IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-000498

BETWEEN	FLETCHER STEEL LIMITED Plaintiff
AND	NAHAL CONTRACTORS LIMITED First Defendant
AND	BALVIR NAHAL Second Defendant
AND	NAHAL PROPERTIES LIMITED Third Defendant
AND	BN & MG HOLDINGS LIMITED Fourth Defendant
AND	BALVIR NAHAL, KAMALJIT NAHAL AND FASTCO TRUSTEES LIMITED Fifth Defendants

Hearing: 25, 26, 27, 28, 29 June 2007

Appearances: K W Fulton and H M Gilbert for Plaintiff
D G Smith for First, Second, Third and Fourth Defendants
H L Sumich for Fifth Defendants

Judgment: 26 February 2008

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
26 February 2008 at 9.30 p.m., pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

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Table of Contents

	Para. No.
Introduction	[1]
The Services Agreement	[13]
The Invoicing System	[30]
Factual basis of the plaintiff's claim against the first and second defendants	[36]
The first and second defendants' response	[55]
Mr Nahal's credibility	[71]
The causes of action against the first and second defendants	[90]
Evaluation	[95]
Gate recorder records	[96]
Absence of dockets	[105]
Key differences	[108]
Chargeable hours of employees	[110]
Mr Nahal's supervisory charges	[129]
Other allowances claimed	[135]
Margin on non-employee costs	[163]
Interim summary	[176]
Counterclaim	[178]
The claim against the third defendant	[188]
The claim against the fourth defendant	[202]
The claims against the fifth defendants	[207]
Result	[220]

Introduction

[1] On 26 June 2002, the plaintiff and the first defendant entered into an agreement (the "Services Agreement") pursuant to which the first defendant agreed to carry out cleaning and maintenance work at the plaintiff's industrial premises in Penrose, Auckland.

[2] The Services Agreement came to an abrupt end in November 2005, after the second defendant, Mr Nahal (the controlling mind of the first defendant) admitted that the first defendant had been rendering false invoices to the plaintiff, charging for services not in fact provided.

[3] The first defendant's fraud was assisted and on Mr Nahal's evidence instigated by one Dean Purchase, employed by the plaintiff in the position of Mechanical Team Leader at the plaintiff's Rolling Mill. Over the period during which the first defendant provided services for the plaintiff, over 75% of the total amount paid by the plaintiff to the first defendant was on the basis of purchase orders created by Mr Purchase.

[4] Mr Purchase too admitted his involvement in the fraud on the plaintiff, although he disagreed with Mr Nahal as to the extent to which each had benefited. Mr Nahal asserted that over the period from 20 June 2002, he made 45 payments to Mr Purchase, totalling $228,906. According to Mr Purchase, he received much less, about $120,000, although he admitted he could not prove that was the case.

[5] Mr Purchase was dismissed from the plaintiff's employment. Both he and Mr Nahal were subsequently prosecuted for fraud. Mr Purchase pleaded guilty and was sentenced to 18 months in prison. Mr Nahal also pleaded guilty. Upon conviction, he was sentenced to imprisonment for one year.

[6] In December 2005, Mr Nahal provided the plaintiff a list of invoices that he admitted were fraudulent. There were 57 such invoices in the list, totalling $288,815.40 exclusive of GST. At the same time, a list of payments allegedly made

to Mr Purchase was also provided. There were 45 such payments, in the period between 20 June 2002 and 22 September 2005. The total sum paid was $228,906. That list did not include a payment (which is now admitted) of $25,000 in October 2005, the funds being drawn from the Nahal Family Trust (the fifth defendant). Some payments were also made by the first defendant to Mrs Purchase, on the basis that she was or would become an employee of the first defendant. The first defendant admits that she never worked for it, despite the payment to her of $12,852.

