follow its own policy. If it had, it most certainly would not have financed these syndicates."

There is set out, at length, the ways in which it is said MANL failed to follow the policy. These submissions also appear to relate to para37 which pleads various things MANL did as part of its business of bloodstock financing, and para38 which alleges, somewhat irrelevantly as the case was presented, that the majority shareholding in MANL was owned by BFC, the loan funds were provided by it to MANL, and that in respect of these syndicates it was a requirement that BFC approve the fundings. It is, with respect to the pleader, difficult to see precisely where these allegations are leading, although in para43 certain knowledge is imputed to MANL. On the hearing some of those allegations, such as MANL having any knowledge of the terms of Exhibit B, and knowing of the specific problems B and T was experiencing meeting its commitments to Excel, were abandoned. Notwithstanding, in relation to the lastmentioned matter, the submission was made:

"However, the plaintiffs rely upon MANL's knowledge of" B and T's "financial difficulties, referred to in the submissions above."

BC9402679 at 29

Mr White stated that this was only relied on to establish that the syndicate would never have gone ahead, not to found a submission that because of the financial problems the operation and performance of the syndicate was jeopardised. I have referred to the way this submission was put earlier.

In para43(h) it is alleged that MANL "ignored or alternatively took no steps to ensure that the terms of its bloodstock lending policy were complied with". Certain particulars are furnished of that.

It was submitted, on behalf of MANL, that firstly no consequence, other than that to which I have referred, of the alleged failure to comply with the policy was established; secondly, that even assuming there had been a failure to comply with the policy it could not be suggested that MANL owed, either generally, or in the circumstances of this case, any duty to the plaintiffs to do so; and, thirdly, that there was no evidence, even assuming the existence of a duty, that the failure to comply with the policy, or that the adoption of the method for lending, constituted any breach. In this regard it was submitted that there was no evidence whether the lending policy of MANL was conservative or reckless or lay somewhere between those possible limits. In other words it was submitted that it did not matter what MANL's lending policy was. The plaintiffs applied for loans, which were granted. It was not suggested that it was inappropriate to make a loan to any of the plaintiffs per se, the submission being that no loans should have been made thus preventing the syndicates from proceeding. It was not suggested that the position of B and T as a syndicate member made any difference to the financial viability or the operation of the syndicates. It was simply said that if MANL had applied its policy it would never have made any loans so that the syndicates would not have gone ahead, with the consequence that no loss would have been incurred by the plaintiffs. In my opinion no legal basis has been established imposing a duty on MANL to follow its lending policy, and it has not been established that if there was a failure to do so, that failure, as opposed to the consequence of lending money, led to any loss. Insofar as the lending of money is said to have caused loss that simply ignores that MANL was requested and agreed to do so on terms the plaintiffs, by their attorney accepted, and that the loss flowed because of the failure of the syndicates, which can in no way, in my opinion, be visited upon MANL.

BC9402679 at 30

Para58 alleges that on or about 7 November 1989 B and T resigned as manager of the two syndicates. It now seems to be common ground that the resignation took place on 27 October 1989, and was reported to a meeting of members of the syndicates on 9 November 1989.

In para60 it is pleaded that in or about December 1989 or January 1990 the plaintiffs learned that various payments had been made to intermediaries. To the extent to which this still remains an issue MANL submits that the payments were made at the request and by the direction of the plaintiffs' duly authorised agent, B and T, that the payees were brokers or agents engaged by B and T to procure financiers ready, willing and able to lend the required fund to prospective syndicate members, that as such those brokers were acting on behalf of the plaintiffs as prospective syndicate members and were entitled to look to them for their reward or remuneration, and that there is no evidentiary or other basis on which it can be said that the brokers or agents were acting on MANL's behalf. MANL's submissions refer to the Thoroughbred Investment Agreement: CL10.1(g), and the Lease: CL31.1. In my opinion MANL's submissions are clearly correct.

BC9402679 at 31

In the alternative it is submitted that the plaintiffs knew, or had an ability to ascertain, full details of all of the payments by November 1989. On 20 November 1989 Mr Logan sent by facsimile transmission to Mr Fraser minutes of a meeting of the syndicates held on 9 November 1989 "together with the draft financial position of your syndicate, as prepared by Foster and Co". That disclosed claims against B and T including a consulting fee paid to Mr Still, said to be not mentioned in the prospectus or advised to members, of $10,000, and a rebate syndication fee of $50,000. There is a "further claim" being brokerage "not mentioned in prospectus or advised to members" of $32,000. The next page of the accounts shows a claim against B and T for brokerage in the sum of $75,000. The document is Exhibit 14.

The submission is also made that notwithstanding the complaint now made by the plaintiffs they included these amounts among their claims for tax deductions.

In para64 it is alleged:

"In the premises Bell and Tonkes made the representations referred to in para16 and para17 for and on behalf of MANL or in the alternative MANL adopted the said representations."

BC9402679 at 32

Para65 pleads:

"Further or in the alternative MANL was a party to and/or was knowingly concerned within the meaning of s75B of the Act in the making of the said representations and each of them."

In address Mr White said that reliance was being placed upon subpara(a) and subpara(c) of s75B.

Para67 pleads that MANL owed a duty "in the nature of" a fiduciary duty to the plaintiffs to act with strict fairness and openness towards them, not to prefer its own interests or the interests of B and T or of any other party to those of the plaintiffs, to disclose to the plaintiffs the facts referred to in para34, para43, para57 and para60, and to ascertain whether the representations made to the plaintiffs were and/or remained accurate, and/or alternatively that any material change to the representations was notified to them.

It is then pleaded that in the alternative MANL "was a party to/or participant in the breach by the second and third defendants of their fiduciary duties to" the plaintiffs.

In para68 it is alleged that MANL owed a common law duty of care to the plaintiffs to take reasonable care to ensure that the representations referred to in para16 and para17 were and remained accurate, and/or alternatively that any material change thereto was notified to the plaintiffs, and to take reasonable care to ensure that the plaintiffs and each of them knew of the terms of the documents prepared and/or approved by MANL prior to their execution by Bell on behalf of the plaintiffs.

BC9402679 at 33

It is alleged, in para69, that in breach of these duties MANL caused or permitted the representations referred to in para16 and para17 to be made to the plaintiffs, failed to inform them of the facts and matters referred to in para34, para43, para57 and para60, and entered into the agreements referred to in para29, para32 and para32A without taking any or any reasonable steps to ascertain whether or not the representations in the brochure and the other documents submitted to the plaintiffs were correct, and without taking any or any reasonable steps to ensure that the plaintiffs and each of them were aware that MANL had become the financier of the syndicates and that the plaintiffs knew of the precise terms and conditions upon which MANL was offering such finance.

It is alleged in para70 that MANL did not furnish the plaintiffs with copies of the financial documents referred to in para29 and para32 until February 1990. In para71 it is alleged that by letter dated 5 February 1991 the plaintiffs alleged, inter alia, that secret commissions had been paid and referred to other aspects of the funding of the syndicates and demanded that adjustments be made on account of the payment of commission, that by notice dated 15 March 1991 to each of the plaintiffs MANL demanded payment of moneys alleged to be outstanding by the plaintiffs to MANL under the lease agreement and the Deed of Loan and Guarantee, that by notice dated 1 May 1991 to each of the plaintiffs MANL demanded payment as guarantor of moneys owing to it, and that in consequence of the breach of the duties referred to in para67 and para68, ie the fiduciary and common law duties, the plaintiffs "became entitled to avoid" the contractual documents.

BC9402679 at 34

MANL submits that the relief claimed in para74 "cannot withstand even cursory scrutiny". It submits that if the breaches are established they do not have any contractual consequences, but rather give rise to damages or an obligation to account for any gain or profit derived from misuse of a position or office.

Para78 to para80 invoke reliance upon s169 and s170 of the Companies (NSW) Code and plead that the interests conferred upon the plaintiffs in respect of the syndicates "were prescribed interests" within the meaning of those sections. The particulars are:

"Pursuant to the agreement purportedly executed on their behalf, the said plaintiffs were entitled to the profits and assets of the syndicates and acquired an interest and/or rights in respect of the syndicates. Further, the syndicates involve the common enterprise in relation to which the said plaintiffs would profit from the promoter of the syndicates."

It is alleged that in contravention of s169 and s170 B and T and MANL "offered and/or alternatively" B and T "offered and MANL was an accessory to the offer to the public for the subscription or purchase of a prescribed interest" being the interests to which reference was made. The consequence is pleaded in para80 as follows:

"In the premises, the agreements purportedly entered into by the said plaintiffs were illegal and thereby unenforceable and the first, second, third and fourth defendants were thereby unjustly enriched and the plaintiffs seek restitution."

MANL's submissions take, as their starting point, the absence of evidence that any "offer to the public" was made by MANL, it being apparent that the brochure, Exhibit A, was prepared and distributed well before there was any contemplation that MANL would be the financier. In the alternative it is submitted that the evidence does not establish that any offer was made to the public, but rather that the promoters and Mr **McConnell** used their "personal connections" to approach would be participants.

BC9402679 at 35

The final submission made is that the definition of "prescribed interest" requires there to be a "participation interest", which is expressed to exclude "an interest in a partnership agreement". It is submitted that the syndicates were partnerships.

The balance of the Amended Statement of Claim is concerned with the claim against the fourth defendant. In the circumstances I do not have to detail that.

FIDUCIARY DUTY The plaintiffs submit that MANL was a promoter of the syndicates, that as such it owed a fiduciary duty to the plaintiffs in their becoming and being members of the syndicates, and that MANL breached the fiduciary duty. MANL submits that it was, at all times, a financier, dealing at arm's length with the plaintiffs, and that it did not assume the role of a promoter or a fiduciary.

The word "promoter" has not been the subject of specific judicial definition and is said to be a word of "no very definite meaning": Emma Silver Mining Co v Lewis (1879) 4 CPD 396 at 407. It was suggested in that case:

"As used in connection with companies the term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it) and also the idea of some duty towards the company imposed by or arising from the position which the so called promoter assumes towards it."

BC9402679 at 36

In Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218 Lord Cairns LC referred to promoters at 1236 in the following terms:

"They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation."

In United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1 Gibbs CJ said at 5 to 6:

"Other authorities, cited by Lindley, concerned promoters of companies, but there is an analogy between the position of company promoters and that of persons who invite others to join in a partnership. The principle was stated generally in Directors etc of Central Railway Co of Venezuela v Kisch (1867) LR 2 HL 99 at 113: 'It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterise their published statements.'"

In Traces and Ors v Mandalay Pty Ltd (1953) 88 CLR 215 Dixon CJ, Williams and Taylor JJ referred, at 241, to the fact that it had been said on many occasions that the word "promoter" has no very definite meaning. Their Honours referred to Emma Silver Mining Co and quoted from the judgment of Lindley J. Thereafter they said at 242:

"In the present case Salon was admittedly a promoter of the plaintiff. He was directly responsible for its incorporation. It was on his instructions that the memorandum and articles of association were prepared and registered and incorporation effected. Some of the other defendants also took an active part in the promotion of the plaintiff, and we shall refer shortly to some of these activities. But it is not only the persons who take an active part in the formation of a company and the raising of the necessary share capital to enable it to carry on business who are promoters. It is apparent from the passage cited that persons who leave it to others to get up the company upon the understanding that they also will profit from the operation MAY become promoters." (My emphasis.)

BC9402679 at 37

In Hospital Products Ltd v United States Surgical Corporation and Ors (1984) 156 CLR 41 the High Court considered circumstances in which a fiduciary duty may arise. If one can equate those circumstances to the role played by a person, who is a promoter, it seems that a promoter, if he owes a fiduciary duty, must hold the same or at least a strongly similar position as does a person who owes a fiduciary duty. At pp.68 to 69 Gibbs CJ said:

"The learned members of the Court of Appeal considered that the first of these statements needed a qualification which McLelland J had intended to suggest, namely that the undertaking to act in the interests of another meant that the fiduciary undertook not to act in his own interests; they said that the principle is that 'a fiduciary relationship exists where the facts of the case in hand establish that in a particular matter a person has undertaken to act in the interests of another and not in his own'. They added that it is not inconsistent with this principle that a fiduciary may retain that character although he is entitled to have regard to his own interest in particular matters. Their conclusion was that in matters concerning the development of USSC's market in Australia for its surgical stapling products, and its protection from competition, HPI undertook to act in USSC's interest and not in its own."

After considering circumstances in which a fiduciary duty may arise his Honour said, at 70:

"On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose ...".

BC9402679 at 38

Mason J commenced his consideration of identifying a fiduciary relationship at 96. At 99 his Honour said:

"The classical illustrations of the fiduciary relationship are those in which the fiduciary is under a duty to act not in his own interests or solely in his own interests but in the interests of another or jointly in the interests of another and himself, eg a trustee and a partner. ... But entitlement to act in one's own interests is not an answer to the existence of a fiduciary relationship, if there be an obligation to act in the interests of another. It is that obligation which is the foundation of the fiduciary relationship, even if it be subject to qualifications including the qualification that in some respects the fiduciary is entitled to act by reference to his own interests. The fiduciary duty must then accommodate itself to the relationship between the parties created by their contractual arrangements. An entitlement under the contract to act in a relevant matter solely by reference to one's own interests will constitute an answer to an alleged breach of the fiduciary duty. The difficulty of deciding under the contract when the fiduciary is entitled to act in his own interests is not in itself a reason for rejecting the existence of a fiduciary relationship, though it may be an element in arriving at the conclusion that the person asserting the relationship has not established that there is any obligation to act in the interests of another.

There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalisation that is universally true in relation to every commercial transaction. IN TRUTH, EVERY SUCH TRANSACTION MUST BE EXAMINED ON ITS MERITS WITH A VIEW TO ASCERTAINING WHETHER IT MANIFESTS THE CHARACTERISTICS OF A FIDUCIARY RELATIONSHIP." (My emphasis.)

At 96 to 97 his Honour said:

"The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf Phipps v Boardman), viz, trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. THE CRITICAL FEATURE OF THESE RELATIONSHIPS IS THAT THE FIDUCIARY UNDERTAKES OR AGREES TO ACT FOR OR ON BEHALF OF OR IN THE INTERESTS OF ANOTHER PERSON IN THE EXERCISE OF A POWER OR DISCRETION WHICH WILL AFFECT THE INTERESTS OF THAT OTHER PERSON IN A LEGAL OR PRACTICAL SENSE. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal." (My emphasis.)

BC9402679 at 39

At 118 Wilson J said:

"In a commercial transaction of the kind here under consideration, where the parties are dealing at arm's length and there is no credible suggestion of undue influence, I am reluctant to import a fiduciary obligation."

At 141 to 142 Dawson J said:

"Notwithstanding the existence of clear examples, no satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary. It is usual - perhaps necessary - that in such a relationship one party should repose substantial confidence in another in acting on his behalf or in his interest in some respect but it is not in every case where that happens that there is a fiduciary relationship. If it were, whenever there is 'a job to be performed' .. and entrusting the job to someone involves reposing substantial trust and confidence in him, equity would impose fiduciary obligations. Clearly, that is not the case. Nor does a fiduciary duty arise because the person to whom a job is entrusted acts in his own interest and thereby fails to perform the job properly, however useful it may appear with hindsight that such protection should have been available."

His Honour thus rejected the notion, which flows through the plaintiffs' submissions, that one can find a fiduciary duty, in effect, with the benefit of hindsight.

At 147 his Honour said:

"A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of character or reliability. That is to say, the relationship must be of a kind which of its nature requires one party to place reliance upon the other; it is not sufficient that he in fact does so in the particular circumstances. Of course, where a relationship is fiduciary in character it will be so whether or not the party in whose favour the fiduciary obligations are imposed actually trusts the party upon whom the obligations are imposed."

BC9402679 at 40

At 149 his Honour noted that "the undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where the parties are at arm's length from one other" were referred to in Weinberger v Kendrick (1892) 34 Fed Rules Serv (2nd) 450. His Honour said:

"There can be no doubt that the behaviour of Blackman was calculated and fraudulent. But the law provides remedies for such behaviour which are capable of precise application. To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principle upon which those remedies are based. It would

be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law now imposes upon them."

In Catt and Ors v Marac Australia Ltd and Ors (1987) 9 NSWLR 639 Rogers J referred to one party as "the originator, the instigator and sponsor of the project for the acquisition of the three aircraft in question, through the medium of the syndicates .. ": at 652. He then turned to consider the basis upon which a promoter, which I take to be within his description of "originator, instigator and sponsor", owed a fiduciary duty. At 653 he said:

"The foundation on which, I believe, the many cases of the last century in the English Courts where promoters were held to owe fiduciary duties to the company should rest is the absence of independence on the part of the directors from the promoters. The directors either did what they were asked to do or lacked the necessary judgment to form an independent commercial view. In the present case Jet, through Joffick, destroyed any independence Winter may otherwise have had and blunted any sense of responsibility he may otherwise have had to the partners by the offer of the generous commission."

BC9402679 at 41

At 654 his Honour considered whether Marac, which was a lender, was entitled to the protection suggested in Hospital Products. He said:

"The reason why Marac is not protected by the approach indicated in the quote from Dawson J is precisely because it is not at arm's length from the other parties. Its arm was firmly linked into Jet's and Winter's. In the plaintiffs' submission, on a true analysis, Marac's position was more akin to that of a promoter. It became the purchaser of the aircraft from Shorts. It was the vendor to the nominee company in each case. Furthermore, it was the vendor at a price higher than that paid to Shorts. It knew that this price accommodated a profit, and a very handsome profit it was, to Jet as well as a commission to Winter. Its role was essential for the achievement of Jet's and Winter's purpose. Without Marac, the fruits of Winter's breach of duty would never have come home."

This passage, having regard to the facts of the present case, demands particular attention. Firstly, in the present case, it must be determined whether MANL was acting at arm's length from the other parties or, perhaps put more correctly, it must be established that MANL failed to do so. MANL took no part in the origination, instigation and sponsorship of the syndicates. It had, so far as the evidence reveals, no special relationship with B and T. It had, and of necessity had to have, a business relationship, but that, in my opinion, cannot amount to the type of relationship whereby its arms would touch, let alone link with, those of B and T. It was, on the evidence, unaware of any of the matters which, for example, were within the knowledge of Marac and to which Rogers J referred. It in no way facilitated any transaction for the benefit of any party save, of course, to the extent to which the lending of money by it and the purchasing of the horses by it provided the financial wherewithal for the syndicates to go ahead. It cannot be said that in consequence of those matters "the fruits" of any breaches of any duty came home. If the view be taken that B and T received some benefit to which it was not entitled, there is no evidence that MANL was aware of that.

BC9402679 at 42

At 655 Rogers J identified a particular aspect of the transaction which he considered significant. His Honour concluded that Marac had no direct fiduciary obligation to the plaintiffs for various reasons connected with the transaction he specified. However he continued:

"In my view, the stronger argument is that Marac's insistence on dealing with one person rather than twenty partners, geographically scattered, although perhaps not deliberately so designed, had a considerable consequence. It installed as the person with whom Marac was to deal, the compliant Winter anxious to earn his commission. Thus, Marac brought about a situation in which the partners were in a position of singular disadvantage. Goodsell" (a senior officer of Marac) "knew that Winter was to receive a substantial commission. The partners did not. Furthermore, as I will discuss later, there was no proper basis on which Goodsell could assume that they did know. In my view, that action by Marac completely altered the relationship between Marac and the partners. Marac assumed the position and responsibility akin to that of a promoter. It interposed between itself and the partners, who might otherwise have looked at documents, asked questions and exercised judgment, the figure, of Winter, after his commission. There was thrust upon Marac the obligation to ensure that the partners were not damaged by the conduit established between them and Marac, by Marac."

It is important to identify the conduit to which his Honour was referring. That was Winter as the recipient of a Power of Attorney from the partners to enable the documentation to be entered into. It may be thought, at first blush, that that bears a strong resemblance to the present case. But it overlooks what, in my opinion, is a significant feature, namely that whereas Marac insisted upon Powers of Attorney being given to Winter, MANL did not require Powers of Attorney to

be given to anyone. There is no evidence to indicate where the idea that the documents should be signed under Power originated. I appreciate that as drafted the documents provide that they should be executed under Power and that MANL's settlement check list sheet refers to Powers of Attorney. But one could not infer from that that there was any requirement or even polite request from MANL that the documents should be executed in that way. So far as the evidence discloses the plaintiffs were requested by Mr **McConnell** to furnish Powers of Attorney because of the urgency involved in having the documentation executed. It was, no doubt, a convenient way of proceeding. However, in the absence of any evidence that it was done as a requirement of MANL's or for the purpose of concealing some part of the transaction from the plaintiffs, there can be no suggestion that MANL "interposed" Mr Bell between itself and the plaintiffs or that the Powers of Attorney were required by or utilised by MANL for an improper purpose.

BC9402679 at 43

Rogers J referred to the position Marac occupied as "akin to that of a promoter". I assume thereby his Honour intended to imply into the relationship the characteristics specified by the High Court in HosPital Products. Unless that occurred a fiduciary duty would not arise.

I am satisfied on the evidence before me that MANL cannot be said to be a promoter of the syndicates. It had nothing to do with their formation or getting up the project. It became involved because a financier was needed. It was prepared to act as financier and it did so, I am satisfied, on an arm's length basis. Obviously there were commercial incentives for it to so act. The main one was that it would derive interest on the money outlaid at a rate submitted on behalf of the plaintiffs to be very favourable. However there is no evidence before me to suggest that the interest rates, although they may appear high, were other than commercially acceptable interest rates at the time. Even if they were not the plaintiffs cannot complain if they made a bad bargain. There is no suggestion that the other terms of the financial documents, including the guarantees, were deliberately concealed from anyone, or that MANL took advantage of the documents being signed under Power to "slip in" terms and conditions advantageous to it. It reserved the right to deal with the parties on whatever basis it saw fit. No satisfactory answer was ever given to my question of Mr White as to what would have happened if one or all of the plaintiffs had decided to exercise their undoubted rights to attend on settlement and sign the contractual financial documents personally after reading them.

BC9402679 at 44

I do not regard his answer that because of the urgency it was impractical for the plaintiffs to do so and, in all probability, they would not have, as an appropriate answer. There was no evidence MANL was aware none of the plaintiffs would attend personally. However the answer exposes one of the problems the plaintiffs' case confronts, viz that they were apparently indifferent not only to the identity and integrity of the donee of the Power, but also to the terms of the contractual obligations to which he was committing them. Not only were they then indifferent, but after the disclosure of matters to them, about which they complain bitterly now, they took no steps to seek to avoid the contracts. By their conduct they ratified them, and, in particular, they continued to take benefits from them. It must be said again that the plaintiffs were experienced commercial solicitors, who one would assume must have been aware of their rights, or, if they were not, of the means of ascertaining them. If MANL was imposing terms it believed were unacceptable it ran the risk the transactions would not go ahead. It was apparently content that this should be so because Mr Lock told Mr Cross the terms were not negotiable. The plaintiffs did not choose to take even the most basic steps to protect their own interests, if it be correct to say, as they now seek to do, that their complaint is that their interests were not protected by the donee of the power.

BC9402679 at 45

Even accepting that the documents had to be signed in a hurry and that this justified the appointment of an attorney, no attempt was made within a reasonable time after 30 June or 12 July 1989 to obtain the documentation to ascertain the nature of the obligations. A suggestion was made that the documentation was deliberately concealed or held back from the plaintiffs. This is ludicrous. It was unsupported by any evidence and in any event did little credit to those on whose behalf it was made. I am asked to accept that experienced commercial solicitors allowed a situation to continue where contractual documents, executed by their attorney under Power, were withheld from them. I reject the submission. The plaintiffs could have demanded to see the documents signed on their behalf and to have checked. They did see the documents in February 1990 and they had the opportunity of considering them from the viewpoint of experienced commercial lawyers. They raised no objection to the terms of the documentation at that stage, notwithstanding that if their present complaints be correct the documents reflected a different transaction from that into which they believed they were entering. I find it inconceivable that experienced commercial solicitors took the view that the documents did not reflect the transaction into which they thought they were entering, but did nothing to seek to relieve themselves of liability thereunder.

BC9402679 at 46

It is quite clear that there were various remedies available to them. They chose to avail themselves of none. For them to suggest, as Mr Killalea did, that they were "trapped" or in some other way obliged to go ahead with the transactions is, in my view, nonsense. One can but allow one's mind to contemplate the response of one of Mr Killalea's commercially experienced clients, if, having sought his advice on this point, he had been told he was "trapped" or was otherwise required to proceed with the transaction. The client's response, I venture to think, would be one of disbelief at the failure to suggest a legal remedy. Mr Killalea's response to the situation which confronted him may, and I put it no higher than this, be the type one would expect from a person seeking to avail himself or herself of the palliative effects of the Contracts Review Act 1980. It is scarcely the reaction expected not merely of one but of a number of experienced solicitors practising in the various fields of commercial law. Whilst I appreciate that the documents were received some six or seven months after they were executed if, as it was submitted repeatedly to me, the documents did not reflect the transaction into which the plaintiffs either thought they had entered or believed they had authorised their attorney to conclude, one would have expected an immediate complaint in the clearest terms to that effect. It was not forthcoming.

BC9402679 at 47

Nor was there any analogous complaint to the effect that there had been a breach of some duty owed by MANL to the plaintiffs in relation to the entry into the documentation.

In my opinion MANL was not, within the meaning described by the authorities and on the facts of this case, a promoter and therefore under that designation it owed no fiduciary duty to the plaintiffs. Nor, in my opinion, independently of its being a promoter, did it owe a fiduciary duty, so that it could be said it stood in the position of a fiduciary qua the plaintiffs. MANL was acting at arm's length with all the parties in performing its role as a financier. In those circumstances there was no such duty to be breached.

THE COMMON LAW DUTY It was submitted on behalf of the plaintiffs that MANL owed a duty at common law to them to take reasonable care to ensure that the representations referred to in para16 and para17 were and remained accurate and/or alternatively that any material change thereto was notified to them, and to ensure that each of the plaintiffs knew the terms of the documents prepared and/or approved by MANL prior to their execution by Mr Bell on their behalf. The breach of this duty is pleaded in para69 of the Amended Statement of Claim as being that MANL: (a) caused or permitted the representations referred to in para16 and para17 to be made to the plaintiffs; (b) failed to inform the plaintiffs of the facts and matters referred to in para34, para43, para57 and para60; and (c) entered into the agreements referred to in para29, para32 and para32A without taking any or any reasonable steps to ascertain whether the representations in the brochure, (Exhibit A), and the other documents submitted to the plaintiffs, (Exhibit B), were correct, and to ensure that each of the plaintiffs was aware that MANL had become the financier and that they were aware of "the precise terms and conditions upon which MANL was offering such finance".

BC9402679 at 48

It is not clear to me whether para70 is intended to relate to this cause of action. It pleads, without suggesting any consequence flowing therefrom, that MANL did not furnish to any of the plaintiffs copies of the documents referred to in para29 and para32 until February 1990.

The duty firstly alleged is to ensure that the representations pleaded in para16 and para17 were accurate and remained accurate and, further, that any material change to them was notified to the plaintiffs. Inherent in these allegations, as supported by the particulars, is that the representations were not accurate and did not remain accurate and that material changes were not notified to the plaintiffs.

Para16(a) pleads written representations alleged to have been made by B and T, or alternatively by B and T and Mr **McConnell,** or alternatively by Messrs Bell, Tonkes, **McConnell** and Logan to the plaintiffs. It is concerned with representations alleged to be found in the brochure. Subpara(b), subpara(c) and subpara(d) refer to representations in Exhibit B. I have noted the concession made, on behalf of the plaintiffs, in Mr White's final address that it could not be submitted that Exhibit B ever came to the notice of MANL. Although, as I understand it, the representations said to flow from Exhibit B, as such, are no longer relied on, the plaintiffs were cross examined about their allegations arising from Exhibit B and, in assessing their credit, it may be necessary to consider their evidence in relation to those allegations.

BC9402679 at 49

Para17 alleges that in or about June 1989 B and T by its agent, Mr **McConnell,** made oral and written representations to the plaintiffs.

It is alleged that all the representations were false, were made with the intention of inducing the plaintiffs to enter into the financial contracts, and caused the plaintiffs, acting in reliance upon them, to do so.

There is obviously a difficulty in establishing any duty upon MANL to ensure that representations made by another party or other parties before MANL became in any way involved in the matter "were accurate". Inherent in the allegation is an assertion that MANL became aware that the representations were not accurate. Nextly, the duty is said to be to ensure that the representations "remained accurate". This requires that MANL should ensure that the representations, which it was required to ensure "were accurate", "remained accurate". That postulates a number of questions one of which is the time at which that obligation was imposed upon MANL in relation to the time it became involved in the transaction.

BC9402679 at 50

It may be that what is sought to be alleged is that when MANL came on the scene as the financier it was then bound to satisfy itself that the representations referred to in para16 and para17 were accurate at the time they were made and, thereafter, remained accurate. If any such duty can be imposed on MANL it may be thought that is a more sensible way of framing it on the basis, perhaps, that MANL, in some way, adopted the representations such that it became responsible for them. But that reading is not consistent with the breach pleaded in para69 namely that MANL "caused or permitted the representations referred to in para16 and para17 to be made to the plaintiffs". That allegation can only be made sensibly if it refers to the time the representations were made. However, on the uncontradicted evidence, MANL was not involved at those times. And, in the circumstances, even if there was a duty as pleaded in relation to the making of representations by a third party or third parties MANL could not be said to have had that duty at a time before it became involved in the transaction or, if it did, it cannot be said to have breached that duty in the manner alleged.

The second duty alleged is an obligation to ensure that each of the plaintiffs knew of the terms of the financial contracts prior to execution by Mr Bell on their behalf. The duty thus stated seeks to impose upon a party entering into contractual arrangements with another party an obligation to ensure that that other party knew the terms of the documents and approved of them. It cannot be assumed, so the submission must run, that if such a duty exists, the execution by the other party of the documents evidences his or her knowledge of the terms of the documents. The fact that the documents were executed by the attorney appointed by the other party does not seem to affect the legally asserted duty. Whilst it may be common for parties entering into contractual relations, particularly where the parties are advancing money, to require certificates of independent advice to the party undertaking financial obligations, I cannot think that that is a legal duty. Rather it is done out of an abundance of caution to seek to overcome defences available to parties who have entered into contracts eg under the Contracts Review Act 1980. However if a document is executed by a party or by the party's duly appointed agent then, unless perhaps it can be shown that the party seeking to enforce the contract was on notice of some obvious lack of contracting ability in the other party or the agent, the contract, in my opinion, is prima facie enforceable.

BC9402679 at 51

The matters of which it is said the plaintiffs were not informed were the identity of the borrower and the terms of the financial contracts: para34. These matters would have been obvious when the documents were executed by or on behalf of the plaintiffs if anyone had troubled to read them. The fact that the agent may not have troubled to do so or, if he did, to communicate the matters to his principals, does not mean, and cannot in law mean, that MANL failed to inform the plaintiffs of those matters. There is no evidence to suggest that MANL concealed or sought to conceal the terms of the documents from anyone.

BC9402679 at 52

Para43 alleges MANL had certain knowledge, namely: (a) The terms of the documents referred to in para15 to para15C "and in particular the brochure". The documents are Exhibits A and B.

(b) That the costings represented at 27 of the brochure for the No 1 Syndicate for the year ended 30 June 1989 and totalling $1m were different from the utilisation of loan funds proposed in the MANL credit proposal.

(c) That costings represented in the brochure for the No 1 Syndicate for the year ended 30 June 1989 and totalling $950,000 were different from the utilisation of loan funds proposed in the MANL credit proposal.

I pause to note the differences alleged. In respect of the No 1 Syndicate the brochure showed the first lease payment on bloodstock and ancillary expenses as $438,953 and $47,485, whereas MANL proposed the division of $450,174 and $36,264 respectively. The sum of each of these two sets of figures is $486,438.

In respect of the No 3 Syndicate the brochure showed the first lease payment on bloodstock and ancillary expenses as $425,788 and $40,761 respectively totalling $466,549, and the proposed MANL division of $436,672 and $79,877 totalling $516,549. It will be remembered the plaintiffs who joined this Syndicate did not read that brochure.

BC9402679 at 53

Even assuming that MANL knew of this difference it is not stated what its relevance or significance was to the plaintiffs.

(d) That no provision had been made in the syndicates' costing for the payment of a brokerage fee to the fourth defendant of 38. The particulars assert that an original provision for a payment of brokerage was deleted from the proposal.

(e) That potential investors, who were to obtain loans from it to acquire interests in the syndicate, did not know that brokerage fees of 3% would be payable. For good measure it is said that MANL ought to have known this "with the exercise of reasonable care", ie it did know or ought to have known that which prospective investors did not know.

(f) That B and T was in severe financial difficulties. Particulars of such knowledge are provided. The plaintiffs' written submissions acknowledge that the evidence does not support those furnished in para43(f)(i). But it is submitted:

"However, the plaintiffs rely upon MANL's knowledge of" B and T's "financial difficulties, referred to in the submissions above."

Mr White stated that this was only relied on to establish that MANL should have applied its guidelines or otherwise determined that because of the financial position of B and T it should not have accepted it as an investor and thus, so he submits, if it had not been so accepted the syndicates would not have been filled and thus would not have gone ahead. Had the syndicates not gone ahead the plaintiffs would not be in the position in which they find themselves now.

BC9402679 at 54

By way of particulars the reader is referred to para9 and para38. The written submissions disclaim any reliance upon para9. No specific comment is made about para38 probably because the issues raised appear to be totally irrelevant to any issue in these proceedings.

(g) Certain matters relating to the proposed No 2 Syndicate, including that it did not proceed because there were insufficient investors.

The submission was made that MANL ought to have known that the failure of the No 2 Syndicate to secure sufficient investors "as well as the shortfall in respect of the No 1 and No 3 Syndicates, seriously impacted on the overall viability of the syndicates" B and T "intended to manage". The oral submissions ultimately made did not assert that the financial position of B and T affected adversely the operation of the syndicates, in the sense that if B and T had been financially sound the problems would not have arisen. Rather, as I have recorded earlier, the submission was that MANL should not have lent with the consequence that the syndicates would not have gone ahead.

(h) That it ignored, or alternatively that it took no steps to ensure, that there was compliance with the terms of its bloodstock lending policy.

The first particular is that MANL failed to obtain any or any proper evidence of the value and ownership of the horses. I am not satisfied that either of these allegations of fact has been established, nor, even if it has, that it is in any way relevant to the issues before me. It is not suggested that MANL did not have a valuation from a qualified valuer supporting the value attributed to the horses. It was submitted that I should not have regard to the valuation and that I should infer that notwithstanding that on its face it purported to be a valuation it was no more than an adoption of an unacceptable and unsatisfactory prior valuation. I reject this submission. There is no evidence, which satisfies me, that it has any substance.

BC9402679 at 55

When the submission as to the ownership of the horses was explored in a little more detail, it emerged that even if there was some doubt about who had title to the horses at the time the financial transactions were entered into, this has had no impact upon the operation or performance of the syndicates. The submission is that had an attempt been made to establish title MANL would have learned that B and T did not have title, from which it would or should have inferred that B and T had not paid for the horses, and therefore could not pay for them. This, so it was submitted, would have indicated that B and T was in serious financial difficulties, with the consequences otherwise submitted. I suggested to Mr White that B and T may have purchased the horses on acceptable commercial credit, the terms of which did not expire until after the syndicates were formed and the purchase price was paid to it, and that in those circumstances, whilst B and T

would not have had title, the various payments would have fed the title. He submitted that that would or should have alerted MANL to B and T's poor financial position. I do not agree. He further submitted that that would have been contrary to the statement in Exhibit A about the acquisition of the horses. In my view this matter, in the end, provided nothing more than an irrelevant distraction. If there was a lack or absence of title it did not have any effect upon the operation or performance of the syndicates and it did not, in itself, lead to the view that B and T was in serious financial difficulties.

BC9402679 at 56

The second particular is that potential investors satisfied lending requirements. Mr White did not submit that the plaintiffs failed to satisfy those requirements, but that B and T did, with the consequences to which I have referred. The third particular is to the same effect.

The fourth particular relates to the experience of investors within the industry. Whilst it may have been a part of the lending policy it does not have any relevance to any matter I have to decide.

The fifth particular relates to the payment of commission to the fourth defendant, it being submitted that MANL was obliged to ascertain whether it was entitled to commission. I do not understand how this is said to be relevant in the light of the absence of an assertion that the plaintiffs did not know that commission was being paid. Perhaps for this reason the sub paragraph was not pressed.

The next paragraph to which attention is drawn is para57. It alleges that B and T had "at all times since June 1989 been in severe financial difficulty and was unable, despite payments from MANL", to pay for the horses it purchased to place in the No 1 and No 3 Syndicates, holding charges in respect of those horses incurred prior to 30 June 1989, "the continuing expenses of the syndicate or any expenses at all", and that it was unable and never could have managed the syndicates "for a period of two years or anything like that period". The allegation is that MANL failed to inform the plaintiffs of these facts. If there was a failure it related to knowledge MANL had, assuming it had any knowledge at all, of the state of affairs "since June 1989".

BC9402679 at 57

The evidence is that the severe financial difficulties of B and T were disclosed to the plaintiffs in September 1989 and that shortly thereafter B and T was replaced as the manager. The occurrence of these events, the latter of which was joined in by the plaintiffs, did not cause them to assert that any action should be taken to terminate the syndicates. The questions must in any event be posed, on the assumption that MANL had a duty to disclose these matters, as to when it became aware of them and when the duty of disclosure arose.

In reviewing all these submissions it must be borne in mind that B and T was the plaintiffs' agent.

Finally, it is necessary to consider para60. It is alleged that MANL should have informed the plaintiffs of the matters pleaded therein, namely that in or about December 1989 or January 1990 the plaintiffs learnt, "as was the fact" that certain payments had been made by MANL of the amounts particularised to the recipients specified. The pleading cannot mean what it says. I shall proceed on the basis that it means that MANL should have informed the plaintiffs that the payments had been made. Assuming that MANL was aware that these payments had been made and should not have been made, which are the most favourable assumptions which could be made from the point of view of the plaintiffs, the question arises as to what the plaintiffs would have done. They did complain that unauthorised commissions had been paid at a much later date, but they did not, upon receipt of this information, take any steps to enforce any asserted legal rights or obligations said to arise from those events.

BC9402679 at 58

It is not suggested that MANL furnished any advice, or purported to furnish any advice, to the plaintiffs. In Beneficial Finance Corporation Ltd v Karavas and Ors (1991) 23 NSWLR 256 at 276 Meagher JA said:

"As to the principles of law, they can, I think, be adequately summarised as follows: (1) There is no duty on a financier to provide either a borrower or a third party guarantor with any commercial advice. Although if any such advice is tendered the financier may assume a duty of care: see Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84; Stanton v Australia and New Zealand Banking Group Ltd (1987) 9 ATPR 40-755 ane Cornish v Midland Bank PLC [1985] 3 All ER 513. In the present case, Beneficial did not presume to offer any advice and assume no duty of care."

In Commonwealth Bank of Australia v Smith and Anor (1991) 102 ALR 453 at 475 and 476 the Full Court of the Federal Court (Davies, Sheppard and Gummow JJ), said:

"We turn to the question of negligence. All that we have so far said is relevant to this question. The evidence establishes that Mr Dungan, on behalf of the bank, assumed the position of business adviser to the respondent. He was not merely acting in the interests of the bank; he had another capacity, namely, that of adviser to the respondents as well. He was therefore under a duty to advise them with due care and skill. He failed in this duty because the advice he gave the respondents about the appropriateness of the transaction was wrong. For reasons earlier given, he had no basis, let alone any reasonable basis, for making the statements which he did."

BC9402679 at 59

Subsequently their Honours said, in considering whether or not a fiduciary relationship had been created:

"A bank may be expected to act in its own interests in ensuring the security of its position as lender to its customer but it may have created in the customer the expectation that nevertheless it will advise in the customer's interests as to the wisdom of the proposed investment. This may be the case where the customer may fairly take it that to a significant extent his interest is consistent with that of the bank in financing the customer for a prudent business venture. In such a way the bank may become a fiduciary and occupy the position of what Brennan J has called 'an investment adviser': Daley v Sydney Stock Exchange Ltd (1986) 160 CLR 371."

There is no basis to suggest that the evidence in the present case discloses that MANL acted in a way to create the type of expectation in the plaintiffs to which their Honours refer, nor is the present a case where the plaintiffs "may fairly take it" that there is a coincidence of interest between them and MANL. In NIAA Corporation Ltd v Brophy (15 March 1994), I considered whether there was a common law duty on a financier to disclose certain matters on the facts of that case and considered the authorities at some length. I do not propose to repeat what I said there but, insofar as it is appropriate, I adopt it.

The particulars of breach alleged in para69(c) assert that MANL was in breach of its duty to the plaintiffs in that it entered into the financial agreements without taking any or any reasonable steps to ascertain whether or not the representations in the brochure and the other documents submitted to the plaintiffs were correct. One assumes that it must be intended to add and, having taken those steps, to have advised the plaintiffs if they were not correct. It is, perhaps, legitimate to look at the pleading in a benevolent and perhaps expansive way as meaning all of these things. Unless one does I am of the view that no possible cause of action has been established. The duty sought to be imposed upon an entity in the position of MANL is to undertake the task of ascertaining whether the representations were correct. Let it be assumed that there is such a duty and that the investigations show that the representations, or some of them, were not correct. It may well be that notwithstanding that the representations were not correct they neither induced a plaintiff to enter into the contract nor did the plaintiff enter into the contract in reliance upon them. If the task is to find out whether the representations were correct it would seem there must be a further task of finding out whether the plaintiff knew they were not correct and, if the plaintiff did, whether the plaintiff was induced by or relied upon the representations in entering into the agreement. The financier would also, presumably, have to make an evaluation of the nature of the representations to decide whether they were "trivial" or "minor", or otherwise representations from which it could be inferred that the making of the representations led to the entry into the contract.

BC9402679 at 60

It is only necessary to state the range of the duty to expose what, in my opinion, is the fallacy in the submissions on behalf of the plaintiff in this regard. Moreover the financier must have regard to its own position. As I have said the law is that provided the financier does not give or purport to give any advice to the borrower, it does not come, generally speaking, under a duty of care. Once the financier begins to discuss with the borrower the representations it steps into an arena which could result in its being rendered liable.

BC9402679 at 61

Further, it cannot be said that the obligation is simply to ascertain whether a representation is correct. Let it be assumed that it ascertains the representation was not correct. For the duty to have any content the financier must then advise the borrower. That may involve the consequences to which I have just referred. It may lead to the borrower saying he was fully aware of that fact, or that even if he had been aware of that fact he still would have entered into the contract, or that that fact was of no materiality to his decision in entering into the contract and in no way induced him to do so and he did not rely upon it in doing so. There may, of course, be a range of intermediate positions or a combination of some or more of those to which I have referred.

The problems thrown up by imposing this type of duty would mean that the financier was not merely a financier lending according to terms acceptable to the parties, but that the financier took on the role of advising the borrower as to the commercial wisdom of entering into the transaction. The financier is not entitled to assume that the borrower has carried

out his own investigations and satisfied himself as to the feasibility of the transaction. The financier must not only look after his own interests, but also those of the borrower. In my opinion it has not been established that any such duty is recognised by the law. I would add that any disclosure may cause further problems for the financier of the type to which I referred in NIAA Corporation v Brophy.

BC9402679 at 62

If representations have been made by the financier for which it is liable in law then, depending upon whether the representations are innocent or fraudulent, the borrower will have remedies at law or in equity. But to simply assert that because a financier agrees to finance a transaction entered into between a borrower and another party in circumstances where the other party is alleged to have made representations to the borrower inducing the borrower to enter into the transaction, that the financier thereby adopts and becomes liable for the representations does not state the law as I understand it. It may be there are circumstances where the relationship between the third party and the financier changes that prima facie position, eg if the financier and the third party are shown to be acting in concert in providing the overall contractual situation but that is not this case. There is no suggestion that MANL and B and T had any prior business relationships or that the nature of this business relationship showed that they were acting in concert or in any other way which could give rise to the inference that a financier was bound by the third party's representations.

The second way in which the breach of duty is put is the failure to take any or any reasonable steps to ensure that the plaintiffs were aware that MANL had become the financier and that they knew of the precise terms and conditions upon which MANL was offering finance. I have already dealt with this point. A reading of the documents would have disclosed all.

In my opinion it is not established that there was any duty imposed upon MANL of the type pleaded, even reading the pleadings in the way I have chosen to do, nor is it established that if there was any such duty there was any breach of it.

BC9402679 at 63

ILLEGALITY In para78 of the Amended Statement of Claim the plaintiffs plead that the interests conferred upon them under the syndicates were "prescribed interests" within the meaning of s169 and s170 of the Companies (NSW) Code. S169 provides:

"A person, other than a company or an agent of a company authorised for that purpose under the common or official seal of the company, shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest."

S170(1) provides:

"A company or an agent of a company shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless a statement in writing in relating to that prescribed interest has been registered by the Commission under Division 1."

S174 provides:

"(1) A person shall not: (a) Contravene or fail to comply with the provision of s169, s170 or s171; or ... Penalty: $20,000 or imprisonment for five years or both. (2) A person is not relieved from any liability to any holder of a prescribed interest by reason of any contravention of, or failure to comply with, a provision of this Division."

"Prescribed interest" is defined as meaning, inter alia, "a participation interest", which, in turn, is defined as meaning the right to participate "in any profits, assets or realisation of any financial business undertaking or scheme .." or "in any common enterprise .. in relation to which the holder of the right or interest is led to expect profits ... from the efforts of the promoter of the enterprise or a third party", but does not include:

"(g) An interest in a partnership agreement, unless the agreement or proposed agreement: (i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is, or is to become, a party to the agreement or proposed agreement; or (ii) is or would be an agreement, or is or would be within a class of agreements, prescribed by the regulations for the purposes of this paragraph."

BC9402679 at 64

"Investment contract" is defined as meaning:

"Any contract, scheme or arrangement that, in substance and irrespective of the form of the contract, scheme or arrangement involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property, whether in the territory or elsewhere, that, under, or in accordance with, the terms of the investment will, or may, or may at the option of the investor, be used or employed in common with any other interest in or right in respect of the property, whether in the territory or elsewhere, acquired in or under like circumstances."

Para79 alleges that in contravention of s169 and s170 B and T and MANL "offered and/or alternatively" B and T "offered and MANL was an accessory to an offer to the public for the subscription or purchase of a prescribed interest".

Para80 alleges:

"In the premises, the agreements purportedly entered into by the said plaintiffs were illegal and thereby unenforceable and the first, second, third and fourth defendants were thereby unjustly enriched and the plaintiffs seek restitution."

BC9402679 at 65

For the purposes of these submissions the plaintiffs place considerable reliance upon the decision of the Court of Appeal in Hurst and Ors v Vestcorp Ltd (1988) 12 NSWLR 394. In these circumstances it is useful to consider that decision immediately and, in particular, to pay careful regard to the precise factual situation.

The respondent was formerly known as Filmco Ltd, ("Filmco"). It was incorporated in early 1981 to promote schemes concerned with film production from which income tax advantages could be derived. Filmco agreed to lend to investors so they could participate in the scheme and it was entitled not only to interest on the loan, but also to "an interest equivalent to twenty five per cent of the investor's interest in any nett profit derived from the film". Filmco therefore filled the roles of promoter and, in certain cases, lender and, to the extent of its entitlement to an interest in any nett profit, as, in effect, a joint venturer or equity participant. Four films were produced and did not prove commercially successful. It was held at first instance, and not challenged on appeal, that Filmco owed a fiduciary duty to the investors, which it breached.

It was not in issue in the present case, as it was not in issue in Hurst, that B and T had not registered a statement in writing in relation to the prescribed interest as required by s170(1). In Hurst the relevant provisions were those of the Companies Act 1961.

The investors were sued and, relevantly for present purposes, alleged that there had been a contravention of the Companies Act 1961. It was held at first instance there had been no such contravention but, if it was found that Filmco's loan contracts with the appellants were made in breach of the Act and were illegal and unenforceable, the loan contracts were severable from the investment contract so that they could be enforced.

BC9402679 at 66

The first issue was whether there was an offer to the public, it not being in issue that an offer had been made to various persons. I propose to reserve the question as to whether, in the present case, there was any such offer, for consideration a little later. The Court of Appeal held there had been an offer to the public and this raised the question as to the consequences of illegality.

In the present case it may be assumed that there was an offer and, at the moment, that it was made to the public. It is firstly necessary to ascertain who made that offer. Perhaps more accurately it is necessary to ascertain whether MANL made the offer. In my view MANL did not make an offer. The literature comprising Exhibits A and B, which was said to be the relevant documentation constituting the offer to the public, was circulated, on any view, some weeks before MANL became involved in the matter, which, as I have said, was only several days prior to 30 June 1989. MANL had nothing to do with circulating the documentation and there is no evidence that MANL knew that was being done. It may be it was aware such an offer had been made when it became involved subsequently, but I am satisfied it did not make an offer. The matters pleaded against MANL are either that it made the offer, which I am satisfied it did not, or that it was "an accessory to the offer". In the circumstances, as I have found them, that can only mean that it was an accessory after the fact. There is no provision in the Code, so far as I am aware or to which I was referred, to the same effect as s351 of the Crimes Act 1900 (NSW).

BC9402679 at 67

In Giorgianni v The Queen (1985) 156 CLR 473 the High Court considered circumstances in which a person, by virtue of s351, may be convicted of an offence under s52A(1) of the Crimes Act of driving a motor vehicle in a manner dangerous to the public. The applicant was the employee of the driver of a truck, which truck went out of control as a result

of brake failure and collided with a number of vehicles causing the death of five persons and serious injury to another. It was not suggested that the applicant was present at the time this occurred. Gibbs CJ, at 479, said:

"S52A prescribes an objective standard and, speaking generally, the reference to a motor vehicle being driven "at a speed or in a manner dangerous to the public" refers to the actual behaviour of the driver and does not require any given state of mind as an essential element of the offence: R v Coventry. That does not mean that a person can aid, abet, counsel or procure the commission of an offence with strict liability without having an intention to do so formed in the light of knowledge of the facts. The very words used in s351, and the synonyms which express their meanings - eg help, encourage, advise, persuade, induce, bring about by effort - indicate that a particular state of mind is essential before a person can become liable as a secondary party for the commission of an offence, even if the offence is one of strict liability."

His Honour then equated "secondary parties" with "accessories".

At 481 he cited with approval a statement of Lord Goddard CJ in Johnson v Youden [1950] 1 KB 544 at 546:

"Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence."

BC9402679 at 68

At 482 his Honour said:

"Further, as has already been indicated, the person charged must have intended to help, encourage or induce the principal offender to bring about the forbidden result. In other words, both knowledge of the circumstances and intention to aid, abet, counsel or procure are necessary to render a person liable as a secondary party ..."

His Honour noted that whilst "actual knowledge of all the essential matters which made the act done a crime" was necessary, there is a qualification namely "wilful blindness, the deliberate shutting of one eyes to what is going on". His Honour stated that that is equivalent to knowledge.

At 483 his Honour said:

"The failure to make such inquiries as a reasonable person would have made is not equivalent to knowledge; it is not enough to render a person liable as a secondary party that he ought to have known all the facts and would have done so if he had acted with reasonable care and diligence. That is so even when the offence is one of strict liability, so that the actual perpetrator may be convicted in the absence of knowledge. That this is so is shown by Callow v Tillstone. In that case a butcher was convicted of exposing unsound meat for sale. He had relied on a certificate given by a veterinary surgeon that the meat was sound and healthy. The veterinary surgeon had been guilty of negligence in examining the carcass and giving the certificate. It was held that the fact that he had been negligent, and that the negligence had caused the exposure of the unsound meat for sale, was not sufficient to justify his conviction for aiding and abetting the exposing of the unsound meat for sale. (Perhaps he should more properly have been charged with counselling or procuring the commission of the offence, but the decision did not turn on that point.)"

At 487 and 488 his Honour said:

"My view of the law may be summed up very shortly. No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness, in the sense that I have described, is treated as equivalent to knowledge but neither negligence nor recklessness is sufficient. It follows that the summing up in the present case was materially defective and that the decision cannot stand."

BC9402679 at 69

At 494 Mason J said:

"The proposition that a person cannot be convicted of secondary participation at common law unless he knows the facts which must be proved to show that the offence has been committed has also been embraced in Australia."

His Honour was of the view that the summing up was defective "to the extent that it referred to the concept of recklessness".

At 500 and 501 Wilson, Deane and Dawson JJ said:

"We have mentioned at the outset the requirement of intent on the part of a secondary participant, because, in each count, the principal offence, culpable driving, is, in the sense in which we have explained it, an offence involving strict liability: the prosecutor is not required to prove any mental state on the part of the driver. That does not, however, relieve the prosecution of the burden of proving intention on the part of a secondary participant and it is this consideration which we think lies behind a submission that the offence of culpable driving created by s52A of the Crimes Act is of such a nature as to preclude secondary participation in it with the result that the application of s351 is excluded."

Their Honours rejected this submission.

At 504 and 505 their Honours said:

"In the first place, there is no basis upon which it can be said that where a statutory offence requires no proof of intent, it is unnecessary in order to establish secondary participation in the commission of that offence to prove actual knowledge of all the essential facts of the offence. Intent is an ingredient of the offence of aiding and abetting or counselling and procuring and knowledge of the essential facts of the principal offence is necessary before there can be intent. It is actual knowledge which is required and the law does not presume knowledge or impute it to an accused person where possession of knowledge is necessary for the formation of a criminal intent. Secondly, although it may be a proper inference from the fact that a person has deliberately abstained from making an inquiry about some matter that he knew of it and, perhaps, that he refrained from inquiry so that he could deny knowledge, it is nevertheless actual knowledge which must be proved and not knowledge which is imputed or presumed."

BC9402679 at 70

Their Honours then considered whether one could aid, abet, counsel or procure the commission of an offence "by acting recklessly". They said, at 505:

"Aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence. The necessary intent is absent if the person alleged to be a secondary participant lacks knowledge that the principal offender is doing something or is about to do something which amounted to an offence."

In the light of the principles thus expressed it is necessary for me to be satisfied that MANL knew all the essential facts which made the offer to the public a crime, and that it intentionally aided, abetted, counselled or procured the acts of B and T. It is only, so it seems to me, if these matters can be established that it can be held that "MANL was an accessory to an offer to the public for the subscription or purchase of a prescribed interest". What is being alleged against MANL is the commission of a criminal offence, albeit in civil proceedings. It must therefore be proved to the highest extent within the balance of probabilities. It is necessary to prove the intent. There is no evidence, in my opinion, to prove that MANL had that corporate intent.

BC9402679 at 71

Mr White also submitted that MANL deliberately shut its eyes to the true position. The evidence does not satisfy me that it did. But, even so, the law requires knowledge of relevant facts of which the participant seeks to remain ignorant.

In the result I have come to the conclusion that MANL neither made an offer to the public, nor was an accessory to the making of an offer to the public and, accordingly, it did not contravene s170.

Mr White, however, adopted a secondary position. He submitted that even if MANL had not directly or in a secondary sense breached the Code nonetheless the financial contracts were so integral a part of the whole transaction as not to be severable from some rather vaguely identified transaction which breached the Code, with the consequence that the financial documents were not enforceable at the suit of MANL. In other words it was submitted that because there had been illegality which, for the purpose of discussion I shall assume, on the part of B and T, that illegality had a contaminating effect on the documentation to which MANL was a party. In consequence, so the submission ran, that documentation was struck down for illegality. In other words it was submitted that where a party provided finance for a transaction albeit by another transaction, which first transaction was rendered void through illegality, the party providing the finance, although in no way involved in the illegal conduct or aware it had occurred, was to be deprived of its contractual rights in consequence of the illegal conduct of another party.

BC9402679 at 72

A question in many cases is whether the enforceability of a contract is affected by a statutory provision which renders particular conduct unlawful. In Yango Pastoral Co Pty Ltd and Ors v First Chicago Australia Ltd and Ors (1978) 139 CLR 410 the Court was concerned with whether transactions entered into by a bank, which was carrying on banking

business in Australia without the necessary authority in contravention of s8 of the Banking Act 1959, were enforceable. At 413 Gibbs ACJ said:

"There are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful: (1) the contract may be to do something which statute forbids; (2) the contract may be one which the statute expressly or impliedly prohibits; (3) the contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) the contract, although lawful according to its terms, may be performed in a manner which the statute prohibits."

His Honour noted the principal question to be whether "s8, on its proper construction, prohibited the making or performance of the contract". He continued:

"As will be seen, if that question is answered in the negative, it will not be possible to say that the contract cannot be enforced on the ground that it was made in order to effect an unlawful purpose or was performed in an unlawful manner."

The first matter which arises in the present case is whether the lease and loan contracts fall within any of the circumstances identified by his Honour. It seems to me that they do not fall within the first or second formulation. The third formulation requires it to be made to effect a purpose which the statute renders unlawful. In the present case the statute renders unlawful the making of an offer to the public in certain circumstances. I do not see how the entry into the loan and lease transactions, even though they may be consequential upon the performance by another of unlawful conduct, can be said "to effect a purpose which the statute renders unlawful" ie to effect the making of an offer to the public in certain circumstances.

BC9402679 at 73

The fourth formulation does not seem to me to be apposite to the facts of the present case. There can be no question that performance of the lease and loan contracts would be in a manner the Code prohibits.

At 416 his Honour said:

"There have been many cases in which a statute which imposes a penalty on an unlicensed or unqualified person for acting in a particular capacity has been held to prohibit by implication all contracts express or implied made by such a person to act in that capacity. In those cases the unsuccessful plaintiff did the very thing which the statute forbade him to do unless he was authorised ... Those cases are clearly distinguishable from the present, wherein making and performing the contract the parties have not done or contracted to do anything which the Act expressly prohibits."

At 417 his Honour said:

"Further it cannot be said that the contract was performed for any illegal purpose. There is of course no suggestion that the money was borrowed for an illegal purpose, and the fact that the contract was made in the course of the unlawful banking business does not mean that the contract was made in order that the unlawful purpose of carrying on a banking business without authority could be achieved or carried out. Once it is held that neither the making nor the performance of the contract was unlawful, the fact that the contract was made and performed in the course of the conduct of an unlawful business provides no ground for denying relief to the respondent."

At 423 Mason J said:

"The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of longstanding but it has always been recognised that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute itself is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the Court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains."

BC9402679 at 74

In the present case I consider that one can divide up, which words I use lest it be thought that I am speaking of severability, the offending transaction, which is stated to be the offering to the public of the prescribed interest, and anything which may have arisen consequentially therefrom as between the party making the offer to the public and a party acting

upon such offer, on the one hand, and a contract which can, in a general way, be said to flow from the offending conduct, but which itself does not constitute such conduct or an integral part thereof, on the other hand. The latter are the types of contract into which MANL entered, but they do not fall within the proscription in Yango. I refer to the way in which Mahoney JA considered the matter in Yango in the Court of Appeal: [1977] 2 NSWLR 583 at 595 and 599, which, I believe, proceeded on similar reasoning. See also Troja v Troja (Court of Appeal - 29 March 1994 - unreported - per Mahoney JA at 16 of his Honour's reasons).