[7] As a result of its investigations, the plaintiff formed the view that the fraud had been on a much grander scale than Mr Nahal and Mr Purchase had admitted. In this proceeding, it sues the first defendant in deceit and breach of contract for the sum of $2,090,795 or, alternatively, a lesser amount of $1,404,936. The different figures represents different methods of calculating the damages sustained. The larger sum is claimed on the basis that it represents the amount for which the plaintiff could have had the services performed under the Services Agreement by a third party after a competitive tender, net of certain payments made by the first defendant and Mr Purchase to reimburse the plaintiff in respect of the sums admittedly wrongly claimed in the admitted false invoices.

[8] In that respect, notwithstanding his position that he had not received the full amount claimed, Mr Purchase in fact reimbursed the plaintiff in the sum of $242,000. In addition, the first defendant made a payment of $148,885 representing the balance ($82,917) of the admitted fraud of $324,917 ($288,815 plus GST) together with interest thereon on a compounding basis at 8% down to 30 June 2006. These payments were accepted by the plaintiff on a basis that was without prejudice to its claim, and have properly been deducted from the quantum of the amount claimed in this proceeding.

[9] The lesser amount of $1,404,936 is calculated on the basis that it represents the amount by which it claims was in fact wrongly overcharged ($2,088,155) less an amount ($358,302) that the plaintiff refused to pay on invoices issued by the first defendant in October 2005, and less the further sum of $324,917 for the payments made by Messrs Purchase and Nahal in respect of the admitted fraud.

[10] The third defendant to the claim is a property investment company of which Mr Nahal is the principal. The fourth defendant is also a property investment company in which Mr Nahal is a 50% shareholder together with one Matthew John Gould who, at the relevant time, was first the Business Unit Manager of the plaintiff's Rolling Mill and subsequently Site Operations Manager for the whole of the plaintiff's Penrose site. The fifth defendants are sued as trustees of the Nahal Trust. When it became aware of the fraud, the plaintiff placed caveats on properties owned by the third to fifth defendants. The plaintiff's case is that Mr Nahal channelled funds received from the plaintiff as a result of the fraudulent bills issued by the first defendant into the hands of the third and fifth defendants. They were then used by those parties to purchase properties. Insofar as the fourth defendant is concerned, the company jointly owned by Mr Nahal and Mr Gould, the plaintiff's case is that it acquired a property at 230 Great South Road from the third defendant in August 2005, and on the basis of a loan of $440,000 which the third defendant left in the property on the sale. In respect of all of the third, fourth and fifth defendants, the plaintiff claims that they hold the properties in question subject to constructive trusts in favour of the plaintiff.

[11] On the basis of an analysis of the various bank accounts and other relevant documents, the plaintiff claims to trace payments made by the first defendant totalling $1,723,371 used to fund the acquisitions of the properties concerned in the period between 4 September 2002 and 15 December 2005. The plaintiff claims to recover from the defendants 74% of the sums expended on the acquisition of the properties, that being the proportion of the expenditure illegitimately derived from the plaintiff.

[12] There are additional claims against Mr Nahal personally in respect of an alleged conspiracy to defraud, and against the fifth defendant in respect of the sum of $25,000 paid to Dean Purchase in October 2005. It is alleged that this payment was unlawful, as a bribe or secret commission although the plaintiff disavowed any intention to rely on the Secret Commissions Act.

The Services Agreement

[13] The Services Agreement was executed by the parties on 26 June 2002. Mr Nahal claimed that he was not given a copy of the contract that had been signed on behalf of the plaintiff, but nothing turns on that. He accepted that he had retained his own copy of the signed agreement. Under clause 2 of the agreement, the plaintiff appointed the first defendant "to provide the Services on the terms and conditions set out in this Agreement" and the first defendant accepted such appointment.

[14] Clause 3.2 was headed "Skill and Diligence" and obliged the first defendant to perform the services with all reasonable care, skill and diligence, and to provide "independent and unbiased assistance to the company".

[15] Clause 3.6 provided:

> The Contractor shall notify the Company of any interest the Contractor has which may conflict with the interests of the Company immediately upon the Contractor becoming aware thereof.

[16] That clause was relied on for the plaintiff's claim against the first defendant alleging breach of the agreement, the plaintiff asserting that there were conflicts of interest that the first defendant failed to advise it about, namely the submission of false invoices, and the payments made to Mr Purchase.

[17] Clause 4.1 of the Services Agreement provided as follows:

> The Company shall pay the Contractor for the Services the amount of fees and expenses set out in or determined by Schedule 2 and elsewhere in this Agreement at the times and in the manner set out in this Agreement.

[18] Clause 6 of the Services Agreement dealt with payment. Clause 6.1 stipulated that amounts due to the first defendant were to be paid in full on or before the final working day of the month following the month of issue of any invoice. Clause 6.2 was headed "Disputed Invoices", and provided for notice by the plaintiff in the case of any disputed invoice with reasons for disputing it. It was stipulated that in the case of such a dispute, payment of the remainder of any invoice which

was not disputed would not be delayed. Clause 6.3, headed "Independent Audit" provided as follows:

> In the case of Services carried out on a time charge basis and for all other reimbursable costs, the Company may within one year after completion or termination of the Services and not less than 10 working days' notice require that a reputable and independent firm of accountants nominated by the Company, and at the Company's expense, audit any amount claimed by the Contractor by attending during normal working hours at the office where the records are maintained.

[19] The plaintiff's breach of contract claim also relied on this clause. It was pleaded that pursuant to the Services Agreement, the first defendant was "expressly" obligated to repay any sum over-claimed as found by any audit or that there was an implied term in the agreement that any sum overpaid by the plaintiff should be repaid by the defendant. I was not referred to any express provision to that effect. I accept however that the wording of clause 6.3 would be such as to found an implied term that such as that alleged by the plaintiff and I did not understand Mr Smith to submit to the contrary. However, that does not really take the plaintiff any further than it can get by simply relying on the overcharging itself as a breach of contract with the damages measured in accordance with the extent of the overcharging.

[20] Clause 7 of the Services Agreement made it plain that the relationship between the parties was that of contractor and principal, and that the first defendant was not an employee or agent or the plaintiff. Accordingly, one of the provisions in clause 7.1 of the Services Agreement was:

> The Contractor shall be responsible for the Contractor's own liability for tax, ACC levies and all other liabilities and expenses of whatever nature relating to the Contractor and the Contractor's employees.

[21] Clause 11 of the Services Agreement dealt with its termination. Amongst other provisions, clause 11.2(c) provided that the plaintiff could terminate the agreement in the event of an unremedied breach of it by the contractor. There is no suggestion in the present case that, given the circumstances, the plaintiff did not have the right to terminate the agreement.

[22] Clause 16 provided that the Services Agreement constituted the entire agreement between the parties, superseding "all previous negotiations, commitments

and/or writings". It further provided that no alteration to the terms of the agreement would be binding unless it was in writing and executed by both parties. I mention that provision because there was some discussion in the evidence about the terms upon which the plaintiff had employed another company, Pollock Engineering & Maintenance Services Limited prior to letting the contract to the first defendant. Mr Nahal had worked for Pollock Engineering & Maintenance Services Limited and had met various of the plaintiff's personnel while so employed. Whatever the terms of the contract between the plaintiff and that company, clause 16 of the Services Agreement made it plain that it was only its terms which were to govern the relationship between the plaintiff and the first defendant.

[23] The services to be provided pursuant to the agreement were set out in the first schedule under three separate headings reflecting the different components of the plaintiff's business. The schedule read as follows:

SERVICES TO BE PROVIDED

Rolling Mill

Production Cleaning
Rework Inspections
Bar Straightening Work
Painting
General Labouring

Steel Plant

Production Cleaning
General Labouring
Painting

Pacific Wire

Production Cleaning
Painting

[24] Schedule 2 then set out various rates of remuneration as follows:

REMUNERATION

Rolling Mill

SUPERVISOR RATE	$35.00 per hour
Production Cleaning	$22.50 per hour per man
Rework Inspections	$22.50 per hour per man

Bar Straightening Work	$22.50 per hour per man
Painting	$22.50 per hour per man
General Labouring	$22.50 per hour per man