In Hurst at 411 Kirby P stated the principles, which he considered arose from Yango, in the following terms:

"1. The fact that a transaction is made which results from or involves a breach of the requirement of statute may result in a conclusion that the transaction itself is illegal such that, to give effect to the statute, a court will decline to enforce the transaction or will treat it as void; 2. Such a result will not, however, always follow. Because statutes rarely provide, in terms, for the effect of the breach of their provisions upon such transactions, it is for the Court, in applying the potentially crude instrument of the doctrine of illegality, to determine the imputed legislative intention. It must do so from the language, history and apparent policy of the statute; the Court necessarily filling the gaps left by the legislature; 3. In reaching its conclusion, the Court will consider the extent to which the statute itself already provides adequately for securing the attainment of its apparent objects and for punishing breaches of and non compliance with its terms. It will also have regard to the possible consequences upon innocent third parties of a rigorous application of the principles as to illegality; and 4. Because of the sometimes drastic consequences of the application of the doctrine of illegality upon transactions, the proscription may be extended beyond those transactions which are clearly in breach of the statute, lest, by casting the net more widely, serious injustice may be done to third parties beyond that necessary to give effect to the presumed legislative intention. Inherent in these principles, and their application to the particular cases, is an inescapable element of imprecision and judgment. As in other cases, so in this, there are considerations which point in different directions."

BC9402679 at 75

None of these statements support the contaminating effect of an illegal contract or a lawful one, although that result seems to be assumed subsequently in his reasons.

In speaking about the results to third parties, I do not think his Honour was speaking about a third party in the position of MANL. His Honour had taken the principles from Yango. At 427 Mason J had pointed out the prejudice which would flow to depositors in denying innocent depositors the right to recover moneys deposited unlawfully with persons carrying on banking business because, ex hypothesi, the prohibited contract would be illegal and void. At 434 Jacobs J referred to similar considerations, as did Murphy J at 436. In my opinion this was the result, in relation to third parties, to which Kirby P was referring at that stage.

BC9402679 at 76

In considering the question of severability in Hurst Kirby P, obviously enough, directed his attention to whether the loan agreement upon which the respondent sued was severable from the other documents, which came into existence in breach of s82. However, in my respectful opinion, it is not clear that his Honour identified into which category, as expressed in Yango, the contract for loan fell. Whilst Kirby P acknowledged the force of the submission that the loan agreement should be treated separately he said, at 413:

"Once it is held that the 'interest' was offered to the public in breach of s83(1) of the Act and its requirements, it is necessary to consider the relationship between the investment agreement and the loan agreement to see if the latter is contaminated by its connection with the former."

This manner of stating the question, once again, fails to identify the Yango category to which reference is being made. I have tried, without success, to see how the loan contract, in the present circumstances, could fall into any such category. On the other hand it may be that the categories set out in Yango are not exhaustive, or it may be that all contracts fall into the same category as the offending one from which the contamination spreads.

His Honour then noted the close relationship between the two agreements and that they were "each part of an integrated scheme for investment and tax avoidance". In these circumstances his Honour held it was tainted with illegality.

BC9402679 at 77

At 428 and 429 Mahoney JA said:

"In the present case, s83(1) proscribes an issue and offer and an invitation. In one sense, it does not proscribe the taking of an interest. The suggestion was that the law of illegality should be applied to the obligations embodied in, for exam-

ple, the investment agreement and the production agreement and that these should remain enforceable: a fortiori, the transaction of loan by the company to the investor here sought to be enforced should remain enforceable. The loan transaction was, in my opinion, an essential part of the interest which investors were invited to subscribe for, which was offered to them, and which was in due course 'issued'. Whether, as Mr Gleeson QC submitted, the loan transaction was within the proscription, it was, in my opinion, so much involved with it that, if the matter falls to be tested upon the 'ex turpi' principle, the justice and good sense of the legislation warrants that the law of illegality should be applied to it."

If I may say so Mahoney JA has applied a test, as I understand it, which makes the loan contract affected directly by the section by dint of its being part of the prescribed interest, which was issued following the offer prohibited by the section. The involvement his Honour perceived was one which caused the loan contract to be part of the proscribed conduct, rather than separate from but by close relationship tainted by it. This seems to conform more closely with the tests propounded in Yango both in the High Court and by his Honour.

His Honour considered subs(2) of s86, which has its counterpart in the Code and, in relation to it stated:

"Its purpose is to preserve, to the extent stated, the position of the innocent interest holder. It does not, in my opinion, operate to relieve an invitor from obligations imposed on him by that interest OR FROM THE EFFECTS OF HIS OWN ILLEGALITY." (My emphasis.)

BC9402679 at 78

This is consistent with his Honour's view in Yango as stated in Troja.

At 443 McHugh JA said:

"In the present case the Act contains a severe penalty (imprisonment for up to twelve months) for a breach of s83: see s86(1). This is an indication that the penalty, and not the invalidation of any contract made as a consequence of a breach of s83, was intended as the machinery for enforcing the Act: cf Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (at 415, 426, 436). Moreover, the invalidation of all contracts in a scheme may result in injustice to third parties. FOR EXAMPLE IN THE PRESENT CASE THE LOAN TO THE APPELLANTS COULD HAVE BEEN MADE ON PURELY COMMERCIAL GROUNDS BY A THIRD PARTY. Yet to hold that all contracts made as a consequence of a breach of s83 remain enforceable might result in holding an investor to a contract which has none of the protections which the existence of an approved deed would have given him. In my opinion the better view is that one of the purposes of s86(1) is to strike down contracts made as the result of one of the provisions of the Division. The consequences of upholding a contract made as a result of a breach of s83 is so unjust in many situations that I think the parliaments could not have intended a contract made as a result of a breach of that section to remain enforceable. S86(2) supports the view that one of the purposes of s86(1) is to strike down such contracts because it provides that contravention of a provision of the Division does not relieve from 'liability to any holder of an interest'. That sub section assumes that but for its provisions a contract made in breach of the Division would not be enforceable. Moreover, the doctrine of severability enables some measure of protection to be given to contractual provisions which are outside the mischief at which s83 strikes. Accordingly, I am of opinion that breach of s83 gives rise to civil as well as criminal consequences."

His Honour then went on to consider severability and noted that s83 made "unenforceable a contract which comes into existence as a result of an offer for subscription or purchase of any interest" but noted "a lawful provision of the contract which can be severed from the unlawful part is enforceable". His Honour continued:

"Where, as in the present case, more than one contract has come into existence as the result of a breach of the law, the same principles apply. If a contractual right or obligation is supported by valid consideration, it will be severable and enforceable unless it is in substance so connected with the illegal provisions 'as to form an indivisible whole which cannot be taken to pieces without altering its nature': McFarlane v Daniell (138) 38 SR (NSW) 337 at 345; Thomas Brown and Sons Ltd v Fazal Deen (1962) 108 CLR 391 at 411; Carney v Herbert (at 44)."

BC9402679 at 79

Whilst his Honour acknowledged that the loan agreement created no interest in the copyright in the films and did not assign any such right, he held that as it came into existence as part of the scheme and as the loan was available only for the purpose of investing in film production and as the repayment of the loan was a condition to the receipt of the proceeds of the investor's interest in the film, there was such a relationship between the loan agreement and the rest of the transaction that it was not severable.

It seems clear from his Honour's consideration of third parties that once it is shown that the loan agreement is closely related to or not severable from the impugned transaction, the third party must also suffer.

Kirby P said at 412 and 413:

"The issue is not an easy one to resolve. In the end, a policy choice must be made which weighs the competing considerations and reaches a conclusion which is presented by the Court as the imputed intention of Parliament. Clearly it would be preferable for Parliament to state its intention (as it sometimes does) and to provide a carefully balanced scheme for the adjustment of consequent interests rather than to leave the determination of its intention to courts. As this case demonstrates, courts may be faced with conflicting indications of intention and armed only with the heavy handed instrument of the doctrine of illegality by which to adjust the determination they make. This said, I consider that the preferable conclusion is that a transaction as a direct consequence of a breach of, relevantly, s83, is illegal and unenforceable. ALTHOUGH THIS CONCLUSION MAY RESULT IN SOME UNDISCRIMINATING EFFECTS ON PERSONS INNOCENT OF THE CAUSE OF BREACH, THE OPPOSITE ARGUMENT WOULD EMASCULATE THE EFFECTIVE OPERATION OF S83 AND THE ACHIEVEMENT OF ITS OBVIOUS PURPOSE FOR THE PROTECTION OF THE PUBLIC. To some extent, the law of illegality contains within it means for protecting the innocent from the worst consequence of hardship that may follow illegality: cf Cheers v Pacific Acceptance Corporation Ltd (1960) 60 SR (NSW) 1. The construction which, on balance, I prefer is more consonant with the apparent implication inherent in the terms of s86(2) of the Act." (My emphasis.)

BC9402679 at 80

Therefore, in his Honour's view, where there was a transaction made "as a direct consequence of" statutory breach, it was illegal and unenforceable. His Honour appreciated that that may have "some undiscriminating effects on persons innocent of the cause of breach", but, took the view that to have regard to the rights of such persons would destroy the statutory protection furnished. In this context his Honour was certainly referring to innocent third parties in the sense adopted by McHugh JA.

Notwithstanding these statements as to the effect of statutory illegality his Honour said at 417 and 418:

"This may involve doing equity to the other parties to the litigation. It may also, in today's circumstances, involve the doing of equity to the community of other taxpayers. As McHugh JA has pointed out, the result of simply allowing the appeal would give no satisfaction, and on the contrary would appear to result in a serious injustice. The appellants would be entitled to rely upon the tax deduction which flowed from the amount of the loan by the respondent to them. They would also have been able to increase their interest in the films consequent upon the loan. Yet the respondent would be unable to secure a refund of the moneys which these apparently well advised investors had borrowed from it. When considered from the point of view of this respondent or of the appellants as taxpayers such a result does sufficient offence to conscience, when considered from the point of view of this respondent or of the appellants as taxpayers, to suggest that the conditions proposed by Hodgson J (or conditions like them) should be considered and fully argued before declaratory relief is finally offered by the Court. Hodgson J did not, in the view which he took of the principal contest between the parties, have finally to determine this question. Nor did his Honour consider the application of the doctrine of restitution to which McHugh JA has drawn attention: cf Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221 at 263. I agree with what McHugh JA has written on this subject. Hodgson J did, however, make it plain that the issue of the appropriate relief and the conditions which would attach to it, were still a live question in his mind, contingently upon the conclusion reached by this Court on appeal. In my opinion, the proceedings should be remitted to his Honour to conclude this question, to consider possible operation of the doctrine of restitution and to provide such relief (if any) upon such conditions (if any) as his Honour considers appropriate consonant with the decision of this Court."

BC9402679 at 81

McHugh JA at 445 and 446 considered restitution and stated that even though severability was not permissible it did not follow "that the parties are without remedy in respect of executed transactions entered into under the unenforceable contract".

His Honour continued:

"In some cases the doctrine of restitution will enable a party to recover compensation for a benefit accepted by the other party under the contract even though the contract is unenforceable. Recovery of compensation in these cases does not depend upon the terms of the unenforceable contract. The right of recovery is based on an obligation or promise which the law itself imposes: Pavey and Matthews Pty Ltd v Paul ... As the decision in that case shows, compensation may be payable in respect of work done and accepted under a contract even though the statute declares that the contract is unenforceable. Whether restitution is possible in respect of benefits accepted under a contract declared by statute to be unenforceable depends on the intention of the legislature. That is to say, the question is whether the legislature evinces an intention not only to invalidate the contract but to preclude the recovery of compensation by way of restitution for

the benefits given and accepted under the enforceable contract: cf Pavey and Matthews .. . In the present case the contract of loan is invalid because it was made as a result of a breach of the Companies Act 1961, s83. Nothing in s83 and s86 of the Act or the Act as a whole indicates that the legislature intended that a loan of money made to an investor who takes up an interest is not recoverable as a matter of restitution. Although the contract of loan is unenforceable, the appellants have received and have had the benefits associated with the loans. With one exception, they have had the benefit of the tax deductions associated with the amounts of the loans. They have also been able to increase their interest in the films as the result of the loans. Yet the result of my judgment is that the contracts of loan are unenforceable. If appellants are not required to refund the moneys which they borrowed, they will reap an unmerited benefit. That, of course, is often the result of the illegality doctrine. The modern doctrine of restitution enables the Court in appropriate cases to overcome these injustices. Whether or not Filmco is entitled to recover compensation for the loans by way of restitution was not argued in this appeal or before Hodgson J. This is understandable since Filmco was the defendant in an action which sought to declare the loan agreements invalid. But once the Court declares the loan agreements are enforceable, Filmco should be given the opportunity to raise the matter: see Supreme Court Act 1970, s63. This should be done before Hodgson J."

BC9402679 at 82

The reasoning in Hurst, therefore, is that a breach of s83 leads to any agreement entered into as a consequence of that breach, or inextricably linked with the affected contract being unenforceable. However, the potential injustice arising from that result requires a remedy, subject to certain pre conditions being met, by way of restitution. At first blush it may seem strange that contracts struck down as offending against the interests of investors, as recognised by the judicially perceived legislative intent, are not enforceable, but the same investors, who thereby gain immunity from suit may, nonetheless, be required to repay moneys borrowed under the principles of restitution, which proceed on the basis that the law should not countenance unjust enrichment. Thus, if the purpose of the illegality doctrine is to protect investors there seems no particular logic in enforcing that protection by resort to principles of illegality, if the remedy the lender or financier seeks can be achieved, either wholly or in part, by seeking restitution. The protection perceived to be afforded by the statute is, nonetheless, overcome.

BC9402679 at 83

It is, in my respectful opinion, to be borne in mind that in Hurst Filmco was both the promoter and the financier. The Court of Appeal was not called upon to consider the position of a third party financier which was in no way responsible for, or a party to or aware of the statutory breaches said to give rise to the illegality. To that extent the reference by Kirby P and McHugh JA to innocent third parties and the effect that illegality has upon them may be seen as obiter dicta, although clearly obiter dicta requiring the greatest respect. However, one may be forgiven for thinking that it is somewhat strange that the protection to the public afforded by striking down the contracts of loan is, subject to it being appropriate to apply relief by way of restitution, taken away. One may be forgiven for asking why if the legislative intention was that members of the investing public should be protected, that protection should be torn down by resort to the principles of restitution, which are based on preventing unjust enrichment.

The obiter dicta also raises considerations of potentially more wide ranging effect for financiers. Generally the financier will be advised of the purpose for which money is to be borrowed so that it can be said that the borrowing is linked, or even inextricably linked, with the particular purpose to which reference is made. Apart from the financier being aware of that purpose and lending the money to enable it to be effected, the financier may be quite innocent of the existence of any illegality affecting the contractual provisions for the purpose of which the money is borrowed. But if it be correct to say that the innocent financier may nonetheless find its contract struck down by illegality, such that it is remitted to its rights of restitution, the financial community may well take the view that money should be lent on far more restrictive terms. That does not fall foul of the general policy enunciated by Kirby P and McHugh JA, but it does not seem to me, with respect, to be consistent with the view that nonetheless the money can be recovered by way of restitution.

BC9402679 at 84

In my respectful opinion it is more consonant with the principles applicable to illegality to allow a party innocent of any illegality to recover under its contract, notwithstanding that the contract is, unbeknown to the innocent party, for the purpose of allowing a different illegal activity to be consummated. If this approach is adopted one leaves the remedy of restitution to those who must, of necessity, have resort to it because their participation in the illegal contract precludes recovery under that contract. In these circumstances I am of the opinion that MANL should not be forced to resort to relief by way of restitution, but that it is entitled to recover under its contracts.

BC9402679 at 85

McHugh JA identified a circumstance in which a contract would be severable and enforceable, namely where there is a contract supported by valid consideration. He then made an exception, namely, "that unless that contract was in substance so connected with the illegal provisions, as to form an indivisible whole which cannot be taken to pieces without altering its nature". It would seem that these words must mean that the contract or contractual provision, which is capable of being severed, must be something other than merely a part of the overall transaction, for if that is all his Honour meant it is difficult to see any case where severance would be permissible. The underlying premise, as I understand it, is that the contract or contractual provision is an integral part of the overall transaction affected by illegality.

His Honour cited, as authority for the proposition I have just quoted, McFarlane v Daniel; Thomas Brown and Sons Ltd v Fazal Deen, and Carney v Herbert. The firstmentioned case was not concerned with illegality. The Court was concerned with the enforceability of promises made as consideration in circumstances where they may be illegal, although that was not necessary for the decision, or unenforceable. At 344 Jordan CJ said:

"If the promises on one side are all illegal, it is obvious the promises cannot themselves be enforced, and obvious also that the promises by the other party which are based on a wholly illegal consideration cannot be enforced. If the promises on one side are all void, they are obviously unenforceable themselves, and the promises on the other side are obviously unsupported by any consideration."

His Honour considered whether, where some of the promises are illegal or void and some are valid, the valid can be severed from the invalid and, if they can, whether they are enforceable. He continued at 345:

"When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature: Horwood v Millar's Timber and Trading Co Ltd. If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable: Putsman v Taylor. If the substantial promises were all illegal or void, merely ancillary promises would be unseverable."

BC9402679 at 86

In that case the Court was considering one contract. It was not considering whether one contract, which was infected by illegality, would contaminate another contract, which was not affected by illegality "by its connection with the former". In Hurst the Court was considering two contracts, one of which was made not in contravention of a statutory provision, ie the statute did not preclude the entry into the contract, but as a consequence of one contracting party doing something, namely making an offer to the public without complying with the provisions of the statute before so doing, the investment contract infringed the statute. The loan agreement was entered into by the same party, ie the party which failed to comply with the statute in making the offer to the public, to facilitate the entry into and operation of the firstmentioned contract. At that point it may seem but a short step to strike down the loan agreement if, as I am bound to assume to be the law, the failure to comply with the statute before making the offer to the public struck down the contract consequential upon that offer. However, McHugh JA also held that if the loan had been made by a third party, which I think meant a third party unaware of the breach of the statute, and for purely commercial reasons, that contract should be struck down also. The reason for that was that the contract with the third party was one which gave the investor none of the protections, which the existence of an approved deed would have provided.

BC9402679 at 87

On this reasoning if an investor obtained overdraft accommodation from a bank, without disclosing the reason for so doing, the bank could not recover the money lent. Any other lender would be in the same position. This may be thought a strange result. On analysis there are two separate contracts at least. The contract for the acquisition of the interest may, for the reasons given in Hurst, be struck down. But the contract of loan is not given for illegal consideration. In consideration for the making of the loan to be paid in accordance with the borrower's direction, the borrower promises to repay the money and to pay interest thereon. The decision in Hurst requires the lender to satisfy itself, before making the loan, that the contract to be entered into as a consequence of receiving the loan is not an illegal contract. In view of the complexities surrounding such a determination the burden on the lender is great. Further, the degree of satisfaction does not seem to be cast in terms of what is reasonable, but rather on the basis that there be an absolute, in legal terms, satisfaction. That state of satisfaction could only be achieved, one may think, by a determination at the highest judicial level. The requirement to be so satisfied also imposes an obligation on the third party lender to investigate the purpose for which the money is to be used.

BC9402679 at 88

In Thomas Brown and Sons Ltd v Fazal Deen the High Court applied the words of Jordan CJ in McFarlane:

"If the elimination of the invalid promises changes the extent only but not the kind of contract, the valid promises are severable."

The Court was only concerned with the severability and provisions of one contract. However I think that there is no difficulty in coming to the same conclusion where there is more than one contract, where, the same parties to the contract affected by illegality are the parties to another contract inter related with the firstmentioned contract. The law would not countenance illegality being circumvented by the form in which the total contractual arrangements between the same parties were cast. That, however, is very different from saying that the effect of illegality will impact upon a contract with a third party where the consideration provided by the parties cannot be said to be either illegal or unenforceable in itself.

The result in Thomas Brown was that as the plaintiffs had to rely on the contract of bailment to recover the gold, which contract was infected with illegality, the plaintiff could not recover the gold. It is, in my opinion, necessary to identify the infecting element. It was that the plaintiff's entrusting of the gold to the defendant was in breach of a statutory regulation.

In the present case the lending of money was not in breach of any law. It was entirely lawful to lend the money. What must be said is that because the loan agreement was to place money in the borrower's hands, which money the borrower would use to acquire an interest, which interest could not lawfully be offered to members of the public because of failure to comply with the statute, therefore the loan agreement was also rendered illegal.

BC9402679 at 89

In Carney v Herbert [1985] AC 301 proceedings against a guarantor were defended on the ground that the sale agreements were illegal and unenforceable by reason of the provisions of s67 of the Companies Act (NSW) 1961, with the consequence that he and his company were entitled to retain shares, which had been purchased, without having any liability to repay $243,000 outstanding on that purchase. Rogers J, at first instance, held that although the mortgages were illegal and of no effect, they could be severed from the sale agreements and guarantees. The illegality of the mortgages was not challenged on appeal, with the consequence that:

"The plaintiffs were therefore implicated, together with the defendant, Airfoil, Ilerain and Newbridge, in an illegal act, namely a breach of statute law which amounted to a criminal offence": at 309.

This, so it seems to me, was an important finding because it connected, in a prima facie inextricable way, the plaintiff with the wrongful conduct. Their Lordships held further that the sale agreements, the guarantees and the mortgages were "rightly to be viewed as concurrent steps in a single though composite transaction". They noted that a party could not sue on an illegal contract and posited the question thus:

"The question therefore arises whether the illegality of the mortgages taints the whole transaction and prevents the plaintiffs suing Ilerain upon the sale agreements and suing the defendants on the guarantees, or whether the illegal mortgages can be severed for the purposes of the action from the overall transaction, leaving intact the rights of action against Ilerain and the defendant because, by reason of such severance, a plaintiff would not need to sue on an illegal agreement": at 309.

BC9402679 at 90

Their Lordships then observed that there were no "set rules" to decide all cases of severability and added:

"To some extent each case must depend on its own circumstances, and in particular on the nature of the illegality": at 310.

At 310 their Lordships cited from the judgment of Lopes LJ in Kearney v Whitehaven Colliery Co [1893] 1 QB 700 at 713:

"The law is clear that where the consideration for a promise or promises contained in the contract is unlawful, the whole agreement is void. The reason is that it is impossible to discriminate between the weight to be given to different parts of the consideration, therefore you cannot severe the legal from the illegal parts. But where there is no illegality in the consideration, and some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent upon one another. Here the consideration moving from the master to the men is the employment and the payment of wages. The consideration moving from the men to the master is the services rendered by them. Both are good and lawful considera-

tions. Then we come to the stipulation with respect to deductions. I am of opinion that that stipulation is altogether separable from and independent of consideration."

Their Lordships were of the view that this was the approach taken by Jordan CJ in McFarlane and, thereafter, referred to the decision of the High Court in Thomas Brown and the approval of their Honours, at 411, with the observations of Jordan CJ in McFarlane to which I have referred already. At 316 their Lordships said:

"The contract in the present case was basically one for the sale by the plaintiffs to the defendant or his nominated company of shares in Airfoil. The mortgages, like the guarantee, were ancillary to that contract for the sole purpose of ensuring the due performance of the contract by the purchaser. The defendant wanted only the shares in Airfoil. The plaintiff wanted only the purchase money. It made no difference to the plaintiffs, or to the nature of the transaction, what security was provided so long as it was satisfactory security. The mortgage did not go to the heart of the transaction, and its elimination would leave unchanged the subject matter of the contract and the primary obligations of the vendors and the purchaser. The debenture is therefore capable of being severed from the remainder of the transaction, and its illegality does not taint the whole contract. There is no policy objection to the enforcement of the contract from which the debenture has been divorced."

BC9402679 at 91

In the present case I consider the lease and loan contracts are severable. The lease contracts were not entered into by any party guilty of any illegality and under them the plaintiffs took an entitlement to property. Further, there is no evidence to support a finding that MANL was aware of any illegal conduct. The same observations apply, in my opinion, to the loan contracts. The authorities on which McHugh JA relied support this conclusion, which, in my respectful opinion, points up the distinction being drawn between the particular factual circumstances in the present case.

In my opinion insofar as the judgments of Kirby P and McHugh JA in Hurst hold that contracts entered into with third parties in circumstances where: (a) the third parties are innocent of any conduct which is illegal, or of any complicity in any such conduct; and (b) the contract with the third party is not itself subject to one of the accepted heads of illegality, are not severable and, hence, not enforceable, those observations are obiter dicta. For the reasons I have sought to give I respectfully decline to give effect to that part of their Honours' reasons. Accordingly, even on the assumption that what transpired amounted to an offer to the public, I am, nonetheless, of the opinion that the contracts of loan are enforceable by MANL. Insofar as this requires me to hold that those contracts are severable I do so. Another approach is to hold that the lease and loan contracts are independent and resort to severance is not necessary. I appreciate that the borrowing of money was a part of the transaction, in the sense that investors needed money to purchase their interests. However, investors were not obliged to borrow money. They could have used their own money to fund the investment. Therefore it only became an integral part of the transaction to borrow money because that was the way the investors chose to structure their affairs.

BC9402679 at 92

I have, so far, made the assumption that this was an invitation to the public. In Lee v Evans (1964) 112 CLR 276 the High Court was called upon to consider the meaning of the words "invitation to the public". At Barwick CJ said:

"Whether the question is whether the invitation is ex facie an invitation to the public or whether an invitation has become an invitation to the public by reason of the nature or extent of its issue, the basic concept is that the invitation, though maybe not universal, is general; that it is an invitation to all and sundry of some segment of the community at large. This does not mean that it must be an invitation to all the public either everywhere, or in any particular community. How large a section of the public must be addressed in a general invitation for it to be an invitation to the public in the relevant connection must depend on the context of each particular enactment and the circumstances of each case. But within that sufficient area of the community the invitation must be general in the sense spoken of by Viscount Sumner in Nash Lynde and by Warrington J in Sherwell's case, "An offer of shares to anyone who could choose to come in", and by Jordan CJ in Ex Parte Lovell: re Buckles 'made to the public generally and capable therefore of being acted upon by any member of the public'. That those to whose hands such an invitation is intended to come, also stand in some special relationship to the invitor, will not prevent the invitation being an invitation to the public.... He knew the invitation was made to the Broadbents alone. It was not made to anyone else, nor was it capable of being acted upon by anyone else. It was not general but particular to them. Though it would seem that the Broadbents may have been chosen as recipients of the invitation because of their supposed special interest in timber raising or timber selling activities, I find it unnecessary in this case to base any conclusion wholly or partly upon that circumstance."

BC9402679 at 93

Kitto J considered that the magistrate was correct in holding that the expression "invitation to the public" meant "an invitation to the public generally and capable therefore of being acted upon by any member of the public": at 286. At 287 his Honour continued:

"I am not intending to hold, however, that the size of the immediate audience is necessarily conclusive of the question whether the invitation is an invitation to the public. That is a question of the true scope of the invitation. While it may be answered conclusively in one case by the terms in which the invitation was expressed, it may require in another case a consideration both of the words in which it was expressed and of the circumstances in which they were used. I see no reason to doubt that the statement of an invitation even to one person only may be seen, when considered in the light of all the circumstances, to be part of, even though only the first step in, the communication of the invitation to the public generally, so that if the lone hearer were to tell some stranger of it the stranger would be right in treating it as open to acceptance by him no less than by the hearer. ..."

His Honour then stated that the question remained one of fact, and continued:

"In many cases the answer may be easy, but that does not mean that the question is not there to be answered; and in considering the answer that distinction must not be overlooked between the case of an invitation which itself is open to acceptance by any member of the public who may be interested and the case of an invitation which itself is open to acceptance by a specific individual only but, if declined by him, is likely to be followed by similar invitations to other specific individuals in succession until an acceptor is found. The first of these is a case of an invitation to the public; the second, in my opinion, is not."

BC9402679 at 94

Taylor J considered that it was necessary to have regard to the character of the invitation.

In Australian Softwood Forests Pty Ltd and Ors v Attorney General for the State of New South Wales ex Rel Corporate Affairs Commission (1982) 148 CLR 121 questions arose as to the meaning of the word "interest" in s76(1) of the Companies Act 1961 and the meaning of s81(1) of that Act. Mason J, with whose reasons Gibbs CJ and Stephen J agreed, considered the question whether there was an offer or invitation to the public commencing at 134. His Honour rejected a construction of the word "issue" for which the appellants contended and said:

"And I see no difficulty in saying that interests are issued to the public if, as will be seen to be the case, there are many instances in which an interest is allotted to an individual, the individual being selected or identified as the recipient of the interest by reference to his being a member of the public."

His Honour noted that the documentation was distributed by the appellants to brokers and that "once a grower comes into contact with a broker by any of the methods disclosed in the Statement of Agreed Facts it is unrealistic to say that an offer for subscription or purchase, or at least an invitation to subscribe for or purchase, an interest is not thereafter made to the grower". His Honour acknowledged that, as a matter of strict contract law, the grower made the offer to the company, which accepted it and that the use of that form of agreement only gave rise to an invitation to treat. But his Honour was of the view that "offer" was not used in its strict contractual sense: Mutual Home Loans Fund of Australia Ltd v Attorney General (NSW) (1973) 130 CLR 103 at 118, 120. After this analysis his Honour posed "the real question" as being "whether what has occurred gives rise to an issue, offer or invitation to the public". His Honour stated that the growers were approached by brokers and:

"Although the company through the brokers negotiated with members of the public individually, the persons signed up were approached as members of the public. The facts do not suggest that the company or the brokers looked to a particular class of person as growers. The documents contain no hint of any restriction to a class or group of persons having some common characteristic or qualification, except that of possessing the money with which to buy the trees."

BC9402679 at 95

His Honour then cited with approval the remarks of Kitto J in Lee v Evans (supra) at 287.

At 143 Wilson J dealt with the submission that there was no issue or offer to the public because there was no advertising or public solicitation. It had been submitted that "issue" means no more than "proffer" and so adds little to "offer". His Honour considered the judgments in Lee v Evans and said:

"The judgments in that case emphasise that the determination of the true nature of an invitation is a question of fact and degree dependent upon the particular enactment and the circumstances of each case. The manner in which the invitation is conveyed, whether by public advertisement or by personal solicitation is not decisive. But, however conveyed, to be

an invitation or offer to the public, it must be general in the sense of being available to be acted upon by any member of the public."

His Honour accepted the test that the question was not to whom the offer was made, but by whom the offer is capable of acceptance.

BC9402679 at 96

At 144 his Honour said:

"Any member of the public may become a grower provided that he or she pays the requisite fee and executes the agreement, and provided, of course, that the company accepts the agreement. It was not suggested in argument that this latter requirement affects the character of the invitation or offer. Having regard to the number of participants the fact that the sole characteristics which they have in common is that they are members of the public, the nature of the scheme, and the protective purpose of the legislation, I conclude that the circumstances were such as to establish an offer to the public of an interest for subscription or purchase or an invitation to the public to subscribe for or purchase any interest."

I was referred to the decision of Von Doussa J in Van Reesema v Flavel Australian Growth Resources Corporation Pty Ltd v Flavel (1987) 11 ACLR 463. His Honour cited the following passage from the majority judgment in Corporate Affairs Commission (South Australia) and Anor v Australian Central Credit Union (1985) 61 ALR 236 at 240:

"In a case where an offer is made by a stranger and there is no rational connection between the characteristic which sets the members of a group apart and the nature of the offer made to them, the group will, at least ordinarily, constitute a section of the public for the purposes of the offer. If, however, there is some subsisting special relationship between offeror and members of a group or some rational connection between the common characteristics of members of a group and the offer made to them, the question whether the group constitutes a section of the public for the purposes of the offer will fall to be determined by reference to a variety of factors of which the most important will ordinarily be: the number of persons comprising the group, the subsisting relationship between the offeror and the members of the group, the nature and content of the offer, the significance of any particular characteristic which identifies the members of the group and any connection between that characteristic and the offer ..."

In WA Pines Pty Ltd and Ors v National Companies and Securities Commission (1987) 11 ACLR 545 Burt CJ, at 548, after referring to the various authorities to which I have referred and also the decision of the New South Wales Court of Appeal in Kirton v Venture Acceptance Corporation (1986) 5 NSLWR 274, said:

"It is not necessary to refer to the facts of any of those cases. One must I think approach and judge each case on a case by case basis applying to the facts what was said by Mason ACJ, Wilson, Deane and Dawson, JJ in the Australian Credit Union case ..."

BC9402679 at 97

His Honour also quoted from the judgment of Brennan J at 244:

"In my opinion the criterion which distinguishes an offer to a group of offerees who are not a section of the public from an offer to a section of the public is this: whether offerees are members of a group who, by reason of their antecedent relationship with the offeror, have an interest in the subject matter of the offer substantially greater than or substantially different from the interest which others who do not have that relationship would have in the subject matter of the offer."

In Kirton (supra) the company was contractually bound by existing options to issue shares to option holders upon certain terms. An offer was made by the company by letter to the option holders to issue shares on the basis of a variation of some of the original terms. It was held that this was not an offer "to the public" or "to any section of the public" within the meaning of s37(2) and s5(6) of the Companies Act 1961. Mahoney JA, with whom Hope and Glass JJA agreed, considered the various authorities relating to offers to the public and said, at 279:

"In the present case the letters were sent only to the person to whom the company was contractually bound to issue shares. The letters were, on the defendants' case, an offer to issue such shares in circumstances other than those in which the company was already contractually bound to issue them: they were, in a sense, an offer to vary some of the terms of that contract. The number of persons to whom the letters were sent was, as I infer, no more than about 176, being all of the option holders registered in the records of the company.

BC9402679 at 98

In my opinion the offers so made to the defendants were not, and were not part of, offers made to a section of the public. The first matter argued for the defendants therefore fails."

In Hurst the Court of Appeal held that there was an offer to the public. As I have noted, the legislative provisions under consideration were the same, or substantially the same, as those being considered in the present case. Kirby P, after setting forth the competing contentions as to whether there was an offer or issue to the public, in which he noted that no one was rejected as an investor, (at 408), continued:

"Everyone who returned the forms and deposited the funds was accepted and this not because he was a friend, partner, spouse or ex water polo colleague of Mr Fox but because he was an investor. Then there is the geographical spread and the variety of accountants and solicitors who acted as brokers for the investors. It is true that the number of the investors is small. On the other hand, numbers alone cannot determine the character of the offer, in the end, the amount of investment raised approximated the amount required as the budget for the four subject films. Accordingly it was not necessary to go beyond the investors. The fact that Mr Fox and Filmco economically tugged at the likely members of the public who would be interested in an investment in Filmco merely demonstrates their efficiency. It has never been necessary, to give the public quality to an initial offer that leaflets should be distributed in suburban letterboxes. And when the targeting is analysed, by reference to the detailed evidence given by the resisting investors, it can be demonstrated that in many cases (although not all) they fell outside a pre-existing relationship which could qualify for a description other than 'the public'. Some received the circular unprovoked. Others heard of the scheme at meetings addressed by Mr Fox which were open to clients of accountants to attend or not as they pleased. Some brought their spouses into the scheme. As the circle widened, the risk that it would be categorised 'the public' inevitably grew. ... The conclusion I have reached is therefore that the friendship of previous tax avoidance association with Mr Fox was the means by which the collection of investors for Filmco was initiated; but when defining the character of the offer and issue then made, of interest in Filmco, the friendship and previous association, direct or indirect with Mr Fox was not essential. In short, it was a means but not a pre-condition or requirement for acceptance of the offer to invest. That offer was open to those members of the investing public who came into possession of the second 'Dear Member' circular letter. That letter was open to the public and represented an offer to investors, not as friends or past associates, but as members of the public. As such, it attracted the obligations imposed by s82."

BC9402679 at 99

Mahoney JA held that a number of people who invested in the scheme did so as a result of their relationships "to the company and Mr Peter Fox either directly or through such a direct relationship". Had the matter stopped there his Honour would have found, as I understand it, that it was not an offer to the public. His Honour continued, at 426 and 427:

"However, the evidence established that the persons who had invested in arrangements of this kind had in fact numbered at least 160. Of those other than the plaintiffs, there was, for the most part, little known. The argument for the plaintiffs was that, in the absence of evidence as to there being any relevant relationship between those other investors and the company, it should be concluded that the invitations as the result of which they became investors were extended to them in the absence of relevant relationships and so were invitations to the public in the statutory sense. It was to be inferred, the argument ran, that the plaintiff's invitation was part of the general invitation to the public and did not flow from particular circumstances of the invitation extended to them. As I have said, if there is an invitation to the public generally, the fact that one of the persons to whom it is communicated has a particular relationship with the investor does not, as such, mean that in his case the invitation is accepted otherwise than as a member of the public: the categorisation of his case will depend on the circumstances. I shall assume without deciding that, in relation to the great bulk of the persons involved, there was not a particular relationship as existed in relation to almost all of the present plaintiffs. I do not so decide: the proper conclusion, I think, is that the evidence is so equivocal and deficient that no appropriate conclusion of fact could be drawn upon the matter. But upon that assumption, I think that the evidence of how the individual plaintiffs, excluding Mr Francis, came to be holders of interests is such that, in relation to them, the proper conclusion is that their acquisition of their interest did not occur as part of the inviting of the public within s83(1). And they, for present purposes, carry with them the case of Mr Francis."

BC9402679 at 100

McHugh JA held there was an offer to the public, noting the basic concept that such an offer is made "when it is apparent from the terms of the offer or the circumstances in which it is made that it may be accepted by any member of the public who wishes to do so". His Honour was satisfied, having regard to the findings that no applicant was rejected and that there was no restriction on any person being accepted, coupled with the marketing methods used by the respondent, that the most probable conclusion was that the investment in the scheme "was open to any member of the public": at 440. He said:

"By itself the offer of commission to accountants in return for introducing investors is a powerful, if not decisive, factor in favour of that conclusion. Employment of agents for commission to introduce suitable investors seems almost con-

clusive evidence of an offer to the public. It is no answer to that proposition to say that the agents themselves came from a specially selected group or that many of the investors came from their clients. The overwhelming inference is that persons were accepted as investors, not because they were clients of accountants or had participated in previous tax schemes or were partners or members of the families of such persons but because, as members of the public, they had the funds to invest in a scheme which gave them tax advantages."

The facts of this case satisfy me that there was an invitation to members of the public. There was no special relationship between the promoter and the investors. There was no requirement that the investors should come only from a discrete section of the community. The promoter was content for Mr **McConnell** and others to obtain investors. The number of shares in each syndicate meant that of necessity the number of investors would be small. But this latter factor does not preclude the inference that in seeking that small number the invitation was made or susceptible of being made to a range of people. This is pointed up by the attempts made to fill the syndicates.

BC9402679 at 101

The promoter was not concerned with the individual characteristics of investors, save for their ability to fund the acquisition of their interest. I also consider it appropriate to have regard to the relatively large number of brochures printed and their area of distribution. In all the circumstances I consider that the offer of invitation satisfied the various criteria referred to in the authorities. It was an offer to anyone who could choose to come in, it was capable of being acted upon by any member of the public, there was "no hint of any restriction" on the class who may apply, and there was, generally speaking, no relationship between the promoter and the investors. I also have regard to the fact that Mr **McConnell** was either paid or offered a commission for procuring investors.

I am, for these reasons, satisfied that the invitation or offer was one made to the public.

Mr Grieve submitted that as this was an interest in a partnership agreement it did not constitute a prescribed interest. I have set forth the relevant statutory provisions. I agree that the relationship between the parties gave rise to a partnership. But the agreement related to the type of situation "promoted by or on behalf of a person" (B and T) "whose ordinary business" was to promote such schemes. That in my opinion excludes the situation from the exclusion given to an interest in a partnership agreement. That conclusion is somewhat reinforced by the definition of "investment contract".

BC9402679 at 102

On the basis that I am wrong in holding that the contract of loan is enforceable it is now necessary for me to consider whether MANL is entitled to recover restitution on the ground of unjust enrichment. It must also be remembered that the plaintiffs seek restitution on the same basis, relying upon the illegality said to attach to the loan agreement.

UNJUST ENRICHMENT In Pavey and Matthews Pty Ltd v Paul (1986) 162 CLR 221 the Court considered the right to recover on a quantum meruit. Mason, Wilson and Deane JJ held that the right to recover for building work carried out, where recovery under the contract was not permitted on the basis that the contract was not enforceable, depended on a claim to restitution based on unjust enrichment.

At 228 Mason and Wilson JJ said:

"If the effect of bringing an action on a quantum meruit was simply to enforce the oral contract in some circumstances only, though not in all the circumstances in which an action on the contract would succeed, it might be persuasively contended that the action on a quantum meruit was an indirect means of enforcing the oral contract. So, if all the plaintiff had to prove was that he had fully executed the contract on his part and that he had not been paid the contract price, there would be some force in the suggestion that the proceeding amounted to an indirect enforcement of the contractual cause of action. However, when success in a quantum meruit depends, not only on the plaintiff proving that he did the work, but also on the defendant's acceptance of the work without paying the agreed remuneration, it is evident that the court is enforcing against the defendant an obligation of difference in character from the contractual obligation had it been enforceable."

BC9402679 at 103

After their Honours considered the protection the legislation provided they continued at 229:

"But it would be going a very long way indeed to assert that the statutory protection extends to a case where the building owner requests and accepts the building work and declines to pay for it on the ground that the contract fails to comply with the statutory requirement. True it is that the informal contract, though not enforceable by the builder, is enforceable against him. But it is not to be supposed that it is enforceable against him on the footing that the building owner is under no liability to pay for building work upon which he insists and the performance of which he accepts. The

consequences of the respondent's interpretation is so draconian that it is difficult to suppose that they were intended. An interpretation that serves the statutory purpose yet avoids a harsh and unjust operation is to be preferred."

At 256 and 257 Deane J said:

"To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might indicate. The circumstances in which the common law imposes an enforceable obligation to pay compensation for a benefit accepted under an unenforceable agreement have been explored in the reported cases and in learned writings and are unlikely to be greatly affected by the perception that the basis of such an obligation, when the common law imposes it, is preferably seen as lying in restitution rather than in the implication of a genuine agreement where in fact the unenforceable agreement left no room for one. That is not to deny the importance of the concept of unjust enrichment in the law of this country. It constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case .. In a category of case where the law recognises an obligation to pay a reasonable remuneration or compensation for a benefit actually or constructively accepted, the general concept of restitution or unjust enrichment is, as is pointed out subsequently in this judgment, also relevant in a more direct sense to the identification of the proper basis upon which the quantum of remuneration or compensation should be ascertained in that Particular category of case."

BC9402679 at 104

At 259 his Honour referred to the fact that he had concluded that the obligation to pay arose not from an unenforceable agreement "but under an obligation or promise imposed or imputed by law to make fair and just restitution". At 262 his Honour said:

"There is no apparent reason in justice why a builder who is precluded from enforcing an agreement should also be deprived of the ordinary common law right to bring proceedings on a common indebitatus count to recover fair and reasonable remuneration for work which he has actually done and which has been accepted by the building owner .. Nor, upon a consideration of the words of s45 and their context in the Act, am I able to identify any legislative intent to deprive the builder of that ordinary common law right. The section does not make an agreement to which it applies illegal or void. Nor do its words disclose any legislative intent to penalise the builder beyond making the agreement itself unenforceable by him against the other party."

In a case similar to the present case (Hurst) the Court of Appeal held that the relevant statutory provision does render the contract of loan illegal, and that the legislative intent is to penalise parties seeking to enforce a contract tainted by illegality. In these circumstances I have difficulty in seeing how the principles expounded by Deane J, which are accepted as the basic statement of the present claim for relief, and which were accepted by Kirby P and McHugh JA as providing a basis for relief, can be applicable to a case where there is illegality. It may be that this analysis explains the difficulty I have in understanding the approach of Kirby P and McHugh JA insofar as their Honours held that the contract was illegal, but nonetheless restitution was permissible. As Deane J pointed out Pavey and Matthews is not a case where the legislation made the contract illegal. The passage I have just quoted would tend to indicate that his Honour was of the view that if the legislation made the contract illegal or void then there would be a manifestation of a legislative intention to deprive the builder of the ordinary common law right. In those circumstances, so his Honour would seem to suggest, the law of restitution would not operate. No doubt the rationale is that where contracts have been held to be illegal the loss, generally speaking, lies where it falls.

BC9402679 at 105

In Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation (1987 and 1988) 164 CLR 662 Mason CJ, Wilson, Deane, Toohey and Gaudron JJ said at 673:

"The basis of the common law action of money had and received for recovery of an amount paid under fundamental mistake of fact should now be recognised as lying not in implied contract but in restitution or unjust enrichment .."

After considering possible formulations of the cause of action, their Honours said:

"It is a common law action for recovery of the value of the unjust enrichment and the fact that specific money or property received can no longer be identified in the hands of the recipient or traced into other specific property which he holds does not of itself constitute an answer in a category of case in which the law imposes a prima facie liability to make restitution. Before that prima facie liability will be displaced, there must be circumstances (eg, that the payment

was made for good consideration such as the discharge of an existing debt or, arguably, that there has been some adverse change of position by the recipient in good faith and in reliance on the payment) which the law recognises would make an order for restitution unjust. The prima facie liability to make restitution is imposed by the law on the person who has been unjustly enriched."

BC9402679 at 106

Their Honours recognised that receipt of a payment made under a fundamental mistake "is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment .."

In Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 a partner in a firm of solicitors, who had authority to operate on the firm's client account at the bank, was, unbeknown to the other partners, a compulsive gambler. Without their knowledge he withdrew moneys from that account and used them gambling at the defendant club, where he exchanged cash for gambling chips. The chips were only recognised as currency within the club. The solicitor lost money and the firm brought an action against the club and its bank to recover the moneys the solicitor had stolen. It was held that the contracts for the exchange of money for chips were void under the Gaming Act 1845, but, notwithstanding this, the moneys so paid to the club were not recoverable by the solicitors as money had and received.

At 558 Lord Bridge of Harwich said:

"I agree with my noble and learned friend, Lord Goff of Chieveley, that it is right for English law to recognise that a claim to restitution, based on the unjust enrichment of the defendant, may be met by the defence that the defendant has changed his position in good faith. I equally agree that in expressly acknowledging the availability of this defence for the first time it would be unwise to attempt to define its scope in abstract terms, but better to allow the law on the subject to develop on a case by case basis."

Lord Templeman identified that the recipient of stolen money may be unjustly enriched and thus liable to make repayment on a count for money had and received, where full consideration was not given for the amount stolen. He gave the example of a thief having paid money to a friend as a gift, although he acknowledged that complications arose if the donee innocently expended that money in reliance on the validity of the gift before receiving notice of the victim's claim for restitution. In the present case, to the extent that the solicitor lost money to the club it alleged it gave consideration for that money by allowing the solicitor to gamble and agreeing to pay his winnings and that, accordingly, the club was not enriched or, alternatively, was not unjustly enriched. The solicitors submitted that the club acquired this money under void contracts so that as between them and the club the club was in no better position than an innocent donee from a thief. The solicitors alleged that the contract was void under s18 of the Gaming Act 1845.

BC9402679 at 107

At 566 his Lordship held that the contracts were void under s18 and that, accordingly, the club was in no better position than a donee, and continued:

"On principle and on authority a donee is bound to reimburse the victim for stolen money received and retained by the donee and, in the circumstances, the club was unjustly enriched to the extent that the solicitors' money was retained by the club."

Lord Goff held that the contract was void under s18 and that the club did not give valuable consideration for the money. He then turned to consider whether the club could rely upon the defence of change of position. At 577 and 578 his Lordship said:

"I turn then to the last point on which the respondents rely to defeat the solicitors' claim for the money. This was that the claim advanced by the solicitors was in the form of an action for money had and received, and that such a claim should only succeed where the defendant was unjustly enriched at the expense of the plaintiff. If it would be unjust or unfair to order restitution, the claim should fail. It was for the Court to consider the question of injustice or unfairness, on broad grounds. If the Court thought that it would be unjust or unfair to hold the respondents liable to the solicitors, it should deny the solicitors recovery."

BC9402679 at 108

His Lordship listed the matters upon which the club relied to show that it would be unfair to hold it liable and continued:

"I accept that the solicitors' claim in the present case is founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club was indeed unjustly enriched at the expense of the solicitors. The claim for money had and received is not, as I have previously mentioned, founded upon any wrong committed by the club against the solicitors. But it does not, in my opinion, follow that the Court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the Court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle."

His Lordship acknowledged that there was a defence of change of position recognised in English law.

At 579 his Lordship posed the question as to why it would be unjust to allow restitution where there had been a change of position, and then provided the answer in the following terms:

"The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these. The principle is widely recognised throughout the common law world."

BC9402679 at 109

At 580 his Lordship considered that each case would have to be considered on its own facts, and said:

"At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only on comparatively rare occasions."

The matter was next considered by the High Court in David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353 where consideration was given to whether there should be recovery for money paid under mistake, whether of fact or law. In their joint judgment Mason CJ, Deane, Toohey, Gaudron and McHugh JJ said:

"The criticism gains added impetus in Australia by virtue of the recognition by this Court in Paves and Matthews Pty Ltd v Paul of the 'unifying legal concept' of unjust enrichment. As Dickson J stated in Ontario Hydro: 'Once a doctrine of restitution or unjust enrichment is recognised, the distinction as to mistake of law and mistake of fact becomes simply meaningless.'

BC9402679 at 110

If the ground for ordering recovery is that the defendant has been unjustly enriched, there is no justification for drawing distinctions on the basis of how the enrichment was gained, except insofar as the manner of gaining enrichment bears upon the justice of the case."

At 378 their Honours quoted from the judgment of Deane J in Pavey and Matthews at 256 and 257 and, at 379, said:

"Accordingly, it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or ILLEGALITY." (My emphasis.)

Their Honours then said:

"The respondent's submission that the appellants must independently prove 'unjustness' over and above the mistake cannot therefore be sustained. The fact that the payments have been caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the respondent to make restitution. Before that prima facie liability is displaced, the respondent must point to circumstances which the law recognises would make an order for restitution unjust. There can

be no restitution in such circumstances because the law will not provide for recovery except when the enrichment is unjust. It follows that the recipient of a payment, which is sought to be recovered on the ground of unjust enrichment, is entitled to raise by way of answer any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust."

For the word "mistake" I would interpolate the words "duress" and "illegality": I do so because those words are used in conjunction in the passage I have earlier quoted. In those circumstances David Securities stands, in my view, as authority for the proposition that where the payment has been caused by "illegality" the fact of the payment gives rise to the prima facie obligation to which their Honours referred. In this case the moneys were paid by the defendant for good consideration and it changed its position, in the sense of substituting contractual rights against the plaintiffs, for the money it had previously.

BC9402679 at 111

Notwithstanding the reservation I have expressed earlier about the inconsistency between holding that a payment was illegal and that it could be recovered under the principle of unjust enrichment, I am satisfied that the High Court has now stated that it can be recovered on the basis of unjust enrichment in the case of statutory illegality, if the enrichment is unjust. In so concluding their Honours, at least impliedly, endorsed the views expressed by Kirby P and McHugh JA in Hurst.

The first question which arises is whether the enrichment was unjust. The plaintiffs borrowed the money for the purpose and with the intention of investing in the syndicates, and with the further intention of repaying it. I am satisfied they appreciated that there was a real element of risk in making the investment, which, if the risk came to fruition, could have meant that they would be required to repay the borrowed money from their own funds rather than from the proceeds of the investment. The money was invested, essentially, in the way they intended. They derived financial benefits from the investment in the form of income tax advantages, prize winnings and the proceeds of the sale of horses. They have accounted for none of this to MANL and they have not repaid the money prima facie owing. Indeed the plaintiffs assert that not only are they entitled to retain the money borrowed and all the advantages derived from the investment but they are also entitled to the payment of further money from MANL because, so it is submitted, MANL was unjustly enriched.

BC9402679 at 112

In my opinion this is a case in which if MANL is not otherwise entitled to relief, it is entitled to it by restitution for enrichment which would, in my opinion, be unjust. The plaintiffs borrowed the money to invest in a speculative manner. MANL was not to blame for their borrowing the money from it for that purpose. In that I encapsulate that nothing MANL did or failed to do prior to the lending constituted a breach by MANL of any of the many duties asserted by the plaintiff to be due to them by it. I shall explain my further reasons for so concluding subsequently. The venture failed, in my opinion, for reasons in no way attributable to MANL. On the evidence of Mr **Beatty** it was, arguably, because the plaintiffs failed to put in sufficient money to keep it going, although I think there are more fundamental and compelling reasons for concluding that MANL was not responsible for the plaintiffs' investing or for the failures of the syndicates. Even before the venture failed numerous matters were brought to the plaintiffs' notice, about which they complain in this litigation, but about which they did nothing at the time. Leaving aside whether that failure amounted to adoption or ratification or acquiescence, it did mean that MANL was not given the opportunity to consider recovery at that Point.

Notwithstanding the grounds of complaint, the plaintiffs maintained their entitlement to the tax advantages, the prize money and, eventually, the proceeds of sale of the horses. Further, they sought to enter into negotiations with MANL either to have the terms of the original contract varied or for an overall settlement. The total inconsistency of their approach beggars belief, not only at a moral level, but also at a legal level. Yet they have sought in this litigation to maintain what, in my view, was a totally untenable and inherently contradictory approach.

BC9402679 at 113

In my opinion the receipt of the money for the purpose the plaintiffs required it, and the application of it to that purpose, coupled with their original promises to repay, which have not been fulfilled, makes their present refusal to repay the money borrowed unjust. They will, if ordered to repay the money with interest, retain the advantages of the benefits received. The two figures should not be set off against each other because, insofar as there is a shortfall, it represents the risk they were, I am satisfied, prepared to undertake in entering into the syndicates. Further, they have had the benefit of the proceeds of the sale of horses, a benefit to which, as I have pointed out, they had no right at law at all.

In a detailed written submission the plaintiffs put forward that if I were of the view that there should be repayment for unjust enrichment I should make a detailed analysis of various figures. The figures used in the submission show the

following liabilities: Messrs Killalea, Fraser and **Beatty** $ 127,996 Messrs Davis and Taperell and Miss Wilson $ 113,881 Messrs Connor, Blessington and Logaraj $ 123,043.

BC9402679 at 114

I reject this method of approaching the matter for the reasons I have given, which, in my opinion, accords with the principles to which I have referred. To these I should also add a reference to the statement of Deane J in Pavey and Matthews at 257 where his Honour said:

"In many cases, such as where the claim is for money lent or paid, the obligation to make restitution will plainly involve the obligation to pay the precise amount advanced or paid."

For the reasons I have sought to give, the present case, in my opinion, is such a one.

It was further submitted that various competing allowances should be set off. Those submissions proceed, in effect, on the basis that the plaintiffs and MANL were joint venturers, and that the plaintiffs having lost by reason of a bad investment MANL should share that loss. Once I am satisfied that the conduct of MANL neither led to the plaintiffs investing in the syndicates, nor caused the syndicates to fail, any suggestion of some apportionment of the loss falls away. The submission also calls in aid the bringing about of a "just" solution. That may, although I do not have to decide this, corrupt the principles of unjust enrichment by diverting attention from whether the enrichment was "just" or "unjust" to a related but not the same question viz. the remedy if the enrichment was unjust. However if, as one would assume to be the legal position, the ultimate result must be "just", the way in which that can be achieved, on the facts of this case, is by ordering the plaintiffs to repay all money borrowed with interest at the contractually stipulated rates.

BC9402679 at 115

When all these matters are considered I conclude that the plaintiffs will be unjustly enriched if they are not ordered to repay the moneys borrowed from MANL with interest at the contractually agreed rate. On the other hand I do not consider that MANL has been in any way enriched, let alone unjustly enriched, as a result of entering into or performing its contractual obligations.

Essentially for the reasons I have given, I am of the opinion that the plaintiffs have not changed their position in circumstances precluding recovery by MANL.

In the result, if I am wrong in permitting MANL to recover under the lease and loan agreements, I would permit it to recover the same amount to which it would be entitled under those agreements by way of restitution for unjust enrichment.

ALLEGED BREACH BY MANL OF S75B OF THE TRADE PRACTICES ACT I have set forth already the terms of para65 of the Amended Statement of Claim (at 30), alleging that MANL was either a party to or was knowingly concerned, within the meaning of s75B of the Trade Practices Act, in the making of the representations pleaded in para16 and para17. The plaintiffs rely upon subpara(a) and subpara(c) of s75B. The circumstances which render a party liable were considered in Yorke and Anor v Lucas (1983-1984) 158 CLR 661. In order to contravene subs(a) and subs(c) it is necessary to find that the person:

"(a) has aided, abetted, counselled or procured the contravention: ... (c) has been in any way, directly or indirectly, knowingly concerned in, or a party to, the contravention: ....."

BC9402679 at 116

At 667 Mason ACJ, Wilson, Deane and Dawson JJ noted the difficulty encountered in applying subpara(a) arising from the collocation of words taken from the criminal law "where they are used to designate participation in a crime as a principal in the second degree or as an accessory before the fact". They emphasised that to be guilty required an intentional participation, and that to form the requisite intent the person "must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime". Their Honours observed that this had been affirmed in Giorgianni v The Queen to which I have referred at length already.

Their Honours were satisfied that the person alleged to have contravened s75B(a) lacked the knowledge necessary to form the required intent, and that, whilst he was aware of the representations, "he had no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention": at 668.

In the present case the evidence does not satisfy me MANL was aware that the representations had been made. Nor is there a skerrick of evidence to suggest that MANL was aware that any representation made was false. For those reasons MANL could not have been in breach of subs(a).

In relation to subs(c) their Honours said at 670:

"There can be no doubt that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention. It cannot, therefore, be suggested that Lucas falls within the first limb of para(c). It might be thought possible to construe the express requirement of knowledge as extending not only to being 'concerned in' but also to being 'party to' a contravention. However, there are two reasons, in our view, why it is inappropriate to do so."

BC9402679 at 117

Their Honours rejected that construction and concluded:

"In our view, the proper construction of para(c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention."

Essentially for the reasons I have just given I do not consider that that has been established. For essentially the same reasons Brennan J came to the conclusion that the appeal should be dismissed.

In my opinion the assertion that MANL was in breach of the provisions of s75B must be rejected.

This finding proceeds on the assumption that there was a contravention of s72. The contravention is alleged to have been perpetrated by B and T. I have already rejected the submissions that MANL adopted the conduct or that it is otherwise liable in respect of it. However, against the eventuality that my findings are found to be incorrect, it becomes necessary that I should now consider whether there were fraudulent representations or there was a contravention of s52 in the manner pleaded. This requires a consideration as to whether or not the oral and written representations were made to the plaintiffs, whether, if they were, they were misleading or deceptive, or likely to mislead or deceive, and if they were, whether they induced the plaintiffs to enter into the contractual arrangements. The parties conducted the proceedings on the basis that the factual matters were in issue and, to that extent at least, the credit of the plaintiffs was in issue.

BC9402679 at 118

A CONSIDERATION OF THE REPRESENTATIONS The written representations, which remain relevant after the concession that MANL did not know of Exhibit B prior to entering into the transaction, are pleaded in para16(a) of the Amended Statement of Claim. They are:

"(i) That the partnership was formed because it believed a select thoroughbred racing and breeding operation can be a very successful and profitable business venture; (ii) That the manager's performance record in the industry clearly indicated the potential of the venture; (iii) That at all times it was the single minded objective of the partnership to trade itself into profit as quickly as possible and thereafter to make the syndicate operate Profitably; (iv) That the bloodstock had been purchased on the syndicate's behalf by a leading financial institution which was becoming increasingly adept at bloodstock finance; (v) That all yearlings were sold into the syndicate at exactly their sale ring price; and (vi) That on 1 June 1989 the syndicate was to enter into a lease with the abovementioned bloodstock finance company."

In para17 of the Amended Statement of Claim it is alleged that B and T, by its agent Mr **McConnell,** made certain representations orally in June 1989 to the effect:

"(a) That the promoters of the syndicate, being B and T and in particular Bell, were experts at picking good horses and had a great deal of success with a syndicate put together in 1988; (b) That the thoroughbreds to go into the syndicate would be top quality; (c) That the syndicate would be put together in a way that would give a good tax deduction up front; and (d) That the syndicate would be fully funded and that the only amount payable before 30 June would be about $3,000 for interest on a personal loan which would be unsecured."

BC9402679 at 119

It is alleged in para18 of the Amended Statement of Claim that these representations were made to the first, second and fourth plaintiffs "for the purpose of inducing them and each of them to apply for a share in a Bell and Tonkes Racing and Breeding Syndicate".

It is alleged in para19 that in reliance on these representations and induced thereby the first, second and fourth plaintiffs applied for one share in a Bell and Tonkes Racing and Breeding Syndicate, with the exception of Messrs Blessington and Logaraj, who jointly applied for one share and that "they paid $3,062 to Bell and Tonkes being the first payment of interest payable to NMRB pursuant to the representation referred to in para16(c)(ii) and para17(ii)(a) hereof".

As the two paragraphs lastly mentioned are no longer relied upon as against MANL it is unnecessary to consider that particular allegation.

In para20 and para21 of the Amended Statement of Claim it is alleged that the representations pleaded were made in trade and commerce and each of them was false and/or misleading. The particulars are:

"(i) The partnership was not and never could have been successful and profitable; (ii) B and T's performance as a manager had been a failure and it had been removed from the management of syndicates it had promoted and managed in 1988; (iii) The bloodstock had not been purchased by a leading financial institution adept at bloodstock finance: (iv) The yearlings had not been sold and were not intended to be sold into the syndicate at exactly their sale ring price; (v) The syndicate had not entered into a lease with a leading bloodstock finance company; (vi) The promoters were not experts in picking horses; (vii) The horses to go into the syndicates were not top quality; and (viii) The syndicate could not be funded by a payment of $3,000 by each investor being interest on an unsecured personal loan."

BC9402679 at 120

It is pleaded in para22 of the Amended Statement of Claim that in making the representations B and T engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s52 of the Trade Practices Act. The particulars are that the representations were false and/or misleading in the respects pleaded in para21 and, further, that B and T "engaged in conduct that was misleading or deceptive by remaining silent and/or failing to disclose to the first, second, third and plaintiffs (sic) that: (i) NMRB had declined to provide funds; (ii) That the alternative financier was MANL which was not providing loan funds to the plaintiffs sufficient to ensure that the syndicate was fully funded for the first two years; (iii) That MANL was providing funds on terms substantially different from those offered by NMRB, including terms relating to the rate of interest and terms for repayment; and (iv) That the first and fourth plaintiffs were required to guarantee each other's obligations under a loan agreement."

BC9402679 at 121

It is pleaded in para23 that insofar as the representations related to future matters reliance was placed upon s51A(1) of the Act. The evidence in respect of these various allegations can be considered in respect of each at the one time.

THE EVIDENCE OF PETER MICHAEL FRASER Mr Peter Michael Fraser, whose witness statement is Exhibit C, was the first plaintiff called. He was admitted as a barrister in New South Wales in 1978 and as a solicitor in 1984 and, shortly thereafter, he commenced employment with Baker and McKenzie of which he became a partner in 1986. His speciality is taxation law. He recalled that Mr **McConnell,** who had been based in Baker and McKenzie's Hong Kong office, returned to Sydney in about 1986 and, shortly after his return, he initiated setting up a racing and breeding syndicate, which comprised a number of partners of the firm, of which Mr Fraser was one, and one or two employees. In these circumstances Mr Fraser became aware that Mr **McConnell** was very interested in thoroughbred racing, and in 1988 both Mr Fraser and Mr **McConnell** participated in another horse racing and breeding syndicate. Thus, before Mr Fraser became involved in the No 1 Syndicate, he had been a member of two other syndicates formed for essentially the same purposes.

Mr Fraser also knew Mr Logan, an insurance broker, who had placed insurance on behalf of Baker and McKenzie. He understood that Mr Logan was involved in the racing industry and that he knew a great deal about it. He also understood that Mr Logan specialised in insuring thoroughbred horses.

BC9402679 at 122

Mr Fraser recalled that in late May or early June 1989 Mr **McConnell** told him that B and T was putting together a syndicate to race and breed thoroughbred horses. Mr **McConnell** said it was similar to the 1988 Syndicate, although it would be on a smaller scale and Mr Bell would be involved. Mr **McConnell** said that Mr Bell was an expert "at picking good horses and had a great deal of success with the syndicate he put together" in the previous year. Mr **McConnell** referred to very substantial taxation benefits and added:

"You only have to pay a sum of about $3,000 before 30 June to get a sizeable tax deduction for the 1989 financial year. Are you interested?"

Mr Fraser said he had never heard of B and T and he asked how good was its "track record", whether Mr **McConnell** had any documentation on the syndicate, and who else would be involved. Mr **McConnell** said that he was getting information from Mr Bell, that he should have some documentation "in the next few days", and that he thought a lot of partners would be interested "including Jim **Beatty**". The potential significance of Mr **Beatty's** being interested was that he was the Chairman of Directors of Tulloch Lodge Ltd, which had formed the TJ Smith 88 Syndicate into which Mr Fraser had entered.

Mr Fraser received a memorandum from Mr **McConnell** on 5 June 1989, the brochure (Exhibit A), and the documents which comprised Exhibit B. He read them and he said he placed importance on the description of the prize money available "since this indicated that investment in the syndicate would be profitable". He said he took particular note of the second and third paragraphs at 23 of Exhibit A, which state:

"The bloodstock had been purchased on the Syndicate's behalf by a leading financial institution which is becoming increasingly adept at bloodstock finance. The financier will then lease the said bloodstock back to the Syndicates (see below). Costs incurred between purchase and the formal establishment of the Syndicate are capitalised into the lease including interest, air freight, holding costs, breaking in, agistment, pre training and insurance. ALL YEARLINGS ARE SOLD INTO THE SYNDICATE AT EXACTLY THEIR SALE RING PRICE. LEASE OF BLOODSTOCK On June 1, the Syndicate will enter into a lease with the above mentioned bloodstock finance company. Under our suggested lease structure, the bloodstock is leased over two years on a forty per cent residual. This is because the majority of race horses have achieved their level of performance at the end of their second season of racing. In order to minimise the interest component with the lease structure, payments should be made annually in advance."

BC9402679 at 123

Mr Fraser referred to the attention he paid to various of the statements in Exhibit B and to his being comforted by the fact that National Mutual Royal Bank, ("NMRB"), was involved. He said that its involvement was considered by him "to be essential if I was to participate in any syndicate". His reason for saying this was that he assumed NMRB would itself analyse the proposed investment carefully. He also formed the view that NMRB "would be prepared to fund up to $210,000 to each investor in the syndicate and that the moneys advanced would cover all anticipated expenses of the syndicate in its first two years". He thought that thereafter the investment would be self funding.

In para14 he said he placed great emphasis upon the statement that the purchase price of the bloodstock was $795,232 and that its value was estimated to exceed $1.25m. He said he regarded this "as confirming that the participation in the syndicate provided a sound and long term business investment".

BC9402679 at 124

In para15 he said he would not have agreed to participate in the syndicate had he known that B and T "might have been experiencing financial difficulties", because he regarded it as inappropriate "for a company in financial trouble to be controlling the syndicate's funds and managing the syndicate's assets."

He was informed in late June 1989 by Mr **McConnell** that a number of other partners of Baker and McKenzie intended to invest in the syndicate and he said that in reliance upon what he had read he decided he would invest. He completed the application form and wrote out a cheque for $3,062.52 "which I believe represented the firstly monthly repayment on a loan of $210,000 at an interest rate of 17.5%".

He received a form of Power of Attorney from Mr **McConnell's** secretary on or about 29 June 1989, which he signed and returned to her as she "was co ordinating the distribution and execution of the syndicate documents".

In para20 he said:

"I believed at the time I signed the Power of Attorney that standard form documents would be executed on my behalf. I was familiar with the terms of such documents, since I had signed agreements of the sort contemplated in respect of the TJ Smith 88 Syndicate. In respect of the proposed loan agreement, I assumed that its terms would be consistent with the terms specified in the documents I have received, for an interest only loan. It did not enter my mind that my guarantees or that any other form of security, apart from the horses themselves, would be required, since none of the documents I had read had mentioned such a requirement. I am quite certain that I would not have entered the syndicate if I had been informed that cross guarantees would be required, particularly since I did not know the identity of all the persons who would be taking up units."

BC9402679 at 125

In para21, after saying that prior to June 1989 he had never met Mr Bell and he had never heard of B and T, he said:

"I participated because I relied upon the terms of the documents, because I was comforted by NMRB's involvement and because I trusted **McConnell.**"

He said that had he known that Messrs **McConnell** and Logan had personally guaranteed the payment of significant expenses in connection with the horses to be placed in the syndicate he would not have proceeded with the investment.

In para23 he said he was not aware, until about 28 September 1989, when he received a letter from B and T, of MANL. He continued:

"If I had become aware that Mortgage Acceptance was providing the finance I would have been concerned about such an institution being involved. I would have made enquiries of and about Mortgage Acceptance for the purpose of ascertaining if it was reputable and if it had satisfied itself as to the fundamental viability of the Syndicate and the value of the horses. I would also have confirmed the terms of the proposed loan. I would have been concerned to know, in particular, the applicable interest rate."

On 16 October 1989 Mr Fraser received a memorandum from Mr **McConnell** and then became aware, for the first time, that B and T "may be experiencing some financial difficulties". Nonetheless he paid the sum of $27,437.50 in about October 1989 on the basis that he believed that B and T, prior to 30 June 1989, had paid that amount on his behalf as interest payable in advance to the financier on the loan.

On 9 November 1989 he attended a meeting to discuss the syndicate at the offices of Baker and McKenzie and he recalled that it was announced at that meeting that B and T had resigned as manager. On or about 21 December 1989 he received a letter from the accountants enclosing the syndicate's taxation return and accounts for the year ended 30 June 1989. He noted that $7,500 in fees had been paid to Australian Thoroughbred Finance and that $1,000 had been paid to Mr F. Still from the moneys Mr Fraser had contributed in November 1989. Prior to that he was unaware of the involvement of these parties and he had not consented to their being paid any moneys. He believed then that the payments were inconsistent with the terms of Mr **McConnell's** discussion with him and the terms of his memorandum dated 23 June 1989. He appreciated that the payment of commissions increased "substantially" the cost of the finance and reduced "significantly" the funds available to the syndicate. He said he would not have entered into the syndicate had he known that such commissions were to be paid. However, he contented himself with understanding that Mr **McConnell** and the accountants were investigating the financial affairs of the syndicate, including the payment of commissions, and he "believed that their investigations would protect my legal rights".

BC9402679 at 126

In about February 1990 he received a letter from MANL enclosing the documents which had been executed. He read the documents and "noticed" that the loan agreement contained a cross-guarantee. He also "noted" that the commercial terms of the loan were quite different from those which had been described in the documents he had received in June 1989 and, in particular, that the applicable interest rate was substantially more than 17.5%.

Notwithstanding this store of knowledge Mr Fraser did nothing to seek to terminate his involvement in the syndicate. He understood that Mr **McConnell** was pursuing the matter and, in about April or May 1990, Mr **McConnell** said, at a meeting, that it appeared that secret commissions involved may be in excess of $300,000. Mr **McConnell** also referred to the fact that MANL was not prepared to do anything "despite the fact that one of their employees took cash". There was a suggestion by Mr **McConnell** that MANL wished to re negotiate the terms of the loan, but Mr Fraser said that was "not on" because of the secret commissions and the interest rate. Still Mr Fraser did nothing to seek to protect the legal rights he asserted. The matter continued through 1990, without any resolution, and on 17 December 1990 Mr Fraser attended a meeting with representatives of MANL about the continuance of the syndicate.

BC9402679 at 127

In cross examination Mr Fraser conceded that he had claimed tax deductions as a consequence of his membership of the No 1 Syndicate in the vicinity of $242,001. He said that as he was in a loss position it was "irrelevant" that the claims had been allowed by the Australian Taxation Office, although he agreed he was able to carry forward that loss, which would be a substantial tax benefit to him when he derived more income. I do not accept the evidence that the taxation benefits were irrelevant to Mr Fraser.

Mr Fraser agreed that the taxation benefits flowed from the moneys MANL had provided on his behalf, and that he had not made any payments to MANL apart from the appropriations MANL was authorised to make on 30 June 1989. He said that he was unaware of the prices for which horses had been sold or of the prize money which had been derived from racing them. He said he was not aware whether the syndicate had accounted to MANL for the proceeds of sale of horses or any prize money.

BC9402679 at 128

Commencing at Tp 8 Mr Fraser was cross examined about his assertion, in para14 of his witness statement, that participation in the syndicate provided "a sound and long term business investment". He agreed that the word "sound" represented an investment with little risk of failure, and that it was "the very antithesis" of a speculative investment. He said

he believed there was an element of risk, and he was then taken to the brochure, Exhibit A, with a view to determining how he had established by reading it that there was a high probability the investment would prove to be profitable. He took into account the statement in that document:

"Investment in the bloodstock industry should be considered to be of a speculative nature" but said that he regarded other factors as indicating that a favourable situation would be brought about. Mr Fraser agreed that in addition to taking into account matters referred to in the brochure, he also had regard to "my experience with the TJ 88 Horse Racing Syndicate and other - and of other information I had about the industry at that time".

At Tp 10 Mr Fraser said he understood there was an independent valuation obtained in relation to the horses, which he had not seen, and he "just assumed that", or "may have assumed it". The basis for the assumption was his involvement in other syndicates. He agreed "with hindsight" it would have been prudent to call for the independent valuation which he assumed existed, but that he did not consider doing so prior to 30 June 1989.

BC9402679 at 129

Mr Fraser was cross examined at some length about his gambling on the success of the horses and he said that he was relying on the business acumen of those who had put the prospectus together insofar as reference was made to their being "very very astute and successful at picking good horses", although immediately thereafter he conceded he had never heard of the people, and that he had asked Mr **McConnell** about them.

At Tp 19 Mr Fraser said that when he read the brochure on about 5 June 1989 he understood a lease was already in place, but he said it did not occur to him to call for it, and that had he been advising a client he would not have advised the client to do so.

At Tp 25 Mr Fraser agreed he read the statement in Exhibit A:

"The unpredictable and cyclical nature of the thoroughbred bloodstock business makes budgets and positive cash flow projections impossible."

He said he accepted that as a realistic statement, but he disagreed, in the light of that, that it was absurd for him to maintain that the investment was a sound, profitable and long term one. He said it was possible to come to this conclusion by spreading the risk, applying good management techniques, selling yearlings properly and deriving prize money. He added:

"... It certainly makes sense and that was my experience in previous horse racing syndicates."

At Tp 26 he said that he would not have entered into the syndicate unless he believed, in June 1989, "that a select thoroughbred racing, breeding and training operation makes good business sense".

BC9402679 at 130

At Tp 27 Mr Fraser said one of the reasons he went into the syndicate was to obtain a tax benefit, although that was "not a terribly important one because of my tax position at the time". He rejected the suggestion that the whole venture was a reckless gamble but agreed that he was aware that in entering into the syndicate he was entering into a partnership between the members to be constituted by their agreement to become members on the terms and conditions set out. He agreed that by becoming a member of a partnership he assumed joint and several liability with the other partners for all liabilities other than the lease payments, although he conceded that that would depend upon the terms of the lease agreement, for which he did not call.

Mr Fraser was cross examined about his reliance that NMRB would be the financier and his suggestion that he thought it would make an independent appraisal of the viability of the B and T Syndicate. At Tp 30 Mr Fraser said he believed the financier had some duty to make an appraisal, notwithstanding that it was not taking any equity participation in the venture, and was dealing at arm's length. He said he did not ring NMRB or make any attempt to communicate with it to ascertain whether it was the financier.

Thereafter Mr Fraser was taken to Exhibit B which, as I have said, is no longer relied upon as providing any operative representations as against MANL.

At Tp 37 Mr Fraser agreed the investment was "a speculative investment", although he said he thought it was going to be "soundly managed and risks minimised the same as any good business would be run". In these circumstances he said that to his mind it was not inconsistent that the investment was "sound" and "speculative". However Mr Fraser agreed

that the case had been opened by Mr White on the basis that the plaintiffs were not contending "that they were unaware that the investment was speculative and a risk". He did not seek to cavil with that description in the opening.

BC9402679 at 131

At Tp 46 Mr Fraser said he had complete trust in Mr **McConnell** in June 1989 and regarded him as the effective go between between himself, as a prospective member of the syndicate, and the manager.

Commencing at Tp 46 Mr Fraser's attention was directed to his statement that he assumed the proposed loan agreement would be consistent with the terms specified in the documents he had received, to which statement he said he adhered. He agreed it would have been advisable to see the proposed loan agreement before entering into it, and that he would have advised a client to do so.

At Tp 51 Mr Fraser said he was aware that MANL had brought proceedings against the members of the No 1 Syndicate on the basis that they had wrongfully sold or purported to sell a horse which was MANL's property and that this was a serious allegation to be made against a solicitor. Mr Fraser said he did not make any enquiries because he understood the manager had power to do that, and he referred to various passages in Exhibit A and CL27.1 of the lease. Mr Fraser agreed that the decision of Cohen J was the subject of an appeal, which was not prosecuted. Mr Fraser agreed that he was informed that B and T was in financial difficulties, but that he made no further enquiries about that matter. He agreed he paid a further $27,547.50 at a time when he knew that MANL was the financier and that the money was to find its way to MANL as financier. He said that he did not believe, at that time, there was an option to simply withdraw.

BC9402679 at 132

At Tp 56 Mr Fraser agreed it was an essential condition of his belief in the viability of the syndicate that B and T had a special degree of expertise, that when he learnt B and T was in financial difficulties he became concerned, and that one of the options available in November 1989 was to sell the horses and repay the financier. He said he favoured the option of finding out more facts and that before he made a decision to dispose of the livestock, with the approval of the financier, he wanted to know more facts.

Mr Fraser agreed that at the meeting held on 9 November 1989 it was unanimously resolved that Logan Financial Services Pty Ltd be appointed manager of the No 1 Syndicate in the place of B and T, but that he had no information of the financial position of that company. Notwithstanding, Mr Fraser said he did not take any steps to find out the financial position of B and T. At first he suggested that Mr **McConnell** was engaged in that exercise, and he then said that it became quite clear that Mr **McConnell** was not obtaining information which was satisfactory to Mr Fraser. However he seems to have done nothing to advance his knowledge in relation to B and T.

Mr Fraser was referred to his receipt of the letter from the accountants of 21 December 1989, which disclosed the amounts paid to Australian Thoroughbred Finance and Mr Still. He was further referred to an affidavit he swore on 28 February 1992, in which he deposed:

"It was only in the latter part of 1990 that I was informed that commissions had been paid to various persons and entities including associates of Murray Bell, Jill Cantrell, Frederick Still, Fred Still and Associates Ltd, MANL, its employees and Equico Financial Corporation Pty Ltd and its employees."

BC9402679 at 133

He said he did not become aware of "those payments until, a lot of those payments until that time". The statement in this affidavit can only be justified, if at all, if given the most literal of constructions. It is completely at odds with the evidence as presented. Further, if it is given the very literal construction it lacks frankness, because I think a fair reading indicates that Mr Fraser was not aware that payments were made to any of these people until "the latter part of 1990". This was not correct. Mr Fraser's attempt to explain the statement in this way did little credit to him.

Mr Fraser said that notwithstanding he formed the view in December 1989 that the payments to Australian Thoroughbred Finance and Mr Still "were improper" he included them in the expenditure deductible against assessable income.

At Tp 63 Mr Fraser was referred to the No 1 Syndicate's income tax return for the financial year ended 30 June 1989, which he received in about December 1989, and to a statement as to the intention of the syndicate members at that time. He said that the document represented his intention as a member of the syndicate as at December 1989, at a time when he knew of MANL's existence as the financier and the replacement of B and T by Logan Financial Services Pty Ltd as manager. The intention, in general terms, was that the business of the syndicate would continue. Mr Fraser said that he had not obtained the documents, at that stage, from MANL and that while that was not a matter of indifference to him "there were a lot of other issues being considered at the same time". He said he did not trouble to dictate a letter re-

questing a copy of the documents. He said that the more important issues as at November or December 1989 were the finding out as to why B and T had gone into liquidation, ascertaining the position about commissions, and seeing documents signed on his behalf. He said that was the situation as it existed towards the end of October or early November 1989, but that he did not see the documentation he had signed until February 1990. He agreed that upon reading the documents and noting the existence of the cross guarantee and the interest rate being higher than 17.5% he did not directly take any steps to find out what was happening, because he believed Mr **McConnell** was doing that on his behalf. He agreed he did not write asserting that the documentation did not accord with his understanding of what was to be done because, he said, Mr **McConnell** had been appointed to find out what had happened about the syndicate.

BC9402679 at 134

At Tp 75, in relation to the September and December 1990 period it was put to Mr Fraser that he wanted to carry the syndicate on, and he replied:

"I didn't believe a fire sale was in the interests of anybody."

Mr Fraser was cross examined at some length about an offer made by MANL to settle the matter and to certain correspondence emanating from Mr Taperell to Mr Symond of MANL, particularly a letter of 3 December 1990. By the end of 1990 Mr Taperell seems to have taken over the negotiations from Mr **McConnell** and, in a letter of 3 December 1990, he wrote:

"We are also of the view that Mr Bell had no authority to enter into agreements with MANL dated 30 June 1989 as he purported to do on our behalf."

BC9402679 at 135

This letter was written by Mr Taperell on behalf, inter alios, of Mr Fraser.

At Tp 88 Mr Fraser said he did not arrange for a lawyer to attend on settlement of the No 1 Syndicate on 30 June 1989 because, he said, it was not usual for a member of a syndicate to attend on settlement.

Mr Fraser was cross examined about his involvement in the other two syndicates, prior to entering into the No 1 Syndicate, at Tpp 90 and 91. He agreed that the TJ 88 Syndicate failed subsequent to 30 June 1989, that he found himself being sued by a financier to recover the money lent to him, that he resisted liability to pay the financier but that ultimately the action was settled on the basis that he was required to pay some amount to the financier.

At Tp 94 Mr Fraser agreed that as at 5 January 1990 he was of the opinion that MANL was an experienced financier and, at Tp 95, that he did not purport to exercise any right to rescind the contract with MANL until some time in 1991, which was well after he was aware of what he asserted to be irregular payments, that B and T had encountered financial difficulties, that MANL had provided the finance and after he had, with knowledge of those matters, continued to pay trainers' fees, stud service fees and other expenses as a member of the syndicate. Finally he agreed it was with the knowledge of those matters that he allowed the manager to sell one horse possessed by the syndicate.

BC9402679 at 136

The evidence of Mr Fraser satisfies me: (a) That prior to becoming involved in the No 1 Syndicate he had experience in two other racing syndicates.

(b) That before becoming involved in the No 1 Syndicate he made no meaningful enquiries as to its viability or the manner in which it would be conducted, but rather relied upon what he had been told by Mr **McConnell.** This is quite understandable as Mr **McConnell** had introduced the scheme to him and assumed, in accordance with a practice at Baker and McKenzie in such circumstances, the role of the "lead" partner.

(c) That he was prepared to become involved in it notwithstanding the matters to which I have referred in (b) and by granting a Power of Attorney to Mr Bell, whom he did not know, enabling Mr Bell to sign documentation on his behalf.

(d) That thereafter he made no attempt to find out the terms of the documentation, and that, on his evidence, he did not have any basis for anticipating what the terms of the documentation would be even from his previous experience.

(e) That he became aware that B and T was not financially sound, that MANL was the lender, and that payments in the nature of secret commissions had been made by the end of 1989. Notwithstanding the importance he sought to attribute to each of these matters in his evidence, he took no steps to terminate the arrangements, either on his own account or together with the other syndicate members. He allowed the matter to continue, even after he received the documentation in February 1990, until some time in 1991.

BC9402679 at 137

(f) After receiving the documentation in February 1990 he must have appreciated, if it had been the fact, that it did not accord with what he had anticipated. Notwithstanding he made no attempts either on his own behalf or jointly with the other syndicate members to terminate the arrangements.

(g) He continued to claim such tax deductions as he was entitled to and to retain the benefits of moneys derived by the syndicate.

(h) He stated that as at December 1990 his intention in relation to the No 1 Syndicate was as stated in the income tax return.

All this evidence is totally inconsistent with the case now sought to be made against MANL based upon the alleged representations and conduct of a misleading or deceptive nature. The inconsistency is so gross that I cannot be satisfied that Mr Fraser either relied upon such representations as may have been made or was induced by them to enter into the contractual documents. A simple answer to such allegations is that upon becoming aware of the various matters about which he now complains the only response one could anticipate would have been to seek to avoid the contractual obligations. The failure to do so leads to the irresistible inference, in my opinion, that Mr Fraser did not rely upon the various matters he asserts he relied upon in his evidence in entering into the transaction and that he was not induced thereby to enter into it. Further, in my opinion, the result must be that he was neither misled nor deceived by the representations.

BC9402679 at 138

It cannot, in my opinion, be said that Mr Fraser was not receiving a financial benefit, such as to lead to the inference that there was no reason for his failing to seek to terminate the transaction. I have referred to the taxation benefit and, notwithstanding that Mr Fraser said that it was not immediately capable of being utilised, nonetheless the situation is that it was a benefit of which he hoped to take advantage in following years.

It is also necessary to bear in mind that not only were the agreements kept on foot, but Mr Fraser, as one member of the syndicate, was of the view that it was open to the syndicate to sell one of the horses and not to account to MANL for the proceeds of sale. This may seem a very strange attitude of and conduct by an experienced solicitor. Notwithstanding, Mr Fraser and other syndicate members exercised their undoubted right to have the matter determined by the Court.

The views to which I have come concerning Mr Fraser are assisted by regard being had to his being an experienced solicitor and having access to such legal advice as he required to assess his position. This comment, of necessity, will apply to all the plaintiffs. The simple fact of the matter is that the case propounded by Mr Fraser of representation, reliance and inducement is so contrary to the way in which he acted when he became aware of the true facts, assuming in his favour that he was not previously aware of them, that I cannot accept, and I do not accept, that he placed any reliance upon the matters he asserts he did or that he was induced by the representations to enter into the contractual arrangements. I have referred to the matters on which I find he placed reliance.

BC9402679 at 139

It is also necessary to bear in mind that the parties, including Mr Fraser either directly or through Mr Taperell, were negotiating or seeking to negotiating with MANL to bring about a commercial resolution of the matter, including an offer made by Mr Taperell to Mr Curtis of the State Bank of South Australia by letter dated 24 January 1992.

THE EVIDENCE OF MR PAUL ANTHONY DAVIS The witness statement of Mr Paul Anthony Davis is Exhibit F. Mr Davis is a partner of Baker and McKenzie having been first admitted as a solicitor in New Zealand in 1967 and in New South Wales in 1977. He became a partner in 1978. His practice concentrates on commercial law including, particularly, contract and company law, and that has been the concentration of his legal practice since 1975: Tp 114.

Mr Davis knew Mr **McConnell** from the time he joined Baker and McKenzie and had both a professional and personal relationship with him. He also met Mr Logan and he became involved in a horse racing enterprise with a number of people, including other partners of Baker and McKenzie. Mr **McConnell** approached Mr Davis towards the end of June 1989 about the B and T Syndicates, which he explained were being put together by "Murray Bell", who "is a top man in the industry". Mr Davis said Mr **McConnell** told him that there would be a tax deduction, that it would be fully funded and if he was interested he should let Mr **McConnell** know quickly. Mr Davis had not heard previously of Mr Bell or B and T, but he expressed interest in the investment. He received the brochure, Exhibit A, and the bundle of documents, Exhibit B, all of which he read.

BC9402679 at 140

He said that in reading the brochure he was particularly interested in making sure that the investment made "business sense". He was impressed by the calibre of the people involved and:

"In addition I believed that an investment in the Syndicate would be financially sound and that the returns of the Syndicate would ensure a good return to investors."

He said that he could not specifically recall reading the words at 23 of the brochure, which I have quoted, "although I did read it carefully". He said that he was certain he was of the understanding horses had been secured and would be the horses in which he was investing, and that he was reassured by the fact that NMRB was involved, because he had previously had dealings with one of its parent companies in Asia. He said he regarded NMRB as a highly reputable and substantial bank "which would not have agreed to stand behind the syndicate without itself first examining the proposal. The fact that NMRB was said to be involved influenced my decision to join the syndicate".

In para9 he stated he was attracted to the option of taking an interest only loan involving monthly payments of $3,060 and that it was his clear recollection that the finance fully funded all syndicate expenditure for the first two years of the syndicate. His anticipation was that thereafter the syndicate would be self funding. He said that had he thought that he had a commitment to ongoing funding of the syndicate and that his financial commitment would be greater than that to which I have just referred, he would have decided not to apply for a share. He saw the syndicate as a worthwhile investment, which involved "a tax effective up front payment and which was to be fully funded by borrowing". He had previously been involved in partnerships funding the production of films.

BC9402679 at 141

In para11 he said he would not have agreed to participate if he had known that B and T "might be experiencing financial difficulties". He said that he decided to invest in the syndicate "subject to a final conversation with **McConnell**", who, at the time, he trusted completely. He said he believed Mr **McConnell** was no more than an investor, but that he had a good knowledge of the racing industry of which Mr Davis knew little. He also believed that Mr **McConnell** "was co ordinating the investment and that he had or would vet and approve all the documents before they were executed. This was the way we normally operated when investments were introduced to the firm. One partner, usually the partner who introduced the investment, would liaise with the other partners and co ordinate the supply of documents in relation to the investment. I myself had performed such a role in relation to an investment in shares in Hunter Resources".

This evidence highlighted the reliance Mr Davis placed not only on Mr **McConnell,** as such, but upon him in the role of the "lead" partner.

Against this background Mr Davis telephoned Mr **McConnell,** said he thought he would go into the syndicate, and asked "is it OK?", to which Mr **McConnell** replied that Mr Logan was in it, he would be in it and "Murray Bell is one of the top people in the industry. I think it is really good". Thereupon Mr Davis said:

"All right, I'll go ahead."

BC9402679 at 142

In my view there cannot be the slightest doubt that Mr Davis elected to go ahead because of the assurances he had from Mr **McConnell,** who was the partner who introduced the investment and who was the person Mr Davis believed would "vet and approve all the documents before they were executed".

After the conversation with Mr **McConnell,** Mr Davis completed his application and wrote a cheque for approximately $3,063, which, so far as he recalled, he sent to Mr **McConnell.**

In para15 Mr Davis said that he had recently seen documents suggesting that Mr **McConnell** and Mr Logan acted as guarantors for the purchase price of the horses to be included in the syndicates, and describing them as directors of B and T. He said that had he known that they purported to be directors of B and T or that they had been involved in the acquisition of the horses, which were placed in the syndicate, he would not have gone ahead with the investment "without making further and independent enquiries". He said, in para17, that had he known that a guarantee was required he would not have gone ahead, because he believed there were significant differences between the financial positions of the Baker and McKenzie partners. He believed his own was better than some others and he was conscious of the limit to which he was prepared to be exposed financially in respect of such an investment. He also "I also recall having been told by Mr Connor either in late 1989 or early 1990 that the syndicate of which he was a member, namely the No 3 Syndicate, had not involved the giving of cross guarantees whereas mine had. I can recall being annoyed that I had been included in a syndicate with cross guarantees, whereas other partners of Baker and McKenzie had not been required to give cross guarantees."

BC9402679 at 143

It is necessary to have regard to the significance of this evidence. Mr Davis asserted that he was unaware that cross guarantees were involved and that had he been aware of that "I would not have gone into the syndicate". I have just stated his reasons for that. He learned in late 1989 or early 1990, quite contrary to what he asserted was his expectation, that the No 1 Syndicate involved cross guarantees, whereas the No 3 Syndicate did not. He was fully aware of the effect this had on his potential liability and, if his evidence is to be accepted, he did not understand that he was entering into any such obligation. The question arises, therefore, as to why as an experienced commercial solicitor he failed to take any steps to seek to terminate immediately any liability. The answer must be that either he was unconcerned about the cross guarantees, contrary to his evidence, or that he was prepared to ratify the entry into the contractual documentation.

After his discussion with Mr **McConnell** he was asked to sign a Power of Attorney in favour of Mr Bell "as a matter of urgency", so that he "can sign all the documents on your behalf". He did not see any documents until about February 1990, although he said he was not concerned "since the document of greatest importance was the loan agreement contemplated in para3 of the Power". He continued, in para18:

"Since I regarded NMRB as having a first class reputation, since I believed that the terms of the loan I was taking were as described in the documents I had seen, since I regarded the terms of the Power of Attorney as very limited and since I had been told it was urgent I did not ask to see that document beforehand. I also trusted **McConnell,** as I have described in para11."

BC9402679 at 144

Mr Davis received a letter from B and T dated 28 September 1989 and, on 16 October 1989 a memorandum from Mr **McConnell.** He said he was concerned after he received the letter of 28 September 1989, but having spoken with Mr **McConnell** "whatever concerns I had about the substituted financier and the changed conditions relating to the payment of interest were allayed. I certainly did not then believe that there had been any changes to the fundamental principles which I understood lay behind the syndicate, which were that it was wholly funded for a period of two years and that the only ongoing financial commitment on my part was the payment of interest on the moneys I had borrowed for this purpose. I still believed that I had made a sound investment".

Although Mr Davis did not remember attending the meeting on 9 November 1989, he remembered that by October/November 1989 he was aware that B and T "had encountered financial difficulties and that some commissions had allegedly been paid. My understanding then was that **McConnell** was in charge of and was in fact setting about resolving the problems which had arisen". Mr Davis then refers to learning "about the same time" that the loan agreement had been signed by Mr Bell and of the cross guarantees, which he said he found out about from Mr Connor "probably in late 1989".

BC9402679 at 145

He said that he received the documentation under cover of a letter dated 2 February 1990, by which time he understood "there were very serious concerns about the financial viability of the Syndicate". He had also learnt by then that the $27,437.50 paid by him in September or October 1989 not only included interest payable to MANL but also $7,500 "allegedly payable by me to Australian Thoroughbred Finance" and a further sum of $1,000 "allegedly payable by me to Mr F Still" "in connection with the procuring of finance from MANL".

Mr Davis said:

"These payments had the effect of making a loan from MANL extremely expensive, and far more expensive than the cost I had expected to pay for obtaining finance from NMRB".

He added that had he been aware that such commissions had been paid he would not have participated in the syndicate "without first making further independent enquiries as to the nature of the payments and their purpose".

At that time Mr Davis was involved in a number of legal matters in the Tokyo office of Baker and McKenzie and was spending a substantial amount of his time in Japan or commuting, which made him "usually unable to attend many of these meetings" or to take part in attempts to resolve the problems. In these circumstances Mr Davis appears to have left a resolution of the problem to his partners. He said that either in late 1990 or early 1991 he learned that negotiations had broken down and he agreed, with other members, to seek legal advice.

In cross examination Mr Davis said that he believed the scheme was soundly conceived and, in that sense, was sound. He said that the various statements sounding caution in the brochure appealed to him as being reservations he would expect to be made in such a document, and "the normal sort of disclaimer" to be included therein. He said, Tp 118:

"I personally relied heavily upon the fact that Mr Logan was involved in, I don't whether it is the setting up of this but certainly the recommendation of it, to us."

BC9402679 at 146

Therefore, in addition to the recommendation from Mr **McConnell,** it is clear that Mr Davis was relying upon the recommendation of Mr Logan, whom he had known for a long time. At Tp 119, when asked about verifying certain information, Mr Davis said:

"Well, for that I relied very much on the fact of Mr Logan was investing and my conversation was with Mr **McConnell.**"

Mr Davis agreed that any financier, including NMRB, would only be prepared to lend after it had checked the creditworthiness of the borrower because it would have to look to the independent resources of each borrower rather than to the subject matter of the syndicate to recover its money: Tp.127. Whilst being cross examined as to the extent to which he paid attention to the brochure Mr Davis said, Tp 128:

"If I could just explain, I mean, I am a bit embarrassed, but I was spending a large amount of time out of the country at the time. I was commuting to Japan once a month and I was in fact out of, I think I got back to Australia in the second week of June, so perhaps if I'd had more time I would have done that, but I didn't do it."

He said his embarrassment was caused, in effect, by his failure to look into the matter more carefully. This evidence indicates further the reliance placed on Mr **McConnell** and Mr Logan. He also said that he considered NMRB would have looked at information, which was not available to him, before agreeing to lend, although he made no enquiries of NMRB whether it had any additional information, nor did he make any enquiries from Mr **McConnell** or any other of his partners as to whether they had made any such enquiry of NMRB, but he believed that NMRB would not have been involved unless the syndicate "hung together in a commercial sense and a legal sense, that their name was not going to be used for something which was a rort".

BC9402679 at 147

Mr Davis said he did not give much consideration to when it would be necessary to repay the principal. He continued:

"One tends to look at these things with rose tinted spectacles I suppose, but I understood that I personally would be liable on the borrowing from the bank, yes."

He agreed that that sentence fairly described the way in which he looked at the investment in June 1989, and he denied that what was really influencing him was the immediate availability of a very substantial taxation deduction, rather than the prospect of a significant return from the horses. However, he agreed he had had taxation deductions allowed in the sums of $119,328, $432,087, $13,295 and $342 for the financial years ended 30 June 1989, 1990, 1991 and 1992 respectively. He also agreed that that constituted "a very significant benefit".

Mr Davis showed little knowledge of the proceedings before Cohen J in relation to the "Mountain Rule" decision, and he said he did not think he had read his Honour's reasons for judgment. At Tp 131 Mr Davis indicated that he had little knowledge of payments made by him to MANL.

At Tp 136 Mr Davis said that he did not think it was necessary to identify the other parties to the syndicate, notwithstanding that he was undertaking a joint and several liability for training and stud fees and the like, because "I was taking a somewhat rosy view that the project would provide (sic) as contemplated in the documents". Although this word was not corrected by counsel I think it probably should read "proceed".

BC9402679 at 148

After Mr Connor told Mr Davis about the cross guarantee, Mr Davis did not immediately communicate with Mr **McConnell.** He sought to explain this by saying:

"Perhaps, that it was already clear at that time that the project was in some - had some problems and I think we were focusing more on resolution of those problems": Tp 137.

It was then put to Mr Davis that that had given him "added incentive to protest to Mr **McConnell**", to which he replied in the affirmative and that he thought "we did discuss it at some of the meetings that I attended". He said he made no

protest to MANL. He also said that he was aware that B and T had been removed or had resigned as manager on the grounds of apparent insolvency and been replaced by "Mr Logan's company". He could not remember if he was at the meeting at which that change was effected and:

"Q. Did you, having regard to the removal of Bell and Tonkes, consider that it would be prudent or appropriate to terminate the syndicate and realise the horses so conserving losses?

A. I was a very passive member of the syndicate I am afraid. Largely because of my absences from the country and because I know less about this industry than some of the other people. So I tended I must say to go to meetings if I knew they were on, but not to take a particularly active part in deciding what courses of action should be taken.

Q. Is the short answer to my question no.

A. Yes, it is.

Q. Thank you. You in your passive way, as you have described it, acquiesced in the continuance of the syndicate's business activities is that it?

A. I went along with whatever course of action we as a group decided to take.

Q. Which involved the continuance of the syndicate's business activities, did it not?

A. Well, I am not sure whether it was continuance in the same form."

BC9402679 at 149

Mr Davis said he thought he became fully aware of the payments of supposedly improper commissions in the middle of 1990, although he was not sure and, when it was suggested to him that he acquiesced in the syndicate's continuance of its activities, he said:

"Well, as I said, I don't think the activities of the syndicate were continuing in the same way that they had been foreseen to proceed in the original plans and documents, but I knew that things were happening in the syndicate, yes": Tp 138.

Mr Davis agreed that he received a facsimile transmission from Mr Plumptre dated 29 June 1990, Exhibit 16, calling for the payment of $14,115 towards syndicate expenses, which he paid. There can be little doubt that by this time Mr Davis was aware of the various matters of complaint he raised in relation to the syndicate. Notwithstanding he made the further payment.

At Tp 142 Mr Davis agreed that he became aware in September 1989 that MANL was the substitute financier. He said he did not call for the documents nor take any steps to check the situation, although he was severally liable. His explanation was:

"We have a number of investments, different combinations of people are involved in, and I guess because of the sheer volume we usually appoint one or two people to act as the action takers, so to speak, and that is what happened here."

BC9402679 at 150

He identified the "action taker" as being firstly Mr **McConnell,** then Mr Taperell and subsequently he thought Mr Fraser "became more involved as well".

When Mr Davis learnt that B and T was in financial difficulties and that certain commissions had been paid in October/November 1989, he said he regarded those matters as serious and going to the heart of his involvement in the syndicate. He said he did not think about rescinding the contracts, but that he did contemplate his rights "in conjunction with the other parties". He agreed he did not exercise a right to rescind in the latter half of 1989, but he did not agree that he affirmed his commitment by acquiescing in the continuance of the syndicate activities for the next few years. He tried to explain this by saying that there were meetings being held and other people were taking action to try "to figure out what to do". If the facts were as clear cut as Mr Davis would wish me to believe this was an extraordinary course of action for an experienced commercial lawyer to adopt in my opinion.

By February 1990 Mr Davis had received the contractual documents and had been advised by Mr Connor of the joint and several liability. He did not protest to MANL. He agreed he made no independent enquiries about the syndicate before investing in it other than through Mr **McConnell** and Mr Logan: Tp 145. Mr Davis agreed that if he had been made aware that commissions were payable in June 1989 he would have made enquiries and if he had been satisfied "I may well have decided to proceed".

BC9402679 at 151

Mr Davis agreed, Tp 146, that the offer contained in the letter from Mr Taperell of 24 January 1992 was made with his authority. Mr Davis was cross examined about that offer, which he denied was risible, and he proffered the view that he did not see "why we should pay anything to MANL". He said, Tp 148:

"Q. And you say, do you, that having had the use of MANL's money for now over four years, you have no, in your view, obligation to repay a penny or a cent I should say, to it. Is that what you say?

A. Yes."

A number of the observations I made about the evidence of Mr Fraser are at least equally applicable in relation to the evidence of Mr Davis. However I consider there are other factors which make it even more difficult for him to establish that he relied upon or was induced by the representations. Firstly, his evidence is clear that he relied upon such advice as he received from Mr **McConnell** and Mr Logan and, perhaps more importantly, upon their involvement. This evidence is strengthened by the evidence he gave as to the responsibility undertaken by a partner introducing an investment for that investment. It is further supported by the evidence that he tended to look at the investment through "rose tinted spectacles". In my view this attitude was brought about by his reliance upon the advice and involvement of Messrs **McConnell** and Logan. As with Mr Fraser, Mr Davis' failure to react in any positive way to the change of financier, the payment of commissions, and the insertion in the documents of the cross guarantee, makes it obvious to me that he was not relying in any way upon any representations and that he was not induced thereby to enter into the agreement. As I have said the short answer to Mr Davis' case is that he relied on others, apparently took no real interest in what was happening because of that reliance, and, insofar as he now seeks to assert that he relied upon other matters, I do not accept that evidence.

BC9402679 at 152

After being cross examined by Ms Goddard, Mr Davis was cross examined by Mr Svehla. He agreed there was a practice amongst the partners of Baker and McKenzie that if any of their clients had an investment opportunity in which they thought some or other of the partners might wish to invest, they would circulate that information. He agreed that this activity increased around 30 June. This fits quite comfortably with the evidence of reliance on Mr **McConnell.**

THE EVIDENCE OF JOHN DAVID BLESSINGTON Mr John David Blessington, whose witness statement is Exhibit G, was admitted as a solicitor on 12 February 1971 and joined and became a partner of Baker and McKenzie on 1 January 1986. He specialises in insolvency law. After joining the firm he became friendly with Mr **McConnell,** whom he learnt was keenly interested in thoroughbred racing. In the last week of June 1989 another partner, Mr Logaraj, approached Mr Blessington and mentioned a horse racing syndicate, which Mr **McConnell** had drawn to his attention. Mr Logaraj discussed with Mr Blessington whether he would be interested in taking a half interest in one share with him. Mr Blessington said he was not certain and that he would have to "look at the documents and understand what it is all about. Have you got any documents?"

He and Mr Logaraj discussed their concern to ensure there was no joint and several liability, which showed an appreciation of the prospect of such liability, which prospect could become an eventuality if not checked properly. Certain documents were furnished to Mr Blessington, which he examined, and, he said he satisfied himself that liability would be several only, which he discussed with Mr Logaraj. Mr Blessington became the owner of a half interest in the No 3 Syndicate.

BC9402679 at 153

He said he was attracted to the investment because there was a taxation deduction and "the possibility of a sound investment". He had regard to "the relatively attractive interest rate which was being offered" and to the fact that "an interest only loan was available", and the representation "that the Syndicate would be self funding during years 3 and 4". He said that the last matter "was of particular concern to me", as he had not been involved previously in any such syndicate and did not want to be liable for open ended cash outlays over the course of many years. He said he noted the increase in the value of horses and that he would not have entered into the syndicate had he not been believed it could be profitable, and that the terms of finance were affordable, and that it would be self funding after its second year.

He discussed the matter further with Mr Logaraj, who told him that he, Mr Logaraj, had not read the documents through in detail "but they seem OK". Mr Logaraj added:

"Seeing as we are only taking a half share each, given that we are not jointly and severally liable, it does not seem to me that the risks are high. It is also a good investment."

Mr Blessington said he agreed that it was not "a huge outlay" and that he was prepared to go ahead if Mr Logaraj was. Mr **McConnell** was advised of this and asked for his view. He said to Mr Blessington that the syndicate "looks all right to me" and added some remarks about the value of the horses.

BC9402679 at 154

Thereafter Mr Blessington signed the Power of Attorney on, he said, the assumption "that the terms of the loan reflected the terms which had been described in the brochure and the accompanying material". Mr Blessington stated that having become aware, recently, that Mr **McConnell** was a director of B and T and had personally guaranteed the payment of expenses incurred in relation to the purchase of the horses placed in the syndicate, if he had known that previously he was "quite certain" he would not have participated without "at the very least, making further, detailed enquiries". Mr Blessington said he trusted Mr **McConnell** "in particular because he appeared to be very experienced in the thoroughbred racing business and because he expressed the view that the Syndicate would be a success".

Mr Blessington asserted that prior to 28 September 1989 he was unaware of the participation of MANL and he was surprised at the request to pay $13,718.75, although he and Mr Logaraj agreed between themselves that they should each pay that amount.

He said that he received a letter dated 9 January 1990 and that prior to receiving it he was unaware of the payment of moneys to Australian Thoroughbred Finance or to Mr Still. This concerned him and he added that he was "now" quite certain that he would have refused to invest had he known that undisclosed commissions had been paid. He received the contractual documents under cover of a letter dated 2 February 1990. He did not read the documents "since at the time I believed they reflected the terms of the proposal I had seen during 1989".

BC9402679 at 155

During the latter part of 1989 and early 1990 he also became aware that there were problems with the syndicate, that B and T had resigned as managers and had subsequently gone into liquidation and that there were allegations of secret commissions. He was busy with his professional commitments and he believed that other partners, in particular Mr **McConnell** and Mr Taperell, were investigating the matter.

In June 1990 he paid B and T $7,832.50, although he did not recall being aware why he was required to make that payment. He said he assumed that everyone else in the syndicate would be making such a payment and "accordingly, I believed that I was expected to pay my contribution".

He said that throughout 1990 he believed that one or more of his partners was or were acting to protect the interests of syndicate members.

The application form filled out by Messrs Blessington and Logaraj is for a share in the No 1 Syndicate, although the Power of Attorney is in respect of a share in the No 3 Syndicate. Those documents became respectively Exhibits 21 and 22 and, notwithstanding the frequently repeated statement in his witness statement that he only thought there was one syndicate, Mr Blessington agreed that when he signed Exhibits 21 and 22 he must have known that there were at least two syndicates.

Mr Blessington said that he gained "some considerable comfort from the fact that Mr Logan, whom I believe had also taken a share in this or another syndicate, at least one of the syndicates, was also involved in the insurance of the bloodstock. I had met Mr Logan on a number of occasions before. I had been to his office, I had seen the wall adorned with a number of pictures of thoroughbred horses and I knew his involvement in that industry was quite considerable. As a consequence, I took some comfort from that": Tpp 160 and 161.

BC9402679 at 156

Mr Blessington agreed, Tp 162, that prior to applying for the share and entering into the contractual arrangements he had not read a brochure in respect of the No 3 Syndicate, but he added, by way of what he described as a qualification, that he had "a great deal of trust in the people who were involved in this to ensure that there would be sufficient number of horses in the syndicate". The fact remains he never read a brochure in respect of the syndicate into which he entered.

Mr Blessington agreed, Tp 164, that the taxation benefit was very attractive as well as the syndicate providing, what he asserted to be a good investment. Mr Blessington, when pressed as to his knowledge of the financial position of B and T, said that he had not personally considered it, but he "assumed that other people had done whatever was necessary to ascertain the existence of this company, its financial position etc". He said he remembered being "quite confident that the legal side of this matter, if I can put it in those general terms, was looked after by others" and he suggested "specifically Mr **McConnell**": Tp 171. Mr Blessington said he did not enquire of NMRB whether it was financing the syndicate

and he did not make arrangements for a lawyer to be present at settlement on his behalf. He somewhat corrected that answer by saying:

"But certainly I believed that one of my partners would be present and one of my partners is certainly a lawyer."

BC9402679 at 157

He added:

"I just assumed that since I believed Keith **McConnell** was driving the matter he would be involved in it."

When pressed about the terms of the contracts Mr Blessington said he relied on others on the basis that if they were looking after their own interests he assumed they would look after his.

A closer perusal of Mr Blessington's statement made it necessary for him to withdraw the last two sentences of para16, which flowed from his mistaken statement that he was not aware that there were two syndicates, and to amend the last sentence of para15. In assessing the evidence of Mr Blessington I must take into account that he had verified the truth of these statements in his evidence in chief.

It was put to Mr Blessington that he had not referred to his attending a meeting on 9 November 1989. He said that if he had overlooked that it should be attended to, and he was referred to an affidavit he swore on 15 May 1992 in which he stated he did attend such a meeting: Tp 175.

These pieces of evidence make it difficult for me to place reliance upon Mr Blessington's recall for even basic detail. This view accords with my impression of the way in which Mr Blessington gave his evidence, in that he was prone to give hasty replies, which he then sought, after a moment's reflection or a further question, to qualify.

At Tp 177 Mr Blessington said that he was aware that the viability of the syndicate depended upon the acumen and expertise of the manager and that the manager had resigned because of financial difficulties, and that these were matters of grave concern to him. He was asked whether he considered "given the manager's resignation for financial reasons" that it may have been prudent to wind up the syndicate. He said he felt it was preferable to continue the syndicate and, to that end, he supported the motion that Logan Financial Services Pty Ltd be appointed as manager in place of B and T.

BC9402679 at 158

Mr Blessington was shown Exhibit 24, which was a facsimile transmission from Logan Financial Services Pty Ltd to Mr Logaraj dated 20 November 1989. He agreed he saw it. It reads:

"Further to the meeting of B and T 1 and 3 Syndicates held on Thursday 9.11.89, I now have pleasure in forwarding to you the minutes of this meeting together with the draft financial position of your syndicate, as prepared by Foster and Co."

The financial statements show the payment of brokerage and commission. In para17 of his witness statement Mr Blessington had said that prior to receiving a letter dated 9 January 1990 he was unaware that any of the moneys had been paid to Australian Thoroughbred Finance or to Mr Still "or indeed anybody else in connection with the promotion or funding of the syndicate". He agreed, in the light of Exhibit 24, that the statement to which I have just referred was wrong. He was then shown the original of the affidavit he swore on 15 May 1992 and referred to a statement in para18:

"It was only in the latter part of 1990 that I was informed that commissions had been paid to various persons and entities, including associates of Murray Bell, Jill Cantrell, Frederick Still, Fred Still and Associates Ltd, MANL, its employees and Equico Financial Corporation Pty Ltd and its employees."

BC9402679 at 159

It was put to Mr Blessington that he regarded the facts stated in his affidavit of significance. He said he certainly did and that he was careful to ensure his evidence was "scrupulously accurate". He said he could not have had access to the document Exhibit 24, otherwise he would not have made the statement in para18. Mr Blessington sought to give an explanation at Tp 179, but on any view such evidence, particularly as he is a solicitor of the Court, it gave rise in me to a feeling of disquiet about his reliability as a witness. This was reinforced by the way in which the answer was given.

Mr Blessington said that having received Exhibit 24 on or about 20 November 1989 he thought that the payment of what he believed to be secret commissions "would give me grounds to set aside the contract. Or have the contract set aside". He agreed that notwithstanding that belief he approved of the continuation of the syndicate's operations since November 1989, and that pursuant to that he has claimed fairly substantial taxation deductions.

At Tp 181 Mr Blessington affirmed that having received the contractual documents he did not read them although at that time, namely February 1990, he knew that the syndicate was in trouble and that there was a real prospect, as distinct from a mere possibility, that he may be called upon to repay the moneys lent to him "otherwise than from the resource of the syndicate". He then gave evidence I found strange:

"Q. And didn't it, in that context, occur to you as a matter of importance, that you read the terms and conditions of your liability to the financier, namely as contained in the documents enclosed with the letter of 2 February 1990?

A. I thought it was important that someone on my behalf did so and I believed that is what happened.

Q. Who?

A. It was either Keith **McConnell** or Geoffrey Taperell."

BC9402679 at 160

I found this evidence strange because I would have expected an experienced commercial solicitor confronted with the situation as foreseen by Mr Blessington to have sought to understand for himself the contractual obligations undertaken.

He said neither Mr **McConnell** nor Mr Taperell provided him with a report, a matter about which he did not protest because he believed his interests were being looked after and he was "content with that". He said he thought he took it for granted that they had checked the documents, but he did not recall asking them if they had.

Mr Blessington said on several occasions that he believed that the matter was being looked after by Mr Logan and one of his partners, either Mr **McConnell** or Mr Taperell. He said, Tp 184, that he noted several months after receiving the documents that the No 3 Syndicate was not settled on 30 June 1989.

Commencing at Tp 189 Mr Blessington gave, what I considered to be, quite unsatisfactory evidence about the sale by the No 3 Syndicate of livestock. He said that he believed that "in the circumstances" the decision to sell the horses without the consent of the owner was permissible. He described the circumstances as follows:

"Your Honour, as I said, these matters were being handled very much by others on my behalf. I did not take a large part in what was taking place, but I believe that, given that by then the Bell and Tonkes Syndicate had collapsed or was in the course of collapsing and that Mortgage Acceptance had been responsible at least with Bell and Tonkes for its collapse, that we were entitled, the syndicate was entitled to dispose of the horses."

BC9402679 at 161

He said he would not have advised a client to sell the horses because he would have understood "there was a possibility the Court would subsequently find that that" was unlawful, and he continued:

"Q. At least you had an apprehension, did you, that what you were doing may be held by a Court to be civilly wrong; is that right?

A. Yes.

Q. And yet you proceeded nonetheless?

A. Yes. It was a practical way to proceed at the time.

Q. Did you think that it may have been prudent in those circumstances to obtain independent advice as to whether or not what you were doing was permissible?

A. No, because I relied on my, the others of my partners who were looking after this matter": Tp 191.

Mr Blessington conceded that he had the apprehension that what was being done amounted to a civil wrong and, notwithstanding that he was at the time a solicitor of much experience, he was prepared to countenance that as being "the practical way to deal with the problem". He was prepared to adopt a stance which suited his financial benefit. I consider this was reflected in much of his evidence before me. I have already pointed to difficulties with the evidence of Mr Blessington. It becomes increasingly difficult to accept his evidence in circumstances where he was prepared to take a course of action, notwithstanding his apprehension that it may be found to be civilly wrong, but which was to his financial advantage, at least as he perceived it then.

Mr Blessington agreed that a claim was made on the No 3 Syndicate by Three State Racing and Breeding Syndicate No 1 for $72,000. On 22 May 1990 Logan Financial Services Pty Ltd sent a facsimile transmission to Mr Connor, Exhibit 34, stating, inter alia:

"I am pleased to announce that the majority of members have voted to proceed with the syndicate on a month to month basis as outlined in Option 4."

BC9402679 at 162

This was a matter of which Mr Blessington said he was informed. On the same date a further facsimile was sent from Logan Financial Services Pty Ltd to Mr Logaraj, (Exhibit 35), in the following terms:

"Call on funds - $7,000 per 10% share $3,500 per 5% share You will recollect that this call has been placed on members following a resolution at a syndicate meeting held in Coopers and Lybrand's Melbourne office on April 1 to pay out the $72,000 owing to the receiver/manager of the Three State Racing and Breeding Syndicate No 1. There has been ample time since the call was originally placed on members for the funds to have been sent to Russell Clear at Coopers and Lybrand.

Therefore, in accordance with the Syndicate Terms and Conditions s5 para5.3, I inform you that should you not have your call funds deposited in the syndicate bank account by June 1 that you will be in default of the syndicate. .."

Mr Blessington agreed that the payment of $3,500 made by him on 31 May 1990 was a response to that facsimile transmission.

Mr Blessington agreed that on 6 June 1990 he had authorised Mr Taperell "to take whatever steps he thought necessary including any correspondence and I would have approved it in the form that he sent". He was referring to a draft letter to be sent to Mr Symond, which forms part of Exhibit 36, and which refers, in general terms, to a proposed resolution of the problems which had arisen between the syndicate members and MANL.

BC9402679 at 163

On 4 June 1991 Mr Logan sent a facsimile transmission to Mr Blessington referring to earlier faxes dated 15 and 22 January 1991 and noting that there had been a failure by Mr Blessington to pay outstanding fees totalling $4,650 for the months of August 1990 to January 1991 inclusive in respect of the No 3 Syndicate, and stating that unless payment was made by 15 June 1991 Mr Blessington would be expelled from the syndicate. Mr Blessington agreed that in answer to that communication he paid $4,650 on 14 June 1991. Mr Blessington agreed that in October 1990 he "went along with the idea of continuing the syndicate" and that he paid the amount required in Exhibit 42, although he said he "feared there was absolutely no alternative". He agreed that as at June 1991 he was well aware of all the facts "which you know now or alleged facts about the secret commissions and so forth".

I cannot be satisfied that Mr Blessington relied upon or was induced by the representations pleaded in entering into the contractual arrangements. I have pointed to a number of unsatisfactory parts of his evidence and I believe it to be essentially unreliable in respect of matters of detail, an impression I formed not only from the terms of the evidence, but also from the way in which it was given. As with the earlier witnesses, although perhaps even more so, Mr Blessington appears to have relied upon others, being particularly Mr **McConnell** and Mr Logan, in coming to his decision to enter into the agreement and, in these circumstances, I am not satisfied that he relied upon or was induced by the representations. Mr Blessington placed far greater emphasis, in his evidence, upon the taxation advantages accruing from the transaction and, in this respect, I accept his evidence. I am of the opinion that he believed the risk was small and the potential gain was great and that in these circumstances and in reliance upon the involvement and advice of Messrs **McConnell** and Logan he entered into the transaction. His evidence makes it inherently improbable that he relied upon or was induced by the representations alleged to enter into the transaction. Had he been there can be no doubt, in my mind, that upon being made aware of the various matters of which he now complains he would have withdrawn or sought to withdraw from the transaction. Far from doing so he continued, in effect to affirm it by making payments to the No 3 Syndicate, as they were requested, or demanded, including the payment to enable that syndicate to pay off its indebtedness to Three State Racing and Breeding Syndicate, and otherwise agreeing to the continuance of the Syndicate.

BC9402679 at 164

I should note the re examination of Mr Blessington at Tp 203:

"Q. You recall shortly before the luncheon adjournment that his Honour asked you a question in terms which my note suggests were these, the long and the short of your evidence is that you relied almost entirely on your partner Mr **McConnell** in connection with your entry into the transaction, do you recall that question?