Steel Plant

SUPERVISOR RATE	$25.00 per hour
Production Cleaning	$22.50 per hour per man
General Labouring	$22.50 per hour per man
Painting	$22.50 per hour per man

Pacific Wire

SUPERVISOR RATE	$25.00 per hour
Production Cleaning	$22.50 per hour per man
Painting	$22.50 per hour per man

[25] There was another document produced which contained the same and additional information to that set out in schedule 2. This document was headed "Scope of Works". On it, the various rates to apply were handwritten. In addition to reference to the Rolling Mill, Steel Plant and Pacific Wire, there was a fourth business unit referred to, namely "Site Services". Instead of providing for specified rates, the handwritten notation against that business unit was simply "rates for site services are negotiated. To each job.".

[26] There was also provision for each unit manager to sign his name under the provisions relating to that business unit. Mr Gould signed for the Rolling Mill, Mr Schonewille for the Steel Plant, Mr Green for Pacific Wire and Mr Honey for Site Services.

[27] In respect of the Rolling Mill, Steel Plant and Pacific Wire, there was no provision on the separate document for a "supervisor rate". However, in handwriting in the part of the document referring to the Rolling Mill, the words "Balvir/ supervisory service $35.00/HR" have been written and signed by Mr Gould. Similarly, in the Steel Plant section of the document, the words were written "Balvir $25.00", with the initials "C.S." (Mr Schonewille) following.

[28] Again, in the case of Pacific Wire, the words appeared "Balvir $25.00".

[29] Among the witnesses called by the plaintiff was Mr David Wood, who was the plaintiff's Supply Contracts Manager at the relevant times. As such, he was

responsible for most of the commodities and supply service contracts of the plaintiff. He was responsible for the drafting and execution of the Services Agreement. It was his evidence that the document on which the managers of the various unit managers had signed their names was part of the agreement and I did not understand there to be any suggestion by the defendants that that was not the case.

The Invoicing System

[30] Before turning to the substance of the plaintiff's claims against the first and second defendants, it will be appropriate to describe the invoicing system which enabled the fraud to occur. Its essential features were described in the evidence of Mr Brian David Palmer, who since June 2000 has been the Group Financial Controller for the Fletcher Building Steel Group. He explained that during 2000, the group introduced a new accounting system for all of its businesses. Because of the number of invoices that had to be processed within the group, it was decided to give selected employees the authority to create and approve purchase orders under the new system. The authorised personnel were able to raise purchase orders up to a pre-specified amount. If it was sought by the employee in question to raise a purchase order for more than their maximum specified amount, then approval had to be obtained from someone who had financial authority for the amount being sought. Mr Purchase's authority was up to $3,000, and for maintenance related work only.

[31] It was Mr Palmer's evidence that:

> 9. In order to raise a Purchase Order, a user must have been granted access to that module in the system. Generally speaking, employees with some financial authority or those with a managerial role were granted authority. There is thus a significant level of trust given to the employees, as they are in a real sense in control of the company cheque book.
>
> 10. Once a Purchase Order is created, the system automatically generates a time and date stamp attached to that Purchase Order. Irrespective of whether the Purchase Order is later amended in any way, the time and date stamp remains unchanged. The same principle also applies to Purchase Order numbers.
>
> 11. There are numerous options available to a user once a Purchase Order is created, and much will depend on the type of order being sought. There are however certain fields that a user must complete.

> These fields include: the vendor's number, (which then automatically enters the vendor's name and address); a code for where the item or work is required (which then automatically enters the address), and the work type (which creates the GL code) and the amount of the Purchase Order. Even when these fields are complete, the system will not allow the Purchase Order to be faxed or printed until such time as the Purchase Order has been approved.
>
> 12. If the amount of the Purchase Order is within the user's financial authority, then the Purchase Order could be created and approved by that one user. At that stage, the user may also select another screen and confirm that the work has been done. This is recorded on the system as "receipted", which essentially tells the system that the work is complete or the item received, and a liability has arisen for Fletcher Building Steel Group.