A. Yes. I do.

Q. And you responded in part very largely, do you recall that?

A. Or words to that effect, yes.

Q. Mr Blessington, when his Honour asked you that question to what did you understand his Honour was referring when his Honour used the words entry into the transaction?

A. The checking of the documents from the financier, their execution and settlement.

Q. Did you understand his Honour to be referring to your decision to invest in the syndicate?

A. No."

BC9402679 at 165

Whatever may have been Mr Blessington's understanding of my question, I am satisfied by his evidence that he relied substantially upon the involvement of Mr **McConnell** and Mr Logan and that his evidence does not justify the qualification he proffered.

THE EVIDENCE OF NADAISAN RAJ LOGARAJ

The witness statement of Mr Logaraj is Exhibit H. He was admitted as an advocate and solicitor in Singapore in 1971, where he practised until 1979 in which year he immigrated to Australia and was admitted as a solicitor in 1981. He joined Baker and McKenzie in 1985 as a consultant and, in 1986, he was appointed a partner. He met Mr **McConnell** in 1980 and thereafter they became friends. Mr Logaraj learned that Mr **McConnell** had developed an interest in following and owning thoroughbred horses and it was his impression Mr **McConnell** had acquired considerable knowledge about the racing industry. Mr Logaraj received Mr **McConnell's** memorandum of 5 June 1989 but, initially, expressed no interest in joining the syndicate. In the final week of that month Mr **McConnell** spoke to Mr Logaraj and said:

"I know you will need a tax break this year. I've got a horse racing and breeding scheme for you, which will be at no risk to you. The boys are all in it."

Mr **McConnell** mentioned the names of various partners of Baker and McKenzie including Messrs **Beatty,** Fraser, Davis and Killalea and there was some discussion about costs, Mr Logaraj saying he could not afford to take a whole share. Thereafter Mr Logaraj discussed the matter with Mr Blessington, who told him he would read the documents and let Mr Logaraj know if he was prepared to enter into the syndicate jointly with him. After some discussion with Mr Blessington, Mr Blessington and Mr Logaraj went to see Mr **McConnell** and asked him what would happen at the expiration of three years. Mr **McConnell** said not to worry as the loan would be rolled over and that there should be some money from sales and wins.

BC9402679 at 166

Mr Logaraj said he was attracted to the investment because he believed that NMRB was involved, and he did not know of the fact that MANL was to become involved. He said in para12:

"I would definitely not have taken out any substantial loan with that company, or any other company which I did not consider to be a major financial institution, had I known that it was, in fact, involved."

Because one of Mr Logaraj's major clients had gone into liquidation he was concerned to confine his financial commitments as his income stream had been affected adversely. In para14 he said his decision to invest in the syndicate "was also prompted by the trust which I placed in my partners and, in particular, **McConnell.** This was partly because I had not then heard of a company called Bell and Tonkes ... It was also because **McConnell** was, by that stage, a senior partner of the firm (having been a partner for more than fifteen years) and was also a member of Baker and McKenzie's International Executive Committee. That committee was responsible for the global management of Baker and McKenzie and comprised only seven members. **McConnell** was thus a leading figure in the firm and in light of his apparent knowledge of the thoroughbred racing industry I assumed that he would have scrutinised the relevant Syndicate documents closely. I presumed he was content with the documents."

BC9402679 at 167

Mr Logaraj said he would not have entered into the transaction without further detailed investigation had he been aware that Mr **McConnell** was a director of B and T and had personally guaranteed the payment of expenses in connection with the horses to be placed in the syndicate. He also said he considered the syndicate represented an attractive investment "and could be highly profitable". He said he would not have entered into it "unless I believed this".

In August or September 1989 Mr **McConnell** told Mr Logaraj that NMRB had not provided the finance, which had been arranged through MANL. Mr **McConnell** told Mr Logaraj that MANL was associated with Custom Credit. For this reason Mr Logaraj said that his fears were allayed, as he regarded Custom Credit as a reputable lender.

On or about 28 September 1989 Mr Logaraj received a letter from B and T, signed by Miss Cantrell, advising that B and T had believed the syndicate would be funded by NMRB, that this had not occurred and that finance had been arranged through MANL, whose conditions "were quite different to those of NMRB, even though you joined the syndicate on the understanding that NMRB's funding methods were to be available to you BY DIRECT NEGOTIATION and that your deposit would be an interim amount on the first year loan". (Emphasis added.)

The letter advised that B and T had to pay $15,250 on behalf of Mr Logaraj on June 30 and sought reimbursement of the amount "which was paid in good faith". Credit was given for the sum of $1,531.25 which had been paid and the balance of $13,718.75 was requested.

BC9402679 at 168

This request led to a meeting between Messrs **McConnell,** Logaraj and Blessington and subsequently Mr **McConnell** advised that the amount would have to be paid as it was part of the arrangement with MANL. In these circumstances Mr Logaraj paid it on 1 November 1989.

Thereafter Mr Logaraj became aware that moneys he paid included an amount paid to Australian Thoroughbred Finance and Mr Still. He received this information on or about 9 January 1990.

On 2 February 1990 Mr Logaraj received the documentation and was concerned because the documents were dated 12 July 1989, which was after the expiry of the Power of Attorney he had granted.

In February 1990 Mr Logaraj discussed the matter with Mr **McConnell** who told him that he was "sorting out the problems", and not to worry. Mr Logaraj subsequently paid the sum of $7,832.50 being the call to enable payment to be made to Three State Racing and Breeding Syndicate.

Mr Logaraj was cross examined firstly by Mr Svehla on behalf of Mr **McConnell.** Mr Logaraj said that he derived comfort from the fact that a number of the partners of Baker and McKenzie were prepared to go into these syndicates, which partners had been in the successful 1988 Syndicate, and that he only looked at the documents Exhibits A and B "quickly". He derived comfort from Mr **McConnell's** statement that there would be no risk.

BC9402679 at 169

At Tp 228 Mr Logaraj said:

"I ought to add, I should add as well that in my mind I was holding Mr **McConnell** responsible for what had happened with the syndicate and I expected him to resolve the difficulties that had arisen. He introduced the investment to me. I expected him to fix it."

Mr Logaraj said that he did not understand that Mr **McConnell** was a promoter of the scheme, but that he was a very keen investor anxious to make sure that it got off the ground, and that he was very enthusiastic about the prospect of the syndicate's success. Mr Logaraj agreed that was a matter of significant influence, so far as he was concerned, having regard to his understanding of Mr **McConnell's** previous involvement in thoroughbred horses: Tp 230. At Tpp 232 and 233 Mr Logaraj said:

"Q. Do I understand that you paid no real attention to either Exhibit A or Exhibit B before entering into the transaction?

A. I did read them quickly your Honour.

Q. No. I said real attention?

A. That would be correct your Honour.

Q. You really relied upon Mr **McConnell;** is that right?

A. If I may respond to your Honour's question.

Q. Yes, I am inviting you to?

A. Any investment decision we make either personally or as a family is based on two factors your Honour. The return on investment as represented, but, more importantly to us, the people associated with that venture. I'd derived considerable comfort from the fact that the financier to this venture was NM Royal Bank, that the manager in respect of this

venture was Mr Murray Bell, who I had been informed by Mr **McConnell** was highly experienced in the bloodstock industry, and that the managers and that the trainers of these horses were people of the calibre of Messrs Bart Cummings, Lee Freedman and Colin Hayes. On the basis of the personnel involved and the people associated with this venture, and the comfort levels I derived from it, we tried, I tried to proceed with my participation your Honour."

At Tp 235 Mr Logaraj said that his speciality in the field of law was contract law.

BC9402679 at 170

At Tp 236 Mr Logaraj confirmed that he assumed that NMRB, which he regarded as a reputable lender, had independently satisfied itself that the proposed syndicate was viable and offered good prospects of success. He said he did not make the assumption on the basis of anything said to him and he agreed that, prior to 30 June 1989, he had never encountered a circumstance in which a lender had independently satisfied itself that a syndicate of the nature of the No 3 Syndicate was viable and offered good prospects of success. In these circumstances there seemed no basis for any such assumption and I do not accept Mr Logaraj made such an assumption. Mr Logaraj said he made no attempt to communicate with NMRB.

Mr Logaraj was cross examined about a statement in a letter, which he adopted, written by Mr **McConnell** to MANL that Mr Logaraj's average annual income was in excess of $250,000. For the financial year ended 30 June 1989 it was not for reasons Mr Logaraj explained at Tpp 245 to 247. I accept that Mr Logaraj may not have appreciated the full impact of the liquidation of his major client. However, that did reduce his income from Baker and McKenzie substantially below $250,000 and for the financial year ended 30 June 1990 he declared a loss as a partner of Baker and McKenzie of $52,962. He agreed the liquidation of his major client "had a significant and enduring impact upon" his professional income: Tp 245.

At Tp 247 Mr Logaraj agreed that for the financial years ended 30 June 1989, 1990 and 1991 he claimed deductions as a consequence of his participation in the No 3 Syndicate of $46,434, $12,392 and $10,255 respectively. He agreed that he knew his belief that the documentation had been signed and put in place by 30 June 1989 was erroneous by February 1990 at the latest, and he believed he became a syndicate member as at 30 June 1989 "because I had made a contribution by that date": Tp 248. He then gave the following evidence I consider self contradictory:

"Q. Is it not part of your defence to the cross claim made against you in these proceedings that you have no liability to MANL because the documents executed by Mr Bell on your behalf were executed after 30 June 1989?

A. Yes, to the best of my recollection.

Q. Is it not the case that by reason of the fact that those documents were not executed until after 30 June 1989, you claimed that you were never properly made a member of the No 3 Syndicate?

A. No, I believe that I was entitled to the deduction because of the payment that I had made prior to June 30 1989."

BC9402679 at 171

Mr Logaraj was cross examined about the degree of risk he foresaw in the investment, which he described as "minimal": Tp 251, and he continued:

"Q. Surely those risks were greater than the minimal?

A. No, because of the experience of those who were putting this together in terms of their experience in the bloodstock industry."

This piece of evidence, when taken with the totality of his evidence, confirms, in my view, the reliance Mr Logaraj was placing upon that matter which, in my opinion, cannot be visited to any act or omission on the part of MANL.

At Tp 253 Mr Logaraj was cross examined about the statement in para12 of his witness statement:

"I would definitely not have taken out any substantial loan with that company," (MANL) "or any other company which I did not consider to be a major financial institution, had I known that it was, in fact, involved."

BC9402679 at 172

He said he stood by that statement, but he then asserted that had he known, prior to 30 June 1989, that MANL was to be the financier he would not, without more, have withdrawn, but he would have made enquiries as to its standing "and if they were either in their own right or associated with a major financial institution, I may have proceeded". He said he

saw nothing inconsistent between that evidence and the concluding sentence of para12 of his witness statement and, when asked to explain why, he said:

"A. Your Honour, if I will known (sic) that MANL was involved as at the end of June 1989, I had not heard of this institution before your Honour. I would have made enquiries and if those enquiries satisfied me in terms of their association with a major lender, then I may have proceeded. But I had not heard of MANL at that time."

It seems to me that the evidence is inconsistent, and that the statement made in the witness statement puts the case higher than the oral evidence of Mr Logaraj accepted. I am satisfied Mr Logaraj put his evidence this way because he appreciated his evidence in para12 was difficult to reconcile with his failure to act when he learnt that MANL was the financier.

At Tp 254 Mr Logaraj was asked about the additional enquiries to which he was referring in the last sentence of para15 of his witness statement. He said the enquiries would have been directed to partners other than Mr **McConnell.** At Tp 255 he said:

"Q. Did you not consider personal scrutiny of the relevant documents a matter of basic prudence regardless of any supposed involvement on Mr **McConnell's** part?

A. I will have to agree with the benefit of hindsight, that I assumed that Mr **McConnell** had scrutinised the documents and it was because of the trust I placed, I had placed in Mr **McConnell.** I assumed that he had gone through them because he was after all introducing the investment to me."

BC9402679 at 173

Once again, in my opinion, this shows that the fundamental reliance was being placed upon the recommendation of the investment given by Mr **McConnell** and his supervision of the documents.

At Tp 255 Mr Logaraj was cross examined about his assertion, in para16 of his witness statement, that he considered the syndicate represented an attractive investment. He was unable to say what his expectation was as to the yield likely to be obtained, which is somewhat surprising in view of the fact that he said he regarded it as "an attractive investment". He said he was untroubled by the warning statement in the brochure about the unpredictable and cyclical nature of the thoroughbred bloodstock business making budgets and positive cash flow projections impossible and he remained satisfied it was an attractive investment "given the breadth of experience of those involved with it in terms of their involvement with the bloodstock industry".

He was cross examined about his statement in para18 that he anticipated "that a standard form loan agreement would be executed" on his behalf. He agreed, Tp 256, that the reference by Mr **McConnell** to voluminous documentation meant there was more than "a standard form loan agreement", that he understood there would be some form of lease, and that he understood there would be some form of mortgage or charge over his interest in the partnership. He agreed he also understood there would be some form of management contract between him and the other syndicate members on the one hand and the proposed manager of the syndicate on the other and:

"Q. And all of these instruments, as you understood it, were to define in voluminous terms the respective rights and liabilities of the parties to them, including yourself?

A. Yes. That's right.

Q. Is that right, and you really had no idea when you granted this Power of Attorney what specific provisions may be contained in all these various documents, did you?

A. That's correct.

Q. Yet you granted the Power in the expectation that the donee of it, Mr Bell, would execute those documents as you have acknowledged them on your behalf; is that right?

A. That Mr Bell, yes, but Mr Bell would execute those documents and that those documents would be the documents which Mr **McConnell** had scrutinised and was satisfied with.

Q. Yes. He, Mr **McConnell,** said at the time, that is when he asked for the Power of Attorney, 'I will make sure that you get copies after the deal has been put in place'. Is that right?"

A. Yes."

BC9402679 at 174

Once again it becomes apparent from the evidence that Mr Logaraj was relying upon Mr **McConnell** as the partner introducing the investment.

He agreed he received copies of the documents in February 1990 but, to the best of his recollection he did not peruse them, notwithstanding that he was well aware there were serious concerns about the viability of the partnership, that MANL had become the financier, and that the terms were different. I find this very odd. Mr Logaraj said he did not take any steps to find out whether his cheque in the sum of $1,531.26 had been negotiated prior to the conclusion of 30 June 1989, although he supposed it was a matter of significance to him, and he did not trouble to have a lawyer attend at settlement on his behalf because he assumed that Mr **McConnell** would be doing that. This points up further the reliance being placed on Mr **McConnell** to the extent that he was anticipated to attend on settlement.

BC9402679 at 175

In para21 of his witness statement Mr Logaraj said that he was not informed until about August or September 1989 that there was more than one syndicate or that the No 1 Syndicate required cross guarantees. He said he adhered to the statement and what he said on his oath, namely that "no one told you until August or September of 1989 that there would be more than one syndicate". Mr Logaraj said that whilst he knew from the memorandum Mr **McConnell** wrote on 5 June 1989 there were to be three syndicates he did not find out until August or September 1989 that some of the Baker and McKenzie partners were in one and some in another.

Mr Logaraj was taken to certain matters he deposed to in an affidavit he swore on 27 May 1992. Mr Logaraj confirmed his earlier evidence that he had looked at Exhibits A and B quickly. He was referred to a statement in para3(b) of his affidavit that he "perused the documents carefully" and it was suggested to him that there was an inconsistency in his evidence. He denied it was inconsistent and he said that so far as he was concerned they meant one and the same thing. He said by stating that he "looked at them quickly" he did not mean to convey that he read and considered each and every word on each and every page and he added:

"I believe it is possible to look at a document quickly and still exercise care in looking at them."

BC9402679 at 176

He said he looked at the documents quickly but also carefully, although he was unable to remember for how long he looked at them. At Tp 262 Mr Logaraj said that he was distinguishing between looking at the documents quickly and scrutinising them. I have the greatest difficulty in reconciling these answers and, although it may not seem to be a matter of great importance in itself, it is a matter which I have taken into account in considering the extent to which I should accept his evidence. Mr Logaraj agreed that the evidence he gave at Tp 232, which is produced at Tp 262, could not stand with the statement in para3(b) of his affidavit of 27 May 1992, but he disagreed that one or other of the statements was wrong. He was then invited to reconsider the answer that the evidence could not stand with the statement in para3(b) and he replied, Tp 263:

"Your Honour, in response to your Honour's question, I believe I have drawn a distinction between reading documents carefully and scrutinising documents. I believe that when I read them quickly, there was a degree of care attached to that reading and that is why I do not find any inconsistency in the statement made in the affidavit and the evidence given on Thursday."

The difficulties about this evidence were further exposed at Tpp 263 to 265. That evidence merely confirms the view to which I have come and which I have already expressed.

Mr Logaraj was then asked questions about having sworn in para5 of his affidavit of 27 May 1992 that the Power of Attorney was in identical form to the Power given by Mr Taperell, a copy of which was annexed to his affidavit. The cross examination was on the basis that Mr Taperell's Power of Attorney related to the No 1 Syndicate, whereas Mr Logaraj's related to the No 3 Syndicate. I asked certain questions of Mr Logaraj at Tp 267 about any attempt he had made to obtain a copy of his Power of Attorney before he swore his affidavit on 27 May 1992 and this revealed, at least, a deficiency of recall, which makes it the more difficult for me to place reliance upon his evidence.

BC9402679 at 177

Commencing at Tp 268 Mr Logaraj was cross examined about his knowledge of what transpired at the meeting of 9 November 1989. He agreed he received the minutes of that meeting on or immediately after 20 November 1989, and that he swore in para18 of his affidavit of 27 May 1992:

"It was only in the latter part of 1990 that I was informed that commissions had been paid to various persons and entities, including associates of Murray Bell, Jill Cantrell, Frederick Still, Fred Still and Associates Ltd, MANL, its employees and Equico Financial Corporation Pty Ltd and its employees."

It was suggested to him that in the light of the information furnished in Exhibit 24 on or immediately after 20 November 1989 that statement was wrong. He said he had no recollection of reading those documents "at that time". Not only is it inherently probable that he did not, but it is impossible to accept that he failed to do so for almost twelve months. One appreciates that a number of the plaintiffs made this statement in identical or almost identical terms. The comments I have made about the necessity to read it literally and, in so doing, about its veracity apply with equal force.

He was asked about his knowledge, which he agreed he had, as at November, 1989 that the manager of the syndicate was experiencing severe financial difficulties and had been wound up. He said that was a matter of concern, but not grave concern to him. He agreed that the meeting of 9 November 1989 was important, but he said he expected Mr **McConnell** to be monitoring it and to be representing his interests. He said he had no recollection of reading the financial information contained in Exhibit 24 and that he could not recall anyone telling him "even in the broadest of terms" of its contents, although he added that someone may have.

BC9402679 at 178

Nonetheless he adhered to the statement in para18 of his affidavit and gave the following evidence, Tp 270:

"Q. Is it your evidence that no one who was a member of the No 3 Syndicate told you of that fact, or alleged fact, before the latter part of 1990?

A. I can't recall. The conversations I had in relation to this investment were largely with Mr **McConnell** and I can't recall whether he had informed me of this prior to the latter part of 1990.

Q. Do you, by that answer, acknowledge that it is at least possible that someone told you about these commissions or alleged commissions, before the latter part of 1990?

A. I have sworn an affidavit your Honour based on my best knowledge and belief at that time. And I believe that it was only in the latter part of 1990 that I was informed.

Q. Would you please answer my question. Do you acknowledge that it is at least possible that you were told about these commissions, or alleged commissions, prior to the latter part of 1990?

A. I can't recall. It is possible.

Q. It is possible. In para18 of your affidavit, however, you state in unqualified terms that you were not told about those commissions until the latter part of 1990?

A. That's correct.

Q. Do you not?

A. Yes.

Q. The matter is a matter which you consider to be of considerable significance in these proceedings?

A. Yes.

Q. When you swore that affidavit, that is the affidavit of 27 May 1992, did you trouble to check your files to ascertain whether or not they contained a copy of Exhibit 24?

A. I cannot recall sir."

BC9402679 at 179

To my observation not only is the evidence inherently unsatisfactory but, as it was given, it impressed me as being quite unsatisfactory. I have no doubt that Mr Logaraj knew prior to the latter part of 1990 that certain of the people to whom he made reference in para18 had received commissions and that his evidence, at the least, was not totally frank. In either event it casts further doubt on the reliability of his evidence.

Mr Logaraj was referred to para8(b) of his affidavit at Tp 271. He said that the documents, which he received in February 1990, had not been explained to him in June 1989 and, in the affidavit, he said:

"The documents represented a complete departure from the terms of the prospectus and associated documentation."

Not only was he unable to say in what respect there was such a departure, but the evidence was contrary to the evidence he had given earlier before me that he was unable to recall whether he read the documents when he received them in February 1990.

Mr Logaraj continued to assert, notwithstanding his acknowledgment that he received a letter of 9 January 1990 from the accountants, that some doubts had been expressed in relation to fees paid to Australian Thoroughbred Finance and Mr Still, which amounts he had incorporated as deductions in his 1989 taxation return, and that it was not inconsistent to say that it was only in the latter part of 1990 that he learned about the commissions, as stated in para18.

BC9402679 at 180

Commencing at Tp 272 Mr Logaraj was cross examined about para19 of his affidavit of 27 May 1992 in which he complained, in effect, that MANL drew down funds otherwise than in accordance with his permission or consent. He continued:

"I understand that the money which was represented to me to be for expenses of the syndicate for two years of operation was drawn down in one lump sum and paid to B and T."

In his oral evidence he said he believed that was one of his complaints, although he could not recall the reason for the complaint and the evidence at Tp 273 showed that the complaint, if there ever was one, was quite unjustified. Mr Logaraj agreed with this, although in coming to that agreement he gave certain answers which sought to make good the complaint. He suggested that financiers do pay moneys, in effect by instalments. However, when confronted with the circumstances in which that occurs he agreed it was completely different from the circumstance of the present case in which the financier was entirely at arm's length from the manager of the syndicate. It is quite clear to me not only from the evidence, but from the way in which it was given, that the supposed complaint referred to in para19 of his affidavit never was thought by Mr Logaraj to be a justified complaint and that when confronted with the difficulties about making it Mr Logaraj gave completely unacceptable evidence. This was made the worse by his attempt to mould the evidence in a way which may seem to justify the making of the complaint.

Commencing at Tp 277 Mr Logaraj was cross examined about the contents of para38 of his witness statement. Although the second sentence asserted a belief that the payment "constituted a lease payment under the existing arrangements", Mr Logaraj agreed, Tp 278, that he believed the amounts were different from the amounts which he understood to be payable under the documents furnished to him in February 1990. Mr Logaraj sought to explain this by saying that the payment followed a discussion with Mr **McConnell** and that when there was a demand for payment it was his practice to discuss that with Mr **McConnell.** He said he paid what Mr **McConnell** suggested he should pay, irrespective of what he understood his contractual obligations were, because he expected "Mr **McConnell** to monitor this investment and I believe that he was representing my interests. So I was guided by his advice in this respect": Tp 279.

BC9402679 at 181

On 1 November 1989 Mr Logaraj made, or a payment was made on his behalf in the sum of $13,718.75, on 30 May 1990 in the sum of $3,500 and on 25 June 1990 in the sum of $7,832.50. These payments were all made at a time when Mr Logaraj was feeling concern about the affairs of the partnership.

At Tp 280 Mr Logaraj said he believed he acquiesced in the sale by the No 3 Syndicate of certain horses and, when confronted with the suggestion that that syndicate had no title to the horses, Mr Logaraj replied:

"I had left the question of the sale of horses to Mr **McConnell** and I did not focus on that particular aspect."

Mr Logaraj said he appreciated from the very outset that the horses obtained by the syndicate were on lease from the financier, that that meant that the financier had title to the horses and had merely leased them to the syndicate, and that nothing occurred until the sale of the horses to suggest that position did not continue. When the consequential question was put to him that when he acquiesced in the sale of the horses he did so in the knowledge that the syndicate did not have title to them, he replied unresponsively:

"I cannot recall whether I was aware that the horses were being sold at that time."

BC9402679 at 182

He agreed that if he read a facsimile transmission addressed to him dated 17 January 1991 he would have been so aware. It seems to me that this is another instance of unsatisfactory evidence from Mr Logaraj. He was, undoubtedly, aware that the No 3 Syndicate had no title to the horses. In these circumstances the sale by the No 3 Syndicate was in derogation of the rights of MANL. The suggestion he did not read a facsimile transmission to him is hardly plausible.

The unresponsive answer to the question I have last quoted shows an evasiveness, which, unfortunately, pervaded much of his evidence. I have already referred to various matters where Mr Logaraj failed to confront the specific question put to him.

At Tp 281 Mr Logaraj repeated that he relied upon Mr **McConnell** to monitor the affairs of the No 3 Syndicate and to represent his interests, and that he expected this to be done, notwithstanding that by early 1991 he was aware of the severe financial difficulties being confronted by the syndicate and of his own financial problems resulting from the liquidation of his major client in March 1989. It should be noted in this regard that not only was the cash flow affected adversely, but that under the policy adopted by Baker and McKenzie there was an obligation on Mr Logaraj to refund to the firm certain moneys which could not be obtained from the client.

BC9402679 at 183

Mr Logaraj said that he took little interest in the "Mountain Rule" case, which may be understandable as it involved the No 1 Syndicate. He received a letter from Mr Logan dated 25 May 1992, Exhibit 48, stating that the remaining horses in the No 3 Syndicate had been sold, that a balance of $12,000 was held in a bank account to cover costs still to come and any contingencies, and that the remaining funds were being distributed back to syndicate members "in accordance with their equity in the syndicate". A cheque was enclosed in favour of Mr Logaraj in the sum of $5,389. Mr Logaraj said he did not understand there was any impediment to his banking the cheque, which he said he believed he did, and he added that he did not know if he was aware of Cohen J's decision in the "Mountain Rule" case at that stage, which may be thought to be somewhat extraordinary in view of the fact that his Honour gave judgment in November 1991.

In re examination at Tp 287 Mr Logaraj gave this evidence:

"Your Honour, as I said in evidence on Thursday, it was my assumption that if a reputable major lender was associated with this transaction, it would have satisfied itself with the viability of any venture that it was financing before allowing its name to be so furnished as a party in the venture. That was the reason I made that assumption, that they would have, that the National Mutual Royal Bank would have gone through the details of the venture and satisfied itself that it was something it ought to be associated with."

I have already dealt with the cross examination, which disclosed, in my opinion, there was no basis for any such assumption. I did not accept his evidence about the making of the assumption given in cross examination and I do not accept it when given in re examination.

BC9402679 at 184

At Tp 292, after a lengthy submission by Mr White as to the affidavits made by a number of his clients, Mr Logaraj made it clear that prior to affirming his affidavit he read it and "on the basis of my knowledge and belief at that time, agreed with its contents and affirmed it". It also appeared, although the answer was somewhat non responsive, that he had access to the documents he maintained in his file, which Mr White seemed to accept.

I have referred to much of the evidence of Mr Logaraj which I found to be unsatisfactory. In my view certain of his evidence not only reflected upon the reliability of his recall, but upon his reliability as a truthful witness. I am satisfied that in entering into the transaction he did not rely upon any of the representations made and was not induced thereby to do so. I am satisfied that he was content to follow the course suggested by Mr **McConnell.** Notwithstanding his awareness of problems which had arisen in the No 3 Syndicate he continued to affirm the contractual relationship by making payments and by the receipt of the cheque enclosed with the letter of 25 May 1992, Exhibit 48. This conduct I find to be totally inconsistent with the complaints now made.

THE EVIDENCE OF MR JOHN KENNETH CONNOR Mr John Kenneth Connor was the most senior of the partners of Baker and McKenzie involved in the syndicates. His involvement was in the No 3 Syndicate. He was admitted to practice as a solicitor in Victoria in 1961 and in New South Wales in 1964. He established Baker and McKenzie in Sydney and practised here until 1974 when he moved to Hong Kong, where he established the office of Baker and McKenzie. He worked in Hong Kong, Singapore and Bangkok until 1988 when he returned to Sydney. In 1992 he returned to the Singapore office of Baker and McKenzie, which he had established during his time in Asia. Mr Connor impressed me as a thoroughly competent solicitor and a person with various business interests. I have no doubt that he is also a competent business man. He engaged in some business activities with another partner in the Sydney firm. He had met Mr **McConnell** in about 1971 when he interviewed him for a position with Baker and McKenzie in Sydney and he formed a personal relationship with Mr **McConnell,** who joined Baker and McKenzie then.

BC9402679 at 185

Mr Connor said he was interested in the proposal about the No 1 and No 3 Syndicates, about which he learnt in June 1989.

Mr Connor read Exhibits A and B. He was concerned about whether the thoroughbred racing and breeding industry could survive an economic downturn, although he noted the prize money on offer and he thought that if the horses were well chosen the prospects of winning prize money were significantly improved. He concluded that the breeding and racing of thoroughbreds "could be a profitable undertaking". He also read the passage at 23 of the brochure, which I have quoted. He was attracted by the statement that a leading financial institution had been involved in the purchase of the horses, and he identified it as NMRB. He said the involvement of NMRB gave him confidence because he believed it would have made "some assessment of the venture on an independent basis before being involved in it". He said the syndicate was also attractive because the value of the horses had risen greatly since their purchase and because it was expected to be self funding after two years. He made further enquiries of Mr Logan, Mr **McConnell** and Mr Still. He said he was influenced by the participation of Messrs **McConnell** and Logan, although he believed they were only concerned as investors. If he had known that B and T was in financial difficulties he would not have participated in the syndicate, firstly, because B and T would be handling substantial sums of money and dealing with the syndicate's assets, and secondly, because he believed that Mr Bell's involvement was very important to the future of the syndicate. For these reasons he decided to invest in the syndicate.

BC9402679 at 186

In para12 he recounted a telephone conversation with Mr Still in which he was told there was some problems with NMRB relating to the financial statements furnished by people who had applied for shares in the syndicate and that it may be necessary to seek finance from another financier. He was concerned with this information, because of the potentiality of joint and several liability. This was a matter he wished to avoid because he had entered into several business undertakings with a stockbroker in the early 1970's in which there was "effectively" joint and several liability, and after the stockbroker became bankrupt he was called upon to meet certain liabilities on that basis. Therefore, excluding his professional partnership, he was not prepared to enter into any business arrangements which involved that potentiality. Mr Connor told Mr **McConnell** he was not prepared to enter into an arrangement on that basis. For that reason he was not prepared to become an investor in the No 1 Syndicate.

BC9402679 at 187

In para16 he said that whilst he became aware, some time prior to 30 June 1989, that another financier might be involved, he did not know the name of it. He said had he been told that it was MANL, that would not have made an impression on him because he had never heard of it. He said he understood the possible new financier was a specialist in financing thoroughbred horse racing and breeding syndicates and:

"Had I been informed that Mortgage Acceptance stood behind the Syndicate, I would have been concerned to carry out enquiries as its standing and reputation."

Mr Connor joined the No 3 Syndicate. He said that had he not believed that all the expenses for the syndicate over the next two years were being funded by the loan, and had he not believed that his financial commitment was limited to paying interest of approximately $3,000 monthly in respect of that loan, he would not have taken a share in the syndicate. He entered the syndicate because he believed it offered a good, long term investment. He said that had he been aware that Messrs **McConnell** and Logan were involved in the venture other than as investors he would not have entered into it without making much more detailed enquiries.

Mr Connor did not recall receiving a letter of 28 September 1989 from B and T. At that time he was a member of the International Executive Committee of Baker and McKenzie and spent a very substantial part of his time out of Australia. He was extremely busy. He paid $27,437.50 to the No 3 Syndicate and it was his recollection "that the alternate financier of the Syndicate had required the payment of interest annually in advance and that this cheque, together with the cheque I had already paid prior to 30 June 1989, represented interest or some other charges payable to the financier". He was unaware that payments were to be made on behalf of syndicate members either to Australian Thoroughbred Financiers or to Mr Still.

BC9402679 at 188

He became aware of problems with the syndicate in the later part of 1989 and he believed that Messrs **McConnell** and Logan "and others" were involved in attempting to sort them out. He attended a meeting with Mr Symond at the offices of MANL in early 1990, when there was some discussion about secret commissions and after which he believed "an impasse had been reached".

On about 26 June 1990 he was told either by Mr **McConnell** or Mr Logan that it was necessary, to "keep negotiations alive", to pay $14,150 interest to MANL. He paid that amount and various other sums in discharge of the syndicate's expenses.

In the latter part of 1990 a decision was taken to seek advice from Senior Counsel and, thereafter, Mr Connor seems to have left the conduct of the matter to Mr Taperell.

Mr Connor was asked a number of questions in chief. His attention was drawn to his statement in para16 that he was not told the name of the new financier prior to entering into the transaction. This was obviously not correct because on 27 June 1989 he wrote to Mr Bell in the following terms:

"Pursuant to our conversation and that with Fred Still today with Keith **McConnell,** I enclose an application form for one share in the No 1 Syndicate. The lodging of my Application is subject to my getting finance, as discussed, from Mortgage Acceptance Corp on acceptable terms. I understand that my first payment will be approximately $3,000." (Exhibit K)

BC9402679 at 189

Mr Connor said this document was not available to him when he made his statement on 10 September 1993 as it was with his former solicitors.

Mr Connor nextly explained that he had his own Power of Attorney prepared and, in para3, he limited the liability to $210,000, which he understood to be the amount "that will represent my borrowings exposure and I was concerned that there not be a higher level".

Mr Connor said he recalled first learning of financial difficulties associated with B and T in late 1989. Mr Connor was able to deny he attended the meeting on 9 November 1989 as his diary disclosed he was in America. He seems to have first learned about commissions said to be secret commissions on 9 January 1990: Tp 302, although he agreed there may have been some prior mention of such commissions. The fact that Mr Connor overlooked the terms of Exhibit K and his knowledge that MANL was the financier prior to 30 June 1989 is very strange having regard to the fact that he swore an affidavit in January 1992 in which he had a clear recollection of MANL's participation prior to 30 June 1989 and to which he annexed the letter, which became Exhibit K.

At Tp 328 Mr Connor was cross examined about an answer he gave in his evidence in chief at Tp 296, the first sentence of which read:

"Mortgage Acceptance I am not sure about, Mortgage Acceptance Nominees."

BC9402679 at 190

He was referred to his affidavit of 23 January 1992 in which he swore:

"In or about late June 1989 I was telephoned by Mr Bell. He informed me that the financing through the National Mutual Royal Bank would not be proceeding and that a number of alternative financiers including Mortgage Acceptance Nominees Ltd ('MANL') were being considered."

At Tpp 330 and 331 Mr Connor acknowledged the importance, particularly as a solicitor, of ensuring that statements in an affidavit are factually accurate. He was referred to a paragraph in his affidavit of 23 January 1992, in which he said:

"On 9 November 1989, I attended a meeting at the offices of Baker and McKenzie at 50 Bridge Street Sydney."

He was then reminded of his evidence that he did not attend that meeting because he was in America. He thereupon acknowledged that the first statement was wrong. He conceded that the error was significant. The reason the diary entry was inaccurate was not explored further.

He agreed that in the same affidavit he swore:

"It was only in the latter part of 1990 that I was informed that commissions had been paid to various persons and entities, including associates of Murray Bell, Jill Cantrell, Frederick Still, Fred Still and Associates Ltd, MANL, its employees and Equico Financial Corporation Pty Ltd and its employees."

Mr Connor denied that that statement was either at the time it was made, or at the time he gave evidence before me, false. Upon being further challenged about the veracity of the statement Mr Connor said:

"Mr Grieve, the way I read that was that it was only in the latter part that I was informed that commissions had been paid, with any certainty, to all of those people. I knew in the latter part of 1989 that commissions had been paid to at least some of them."

BC9402679 at 191

As with other witnesses, so with Mr Connor, this statement caused serious difficulties. In my view it showed an absence of frankness on the part of Mr Connor. This, combined with other discrepancies and errors in his evidence, to which I have referred, casts serious doubt upon the reliability of his evidence.

He said that he did not know about commissions being paid to Jill Cantrell at that stage, but he could not think of any others ie in the latter part of 1989. At Tp 300 Mr Connor was referred to the letter of February 1990, which he said he probably would have seen early in February 1990, and asked:

"Q. That letter makes reference to fees paid in the sum of seven and a half thousand dollars to Australian Thoroughbred Finance and $1,000 to Mr Still. Prior to reading that letter or a copy of it to you, were you aware that those payments had purportedly been made?

A. No. I don't believe so."

At Tp 333 Mr Connor was referred to the fact that if he had received a copy of a facsimile transmission from Mr Logan to Logaraj of 20 November 1989, which disclosed that Australian Thoroughbred Finance had been paid $75,000 and Mr Still or his company $10,000, and he confirmed that he must have seen it at about that time although he was not "confident of that recollection". At Tp 336 Mr Connor said that whilst he did not believe that he understood that Mr Still would be remunerated in some way for his efforts "if asked I would have assumed it".

At Tp 341 Mr Connor was taken to the various matters, to which he referred in para8 of his witness statement, as being matters which stimulated his interest in the investment. He referred firstly to his understanding that the horses specified in the brochure had been secured and would be horses in which he was investing. He agreed that he appreciated that upon entering into the No 3 Syndicate there were different horses about which he knew nothing, which made a nonsense of his first statement.

BC9402679 at 192

He was nextly referred to his concern, as expressed in para8, about the likelihood of a severe economic downturn in Australia. He said that he thought that an economic downturn would induce more people to gamble or, perhaps, those who gambled to gamble more, thus assisting prize money. He also said that he made enquiries about the international appeal of Australian thoroughbreds.

He was then taken to para8(ii) in which he said that from reading the brochure he formed the opinion that if he entered into a syndicate, which involved a spread of well chosen horses, the prospects of winning prize money were significantly improved. He said he formed that view before he met with Messrs **McConnell,** Logan and Still, and without regard to what he was told at that meeting.

In relation to para8(iii) he denied that his reference was a belated attempt to attach significance to the words in the brochure some time after June 1989. He said he did not necessarily believe there was a lease in existence when he read that passage but, in any event, when he learned before 30 June 1989 that there had been a change in the identity of the financier he did not consider the statement in the brochure at all at that time.

BC9402679 at 193

At Tp 343 he was cross examined about para8(iv) of his witness statement in which he referred to NMRB and to the confidence that its participation instilled in him because he believed it would have made some assessment of the venture on an independent basis. He agreed that between reading that and 30 June he became aware that NMRB had withdrawn, although he said that did not change the belief he had formed and which found expression in para8(iv). He did not communicate with NMRB to ascertain whether it had made an independent assessment of the venture, what it was or why it had not gone ahead. If he was relying on its involvement it is difficult to understand why he took none of these steps.

His evidence in relation to para8 does not satisfy me that Mr Connor relied, as he asserted, upon any of the matters referred to therein.

Mr Connor acknowledged, in general terms, that there was an element of speculation in the investment, and that there were no independent reports in Exhibit A verifying the statements made by the promoter.

At Tp 352 Mr Connor denied that it was incorrect to describe the investment as a sound investment and as a long term investment, and, further, it was in the nature of a gamble on the future breeding and racing ability of a group of horses unknown to him. He said he regarded the success as being dependent on the success of the spreading of the investment risk. He agreed he was influenced by his belief that the proposed manager appeared to have some expertise in the horse racing industry and, in this regard, he made enquiries about Mr Bell from Mr Logan. He said he made no enquiries about B and T although, he added, in hindsight he should have.

BC9402679 at 194

Mr Connor acknowledged receiving a letter from B and T dated 28 September 1989 and reading it. He said that happened "most likely late October". He said that about that time, although he was not able to remember exactly when, he began to have doubts about Mr Bell. He paid the money required in that letter.

At Tp 354 he said that when he was making his witness statement he forgot he knew of the existence of MANL and its involvement in the No 3 Syndicate prior to 30 June 1989. He made enquiries of Mr Still who, to his knowledge was not an employee of MANL, but he made no enquiries of MANL or of anyone apart from Mr Still. He said he was content to enter into the agreement with MANL.

Mr Connor said that he assumed the interest rate was 17.596 on $210,000. He said that having received the letter of 28 September 1989 he appreciated that assumption was wrong, but nonetheless thereafter he participated in the syndicate for several years and did not call for the documents evidencing his liability to MANL. He said he did not do that because his assumption was that the documents "were standard in the industry in form and were similar to those which my partners, who had other experience in these matters, would have executed". He said he had "some fair knowledge of what standard forms of loans for $210,000 might contemplate".

BC9402679 at 195

It became quite clear, when Mr Connor was referred to Exhibit A and portion of Exhibit B, and he acknowledged this, that there was an inconsistency between the two documents upon which he did not focus adequately and that, in thinking about it in the witness box, he concluded that the inconsistency indicated a confused situation involving an expenditure of some $2.6m over a four year period against income impossible of projection: Tp 358.

At Tp 361 Mr Connor said he read the financial documents, furnished to him in February 1990, in March 1990 "or a little bit later". He said he did not read them from cover to cover, but he did look at the terms and he noted that there were significant departures from the terms of the prospectus and other documents. The differences he discerned were that the loan was $100,000 and not $210,000, and that there was a question of the interest rate. He agreed that one of his complaints in the litigation is that MANL lent money to him, but the money was not lent on the terms originally contemplated, and that the loan was effected by the use of a "stale Power". Although Mr Connor became aware of those facts in February or March 1990, as he agreed at Tp 362, he also agreed he persisted with his involvement in the syndicate, and:

"Q. And it wasn't until some time in 1991 when MANL threatened to sue you to recover its money that you finally decided that you would instruct your then solicitors to rescind, at least purportedly, the syndicate documents, is that right?

A. Well the decision was made to issue that notice of rescission at that time, yes."

He agreed that was in May 1991. He said that thereafter he made a payment, although not one to conform to the requirements of the agreement, that he was aware that horses were continuing to race and that he did nothing to prevent the sale of syndicate horses. He said he did not know that it was wrong to sell the horses and the suggestion that the No 3 Syndicate had no title to them involved his making a judgment as to who did have title. It is strange that an experienced commercial solicitor, whose agent was selling property, would not, in the circumstances, be concerned about title. At Tp 364 Mr Connor tried to explain how it would be that the horses could be sold and he was cross examined about the "Mountain Rule" litigation of which he said he had little knowledge, notwithstanding that his professional partners were, he assumed, defendants. He said he knew virtually none of the detail and he did not trouble to find out anything more about that matter.

BC9402679 at 196

Mr Connor agreed that B and T resigned as the manager of the No 3 Syndicate on 9 November 1989 because of its apprehended financial difficulty. This led to cross examination of Mr Connor about the financial condition of the No 3 Syndicate and he agreed that he knew that there were financial difficulties, which were a matter of concern to him.

At Tp 369 Mr Connor said that he was not certain that he was prepared to go along with the various options suggested for the continuance of the No 3 Syndicate, but that he was more concerned "to settle matters out with Mortgage Acceptance". Mr Connor said that he was travelling a great deal and that he understood that Messrs Logan, **McConnell** and Taperell were seeking to re negotiate the arrangement with MANL, Mr Connor believing that Mr Logan was an appropriate person to continue discussions with MANL.

BC9402679 at 197

Mr Connor agreed, Tp 373, that in the financial year ended 30 June 1989 he claimed and was allowed a deduction by way of a loss of $92,868 and an additional deduction of $3,063 on account of interest, although he was unable to agree that that included amounts paid to Australian Thoroughbred Finance and Mr Still.

For the financial year ended 30 June 1990, 1991 and 1992 he was allowed deductions of $24,790, $20,511 and $27,328 respectively. Each of those deductions was made on the basis that he was a member of the No 3 Syndicate.

I have difficulty in accepting that Mr Connor relied upon or was induced by the representations. His conduct in not seeking to terminate the No 3 Syndicate when he learned of the various discrepancies about which he now complains is, to my view, totally inconsistent with the case he propounds. As I said initially Mr Connor impressed as a careful and competent solicitor and business man. I formed the view from his evidence that he would have no hesitation in making decisions which he saw would properly advantage him in his business activities. There can be not a shadow of doubt that knowledge, which he acquired, of the unfortunate financial position of the No 3 Syndicate demanded that he should seek to extricate himself from it. I have no doubt that if he believed at that time that he had reason to do so he would have. The only reasonable inference flowing from the evidence is that he did not then believe he had any such grounds. Unfortunately the inference flowing from his now asserting he has such grounds is either that he is looking at the matter with the benefit of hindsight and with what he would like to accord with the facts, rather than with what he knew at the time accorded with the facts, or that he has deliberately fabricated his evidence. I am not satisfied that he has taken the latter course, although in evaluating his evidence I have to have regard to a number of internal discrepancies and discrepancies between it and what he swore in his previous affidavit. I give these matters full weight in coming to the view that the way in which Mr Connor has advanced his case is one which places reliance upon what he would have wished the position to be, rather than what he understood and appreciated it was at the time. To the extent that this involves his having fabricated his evidence, the conclusion I reach is that that is what he did. To the extent that it relies upon my concluding that his evidence is unreliable, then I am satisfied that it is. In either circumstance I cannot be satisfied, and I am not satisfied, that such representations as were made were either relied upon by Mr Connor or induced him to enter into the agreement.

BC9402679 at 198

THE EVIDENCE OF MISS JENNIFER PRIMROSE WILSON Miss Jennifer Primrose Wilson, whose witness statement is Exhibit M, ceased to be a partner of Baker and McKenzie on 31 March 1992. She is presently a consultant to a firm of solicitors and based in its London office. She was admitted as a barrister and solicitor of the Supreme Court of Victoria in April 1964 and, in 1971, moved from Melbourne to Sydney and commenced employment with another firm of solicitors. She was admitted as a solicitor in New South Wales thereafter and commenced employment with Baker and McKenzie in September 1973, becoming a partner in 1976. She left Sydney in June 1991 and resigned from the firm on the date to which I have referred. She met Mr **McConnell** in about May 1973 and remained on friendly terms with him for some twenty years thereafter. She was a member of one horse racing syndicate prior to being asked by Mr **McConnell** in early June 1989 about joining the No 1 and No 3 Syndicates. She received various documentation from Mr **McConnell,** which she read and her impression was that the investment would be profitable as well as providing tax advantages. She said in coming to these conclusions she placed significance on the fact that a reputable banker stood behind the syndicate and was offering an interest only loan with monthly repayments in the order of $3,000, that the promoters of the syndicate anticipated that its income would be sufficient to meet all its costs for the third and fourth years, and that the value of the horses secured by the syndicate had already substantially increased by about half a million dollars. She was also influenced by the fact that NMRB was involved, and she regarded it as a leading financial institution "which would itself have carefully examined the proposed syndicate". She considered the involvement of NMRB "to be essential to my decision to invest in the syndicate". As at June 1989 she had not heard of MANL. She said that had she known that it was to provide the finance she would have made additional enquiries of it and of the syndicate.

BC9402679 at 199

Miss Wilson said she was attracted to the syndicate because she believed she could borrow one hundred per cent of the moneys required on an interest only basis payable monthly, and the funding and terms of repayment suited her financial

position. She also said that she was unaware that Messrs **McConnell** and Logan were other than investors in the syndicate and that had she been aware of their relationship with B and T she would have been "most concerned". She assumed that B and T was capable of meeting its obligations, whether financial or otherwise, to the syndicate and she said that had she believed it was in financial difficulties "I would not have invested in the syndicate". She was unaware of cross guarantees being required and she said that she would not have invested in the syndicate if she had known of that.

BC9402679 at 200

She said that after completing her application form she anticipated receiving documents from NMRB, including a loan agreement prior to 30 June 1989. She said that because of pressure of work she did not realise that that had not occurred until July 1989, although she learned that the syndicate had gone ahead.

She said in para18:

"I have no recollection of authorising any person to authorise any other person to sign documents on my behalf."

In para19 she said she asked Mr **McConnell** if she was in the B and T Syndicate and that he replied:

"Yes, I signed an authority which authorised Murray Bell to sign all of the relevant documents on your behalf. I had to do that because of the short period of time we had."

She said she replied to Mr **McConnell:**

"I don't see why you needed to do that. I certainly wasn't far away."

BC9402679 at 201

Annexure "D" to her statement is a copy of the document the original of which became Exhibit P. It states:

"I, Keith Stevens **McConnell** authorise Murray Bell to execute on behalf of Jennifer Primrose Wilson, identical documents to the ones that he is executing on my behalf for participation in the Bell and Tonkes 1989 Racing and Breeding Syndicate (No 1). I warrant that I have authority to authorise Murray Bell to execute said documents on behalf of Jennifer Primrose Wilson."

Miss Wilson said she did not authorise Mr **McConnell** to prepare or sign or deliver such a document and that she only became aware of its existence some time later. She said:

"However at that stage I believed, because of **McConnell's** involvement, and because most of my fellow syndicate members were my partners, that I should be in the syndicate. I had already been committed to it."

She received the letter of 28 September 1989 and paid the further sum of $27,000 because she believed that the new financier "had required moneys to be paid annually in advance rather than monthly as I had contemplated and I paid the moneys requested". In late 1989 she became aware, from informal discussions with other syndicate members, that the syndicate was experiencing financial difficulties, that B and T had resigned as its manager, and that secret commissions may have been paid. Either in late 1989 or early 1990 she received a letter from the accountants bearing date 21 December 1989. That was the first occasion, she said, that she was aware of the existence of Australian Thoroughbred Finance and Mr Fred Still. She said she did not consent to any payments being made to them and had she known that payments were being made by way of commission she would have had "very great concerns about participating in the syndicate at all". She first saw the contractual documents in February 1990, when MANL forwarded them to her. As with a number of other partners she travelled overseas extensively, but she believed that her interests were being protected by her partners. She agreed that in July 1990 she paid $14,115, although she said she was unable to recall why she was required to do so "save that I believed it was pursuant to the existing arrangements".

BC9402679 at 202

The allegations made by Miss Wilson that she had not authorised Mr **McConnell** to sign the document Exhibit P on her behalf raised a very serious matter for consideration. If she had not authorised Mr **McConnell** to sign that document then his conduct would call for the most careful scrutiny. On the other hand, if she did, but denied that she had, her conduct would call for the same degree of scrutiny. She subsequently withdrew the allegation.

Her oral evidence disclosed that she was a member of the TJ Smith 1988 Syndicate and the Tasman No 1 Racing and Breeding Syndicate prior to entering into the present transactions.

She said that her witness statement in these proceedings was prepared pursuant to instructions taken from her by telephone and at a time when she did not have any documents related to the B and T Racing Syndicate.

At Tp 388 Miss Wilson said she was last in Sydney prior to 30 June 1989 on 28 June 1989 and that she left late on 28 June 1989 to travel overseas. She was in Paris on Bastille Day and then travelled to Canada, so that she would not have returned to Sydney until about 20 July 1989. Miss Wilson said, at Tp.390, that it would have been difficult for her to sign any document after she left Sydney on 28 June 1989 before 30 June 1989.

BC9402679 at 203

Miss Wilson agreed, at Tp 391, that she received a copy of a facsimile transmission directed by Logan Livestock Insurance Agency Pty Ltd to Mr Taperell dated 18 December 1990 and that thereafter she signed a cheque for $6,000 as a consequence of what was contained therein.

At Tp 397 Mr Svehla put to Miss Wilson, with which she agreed, that the allegation she was making that Mr **McConnell** had no authority from her to authorise a person to sign documents on her behalf was a very serious allegation and the seriousness was such that she would have asserted it as soon as it came to her attention. That is a matter about which she said she had no doubt. She continued:

"Q. The seriousness of that allegation was not a matter which you ever brought home to Mr **McConnell** prior to filing an Amended Statement of Claim in these proceedings in January 1993; isn't that correct?

A. I was not aware for some considerable time that this had happened Mr Svehla. I believe I saw that document only relatively recently.

Q. Which document are we talking about?

A. The Power of Attorney Mr **McConnell** signed in favour of Mr Bell saying that he was authorised to sign on my behalf.

Q. When you do you say you first saw that document?

A. I have no recollection of seeing it until July 1992 when it was sent to me with the draft of my affidavit."

Miss Wilson was asked on what basis she understood she had become a participant in the venture. She said she had little recollection of what documents had actually been signed and "I possibly thought I had signed them myself". She said she was not referring to the actual contractual documents but to the Power of Attorney, so that it was her belief up to July 1992 that she had signed a Power of Attorney. This belief was based on her having seen correspondence that suggested it had been sent to her for signing, that she had left to catch a plane in a great hurry, and she believed she probably had signed it. On this aspect her evidence became quite confusing and, notwithstanding the evidence to which I have just referred, at Tp 400 she said:

"Q. And up until that time, it was your belief that you had authorised the execution of the agreements under Power of Attorney, isn't that correct?

A. I really don't know whether I had formed a belief that I authorised the execution of the Power of Attorney as distinct from having signed it myself.

Q. Signed yourself meaning the actual agreements?

A. Yes.

Q. The various loan mortgage agreements, lease agreements, etc?

A. The various documents that were in fact executed pursuant to Power of Attorney.

Q. So you are saying in July 1992 you may have had, you were confused or you were unclear as to whether or not you had actually signed those documents or whether or not you had signed a Power of Attorney authorising Mr Bell to sign those documents?

A. I don't accept that I had any clear recollection of the events of June 1989 by July 1992, yes."

BC9402679 at 204

Miss Wilson agreed that when she swore an affidavit in July 1992 she had access to Annexures "A", "B" and "D" to her witness statement. She asserted that notwithstanding having access to those documents her recollection of the events was hazy and unclear and that at the time she swore the affidavit she made no claim that Mr **McConnell** had signed Annexure "D" without authority. She continued:

"Q. In spite of the fact that you understand it to be an extremely serious allegation to make?

A. I now understand that as you have explained it to me this morning. I was simply stating facts at the time and I was not particularly intending to make allegations.

Q. You were aware that the nature of the allegation you make is an allegation which could get a solicitor possibly struck off, isn't that the case?

A. I believe so."

BC9402679 at 205

The simple position is that notwithstanding she had access to the authority signed by Mr **McConnell** in July 1992, she made no allegation that she had not authorised him to sign that document. I have not the slightest doubt that Miss Wilson was, in July 1992, possessed of all the information, which would have brought to her mind the position and that she then accepted that Mr **McConnell** was authorised to sign Exhibit P. In para28 of the Amended Statement of Claim it is alleged:

"At no time did Wilson authorise the fourth plaintiff to authorise Bell to execute documents on her behalf, nor did she ever authorise Bell to execute documents on her behalf."

The allegation could not have been clearer and I cannot accept that Miss Wilson did not understand the seriousness of it when she made it. As matters subsequently transpired this allegation was untrue and, on the whole of the evidence, I am satisfied it was untrue to her knowledge when she eventually made it. Her evidence must, therefore, be viewed as that of a witness prepared to make the most serious of allegations without there being, to her knowledge, any substance in them.

At Tp 403 Miss Wilson was cross examined about the allegation she made against Mr **McConnell** and she denied that she was seeking to escape entire liability to MANL based upon the fact that he was not authorised to sign the document, which is Annexure "D" to her statement and Exhibit P. She continued:

"HIS HONOUR: Q. Well leaving that aside just for the moment. You may come back to it. It was a fairly easy escape route if that was what you were seeking so far as any liability to MANL was it not?

A. Yes.

Q. And you knew that in at least in July 1992?

A. Yes.

Q. And you said not a word about it, is that right?

A. Yes your Honour.

Q. You agree with my proposition?

A. Yes your Honour."

BC9402679 at 206

Miss Wilson was then taken to the affidavit she swore on 23 July 1992 in London. She agreed that Annexures "A" to "D" inclusive corresponded with the annexures so lettered and annexed to her witness statement. Miss Wilson said she gave considerable attention to the affidavit as she wanted to tell the truth. It appeared that having worked on the draft affidavit during some part of the Christmas vacation, Miss Wilson came to Australia in March 1992, at which stage she had access to all the source documents. In fact she was asked to remove them from the premises of Baker and McKenzie, where she said they had been kept since she left Australia, and she took them to Messrs Colin Biggers and Paisley, the solicitors then acting for her and the other plaintiffs. She went through the documents, although she suggested that by the time she came to swear her affidavit in July 1992 some five months had elapsed.

At Tp 409 Miss Wilson was referred to para5 of that affidavit in which she referred to the Power of Attorney having been forwarded to her on 28 June 1989, although she said she was not necessarily seeking to convey to the reader the understanding that she had in fact received it on or about that date. She said she knew the document had come into her office on that date. "I didn't necessarily know that I had received it and, in fact, it appears it was not attached although I was not aware of that at the time". She also agreed that it was her understanding that to derive a tax benefit from entering into the syndicate the matter had to be completed by 30 June 1989. In these circumstances she said that she believed

she had done everything and taken all steps required of her prior to leaving Australia to ensure she would be a participant, and that when she left Australia it was her intention to become a participant and to obtain tax deductions in the tax year and that she had communicated that to Mr **McConnell.** Miss Wilson denied that she was meaning to convey in para5 that she received the Power of Attorney by facsimile, but rather that it had been forwarded to her in circumstances where she may not personally have received it.

BC9402679 at 207

At Tp 412 Miss Wilson did not adhere to her earlier evidence that she either signed the contractual documents or the Power of Attorney, according to her best recollection as at July 1992. She suggested there was a further option, namely that she might not have signed anything and she added "My recollection of the whole scenario is unclear". She then stated that at the time she saw her affidavit of 23 July 1992 she had overlooked, or forgotten, that she had left Australia on 28 June 1989, that not being information among the documents she reviewed in March 1992. She agreed that in para6 of that affidavit she swore that she was not available to sign the Power of Attorney and, although she had forgotten when she swore the affidavit, so she said, that her unavailability related to her leaving Australia on 28 June 1989 to travel overseas, she said she had very little recollection of the reason for her non availability in July 1992. This evidence became somewhat unbelievable and continued:

"Q. Well you made a positive statement in your affidavit and you swore that it was truthful that you were not available to sign the Power of Attorney, did you not?

A. Yes.

Q. And you did not because you have a specific recollection; isn't that correct?

A. No. I was told I wasn't there and if somebody comes to look for me and says I'm not there, I am inclined to believe them Mr Svehla.

Q. Who told you you were not there?

A. Whoever drafted the wording that I was not available.

Q. Some solicitor who drafted the wording, 'I am not available to sign the Power of Attorney' told you in either a conference or a telephone discussion that you were not in the office, is that correct?

A. I doubt it.

Q. I repeat the question, who told you that you were not there?

A. I believe Mr **McConnell** told me.

Q. And when did he tell you this?

A. After I returned from my trip some time in late July."

BC9402679 at 208

Miss Wilson said this was July 1989. The inconsistencies in this evidence are obvious.

At Tp 414 Miss Wilson was asked about a conversation with Mr **McConnell** and she said that to the best of her recollection she asked him if the syndicate had gone ahead and he said it had. She asked "What about the documents?" and he said he had signed them on her behalf, to which she replied "How were you able to do that?". She was asked what he said and she replied:

"I don't recollect clearly and clearly something is going to turn on this so I would rather not attempt it."

BC9402679 at 209

She was pressed on this and proffered that Mr **McConnell** said words to the effect:

"You weren't there and it was very urgent".

It is necessary to contrast this evidence with what Miss Wilson said in para19 of Exhibit M. However, at Tp 415, notwithstanding the evidence at Tp 414, Miss Wilson returned to evidence more in accord with para19 of Exhibit M. I asked her whether Mr **McConnell** told her in July 1989 that he had signed the contractual documents on her behalf, which accorded with the evidence at Tp 414, to which she replied that he signed the Power of Attorney authorising Mr

Bell to sign the contractual documents. That version, of course, did not accord fully with the one proffered in para19 of Exhibit M. At Tp 416 she repeated:

"I believe he told me he had signed that Power of Attorney in favour of Mr Bell" or "Murray Bell" and he continued:

"You are in the syndicate".