[32] Mr Palmer further explained that if the purchase order sought to be raised was for an amount greater than the user's financial authority, then the system would automatically send that purchase order to the relevant manager with sufficient authority to approve the account. In Mr Purchase's case, approvals beyond $3,000 went to a Mr Owen Sturgess, who was Mr Purchase's superior. Referring to persons in Mr Sturgess' position, Mr Palmer said:

> 15. The person receiving that notification would then go to the procurement authorisation screen, which would list all the Purchase Orders waiting for that person's approval. From there, the Purchase Order could either be approved, declined or further details obtained from the system concerning the order. Very little detail is visible to the person about the request on the first screen (they are required to expand that screen) and in practice there is little doubt that a high level of trust is placed on the person seeking the approval and this is even more the case in an ongoing contract with regular work routines.

[33] Once an invoice was received by the accounts department, it would query the system to see if a purchase order had been approved. There would then be a check to see if the purchase order matched the invoice. In the case of a variance, the invoice would be sent to the person who created the purchase order for resolution.

[34] According to an analysis of purchase orders approved by the first defendant which Mr Palmer carried out, about 75% of the total payments made by the plaintiff to the first defendant were on the basis of purchase orders created by Mr Purchase. By far the majority of the purchase orders, estimated by Mr Palmer at 85% were raised after the date of the first defendant's invoice. Mr Nahal did not disagree with

that evidence, indeed he specifically said that the evidence given by Mr Palmer as to the order numbers being created after the generation of the invoices was correct.

[35] As Mr Palmer observed, one way of having a false invoice accepted was to have Mr Purchase's collaboration as the person who raised the purchase order. However, since the majority of purchase orders were raised once an invoice had been created by the first defendant, it would have been possible for the hours spent on the work covered by the invoice to be exaggerated, or the number of personnel actually to be used to undertake that work to be overstated. Unless the particular task was being monitored, it would have been difficult to identify that type of false invoicing at the time. Mr Palmer observed that in reality, the plaintiff's personnel did not have time to engage in such checking. As a consequence, a false invoice could be approved without the knowing collaboration of the person who issued the purchase order, especially if they were not close to the activities involved as was the case with Mr Sturgess.

Factual basis of the plaintiff's claim against the first and second defendants

[36] I have already referred in general terms to the basis of the plaintiff's claim against the first and second defendants. The factual basis of the claims against both is a very widespread fraud in which the plaintiff claims it was extensively over-billed during the period of the Services Agreement.

[37] In calculating the amount of the alleged over-billing, the plaintiff had to confront the fact that there was no way to tell on the face of the invoices that had been rendered, which invoices might have involved inflated hours or relate to work which had not been done and which invoices might be genuine and accurate. There was no discernible pattern on the face of the invoices that Mr Nahal had himself identified as being false; it can be noted here that the 57 invoices related to a period between 11 October 2002 and 18 September 2005 and were evidently completely fictitious, that is to say they related to work that had simply not been done. But there was on the face of it that there was no common element which could be used to identify what further invoices might be in that category.

[38] At an early stage, Mr Nahal was interviewed by a private investigator employed by the plaintiff, Mr Rodney Sutton. He met with Mr Nahal and Mr Smith, counsel for Mr Nahal, on 22 November 2005. At that meeting, according to Mr Sutton, Mr Nahal told him that he would not be able to distinguish between false and genuine invoices, although he might be able to identify a small number. Later in the interview, however, Mr Nahal claimed that he could identify about 80% of them, and they were coded "waste disposal, safety, painting and ground maintenance."

[39] In his evidence, however, Mr Nahal stated that the invoices that were false were not able to be identified by looking at the invoices. Rather, he maintained that it was necessary to look at the timing of the invoices and when payments had been made to Mr Purchase, and work back from that. A more confused picture emerged during Mr Nahal's cross-examination (about which I shall have something more to say later) but for present purposes, I think it is sufficient to note that the plaintiff plainly did not wish to rely on Mr Nahal's assertion that the list of admittedly false invoices that he provided on 23 December 2005 was complete.

[40] In February 2005, the plaintiff had implemented a system at the Rolling Mill that required its employees and those working for the first defendant individually to record electronically their entry and exit to the plaintiff's premises by swipe card. The plaintiff analysed the records of the gate recorder for the period February 2005 to October 2005. During that period, the total hours billed by the first defendant to the plaintiff totalled 60,669. However, based on the gate recorder records, only 31,101 hours had been worked. Reliance on the electronic gate recording system to show when and for how long and in what numbers employees of the first defendant had been on the plaintiff's site was criticised by the first and second defendants on a number of bases. Mr Gould, who was called to give evidence for the defendants, noted that he had attended meetings at a time when the swipe cards were introduced by the plaintiff and it was quite clear that the system was not supposed to be a time recording system. Various minutes of the plaintiff's "site consultative committee" were produced in evidence which tended to support Mr Gould's observation. Further, they attested to problems that had been experienced in implementing the system. Indeed, Mr Purchase said in cross-examination that when first installed, the gate recorder system had frequently broken down. Then, although all persons

entering the site in a vehicle were supposed to use their access cards, in practice, it might only be the driver of a vehicle who would do that. Also, there were parts of the plaintiff's premises which could be accessed without use of the card.

[41] Nevertheless, although accepting that the recording system was not absolutely accurate and at times people could and did avoid using the system, Mr Palmer's evidence was that the plaintiff had made it clear to all staff and contractors that they were expected to swipe their entries and exits. Failure to use the swipe card was taken seriously and disciplinary action was considered because it was a health and safety tool. Most workers were based either at the Rolling Mill or Pacific Steel, where access was controlled by the swipe card system. Once there, they would usually stay there.

[42] Perhaps recognising that basing its claim on the figures produced by an analysis of the electronic gate control system would have been problematic, the plaintiff also commissioned a forensic accountant, Mr Iain McLennan, to carry out an audit of the defendants' discovered documents and to undertake an assessment of the extent of the over charging by the first defendant. In the event, it was on the basis of his investigation and analysis that the various sums sought in the statement of claim were ascertained and pursued.

[43] Mr McLennan's approach was to analyse the first defendant's revenue and expenses. A large part of the first defendant's income was derived on the basis of employees charged out at an hourly rate. In order to calculate the hours which it was able to charge, Mr McLennan carried out an audit of the employees, the hours they had been paid, amounts returned to the Inland Revenue Department, the expenses paid by the first defendant and a reconciliation of its bank accounts.

[44] Because the first defendant paid its staff on an hourly rate basis, Mr McLennan was able to ascertain the number of hours for which they had been paid. He noted that the first defendant did not appear to have paid any overtime, but paid holiday day, some sick pay and for statutory holidays. Holiday pay was paid to employees at the time that it was earned, that is weekly. The amounts paid on a

weekly basis were compiled for all employees in the first defendant's computerised payroll system.

[45] On the basis of the information that he was able to review, Mr McLennan concluded that the first defendant had paid its employees for 149,503 hours during the period of the Services Agreement. During the same time, it had billed a total of 231,998 hours to the first defendant. In addition, Mr Nahal's time had been billed by the first defendant at the supervisory rate provided for in the contract. Mr McLennan was not able to calculate Mr Nahal's time as he had done in the case of employees, because Mr Nahal was paid a salary which was not based on hours worked, and no PAYE return had been made in relation to him. Mr McLennan made an assumption that he had billed 40 hours per week for 52 weeks of the year, for a total of 7,280 hours over the period that the Services Agreement had been in place. In the absence of any information enabling him to ascertain how much of Mr Nahal's supervisory time might have qualified for the higher $35 per hour rate specified for supervisory work in respect of the Rolling Mill, Mr McLennan applied that rate across the board.