Miss Wilson was then asked whether she said to Mr **McConnell:**

"Was that really necessary, I certainly wasn't far away at the time?", to which she gave the unresponsive but nonetheless extraordinary answer:

"I believed at that time, that those documents had come in on 28th while I was still there and I could have been contacted but .."

BC9402679 at 210

This was an extraordinary answer because much of her earlier evidence placed stress upon the fact that she was not available at the time the documents were received. The question was re read to her and she replied:

"I have a recollection of saying it on some occasion. It may not have been on this occasion, sorry your Honour, I am not absolutely sure."

At Tp 418 Ms Wilson was asked:

"Q. Because if you had seen Annexure "D", that would have satisfied your enquiries, is that correct?

A. I would have known that that authority had been given. I would probably still have asked about the documents that were signed pursuant to that Power of Attorney.

Q. So it is your evidence now that even if you had seen Annexure "D", you would still have needed to speak to Mr **McConnell?**

A. Yes.

Q. And what would you have said to him in those circumstances?

A. I would have asked what was happening with the syndicate because I had heard nothing about it for a few weeks and it was a normal enquiry."

At Tp 421 Miss Wilson gave the following evidence:

"Q. By the way, when Mr **McConnell** told you that he had signed whatever he told you he had signed on your behalf, that is when he told you that in July 1989, did you say, 'You had no authority to do any such thing'?

A. I doubt if I said that your Honour.

Q. Why not?

A. Really, it didn't seem, there seems to be no point in being confrontational after the event.

Q. But your assertion now is that he had executed contractual documents, or caused contractual documents to be executed on your behalf, without your authority?

A. Yes your Honour.

Q. And you have known that since July 1989?

A. Yes your Honour.

Q. And you didn't say a word to Mr **McConnell** about that in July 1989?

A. Well, I was presented with a fait accompli so far as the involvement in the syndicate was concerned and there didn't seem to be much Point at the time complaining about something that couldn't be rectified.

Q. Well what about in July 1992, you didn't complain about it then either did you?

A. No your Honour."

BC9402679 at 211

The whole evidence of Miss Wilson on this point seems to me to be incredible, and it became more so. At Tp 422 Miss Wilson said that in July 1992 proceedings had been commenced against MANL, but she did not seek to raise the want of authority as the reason for avoiding any liability to MANL and:

"Q. When you said to Mr **McConnell** in July 1989: 'That wasn't really necessary, I wasn't far away at the time', all you were trying to convey to him was that you were available to sign the Power of Attorney prior to getting on to the aeroplane, isn't that correct?

A. Yes.

Q. And that was because if that Power of Attorney had been given to you, you would have signed it, isn't that correct?

A. Yes.

Q. And also because you knew the contents of that Power of Attorney prior to getting on to the aeroplane, isn't that correct?

A. I don't know whether I knew the contents or not.

Q. Because all you were complaining to Mr **McConnell** of was the fact that he didn't need to do it, you could have done it yourself, isn't that correct?

A. Yes.

Q. Nothing more?

A. No, nothing more."

At Tp 423, after further cross examination in relation to the failure to make any complaint about the absence of authority prior to September 1993, Miss Wilson said:

"Q. And you are aware that the consequence of your complaint which you make now is that you are in effect saying that Mr **McConnell** fraudulently represented to Bell and Tonkes that he had authority from you for Mr Bell to enter into the agreements?

A. Now that you put it to me, I can see that that is the effect, yes.

Q. Has that just dawned on you now?

A. Yes."

BC9402679 at 212

I do not accept that answer. Miss Wilson is a highly experienced legal practitioner. In much of her evidence she demanded, quite justifiably, accuracy of questions. I do not believe that she did not understand when she made the assertion about want of authority that she did not then understand how serious this allegation was.

After some extensive cross examination as to the advice she would have given to a client based upon an employee of the client having acted in the way in which Mr **McConnell** had acted, Miss Wilson said she would have characterised the statements in Annexure "D" as being false or misleading or untrue.

At Tp 428 Miss Wilson agreed that there was a typographical error in the second line of para6 of her affidavit, which had not previously occurred to her. The inference is that at the time of swearing the affidavit it was not a matter of importance to her whether the draft Power of Attorney had been forwarded to her.

The note on Annexure "A" is in the handwriting of Miss Wilson's secretary and records what the secretary conveyed to Mr **McConnell,** namely that she told him that B and T could act "as 'agent'". The note also states that Mr **McConnell** was "to approve that". That note is dated 30 June 1989. However, Miss Wilson said at Tp 431 that this handwritten notation was written by her secretary without any prior instruction or conversation with Miss Wilson.

After some consideration of the note Miss Wilson said that she thought she understood it to mean that her secretary could not find a Power of Attorney in the office "so she had to consult Mr **McConnell** who had told her that Bell and Tonkes could act as agents and he would approve that". She confirmed that that was her understanding at Tp 432. Notwithstanding this tolerably clear evidence Miss Wilson then said she was uncertain what it was Mr **McConnell** was doing as at June 1989, but she was not uncertain as at July 1992 and, at Tp 433, she said:

"* Q. So you swore your affidavit in July 1992 with full knowledge of the following facts: 1, that you had never authorised Mr **McConnell** to warrant that Bell and Tonkes could act as your agents; 2, that Mr **McConnell** had done so on 30 June 1989; 3, that he had told your secretary of that fact, and 4, that you had seen the actual document written by Mr **McConnell** to Bell and Tonkes. Isn't that correct?

A. Sorry. It was a very long question. (Question marked * read) WITNESS: Yes. That's correct."

BC9402679 at 213

At Tp 433 it appeared, more probably than not, that the document Annexure "D" was left with Miss Wilson's other papers at the offices of Baker and McKenzie until March 1992 and that those were documents to which Mr **McConnell** had access whilst they were there. She continued:

"Q. Did you communicate with Mr **McConnell** about July 1992 and ask him what this document, Annexure 'D' was all about?

A. No your Honour, because I knew by then that these documents entering the syndicate had been signed. I knew what it was about.

Q. When you say what it was about, you are now saying he was not authorised to sign it?

A. I am saying that.

Q. Have you ever raised that with him at any stage?

A. Only in the brief conversation recounted earlier your Honour.

Q. In July 1989?

A. I believe that to be so your Honour."

BC9402679 at 214

At Tp 436 Miss Wilson identified the allegation being made against Mr **McConnell** as being that if the agreements were not validly executed on her behalf she should have no obligation under them, and that if they were executed without her authority and not under any other valid authority they might not be contractually binding, and that as at July 1992 she was aware of the facts which she asserts entitled her to be relieved of her obligations under the agreements by reason of want of authority. It is inexplicable why she did not raise the factual basis for such a defence then, unless, as I am satisfied was the case, there was no foundation for such an allegation.

At Tp 435 Miss Wilson agreed that on one reading of the last sentence of para6 of the affidavit it accepted the veracity of the document Annexure "D", her words being:

"It describes the document as what it is your Honour."

At Tpp 437 and 438 she agreed that she was telling the reader of that sentence that she was annexing a copy of a document authorising Murray Bell to do certain things, that that authority sprang from a document signed by Mr **McConnell,** that she was aware that Mr Bell's authority was only as good as Mr **McConnell's** authority, that she did not put any qualification upon Mr Bell's authority and:

"Q. May I take it from that that you didn't intend, on 23 July 1992 to cast any doubt upon the authority of Mr **McConnell?**

A. I think that is correct your Honour."

At Tp 438 Miss Wilson said that she did not seek to place any qualification as to the want of authority of Mr **McConnell** in her affidavit of 23 July 1992. She was asked then about the statement in para20 of her witness statement in which she asserted she did not authorise Mr **McConnell** to execute any such document.

BC9402679 at 215

Miss Wilson was further cross examined about her failure to raise this matter earlier and I referred back to certain evidence she had given in answer to questions I asked at Tp 403 and, at Tp 440, she gave this evidence:

"Q. But you weren't committed to anything, as you understood it, if there was no authority in Mr **McConnell,** were you?

A. I thought that what had happened was such as to amount to my having decided to proceed.

Q. A ratification in other words?

A. Yes.

Q. That you made good for want of authority as you understood it?

A. As I understand it."

At Tp 441 she said she did not complain to Mr **McConnell** "in the circumstances" and the following question and answer is recorded:

"Q. Because by your acts you had warranted for want of authority?

A. That is what I believed."

She said that when she swore her affidavit on 23 July 1992 she would probably have complained if she had considered there was a want of authority if she had recollected that fact, or it had been brought to her attention. It is inconceivable that the documents annexed to her affidavit would not have revived her recall, if she had not authorised Mr **McConnell.**

Thereafter Miss Wilson was cross examined about a situation which, in my opinion, caused her real difficulty. On the one hand she was asserting that when she left Sydney she was committed to entering into the venture, in the sense that she had decided to go ahead with it, and on the other hand she was unable to explain how that could happen in the event that she had neither signed a Power of Attorney, nor authorised anyone else to act on her behalf. She agreed the entry into the venture was worth a tax deduction of "a hundred thousand dollars at 30 June": Tp 444. She attempted to say that she had other things on her mind and that she did not communicate with Australia, after arriving in England, and prior to 30 June, to ascertain whether the matter had proceeded.

BC9402679 at 216

At Tp 447 Miss Wilson was asked about the reason for her enquiry as to whether the syndicate had gone ahead and whether she was a party to it, and she gave this evidence:

"Q. And you could only be in it, to use your words, or in the Bell and Tonkes syndicate more accurately, if you or somebody on your behalf had signed those documents?

A. Yes your Honour.

Q. If you had signed the documents there would have been absolutely no need I take it to ask whether you were in it?

A. No your Honour.

Q. It was only if you left it to somebody else to sign the documents that you would have to ask that question?

A. I don't think I had deliberately and formally left somebody else to sign the documents.

Q. Well, in those circumstances you couldn't have been in it unless you had signed the documents?

A. Yes your Honour.

Q. You knew you hadn't signed the documents?

A. As I say, I knew I had signed applications and so forth. I wasn't sure what else was required.

Q. You knew you hadn't signed the loan and lease documents?

A. Yes. I knew that.

Q. So, absent your signature, if you were to be in the Bell and Tonkes syndicate somebody must have signed those documents on your behalf?

A. Yes your Honour.

Q. And your question assumed that somebody must have done that, did it not?

A. Yes. I would have to say it did your Honour.

Q. Who was that somebody?

A. Mr **McConnell** your Honour."

BC9402679 at 217

Miss Wilson agreed that what Mr **McConnell** told her led her to understand that he had warranted that he had her authority, although she was surprised it had been delegated to Mr Bell as she expected Mr **McConnell** to exercise the authority directly: Tp 448. She said that she would have expected Mr **McConnell** to have prepared a document in which he had said that he was authorised by her to authorise Mr Bell to sign all of the relevant documents necessary for her to enter into the transaction, that Mr **McConnell** had signed that document and that he had made it available to Mr Bell. She agreed that there was no extra fact or circumstance in relation to Annexure "D" of which she was not aware in July 1989 and:

"Q. So your evidence now is that at all material times from July 1989 you were aware of the material circumstances regarding Mr **McConnell's** want of authority; isn't that correct?

A. Yes."

In answer to Mr Skinner Miss Wilson said that she believed she had ratified the agreement, and at Tp 459 she said she never communicated to MANL the assertion of absence of authority in Mr **McConnell** to authorise Mr Bell to so act. At Tp.460 Miss Wilson agreed that prior to 28 June 1989 she was aware there were difficulties over financing the venture and, although she did not know the details, she believed that NMRB had decided not to proceed, although she qualified that by saying that she may not have known that but she may have known there was some question in relation to it. Subsequently, at Tp 461, she agreed that before she went overseas on 28 June 1989 she knew that NMRB was not going to be the financier and that another financier was being sought to provide finance. She said this was a matter of concern and importance to her but, notwithstanding that she knew that NMRB would not be the financier she retained the intention, when she went overseas on 28 June 1989, to become a participant in the No 1 Syndicate. This set at nought, in my opinion, her evidence about the involvement of NMRB.

BC9402679 at 218

In addition to reading the brochure, Exhibit A, carefully and making enquiries of Messrs **McConnell** and Logan, Miss Wilson did not make further enquiries about B and T or Mr Bell or Mr Tonkes.

At Tpp 473 and 474 Miss Wilson agreed that the performance of bloodstock in racing and production of progeny is unpredictable and that a statement to that effect was sensible, that the manager was not making any prediction, and that it gave no assurance as to how well the horses would perform in CL14.3 on at 27. Miss Wilson agreed that the investment was of a speculative nature in that the results could be uncertain or "certainly not completely predictable", which she agreed meant not predictable at all: Tp 475. She said she read the cautionary note, which she chose not to follow, and that the unpredictability applied whether there was one horse or twenty. She also said she took the quality of the horses on trust. In relation to the brochure Miss Wilson said she would probably not have advised a client at all, if she had been approached by one for advice, but would have suggested that the client talk to somebody "more familiar with this kind of document": Tp 478. At Tp 480 Miss Wilson said she thought that it was only a possibility that the syndicate would be profitable, that the other ventures of which she had been a party had not been profitable in the sense that income exceeded expenses, and that she had no confidence that it would be "any more profitable than the other three". Miss Wilson formed the view that the brochure indicated that the syndicate "was put together quite sensibly" and she expected "on the track records of people involved and so forth" that it would at least have some possibility of success. She added, Tp 481, that any industry involving livestock is very hard to predict for a number of reasons upon which she elaborated. I accept Miss Wilson's evidence about these matters, all of which makes it the more impossible to accept that she relied on the representations. She knew full well the risks involved.

BC9402679 at 219

Miss Wilson agreed, having been referred to Exhibit N, that she could not have remained of the view, if she read the document carefully, that there would be an increase in the value of the horses in the order of half a million dollars. Miss Wilson agreed that one of the attractions of the venture was a tax deduction in the financial year ended 30 June 1989 of $98,000, although she said that one would not go into a non viable venture for that reason alone. At Tp 485, after various figures were put to Miss Wilson about the tax deduction, she agreed that the taxation advantages were a most important reason for entering into the venture.

Although Miss Wilson said that she thought NMRB would look at the transaction and therefore, at least by inference, she was comforted by that, when she learned that another financier was to become involved she did not form the opinion that NMRB, having looked at the matter, was not proceeding with the lending because there was something wrong with the concept, Tp 488.

BC9402679 at 220

At Tp 493 Miss Wilson said that both her affidavit of 23 July 1992 and her witness statement in these proceedings were made without any recollection she had been overseas in late June/July 1989 so that when she made the witness statement she had no reason to think that she would have had to authorise anyone to sign any documents on her behalf. This answer is consistent with the terms of para19 of her witness statement, but, in light of the annexures to both her affidavit and witness statement, including the note of her secretary on Annexure "A", it seems to me incredible that she overlooked the matter. It appears that she did not recall that she travelled overseas on 28 June 1989 until the Monday before she gave evidence when she saw a copy of her income tax return.

At Tpp 498 and 499 Miss Wilson gave some evidence I find troubling. She was referred to para8 of her affidavit of 23 July 1992 which said that on 9 November 1989 she attended a meeting at the offices of Baker and McKenzie. She was asked if that was a truthful statement to which she replied that she did not know because she did not have access to any documents at the time and she was relying on her solicitors, who drafted the affidavit, to verify from the documents they were holding that fact. She said she believed it would be true because they had the documentation, but she had no means of establishing it beyond telling the solicitors she was relying on them for the accuracy of factual statements. It was put to Miss Wilson that she could have checked to ensure that the solicitor had some independent verification of the fact as she had no recollection of it, and she said that that had not occurred to her but "it should have done": Tp 501. The sentence should either read "I should have done" or "it should have been done". However, the meaning is quite clear.

BC9402679 at 221

At the same page Miss Wilson said she wished to withdraw the last sentence of para10 of her witness statement. Her attention was then directed to para11 of that document. She agreed she made no enquiries about MANL.

At Tp 506 Miss Wilson said that she was aware, in November 1989, that allegations were being made that certain payments had been made to Australian Thoroughbred Finance and to Mr Still, although she said she was unaware of the details.

At Tp 507 Miss Wilson agreed that Annexure "D" to her statement was with her documents, that Mr **McConnell,** and indeed any partner at Baker and McKenzie, could have had access to her files while she was away, that that document, so far as she was aware, was the only piece of evidence that Mr **McConnell** warranted that he had authority to authorise Mr Bell to execute the documents, that it was with the papers at Baker and McKenzie in March 1992, in respect of which she corrected an answer she had given the previous day, namely that she had not seen it until even later than that, and continued:

"But if it was with my papers, and that does seem very likely, it is very difficult for me to recollect those events."

BC9402679 at 222

She agreed the document could only have been with her papers, leaving aside the intervention of secretaries, either if Mr **McConnell** had put it there or if she had put it there, and that if anyone had been worried about the document it could have been removed from her file.

The position becomes even more strange in relation to Exhibit P, so far as I am concerned. As Miss Wilson said the document was with her papers and it could only have been placed there either by her or by Mr **McConnell** giving it to her, or perhaps placing it there, leaving aside the intervention of secretaries. However, assuming that Mr **McConnell** had given it to her, there was no reason why he could not have removed it from the papers during her absence. It would be quite extraordinary, in my view, for Mr **McConnell** to leave this document in circulation, so to speak, if it falsely set out that he had received some authority from Miss Wilson.

Miss Wilson was referred to para23 of her statement and, after some further cross examination, she said she wished to "withdraw" the first sentence, having regard to the fact that she had received a letter in November 1989. Miss Wilson was then referred to para19 of her affidavit of 23 July 1992 in which she said that it was only in the latter part of 1990 that she was informed that commissions had been paid, which she said was true.

At Tpp 510 and 512 I returned to the troublesome question of the document Annexure "D". Miss Wilson agreed that it emanated from Mr **McConnell,** whose signature it bears, that it got into her papers which would indicate to her as a matter of probability it was delivered to her office and filed away, in circumstances where the document told a lie. Miss Wilson said that she could not have put an end to the lie because the documents had been executed. She asked how that could have been done and I suggested to her by approaching MANL and telling it about the documents. I also suggested that she could have approached her fellow partners or gone to the police. I asked a question at Tp 512 whether these

various matters caused Miss Wilson to reflect upon whether she authorised Mr **McConnell** in the terms of Annexure "D" to which Mr White objected. In the course of taking the objection Mr White said:

"The case we put against MANL, which is the case we are here fighting - there is no case against Mr **McConnell** - does not allege that Mr Bell did not have authority to execute documents pursuant to an authority Mr **McConnell** had given him on Miss Wilson's behalf. What the pleadings allege and what our case is is a case which is in precisely the same terms as the case which is put on behalf of the other members of the No 1 Syndicate. That is, that that document into which we seek to import the terms of the Power of Attorney which was in fact executed by Mr **McConnell** and other members of the syndicate, did not authorise the execution of a loan document which contained a cross guarantee and for that reason the loan document containing the cross guarantee and the other documents, which we say are as a matter of law inextricably bound up with the loan document, are void."

BC9402679 at 223

This was a different case from the one pleaded in para28 of the Amended Statement of Claim.

Mr White elaborated by saying that the ultimate evidentiary question was not want of authority to execute "per se" but want of authority to execute a document containing a cross guarantee.

At Tp 513 Mr White said:

"The factual issue is whether or not Mr **McConnell** had an authority which as against MANL was capable of binding Miss Wilson and there is no issue about that except as to the extent that the document containing the cross guarantee was executed and we would submit that in these proceedings that is the only factual issue which is relevant to the case."

BC9402679 at 224

Thereafter Mr White elaborated upon this submission and I then asked Mr Svehla whether he was conceding that Mr **McConnell** had no authority to sign the document, which he said he was not. Mr White suggested that such an assertion was inconsistent with the pleading. Mr White then made further lengthy submissions, which are recorded. At Tp 517 the following, inter alia, was said:

"HIS HONOUR: That may be, but the more you say that these things are moved in the way in which you have just described - which is what I understood you to say Mr White this morning. I wasn't under any misapprehension about what you said this morning - the more it seems to me that it is relevant on this issue because what you are saying is as I put it and as you have agreed I think that Mr **McConnell's** conduct can be made referable to MANL and part of that conduct arguably is that he signed Annexure "D" in circumstances where he had no right to do so.

MR WHITE: I AGREE. HIS HONOUR: And I can only assume, Mr White, that it was put in Miss Wilson's statement, serious as the allegation is, because it was then perceived to be a relevant matter to a matter in issue.

MR WHITE: UNDER THE CIRCUMSTANCES, IT IS RELEVANT TO THE MATTER IN ISSUE, NAMELY, THAT MR **MCCONNELL** WAS NOT AUTHORISED TO AUTHORISE ANYBODY TO SIGN A DOCUMENT CONTAINING A CROSS GUARANTEE." (My emphasis.)

Miss Wilson then answered the question I had put to her at Tp 512 at Tp 518:

"I still believe I did not authorise the execution of that document before June 30, 1989."

On Thursday, 16 December 1993, the thirteenth day of the hearing, there was certain discussion, commencing at Tp 788, about the allegations made by Miss Wilson. It is to be remembered that in para28 of the Amended Statement of Claim it was pleaded:

"At no time did Wilson authorise the fourth plaintiff" (Mr **McConnell)** "to authorise Bell to execute documents on her behalf, nor did she ever authorise Bell to execute documents on her behalf."

BC9402679 at 225

There was no limitation of the type Mr White's submission suggested.

On 16 December 1993 Mr White sought leave to amend so that Miss Wilson said, in effect, that she authorised Mr **McConnell** to authorise the execution of documents in her stead, but only as if she herself had executed the Power of Attorney in the terms of that pleaded in para25 of the Amended Statement of Claim. Mr White is recorded as saying:

"Your Honour, this is what we say happened: Mr **McConnell** signed a document which purported to authorise Mr Bell to execute identical documents to the ones he was executing on Mr **McConnell's** behalf. Now we say that that is a far

wider authority or it could be argued against us that that is a far wider authority than the authority conferred by the Power of Attorney because the Power of Attorney contained limitations. In the result it appeared that the amendment was one which would have involved Mr **McConnell's** admitting that he was not authorised to execute the document pleaded in para26 of the Amended Statement of Claim."

There was some discussion about that and at Tpp 792 and 793 Mr Svehla said he understood the position to be that Miss Wilson was prepared to admit that Mr **McConnell** was authorised to warrant that he had authority that Mr Bell could execute documents in conformity with the Power of Attorney and that if the document in fact signed, when properly construed, was wider than that, Mr **McConnell** was prepared to admit that he had no authority to go that extent.

At Tp 796 Mr White said:

"We say that Ms Wilson as we pleaded in para44 of the Statement of Claim is precluded from contending against MANL that she would not have been bound by documents which were executed by Bell consistently with the Power of Attorney and that situation is in stark contrast with the position of the second plaintiffs who contend that another element of the Power deprived it of validity and that is the fact that the documents were executed after 30 June."

BC9402679 at 226

In the result, at Tp 802, I granted leave to the plaintiffs to delete para28 from the Amended Statement of Claim and to insert in lieu thereof para28 in the terms of the document I initialled and dated that day, and I further noted that Mr **McConnell** admitted para28 as so amended. The amendment read:

"28. (a) Wilson did not at any time herself directly authorise Bell to execute documents on her behalf; (b) In the events which occurred, Wilson authorised the fourth plaintiff to authorise the execution of documents in her stead as if she herself had executed a Power of Attorney in the terms of para25 hereof but not otherwise."

The effect of the amendments was to withdraw the allegation that Miss Wilson at no time authorised Mr **McConnell** to authorise Mr Bell "to execute documents on her behalf". The amendment asserted that "in the events which occurred", Miss Wilson authorised Mr **McConnell** to authorise the execution of documents in her stead "as if she herself had executed a Power of Attorney in the terms of para25 of the Amended Statement of Claim but not otherwise". This, so it seems to me, is the effect of the document pleaded in para26 of the Amended Statement of Claim which is Exhibit P. Thus, Miss Wilson withdrew the very serious allegation she had made against Mr **McConnell** and which she had maintained in her evidence. The fact that Miss Wilson was prepared to make that allegation, albeit belatedly, and to persist in it through her evidence, and then to withdraw it does absolutely no credit to her at all. In view of the amendment I can only conclude that the allegation was without substance, ie the allegation that she did not authorise Mr **McConnell** to authorise Mr Bell to execute documents on her behalf. She did authorise Mr **McConnell** to authorise the execution of documents in her stead as if she had executed a Power of Attorney in the terms executed by him.

BC9402679 at 227

This leaves for consideration the proper construction of the Power of Attorney, but, as I have said, it removes the very serious allegation made against Mr **McConnell.** For reasons I have already given had this matter fallen for my determination I would not have accepted Miss Wilson's evidence that she had not authorised Mr **McConnell** in terms of Exhibit P. The amendment makes it abundantly clear that whilst Miss Wilson was prepared to make the allegation and persist in seeking to make it good, it was without any foundation. This makes it the easier for me to find that I should not accept the evidence of Miss Wilson, save insofar as it is corroborated by evidence I otherwise accept or is given against her interest.

Miss Wilson agreed that she received the various documents from MANL in early February 1990, that she read them, that she saw precisely what they contained including her obligations about payment, interest rates and the cross guarantee. She said she made no complaint after she had read the documents to MANL or to anyone: Tp 519. She knew that in April, May and June 1990 attempts were made to re negotiate various terms of the arrangement. She did not communicate with MANL to qualify the authority Mr **McConnell** had.

BC9402679 at 228

At Tp 521 Miss Wilson agreed that during 1990 and 1991 she knew that the No 1 Syndicate was still operating and that Messrs Logan and Plumptre were the managers in that period. At Tp 522 she said she was aware of the sale and prospective sale and the leasing or prospective leasing of syndicate horses in which she acquiesced. She did not address her mind to whether the syndicate had legal title to the horses, although she said she knew the horses were leased.

I have come to the firm conclusion that in asserting that Mr **McConnell** had no authority to sign Exhibit P on her behalf Miss Wilson was being deliberately untruthful. I have set forth the pleadings and her evidence at some length because I have no doubt about the potential consequences of such a finding. However the issue having been raised by her it was incumbent on me to make a finding. I appreciate Mr **McConnell** did not give evidence. But on the evidence of Miss Wilson alone I am satisfied that her assertion that he had no authority from her is deliberately untrue. In coming to this conclusion I am supported by the amendment subsequently made to the relevant pleading.

Other evidence of Miss Wilson was unreliable and unsatisfactory, and I have referred to it. In the result I am of the opinion that I should reject her evidence to the extent to which I have referred. Accordingly I reject her evidence that she relied upon or was induced by any representation in entering into this Syndicate and in undertaking, through her agent, the contractual obligations to MANL.

BC9402679 at 229

Furthermore by her actions she ratified the contracts. Her whole conduct in failing to complain, with knowledge of the relevant facts, leaves me with the firm view that she never, to her knowledge and appreciation, had any valid complaint against MANL.

THE EVIDENCE OF JAMES DOUGLAS **BEATTY**

Mr James Douglas **Beatty** made two witness statements, both of which form Exhibit Q, dated 17 September 1993 and 26 November 1993. Mr **Beatty** was admitted as a solicitor in New South Wales in 1968 and commenced employment with Baker and McKenzie in that year. He became a partner in 1974. He met Mr **McConnell** in 1971 and they became friends. He learnt of Mr **McConnell's** interest in the thoroughbred racing and breeding industry and he and Mr **McConnell** participated in various thoroughbred racing and/or breeding syndicates in the ten years prior to June 1989. He met Mr Logan in 1968 and in about 1983 Messrs **McConnell** and **Beatty** participated with Mr Logan in a horse racing syndicate. As at June 1989 he was chairman of Tulloch Lodge Ltd, which company invested in thoroughbreds. That company marketed its own syndicates and when Mr **Beatty** was referred to the B and T Syndicates he was not interested because the TJ Smith 89 Syndicate, which Tulloch Lodge Ltd was marketing, was in its final stages of preparation. In about mid June 1989 it became apparent to Mr **Beatty** that the T.J. Smith 89 Syndicate would not proceed and he became interested in investing in the B and T Syndicate. His decision, he said, was based upon the ability to borrow one hundred per cent of the establishment and running costs of the syndicate on an interest only basis payable at the rate of approximately $3,000 per month. No payments were required under the lease. He was attracted by B and T's impressive record in selecting successful thoroughbreds at moderate prices and he examined the horses to go into the syndicate and was impressed by their quality and bloodlines. He believed it was essential to the success of a syndicate to have a manager with knowledge of the industry and the ability to select and manage winning thoroughbreds, which he believed B and T was able to do. He believed the syndicate offered sound prospects of winnings and represented a sound investment "based on the proven formula of using race track successes to enhance proven bloodlines". He also had regard to the fact that it was expected the syndicate would be self funding after two years. He said he assumed that B and T was financially sound and capable of fulfilling its role as manager of the syndicate, and that B and T's participation was crucial. He said that he had known that B and T was in financial difficulties as at June 1989 he would not have agreed to participate in the syndicate. Mr **Beatty** was not only in a highly advantageous position to judge the viability of the B and T Syndicate, but he brought to bear in his considerations those advantages.

BC9402679 at 230

In para11 of his first statement he said that some time after 30 June 1989 he learnt that MANL had been substituted as lender.

He said he was unaware that Messrs **McConnell** and Logan had purported to act as directors of B and T and had a financial involvement in the purchase of some of the horses, and that had he known that he would have made detailed enquiries from B and T as to their involvement "and the role played by the financier".

BC9402679 at 231

In para16 he said that he signed the Power of Attorney and assumed "that the documents contemplated would be in a form that was common in thoroughbred syndicates". He was not aware that cross guarantees would be required from the Baker and McKenzie partners. Had he known that he would not have signed the Power of Attorney.

Mr **McConnell** told him in about September 1989 that B and T was experiencing financial difficulties and that he, Mr **McConnell,** was entitled to a 6% commission for selling the units in the syndicate, but that it was his intention to pass this benefit "through to Baker and McKenzie partners". Mr **Beatty** made no objection to any part of this proposal.

On 9 November 1989 he attended the meeting of the syndicate members at which he said many issues were discussed, including the financial problems of B and T and the appointment of Logan Financial Services Pty Ltd as manager. He was relieved that Mr Logan had been appointed because he was a man Mr **Beatty** trusted and because he understood that he and Mr **McConnell** were working together to ensure that the syndicate's problems would be resolved.

He received the documentation from MANL in early February 1990, which he did not read because he "assumed that those documents were in a standard form. I was still unaware that cross guarantees had purportedly been given".

He said that by at least March 1990 he was very concerned about the position of the syndicate and, in the last quarter of the 1990 financial year he had several discussions with Mr **McConnell** about the negotiations Mr **McConnell** was having with MANL. It was his understanding, during the latter part of 1990 and into 1991, that several of his partners were dealing with MANL "in an attempt to resolve the difficulties which had arisen with the syndicate". He found out that negotiations had broken down and agreed to seek legal advice.

BC9402679 at 232

In his second statement he noted that on his application form had been written the words "G'ee Needed". He said that when he made his application he was chairman of Tulloch Lodge Ltd which, in early 1989, had surplus funds of approximately $2.2m on deposit with the Spedley Group of Companies. Those funds had been set aside to pay for yearlings, which had been acquired, to be placed in the 1989 Tulloch Lodge Syndicates. In addition Tulloch Lodge Ltd had approximately $1.7m invested in shares with GPI Leisure Corporation Ltd.

In April 1989 a provisional liquidator was appointed to the Spedley Group and trading in GPI shares was suspended. This meant Tulloch Lodge Ltd no longer had access to its funds and investments "and came under financial pressure". That led to its requesting, on 12 April 1989, the Australian Stock Exchange to suspend trading in its shares. This raised speculation as to the possible liability of directors, auditors and advisers not only of the Spedley Group of Companies but also of Tulloch Lodge Ltd.

I note at this stage that the submission is that the cross guarantees were required by MANL because of the involvement of Mr **Beatty** and the possibility that he may not be able to meet his obligations under the various contracts.

BC9402679 at 233

At Tp 579 Mr **Beatty** agreed that by 30 June 1989 he had considerable experience in the bloodstock industry and that he was "keenly aware of the trends", which had occurred in the market for bloodstock over five years prior to 30 June 1989. He agreed the market peaked some time between the Easter Sales in 1989 and a large dispersal sale in September 1989 and that thereafter it became less strong. He also agreed that as at June 1989 it was correct to say that investment in the thoroughbred breeding and racing enterprises involved a substantial degree of risk commensurate with the potential for generating substantial returns, and with the statement to the effect that investments in the bloodstock industry should be considered to be of a speculative nature and were not recommended for investors unable to risk the required capital. He agreed that it was accurate, so far as it went, to say that neither the manager nor the promoter could guarantee the success of a syndicate, ie provide an absolute and unqualified assurance of success, and that no one could say with certainty that such a syndicate would succeed. He agreed that neither the manager nor the promoter nor any other person could provide any assurance as to the degree to which any projections would reflect themselves in actual results, although he suggested the more horses there were the better chance of having a successful enterprise.

Mr **Beatty** said that factors that attracted him to the No 1 Syndicate were that he enjoyed being involved as an investor in race horses and brood mares and that there was a taxation advantage. These factors no doubt accounted for his willingness to invest in the No 1 Syndicate when the TJ89 Syndicate did not proceed, and notwithstanding the knowledge and understanding he had, from his own knowledge, about syndicates generally and this syndicate in particular.

BC9402679 at 234

Earlier I have referred to a submission that MANL should have been aware that B and T had not paid for the horses and to the possibility that that did not occur because the horses had been bought on credit. At Tp 595, in referring to the way in which Tulloch Lodge Ltd bought horses, Mr **Beatty** said:

"We didn't borrow to buy the horses. We bought the horses on credit from the auctioneers."

In his submissions Mr White sought to contrast the procedures adopted by the No 1 Syndicate with those adopted by Tulloch Lodge Ltd. In this respect, which was one of complaint, they coincided.

At Tp 930 Mr **Beatty** agreed that he did not have any basis for suggesting that B and T did not believe in June 1989 that a select thoroughbred breeding operation could be a very successful and profitable business venture. For good measure he agreed that in June 1989 he held that belief himself and, as is obvious from the evidence, he was singularly well qualified to form such a view. He agreed, nextly, that when he decided to invest in the No 1 Syndicate he had no reason to think that B and T's previous performance was not indicative of the potential of the venture.

BC9402679 at 235

Mr **Beatty** said he considered that there was a misstatement of B and T's financial position in Exhibit A because, by saying nothing about that position, an investor was entitled to believe B and T was in a sound financial position. He said that that had something to do with its future performance. He agreed it had nothing to do with its prior performance record: Tp 931.

At Tp 931 Mr **Beatty** agreed that he alleged that it was represented to him in Exhibit A that it was at all times a single minded objective of the partnership to trade itself into profit as quickly as possible and thereafter to make the syndicate operate profitably. He said he thought that was false and misleading because there were other objectives that were not disclosed. Mr **Beatty** tried to explain this by saying that B and T was a participant in the syndicate and it sought to recover from its financial predicament by using partnership funds. He said these were used by way of the payment of secret commissions, although he was not able to state the precise amount so paid. The cross examination on this aspect proceeded for several pages. Suffice it to say that I found Mr **Beatty's** answers totally unconvincing both in content and in the way in which they were offered.

At Tp 934 Mr **Beatty** was asked about an allegation that it was stated that the bloodstock had been purchased on the syndicate's behalf by a leading financial institution, which statement was false and misleading. He said he based that on the material which appears at 23 of Exhibit A, which I have already quoted. He agreed he read Exhibit A some time after 5 June 1989. Once again I found the attempt by Mr **Beatty** to explain how this could be misleading or deceptive totally unconvincing. Some measure of the unsatisfactory nature of the evidence can be gleaned from the following evidence at Tp 937:

"Q. Those questions contain words from the phrase 'in June 1989' don't they?

A. Yes.

Q. And when you answered them you knew that they contained those words or phrases, didn't you?

A. Yes.

9. YET YOU DELIBERATELY CHOSE TO ANSWER THEM BY DIRECTING YOUR ANSWER TO SOME POINT IN TIME OTHER THAN JUNE 1989, DIDN'T YOU?

A. YES." (My emphasis.)

BC9402679 at 236

This evidence indicates that a solicitor of the Court of great experience conceded that he deliberately chose to answer questions by directing his answer to some point in time other than June 1989 ie that in purporting to answer a question he chose, without saying so, to omit an important factual element. In my view this indicated a capacity to dissemble, which casts some doubt upon much of the evidence Mr **Beatty** gave and, in respect of the matters about which he was being cross examined, the gravest doubt. As I have said already I found the way in which Mr **Beatty** gave his evidence, particularly in relation to the matters to which I have just referred, such that my impression was that he was not being truthful. His answer, although it may be said that it has the element of frankness, reinforces the view to which I came about his general credibility. When the totality of this passage of evidence is read I consider the frankness flowed from a realisation that to avoid truthfully answering the questions further was not possible.

BC9402679 at 237

After further cross examination Mr **Beatty** said, Tp 938, that he thought that one possibility, after reading at 23 of Exhibit A, was that "some lease had already been entered into on 1 June 1989 between the syndicate manager on behalf of the syndicate to be formed and a financier". He was asked what possibility occurred to him as the most realistic when he read at 23 and he said he could not recall. He agreed that he asserted that he was misled by that page and that by such assertion he must have attributed some certainty of meaning to it, being some meaning out of perhaps a variety of possible meanings. Mr **Beatty** then said he thought reference was being made to the first sentence in the third paragraph rather than the first sentence in the second paragraph and he was asked whether he attributed any certainty of meaning

to the sentence beginning "On June 1 the syndicate will enter ..." and he said he had not. He said he could not recall what he thought about that particular sentence.

He then proffered the view that he thought the sentence alleged to have misled was the second sentence of the second paragraph. He was directed to the pleadings which showed that the sentence to which reference was being made was the one I have just quoted. He said, I think, that he was misled by that sentence, because he read the sentence as meaning that an instrument of lease had been executed on 1 June. In any event he said he read the sentence as if the manager of the syndicate was to have entered into the lease on behalf of the syndicate, so that he would be bound, if he decided to enter into the syndicate, by the terms and conditions of that lease, whatever they may be. He further agreed that he would be bound whether the terms were reasonable or draconian. Faced with this difficulty he said that he thought one could rely "on the fact that if the financier had expertise in the bloodstock industry its lease would follow the form commonly used in the bloodstock industry". He was asked if there was some such form and he said he did not know "whether there was a form", but he said there were "certainly forms used by many of the companies in this area, finance companies, which basically followed a similar form". He agreed MANL was one of those companies as at June 1989 and he said it used a form of lease acceptable to him: Tp 940.

BC9402679 at 238

He agreed he received a lease signed on his behalf by Mr Bell in February 1990, which he did not read then, but since receiving it he said he read "bits and pieces of it", but he could not recall reading the entire document. He was asked if there was anything unacceptable to him in it and he gave the somewhat extraordinary reply:

"There may be, I just can't recall if it is there or elsewhere": Tp 941.

He said he thought that one of the orders sought in the proceedings was a declaration that he was not bound by the lease, and he said he thought that there was a claim against MANL because MANL authorised "whoever it was that made the representation contained in Exhibit A to make that to you". It was suggested to him he had no basis upon which to say that MANL authorised the author of Exhibit A to make the representation, but he said he did not think that was correct, although he then agreed that it was printed some time before 1 June 1989. He also said he knew that MANL had nothing to do with the syndicate until some time towards the end of June 1989. He gave the following evidence at Tpp 941 and 942:

"Q. In the light of those facts, that the brochure Exhibit A was printed some time before 1 June 1989, and that MANL had nothing to do with this syndicate until some time late in June 1989, there is simply no basis upon which you or any of your co plaintiffs can assert as you do that MANL authorised the author of Exhibit A to make any representations contained in it, is there?

A. If MANL adopted the brochure at the time that it entered that financing and did not convey to the investors the extent to which it did not adopt the brochure, then I think that it has adopted it by implication."

BC9402679 at 239

An application was made to strike out that answer which I rejected. It was then put to Mr **Beatty** that he had no basis upon which to say that prior to its publication to him MANL knew anything about the brochure and he replied that that was correct. He continued:

"Q. You say, do you, that simply by providing finance to you as one of the syndicate members without more MANL adopted the brochure Exhibit A in its entirety. Is that what you say?

A. Yes.

Q. And assumed liability at law for everything that is contained in Exhibit A, is that what you say?

A. In essence I think that is correct": Tp 942.

I do not accept that Mr **Beatty,** an experienced commercial lawyer, could have held this view.

At Tp 949 Mr **Beatty** agreed that certain evidence he had given at Tp 945 was wrong.

Mr **Beatty** agreed, at Tp 953, that MANL was no more than an arm's length lender to the No 1 Syndicate members and that it took no equity in the B and T Syndicates.

Mr **Beatty** was referred to the allegation in the Amended Statement of Claim that by Exhibit A it was represented that all yearlings were sold to the syndicate at exactly their sale ring prices, which was alleged to be false and/or misleading.

He said the basis for saying that was that they were not sold into the syndicate at the sale ring prices, although he was not able to say at what price they were sold without going through the documents "and having a while to work through them". Mr **Beatty** was referred to at 27 of Exhibit A, which showed "Bloodstock at hammer prices $795,232", and he agreed that that would suggest that that was what B and T paid for the horses. He said he could not say "for sure" there was no evidence that the promoter did not in fact pay the price set out in Exhibit A for horses, but he assumed that his solicitors had the evidence to prove it. He said he thought it was a "fairly safe assumption": Tp 955. In fact no evidence was forthcoming to show that the horses were not purchased at that price. Evidence such as this indicated the consideration, or lack of it, Mr **Beatty** had given to the very serious allegations made against MANL.

BC9402679 at 240

Mr **Beatty** agreed, Tp 955, that he had no basis for disputing a statement that the promoter believed "the value of the package is such that its current worth is in excess of $1.25m". He said he assumed the author had that belief, and he agreed that he believed from his own experience that statements about the quality of the horses were correct.

Mr **Beatty** was cross examined at some length about the assertion that the syndicate would become self funding within two years. He agreed, Tp 961, that as none of the mares were in foal when they went into the syndicate, they would not have any progeny for sale until the beginning of 1992, so that earnings were to be derived from the sale of colts and fillies acquired in June 1989 or alternatively from prize money won by them, and that the assessment made by Mr **Beatty** was that there would be no sale of those colts and fillies within the first two year period. He was then taken through the expenses for the first two years and he said that while the syndicate may incur losses in the first two years, that in the third year it should start breaking even "and recovering your initial investment": Tp 962. Mr **Beatty** said that he did not think it would reach a break even point until some time during the third year, at which time the expenses would have climbed to some $2.35m and he believed that that was likely to happen. However he agreed that in June 1989 he knew it was possible that the syndicate may not have achieved the break even position in the third year and that meant that there would be a shortage of working capital, which the syndicate members would have to make up for the venture to continue.

BC9402679 at 241

In the course of being cross examined about the ultimate success of the investment Mr **Beatty** gave the following evidence, Tp 970:

"Q. Its failure was, as you know well, due to the fact that the horses didn't prove to be of quite as good quality as everyone thought they were in June 1989 that is the case?

A. That is one of the reasons why it failed.

Q. That is the essential reason why it failed?

a. I think the essential reason it failed was these horses were never given a chance to prove their worth.

Q. Is that simply because the investors weren't prepared to pay from their own resources the funds that were necessary to give the horses the chance that they deserved?

A. That is part of the reason."

BC9402679 at 242

It is quite clear that the syndicate members were obliged to pay the expenses of maintaining and racing the horses. In these circumstances Mr **Beatty,** who on the evidence knew as much about this industry as any of the other plaintiffs, proffered the explanation, as part of the reason for the failure of the syndicate, that the investors were not prepared to pay what was necessary. In submissions Mr Grieve, quite understandably, fastened upon this concession as indicating that much of the problem arose not from any representation, reliance or inducement, but from the refusal of the investors to pay that which they were otherwise obliged to pay.

Contrary to some evidence Mr **Beatty** had given earlier and to which I have referred he said, at Tp 927, he believed the third year "would be a year of such profitability as would enable the syndicate members not only to recoup the losses incurred in years 1 and 2 but also to pay out for the whole of their borrowings". When I say that is what Mr **Beatty** said he agreed with a question in that form, and he said that was his belief in June 1989. As I have said it is inconsistent with other evidence which, insofar as I found Mr **Beatty's** evidence acceptable, I found acceptable. I reject this inconsistent answer.

Commencing at Tp 975 Mr **Beatty** was cross examined about various oral representations made by Mr **McConnell.** He was asked firstly about the allegation in para17(1)(a) of the Amended Statement of Claim. He said he could recall that Mr **McConnell** said that B and T had an excellent track record in prior syndicates. That was all he could recall and he said he was not sure whether Mr **McConnell** knew it was false at the time it was said. Eventually Mr **Beatty** agreed that what he was saying was that what Mr **McConnell** had said was false and that he had deliberately lied to Mr **Beatty** in June 1989, knowing that what he was saying was wrong or false and that he had deceived Mr **Beatty.** Mr **Beatty** said that Mr **McConnell** deceived "us" in June 1989, and that he did not become aware of that until some time in 1992 or 1993. He agreed he had "no inkling" that Mr **McConnell** had deceived him "at all times up to 31 December 1991", and that it followed from that that from June 1989 until at least 31 December 1991 Mr **Beatty** believed that what Mr **McConnell** told him was true.

BC9402679 at 243

Mr **Beatty** then said that he did not believe that the reason for the insolvency of B and T was related to their management of prior syndicates, and he continued:

"Q. How did you discover in 1992 or 1993 that Bell and Tonkes had not had a good prior record, if that was not in fact the case?

A. As it emerged, that they had been dismissed as managers of syndicates in earlier years.

Q. Did you discover that **McConnell** knew of that in fact in June 1989, did you, when he lied to you?

A. I believe that he knew a good deal more about what was happening than that he had indicated to us.

Q. My question, did you say that **McConnell,** in June 1989, when he lied to you, knew that Bell and Tonkes had been dismissed as manager of prior syndicates?

A. I think at that time he may have had an inkling of it.

Q. You say may have. Is it your evidence you are not prepared to go so far as to say that he actually knew that?

A. No, I can't go that far.

Q. But you still make the charge here on your oath that in June 1989 he deliberately lied to you about the subject, don't you?

A. Yes.

Q. Without any basis for asserting that he had actual knowledge in June 1989 about the falsity of what he was saying, that is the case isn't it?

A. That's correct.

Q. It is a grave charge to make of a fellow solicitor, isn't it, that that solicitor lied to you in the course of a commercial dealing?

A. Yes.

Q. You would not make such charge without absolute certainty of its validity, would you?

A. Correct.

Q. You now acknowledge, do you not, that you have no certainty in the validity of the charge that you make against Mr **McConnell?**

A. I think I have very good reason to make it.

Q. You don't have certainty?

A. Not absolute certainty.

Q. You make the charge nonetheless?

A. Yes": Tpp 976 and 977.

BC9402679 at 244

I have set forth this evidence at length because not only does it disclose the very fragile basis upon which the allegation was made, but because it also, in my opinion, points to the quality of certain of the evidence given by Mr **Beatty.** He said he had no basis for asserting that Mr **McConnell** had actual knowledge in June 1989 about the falsity of what he was saying. Notwithstanding he was prepared to make the allegation. He acknowledged that he would not make the charge "without absolute certainty of its validity", yet he acknowledged that he did not have "absolute certainty" but, nonetheless, he made the allegation. It may well be that, as a matter of law, Mr **Beatty** did not have to go to the lengths to which he did accede in cross examination, but nonetheless his evidence was, and he could have sought to correct the legal situation if he had wished, that he could not himself substantiate the allegation and he did not have the absolute certainty, which he would require, before he made such an allegation. In consequence I think the only inference to be drawn is that Mr **Beatty** was prepared to make allegations, which he saw as being helpful to his case, notwithstanding that he did not have the degree of satisfaction he asserted was necessary for him to make them. This causes me to review his evidence with concern.

BC9402679 at 245

At Tp 977 Mr **Beatty** was cross examined about the allegation that Mr **McConnell** lied to him in June 1989 to the effect that the horses to go into the syndicate would be of top quality. He agreed that when he noted the horses in Exhibit A he did not think anything was wrong with them and he thought when he read that material that "they were of top quality". He was then asked whether he was suggesting that Mr **McConnell** knew something about those horses contrary to the information in Exhibit A to which he replied:

"What I assert is that the quality of the horses was also dependent on the selection by Bell and Tonkes as judges of flesh in addition to reading the material set out in Exhibit A": Tp 978.

He agreed that experts could differ in their opinion about horses. Notwithstanding the attempt by Mr **Beatty** to explain the position, which I found totally unconvincing as he gave his evidence at Tp 978, the simple fact remained that he, with a substantial degree of knowledge of the thoroughbred industry, thought that the horses were of top quality. For him to seek to intrude into that a qualification to the effect that it depended upon the assessment by B and T in making the selection and, from that, to suggest that Mr **McConnell** had some knowledge that B and T did not have expertise for the reasons he asserted, was to draw a very long bow indeed. I believe that Mr **Beatty** was prepared to go to that extent because he realised the grave difficulty in maintaining the pleading against Mr **McConnell.** Indeed, after he had given the evidence I found unconvincing from my observation of him, he agreed that independently of anything Mr **McConnell** said to him he formed the opinion from his own knowledge and reading that the horses "were of top quality". This answer was given at the foot of Tp.978 and should be contrasted with his answer at Tp 977:

"Q. Wasn't it your belief, having studied the material in Exhibit A relating to those thoroughbreds, that they were of top quality?

A. No."

BC9402679 at 246

It is obvious that the answers cannot stand together and it merely strengthens the view I had formed for the reasons to which I have referred that Mr **Beatty** was not being truthful in the evidence he gave.

In any event Mr **Beatty** agreed, Tp.980, that he had no basis upon which to suggest that MANL had, in June 1989, any knowledge of the statements made by Mr **McConnell** to him orally about the No 1 Syndicate.

Mr **Beatty** agreed that had he been told, prior to entering into the No 1 Syndicate, that Mr **McConnell** was receiving a 6% commission for selling units in it, the benefit of which he intended to pass through to Baker and McKenzie partners, he would have proceeded with his investment in the syndicate. He said that it occurred to him that B and T would pay the commission by having recourse to the syndicate funds and that that struck him as "probable". He agreed there was nothing in Exhibits A and B that made reference to any commission being payable to Mr **McConnell.** He also agreed the commission was to be $12,600 per unit, totalling $126,000, which would have "made a fair impact on the syndicate's cash flow or viability". He then suggested there was something in the brochure about establishment fees and was referred to the figure of $107,062. His evidence thereafter in relation to establishment fees showed a failure to make any real enquiries, and he agreed he had no basis to suggest that MANL had any knowledge of Mr **McConnell's** entitlement to a 6% commission.

BC9402679 at 247

Mr **Beatty** was referred to the memorandum from Mr **McConnell** stating that the syndicate expenses had increased by $75,000. He said he did not doubt that he received it, but that he could not recall either seeing it or reading it "at that

time". He did not recall either receiving the minutes or making enquiries about the increased expenditure, but he agreed he proceeded with the investment nonetheless.

At Tp 986, whilst being cross examined about giving the Power of Attorney, Mr **Beatty** said that in June 1989 $210,000 was a significant sum from his point of view, and that he assumed that the documents contemplated by the Power of Attorney "would be in a form that was common to thoroughbred syndicates". He agreed he did not seek to call for a copy of the documents and that he was content to entrust Mr Bell, the donee of the Power, to safeguard his interests in exercising his authority as conferred by the Power. He said it did not occur to him that Mr Bell as a director of the promoter company may have an interest that was not necessarily consistent with that of the investors and, when pressed on this, he said:

"A. It did occur to me that the promoter may have had an adverse interest, but as an experienced solicitor I knew it was common practice to provide for Powers of Attorney in favour of the promoter to execute financial documents and other documents giving effect to the investment."

BC9402679 at 248

He said he was not bound by that practice and that he could have signed the documents personally.

Mr **Beatty** said that the Power of Attorney "was limited by the brochure and the accompanying letter" and that he would read it and those documents "all together".

At Tp 988 I asked Mr **Beatty** about the advice he would have furnished to a client, seeking his advice about the execution of a Power of Attorney in the terms of the one he signed. He said:

"A. No, I would have asked them whether they had received any other documents. On the assumption that they had, I may or may not have considered it advisable to limit the Power of Attorney.

Q. That is what I am asking you. Would you or would you not have considered it advisable?

A. In hindsight I think I would have considered it advisable.

Q. What about at the time?

A. At the time I think the package would have been read together, and I think that packages of documents in other syndicates there was no reference to the documents in any greater detail than this Power of Attorney.

Q. So that would have been your advice, you can go ahead and give that Power of Attorney, secure in the knowledge that the only documents will be the ones you have received?

A. That the documents executed on your behalf would be in accordance with the conditions, and so on, set out in the brochure, given the fact that they wanted them executed by June 30, and there may not have been sufficient time prior to June 30 to examine those documents and ensure that they were all in accordance with the brochure.

Q. And does that also accommodate para4 of the Power of Attorney?

A. I would think so": Tpp 988 and 989.

BC9402679 at 249

Mr **Beatty** agreed that it would have been better to see the entire documentation, rather than to rely on others to sign.

Mr **Beatty** conceded that money was being lent to cover one hundred per cent of his share of the cost of the horses and of running costs of the syndicate for two years and that the venture was of a speculative nature. He said it did not occur to him that the financier might require further security. He agreed that it was his right to go to the settlement personally and check for himself the documents the financier wanted, that MANL never said or suggested to him in any way that he was not entitled to exercise that right, that he chose not to exercise it, and not to appoint a solicitor to attend on his behalf. He agreed in hindsight that was "rather rash", although he said that at the time he thought he was justified in taking that position.

Mr **Beatty** said that when he considered the documentation received in February 1990 he was not satisfied with the terms on which the money had been lent, but that it did not occur to him that he would "simply repay the money that MANL had provided on terms which were unacceptable", but rather he and others sought to re negotiate the terms, although, still retaining the money in the sense that the manager and the promoters of the syndicate had it.

At Tp 996 Mr **Beatty** said that he was told by Mr **McConnell** in September 1989 that B and T was experiencing financial difficulties, he did not ask for particulars of that but it concerned him, and that he relied on Messrs **McConnell** and Logan to "sort things out so far as Bell and Tonkes were concerned". He said he relied on them for some time and, because of concern that the funds of the syndicate might be jeopardised accountants were asked to investigate the matter. Mr **Beatty** also said, Tp 997, that he did not advise MANL at any stage of the way in which he understood the Power of Attorney he had given should be interpreted. He added that when he got the loan and lease documents early in 1990 he did not communicate any protest to MANL that the documents "were executed by Bell in excess of the authority conferred on him by the Power", that that would have been a very simple thing to do, and that he did not bother to do it.

BC9402679 at 250

At Tp 988 he gave the following evidence:

"Q. You know as an experienced solicitor that if a person who is paid (sic) to a contract learns as to matters that entitle him to avoid that contract he should act to that effect promptly for fear that he will otherwise lose his right of avoidance. You know that as elementary law of contract, don't you?

A. Yes.

Q. You believed early in 1990, did you not, that you had some right to terminate or avoid your contract with MANL, didn't you?

A. No.

Q. When did it first occur to you that you may have some right to terminate or avoid your contract with MANL?

A. I think it first occurred to me over a period of time from mainly in 1990, I think, that all was not as it should have been with the transaction and that the possibility of taking those steps might have arisen as a result of those factors.

Q. You claim, do you not, that there are a number of factual grounds upon which you became entitled to avoid your contract with MANL?

A. Yes.

Q. When was it that you first became aware of any of those factual grounds?

A. I think in November or thereabouts of 1989, we first became aware that commissions that had not been disclosed had been paid."

BC9402679 at 251

I think the word "paid" in the first sentence of the first question I have just quoted should read "party".

I have no doubt that Mr **Beatty** appreciated the problem these questions posed. His failure to seek to terminate the arrangements earlier not only amounted to a ratification of them, but so also did his allowing the Syndicate to continue. Mr **Beatty's** suggestion that he became aware of material facts "mainly in 1990" I did not find acceptable.

At Tp 1000 Mr **Beatty** did not agree that the accountants found out sufficient to enable the contract with MANL to be terminated. Verbatim the question is recorded as "May 1989", although that is obviously an error. In any event Mr **Beatty** replied that what was found out by the accountants did not give ground to terminate, but "to consider re negotiating that contract, which is what I think we tried to do first of all".

Commencing at Tp 1004 Mr **Beatty** was cross examined about the request in September or October 1989 by Mr **McConnell** that Mr **Beatty** should pay an additional $27,437.50. Mr **Beatty** said he was surprised by that request because of the assumption he had made that all expenses were covered in the budget. He agreed his assumption was wrong in the light of what Mr **McConnell** said and that such concerns as he had were allayed by his colleagues saying "that they were to be recouped by the operation of syndicate and I assumed it was really a timing difficulty more than anything else". Mr **Beatty** said he asked Mr **McConnell** about it and that Mr **McConnell** told him that it was extra expense incurred by B and T which would come out of the operation of the syndicate. He said that answer satisfied him at the time, notwithstanding that Mr **McConnell** was saying the budget was out by over a quarter of a million dollars. Mr **Beatty** suggested that the money was going to be paid out of "Murray Bell's management interests over time". That explanation confronted the difficulty, as Mr **Beatty** acknowledged, that if it were correct that would mean that Mr Bell would be working for nothing for some two or three years, although Mr **Beatty** said he did not think about that at the time, although he did think about it when he wrote para20 of his witness statement. He said it "struck" him "that there

must have been other ways in which Bell was to be recouped, or Bell's share". He was then confronted with the difficulty that about that time he found out that B and T was in financial difficulties and that one possibility was the syndicate had no hope of recovering the $250,000 "budget blow out". Mr **Beatty** agreed that when he discovered in 1989 that B and T was in liquidation he thought the prospect of recovering the additional figure from B h T "was looking a bit sick": Tp 1006, but that did not cause him and his fellow syndicate members to liquidate the syndicate "then and there" or to repay MANL its money.

BC9402679 at 252

He said:

"Q. Instead you went on having the horses trained, having the horses serviced and having the horses agisted and having them run at various race tracks, didn't you?

A. Yes.

Q. In the hope that the dream that you had in June 1989 of great profitability might come off. Is that right?

A. Not only the hope.

Q. Well what? The expectation?

A. In the hope in the realisation that something had to be done with those horses while the matters were resolved."

BC9402679 at 253

Mr **Beatty** said that he understood that MANL had rejected taking the horses back and he said that it was not correct to assert that he knew that neither he nor any other member of the syndicate had any right to sell them. He also said it was not correct to say that he knew that neither he nor any other member of the syndicate had any title to the horses, but it was his belief there was power in the leases in relation to the horses to sell them.

Mr **Beatty** said he understood that it was the practice in the industry, which I assume to mean the thoroughbred horse industry concerning syndicates, for horses to be sold, probably with the acquiescence of the financier, to defray obligations, which he identified as obligations "to the finance company, to the syndicate, etc": Tp 1008.