[46] Mr Nahal also analysed the first defendant's expenses and annual financial statements that had been prepared for the first defendant by an external accountant for each of the years ended 31 March 2002, 2003, 2004 and 2005. In addition, he considered a trial balance set of accounts for the eight months ended 30 November 2005 that had also been prepared by the external accountant. His analysis showed that the plaintiff was the first defendant's largest customer by a wide margin. The percentage amounts billed to the plaintiff by the first defendant for the financial years ending 31 March 2003, 2004 and 2005 were respectively 94.2%, 96.4% and 94.5% of its total revenue. For the eight months ending 30 November 2005, the figure was 97.7%. It was Mr McLennan's evidence that the financial statements showed that:

a) The first defendant had been "extraordinarily profitable";

b) Its principal expense was wages;

c) Wages as a percentage of revenue was substantially lower than would be expected if the Services Agreement was being complied with;

d) Most of the first defendant's overheads varied with revenue. It did not have high fixed overheads and its overheads were really costs directly related to the production of revenue.

[47] On the basis of his investigation and analysis, Mr McLennan concluded that the over-billing during the relevant period had amounted to $2,088,155, the sum relied on in the statement of claim. That figure was arrived by identifying and accounting for:

a) Invoices received by the first defendant from sub-contractors and the sums paid to them;

b) The gross amounts paid to legitimate employees (to work out the hours for which they had been paid);

c) The amounts paid to suppliers that may have been on-charged to the first defendant;

d) The amounts that Mr Nahal may have charged in his role as a supervisor, calculated as previously discussed;

e) The possibility of an increase in the amount that the first defendant was able to charge as its employee's hourly rate under the Services Agreement from $22.50 to $24 per hour (plus GST) from 18 December 2004.

[48] Mr McLennan made the assumption that purchasers and contractors costs related only to the plaintiff, and were on-charged to it at cost, except where he was able to identify specific invoiced amounts in which case he used the invoiced amount. He observed that such an approach was in the defendant's favour because not all of the invoices were available to support the amounts paid and where invoices

were available, the description of the work performed for which client was performed was not clear.

[49] Mr McLennan's analysis was summarised in schedule F to his evidence which I now set out:

Schedule F

	Summary (including GST)	31-Mar-03	31-Mar-04	31-Mar-05	30-Nov-05	Total	Hours
	Staff Hours (from Schedule A)	28,579.2	37,028.3	50,741.2	33,154.0	**149,503**	
	Staff Hours times the Contract Rate (from Schedule C)	723,412	937,279	1,284,386	839,210	**3,784,287**	**149,503**
	Mr Nahal Supervisory Hours at Contract Rate	61,425	81,900	81,900	61,425	**286,650**	**7,280**
	Plus: Purchases (materials etc)	7,377	52,928	125,488	79,923	**265,716**	
	Plus: Sub Contractors	55,653	108,125	225,056	239,067	**628,900**	
A	**Total Revenues Billable**	**848,867**	**1,180,232**	**1,716,830**	**1,219,625**	**4,965,553**	**156,783**
	Revenues per Contractors Annual Financial Accounts	1,195,352	1,634,592	2,519,319	1,637,045	**6,986,309**	
	Plus: Contractors Unpaid Invoices to FSL				377,992	**377,992**	
	Less: Non Fletchers Revenue	68,376	59,488	136,930	45,799	**310,593**	
B	**Contractors Revenue from FSL (Paid and Outstanding)**	**1,126,976**	**1,575,104**	**2,382,389**	**1,969,238**	7,053,708	
B	**Made up of:**						
	Charges for Employees (unknown hour or rate)	1,001,521	1,332,152	1,949,946	1,588,823	**5,872,442**	**231,998**
	Mr Nahal Supervisory Hours at Contract Rate	61,425	81,900	81,900	61,425	**286,650**	**7,280**
	Plus: Purchases (materials etc)	7,377	52,928	125,488	79,923	**265,716**	
	Plus: Sub Contractors	56,653	108,125	225,056	239,067	**628,900**	
	Contractors Revenue from FSL (Paid and Outstanding)	1,126,976	1,575,104	2,382,389	1,969,238	**7,053,708**	**239,278**
A-B	**Over Billing Variance Including GST** Total Revenues Billable less Fletchers Revenues Paid	**- 278,110**	**- 394,873**	**- 665,559**	**- 749,613**	**- 2,088,155**	**- 82,495**