He was cross examined about the "Mountain Rule" decision. He said he did not read the judgment of Cohen J, notwithstanding that it was a judgment declaring that what he had done was wrongful, and notwithstanding that he thought it was very serious to have his conduct declared by this Court to be wrongful. Mr **Beatty** said he did not find out the terms of Cohen J's order, although he knew "in general terms" they were adverse to him. He said it did not occur to him that if they were not complied with he may be in contempt of Court: Tp.1009 which, once again, I find to be an extraordinary answer from a solicitor of Mr **Beatty's** standing. It is one thing to say that one leaves the matter to one's partners, but it is another thing not to make oneself aware of orders of the Court binding upon one.

BC9402679 at 254

Mr **Beatty** agreed that at the meeting of 9 November 1989 B and T resigned and Logan Financial Services Pty Ltd was appointed as the manager in its stead. He said he was concerned in November 1989 about the affairs of the syndicate and he was troubled that he had a liability to MANL in the order of $210,000. He was concerned that there existed the possibility that he may have to have recourse to his own assets to satisfy that liability, and to ensure, as a matter of urgency, that all of the matters about which he had misgivings were clarified. He thought that could be done within a matter of weeks. However that did not occur.

Mr **Beatty** agreed that he swore in his affidavit of 18 May 1992 that he first heard in or about April or May 1990 rumours that certain undisclosed payments may have been made in connection with the promotion of the syndicate and that investigation of those payments were being actively pursued. He denied that was wrong, and he said he knew prior to the meeting on 9 November 1989 that it was said that certain commissions had been paid to people associated with the promotion of the syndicate. He still said that it was not wrong to say that he first heard of it in or about April or May 1990. The basis for this assertion by him is by no means clear. The evidence is simply inconsistent.

In para21 of the same affidavit he said that in the latter part of 1990 he was informed that "those investigations" disclosed "for the first time" that commissions had been paid to various persons and entities "including associates of Murray Bell, Jill Cantrell, Frederick Still, Fred Still and Associates Ltd, MANL, its employees and Equico Finance Corporation Pty Ltd and its employees". He denied that statement was wrong on the basis that the investigations in the latter half of 1989 "did not disclose the full extent of the commissions that had been paid". It will be noted that this evidence

was given by a number of the plaintiffs, who, when confronted by it, gave this type of answer. I have commented on it already. The comments apply to Mr **Beatty** also. In the light of all his evidence on this subject his evidence lacked frankness.

BC9402679 at 255

When Mr **Beatty** was referred to the accountant's report dated 20 November 1989, and it was suggested to him that that disclosed that payments had been made to "among others" Mr Still or his company, he replied, unresponsively:

"It was my understanding that at the end of 1990 we knew for the first time of the full establishment that all those payments that had been made."

It was put to him again that in November 1989, that as a result of the accountant's investigations it was apparent payment had been made to Mr Still or his company, with which he agreed. He none-the-less maintained that it was not wrong to say, as he did, in his affidavit that it was not until the latter part of 1990 that the investigations disclosed for the first time that commissions had been paid to persons including Mr Still.

At Tp 1014 Mr **Beatty** was referred to para10 of his affidavit in which he stated that he had received the documents on or about 2 February 1990 and "I now believe that these documents were executed after 30 June 1989". He said he had reason to believe that at the time and that he believed he asserted it now. The basis, he said, was the information supplied to him by his solicitors. There is no evidence to support the inference that the documents in the No 1 Syndicate were executed after 30 June 1989 and it is very difficult to see where any such belief, based on a factual circumstance, could have arisen. In fact the evidence of Mr Cross, called on behalf of the plaintiffs, denies this suggestion. Once again Mr **Beatty's** evidence is found wanting.

BC9402679 at 256

Commencing at Tp 1016 Mr **Beatty** was cross examined about the circumstances in which he paid the additional sum of approximately $27,000 in October 1989. He said he received an explanation "that they were not strictly syndicate expenses but were in the nature of interest, some kind of pre payment of interest". He was then referred to the statement in para20 of his witness statement that Mr **McConnell** had told him:

"There are a number of expenses outside those provided for in the budget that have to be met but we will recoup them later."

It was put to him that was wrong with which he agreed. It was then suggested to him that Mr **McConnell** when he used those words was misleading Mr **Beatty** with which he agreed. Initially he said he did not realise, within a day or so of Mr **McConnell's** having said that that it was wrong, but then he agreed that it was his evidence that in about October he received an explanation that the $27,000 had nothing to do with syndicate expenses. He said that did not indicate that what Mr **McConnell** said to him was wrong, but rather that Mr **McConnell** did not understand the position either. He did not ask Mr **McConnell** about it because:

"It appeared to me from the notice that I received that these were the expenses that we were being asked to pay and that he simply did not understand what the expenses that we were going to be asked to pay were for, how they were characterised at the time we had discussions in September."

BC9402679 at 257

In these circumstances he said he believed that Mr **McConnell** had made an innocent mistake, but that he was now of the view that Mr **McConnell** deliberately lied to him. He said he formed that view in the preparation of the case when it was discovered for what purposes the funds were actually used.

Mr **Beatty** was cross examined about the use made of winnings by the horses and the proceeds of sale, and the use made to tax deductions.

I have come to the conclusion that Mr **Beatty** was a far from satisfactory witness and that I am not able to place reliance upon much of the evidence he gave. I have no doubt that Mr **Beatty** was desirous of entering into the No 1 Syndicate after he learned the TJ89 Syndicate was not proceeding. I have no doubt that of all the plaintiffs Mr **Beatty** was in the best position to assess the proposal and that he was of the opinion, from matters within his own knowledge, that it was appropriate to enter into it.

As with the other plaintiffs when matters, of which he complained in this litigation, were drawn to his attention he did not react as one would have expected by seeking to terminate the transactions. He kept them on foot and continued to derive benefits from them.

I am satisfied on the whole of his evidence that he was neither induced by the representations, nor relied upon them, in entering into these transactions.

BC9402679 at 258

THE EVIDENCE OF GEOFFREY QUENTIN TAPERELL Mr Geoffrey Quentin Taperell, whose witness statement is Exhibit S, was admitted to practise as a solicitor in 1966. He practised as a solicitor until 1975 in which year he was called to the New South Wales Bar. In 1981 he was re admitted as a solicitor and became a partner of Baker and McKenzie. For many years prior to that he had been a personal friend of Mr **McConnell.** Mr Taperell specialises in trade practices law, and has so at all material times.

Prior to January 1989 Mr Taperell worked in Baker and McKenzie's Melbourne office. He returned to the Sydney office in January 1989. Whilst in Melbourne he learnt that Mr **McConnell** had an interest in horse racing and thoroughbred horses and he entered into two partnerships with other partners and employees of Baker and McKenzie for the purpose of racing and breeding thoroughbred horses. Mr Taperell said he went into the partnerships as an investment and "an interesting diversion". His involvement in those partnerships confirmed his belief that Mr **McConnell** had developed a particular interest in thoroughbred horse racing and breeding, and his perception was "that his interest was more in the nature of a hobby which had the potential to be profitable".

In late May or early June 1989 Mr Taperell had a conversation with Mr **McConnell** in which Mr **McConnell** told him he had a horse racing syndicate, which was being put together by Mr Bell and in which there would be "top horses". Mr **McConnell** also said that it was being structured so that there would be "a good tax deduction up front" and that if he was interested Mr **McConnell** would send him some information. Mr Taperell expressed interest.

BC9402679 at 259

His interest was somewhat heightened by discussing the matter at a dinner with Mr Logan, whom Mr Taperell had known for some time as a client of the firm and an insurance consultant, who had arranged insurance for Baker and McKenzie partners. There was some discussion about Mr Bell, with whom Mr Logan had not previously dealt. Mr Logan said Mr Bell had a very good reputation and that he had run some very successful syndicates. Mr Taperell received the various documentation shortly after that, which he said he read, and he was "particularly interested in reading about the people involved in running the syndicate and looking after the horses". In para11 he said:

"I was attracted to the investment because of what appeared to be the experience of the persons involved and the quality of the syndicate's horses. I was also attracted by the fact that the documents describing how the syndicate was to be funded indicated that syndicate investors could borrow one hundred per cent of the funds needed to invest."

He said his understanding was that each unit holder was required to borrow $210,000, which would cover all expenses for two years whereafter the investment was expected to be self funding. He said he was also impressed by the statement that the current worth of the horses and the amount for which they had been insured was substantially in excess of their cost, which "confirmed to me that the syndicate would be a worthwhile investment".

Mr Taperell said he read at 23 of the brochure, which I have quoted already, and that he gained the understanding that the horses had been secured and would be the horses in which he was investing. He also understood that NMRB would be the financier and he was "comforted" by that fact. This seems to have been because he had previously borrowed money from NMRB on terms he regarded as very reasonable, and he considered NMRB to be reputable and substantial.

BC9402679 at 260

Mr Taperell said that he had "now" no recollection of reading the passage in para5.1 at 34 of the brochure under the heading "Capital and Syndicate Expenses". That reads:

"5.1 The initial capital of the Syndicate No 1 shall be $1m and shall be contributed to the Manager by the Members as follows: (a) Initial working capital contribution of $100,000 for each share held payable on the date of execution hereof. (b) An annual contribution of $85,000 for each share payable June 1, 1990; a third contribution of $52,500 for each share payable June 1, 1991, and a final payment of $27,836 for each share (representing the residual payment on the Bloodstock lease) payable June 1, 1992 PROVIDED THAT alternative financial arrangements have not been developed by the Manager and adopted by the syndicate."

Mr Taperell said he "certainly" did not recall reading that he would be required to make those contributions, and that his "clear recollection from reading the documents which purported to summarise the terms of the investment" was that the amount involved in investing was $210,000. He said it was his understanding that the money would be borrowed from NMRB, that it would cover all expenditure including leasing fees, that the money would be borrowed on an interest

only basis at an interest rate of 17.58 payable by monthly instalments of $3,063. Precisely how this understanding was achieved will have to be considered shortly.

BC9402679 at 261

Mr Taperell decided to invest and delivered the application form and his cheque for $3,062.52 to Mr **McConnell's** secretary. He did this in the belief that other members of the syndicate would be partners of Baker and McKenzie, although he did not know how many were involved and he assumed that people "outside the partnership" would also be investing.

He said his essential reasons for investing were the amount he understood to be involved, the way in which it was being financed, the amount of the monthly repayments, that the syndicate be self funding by Year 3, and the quality of the trainers and the value of the horses. He believed the participation of NMRB "suggested that the syndicate could be a profitable investment". It was Mr Taperell's expectation that he would execute documents before 30 June 1989 in order to obtain a taxation deduction in that year. He was requested by Mr **McConnell** to sign a Power of Attorney, which he did, although "at that stage" he did not know what documents had to be signed. He added:

"The only documents that particularly concerned me were documents relating to my loan from" NMRB.

He said he had previously borrowed money from it and that he believed "that the loan documentation from that institution would be in its standard form". He was only concerned about the amount of the loan, the applicable interest rate and that he was paying interest monthly. He continued:

"I had no doubt in my mind that any documentation executed pursuant to the Power of Attorney would contain these essential elements, consistent with the terms of the documents that had been previously forwarded to me. It did not enter my mind that my borrowing would need to be guaranteed or that I might be required to guarantee any other Syndicate members who took a loan from" NMRB.

BC9402679 at 262

He explained this by saying there was no reference to guarantees in the documents he had read and he added that he would not have entered into the investment if he had known that cross guarantees were required, particularly as he did not know the identity of all persons taking up interests. He added that had he known that NMRB was not to be involved he "would have at least scrutinised the relevant documents much more carefully".

He repeated that he assumed the documents would be "in a standard form", and said that Mr **McConnell** was co ordinating the investment and he "assumed that he had or would see and approve the terms of these documents prior to their execution". He said he trusted Mr **McConnell** completely. He also said that had he known the terms of the documents, which he has now seen, he would not have agreed to acquire a unit in the syndicate "without much more detailed enquiries" and "I would certainly not have accepted the documents which had been furnished to me at their face value and I would certainly not have authorised Mr Bell (whom I had not met) or any director of Bell and Tonkes to execute documents on my behalf".

In "probably" July 1989 Mr Taperell asked Mr **McConnell** whether the syndicate had gone ahead. Mr **McConnell** advised him it had, that there had been some trouble with the financier and that NMRB would not fund the syndicate "and we had to obtain finance from another financier called Mortgage Acceptance. The terms are a bit different but they were acceptable and everything is rolling ahead".

BC9402679 at 263

Mr Taperell said:

"I am now unable to recall precisely my reply, although I believe I informed Mr **McConnell** that I would look at the terms of the relevant documents when they arrived. I had never previously heard of Mortgage Acceptance".

Unaided by any cross examination Mr Taperell's evidence to this point warrants some critical consideration. His evidence was that he was comforted by NMRB's involvement and expected that NMRB would lend money on what he described as its "standard form". Assuming, in favour of Mr Taperell for the moment, that this is acceptable evidence he was told shortly after 30 June 1989 that NMRB was not involved, which one may be forgiven for thinking would have put him on notice of various things, eg why NMRB was not involved, and he was told that "Mortgage Acceptance" was the financier and that the terms "were a bit different but they were acceptable".

Mr Taperell made no enquiries as to the terms and he did not call for the documentation. He did not ask whether the terms equated to the "standard form" he believed NMRB applied or make even the most basic enquiry as to the financ-

ing of the transaction. In these circumstances his evidence that he was "comforted" by the involvement of NMRB, that he believed that the loan would be made on a certain basis, and that he would not have granted the Power of Attorney had he believed that the documents to be executed would not have been "consistent with the terms of the documents" previously forwarded to him has a very hollow ring. In my view, and this is reinforced by the oral evidence that Mr Taperell gave, Mr Taperell was quite unconcerned by the terms upon which the loan was made or of the basis of the financial arrangement provided he received the tax benefits he perceived to flow from his investment. It can only be said that it is quite extraordinary, if the evidence of Mr Taperell in his witness statement is to be accepted, that when he learned of the change of the financier and the change in the terms he failed to acquaint himself with the documentation signed on his behalf. In my opinion his lack of concern stemmed, at least essentially, from the confidence and trust he reposed in Mr **McConnell.**

BC9402679 at 264

On or about 28 September 1989 Mr Taperell received a letter from B and T. He said he believed that MANL required interest to be paid annually in advance, rather than monthly. This, of course, changed a significant basis on which he said he had entered into the transaction. But he made no complaint. He added, in para28:

"I did not know at that stage that there had been any variation in the interest rate of 17.5% which applied to funding from National Mutual Royal Bank."

This is a strange statement. Firstly, he did not know that NMRB was to apply an interest rate of 17.5%. Secondly, he made no enquiries to find out upon what terms the money had been borrowed notwithstanding that he had learned that a new financier was involved. Thirdly, there seems to be implied in the statement an obligation on someone to tell Mr Taperell what the terms of the document signed by the donee of his Power of Attorney were. It does not seem to have entered Mr Taperell's mind that there may have been some obligation upon him to call for the documentation to find out what obligations had been undertaken by his agent on his behalf.

BC9402679 at 265

On or about 9 October 1989 Mr Taperell sent B and T a cheque for $27,437.50 at which time he was "still confident about my investment in the syndicate". He subsequently became aware that the $30,500 was made up of $22,000 interest on a loan of $100,000, $7,500 payable to Australian Thoroughbred Finance and $1,000 payable to Mr Still. He said that when he sent that cheque he did not know that $100,000 had been borrowed, but believed his borrowing was $210,000 and he said he still believed "that all expenses referable to the Syndicate for a period of two years were covered". At the time of sending the cheque he did not know that money was to be paid to Australian Thoroughbred Finance or Mr Still "or anybody else" in connection with the promotional funding of the syndicate.

In late October or early November 1989 Mr Taperell had a conversation with Mr **McConnell** and Mr Logan and was told that B and T were in some financial difficulty but that Messrs **McConnell** and Logan were working to sort "something out".

On 9 November 1989 Mr Taperell attended the meeting of that date and he said he learned for the first time that there were two syndicates. He only attended the meeting for a short time because of "a professional commitment". He was told that B and T had stood down as the manager because of financial difficulty. He subsequently received the minutes of the meeting.

At about that time he received a document "purporting to set out the current financial position of the Syndicate" and, upon reading it, he became "most concerned". He discerned discrepancies between that disclosed in the accounts and his understanding of his financial involvement:

"For example the accounts were inconsistent with my understanding that I had borrowed $210,000 by way of my contribution of capital to the Syndicate. In addition, it was from that document that I became aware that payments had allegedly been made in connection with the promotion and financing of the Syndicate. I had been unaware of this at the time I entered into the Syndicate."

BC9402679 at 266

As a result of his concern he spoke to Mr **McConnell,** who made reference to secret commissions and Mr **McConnell** made some suggestion about the merging of the two syndicates.

On or about 2 February 1990 Mr Taperell received the contractual documentation and he looked at the loan agreement and noted the cross guarantee provision, that the loan was for $100,000 rather than $210,000, and that the interest was specified to be at 22% rather than 17.5%. He added that there was a penalty rate of 26%, the inference being that he did

not anticipate there would be any "penalty rate" over and above the 17.5%. He noted the loan required payment of 10% of the principal annually. He spoke to Mr **McConnell** and told him that the loan document was "totally different from what I understood it to be". He referred to the cross guarantees and asked why it took so long to send the documents, seeking to infer thereby that there was some obligation on MANL to provide the documents and no obligation upon him to ascertain what financial commitments he had undertaken through his attorney. Mr **McConnell** told him not to worry about the "current agreements", because he was seeking to re negotiate "the whole thing" with MANL. This, once again, is quite extraordinary so far as I am concerned. It must have been clear to Mr Taperell that he had incurred obligations quite different from what he had anticipated and that he was bound by the documents, irrespective of any attempt to re negotiate the terms, unless and until there was any such re negotiation or they were set aside.

BC9402679 at 267

In March 1990 Mr Taperell had a conversation with Mr **McConnell,** who told him that there had been "some really crooked dealings surrounding the finance. There had been secret commissions paid. We are going to get them back". It appears Mr Taperell made no further enquiries about this as he believed that Mr **McConnell** was continuing to pursue the question of the commissions and negotiations with MANL "with a view to re negotiating the agreement that had purportedly been entered into in June 1989".

Whilst all this was going on Mr Taperell made no attempt to protect his own position. Although it is understandable that he may have left the matter to Mr **McConnell,** it is incomprehensible to me that a solicitor with commercial experience would not be finding out for himself what Mr **McConnell** was doing and directing his mind to the ways in which he could extricate himself from a contract into which he said he never intended to enter.

It can hardly have been satisfactory for Mr Taperell to be told by Mr **McConnell** that he was seeking to negotiate with MANL, particularly as he was being told that it would be necessary "to pay some more interest to keep the negotiations going". If what Mr Taperell understood was correct there must have been very real grounds for Mr Taperell to have sought to have the transactions set aside. The clear inference is that Mr Taperell had no such understanding.

BC9402679 at 268

Mr Taperell received a facsimile transmission from Mr Plumptre dated 29 June 1990. He "understood" Mr Plumptre was acting as a consultant to Mr Logan, who was the new manager of the syndicate, and he assumed that the payment "for the lease cost referred to in that facsimile was the payment that Mr **McConnell** had suggested I should make to keep negotiations with Mortgage Acceptance alive". The payment involved was $14,115 and a further payment of $3,300. This seems a somewhat large amount to keep the negotiations "alive", particularly as Mr Taperell was asserting that the documentation entered into was documentation to which he had not agreed.

In September 1990 Mr Taperell received some further documents and by October 1990 he was "extremely concerned about the position", and he "formed the view that the negotiations which were taking place in an attempt to resolve the position were not getting anywhere and that I would be obliged to become involved personally in learning precisely what was going on".

This makes obvious, what was already obvious, namely that Mr Taperell took absolutely no steps for approximately twelve months to acquaint himself "precisely" of the position. This was against the background of documentation having been entered into which he asserted he never authorised, of financial difficulties leading to the removal of the manager of the syndicate, and of allegations of the payment of unauthorised and secret commissions. It was hardly the action, or inaction, of an experienced commercial lawyer, whose expertise was in the field of trade practices law.

BC9402679 at 269

On 2 November 1990 Mr Taperell wrote a letter because he "was very anxious to find out what had occurred". He wanted to know particulars of the horses purchased, their purchase price and the basis upon which his liability was alleged to arise. Bearing in mind that he had had the documentation signed by his attorney since 2 February 1990 it is somewhat difficult to understand why a solicitor in the position of Mr Taperell would have any doubt as to the basis upon which MANL was asserting his liability arose. A letter from MANL of 5 November 1990 stimulated him to gather "as many relevant documents as I could concerning the Syndicates" and to prepare a brief, which he forwarded to Senior Counsel. Shortly thereafter he conferred with Senior Counsel and Mr Foster, the accountant, and he consulted a number of the syndicate members. On 3 December 1990 he forwarded a facsimile transmission to Mr Symond. This letter bears some consideration. It noted that Mr Taperell had received advice from counsel and that he had consulted with Mr Foster and other syndicate members. It continued:

"We take the view that in its dealings with the above syndicates your company ('MAN') has been, and is, a fiduciary and that MAN has acted in breach of its fiduciary duty. MAN has been involved in payments of undisclosed commissions in circumstances where it was evident that disclosure of these was never intended. It also seems clear that there have been other irregularities but until we can obtain further information we will not be in a position to particularise these. Nothing said here should, however, be taken as any waiver of our rights in relation to these matters. We are also of the view that Mr Bell had no authority to enter into agreements with MAN dated 30 June 1989 as he purported to do on our behalf. In these circumstances, the agreements dated 30 June 1989 are void and/or unenforceable. TO THE EXTENT THAT MAN HAS PAID MONEYS FOR US AND FROM WHICH WE HAVE OBTAINED A BENEFIT, WE ARE PREPARED TO REPAY THOSE AMOUNTS. In principle, any such amount would be calculated by identifying the moneys so paid by MAN and making adjustments as necessary to take into account moneys lost or wasted as a result of the breaches of duty of MAN and payments already made by us to MAN. We do not accept that there are any valid or enforceable lease agreements between us and MAN nor that MAN is entitled to profit from any of these transactions by recovering interest or otherwise." (My emphasis.)

BC9402679 at 270

Mr Taperell, as I have already noted, had been aware of the so-called unauthorised or undisclosed commissions for almost twelve months at the time he wrote this letter. He did not condescend to identify the "other irregularities" about which he was speaking. His statement that Mr Bell had no authority to enter into the agreements with MANL of 30 June 1989 cannot be accepted as a serious observation. Mr Bell had been granted a Power of Attorney pursuant to which he had signed the documentation. Perhaps of more importance is that there is no statement in the letter that the Power of Attorney did not authorise Mr Bell to sign documents containing cross guarantees or providing for an interest rate in excess of 17.5%, or otherwise containing the terms in the documentation Mr Taperell found objectionable. The reason for this may well be that Mr Taperell must have appreciated that there was nothing in the Power of Attorney to preclude Mr Bell's signing the documents he did.

Notwithstanding the assertions that the agreements were either "void" and/or "unenforceable" Mr Taperell stated the preparedness to repay certain amounts in the terms to which I have referred.

Mr Taperell also said much about the alleged breach of fiduciary duty without seeking to particularise how any such duty arose in the circumstances of the case.

BC9402679 at 271

The letter was written on behalf of all the partners, who are plaintiffs, save Mr Blessington and Mr Logaraj, who confirmed their agreement with what Mr Taperell had written in a separate letter.

On 17 December 1990 Mr Taperell and Mr Fraser met with Mr Paten and Mr Campbell, who were officers of MANL, MANL's solicitor, Mr Mycock, and Mr Logan and consideration was given to the loan moneys advanced. Mr Taperell told those present that there were "enormous financial difficulties in maintaining the horses in this Syndicate", that most of the horses had no prospects of racing or breeding successfully and that it was inevitable and in the interests of all parties that the horses be leased or sold "so that the continuing expenses of maintaining, training and racing the horses can be minimised". Mr Mycock pointed out that there was no provision for sale of horses in the agreement to which Mr Taperell replied that he had been told that it had been suggested that MANL should take over the horses, but that it would not do that. Mr Paten or Mr Campbell advised that MANL did not want the horses, to which Mr Taperell said he replied:

"The horses are eating their heads off. We have to minimise the loss. The syndicate will keep full financial records so that there can be a proper accounting between the parties in due course when the dispute between us is resolved."

He said that no representative of MANL indicated that it would not allow the sale or leasing of the horses.

It is worthy of note that in the "Mountain Rule" case a defence raised by the members of the No 1 Syndicate, but not pursued, was that there was an estoppel precluding MANL from asserting that the manager of the syndicate was not entitled to sell the horses. There was no defence that MANL had consented, although evidence was filed to seek to establish that, but never relied on.

BC9402679 at 272

Thereafter there were further discussions, which came to nothing.

I have taken some time to review the evidence in chief of Mr Taperell because he was put forward as the partner who became responsible for the negotiations with MANL after Mr **McConnell** ceased to be actively or most actively in-

volved. I have referred already to certain difficulties I have with the evidence of Mr Taperell unaided by cross examination.

In cross examination Mr Taperell said, Tp 610, that he became the partner "more involved than the others" in about October 1990, and he agreed that he was the lead partner from then to around May 1991.

Mr Taperell agreed that it was his understanding that the manager of the syndicate would incur liabilities to trainers for training fees, to horse studs for service fees and the like, and that the syndicate was obliged to reimburse or fund the manager in respect of those expenses. He said, however, that the manager was not to act as agent for the syndicate members. This statement, on any view, was clearly not correct.

Mr Taperell said that the taxation advantages were not the primary factor for entering into the syndicate.

At Tp 614 Mr Taperell said he read Exhibit A "from start to finish", although he "skimmed some parts" and read others with greater attention. He was taken in some detail to those parts he read with care and those he "skim" read.

BC9402679 at 273

At Tpp 616 and 617 Mr Taperell was cross examined about the statement, in para15 of his witness statement, that he did not recall reading about the quantum of the contributions he would be required to make as set out at 34 of Exhibit A. He repeated he did not recall reading that, but he said he thought he understood it. He was taken to at 27 and 28 of the brochure and he agreed that if one divided the amounts set out there by ten, being the number of units in the syndicate, it worked out "that each member was to incur or contribute $100,000 in Year 1, $85,000 in Year 2, $52,500 in Year 3 and $27,800 odd in Year 4", which was "precisely consistent with the material contained in CL5.1 at 34".

He said that he understood that a lease already existed with NMRB and he was asked whether, as a lawyer, he considered, when he read Exhibit A, how he would become a party to an existing lease to which he replied:

"Well it could happen - well it could happen in two ways I suppose. One would be another lease would be entered into or a sub lease or I suppose if the lease was - no, that's right. Those were the two possibilities I think."

In this somewhat jumbled response I discern only one method in answer to the question.

He said he did not recall turning his mind to that in June 1989, nor did he call for the lease, because he did not think it was important for him to do so. He said his reason for that was that he thought it would be important "to know the terms of the actual lease that was to apply". He said the lease which had been entered into may not have been the lease which would have applied, and that if the members of the syndicate were to become "tenants in common in a one tenth share in the horses that either there would be a new lease or there would be a sub lease": Tp 619. He readily enough agreed that the syndicate did not exist on 1 June 1989 and he said his understanding was that the horses had been secured and "were to be the subject of a lease to the syndicate or a sub lease. I think that's how I understood it at the time". Mr Taperell said his understanding was that the financier had co operated so that the horses "could be acquired and would be available to be leased or sub leased to the syndicate". This involved an understanding that B and T required the co operation and assistance of a financier to obtain the horses. He then said that it did not cross his mind as to whether B and T had the means to acquire the bloodstock: Tp 620. He added he "just assumed it was in a good financial position" because "it had been very successful". That assumption was based upon what he read in the brochure and what he had been told by Mr **McConnell** and Mr Logan. In all the circumstances the relevance of any prior lease with NMRB is difficult to follow.

BC9402679 at 274

Mr Taperell said that he thought NMRB was to be involved and that the interest rate would be 17.5%. His attention was drawn to a sentence in Exhibit B:

"Interest rate will vary according to the net worth of the applicant."

Mr Taperell agreed he read that and that "he supposed" he thought that 17.5% "was the likely rate", although he agreed that the only basis for that thought was that that figure was mentioned in an example. At Tp 622 he agreed that there was nothing to the effect that NMRB "will lend at 17 percent, is there - 17.5 percent?". He added:

"A. No. I understood it to mean that subject to satisfying the bank about net worth, that the likely rate would be 17 and a half percent. HIS HONOUR: Q. But what net worth?

A. Your Honour, it didn't say. I had borrowed money from National Mutual Royal before, admittedly a smaller amount, and I assumed that they had some guidelines about the amount of the borrowing being covered by net assets to a sufficient degree. I didn't have a clear idea of that."

BC9402679 at 275

This evidence satisfies me that Mr Taperell had no basis for believing that the interest rate was to be 17.5% and, as I have noted, he conceded there was no statement to that effect made.

At Tp 624 Mr Taperell was asked about the statement in para12:

"My understanding from reading the documents was that the syndicate would be comprised of ten units and that each unit holder was required to borrow $210,000."

He agreed that contained a misstatement because the proposal was not that they be required to borrow that amount. That was because there was an alternative to pay cash, but Mr Taperell did not entertain that alternative, although he said that had he had that cash available at the time he would have. Mr Taperell disagreed that he knew that the amount being borrowed would be insufficient to meet all syndicate expenses. He said he read the statement in Exhibit A:

"The unpredictable and cyclical nature of the thoroughbred bloodstock business makes budgets or positive cash flow projections impossible."

BC9402679 at 276

He conceded that there were risks involved and that it was probably a likelihood that the earnings from the syndicate would be insufficient to fund the operation of it.

Mr Taperell was cross examined at some length about the statement in Exhibit B:

"Thus the partnership is picking up some half a million dollars worth of equity on day 1." It was submitted to him that that was "absolute unadulterated rubbish": Tp 627. Mr Taperell said he did not understand it that way and continued:

"A. Well your Honour, I thought it was a very positive sign that whereas they had - the horses had been bought for almost 800,000, they apparently had a value in the market at 1.25 million dollars. Now I understood that there were other costs that then entered into this in the formation of the syndicate and the like but broadly, my reaction to it was that the syndicate was better off to the tune of the difference than it otherwise would have been, had one known at the date of the investment that the horses were still worth $795,00. So I saw it as meaning that, in effect, one could substitute 1.25 million dollars for the $795,000 at the top of that column.

Q. Well, does that mean that on day 2, let's say 2 July, the syndicate members could have met, as you understood it, resolved to wind up the syndicate, sold the horses and distributed $50,000 each?

A. No, I understood that there were these other costs being incurred. All I am saying is that if the value is that much higher, then it justified all these other expenses that went to establish the syndicate."

It seems to me that any sensible reading of the material to which Mr Taperell was being referred makes it abundantly clear, as was suggested to him in cross examination, that the suggestion that the partnership was gaining "some half million dollars worth of equity on day 1" justifies the description Mr Grieve attributed to the statement in cross examination, which I have just quoted.

BC9402679 at 277

Mr Taperell agreed that he understood that the price of the horses would fluctuate and that if they went down that exposed the syndicate to a risk of loss.

Mr Taperell said, Tp 629, he believed that NMRB would have looked "at the offering" to see whether it was such as NMRB wished to be associated with "and that would mean that it had a favourable view based on some sort of reasonable analysis of what was being offered". He said he did not check to see whether NMRB was the financier, although the importance of this having regard to the fact that Mr Taperell thought that it would be a sound long term investment is not immediately easy to understand. Mr Taperell also agreed that the tax deduction of $95,000 was "an element of the decision no doubt". One could scarcely be asked to believe the contrary.

He said he did not try to calculate the fee of $107,062, although he agreed it was 10% of $1,070,618 (sic). He said, at Tp 631, that he learned in November 1989 that certain payments had been made to Australian Thoroughbred Finance and Mr Still or his company, but denied that he became obsessed by that information or that standing alone that matter

would provide a basis upon which to deny all liability to MANL. However, he agreed it was a significant part of his claim in the proceedings. He was referred to information contained with the minutes of the meeting of 9 November 1989, which referred to a consulting fee and brokerage, which minutes he received on or about 20 November 1989 and, accordingly, that he has known from then until now of the payments. Mr Taperell agreed that it was plain that the moneys paid to Australian Thoroughbred Finance and Mr Still came from moneys provided by MANL and that he was in receipt of the necessary information to establish that in late 1989 but that, nonetheless, since around November/December 1990 he had been saying that the payments were secret commissions and that it was very hard to work out what was going on. He suggested, however, and somewhat inconsistently, that those complaints were not wholly without justification. He continued:

"Q. In your affidavit, MFI 20, you swore in para22, 'It was only in the latter part of 1990 that I was informed that commissions had been paid to various persons and entities including associates of Murray Bell, Jill Cantrell, Frederick Still, Fred Still and Associates Ltd, MANL, its employees and EQUICO Financial Corporation Pty Ltd and its employees'. did you not?" [This statement by now has a most familiar ring.] "A. Yes.

Q. That statement made by you on your oath was false, was it not?

A. It was in substance true. It may be incomplete, but it is true."

BC9402679 at 278

Each plaintiff, who made this statement, had the greatest difficulty in seeking to justify it. I have referred to most of them. The attempted justifications were totally unconvincing, as was Mr Taperell's, although it had the merit of acknowledging that the statement was "incomplete". In my opinion that equated to a lack of frankness.

At Tp 641 Mr Taperell said he recognised there was a risk, in the event of the syndicate not being successful that he would have to have recourse to assets, other than his interest in the syndicate, to repay borrowings at the end of the term, which he regarded as "more than minimal". but which he assessed to be "a relatively low risk". He said he thought that even if the syndicate was not successful "the greatest likelihood was that it would achieve at least some reasonable success and that it probably would not cost me much at the end of the day to repay my borrowing and leave the syndicate".

BC9402679 at 279

Mr Taperell agreed, Tp 643, that he was aware that the budget had "blown out" by $75,000, which he understood to be made up of a combination of expenses including the cost of upkeep of the horses and "whatever". He said this was a result of his own reasoning rather than "pure speculation" and that he did not trouble to ask anyone what the $75,000 represented or how it was made up. He also agreed that Mr **McConnell's** note about this was self contradictory but he sought an explanation. Mr Taperell said he thought that the additional expenditure resulted from better information, and, as I understood his evidence, it comforted him that B and T was prepared to indicate that the information given initially was not as complete as it could have been. One must wonder how B and T could have obtained the additional funds without asking for them. Therefore it was forced to state the reason.

At Tp 646 Mr Taperell agreed that Mr Bell, the donee of his Power of Attorney, was an interested promoter, whom he thought must be or would be a reliable honest person "and presumably, in order to meet the deadline, it was preferable to do it that way". He said he expected the documentation, which was to be signed, would be "consistent with what was provided in the brochure and the other documentation". He continued:

"I thought the lease would be a lease in a more or less usual form, or the sub lease. That would provide for a term and rental, residual, as in the document. And I thought that I would have to enter into a loan agreement and that I was comfortable with the idea that there would be what I would regard as a normal sort of borrowing document with Royal Bank."

BC9402679 at 280

Mr Taperell thought that both Mr Bell and Mr **McConnell** would read the documentation, and he expected Mr Bell to safeguard his interests in relation to it. He repeated that he thought Mr **McConnell** would read the documents, although it was his expectation that the documentation would be signed "in effect at settlement" or very close to it. In any event his evidence made it clear that he never considered that he would be reading the documentation himself. He also said, Tp 648, that Mr **McConnell** made it clear to him that he, Mr **McConnell,** would be signing a Power of Attorney, which was inconsistent with his evidence that he expected Mr **McConnell** to read the documentation because he was going to invest also: Tp 647. However he said he believed Mr **McConnell** would see the documents. In the end Mr Taperell agreed that he simply assumed that Mr **McConnell** would read the documents and, so far as the evidence disclosed, he

had no basis for that assumption: Tp 648. I do not accept that Mr Taperell made such an assumption or had such a belief. He was prepared to leave the matter to Mr **McConnell,** whom he trusted. He was vague in his evidence, almost removed from it, and quite unimpressive as a witness.

At Tpp 649 and 650 Mr Taperell gave what, in my view, was completely unsatisfactory evidence about the possibility of Mr **McConnell** looking at the documents within the time limits available, and he agreed that he left it to Mr **McConnell** to protect whatever interests he, Mr Taperell, had. He also said he left it to Mr Bell to protect any interests he had. Mr Taperell was then confronted with the difficulty, which would have arisen if Mr Bell had been provided with documents containing unacceptable terms by the financier on a "take it or leave it basis", and he said that if any unacceptable terms had been put forward he would have expected Mr Bell to have not executed the documents "because that was a proper thing to do in view of what was disclosed to us": Tp 651. This evidence all had the hallmark of being wise after the event, especially when Mr Taperell conceded, Tp 651, that the Power of Attorney was "broad", although he suggested it was "not unlimited". Mr Taperell also made it clear that he expected the transaction to be settled on 30 June so that the tax advantages for that financial year could be derived.

BC9402679 at 281

The problems with which Mr Taperell, and a number of the other witnesses, were confronted arose, quite obviously, from the giving of the Power of Attorney in the terms in which it was given, and from a failure to take even the most elementary steps to seek to protect his position. In my view, and I assess Mr Taperell's evidence in this way, he was prepared to have the documentation signed without bothering to ensure that it was properly checked, or that it contained terms which were acceptable or that it did not contain terms which were not acceptable to him, provided that he would derive the taxation advantage for the financial year. In my opinion his attempt to assert that the documentation should have been checked and other steps taken to Protect his interests. when he chose to take none, is nothing more than an attempt, with the benefit of hindsight and in the light of the unfortunate financial demise of the syndicate, to find a way of avoiding his obligations under the documentation. The simple fact of the matter is that he appointed Mr Bell as his agent to sign the documentation under what he agreed was a broad Power of Attorney. The documentation having been signed and he having been put on notice that both NMRB was not the financier and that MANL had required different terms, Mr Taperell took not one step to seek to ascertain the terms of the documentation, which had been signed. Even when he received the documentation in February 1990 he made no real attempt to raise any objection to its terms. All of these matters support the conclusion to which I have come and which I have just stated. Mr Taperell's evidence was inherently improbable and the manner in which he gave it left me completely dissatisfied with the explanations he sought to proffer for his conduct in respect of the execution of the documentation. I would add to these observations what is obvious, but bears repetition, namely that Mr Taperell was an experienced commercial solicitor, who was advantageously placed to ensure, if he had wished to do so, that not only were his interests properly protected, but, more importantly, that he did not enter into a disadvantageous contract or, if he did, that he was able to avoid it at an early point.

BC9402679 at 282

At Tp 655 Mr Taperell was cross-examined about the secret commissions. He agreed he had been very concerned about the syndicate. He was cross-examined about the fact that his decision to invest in the syndicate was a bad business one, which he attributed to the manager being insolvent, the money that was borrowed being paid, for all sorts of purposes, and the syndicate never operating as anticipated, and the horses appearing "not to have been as good as hoped". He also added that a circumstance making it a bad business decision was the state of the thoroughbred market.

BC9402679 at 283

At Tp 657 Mr Taperell was asked about his statement that had he known that NMRB was not to be involved he would have scrutinized "the relevant documents much more carefully". That statement did not stand up to any of the cross examination. Mr Taperell said that "in retrospect" his failure to make any enquiries as to the financial standing of the promoter was a bad business decision, although he thought he was justified in taking it on trust.

Whatever view Mr Taperell may have taken about the position of NMRB, he learned within several weeks of 30 June 1989 that it was not the financier. Mr Taperell made no enquiries either of Mr **McConnell** or NMRB as to why it had not acted as the financier. In the end Mr Taperell made a number of assumptions, but made no effort to check matters which he agreed could have been easily clarified: Tp 662. It is important, of course, in considering this type of evidence to bear in mind that Mr Grieve expressly disclaimed any reliance on contributory negligence, and the failure by Mr Taperell, which was matched by that of the other partners of Baker and McKenzie, to take even the most minimal steps to protect their own interests was not directed to that issue, but rather to the issue that each of them was prepared to enter into this transaction for the purpose of obtaining the taxation benefit and without any real regard to the obligations being

undertaken to achieve that end. No attempt was made to ensure that Mr **McConnell,** as the partner introducing the scheme, was to check the documentation and in my view the standard answer that there was an anticipation that the documentation would be in some standard form cannot be accepted. The most cursory glance at what was happening would indicate that such evidence is unbelievable. Furthermore, whilst an attempt was made by all the solicitors to rely upon the fact that NMRB was involved in the transaction, once it ceased to be involved in the transaction there was no reaction, which one might well anticipate, showing a desire to be made aware of the obligations which had been imposed by the substitute financier. There also seems to have been a complete disregard for the fact that the donee of the Power of Attorney was the agent of the plaintiffs.

BC9402679 at 284

Another matter which has been disregarded is that there is not a skerrick of evidence to suggest that MANL imposed any terms which were not its usual business terms for the borrowing of money. The argument seems to be constructed in this way. The plaintiffs thought that NMRB would be the lender. The plaintiffs assumed that NMRB would apply its usual or standard lending terms, although they had not seen any document setting forth those terms in relation to this type of an investment. From that unjustified assumption the plaintiffs assumed that there would be an interest rate of 17 to 17.5 per cent and no cross guarantee. Even accepting that all those assumptions are justified, which I do not, the plaintiffs then became aware, at least two before and most shortly after 30 June 1989, that NMRB was not the financier. They also became aware that MANL was to be the financier. The assumptions they had previously made in relation to NMRB could not be made applicable to MANL, particularly, so far as one plaintiff was concerned, when he was told that the terms under which MANL was prepared to finance the syndicate were different prior to 30 June 1989 and the remainder some time thereafter. The plaintiffs made no attempt to look at the MANL documentation themselves or to obtain any assurance from Mr **McConnell** that he had done so. They made no attempt to obtain that documentation and in February 1990, when it was forwarded to them, some of them read it and some did not. The significance of that is that by February 1990 the plaintiffs were well aware that B and T was in severe financial difficulties, that it had been removed as the manager, that commissions which were arguably unauthorised had been paid, and that the syndicate was experiencing financial difficulties. In all these circumstances it is extraordinary that the plaintiffs did not look to the contractual obligations undertaken by them through their attorney, and that they allowed the matter to continue in circumstances where they retained benefits.

BC9402679 at 285

The other matter about which I have commented but which, in this summary, deserves repetition is the failure by the plaintiffs, who asserted that they were comforted by the involvement of NMRB in the project, to take any steps once they learned that NMRB was not involved in the project. One explanation for NMRB's not being involved was that it was not satisfied with the financial viability of the project. Indeed it is difficult to think of any other reason why NMRB would not be lending money upon which interest was to be paid. Yet not only had none of the plaintiffs made any attempt to communicate with NMRB prior to entering into the arrangement, but when they learned that NMRB was no longer prepared to finance it they made no attempt to ascertain why. In my view this conduct on their part removes their suggestion that they were comforted or influenced by the proposed involvement of NMRB.

BC9402679 at 286

At Tp 666 Mr Taperell was asked how he could make an assumption that a document or documents would be in standard form when he had never seen any documents of that nature before, to which he replied:

"I had seen terms and conditions in the prospectus. I assumed that the leases of horses followed a pretty much standard form."

He agreed, in the light of this answer, that he should qualify the third sentence of para23 of his witness statement. However his evidence points up the matter to which I have just been referring.

Mr Taperell said that he had less confidence in Mr **McConnell** after October 1990 because of some prior business dealing between him and B and T. He was asked what "much more detailed enquiries" he would have made, and after a non responsive answer, which led to the question being put to him again, he replied:

"Specifically I don't have in mind particular enquiries, but as a general proposition I would have wanted to have been satisfied that an independent, that someone whose independent view I trusted was favourable to the investment.

Q. When you made that statement and when you verified it yesterday did you have in your mind specifically or otherwise any much more detailed enquiries?

A. I would have needed to know the circumstances in which the syndicate investment was being offered if the person who had commended it to me and the promoter had had prior dealings and had not disclosed them.

Q. Yes or no Mr Taperell. When you made that statement and when you verified it yesterday did you have specifically or otherwise in your mind what much more detailed enquiries you would have made had you known of the facts disclosed in document 13?

A. The only one that occurs to me at the moment is that I would have needed to have known the financial position of the promoter. I don't - beyond that, I didn't have in mind any specific enquiries.

Q. From your experience at the Bar, you know, don't you, that witnesses owe to the Court the duty to observe the discipline of their oath by paying attention to the questions that they are asked; you know that, don't you?

A. Yes.

Q. Now I will ask you for the third time: when you made that statement and when you verified it yesterday did you specifically or otherwise have in mind any much more detailed enquiries?

A. I had in mind more detailed enquiries. I didn't

Q. What?

A. I didn't have in mind specifics.

Q. What detailed enquiries?

A. Enquiries that would satisfy me that this was a sound investment."

BC9402679 at 287

This passage of evidence was indicative of a deal of evidence given by Mr Taperell which, when subjected to cross examination fell away into vague generality which in no way supported the initial statements made. I have referred to this earlier.

He said he would have made enquiries other than from the promoter, the proposed manager and Mr **McConnell,** but he said he could not tell from whom and that he did not give any thought to that when he made the statement. He agreed it was "an imprecise statement", he denied it was wrong, but he said he could not tell, while giving evidence, of whom he would have made those much more detailed enquiries.

BC9402679 at 288

The imprecision of statement, unfortunately, was something which marked a deal of Mr Taperell's evidence and, in my opinion, stemmed from an attempt, with the benefit of hindsight, to justify being relieved of liability in respect of the obligations undertaken by him through his attorney. In my opinion there is no doubt that the attempt made by Mr Taperell to avoid his liabilities has arisen from ex post facto reasoning consequential upon the failure of the syndicates. The converse of that is that he simply failed to address his mind to matters relevant to the No 1 Syndicate before entering into it, such that he cannot be heard to say he either relied upon or was induced by the representations. I regret to say that Mr Taperell, to my observation over the lengthy period he was in the witness box, impressed me as being an unsatisfactory witness. My lack of satisfaction flowed from his imprecision of thought, his inability to make good or maintain many of the statements appearing in his witness statement, inherent contradictions within his evidence, and, as I have adverted to, his attempt, after the event, to justify being released from the contractual obligations undertaken. I add his failure to seek to be relieved of his obligations earlier.

At Tp 668 Mr Taperell said that he learned that the lending terms were different in September 1989 and that the most significant difference was that the interest was to be paid in advance rather than on a monthly basis. He agreed that he had said it was fundamental to his decision to invest that he was responsible for the payment of $3,063 per month and no more, but that notwithstanding that he learnt that interest was payable annually in advance he decided to stay in the syndicate and made no protest to MANL.

BC9402679 at 289

Mr Taperell was challenged about his knowledge of the interest rates and he said he had thoughts and made assumptions about the matter and that the rates "appeared to be in line with my expectation", but he agreed he did not bother to communicate with NMRB, MANL or Mr **McConnell** about this matter and, although he said he had a conversation with someone about it, he did not have a clear recollection of who that person was. He agreed he had a patchy recollec-

tion, in the sense that he could remember some things and not others: Tp 670. Perhaps the problem confronting Mr Taperell was exposed most fully in the following evidence he gave at Tp 670:

"Q. Do you assert that in June 1989 you were credulous?

A. I think in June 1989 I was certainly in my own affairs trusting to a degree but I question myself a bit now.

Q. You used the expression in your own affairs. May I take it that you do so to contrast the approach which you took personally in relation to in (sic) investment with an approach that you would take on behalf of a client if you were asked for your advice about it; is that right?

A. I contrast it to the sort of attention that I give to professional work. I should add that I don't recall being asked by anyone professionally to advise on an investment except, you know, as to the legal aspects."

This type of evidence reinforces the view I have expressed that much of what Mr Taperell was putting forward was an attempt by him to justify his failure, in June 1989 and for some considerable period thereafter, to have any proper regard to his own affairs. Once again I state that that does not go to any question of contributory negligence but rather to the vital issues raised in this case of representation, inducement and reliance.

BC9402679 at 290

This was all underscored by the evidence at Tp 671 where Mr Taperell stated the degree of care with which he considered the documentation and he agreed he did not consult an independent investment adviser, a legal adviser, a taxation adviser or a thoroughbred bloodstock adviser. He denied he "rushed into the whole thing for the purpose of obtaining a massive tax deduction" on the basis that it would have been "nonsensical for me to invest money just to get a tax deduction to throw away a dollar to save 49 cents and to commit myself to an obligation to pay $210,000 just to obtain a tax advantage is something that, whether credulous or not, I just wouldn't have entertained then and I would not entertain now".

Nonetheless Mr Taperell said he found the tax benefit "to be attractive", Tp 672. He also agreed that when he learnt that the expenses had increased by $75,000 and that NMRB would not fund the syndicate he was still confident about it and he said that confidence "arose entirely out of factors other than your earlier apprehension that the Royal Bank had endorsed the syndicate". Lest there was any doubt he gave this evidence:

"Q. I will put the question to you again. The confidence which you had in October 1989 arose from matters entirely unrelated to your earlier apprehension that the Royal Bank had in some way endorsed this syndicate, that is so, is it not?

A. Yes, I think that must be so.

Q. And you knew, as a member of the syndicate, that you were entitled to enquire of its manager, Bell and Tonkes and/or its accountants, Foster and Company, for any information of a financial nature relevant to the syndicate, didn't you?

A. Yes.

Q. You never bothered to make any such enquiry of the manager or the accountants at that stage, that is October 1989, did you?

A. No": Tp 672.

BC9402679 at 291

Mr Grieve commenced to cross examine Mr Taperell about commissions at Tp 672. He agreed he knew a buyer's commission on the horses was payable by the syndicate, but that he did not understand "establishment fees" to include commissions. He said it did not occur to him that a broker had obtained the finance on which a commission would be chargeable.

At Tp 674 he was asked about the second sentence of para32 of his witness statement in which he said that he learnt for the first time at the meeting of 9 November 1989 that there was another syndicate in which some Baker and McKenzie partners had invested. He agreed that Mr **McConnell's** memorandum of 5 June 1989 made it clear that there was to be more than one syndicate, but he said that whilst he was aware of that he was not aware that other Baker and McKenzie partners were members of it.

At the meeting of 9 November 1989 Mr Taperell became aware that B and T had resigned as manager because of substantial financial difficulty, which was a matter of considerable concern to him. He said he may have been able to put off other commitments to attend to this matter of importance but he did not because:

"I thought the matter was well in hand. It was being attended to and I had no special contribution to make to that. "

He said he was concerned about his legal position in relation to the syndicate on 9 November 1989, and about the precise extent of his actual or potential liability in relation to it, and he was concerned to know the syndicate was being managed in the best way possible. He agreed that could hardly be so if the manager had resigned and when taxed with the attention he paid to the matter he replied:

"As I said, I thought that matters were being attended to by people who understood these things and that it was better to let them get about that business of doing whatever was reasonable to make the best of it": Tpp 675-676.

BC9402679 at 292

Mr Taperell had little recollection of who was present at the meeting or of what was discussed at it. He said that before the meeting there had been no meeting of the partners who were members of the syndicate to determine a corporate approach, and that before the meeting he did not believe he had given any consideration to whether, in light of the changed circumstances as he understood them, he would seek to find a way to retire from the No 1 Syndicate himself. He agreed that after he became aware MANL was the financier and was financing on different terms from what he understood NMRB would agree to and that payments had been made to Australian Thoroughbred Finance and Mr Still, he remained a member of the No 1 Syndicate for at least a further two or three years and that partnership tax returns for the No 1 Syndicate were lodged for the financial years ended 30 June 1989 to 1992 inclusive. Mr Taperell signed the income tax returns as the representative partner of the partnership and, in his income tax return for the financial year ended 30 June 1989, he claimed deductions of $96,985 in consequence of his investment in the No 1 Syndicate and an additional amount of $22,000 for interest paid to MANL. The claims were allowed and although Mr Taperell said he did not recall details he agreed they included, at least in part, the money paid to Australian Thoroughbred Finance and Mr Still.

BC9402679 at 293

For the financial year ended 30 June 1990 Mr Taperell claimed an income tax deduction of $34,425 in consequence of his investment in the No 1 Syndicate. For the financial year ended 30 June 1991 he claimed $13,052 in consequence of the investment and for the financial year ended 30 June 1992, $553. He said he believed that each of those claims was allowed, that he has given no notice to the Australian Taxation Office of any intention to withdraw the claims, that the claims arise by reason of MANL having financed the No 1 Syndicate, that as a consequence of MANL's financing the No 1 Syndicate he derived significant tax benefits, but he believed the legal position was that he was under no obligation to repay MANL. Mr Taperell said that subject to principles dealing with unjust enrichment it was his understanding of the legal position that there was no legal obligation to repay MANL. He said he did not have a firm view on the correct legal position and that he did not concede he owed any money to MANL, although he agreed there was a strong likelihood he owed some and he went so far as to say that his personal position was that as a matter of probability he owed money to MANL. He described the matter by saying:

"My starting point was to enquire as to the benefit that I received and I found it difficult there to know exactly how a court goes about determining what the benefit was in these circumstances. So beyond that, I have not looked at it more from a practical point of view of taking the principal sum involved, deducting unauthorised amounts, making allowance for the fact that moneys were wasted ."

Mr Taperell said he had also looked at the question of unjust enrichment and how the principles might apply: Tp 683.

BC9402679 at 294

Obviously, at the end of the day, I will have decide whether any money is owed, whether the principles of unjust enrichment apply, and, if they do, how they should be applied. However it is to be noted that Mr Taperell, who is a commercial lawyer of many years experience, acknowledged, at least to himself, the probability that money was payable to MANL. The relevance of this is not as some form of admission or as some form of expert evidence on the matter, but rather as explaining the failure by Mr Taperell to take any positive steps to seek to set aside the contractual agreements, and, therefore making it the less probable that he was misled or deceived or relied upon or was induced by any representation.

This is consistent with his evidence at Tpp 684 and 685 that he did not "for one moment consider" that in the light of the material mentioned in para33 of his statement he could or should attempt to terminate his contractual arrangements with MANL. He looked through the documents he received with MANL's letter of 2 February 1990 at a time when he knew the syndicate was in trouble, to an extent sufficient to understand what was involved, and he said "the essential terms of the documents were important and I understood those": Tp 685.

At Tp 685 Mr Taperell was referred to the fact that in para36 of his witness statement he recorded that one of the things he noticed, upon reading the loan documentation, was that the loan was for $100,000 rather than $210,000. He said he complained about that during the proceedings, although he agreed he had heard Mr White open the case on behalf of the plaintiffs on the basis that no money should have been lent at all. In those circumstances the No 1 Syndicate would not have gone ahead. He added:

"Well, my evidence is that MANL should have appreciated the basis on which the various investors had proposed to go into the syndicate and should not have facilitated the establishment of the syndicates on a substantially different basis.

Q. What is your answer to my question, do you make those two inherently inconsistent complaints or not?

A. I do not think there are two inherently inconsistent complaints.

Q. Do you say that it is quite consistent of you to complain about the fact that MANL lent you less than half of what you expected and also complain about the fact that MANL lent you any money at all. You say that do you?

A. I think the complaint that I make is as I explained it a moment ago. I think to represent that as being a complaint that they should have lent more money is not, does not accurately reflect what I am saying which is that Mortgage Acceptance should not have facilitated the establishment of the syndicate on a substantially different basis from that understood by the proposed members."

BC9402679 at 295

It is, of course, necessary to read this evidence in the light of the fact that there was no suggestion that MANL was aware that there was a different basis proposed for setting up the syndicate.

Mr Taperell agreed that he was content for Mr **McConnell** to proceed to re negotiate the matter. It appeared, from evidence given at Tpp 687 and 688, that Mr Taperell was unaware of the re negotiations and that in many cases, in the absence of a contemporaneous document to assist his recollection, he had no memory for the events.

Mr Taperell was taken to the statement in the income tax return for the financial year ended 30 June 1989:

"The partners' strategy in entering into a formal horse racing and breeding partnership with interests in valuable horses is to enable them to pursue their activities in a businesslike manner and to be able to use the expertise of highly qualified people in the breeding and horse racing industry."

BC9402679 at 296

This income tax return was signed in late December 1989 at a time when the affairs of the No 1 Syndicate were in considerable disarray. Mr Taperell said, Tp 689:

"No your Honour, I think this statement does refer to what was in the mind of the partners at the relevant time which was up to 30 June 1989. My understanding in December 1989 was that we still had the same strategy. There had been a major problem because the manager had misconducted himself and the affairs of the syndicate were in disarray, but there was still an intention to reform and to try to make the syndicate successful."

There could hardly be any clearer statement by Mr Taperell of ratification.

Mr Taperell said he did not think that the events between 30 June and the end of December 1989 required that to be amended, and that he believed that was an appropriate way of complying with the obligation to lodge a return. That view is, of course, consistent with the continuation of the No 1 Syndicate notwithstanding the difficulties into which it had run.

Mr Taperell was cross examined about negotiations with MANL to attempt to resolve the matter and he agreed, Tp.692, that in late September 1990 MANL made a serious offer of compromise. At that stage Mr Taperell said he thought he had to become much more involved and he became the partner dealing with the negotiations principally from October 1990 to May 1991. He acknowledged that by letter dated 31 October 1990 MANL threatened to sue, as a consequence of which he wrote to MANL on 2 November 1990. It was suggested to Mr Taperell that the letter "was no more than a

nebulous attempt by you to express in quite imprecise terms your subjective complaint about the matter", to which he replied:

"Well, it was an attempt to explain where I stood at the time, which involved a number of points. One was that I did not have a clear view of my legal obligations and I wanted to find out. I did not have a clear idea of all the information I wanted to find out. And I was in the process of taking advice": Tp 693.

BC9402679 at 297

Mr Taperell said he was not in a position to formulate a counter offer at that time, that he had been aware by the time he wrote the letter of 2 November 1990 for over twelve months that certain payments had been made to Australian Thoroughbred Finances and Mr Still, which he regarded as irregular, and that B and T was in liquidation.

At Tp 695 Mr Taperell agreed that he telephoned Mr John Malouf of Beneficial Finance Corporation on 13 January 1992 and, after introducing himself, complained the No 1 Syndicate was trying to reach a compromise with MANL but could not get anywhere. Thereafter, he had a telephone conversation with Mr Curtis of MANL on 15 January 1992. Mr Curtis told him that he, Mr Curtis, was keeping an open mind on the question of a commercial resolution, he asked Mr Taperell to make a proposal and Mr Taperell agreed to do so. Mr Taperell said that he thought that during that conversation he acknowledged to Mr Curtis that he had not sought to make contact with MANL since May 1991, that being the month in which the former solicitors for the plaintiffs issued a notice purporting to rescind the contractual arrangements with MANL and instituted proceedings against it. Between then and the telephone conversation with Mr Curtis the "Mountain Rule" proceedings had been heard and determined. Mr Taperell agreed he swore an affidavit setting out the conversation verbatim as appears in para50 of his witness statement, although that affidavit was apparently not read in those proceedings and the matter proceeded to judgment without the tender of that evidence. Mr Taperell agreed that some days after speaking to Mr Curtis he wrote to him on 24 January 1992 offering to pay an amount of 50 cents in the dollar of the principal amount less amounts paid, to which Mr Curtis replied on 6 February 1992 rejecting the proposal and stating that "in short" it equated to a return of approximately only 10 cents in the dollar to MANL. Mr Taperell telephoned Mr Curtis after receiving that letter. Thereafter there was a discussion between Mr Taperell and Mr Broomhead, who was involved as the purchaser in the "Mountain Rule" case, which led to a resolution as between Mr Broomhead and the interests Mr Taperell was representing.

BC9402679 at 298

Mr Taperell denied that he knew it was wrongful to sell the interest in "Mountain Rule" at the time that it was done, although he agreed he knew that the No 1 Syndicate did not have any title to it. Mr Taperell sought to avoid a fairly direct question as to when it had occurred to him, as a solicitor of the Court, that it was permissible for a person, who has no title to an asset, to purport to sell it by giving a lengthy answer relating to practical problems about maintaining the horses, the affairs of the syndicate being in a mess and that MANL had indicated that it regarded the horses as the syndicate members' problem and did not want them. He concluded by saying that it was his belief that the interests of all concerned would be satisfied or best served by disposing of the horses "in an orderly fashion". Mr Taperell said that he did not think MANL had given its unequivocal consent to the sale and:

"Q. And you assert, do you, on your oath, that absent an unequivocal consent from the owner of the horses, MANL, to their sale, you had some right to proceed to sell them?

A. I believed that Mortgage Acceptance knew what was going on and accepted that situation.

Q. It would be minimally necessary, would it not, to ensure that what you were doing was permissible to have from MANL an unequivocal consent to the sales, wouldn't it?

A. Well, I thought there were communications between Mr Logan or Mr Plumptre and Mortgage Acceptance about these matters through the early part of 1991.

Q. Would you please answer my question. It would be minimally necessary to you, in order to do what you did, to have an unequivocal consent from MANL to that cause of action wouldn't it?

A. That was not clear to me at the time.

Q. And you never had such consent, did you?

A. There was not an unequivocal express consent. I should add if I may, just supplement that last answer, that I also had in mind that most probably the agreements, sorry I have this in mind that there were provisions in the documentation about sale of the horses .

Q. Whatever they said, Mr Justice Cohen decided in the clearest of terms that you had no right to sell the horses, didn't he?

A. Yes, that is what he decided."

BC9402679 at 299

This was a most unconvincing attempt, as appears from the transcript and as appeared to me as Mr Taperell was giving his evidence, to justify conduct which, one would have thought, a moment's reflection would have indicated to an experienced commercial solicitor was unjustifiable, and in a manner which did absolutely no credit to Mr Taperell. Even if there had been any doubt about the position before the decision of Cohen J, that was put to rest by his Honour's decision and the failure to prosecute the appeal. Perhaps the concession Mr Taperell made in that passage as to the absence of unequivocal consent was the reason the matter was not pursued before Cohen J.

BC9402679 at 300

Mr Taperell agreed that his Honour's judgment considered whether there was authority in the manager to sell the horses, which he found there was not, and, insofar as estoppel was raised, it was not based on any statement made by any officer of MANL that the horses could be sold or anything to that effect: Tp 702.

Mr Taperell was cross examined at Tp 703 about a letter he wrote to MANL on 3 December 1990. He agreed he was complaining about not being furnished with a full account of the circumstances surrounding the formation of the No 1 Syndicate, and that MANL was acting as a fiduciary in its dealings with the syndicate. He was asked whether he knew that MANL was acting on an arm's length basis and he said he knew it was an arm's length relationship although there was a question as to whether it was limited simply to lender and borrower. He was cross examined as to his knowledge of any facts that would suggest otherwise when he wrote his letter of 3 December 1990, and he said he knew of facts which would support the proposition that MANL had fiduciary duties. He identified those facts as being that MANL had been involved "in the establishment of the syndicate which had been the subject of the offer document and it had acted as a lender and a lessor in connection with that syndicate". He identified the offer document as Exhibit A. He said he knew that the reference to a lease having been established on 1 June 1989 referred to a financier other than MANL, that when he wrote the letter on 3 December 1990 he knew MANL had nothing whatever to do with the preparation of Exhibit A, but that he could swear on his oath that on 3 December 1990 he was possessed of knowledge of facts of MANL's involvement in the offer document "because it facilitated the establishment of the syndicate". He said that arose because it provided loan and lease finance, and he was then asked whether that was done as "an arm's length lender". He said he did not know what was imported by the words "arm's length", although he then offered the suggestion that they meant "independent, unrelated": Tp 705. He continued:

"Q. And the fact is that when you wrote your letter of 3 December 1990, you knew of no fact that would suggest, let alone establish, that in June 1989, MANL was anything other than an arm's length financier qua the syndicate, that is so, is it not?

A. In the sense of independent, in the sense in which I understand you to be using the term, yes.

Q. You have never known of any such fact, have you? That is the case?

A. Yes, I suppose that is correct."

BC9402679 at 301

This evidence makes it clear to me that Mr Taperell could not have had the understanding he asserted in the letter of 3 December 1990 in relation to this matter and that, in consequence, he was either mistaken about there being a fiduciary obligation, or, alternatively, he was simply seeking to put forward points which could not be established eventually, but which may assist in a resolution of the matter advantageous to him and his legal partners.

He was cross examined nextly about a statement in the letter of 3 December 1990 that the view was taken that Mr Bell had no authority to enter into agreements with MANL dated 30 June 1989 as he had purported to do. He agreed that he knew that had been done pursuant to Powers of Attorney, although he qualified that by saying he had purported to do so, and he then said that he did not know that Mr Bell had done so until February 1990. Once again this answer was unconvincing and it only required several questions in cross examination to establish that in July 1989 Mr Taperell knew Mr Bell had signed the documents. Why Mr Taperell could not have answered that question when originally put to him is a matter I find difficult to understand. It was a simple question and it may not be, in the overall scheme, a matter of significant importance. Nonetheless the approach Mr Taperell took to a simple question was evasive as I per-

ceived it. Mr Taperell agreed that from February 1990 until 3 December 1990 he made no assertion to MANL that Mr Bell lacked authority to execute the documents.

BC9402679 at 302

Mr Taperell agreed that although MANL rejected the offer the 10 cents in the dollar was not paid. He said that offer was put forward "as a basis for negotiation" and it was clear from some unresponsive answers he gave that it was put forward as a negotiating tactic. However, he added that he thought the letter reflected a basis for a practical commercial discussion. He continued:

"Q. You understand that the one view, namely, favouring the proposition that you owe nothing to MANL, is untenable, don't you?

A. I don't think that at all. I think it is amazing that an institution would receive a Power of Attorney and other documentation like that and think it was proper to purport to bind a whole lot of people to joint and several obligations.

Q. What is amazing about that Mr Taperell?

A. I think it is highly irregular and very improper.

Q. I see. The Power contains no limitation which would restrict its donee in the way in which you have suggested, does it?

A. I think a guarantee like that would require very express authorisation and when read with the other documentation is not something that a responsible financial institution would accent.

Q. Do you now? Has any barrister with whom you have conferred about this matter ever endorsed that view of yours?

A. Yes. I believe so.

Q. Who?

A. That was the tenor of the discussion with Mr Bathurst. I think it was the tenor of the way in which part of this case has been presented to the courts": Tp 707.

BC9402679 at 303

This evidence indicates several things, which I think are indicative of the approach taken by the plaintiffs in these proceedings. Firstly, there is no basis in law for suggesting irregularity or impropriety on the part of MANL. The documents were executed by a person who held a Power of Attorney in quite general terms. That Power of Attorney had been freely given by, inter alios, Mr Taperell. Mr Taperell had made no attempt to be present at settlement or to ascertain, within a reasonable time of execution, what documents had been signed by the attorney. I have already outlined these circumstances and it is unnecessary to repeat them. However, the moral rectitude Mr Taperell sought to import into his answer, as I observed it given, may well have coloured and thus impacted, in a relevant way, on the hindsight reasoning in which I believe Mr Taperell engaged.

Commencing at Tp 707 Mr Taperell was cross examined about other sales of horses. He was asked whether the proceeds had been paid to MANL and he said they had been paid into the No 1 Syndicate bank account, the reason for their not being paid to MANL being that until matters were resolved with MANL they should be paid into that account. Mr Taperell agreed that Cohen J had held that MANL owned the horses and in answer to a question as to why it was not paid the proceeds of sale he said "Well, I think, all these, this whole matter of who owed whom what was the subject of these proceedings. My recollection is that by the latter part of 1991 the orderly winding up if you like of the syndicate had pretty much been done and there had been expenses that had been incurred in maintaining the horses and dealing with the proceeds, including managers fees, accountants fees trainers, and the like.

Q. There may have been, but why wasn't MANL paid the money from the proceeds of the sale?

A. My own view of that your Honour was that the respective liabilities in money terms between the parties was to be sorted out by agreement or by these proceedings."

BC9402679 at 304

Mr Taperell said that the fate of the proceeds should await the decision in these proceedings, and that the advice he had was that it was not naked theft, having regard to the terms of Cohen J's judgment, to retain the proceeds of sale. He continued:

"Q. I see. Are you saying on your oath that you had advice from someone to the effect that you were entitled to retain the proceeds of sale after Mr Justice Cohen's judgment?

A. I don't recall what advice we were given about that after that time. I mean, by then moneys had been paid out for various expenses already. I can't recall what the balance was in the syndicate account."

This I regarded as a very strange answer because I would have expected a solicitor to be well aware of advice he had received in relation to that specific matter.

At Tp 709 it was put to Mr Taperell that with his knowledge and consent the syndicate sold all of the horses and retained the proceeds to which he replied:

"That happened and I believe it happened to the knowledge of Mortgage Acceptance."

BC9402679 at 305

Having forced that answer upon the cross examiner Mr Taperell was then compelled to accept that there was "no unequivocal express consent, as I said previously", that Cohen J had not found any consent, and that there had been no accounting to MANL for the proceeds of sale of the horses or for prize money. The unresponsive answer and the concessions it forced from Mr Taperell did no credit to him at all.

This raises to my mind a most serious matter. There can be no doubt that Mr Taperell was well aware that MANL had not consented to the sale of the horses, that Cohen J had found that the syndicate had no right to sell the horses, that Mr Taperell was aware that the syndicate continued to sell horses after his Honour's decision, and that the syndicate failed to account to MANL for the sale of the horses. The only reason, which cannot even be suggested to be an excuse, for so acting was to reimburse the syndicate for expenses it had paid. That provides no legitimate reason at all. The simple fact seems to be that Mr Taperell, as a solicitor of the Court, was prepared to acquiesce in the sale of the horses, which he knew the syndicate had no right to sell, and to acquiesce in there being no accounting to MANL for the proceeds of sale. I find this conduct commercially reprehensible and it reflects most adversely on the credibility and integrity of Mr Taperell.

Mr Taperell agreed that it appeared that the proceeds from the sale of all horses totalled $171,522 and prize money totalled $76,611 and that none of the money was accounted for to MANL.

BC9402679 at 306

It then emerged that the No 1 Syndicate used the proceeds of sales of the horses to meet some of the legal costs in the present proceedings, which was quite contrary to the evidence previously given that the money had been set aside pending the determination of the proceedings. The evidence also was that the money had been spent on syndicate expenses. It also emerged, Tp 715, that the proceeds of the sale of the horses were used to effect the settlement by way of payment to Mr Broomhead. Mr Taperell said he could not say how much of the sale proceeds had been used for legal costs and whether the costs were those concerned with the "Mountain Rule" proceedings or with those proceedings and the present proceedings.

At Tp 716 Mr Taperell said that he had no evidence that any person employed by MANL, other than Mr Lock, knew of the payment to Mr Lock "at the moment".

Some measure of the imprecise, unthought out evidence given by Mr Taperell can be gauged from the following evidence at Tp 739:

"HIS HONOUR: Q. Did you give any consideration as to by whom the money had to be received prior to 30 June for you to get the tax benefit?

A. No I don't think I did your Honour.

Q. Would I be correct in thinking that normally it would have to be received by the financier?

A. I think that would he true.

Q. So this method of paying, namely firstly to Bell and Tonkes with a view to them doing some co ordinating would delay the flow of money from you to the financier?

A. It could your Honour. I suppose unless they endorsed the cheque, I don't know.

Q. There would be hardly any point in giving them a cheque simply for them to endorse, would there?

A. No, I suppose that is correct. I mean I'm merely speculating, just conjecture from me I would have to say. I suppose it could be that the cheque might be returned because the application was unsuccessful so it could not go ahead.

Q. But that would apply whether the cheque was payable to Bell and Tonkes or a named financier?

A. Yes that's true."

BC9402679 at 307

At Tp 746 Mr White conceded that it was no part of the plaintiffs' case that Mr **McConnell** was an agent of MANL.

At Tpp 774 and 775 Mr Taperell was cross examined by Mr Svehla to suggest that he told members of the syndicate, including Mr **McConnell,** that as a result of his discussions with MANL the syndicate could sell the horses. That was not something which appeared in his witness statement and, I am satisfied on the totality of the evidence that Mr Taperell was never told that by any representatives of MANL. Insofar as he gave evidence that he informed other syndicate members that MANL had given its consent to the sale of the horses provided there was a proper accounting I reject the evidence that he was so informed by any representative of MANL. Mr Taperell said that no defence was raised in the "Mountain Rule" proceedings to the effect that MANL consented or was estopped from denying the right of the syndicate to sell, and the giving of any such consent was totally inconsistent with what was litigated by the present plaintiffs in the "Mountain Rule" proceedings. Quite apart from that I accept the evidence of the witnesses called on behalf of MANL in preference to the evidence of Mr Taperell as to what was said. I shall deal with this in more detail.

For the reasons I have given in considering the evidence of Mr Taperell I concluded that it was totally unsatisfactory and, generally speaking, I do not accept it. The evidence was inherently inconsistent, in disagreement with the probabilities, at variance with evidence I otherwise accept and given in a manner I found lacking any conviction or, in some instances, truthfulness. I reject the evidence of Mr Taperell that he was induced by any representations or, in reliance upon them, entered into the contractual obligations with MANL.

BC9402679 at 308

THE EVIDENCE OF BRIAN JOHN KILLALEA The witness statement of Mr Brian John Killalea is Exhibit X. He was admitted as a barrister and solicitor in New Zealand in 1967, joined Baker and McKenzie as a legal assistant in 1969 and was admitted to practise as a solicitor in New South Wales in 1972. He became a partner of Baker and McKenzie in 1975 and specialised in contract law. He met Mr **McConnell** in 1970 and, at about the time he joined Baker and McKenzie he met Mr Logan.

Mr Killalea became aware of Mr **McConnell's** interest in thoroughbred race horses and, in early June 1989, Mr **McConnell** approached him about entering into the B and T Syndicates. Shortly after that meeting he received various documents, including Exhibits A and B from Mr **McConnell,** which he read. Matters of particular significance to him were a statement in the letter dated 4 June 1989, part of Exhibit B, and at 23 of the brochure, Exhibit A. Mr Killalea was attracted to the investment "in part" because he could borrow 100 per cent of the necessary funds from "a reputable financier on an interest only basis". He said he considered that NMRB was well recognised in the market as a strong and reputable financier "which would not have agreed to participate in the syndicate without itself being satisfied of its viability. This was particularly so since it had agreed to lend monies on the security of the horses only".

BC9402679 at 309

Mr Killalea understood that there would be ten ownership units and that each investor would borrow $210,000 from NMRB. He believed this would cover all running expenses for the initial two years of the syndicate and thereafter the expectation was that it would be self funding. He also believed the syndicate offered a sound investment and he would not have participated in it if it did not. He thought the interest rate was approximately 17.5 per cent and that the loan would involve monthly payments of about $3,063 and "as such represented my only on-going financial commitment for two years". He told Mr **McConnell** he would like to invest and filled out his application form and paid a cheque for $3,062.50, which he understood to be the first month's interest.

He anticipated receiving formal documentation from NMRB before the end of the 1989 financial year to enable tax deductions to be claimed. In late June 1989 Mr **McConnell** requested a Power of Attorney in favour of Mr Bell and Mr Killalea said, from reading that document, he was aware that the documents to be executed were a Loan Agreement, a Thoroughbred Investment Agreement and a Livestock Lease Agreement. He added:

"I had by that time come across many loan agreements and I anticipated that the agreement emanating from NMRB would be in a standard form. The matters I was particularly interested in were the amount of the loan, the applicable interest rate and my monthly payment obligations. I had ascertained all these from the documents that had already been

forwarded to me, and I had made my first interest payment accordingly. At no stage did I anticipate that a guarantee would be required by the financier from me, guaranteeing the performance of the obligation of other members of the syndicate."

BC9402679 at 310

Mr Killalea said he assumed that Mr **McConnell** had, or would, see and approve the terms of the contractual documents prior to execution, that he completely trusted Mr **McConnell,** and that he would not have agreed to enter into the syndicate had he known that cross guarantees were required from the investors. He believed that the involvement of Messrs **McConnell** and Logan was restricted to that of investors. Had he been aware of their further involvement he would not have entered into the No 1 Syndicate without making further enquiries about the extent of that involvement, and he would not have executed the Power of Attorney authorising Mr Bell, whom he otherwise did not know, to execute documents on his behalf.

Between September and November 1989 he was absent from his office for lengthy periods. In mid October he became concerned when he received the memorandum from Mr **McConnell** because both the identity of the lender and the terms of the loan had changed without his knowledge or consent. It was then he became aware of the existence of MANL. When he read the letter he thought the additional sum of $27,437.50 comprised interest to be paid and he paid it.

In para22 he said that it was fundamental to his decision to invest that NMRB was standing behind the syndicate because of its reputation and because it was a bank. He said he regarded finance companies "with caution" and if he had known MANL was involved he would "have scrutinised very carefully the investment and the documents that had been proffered". The fact is that when he did become aware that MANL was involved as the financier he did not call for the documentation, which he saw for the first time in early February 1990.

BC9402679 at 311

After October 1989 he was told that B and T "may be in financial difficulties" and that enquiries were being made. He was unable to attend the meeting of 9 November 1989. By letter dated 21 December 1989 he learnt for the first time that substantial moneys had been paid to Australian Thoroughbred Finance and to Mr Still, the effect of such payments being to increase substantially the moneys he was obliged to pay and the cost of the finance. He said in para24 he would not have entered into the syndicate had he known that such commissions were to be paid.

In about May 1990 he became aware that MANL was pressing for payment, and he attended a meeting with various partners of Baker and McKenzie and a representative of MANL. There was discussion at that meeting about a possible resolution of the matter, but Mr Killalea told both Mr Logan and Mr **McConnell** he would not sign any further documents with MANL. He said he was very concerned about MANL's participation in the venture.

Between May 1990 and early 1991 he was aware, from discussions with his partners, that various meetings were held in an attempt to resolve the disputes. He believed that one or more of his partners was or were acting to protect the interests of the syndicate members. He saw some communications but ultimately he was told that solicitors had been retained and proceedings commenced.

BC9402679 at 312

After the luncheon adjournment on 16 December 1993 Mr Grieve announced that the proceedings between MANL and Mr **McConnell** had been resolved and, thereupon, Mr Skinner commenced to cross examine Mr Killalea: Tp 821. He agreed that he had previously joined two syndicates in respect of one of which he used his own finances and in respect of the other of which he borrowed money. Mr Killalea agreed that a tax advantage was a significant feature in his entering into the arrangement, and that without that benefit he probably would not have considered the scheme at all.

At Tpp 831 and 832 Mr Killalea was cross examined about his assertion that the value of the horses had risen by half a million dollars and the significance he attributed to that. He agreed that in his careful evaluation of the business venture he must have realised that the purported increase was much less than half a million dollars. He agreed that the half million dollar increase was significant, and it was put to him that was an erroneous view to which he replied:

"Yes, I must say that I looked at two figures principally: the price at which the horses were bought and the value at which they had been insured because I had known that they were insured by Logans and I was well aware of Logan's reputation as being a very experienced and leading horse insurer and I was confident that a figure he had put on it for insurance purposes would be a pretty accurate figure. These other items in here are essential costs. I must say I did not pay particular attention to the wording that the price of the horses had been increased by these expenses of a figure of over one million dollars."

He agreed that he read the numbers, but did not, at least possibly, realise their significance, although he could not suggest any other possibility.

BC9402679 at 313

At Tp 845 Mr Killalea said he obtained an income tax deduction in respect of the financial year ended 30 June 1989 of $95,000 by virtue of his investment in the No 1 Syndicate.

At Tp 855 Mr Killalea described the words "standing behind" in relation to NMRB as meaning that he saw "the role of the financier in a finance syndicate of this sort" as being "essentially as a partner with the promoters of the syndicate, the syndicate would not and could not proceed without a good viable financier". He agreed that there was nothing in Exhibits A or B which indicated that NMRB was to be more than the lender and that his belief, as just stated, was based on an assumption he gained from reading the documents. He did not point to any part of the documents, which made good the assumption. He said that NMRB was to own the horses, by which he seemed to seek to suggest that it would be an equity partner. He did not communicate with NMRB to see whether his belief was well founded, although he did not indicate there was any difficulty in doing that. Mr Killalea agreed that one of the reasons for entering into the syndicate was to obtain a tax advantage and that he recognised there was a risk involved in entering into the syndicate, although he was not prepared to take that risk to make an investment he thought would carry with it the prospect of real returns and other tax advantages.

At Tp 860 he was cross examined about the Power of Attorney. At Tp 865 Mr Killalea said:

"Q. Bell was the donee of the Power?

A. He was.

Q. And you accepted that whatever he did pursuant to that Power of Attorney was satisfactory for you, isn't that right?

A. Yes.

Q. And you took no steps to inform Mr Bell, as donee of the Power, of any qualification of any challenge (sic) to that Power?

A. No."

BC9402679 at 314

He said he did not arrange for anyone to attend on settlement, but he expected Mr **McConnell** to utilise a Power of Attorney in the same way as he had done, unless Mr **McConnell** was in a position to execute the documents himself, that he had no reason to think, one way or the other, that Mr **McConnell** would look at the documentation or check it, although he then said he would have expected Mr **McConnell** to check the documentation, and that he assumed that he was a member of the No 1 Syndicate.

At Tp 868 Mr Killalea said that when he ascertained that MANL was the financier he did not react to that fact or inform MANL that he was surprised about the change, and that he did not communicate with MANL at all. He did not inform MANL that he did not wish to proceed with the syndicate as it was the financier, and when he was asked whether he accepted that the new financier was MANL he said he did not think he went through that mental process. He agreed that he read that the financing terms were different from those proposed by NMRB, and:

"Q. And when you read that, as a very experienced solicitor, weren't you moved to attempt to discover what those quite different conditions were?

A. No, I was - the juxtaposition of events had caused me a great deal of concern. Perhaps I should have taken a much more calm and sober approach to the whole thing, but I was very confused and concerned.

Q. What could you have done then, Mr Killalea?

A. Well, I don't know.

Q. Quite easy to call up MANL wouldn't it?

A. I suppose I could have found out who they were and called them us.

Q. You could have asked for your documents, couldn't you?

A. I suppose I could have.

Q. Quite an easy thing to do wasn't it?

A. In hindsight, I suppose you are right."

BC9402679 at 315

When one has regard to the fact that Mr Killalea was asserting that the involvement of NMRB was an essential matter, the evidence I have just quoted is very strange. Mr Killalea as an experienced solicitor made no attempt to find out the terms and conditions imposed by MANL and to suggest that to have taken that action was the product of hindsight is one I do not accept. Mr Killalea had left the execution of the documents to the donee of the Power, as he said, and he had believed, if one accepts his evidence, that NMRB was to be the financier. He not only found out that there was a different financier, but that also the terms were different. Yet he took not even the most elementary and rudimentary step to ascertain what his contractual obligations were.

He agreed that when he was called upon to pay the additional $27,437.50 he did so without hesitation.

He agreed he attended the meeting on 9 November 1989 at which B and T resigned, notwithstanding that he had previously said that he did not do so.

He said he recalled discussing the matter of the change of syndicate manager in consequence of the bad financial position of B and T: Tp 872, and that it was likely, when he received the minutes of that meeting, that he would have seen the amounts payable to Australian Thoroughbred Finance and Fred Still. He agreed he could not have missed them and that he could not have failed to see a management fee paid by the No 1 Syndicate of $33,332. He continued, Tp 873:

"Q. And after that document was received or believed to be received by you - that is in about November of 1989 - you continued, didn't you, to accept that you were a member of the syndicate and that the syndicate was continuing to operate as before?

A. No, I was concerned that I was part of a shipwreck.

Q. But you were also accepting that you were still part of the syndicate, weren't you?

A. Yes.

Q. You didn't tell MANL that you wished to terminate your involvement with the syndicate, did you?

A. No."

BC9402679 at 316

I find it difficult to accept that if Mr Killalea had believed he was "part of a shipwreck" in consequence of what had transpired, would have he failed to take any steps, if he believed he had grounds to terminate his contractual obligations with MANL, to do so. After the appointment of the new manager he agreed he continued to be a member of the syndicate and he took no steps to tell MANL that he wished to discontinue that situation. After he received the copy of the syndicate income tax return up to 30 June 1989 in about December 1989 it remained his intention that Mr Logan should continue to manage the No 1 Syndicate.

He received the contractual documents from MANL under cover of a letter dated 26 February 1990 and he said he looked at the documents, and particularly the loan and the lease schedule, because they were the ones that had most effect on him. He noted the schedule of payments, the interest rate, the cross guarantee, the length of the term of the loan and the length of the term for the lease. He was then asked:

"Q. And you brought to bear in your examination of those documents all the skill and experience of over twenty years of legal practice, didn't you?

A. Well, I think, Mr Skinner - I am sorry. HIS HONOUR: Are you all right? (Mr White requested, out of fairness to the witness, the matter be adjourned for further hearing until after Christmas - granted.)"

BC9402679 at 317

It was clear from the evidence Mr Killalea had given immediately before the adjournment that he read and understood the contractual documents. The necessity for the adjournment was that he appeared to become somewhat upset or inconvenienced when a fairly simple question was put to him about his consideration of the documents in his capacity as a solicitor.

The cross examination re commenced on 14 February 1994. Mr Killalea was asked about the contractual documents and, at Tpp 876 and 877 he said:

"Q. Because you brought to bear in your examination of those documents, the ones that were sent under cover of that letter, all the skill and experience of over twenty years of legal practice, did you not?

A. I don't know whether that is the case because - well I suppose I did. We had that and I accepted the fact there was a difference, a substantial difference between what was set out in this document and what I had understood to be the case. But I can't say I read the documents with the coolness I may have read them had I been examining them say on behalf of a client.

Q. You were not careless though, were you?

A. No. I was very upset as if - that is all I will say."

It seems to me that the only reasonable inference to be drawn from this evidence is that Mr Killalea accepted that the contractual documents imposed obligations upon him, which he had not anticipated, but from which he could not see a method of escaping because he had authorised the donee of the Power to execute those documents without more. The extraordinary thing is that although he was "very upset" when he read the documents he took no steps to advise MANL that the documents were not ones he considered to be binding upon him for the reasons now asserted.

BC9402679 at 318

Mr Killalea was referred to para17 of his witness statement in which he said he was particularly interested in the amount of the loan, the applicable interest rate and the monthly payment obligations, and that he knew those matters after he received the contractual documents. He agreed that he had said that he would not have entered into the No 1 Syndicate had he known cross guarantees were required and that he would not have done so, but having received the documents he did not communicate with MANL stating he did not wish to be bound by them. He added:

"Q. You acquiesced to the participation you previously had continuing with B and T's No 1 Syndicate?

A. I don't know acquiesced is the right word. I felt I was trapped and nothing I could do or say to MANL would have any influence on what was happening.

Q. In your experience as a lawyer, and in regard to the contract law you are aware there are some circumstances where a party may properly rescind a contract, are you not?

A. Yes.

Q. When you received those documents did you give consideration to the possibility you might be entitled in law to rescind the agreements that apparently bound you?

A. Well the view I had was that the documents were void.

Q. What do you mean by that?

A. They were not documents I had agreed to enter. HIS HONOUR: Q. When you did you first form that view, namely that the documents were void?

A. I think after receiving them, your Honour around February.

Q. Of?

A. Of February 1990."

BC9402679 at 319

One therefore has the situation of Mr Killalea asserting that he believed documentation, which had been signed on his behalf by his attorney, was void as from February 1990. If that had been a genuinely held belief it is difficult to understand why Mr Killalea either felt he was trapped or that he was part of a shipwreck. Mr Killalea was in a position, if anyone was, to assert that the documents were not binding upon him. As I have noted, at Tp 877, Mr Killalea had said he was very upset when he read the documents and, at Tp 878, he said he thought other members of the syndicate were "looking at the thing with a little more cold blood than I was". This all tends to indicate, and I think the proper inference to be drawn from the evidence is, that Mr Killalea appreciated he had made a bad business deal through failing to take the most rudimentary steps to protect his own interests.

I have come to the conclusion that Mr Killalea, as with other partners of Baker and McKenzie, has brought to bear upon his consideration of this matter the benefit of hindsight. He appreciated that he entered into these transactions without taking any care to protect his own rights and, when the syndicate became a bad business transaction he has cast around to find reasons why he is not bound by the documentation. In my view his failure to assert to MANL that he was not bound by the documentation, when he had had the opportunity of seeing it, leads to the clear inference that he did not then consider he had any basis at all upon which he could escape those liabilities. That he may have committed to other people negotiations with MANL at a time when he thought the documentation was void, at least as against him, is hardly consistent. If, as was undoubtedly the case and as he accepted, the business deal was a bad one, one would have thought, holding the view that the documentation was void, that he would have taken steps to relieve himself of obligations under it forthwith. It was put to Mr Killalea that if he "truly believed" that the documentation was void and of no effect he "surely" would have informed some other body that he was no longer or never had been a member of the syndicate: Tp 880. He answered that in the negative because he said other people were involved apart from himself discussing matters with MANL and, he assumed, with the Australian Jockey Club, and he was prepared to rely on Messrs **McConnell** and Logan completely and what they were doing was all right by him.

BC9402679 at 320

Mr Killalea continued to receive information about the horses in the No 1 Syndicate. He was prepared to accept any benefit derived from the horses and from his membership of the syndicate. He agreed, I think for the second time, that he learnt in October 1989 that MANL was the financier and that the terms of the lending were "quite different from the terms" he had anticipated from NMRB: Tp 881. He took no steps to terminate his participation in the syndicate and when asked why he did not he said:

"I thought you questioned me all about this last time and I told you that a couple of things happened at about the same time. I received news that the syndicate, that Bell and Tonkes collapsed, that the whole thing was a shambled (sic). And then I heard the financier is different. The whole thing was just a disaster. You might say I should have calmly and coldly taken this step, but it was different. I thought you had been through all this when last time I was in the box.

Q. In any event, having had that information you continued to participate as a member of the No 1 Syndicate?

A. I remained a member of the No 1 Syndicate, yes.

Q. You were prepared to accept whatever benefit came your way by virtue of your participate (sic) were you not?

A. I suppose so, yes.

Q. There is no doubt about it, is there?

A. I must say I did not think of it in those terms but I must say you are right."

BC9402679 at 321

Once again this evidence causes me great disquiet. Mr Killalea was expressing the view that by the end of 1989 the syndicate was a shambles and "just a disaster". He proffered the view that one might think he should have taken a step "calmly and coldly". The simple fact is he did not react in that way. One must therefore ask why he did not. In my view the only inference is that he failed to conduct himself, in the way one would have anticipated, because he realised that he had entered into the contractual agreements through his attorney and, contrary to his evidence that he thought that the documentation was void, he understood that he was bound by that documentation. In these circumstances for him to seek to assert now that he should be relieved in some way from the obligations in respect of matters about which he knew in late 1989, but took no steps to advise MANL until 1991, seems to me to be an untenable position. Not only did he not take any steps to relieve himself from the obligations, but, as he agreed, he continued to take the various benefits derived from his participation in the No 1 Syndicate.

This matter appeared more starkly at Tp 885:

"Q. Once you discovered who Mortgage Acceptance was, you accepted its financing to enable you to continue in the syndicate, did you not?

A. No, not really. They were telling me I owed them a whole lot of money with cross guarantees. It was not a case where I could say I want nothing more to do with you, thank you, I was trapped as I said before.

Q. But they were not asking for money in September/October 1989, were they?

A. No.

Q. You were not trapped in September/October 1989, were you?

A. I thought I was a member of a failed syndicate.

Q. You were a lawyer with years of experience?

A. Yes.

Q. If you had any doubt about your legal position you could consultation with another lawyer?

A. I had consultation with others of my partners, yes.

Q. As a consequence of that consultation you went on just as before in relation to the syndicate, did you not?

A. I had very little choice, I had no choice.

Q. Why didn't you say to MANL 'I don't want your money, you can have it back'?

A. I THOUGHT THAT IS WHAT MY PARTNERS WERE DOING.

Q. In September/October 1989?

A. I don't know if the dates are right. I am sorry, that was later, that was much later.

Q. Do you mean by one of your partners a moment ago you believed that one or more of your partners may have said to MANL 'You can have your money back'?

A. I don't feel they said that." (My emphasis.)

BC9402679 at 322

This evidence highlighted, so far as I was concerned, and observing Mr Killalea as he gave it, his appreciation that he was devoid of any basis in late 1989 for seeking to avoid his obligations to MANL and his inability to divorce, in his thinking, the question of his liability from what he perceived to be the failed syndicate. Mr Killalea impressed me as being unable to look at the matter objectively, even when giving his evidence, and, in my view, that lack of objectivity flowed from the emotional involvement arising from his having allowed himself to become a party to this syndicate without taking any steps to look into the matter or to protect his own interests. I have no doubt that as with other partners in Baker and McKenzie Mr Killalea was seeking to erect a legal basis for denying liability, which had no factual or legal validity to his knowledge. If he had believed there was any such validity there is absolutely no reason, so far as I can see, why he would not have sought to have avoided his obligations in late 1989.

BC9402679 at 323

At Tp 886 I suggested to him that a "simple starting point" for relieving himself from the situation would have been to offer to pay back the money. He said he supposed that would be correct, but the reason he did not do it was that all the money had been spent, although he agreed that was hardly MANL's fault, but he added:

"MANL as it turned out was part of the syndicate. They provided the money to enable the syndicate to buy horses, so to that extent they were very closely involved in the whole thing.

Q. If you did not want to be involved further with MANL there was nothing to stop you paying MANL and re financing with the financier of your choice?

A. I suppose that is right.

Q. Why was that not done?

A. I suppose there are questions of amounts. MANL, as I understand it, had got back a lot of money which it had lent out in any event.

Q. At what stage are we speaking about now?

A. As it transpired that happened very early on. That happened in June or July 1989. But I didn't know about that for a long time afterwards."

This evidence tends to point up the difficulties Mr Killalea had in offering any logical or acceptable explanation for the way in which he conducted himself once he had learned of certain matters by late 1989.

BC9402679 at 324

Mr Killalea said that no offer was made to give the horses back and that, during 1990, he continued to be a member of the No 1 Syndicate, although at a time when he believed the agreements were void. His evidence continued, Tp 887:

"Q. How could you take the benefit of participation in the syndicate believing, as you say you do now, that the agreements were void?

A. Well that was the view I had. It was just everything was different. The identity of the lender was different, the terms was (sic) different. Everything was different.

Q. So why didn't you say to MANL these documents purportedly signed on my behalf are void, take your money back take your horses back and bring it to an end?

A. I CAN'T ANSWER THAT.

Q. Why not?

A. I DON'T KNOW WHY I DIDN'T DECIDE TO DO THAT.

Q. But you did decide not to do it, did you?

A. No.

Q. You decided to plough on with the syndicate, didn't you?

A. I don't know plough on is the right word.

Q. You decided to continue your participation in the No 1 Syndicate having been told about commissions and having received in February 1990 every single one of the documents described in Annexure Y?

A. I felt I had no other choice.

Q. You knew at that time there was a cross guarantee in the loan documents?

A. Yes, I think at that stage I had found that out." (My emphasis.)

The inability of Mr Killalea to answer why he did not make certain decisions underscores, in my view, the availability of the inference that he did not do so because he appreciated there was no legal basis upon which he could.

The degree of emotional involvement of Mr Killalea is exemplified further in the following answer at Tp 888:

"This whole business, as I mentioned before, to me it was a disaster. The whole thing was a disaster. I must say whereas with other Syndicates I had been in I paid particular attention to how the horses were going because the Syndicates were working properly. In this thing I tended to shut my mind as to how the thing was operating."

Once again this is an extraordinary approach from an experienced commercial solicitor who would have me believe that he believed the documentation under which he was bound was void. If that were so, or even arguably so, Mr Killalea had every opportunity to seek to escape from the position in which he found himself. His failure to do so only leads to the inference that he appreciated he had no basis for so doing.

At Tp 900 Mr Killalea said that after he became aware of certain alleged prior business dealings with Mr Logan and Mr Bell he took no steps to have Mr Logan removed as manager and he supposed he accepted Mr Logan in the same way as before. He added:

"If I had known that Mr **McConnell** was a director and had an interest in the syndicate, and if I had known that he had a personal interest in guarantees for the promoters of the syndicate and if I had known that he was looking to discharge his obligations under the guarantees by taking money from syndicate members, I would have had no interest in entering into the syndicate at all."

It was clear to me, from the evidence Mr Killalea gave at Tp.901, which repeated other evidence he gave, that he was, basically, prepared to leave negotiations to Mr Taperell. Thereafter Mr Killalea was kept informed of the steps being taken to run the syndicate, including the racing of horses. He was cross examined about his knowledge of the intention to sell horses.

Mr Killalea said he knew "Mountain Rule" had been sold, but he made no enquiries as to how the proceeds of sale were distributed, and he did not seek to ensure that they were paid to MANL. He said he must have known that "Mountain

Rule" was not owned by the syndicate and that the proceeds of the sale of "Mountain Rule" were applied to discharge amounts owing by the No 1 Syndicate to a trainer.

BC9402679 at 326

In March 1991 Mr Killalea received demands for the repayment of the moneys owing to MANL and was aware at that time that MANL still regarded him as being bound by the agreements entered into 1989. At Tpp 908 and 909 Mr Killalea gave this evidence:

"Q. You took no responsibility yourself then to find out what was happening to the sale of proceeds of the horses not owned by the syndicate but leased, it seems so?

A. No.

Q. You believed that the agreement or lease was void, did you not?

A. Yes.

Q. And you were acquiescing in the sale of horses that you had no lease interest in, is that not so?

A. I suppose that might be the case.

Q. You thought that MANL owned the horses, I take it?

A. No, I didn't think that at that stage.

Q. Did you think the syndicate owned the horses?

A. I really didn't apply my mind to who owned the horses.

Q. Who did you think owned the horses?

A. I suppose now it's quite clear I suppose that MANL owned them.

Q. And you were acquiescing in the sale of MANL's horses at a public auction, knowingly, is that right?

A. Yes I must have. ..

Q. You permitted Mr Plumptre to carry out the sale of the horses, knowing that they belonged to MANL?

A. I probably acquiesced.

Q. What did you acquiesce in as to the sale of the proceeds of $700,000 odd that the brood mares produced?

A. I didn't think the sale business was an issue. As far as I was concerned with MANL - there may not have been any dispute with MANL as to whether the horses could be sold or what was done with the proceeds. In my mind there was no knowledge of any disagreements with MANL as to what was being done. HIS HONOUR: Q. Does that mean that you understood at the time that MANL owned the horses?

A. I can't remember thinking at that stage as to, you know, who owned the horses. I knew there had been discussions in relation to the sale of the horses, their intention to sell the horses, but I didn't think that was a point of contention with MANL.

Q. That was what caused me to ask you whether you understood that MANL owned the horses at the time?

A. I can't remember what I thought, your Honour.

Q. I want to be quite clear about this Mr Killalea. Are you seriously saying to me that as at 1991 you did not direct your mind to who owned these horses in this arrangement?

A. Yes your Honour.

BC9402679 at 327

(I think $700,000 should read $70,000, but no application was made to change the question as recorded.)

I reject this evidence. In my view it is inconceivable that Mr Killalea did not direct his attention to the ownership of the horses, which constituted the only security MANL held, in 1991. The answer is inherently improbable. I have not the slightest doubt that Mr Killalea appreciated the difficulty which arose from the decision of Cohen J in the "Mountain Rule" case, so far as Mr Killalea was concerned. For him, as an experienced commercial lawyer, to assert that he did not

direct his mind to the question of ownership is unbelievable. At Tp 911 the improbability of the truthfulness of the answer Mr Killalea gave was exposed further:

"Q. On 9 July 1991 what right did you as a participant in the syndicate have to retain those eight horses?

A. Well I don't know. You see, none of this seemed to be an issue as far as I was concerned with MANL, whether or not the horses were sold, I don't think MANL was kicking up a fuss about that. The retention of the horses by the syndicate, I didn't think MANL was too sore about that, and I must say as a syndicate member, I thought maybe what was happening was done with MANL's consent."

BC9402679 at 328

Mr Killalea said that whilst the proceedings against MANL were commenced in about May or June 1991, so that then there was a real dispute between them, he took no steps to return the horses to MANL, and said, at Tp 912:

"Q. Did you not think it was a duty on you as a solicitor, if nothing else, to enquire about what was happening to the proceeds of the horses as each was sold?

A. No I didn't think that.

Q. You did not think that you owned the horses did you?

A. No."

This evidence is quite contrary to the evidence Mr Killalea had given but a short time before that he did not direct his mind as to who owned the horses.

Commencing at Tp 913 Mr Killalea was cross examined about his knowledge of the "Mountain Rule" proceedings in which he was a defendant and which involved a claim for the return of that horse. He said, notwithstanding, he made no assessment of his position in relation to that sale. Mr Killalea said he appreciated that Cohen J found that the syndicate had no right to possession of "Mountain Rule", but that he did not take any steps to ascertain the position in relation to other syndicate horses, his explanation for not doing so being:

"Well, perhaps I should have but, as in a number of other matters, I felt that the interests of the syndicate were being looked after principally by, I suppose, on the part of the actual members, Mr Taperell": Tpp 916 and 917.

BC9402679 at 329

Mr Killalea was cross examined at some length about why other horses were not returned conformably with the judgment of Cohen J and, at Tp 917, he gave the following totally unsatisfactory evidence:

"Q. On the face of His Honour Cohen J's judgment what right did you think you had to keep "Sensitive Caress"?

A. I am sorry, I can give no explanation beyond what I have said.

Q. Did you think about it?

A. I don't think I did."

I say the evidence is totally unsatisfactory because a solicitor of the Court, against whom a judgment had been given in respect of the horse "Mountain Rule", was unable to give any explanation, save that he did not think that MANL was concerned about the matter which in itself was demonstrably untrue in view of the fact that MANL had instituted the "Mountain Rule" proceedings, as to what right he thought the syndicate had to retain other horses. Not only was he not able to give an explanation, but the reason for that seems to have been that he did not direct his mind to it. I have a great deal of difficulty in accepting the evidence that a solicitor against whom a judgment had been given would not direct his mind to his rights and obligations consequential upon that judgment. If he did not that merely indicated the continuing failure by Mr Killalea to have any proper regard for his own affairs and makes it the more improbable that he relied upon or was induced by the representations to enter into the No 1 Syndicate. This evidence is totally consistent with the evidence he had given earlier of his failure to take any real steps to acquaint himself with the nature of the transaction into which he was entering.

BC9402679 at 330

Mr Killalea said he did not know what horses were sold, although he agreed that "Sensitive Caress" was, and that he did not know what happened to the sale proceeds. His explanation was that he was not looking after the management of the

syndicate or its financial affairs. This hardly explains why he did not make enquiries as to the sale of horses in light of the "Mountain Rule" judgment. That was put to him at Tp 917C and he replied:

"I've got no explanation beyond the answer I gave before, that I was leaving the management of the syndicate's business, what its income or what it did with its money, what it did with its property to the people who were effectively managing the syndicate.

Q. You did not feel any personal responsibility especially as a senior solicitor of this Court, to make personal enquiry?

A. If there had been a matter which to my knowledge was important and sensitive and of concern to MANL, I would have. but I didn't."

He said he took no steps to obtain legal advice, he did not ask Mr Taperell what happened to the sale proceeds and he presented himself to the Court as a syndicate member. He said it did not strike him "as a little odd, in view of what Cohen J had said about the right to the horse 'Mountain Rule', that 'Sensitive Caress' should be sold at all" and he could not recall thinking about it. I asked him whether, as he sat in the witness box, that struck him as a little odd to which he replied:

"Yes, perhaps it does, your Honour.

Q. Because unless it was sold pursuant to an arrangement with MANL, the sale, prima facie, would seem to have been unauthorised, wouldn't it?

A. Yes, your Honour. I don't think that the people who were managing the syndicate would have done anything that was improper or illegal.

Q. But it has been put to you several times, and you have agreed, that you were one of the defendants in the "Mountain Rule" case?

A. Yes your Honour.

Q. Didn't you think it would be prudent, having regard to the terms of that judgment, to get some confirmation from whoever it was that was running the syndicate, as you put it, that the sale of 'Sensitive Caress' was in order?

A. Yes, I suppose I should have your Honour.

Q. No, I am not asking you what you should have done; I am asking you, didn't that occur to you at the time?

A. I don't think it did, your Honour.

Q. Were you just unconcerned about these affairs?

A. No, I was concerned. I was concerned about the financial impact of the whole thing.

Q. What was the financial impact of the whole thing upon the sale of 'Sensitive Caress'?

A. I am not sure what the price was that was obtained for 'Sensitive Caress'": Tp 918.

BC9402679 at 331

Once again it is extraordinary, to me, that Mr Killalea was prepared to say that he did not direct his mind to these matters. They must have been matters he appreciated were of importance.

At Tp 919 Mr Killalea confirmed that he had said in earlier evidence that he thought the various contractual documents were void as at February 1990 by which he meant of no legal effect at all. In these circumstances the whole of his conduct thereafter is the more inexplicable.

As with a number of the plaintiffs I found Mr Killalea's evidence totally unsatisfactory. It was coloured by what appeared to be a strong emotional element. I have no doubt that sprang from his realisation that he appreciated that he had made a bad business deal and that he had taken no steps to protect his interests properly. Once again the evidence of what he did or failed to do after being made aware of relevant facts is completely inconsistent with any inducement from or reliance upon the representations for which he contends. I reject his evidence that he was so induced or so relied.

BC9402679 at 332

A FURTHER CONSIDERATION OF THE S52 CASE A fundamental issue in considering a claim under s52 is, of course, whether a party engaged in conduct which was misleading or deceptive, or likely to mislead or deceive. In the present case that raises a particular difficulty for the plaintiffs. Each acknowledged to a greater or lesser extent, and I am satisfied by the evidence that each appreciated, that the investment involved an element of risk which could only be described as real. It was an element of risk which exceeded that involved in many other forms of investment. The evidence also satisfies me that each plaintiff appreciated that if the risk turned against him or her the result would be that he or she would be required to meet the repayments to MANL out of his or her own resources. The brochure, Exhibit A, which each said that he or she had read stated the risk.

In the case of many investments it may be said that one could not expect that investors would undertake such a risk, so that the inference may be assisted that the investors were misled or deceived. But this investment had an important difference. It provided an immediate substantial taxation benefit, which was to continue in subsequent financial years. For a number of the plaintiffs the benefit for the first year, ie the financial year ended 30 June 1989 was in the order of $95,000. The presence of this feature of the investment takes away the force of the suggestion based on inference that if not misled or deceived the plaintiffs would not have entered into it.

BC9402679 at 333

But I am not in any way satisfied that the plaintiffs were misled or deceived. I am satisfied that each understood the risks involved, to many of which I have referred at the commencement of these reasons, and of the consequences of the risks turning against them. These risks were explained in the brochure. I do not accept, and the evidence of the plaintiffs did not really seek to assert, that as experienced commercial solicitors they did not understand the risk. What they also understood was that there was no risk, provided they entered into the venture, that they would obtain substantial taxation benefits forthwith. Each of the plaintiffs has failed, for all of the reasons given, to establish that he or she was misled or deceived. Each claim under s52 must fail.

I do not mean that a person who enters into an investment, which is risky or speculative with a full appreciation of that, may not, nonetheless, allege successfully that he or she did so as a result of other conduct proscribed by s52. It will depend, in each case, on the facts. The conclusion to which I have come is based on the facts as I have found them in this case.

Mr White presented the plaintiffs' case as one in which it would be necessary to decide the issues propounded under s52 in respect of each plaintiff and, subject to the question whether MANL was in any way a party to or otherwise liable for any breaches of s52, I think this formulation is correct. Although I have concluded that MANL was not so liable it has been necessary for me to consider the evidence of each of the plaintiffs, lest the other conclusions to which I have come are found to be wrong on appeal. By deciding all matters in issue the Court of Appeal can, if otherwise minded to do so, dispose of the proceedings. It will no doubt also be borne in mind that the existence of the guarantees requires findings to be made in relation to each first plaintiff. It was not submitted that if some were successful and some were not the unsuccessful ones would be relieved of their obligations under the guarantees.

BC9402679 at 334

There are a number of matters, which satisfy me that none of the plaintiffs were induced by any representations or relied upon them in entering into the syndicates and that none of them was misled or deceived. The reasons for my coming to this view involve my assessment of the credibility of each of the plaintiffs all of whom are, and were at all material times, experienced solicitors practising in the area of commercial law and with expertise in fields of that law to which I have referred. From the commencement of these proceedings it has been made clear by Mr Grieve that a central issue was the credibility of the plaintiffs. Put more precisely the issue has been whether the reasons they now advance for seeking to be relieved of the obligations created by the contracts entered into on their behalves on 30 June 1989 and 12 July 1989 are genuine, or have been put forward as a consequence of the processes of ex post facto reasoning, with the benefit of hindsight and fabrication after the syndicates failed, for the sole purpose of avoiding a liability to repay the money they borrowed. After an anxious consideration of all the evidence I am satisfied that the reasons advanced by the plaintiffs are without foundation and that they are the product of ex post facto reasoning with the benefit of hindsight and in an attempt, which in my opinion should be held to be totally unsuccessful, to avoid substantial financial obligations created by the contractual documents.

BC9402679 at 335

Although it has been necessary to look to the evidence of each plaintiff individually, there are certain common strands through it, which I find convenient to consider now.

1. Each of the plaintiffs was at the time an experienced commercial solicitor and a partner of the international law firm Baker and McKenzie. I have referred to this frequently, but it is so fundamental that it bears repetition. (On the other hand I am not to be taken as suggesting that people with that experience may not be misled or deceived or be the victims of misrepresentations.) Each plaintiff was used to dealing with commercial situations, was aware of the legal ramifications of entering into a contract, and had available ready access to legal advice.

2. A number of the plaintiffs had previously entered into commercial transactions with each other and/or others, including horse racing and breeding syndicates. The partner at Baker and McKenzie, who introduced an investment proposal, generally adopted the role of the "lead" partner. A number of the other partners relied on him or her to attend to the details of the matter and to advise them thereon.

3. That there should be a "lead" partner was the more necessary because the partners, perhaps because of the international nature of the firm, were frequently absent from Sydney and usually, in such circumstances, overseas. This, together with the substantial professional commitments of the partners, made it very difficult for meetings to be held and one has the impression that that was not regarded as appropriate or necessary. Memoranda were circulated amongst partners and whilst there was some personal communication it does not appear to have been great.

BC9402679 at 336

4. Mr **McConnell** was the "lead" partner in relation to this investment. He was a most senior partner in Baker and McKenzie and held in the highest respected by the others, who also reposed trust in him. Also the partners who entered into the syndicates were on very friendly terms with him. A strong background scenario to the whole case was that Mr **McConnell** not only introduced what turned out to be a bad business venture, but also betrayed that trust and friendship. Suffice it is to say that I have no doubt that in part the attitude taken by the plaintiffs was influenced by the view they took of Mr **McConnell's** role. However the plaintiffs do not seem to have even considered how that impacted on their contractual obligations to MANL. They commenced proceedings with Mr **McConnell** as a co plaintiff, which led to the complication about representation upon which the Chief Judge ruled and to which I have referred. When Mr **McConnell** settled the proceedings with MANL an application was made, although not pressed ultimately, to join him as a defendant.

5. Mr White submitted that it was extraordinary that the former solicitors for the plaintiffs allowed the plaintiffs to swear what he described as "pro forma" affidavits in support of their claims. This is a difficult submission to maintain because one would expect the plaintiffs, as officers of the Court, to have ensured, before they swore to the truth of statements in their affidavits, that they were true. The former solicitors acted, no doubt, on instructions. The only suggestion that the plaintiffs did not have every opportunity to ensure the veracity of their affidavits was that some documentation, which may have assisted, was not available to them because other solicitors were holding a lien for their professional fees. I have no doubt that this matter could have been accommodated and that insofar as it was a matter of importance it was incumbent upon the plaintiffs, as deponents of affidavits and officers of the Court, to take whatever steps were necessary to ensure the truth of the statements in their affidavits. Insofar as statements in those affidavits are not accurate the blame lies with the plaintiffs and not their former solicitors.

BC9402679 at 337

I think it appropriate to note Mr White's written submission, which had as its reference the paragraphs concerning that the plaintiffs became aware of the commissions being paid in the latter part of 1990. He wrote:

"1.17.2 These words were inserted in a 'pro forma' style in each affidavit; affidavits prepared by the solicitors then advising the Plaintiffs and furnished to them for execution when, by and large, the Plaintiffs did not have access to their documents which had been given to their solicitors for discovery. 1.17.3 It is the fact that it was only in late 1990 that the Plaintiffs learnt that the most important undisclosed payment, namely that to MANL's employee Lock, had been made. 1.17.4 Nonetheless it is readily conceded that the affidavits prepared by the Plaintiffs' solicitors were executed by them containing errors and ambiguities. When this was learnt by those presently advising the Plaintiffs, fresh statements were prepared and filed (albeit under severe time constraints). The Plaintiffs accept the criticism that they should not have signed the affidavits put in front of them by their advisors. They strenuously deny that they attempted to mislead the Court or in any way acted in a manner that was dishonourable."

BC9402679 at 338

It is in my view a damning indictment on the credibility of the plaintiffs that their legal representative felt compelled to concede that the affidavits "were executed by them containing errors and ambiguities". For the plaintiffs as officers of the Court to accept that they can be justifiably criticised in those circumstances is a very sad reflection on them. It supports my view not only as to their general credibility and reliability as witnesses, but of their lack of attention generally

to this matter. The submission in para1.17.3 underlines the lack of frankness in the particular paragraph, to which lack of frankness I have referred.

6. In a similar vein Mr White complained that Mr **McConnell** should never have been a co plaintiff, but that he should have been a defendant. That may merely point up, yet again, the lack of attention the plaintiffs appear to have paid to the case they were presenting. I say "may" because I am not disposed to infer that this was not a conscious decision, which would have kept Mr **McConnell** in the plaintiffs' camp.

BC9402679 at 339

7. Although each of the plaintiffs said they read Exhibits A and B and relied to a greater or lesser extent on various parts thereof and were induced thereby and, in reliance thereon, entered into the contracts, it emerged for the first time in final addresses that they conceded MANL had never seen Exhibit B before the contracts were entered into, and that, therefore, insofar as their cases depended upon any material in Exhibit B, that could not be pursued against MANL.

8. Notwithstanding the substantial financial obligations into which the plaintiffs were entering: (a) they did not know Mr Bell or Mr Tonkes and, save for what they were told by Mr **McConnell,** and to a lesser extent by Mr Logan, they knew nothing about them; (b) they gave Powers of Attorney to Mr Bell whom they did not know, but whom they were aware was a director of the promoter; (c) they took no steps to ensure that NMRB would be the lender or of the terms upon which it would lend; (d) they took no steps to read the contractual documentation before it was executed by their attorney, or shortly thereafter; (e) they decided not to attend personally on settlement or to have anyone, save for Mr Bell, do so; (f) they did not call for the contractual documentation Mr Bell had signed until well after that had happened and they first saw it in February 1990.

BC9402679 at 340

9. Although they sought to say it was important that NMRB was the financier, because they assumed from that that NMRB had looked at the financial viability of the transaction, they never asked NMRB what view it had formed or, more importantly, when they ascertained it was not the financier, why that was so. An obvious reason, which one would have thought would have occurred to the plaintiffs if they had ever directed their minds to it, was that NMRB was not satisfied with the business viability of the proposal. But they did not enquire.

10. In any event Mr Connor knew, contrary to what he swore originally, before entering into the transaction that MANL and not NMRB was to be the financier. So did Mr **Beatty** and Miss Wilson. The others knew shortly after the documents were signed. Perhaps more importantly they were told that the terms were different. It was asserted by the plaintiffs that they assumed NMRB would apply standard terms to this type of loan. What the standard terms were, was never articulated. Certain quite unjustified assumptions were made. But when it was learned that NMRB was not the financier and that MANL was and that it was imposing different terms, the contractual documents were not sought. No attempt was made to clarify the contractual liability undertaken by the plaintiffs by their attorney to MANL.

11. The contractual documentation was not received until February 1990. Certain evidence and submissions on behalf of the plaintiffs suggested that was MANL's fault. Nothing could be further from the truth. The simple fact is the plaintiffs never asked for it. It must be remembered that this was in circumstances where they knew the financier had been changed, that the terms of lending were different, that B and T was in financial difficulties and that the commissions, about the payment of which they complained so bitterly in these proceedings, had been paid. Further, they knew that the additional payment of $75,000 had been sought and paid.

BC9402679 at 341

12. When the contractual documentation was obtained some of the plaintiffs read it, to a greater or lesser degree, and some did not. However it came to their knowledge that the cross guarantees were in place. Notwithstanding the assertions that had they been aware of cross guarantees they would not have entered into the transaction, which had a prima facie ring of plausibility, they did nothing, which destroyed that prima facie situation. They did not discuss the matter with MANL and they did not seek to have the agreements set aside. Mr Killalea regarded the agreements as void but he did not seek any relief. The cross guarantees were potentially the most financially damaging features of the transactions. Yet six commercial lawyers of great experience all failed to take any step to right what they now assert was a great wrong done to them.

13. It was asserted by the plaintiffs that a matter of high significance to them in entering into the transaction was the financial "viability" of B and T. By September 1989 they knew that B and T was in serious financial difficulties and, on 9 November 1989, it resigned as the manager of the No 1 Syndicate and was replaced by Logan Financial Services Pty

Ltd. The fact of its insolvency did not cause any plaintiff to seek to avoid the obligations under the contracts with MANL.

BC9402679 at 342

14. It was asserted by the plaintiffs that a matter of serious complaint was the payment of commissions to Australian Thoroughbred Finance and Mr Fred Still or his company. The plaintiffs were made aware that these payments had been made by December 1989, but they took no steps to avoid the agreements.

15. The plaintiffs seem to have left a resolution of the problem to Messrs **McConnell** and Logan firstly and then, basically, to Mr Taperell. Their stated reason for inactivity was that these gentlemen were seeking to re negotiate the agreements with MANL, ie the agreements which they now seek, inter alia, to have set aside as being void ab initio. Not one of the members of the No 1 Syndicate, notwithstanding the joint and several liability, took any steps to avoid the contract until May 1991.

16. The members of the No 3 Syndicate seek also to rely on the fact that the agreements were not executed until 12 July 1989, and that the execution was invalid as the Powers of Attorney expired on 30 June 1989. That was known to them, at the latest, by February 1990, yet none of them sought to rely upon that fact. I also note that Mr **Beatty,** a member of the No 1 Syndicate, asserted that at one stage he did not believe that his agreement was executed prior to the expiry of 30 June 1989. I reject that he had that belief. If he did the basis upon which he was seeking to obtain taxation deductions for that financial year is not clear.

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17. Miss Wilson asserted that Mr **McConnell** had no authority to authorise anyone to enter into an agreement on her behalf. As I have indicated, in considering her evidence, I am satisfied this was an untrue allegation on her part. It was mischievous for her to have made the allegation, which she pursued until the evidence made the allegation so improbable that she was compelled to concede that the allegation could no longer be maintained. However, so far as she is concerned, it is another matter which points up the extent to which she was prepared to go to seek to avoid her contractual obligation. It also suffers from the fact that she made no such complaint at a much earlier point in time when her original evidence was put forward.

18. I have recorded that Mr Grieve was not seeking to submit that the plaintiffs were guilty of contributory negligence. However when considering a claim for relief under s52 it has been made clear that those seeking such relief must have acted reasonably: Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191 per Gibbs CJ at 199. The evidence satisfies me that the plaintiffs, in all the circumstances, failed to take reasonable care for the reasons I have sought to state.

19. Whilst asserting the agreements were not enforceable against them, the plaintiffs continued to accept all benefits, which participation in the syndicates conferred, including substantial income tax deductions.

BC9402679 at 344

20. The syndicate accounts were credited with prize money and the proceeds of the sale of horses. I have dealt at some length with the "Mountain Rule" proceedings and the sale of other horses. But the matter demands consideration in this summary. The plaintiffs would have it that when "Mountain Rule" and other horses were sold the agreements with MANL were no longer binding on them and had not been for some time. I think they ultimately all agreed, or begrudgingly were not prepared to assert, that the syndicates had no title to the horses. In those circumstances, without the consent of MANL, the horses could not be sold by the syndicate manager. An attempt was made to establish consent, but in my view it fails. Indeed had there been any substance in the allegation, one would have expected it to be argued out in full before Cohen J. Therefore, the plaintiffs were either parties to, or acquiesced in, the sale of MANL's property by their agent. It may be that they were induced to do so, in the case of the "Mountain Rule" sale, by some mistake, notwithstanding their experience as commercial lawyers. But after the judgment of Cohen J that could not have still been operative. Without putting too fine a point on it what they were prepared to do was acquiesce in the sale of MANL's property, use the proceeds to meet their own debts and, therefore, not to account for them to MANL. I consider this conduct was commercially reprehensible, and the fact the first plaintiffs were prepared to be part of it helps me to conclude that they were disposed to conduct themselves in a manner which detracts greatly from their acceptability as witnesses of truth. They were prepared to organise their affairs in a way which gave the most advantageous financial position to them even though that involved questionable conduct.

BC9402679 at 345

21. The plaintiffs made no meaningful attempt to resolve the matter with MANL. Mr Taperell appreciated, at some stage at least, that MANL strongly arguably was entitled to receive back its principal, but no offer to repay that was made. Mr Taperell also appreciated that principles of unjust enrichment may be applicable. The plaintiffs maintain, essentially, in this case that they can retain the money they borrowed and all the benefits they derived from borrowing it. In itself that is a startling proposition. It becomes the more so when made, no doubt on instructions, on behalf of nine experienced commercial lawyers.

22. Nine experienced commercial solicitors, apparently independently of each other, notwithstanding they were partners in the same firm, would have it that they were misled and/or deceived or defrauded by essentially the same factors. I do not accept that they were misled or deceived or defrauded.

When I have regard to the matters to which I have just referred, and to the additional observations I have made about the various plaintiffs in considering their evidence, I have no hesitation in concluding that after they realised they had made a bad business deal, which could not be sheeted home in any way to MANL and the potential for which was always a possibility as they well knew, they sought to advance reasons why they were not liable to repay the moneys they had agreed to repay. The evidence satisfies me those reasons have no substance in fact or in law and I am forced to the view that the plaintiffs, in asserting the reasons, have not been truthful. It may be they have convinced themselves that the reasons they now advance represented their views at the time. However, within the evidence of each there was material I did not believe and I have identified it in these reasons.

BC9402679 at 346

I am satisfied the plaintiffs relied upon Mr **McConnell,** as the partner introducing the investment proposal, and the involvement of Mr Logan, with whom each had a long professional and personal association. They were moved by the immediate substantial tax benefits to be derived and not by the matters upon which they now seek to place so much store. They knew that the investment was speculative, but the only inference is that they were prepared to chance the risks turning against them, for even if they did the tax benefits would not be lost. It proved to be a bad risk, which eventuated very quickly, but their conduct, at that time and thereafter, was consistent with an acceptance of that fact, rather than the pursuit of any legitimate grievance they may have thought they had. In that way they retained the advantage of the tax benefits.

In coming to these conclusions I appreciate that one can, as a matter of deduction, conclude that if there was a representation and action conformably with it, the party, who so acted, was induced by and relied upon the representation. I also appreciate that for a representation to be operative it does not have to be the sole operative cause of entering into the transaction, but only needs to be a "non trivial" factor: Gould v Vagellas. In the present case I have come to the firm conclusion that none of the matters about which the plaintiffs complain led them to enter into the transactions. They were led to enter into the transactions for the reasons I have sought to explain. Had the matters about which they complained been reasons for their so doing there can be no doubt, in my mind, that upon the revelation of those matters they would have immediately taken steps to avoid the agreements. I therefore conclude that any representations did not, so far as the plaintiffs were concerned, constitute conduct proscribed by s52 in that they were not misleading or deceptive, nor were they likely to mislead or deceive, and none of the plaintiffs was induced by the representations nor relied upon them in entering into the contractual arrangements with MANL.

BC9402679 at 347

THE REPRESENTATIONS I have concluded: (a) MANL did not make any representations to the plaintiffs. (b) MANL did not adopt or in any other way become or make itself responsible for any representations made to the plaintiffs. (c) The plaintiffs, in entering into the transactions, did not rely upon and were not induced by any representations made by any other person. (d) MANL did not engage in any misleading or deceptive conduct or in any conduct which was likely to mislead or deceive. (e) MANL did not adopt or in any other way become or make itself responsible for any misleading or deceptive conduct or any conduct which was likely to mislead or deceive. In the absence of MANL making or otherwise being responsible for any representations the consequences to which I have just referred, (in the absence of an allegation of any other conduct proscribed by s52), must follow.

BC9402679 at 348

I propose to consider the representations pleaded and the breaches alleged, as set forth at 118 to 121 hereof, which, as I have said there, are the ones still relevant after the concession made on behalf of the plaintiffs in respect of Exhibit B. For the purposes of the s52 claim reliance is placed on s51A whereby if a representation is made in respect of a future matter and the person making the representation does not have reasonable grounds for making the representation, it shall be taken to be misleading. The onus of establishing that the person had reasonable grounds is on that person.

My consideration of the representations will involve some specific matters to which I have referred in discussing the evidence of the plaintiffs, which I do not propose to repeat.

The matters pleaded in para16(a)(i) to para16(a)(iii) were not shown by the evidence to be untrue in my opinion. An attack was made on subpara(ii) on the basis of B and T's financial position. However it was not explained how that rendered false the representation pleaded. I have referred to the evidence of Mr **Beatty** as to the quality of the horses, as he perceived it, and to the continuance of the syndicate by the plaintiffs after B and T's financial position was exposed.

It must have been obvious to the reader of Exhibit A that on 1 June 1989 "the syndicate" could not have entered into a lease with any finance company because the syndicate(s) had not been formed. In fact MANL purchased the horses and I am satisfied that that was done at their sale ring prices. The suggestion that MANL was not "a leading financial institution which was becoming increasingly adept at bloodstock finance" is not established. The evidence of Mr Cross, who was called on behalf of the plaintiffs, and to which I shall refer in more detail later, makes it clear that MANL was one of the few financiers operating in this area. Mr Cross did not suggest that MANL did not meet the criteria and he was in an excellent position to give any evidence about that, if it had existed, as he was a broker.

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Further it should not be forgotten the very limited basis on which all this evidence was led. It was not to seek to establish that MANL, by reason of any deficiency in operation, caused the loss, but that MANL should not have allowed the syndicates to go ahead by reason of the financial position of B and T.

None of the matters pleaded in para17(a) to para17(d) were shown to be untrue. On the evidence I am satisfied each matter pleaded was true.

One nextly comes to the particulars of breach. As events transpired the partnership was not as successful and profitable as the plaintiffs hoped, although I have referred to the financial advantages they derived. But the breach pleaded transforms a reason for the formation into a different factual allegation. When one has regard to the quality of the horses, as stated in the evidence, and of the persons by whom the horses were to be trained I am satisfied that it was reasonable to hold the belief expressed. I am so satisfied on the basis that the onus is upon the person expressing the belief.

BC9402679 at 350

The evidence does not satisfy me that B and T's performance as a manager had been a failure, or, insofar as it may have been removed from the management of any syndicates, that that was for the reasons alleged.

I do not accept, essentially for the reasons I have given already, that the breaches alleged in (iii), (iv), (v), (vi) and (vii) have been established. The breach alleged in para(viii) does not represent the financing of the transaction as it was understood by anyone.

Further matters are pleaded in para22, it being alleged that there was a duty of disclosure in the particular circumstances. I have already dealt with these allegations at length. The clearest disclosure which could have been made was in the contractual documents. Further Mr Connor, Mr **Beatty** and Miss Wilson knew prior to 30 June 1989 that MANL was to be the financier.

Even if I were not satisfied that the representations were relied on or induced, I am not satisfied that they were untrue or amounted to misleading or deceptive conduct.

In some of the pleadings there is an allegation of falsity, which may give rise to a claim for common law misrepresentation. For all the reasons I have given I reject that claim as well as the claims under s52. That, I think, acquits me from considering what, if any, damage the plaintiffs suffered having regard to the way in which each conducted himself/herself after the matters of which they now complain was disclosed.

BC9402679 at 351

THE PAYMENT TO MR LOCK The Amended Statement of Claim alleges in para60, that in or about December 1989 or January 1990 the first, second, third and fourth plaintiffs learnt that the payments particularised had been made by MANL on the dates and to the recipients stated, namely 30 June 1989 $32,118.50 to Australian Thoroughbred Finance, 12 July 1989 $31,155 to Australian Thoroughbred Finance, and 30 June 1989 $50,000 to Fred Still and Associates Ltd.

Para61 alleged that from the $50,000 paid to "Still", "Still" made certain payments, one being to Mr Cross, an employee of Australian Thoroughbred Finance, of $13,000 and one being to Mr Lock, of MANL, in the sum of $10,000.

Para62 alleged that each of the payments referred to in para60 was made without the consent or knowledge of the plaintiffs, although there was no allegation that the payments referred to in para61 were so made. Para66 alleged that in making the payments referred to in para60 and para61 MANL engaged in trade and commerce in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s52, the conduct alleged being the failure to disclose the making of the payments whereby MANL "misled the said plaintiffs as to the fact that such payments were being made". Various consequential matters were pleaded as flowing from those actions.

The pleadings, as I have stated them, remained until 18 February 1994, which was the eighteenth day of the hearing. On that day I granted leave to amend para60 by deleting the date "30 June 1989" where appearing beside the sum of $50,000 and by inserting therefor the date "12 July 1989". As amended para60 alleged that the payment of $50,000 was made to Fred Still and Associates on 12 July 1989.

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Para61 was deleted and substituted by a paragraph reading:

"On 30 June 1989 the following payments were made in cash to the recipients specified hereunder: (i) To Cross (an employee of ATF) - $13,000. (ii) To Locke (Manager of MANL) - $10,000."

To overcome the problem this created in relation to the allegation that the payments to Messrs Cross and Lock came from the $50,000 para61B was inserted to read:

"The said payments were made to the recipients thereof on behalf of Bell and Tonkes out of the sum of $50,000 paid to Still by Equico from a sum of $75,000 received by it out of the funds of the The Bell and Tonkes 1989 Racing and Breeding Syndicate (No 1)."

The pleading therefore alleged that an amount of $75,000 had been paid to Equico, from which Equico paid Still $50,000 and from which Still paid the several sums of $13,000 and $10,000. So understood the pleading makes it very difficult, if not impossible, to implicate MANL in the payment, even if its implication had any detrimental effect on MANL.

Mr Lock was the manager of MANL, who had the day to day conduct of processing the applications for finance. It was agreed by a number of the plaintiffs that the receipt by him of a payment of $10,000 for any services he may have provided constituted a fraud on MANL, although the plaintiffs insisted it also constituted a fraud on them. The payment was proved by the evidence of Mr Wayne Richard Cross whose witness statement, dated 9 February 1994, was Exhibit AB. It is important to keep steadfastly in mind that Mr Cross was called by the plaintiffs. The evidence I am about to recite was led by them. Mr Cross was employed by Equico between March and August 1989 and, prior to that, he had been employed as a manager by NZI Securities (Australia) Ltd. Mr Cross stated neither Australian Thoroughbred Finance nor Equico "were themselves principal lenders". He said they specialised "in locating lenders to finance syndicates" and, thus, acted as brokers. As at mid 1989 only a limited number of lending institutions, so far as Mr Cross was aware, were still prepared to finance racing and/or breeding syndicates. They included MANL. Mr Cross did not have any contemporaneous records to assist him in preparing his statement, but he recalled that the syndicates were first mentioned to him "no more than about two weeks prior to the end of the financial year" and this "left very little time to package them". He had a conversation with a Mr Kinsella on 13 June 1989 about the possibility of financing the syndicates and, shortly thereafter, with Mr Still.

BC9402679 at 353

Mr Cross, after various discussions with Mr Still, decided to approach MANL. He said although another financier's interest rates were more competitive than those of MANL the short time frame made it more desirable to approach MANL and, accordingly, he telephoned Mr Lock and arranged a meeting. When Mr Lock queried Mr Cross about the syndicates he was told:

"Many of the investors are partners of Baker and McKenzie. You can assume that they are comfortable with the deal. I suggest you go over the material and see what you think."

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There was a discussion about interest rates and Mr Lock "mentioned a figure in excess of twenty per cent" and told Mr Cross that as time was so short there would be no negotiation about rates. The reference to time being short was a reference to the necessity to have the matter in place by 30 June. Mr Lock told Mr Cross, in answer to a request by him for information, that he had put the matter forward for approval and that he was confident it would be approved "subject to the creditworthiness of the participants".

Although at that stage it was contemplated there would be three syndicates Mr Cross informed Mr Lock that only two could go ahead and, in the last week of June 1989, Mr Lock telephoned Mr Cross and said:

"In light of the information you have given me about the Baker and McKenzie partners, a joint and several guarantee may be required from them. It's not a condition of approval at this stage, but the chances of getting the deal approved would be greatly enhanced if a joint and several guarantee from the Baker McKenzie partners could be given."

Mr Cross told Mr Lock to leave the matter to him and he telephoned Mr Still, who telephoned Mr Cross shortly thereafter and said:

"It's OK to proceed on the basis of a joint and several guarantee."

Mr Cross added that he did not speak to any of the Baker and McKenzie partners about this.

On 28 June 1989 Mr Cross prepared a credit proposal from what he described as MANL's "standard credit proposal format". He sent this to MANL.

Mr Cross also said that during one of his discussions with Mr Lock he asked whether MANL was interested in re financing the syndicates B and T put together with Excel "last year" and Mr Lock replied not at that stage, but that he would look at them after 30 June.

BC9402679 at 355

Mr Cross was present at two meetings at the Southern Cross Hotel in late June 1989. The second took place on 29 June. It commenced about 11 pm and concluded at about 3 am on 30 June and, during the course of that meeting the documents for the syndicates were executed "although I recall that a problem or problems later arose which delayed settlement of that particular transaction". Accordingly, although the documents in respect of the No 3 Syndicate bore date 12 July 1989, a fact upon which the plaintiffs who are members of the No 3 Syndicate rely, the uncontradicted evidence was that they were signed prior to the expiry of the Power of Attorney on 30 June 1989.

At some stage Mr Cross telephoned Mr Lock and told him that Mr Still "has just told me to tell you that you will be looked after for your efforts". At a meeting on 29 or 30 June 1989 Mr Bell handed Mr Cross an envelope containing $23,000 in cash and, upon receiving the money Mr Cross telephoned Mr Lock and arranged to meet him "outside the offices of MANL" when he handed him $10,000 in cash from the envelope. The evidence referred to in this paragraph was admitted subject to the objection taken by Mr Grieve.

In his evidence in chief Mr Cross was asked about being handed the envelope containing $23,000 in cash by Mr Bell, which appeared in para38. He said there was something he wanted to say about that statement, Tp 1033, namely:

"Yes, the mistake I believe with my memory is although Mr Bell and Mr Still were present, it was actually Mr Still who handed the envelope over."

BC9402679 at 356

As I understood at least one of the reasons for adducing the evidence of the payment to Mr Lock, it was to seek to establish that by virtue of receipt of that payment Mr Lock dealt with the applications for finance on a different footing from which he would have done but for the payment and, thereby, facilitated their acceptance. Mr Cross said that he was just asked to pass the money on, that he made no assumption as to why he was being asked to do so and he agreed he had "no basis upon which to suggest that Locke dealt with the B and T Syndicates' applications, as he did, on the footing that he expected to receive $10,000 or, for that matter, any other sum".

Mr Cross said that it was his understanding that the promoter of syndicates engaged Equico on the basis that if it could find a financier prepared to fund such a venture on terms acceptable to the promoter Equico would be rewarded by a commission payable by the borrowers, and that it was his understanding "that that was precisely what happened in the B and T case as well": Tp 1034. He expanded upon this by saying it was his understanding that Equico would invoice the financier for the amount of its commission and the financier would pay that commission "and debit it to the account of the operators".

Mr Cross gave evidence that the $50,000 fee paid to Equico was calculated as to approximately $30,000 being three per cent on the capital value of the lease, and as to $20,000 being one per cent of the loan funds. However he agreed in cross examination that the $20,000 was, in effect, a fixed fee not based on a percentage of an amount. This was put to him by Mr White in re examination, his evidence in cross-examination to which I have just referred obviously coming as a surprise, and the question continued, Tp 1043:

"The evidence is Mr Cross that a million dollars not two million dollars was advanced by way of loan funds. Can you offer any clarification of that. Objected to; question read; question allowed. WITNESS: A. When the proposal was originally shown, it was our standard practice in this type of syndication to segregate the leases from the loans. The lease was charged at three per cent of the funds advanced as brokerage fee and that was standard in our practice, as was on loan funds a fee of one per cent payable on the loan funds advanced. But that could vary. It could be greater or less but in this case I believe it was approximately one per cent of the loan funds advanced. The original proposal was for a lease fund of approximately one million and loan funds to be approximately two million that was to be drawn down in step payments.

Q. Did you ever learn that one million dollar per syndicate was lent rather than two million dollars?

A. I don't recall being made aware that the second draw down of the loan funds was actually approved. It would always be a step system, i.e. you have a draw down one day on a pre set particular date, the second part of those loan funds are drawn under approval that is already in place, therefore unless the loan is already breached, the approval cannot be breached. I always worked under the impression that commission charged - under the impression that the full approval for the two million was given.

Q. Per syndicate?

A. Per syndicate, two million dollars approximately."

BC9402679 at 357

Mr White then sought to elicit that if only $1m per syndicate had been lent the fee would have been $10,000 rather than $20,000. This was relevant to the sole remaining question as between the plaintiffs and Equico, viz Equico's entitlement to receive $20,000 rather than $10,000. Mr Cross said:

"If the loan funds were for a lesser amount than the deal was negotiated, a lesser fee may have been negotiated but loan funds were charged apparently at a date late in the piece whereby we had already budgeted a negotiated set fee and that fee would have stood.

Q. Or would have stood if you individually found out that the full two million dollars had not been advanced?

A. Yes."

BC9402679 at 358

The word "set" appears in handwriting at Tp 1043. It was written on the transcript when the transcript was received by me. No application was made by any party to amend the transcript.

The sole case pursued against the fourth defendant was to recover shares of the $10,000 being the difference between $10,000 and $20,000. The evidence of Mr Cross makes it clear that $20,000 was not merely referable to a loan of $2m, but was "a set fee" which "would have stood" whether the $2m or a lesser sum had been advanced. In the light of this evidence I consider the plaintiffs' case to recover the $10,000 from Equico, the fourth defendant, must fail.

The position so far as Equico is concerned I find appalling. The most serious allegations involving criminal conduct were made against it but were not, at the conclusion of the evidence, pursued. The only other claims against the fourth defendant were to recover $32,118, $31,115 and $10,000. In final submissions it was conceded the first two amounts could not be recovered. Mr White conceded, very frankly, that even if the plaintiffs were successful in recovering the portions of $10,000 against the fourth defendant there could be no recovery in respect of costs. In my view the conduct of the plaintiffs in pursuing for some twenty hearing days very serious allegations against the fourth defendant, in circumstances where the evidence provided no foundation for those allegations at all, and in circumstances where the plaintiffs' own evidence disclosed no entitlement to recover the $10,000, can only lead to the result that the first and second plaintiffs should pay the fourth defendant's costs of the proceedings on an indemnity basis. The only attempt made to justify the failure to establish the very serious allegations was an absence of evidence. The written submissions stated that "the plaintiffs no longer press as against Equico that the payments were corrupt in contravention of s249B of the Crimes Act 1900". To mount and pursue a case involving such allegations without apparently any, let alone any satisfactory evidentiary base, is a matter which causes me the gravest concern. The appropriate cost order to reflect that concern is the one to which I have referred.

BC9402679 at 359

It is now necessary to consider what, if any, is the effect of the evidence that Mr Lock, unbeknown to MANL, received a payment of $10,000. I say "unbeknown to MANL" because there was no evidence that anyone employed by MANL,

apart from Mr Lock, knew of the promise or the payment. Mr Cross made it clear that the payment did not affect, so far as he could discern, the way in which Mr Lock approached his consideration of the matter. Indeed it is inconceivable it did. All Mr Lock had been told, and then very late in the piece, was that Mr Still had told Mr Cross that Mr Lock would be "looked after for your efforts". There was no suggestion of any amount of monetary payment, even if one were to infer, as I think it is proper to do, that some monetary payment would be forthcoming. Further, when Mr Lock received the $10,000 he said "this is much more than I expected". That shows that Mr Lock anticipated receiving some money, but certainly not $10,000.

BC9402679 at 360

However all that may be the simple fact is that there is not a skerrick of evidence that Mr Lock was deflected in his duty in putting forward the loan applications for approval by what he was told by Mr Cross. It must also be remembered that Mr Lock was not the person in MANL, who approved loans. That was the responsibility of his superiors. Finally, at a factual level, it must be borne in mind that the chain through which the money came, as ultimately pleaded, was from a sum paid to Equico initially and thereafter to Mr Still. It is quite clear from the evidence of Mr Cross that he expected that commission would be paid by the syndicate members, none of whom denied in their cross examination by Miss Goddard and Mr Grieve that they were unaware that commission was payable by borrowers to a broker in the event of a broker being involved in obtaining money.

Some time was spent in submitting that Mr Lock had at least ostensible authority from MANL to receive the payment of $10,000 and that accordingly his action in receiving it was as agent of MANL, such that MANL was the recipient, in fact and in law, of the $10,000. Although, as the evidence ultimately unfolded, it does not appear to me to be a matter of particular significance, I am not satisfied that there is any evidence from which it could be inferred that MANL held out Mr Lock as a person who could receive amounts of money on behalf of MANL for the doing by him of work on its behalf. However, Mr White submitted that Mr Lock, in the position he occupied, was authorised to accept applications for loan funds and to put them forward for approval, much the same as a solicitor's clerk may be held out by the solicitor as being entitled to carry out certain legal work in the course of doing which the clerk acts to the detriment of the client thereby making the solicitor liable. Such liability is well established in law and requires no further exposition. However, once the liability is established it is then possible to sheet home any loss to the principal. In the present case there is no evidence that in consequence of the payment of $10,000 to Mr Lock, or in consequence of the promise to pay Mr Lock an amount, the plaintiffs suffered any loss. I appreciate the plaintiffs seek to assert that but for the payment the applications for approval would never have been put forward by Mr Lock, and had they never been put forward by Mr Lock they would never have been approved, and had they never been approved the plaintiffs would not have been lent the money with the consequence that the syndicates would not have gone ahead. But to make MANL responsible by dint of the promise of payment or the payment to Mr Lock cannot be substantiated on the evidence, because it is not established that in consequence of the payment Mr Lock did anything other than he was employed to do, namely submit applications for loan to his superiors, or that, in so doing, he put the applications in such a form that they would have a different complexion than if they had been put forward "properly" i.e. without any promise of payment.

BC9402679 at 361

On the facts I am not satisfied that there is any basis for holding that MANL in any way breached its duty to the plaintiffs by reason of the promise to Mr Lock or the payment to him of which events MANL was ignorant.

BC9402679 at 362

All these submissions seem to ignore, and indeed they must, the fundamental factual matter that whatever steps MANL may have taken in considering and approving the entry into the contracts, the contracts were not entered into until they were executed by or on behalf of the plaintiffs. It was always open for the plaintiffs to call for the documentation before it was executed and to seek variations of it if so minded. The plaintiffs never did this and they left the execution of the documentation to their duly appointed attorney. I have already referred, on several occasions, to their failure to refer to the documentation, to call for it or, when it was provided to them in February 1990, to raise any objection to its terms.

The evidence of Mr Cross is also instructive in that the plaintiffs led from him that he had been told by Mr Lock about the possibility of giving the cross guarantees. The further evidence is that Mr Cross told Mr Still about that matter and that Mr Still told Mr Cross that it was in order to proceed "on the basis of a joint and several guarantee". The fact that this evidence was led by the plaintiffs indicates to me that they were content to accept that Mr Still had given these instructions. Such evidence could only be admissible if Mr Still was authorised to make such a statement on their behalf. There was no evidence that Mr Still had any general authority to act on behalf of the plaintiffs, such that any statement he made would be binding on or evidence against him. The question as to the plaintiffs' knowledge of the cross guarantees was hotly in issue. Not only did the plaintiffs deny any knowledge of such a requirement prior to entering into the

contracts but they said had they known they would not have proceeded. I have pointed out already how the plaintiffs' conduct, on learning of the existence of the cross-guarantees, was, in my opinion, totally inconsistent with the evidence they gave. Notwithstanding their evidence, the plaintiffs led through Mr Cross the evidence that Mr Still told him that it would be in order for the matter to proceed on the basis of the cross guarantees. The only available inference is that the plaintiffs accept that this evidence was admissible against them - there is no other explanation for their leading it. If, before this evidence was given, I had any doubt about the plaintiffs' knowledge of and agreement to the giving of the cross-guarantees stemming from their failure to object as soon as they learned about them, which I did not, this evidence removed it. To that extent it further supports the view to which I have come about the credibility of the first plaintiffs, although it was not necessary for me to reach that conclusion.

BC9402679 at 363

Mr Still's statement was made to Mr Cross after Mr Lock had advised Mr Cross that MANL may require cross guarantees. Mr Lock had also advised Mr Cross of the interest rates and that the terms were, essentially, non negotiable. One can only infer, the evidence having been led by the plaintiffs from Mr Cross, that the plaintiffs accepted the agency of Mr Cross, otherwise the admissibility of the statements made by Mr Lock to Mr Cross against the plaintiffs is difficult to see. Hence the plaintiffs' agent was made aware of certain terms about which the plaintiffs now seek to complain.

BC9402679 at 364

In relation to the amendment made on 18 February 1994 it is to be borne in mind that there was withdrawn an allegation that $10,000 was paid to Miss Cantrell. As Mr Grieve pointed out in his address this was an allegation, which had been a live allegation since the proceedings had commenced. Mr Grieve also pointed to the concession made by Mr White that the plaintiffs could not prove that MANL participated in the dispersal of the moneys paid to Mr Still.

The final matter I would note, in relation to this aspect, is that it was common ground that Mr Still is dead.

THE VALIDITY OF THE POWER OF ATTORNEY I have set forth already the terms of the Power of Attorney. It was submitted on behalf of the plaintiffs that there was no entitlement under the Power of Attorney to sign any documentation containing joint and several guarantees. So much is pleaded in para44 of the Amended Statement of Claim and, in para45, it is pleaded the Power of Attorney did not authorise the execution of any documents "on 12 July 1989 or on any date after midnight on 30 June 1989".

In para45C it is pleaded:

"Further or in the alternative, in contravention of s162A of the Conveyancing Act 1919, Bell purported to execute documents in relation to the No 3 Syndicate pursuant to the Powers of Attorney granted by the second and third plaintiffs and knowing that the said Powers of Attorney had terminated."

The first question which arises is one of construction. On behalf of the plaintiffs it was submitted by Mr White that CL3 authorised the attorney to execute a document only to borrow money "for my own benefit" in respect of the appropriate syndicate. He submitted that the signing of a document, which contained a guarantee to support the borrowing of another party, could not fall within a document authorising the borrowing of money for that purpose, nor could it fall within "any documents ancillary to the powers referred to in CL1, CL2 and CL3 ..": CL4. As a matter of construction I do not accept these submissions.

BC9402679 at 365

I do not understand why the inclusion in a document whereby money is borrowed, in the expectation that other parties will also borrow money so that the total project can go ahead, of a guarantee in favour of the lender to support the borrowing of another party does not fall within the terms of CL3. Without the guarantees the money would not have been lent. Such guarantees, of course, work both ways in the sense that the borrower has the benefit of each other borrower's guarantee, as well as the detriment of guaranteeing each other borrower with appropriate rights of indemnity as between guarantees. I do not consider that the construction strains the words of the Power of Attorney, particularly when those words are considered in the light of CL4 of the Power, or having regard to the requirement that all shares or units in each syndicate had to be taken up if, as the parties wished, the syndicate was to proceed.

In relation to CL4 Mr White submitted that the cross guarantees were contained in the loan documents themselves and not in any "ancillary" document. In my view CL4 makes it clear that insofar as it was necessary for there to be terms ancillary to the powers conferred by CL1, CL2 and CL3 these could be included in other documents. To suggest from that that such ancillary provisions could not be included in the main documents does not, in my view, accord with the proper construction of the Power of Attorney. I consider that CL4 supports the construction I have placed on CL3.

BC9402679 at 366

As I understand the authorities the attorney must "substantially" carry out duties conferred by the Power of Attorney. I do not see how it can be asserted that the giving of guarantees, in support of the lending of money to others, who would become participants in the syndicates, and in circumstances where without all parties, or a substantial number of the parties, giving the guarantees there would be no lending of money and hence the syndicate would not have gone ahead, cannot constitute part of the borrowing of money "for my own benefit". Without the cross guarantees the money would not have been lent and, arguably, the attorney would have been in breach of his duty to borrow money for the benefit of each donor of the Powers.

If this be wrong it is necessary to consider whether one can sever from the executed documents, on the assumption that there has been no ratification by the plaintiffs, the provisions for cross guarantees. In Collier, Lindsay "Powers of Attorney in Australia and New Zealand" reference is made, at 53, to whether "where there has been an excessive execution of the power" that can be severed from what I shall describe as "a non excessive execution", in the sense that the latter is thereby saved. It is stated that whilst Voumard "The Sale of Land - Victoria" (4th edition) asserts, at 493, that where the boundary is clear severance is permissible, no authority is offered for the proposition. At 493 the author states:

"Whatever effect registration under the Transfer of Land Act may have where an attorney has purported to deal with land of the principal to an extent or in a manner not authorised by the terms of the Power of Attorney, it is clear that in a dealing apart from that Act any excessive exercise by the attorney of his powers may render the transaction wholly void, and not merely void to the extent of the excessive exercise of the power. Thus a lease executed under a Power of Attorney which contains a covenant not within the power is wholly void and not merely void as to the unauthorised covenant. The general rule is that where there has been an excessive execution of the power and it is not possible to distinguish the boundary between the excesses and the execution the instrument so executed is wholly void, but where the excess is clearly severable the instrument is void only to the extent of the excess."

BC9402679 at 367

For the first proposition reference is made to Blake v Lane (1876) 2 VLR(L) 54 and Doe de Ellis v Sandham (1787) 1 TLR 705.

Collier, Lindsay accepts that this may be a special case in that those decisions can be confined to leases because Doe de Ellis v Sandham establishes "only that the covenants of a lease cannot be severed".

For the proposition referred to in the final sentence the author of Voumard refers to Alexander v Alexander (1755) 2 Ves Sem 640 at 644 and Attorney General v Teece (1904) 4 SR (NSW) 347. The footnote continues:

"These were cases of excessive exercise of a Power of Appointment, but the same principles would appear to be applicable to Powers of Attorney."

The decision Teece, insofar as it is relevant, is the reliance by the Chief Judge in Equity upon the following passage from Farwell on Powers at 298:

"Where there is a complete execution of a power and something added which is improper, the execution is good and the excess void; but where there is not a complete execution, or where the boundaries between the excess and the execution are not distinguishable, the whole appointment fails": at 354.

BC9402679 at 368

The matter was considered by the High Court in Marriott v The General Electric Co Ltd (1935) 53 CLR 409. Lindsay, Collier, in referring to that decision, state:

"Although the Court held that the clause was severable it did not discuss the possibility of treating the agreement as binding, with the exception of the offensive clause. It therefore seems safest to assume that any non trivial excess of authority will invalidate an attorney's action."

The precise question the High Court had to consider in Marriott was whether the provisions of an agreement made in London were repeated in the agreement made in Melbourne. At 421 Rich, Dixon, Evatt and McTiernan JJ said, after expressing the opinion that certain additions or variations were "of relatively slight importance, and except that where they give an advantage to the respondent company the advantage might have been obtainable through control of the Board, they have no relevance to or connection with the provisions relating to the constitution of the directorate":

"In these circumstances we are of opinion that the provisions relating to the directorate should not be regarded, as they would in an original agreement, as an interdependent part of the entire arrangement, so that their invalidity would annihilate the contract. The severability of provisions contained in an instrument which is a mere re embodiment of existing

rights and duties must be determined by a very different application of principle from that which is made in the case of an initial or original agreement."

Their Honours held that when those provisions were excluded from the operation of the agreement, it embodied, subject to certain other alterations, "all the terms and conditions of the earlier agreement, and gives them full force and effect".

BC9402679 at 369

It is no doubt against this background that Lindsay, Collier made the statement to which I have referred. The question, nonetheless, remains whether the severance of the provisions for the cross guarantees is permissible.

If the cross guarantee provisions are severed the agreements still take effect according to their tenor, but without the important additional right MANL would have otherwise. That would not in any way prejudice the plaintiffs. It would be, arguably, to their positive advantage. For these reasons I do not consider that severance of the cross guarantee clauses in the agreement is not permissible. If it occurs it does not change the character of the transaction so far as the plaintiffs are concerned.

Finally, I should note CL1.6 of the Deed in which the guarantee is contained. It provides:

"If any covenant agreement or other provisions of this Deed or the application thereof to any party or in any circumstances is or becomes unenforceable or invalid or the operation thereof is or becomes excluded by operation of law or otherwise then and in any such eventuality the remaining covenants agreements and provisions of this Deed shall not be affected thereby but shall remain in full force and effect and shall be valid and enforceable to the fullest extent permitted by law."

This provision provides a contractual basis upon which, if it is not otherwise permissible, the guarantee can be, in effect, severed, if that is not otherwise permissible.

Even if this construction be wrong there can be no doubt, in my view, that the plaintiffs, who were members of the No 1 Syndicate have ratified any want of authority by their actions after learning of the execution of the documents under Power in February 1990.

BC9402679 at 370

I have not referred to any authorities on ratification. So far as the actions of the attorney are concerned there can be no doubt that Mr Bell was professing, at the time of making the contract, to be acting on behalf of and intending to bind each plaintiff. Nor is there any doubt that each plaintiff was identified or that the act was capable of ratification. It was submitted by Mr White that a "non agreement" could not be ratified. I think it more accurate to say that it is only a contract, which could not have been made validly, that cannot be ratified. I see no basis for asserting that the agreements in this case could not have been validly made.

The question then arises as to whether the plaintiffs ratified the agreements. In my view the facts allow of no conclusion other than that with full knowledge of the terms of the agreements they adopted them by failing to complain for a lengthy period about such terms, by taking benefits under the contracts and by meeting obligations under the contracts. Certain of the principles and authorities are referred to in the following passage cited by Mr Grieve in his written submissions from Crabtree Vickers v Australian Direct Mail [1975] VR 607 at 617. Lush J said:

"The authorities dealing with ratification stress the importance of considering the whole of the circumstances surrounding the act said to constitute ratification. Otherwise, the cases tend to stress varying aspects of that situation. Some emphasise the aspect of detriment to the party alleging the contract. Thus, in City Bank of Sydney v McLaughlin 9 CLR 615 Griffith CJ and Barton J said, at 635: 'in general a man is not bound actively to repudiate or disaffirm an act done in his name hut without his authority. But this is not the universal rule. The circumstances may be such that a man is bound by all rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in a position of disadvantage, from which if he speaks or acts at once, they can extricate themselves, but from which, after a lapse of time, they can no longer escape'. The same concept appears in Lamshed v Lamshed 109 CLR 440. In other cases the taking of a benefit by the party alleged to have ratified is stressed. Such a case is Australian Blue Metal Ltd v Hughes [1962] NSWR 904 at 925. In others, an intention to adopt has been treated as important. See Bowstead on Agency 12 ed 42, Barrett v Irvine (1907) 3 IR 462. This requirement has an objective aspect, see eg Lamshed v Lamshed at CLR 448 where Kitto J recited the finding of the trial judge, which he said supported a finding of ratification that 'he so conducted himself in dealing with the respondents that any reasonable person in their position would have inferred that he was accepting the situation that the altered document constituted a binding contract upon him'."

BC9402679 at 371

In Hughes Jacobs J said, at 925:

"It is true that the receipt of the money even with knowledge of its source is not conclusive evidence of ratification, but that it must be viewed in the light of the surrounding circumstances. It is also true that at the time of the receipt of these moneys there was a dispute as to the validity of the June agreement. I do not think that in the circumstances of this case that dispute alters the effect of the defendants' acts. The principle of ratification, as I see it, is that a purported principal cannot both approbate and reprobate the actions of his purported agent. Therefore, if the principal accepts benefits which flow from the allegedly unauthorised act of the agent and knows that the benefit so flows he must, except in very special circumstances, be taken to have ratified the agent's act.

Ratification must be distinguished from estoppel. In the latter case it must be shown that the other party has acted to his detriment. This is not necessary in the case of ratification. Although a receipt of money without prejudice may prevent an estoppel, it does not necessarily prevent a ratification. So, also, if moneys are received under a disputed agreement in the course of the dispute concerning the authority of an agent to conclude the agreement, there may, in my view, be a ratification, although there could hardly be an estoppel."

There can be no doubt in the present case that the plaintiffs knew that the benefits they were receiving and the obligations they were incurring flowed from the agreements. Insofar as there may have been any dispute about the agreements that, in accordance with what his Honour said, is not a relevant consideration. In all the circumstances of the present case I can see no basis at all for suggesting that there was not ratification by the plaintiffs.

BC9402679 at 372

Finally, I remind myself that Mr Taperell stated that he considered the power given by the Power of Attorney to be a "broad power", and Mr Killalea, in evidence to which I have referred at 314 hereof, gave evidence to the effect that anything Mr Bell did pursuant to the Power of Attorney "was satisfactory to him". Whilst I do not treat this evidence as going to the proper construction of the Power of Attorney it evidences a view of the power conferred by those witnesses and, so far as Mr Killalea is concerned, it makes it the more difficult for him to assert that he was not bound by the terms of the contract into which Mr Bell had entered.

In relation to the members of the No 3 Syndicate the same submissions are made and must suffer the same fate. Nextly it is submitted on their behalf that the Powers of Attorney expired on 30 June 1989 and that in respect of the No 3 Syndicate the documents were not executed until 12 July 1989. As I have said the evidence of Mr Cross contradicts this, although it was conceded that the documents had not been executed and the matters settled until that date. I do not think I should deviate from it. The terms of the concession appear in the written submissions at 4 and 12. It is stated at 12:

"The second plaintiffs' assertion that they are not bound by the instruments brought into being on 12 July 1989 (given the expiry of the powers at midnight on 30 June 1989) is met with two words: ratification and estoppel."

BC9402679 at 373

I propose to decide this case on the basis of the concession.

However the purpose of the Powers of Attorney was to enter into transactions which, inter alia, gave a financial benefit for the financial year ended 30 June 1989. Whilst various members of the syndicate gave various reasons for entering into the transactions there can be no doubt that the income tax benefit for that financial year was a very relevant factor in the thinking of each and I have so found. That that end was achieved appears from the evidence of Mr Fraser or, perhaps put more correctly, it is strongly arguable, on Mr Fraser's understanding of the law, that that end was achieved. In these circumstances I cannot see that there has been anything other than a substantial compliance with the terms of the Power of Attorney. Even if there was not I consider that the members of the No 3 Syndicate ratified what had been done by Mr Bell, as their agent, on 12 July 1989. Indeed, in their case the ratification is clearer because it was apparent on the face of the documents that they were dated after 30 June 1989. What occurred was not an attempted termination by the second plaintiffs of the agreements for the reasons now advanced, but the obtaining of advice, at least by the syndicate manager, to seek to ensure that the taxation advantages for the year ended 30 June 1989 would still be available.

BC9402679 at 374

Nextly it is alleged there was a breach of s162A in relation to the No 3 Syndicate. Subs(1) provides:

"Where a Power of Attorney has terminated and an Attorney under the Power, knowing of the termination, does any act or thing under or in pursuance of the Power, he is guilty of a misdemeanour."

Firstly, the only evidence before me is that the documents were signed prior to 30 June 1989 expiring. Once again I think I must proceed on the basis of the concession Mr Grieve made.

I shall assume that the documents were signed on 12 July 1989, contrary to the plaintiffs' evidence. The way in which it is sought to inculpate MANL is that it was a party to a breach of s162A(1) and, in effect, is seeking to benefit from its own wrongdoing. To be liable in any relevant way it must have aided or abetted the commission of the misdemeanour.

At para45D of the Amended Statement of Claim it is pleaded that MANL knew that the Powers of Attorney had terminated and that it "aided, abetted, counselled and/or procured the commission of Bell's contravention of" the Act.

It is also necessary to note the way in which the pleading proceeded in relation to this matter. Mr White submits that the execution of the documents pursuant to expired Powers of Attorney is admitted in para40 of the Defence. Para40 pleads to para45 and para45A of the Amended Statement of Claim. Para45A is not pursued by the present plaintiffs. Para45 alleges that the Power of Attorney did not authorise execution of any documents on 12 July 1989 or on any date after midnight on 30 June 1989. Para40 of the Defence, as to para45 of the Amended Statement of Claim, pleads ratification "notwithstanding any limitation in the terms of the Powers of Attorney", and an estoppel from asserting or relying upon any limitation "by reason of their acceptance of the benefit of the moneys lent and paid by the first defendant pursuant to those instruments". Para45C alleges the contravention of s162A in that Bell purported to execute documents pursuant to the Powers of Attorney knowing that the said Powers of Attorney had terminated. These allegations are denied in para42 of the Defence. I think the concession supersedes the denial.

BC9402679 at 375

It is nextly submitted that there can be no ratification of "a non existent agreement". I do not accept that the agreements were "non existent" for the reasons I have given. The acts of ratification made good any prior lack of authority.

I have considered already what is necessary to constitute an aiding or abetting. In my opinion there is no justification for holding that MANL had the requisite knowledge of the knowledge of Mr Bell that the Powers of Attorney had terminated. I put it this way because a constituent of the offence is not only that the Power of Attorney has terminated, but also that the attorney has knowledge of that termination. If one merely looks to the face of the documents that inference may be open. But I do not see why one is confined in that way particularly eg when one has regard to the terms of the letter written by Mr Fraser in early July 1989 dealing with the way in which the taxation benefits could be obtained. In the circumstances I am not satisfied that MANL procured the commission of the contravention of s162A, if, indeed, there was any such contravention.

BC9402679 at 376

Even if my reasoning is wrong it was pursuant to that documentation that the second plaintiffs obtained the contractual benefits from MANL, and it was in consequence of those contractual benefits that led to them deriving the financial benefits from the transaction. In these circumstances I consider that the principles of unjust enrichment entitle MANL to recover.

Reliance is also placed upon the terms of the letter from Mr Taperell to Mr Symond dated 3 December 1990, Exhibit E1567. Although I quoted it earlier I shall repeat the fourth and fifth paragraphs of that letter:

"We are also of the view that Mr Bell had no authority to enter into agreements with MAN dated 30 June 1989 as he purported to do on our behalf. In these circumstances, the agreements dated 30 June, 1989 are void and/or unenforceable."

That letter was written not only on behalf of Mr Taperell but on behalf of Messrs Davis, **Beatty,** Fraser, Killalea and **McConnell** and Miss Wilson. On 13 December 1990 Messrs Logaraj and Blessington wrote a joint letter referring to that letter and informing Mr Symond "that the views expressed by Mr Taperell are shared by us and are reiterated in this letter".

Far from assisting the case for the plaintiffs this letter, having asserted that Mr Bell had no power to enter into the agreements and that they were void and unenforceable, merely makes it the more inexplicable that thereafter no steps were taken. This letter, of course, was not written until some ten months after the documentation had been furnished.

BC9402679 at 377

ANOTHER DISPUTED ISSUE OF FACT In para38 of his witness statement, Exhibit C, Mr Fraser said that he attended a meeting on 17 December 1990 with Messrs Campbell and Paten on behalf of MANL, MANL's solicitor, Mr Mycock, and Messrs Logan and Taperell. He said a number of issues were discussed, during the course of which he said

that irrespective of the outcome of any litigation it was in everyone's interest that the syndicate be properly managed and that it was clear that there were several horses which should be sold at that time and that several should be sold in the future. He asked whether a joint group should be set up to decide such matters, to which, he said, Mr Mycock replied:

"Our client will have to consider that but, my initial reaction is that the running of the syndicate is not something that it should be involved in.

Mr Fraser said that Mr Taperell pointed out the cost of maintaining the horses and that:

"Unless your client has any other suggestions, commonsense tells us to sell those bad horses in order to reduce the cost of running the syndicate."

Mr Fraser alleged that either Mr Campbell or Mr Mycock told Mr Taperell there were provisions in the agreement dealing with the sale of horses leased to the syndicate, to which Mr Taperell replied that any sales would be made after consultation with Mr Logan "and full financial records would be kept".

Mr Taperell referred to the meeting in his witness statement, Exhibit S, and gave a version of the conversation quite similar to Mr Fraser, but he added that there was some discussion about MANL taking over the horses and that either Mr Paten or Mr Campbell said that the horses were not wanted by MANL and there was then a decision made about selling the horses and keeping accounts.

BC9402679 at 378

Both Mr Paten and Mr Mycock gave evidence. The evidence in chief of Mr Paten was his affidavit sworn on 15 August 1991 in proceedings 4951 of 1991, being the "Mountain Rule" proceedings. This became Exhibit 75. Mr Paten referred to the meeting and to Mr Taperell's saying that to "cut some costs of the syndicate we may need to think about selling some of the horses", to which he said Mr Campbell replied that it would be necessary to have MANL's consent "as the lessor owns the horses". He said Mr Taperell replied that "given the dispute between us" it may be appropriate to put the proceeds aside until the dispute was resolved, to which Mr Campbell replied that consideration could be given to that "when you request our consent to the sale of the horses".

Mr Mycock also swore an affidavit in the same proceedings, which became Exhibit 76 before me. He referred to the meeting on 17 December 1990 and to Mr Taperell's saying that an offer had been received in respect of "Mountain Rule" of $50,000 to which Mr Campbell replied:

"They are not yours to sell. You need our consent."

Mr Taperell then referred to setting aside the moneys and, according to Mr Mycock, Mr Campbell said that MANL "will consider what should be done with any sale proceeds when you seek our consent". Mr Mycock was cross examined at some length about the proceedings which had been taken to recover the money and he was then cross examined about the discussions on 17 December to which he indicated a lack of specific recall. There was a denial that there was any statement that there were provisions for sale of horses in the agreements. Generally it is sufficient to say that there was a dispute between Mr Mycock and Mr Paten on the one hand and Mr Fraser and Mr Taperell on the other hand as to what was said. In my opinion the evidence of Messrs Paten and Mycock was more satisfactory than that of Messrs Fraser and Taperell, on whose credibility I have commented, and it was consistent with the probabilities.

BC9402679 at 379

The undisputed evidence of Mr Fraser and Mr Taperell, on this issue, is strongly supportive of MANL's case of ratification.

It is instructive in relation to the probabilities to consider the matters the subject of the judgment of Cohen J. His Honour dealt firstly with the question as to whether, on the proper construction of the documentation, the manager was empowered to sell the horses on behalf of the syndicates. That was the main issue before him and he noted that apart from certain documents, which were tendered, the only other evidence consisted of two short affidavits read in support of the case of the tenth defendants, the purchasers of the horse: at 13. His Honour continued:

"The plaintiff relies upon the fact that it purchased all of the horses, including 'Mountain Rule', and that under the terms of the lease the property in them remained with it. It says that at no time has it consented to any of the defendants having any property in that horse and accordingly there was no right to transfer an interest in it to the tenth defendants. The first to seventh and ninth defendants in their defence claim that the rights and obligations of the parties were to be governed by the provisions of the Thoroughbred Investor Agreement and that under that agreement the manager had a right

to sell an interest in a horse. In exercise of that power the manager sold a fifty per cent interest and in consequence of the sale, on termination of the lease the plaintiff and the tenth defendants became owners of the horse."

BC9402679 at 380

In addition it was submitted that the title to the horses passed to the "lessees" under the Thoroughbred Investor Agreement. His Honour rejected this submission, and he also held that a sale could only be effected by the manager if the investors, as his Honour referred to the plaintiffs, had a title to sell. At 20 his Honour said:

"In my opinion there is nothing in any of the agreements which gave to the lessees title in the horses. That title has been retained by the plaintiff from the time of their purchase. There was no power in the syndicate members to sell any of the horses WITHOUT THE CONSENT OF THE PLAINTIFF and there was no title for them to pass on to a purchaser in any proposed sale." (My emphasis.)

The importance of this finding is that it was never asserted before his Honour by the present plaintiffs that such consent had been given. In saying that I mean it was never put as an evidentiary issue for his Honour's decision. It must have been obvious that if there had been such consent then MANL's claim as plaintiff in those proceedings would fail.

His Honour nextly dealt with a claim of estoppel, which he said was based upon "the fact that the plaintiff allowed the lessees to have control of the horses and in particular allowed registration of the syndicate as the owner in the records of the Australian Jockey Club. From this it should be implied that the tenth defendants relied upon that registration as evidence of ownership when they purchased a one half interest".

His Honour rejected the submission that an estoppel had been made out. In any event this was part of the claim brought by the purchasers and not by the present plaintiffs. However, at 21 his Honour noted that the buyer would obtain no better title than the seller "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell".

BC9402679 at 381

At 22 his Honour said:

"The plaintiff" (MANL) "took steps to terminate the leases shortly after the dealings with the various horses, including 'Mountain Rule', were discovered. There was nothing done thereafter which could be construed as an acknowledgment by the plaintiff of a right in the lessees" (the present plaintiffs) "to sell an interest in that horse. The evidence only indicates a desire of the plaintiff to insist on asserting its rights."

I have quoted from this judgment to show the way in which the case was fought before his Honour. It was not asserted, in the sense to which I have referred, that there was consent from MANL. Clearly the present plaintiffs had that in mind, but no evidence was advanced by them, although it was clearly available, to establish it, and it therefore became unnecessary to read the affidavits of Messrs Paten and Mycock, which became exhibits before me.

The importance of the present plaintiffs establishing the entitlement to sell must have been obvious and one can only assume that a conscious decision was taken not to pursue that factual issue before Cohen J. I think it sufficient if I say that the attitude then taken by the plaintiffs is totally inconsistent with the evidence upon which they now seek to rely to establish consent. After all it must be remembered that before Cohen J they were seeking to deny that they had been guilty of conversion. One would think that solicitors of the Court, particularly experienced commercial solicitors, would be anxious to put all matters before the Court in support of such denial, whether of a legal or factual nature. Whatever view may have been taken of the strength of the documentary case the present plaintiffs presented before Cohen J, one finds it difficult to understand that they would abandon a factual case based on consent without good reason. One can only speculate as to what might constitute good reason when all the relevant material was within the knowledge of certain of the present plaintiffs.

BC9402679 at 382

CERTAIN OTHER MATTERS RAISED BY THE PLAINTIFFS A submission was made that MANL had acted in a manner, which precluded it from recovering, in that it had "massaged" the contractual documents to suit itself, and otherwise drawn up agreements, which did not accord with the understanding of the parties. It was submitted that not even Mr Cross knew of the changes in the terms of the contracts.

It is important to remember that the plaintiffs did not deal directly with MANL. On the evidence they had no justification for assuming that the contracts would be in any particular form, and their agent, Mr Cross, had been told by Mr Lock that the contracts would be on a "take it or leave it basis". The attorney was authorized by the plaintiffs to execute

documents in the terms, I have held, he did. That constituted the contract. Notwithstanding the multitude of claims made by the plaintiffs relief by way of rectification was not sought. The agreement was presented by MANL and executed. This submission must fail.

Nextly it was submitted that when MANL became aware of the deficiencies in the documents, MANL sought to overcome the position by requesting that fresh documents be executed. I do not consider this brings about a defence even if the execution of the further documents was intended to overcome the problems. Of the many things of which the plaintiffs complain, they can scarcely suggest that MANL would have been able to mislead them into entering into any new documentation, save with a full appreciation of all the circumstances.

BC9402679 at 383

Thirdly, I think a submission was made that regard should be had to the preparedness of MANL to settle the matter on commercial terms. I do not see why MANL should be prejudiced by taking a commercial approach to resolving the matter. I say nothing about the appropriateness of any offer of settlement, but merely that MANL, in the end, has not affected adversely its position by considering a commercial settlement.

ESTOPPEL Mr Grieve relied also on estoppel. By their conduct after receiving the agreements, and, indeed, before doing so, the plaintiffs represented to MANL that the agreements were valid and binding. It was not until long after that any assertion was made to the contrary. MANL quite clearly proceeded on the basis that this was so and thereby failed to take steps which were open to it in relation to the assets of the syndicates. To that extent MANL acted to its detriment. I consider that the plaintiffs are now estopped from denying that the agreements are not enforceable in accordance with their terms.

CONCLUSIONS I am satisfied that the Amended Statement of Claim should be dismissed and that the plaintiffs should pay the fourth defendant's costs on an indemnity basis for the reasons I have given.

BC9402679 at 384

I am satisfied that on the Cross Claim MANL is entitled to judgment against each of the first defendants in the sums of $2,637,992.24 plus interest from 22 February 1994 to today's date of $109,849.68. The figures should, in my view, be calculated in accordance with Schedule A of MANL's written submissions. The amount, if that is the correct basis for calculation, is not in issue. There will be judgment against each of the first defendants in the sum of $2,747,841.80.

If I am in error in holding that the Powers of Attorney did not authorise the entry into the cross guarantees or that there was ratification of such agreements, but correct in holding that the inclusion of those provisions does not invalidate the lease and loan agreements, the amounts owing by each of the first plaintiffs is: (a) Mr Davis, Miss Wilson and Mr Taperell: $421,158.97 plus interest at $302.22 per day as from and including 22 February 1994. (b) Mr Fraser, Mr **Beatty** and Mr Killalea: $458,171.86 plus interest at $329.10 per day as from and including 22 February 1994.

I am satisfied, once again taking the figures from Schedule A of MANL's written submissions, that there should be judgment against Mr Connor in the sum of $415.889.21 plus interest from 22 February 1994 in the sum of $17,182.50 making a total of $433,071.71, and against Messrs Blessington and Logaraj jointly and severally in the sum of $415,889.21 plus interest from 22 February 1994 in the sum of $17,182.50 making a total of $433,071.71.

BC9402679 at 385

MANL seeks costs on an indemnity basis. Various submissions have been made on its behalf to support such an order in effect anticipating the most favourable result, as a matter of fact and law, MANL could achieve. It is obviously desirable to conclude this matter for all purposes as soon as possible. However, I think that the plaintiffs are entitled to consider my reasons for judgment before answering MANL's claim for indemnity costs and also that MANL should formulate its submissions on the basis of what I have said.

I propose to order the plaintiffs pay the costs of MANL. The only issue is whether I order it on a party and party basis or on an indemnity basis as to which I will hear submissions.

I note that it is not necessary to make any orders in respect of the third or fourth plaintiffs or the second, third, fifth, sixth and seventh defendants.

Order

ORDERS

1. Judgment for the first and fourth defendants on the plaintiffs' Amended Statement of Claim.

2. The plaintiffs pay the fourth defendant's costs of the proceedings on an indemnity basis.

3. Judgment on the first defendant's Cross Claim against each of the plaintiffs Paul Anthony Davis, Jennifer Primrose Wilson, Peter Michael Fraser, James Douglas **Beatty,** Bryan John Killalea and Geoffrey Quentin Taperell in the sum of $2,747,841.80.

BC9402679 at 386

4. Judgment on the first defendant's Cross Claim against the plaintiff John Kenneth Connor in the sum of $433,071.71.

5. Judgment on the first defendant's Cross Claim against the plaintiffs Nadaisan Raj Logaraj and John David Blessington each in the sum of $433,071.71.

6. I reserve for further submissions the basis upon which the plaintiffs should pay the first defendant's costs.

7. The exhibits be returned at the expiration of twenty eight (28) days unless within that time an appeal against this decision has been brought.

BC9402679 at 387

AMENDMENT TO JUDGMENT

HIS HONOUR : At 4.20 pm on 19 April 1994, after my reasons were finalised and printed, I received a letter from the solicitors for the first defendant, dated 19 April 1994 stating:

"Since the proceedings concluded on 22 February 1994 the solicitors for the Plaintiffs (in 50175 of 1993) have raised certain questions about the accuracy of the arithmetical calculations contained in the schedules to written submissions presented on behalf of our client, MANL. There has been a deal of correspondence about the matter culminating in a recent agreement between the parties on revised figures which should be substituted for those contained in the schedules. We have reprinted the enclosed amended schedules to reflect that agreement. We also enclose a fourth schedule setting out the amounts of the judgments to be entered against each Cross Defendant as at 20 April 1994 in the event that they are held liable on one or other of the bases contended for by MANL. We are forwarding this letter with the concurrence of Lane and Lane. We sincerely apologize for the lateness of its despatch; regrettably the agreement mentioned above was only concluded this morning."

This letter pointed up an error in the calculations in the first paragraph at 384. That paragraph is withdrawn.

The Amended Fourth Schedule contained with that letter sets out the agreement of the parties if MANL's claim to enforce the joint and several covenants in the loan contracts in the B and T No 1 Syndicate is upheld. In my opinion it should be and I had sought to proceed on that basis.

BC9402679 at 388

Each of Messrs Davis, Fraser, **Beatty,** Killalea and Taperell and Miss Wilson is jointly and severally liable in the sum of $1,619,563.40. In addition each of Messrs Davis and Taperell and Miss Wilson is liable for $157,257.63 making a total of $1,766,821.03. In addition each of Messrs Fraser, **Beatty** and Killalea is liable for $195,848.12 making a total of $1,815,411.52.

The figures appearing in subpara(a) and subpara(b) on 384 have to be amended in accordance with the Amended Fourth Schedule. In subpara(a) they should be amended to read $410,158.97 in lieu of $421,158.97 and $293.55 per day in lieu of $302.22 per day. In subpara(b) they should be amended to read $447,171.86 in lieu of $458,171.86 and $320.75 per day in lieu of $329.10 per day.

It is not necessary to amend the figures relating to Messrs Connor, Blessington and Logaraj.

In lieu of the judgment proposed in para3 on 385 and 386 of my reasons I order: (a) Judgment on the first defendant's Cross Claim against each of the plaintiffs Paul Anthony Davis, Jennifer Primrose Wilson and Geoffrey Quentin Taperell in the sum of $1,766,821.03. (b) Judgment on the first defendant's Cross Claim against each of the plaintiffs Peter Michael Fraser, James Douglas **Beatty** and Bryan John Killalea in the sum of $1,815,411.52.

Counsel for 1st and 2nd Plaintiffs: Mr PD White

Instructed by: Lane and Lane

Counsel for Fourth Plaintiff: Mr JT Svehla

Instructed by: Mr KS **McConnell**

Counsel for First Defendant: Mr DE Grieve QC/Mr MG Skinner

Instructed by: Smits Leslie Barwick

Counsel for Fourth Defendant: Miss SJ Goddard

Instructed by: Holmes and Bevan

---- End of Request ----
Email Request: Current Document: 16
Time Of Request: Friday, June 10, 2016 06:39:05