[50] As mentioned earlier, those calculations, subject to deductions for invoices not paid and the sums reimbursed by Messrs Nahal and Purchase form the basis of the plaintiff's claim for $1,404,936. The alternative greater claim, for $2,090,795 was dealt with by Mr McLennan very briefly, in four short paragraphs of his 99 paragraph brief. The claim for the higher amount was explained by him on the basis that had the plaintiff been able to extract itself from the Services Agreement when the fraud was first occurring, then on the assumption that the plaintiff could have obtained the services for $18.50 per hour (plus GST) from an alternative supplier, the plaintiff would have been significantly better off. Based on the actual hours for which the first defendant had paid its employees, and the supervisory hours, Mr McLennan calculated that the plaintiff would have paid an alternative supplier for 152,413 hours at a saving of $4 per hour (plus GST), the equivalent of $685,859 (inclusive of GST).

[51] Accordingly, on this alternative approach, the plaintiff's total loss would be the $2,088,155 earlier calculated, plus a further $685,859, giving a total of $2,774,014. Making the same deductions as in the case of the claim for the lower amount, the net claim would be for $2,090,795.

[52] The possibility that at the relevant time the plaintiff could have secured performance of the work covered by the Services Agreement at the lower rate of $18.50 per hour was supported by evidence given by Mr Palmer that, when the plaintiff ended its dealings with the first defendant, it contracted with an organisation called "Tradestaff" to undertake the same work. It did so at cheaper hourly rates of $18.50 per hour and Mr Palmer expressed the view that had there been a competitive tender in 2002, then that would have been for the rate that the plaintiff would have been able to obtain. The result of contracting with Tradestaff had been a significant reduction in the plaintiff's expenditure.

[53] Mr McLennan's overall analysis was reviewed and supported by Mr John Waller, who is himself an experienced forensic accountant. However, Mr Waller did not specifically refer to that claim for $2,090,795 and I did not understand his evidence to relate to that claim. Mr Smith pointed out that on the evidence, in 2001, Pollock Production Services Limited (as it was by then called) had been employed at the same rates as applied to the Services Agreement between the plaintiff and the first defendant. No invoices of Tradestaff had been discovered, and there was no sure basis for comparison of the work that they had carried out, compared with the first defendant's services. Furthermore, he pointed out that there was no evidence about what the market would have been in 2002 if the works had been put to competitive tender.

[54] For his part, Mr Fulton did not address the higher claim in his closing submissions. In my view, there was insufficient evidence to justify judgment for the higher amount claimed and in the balance of this judgment, I will refer only to the claim for the lesser amount of $1,404,936.

The first and second defendants' response

[55] A principal issue raised by the first and second defendants in response to the plaintiff's claim was based upon the inaccurate gate swipe card records. Mr Smith pointed out that in paragraph 33 of the statement of claim, the plaintiff had set out the records of the gate recorder for February 2005 to October 2005 so as to demonstrate that on the basis of the records during that period, 31,101 hours had in fact been worked by the first defendant's employees, whereas 60,669 hours had been billed. Although the statement of claim had gone on to refer to the information disclosed in the documents that had been discovered by the defendants, it had repeated its reliance on the gate recorder analysis. Mr Smith asserted that Mr McLennan, in cross-examination, had stated that the amount claimed in the original statement of claim was based on the gate recorder records and in that respect, he referred to the following passage of evidence during his cross-examination of Mr McLennan:

> I put it to you again, if the gate recording material is wrong the answer derived from that also be wrong … In respect of the original statement claim. Yes.
>
> If that figure is wrong and you got the same figure it's also wrong … No my figure was derived totally independent of the gate recording or of Fletcher's analysis.
>
> I know you came by a different way but you got to much the same figure didn't you … Yes.

[56] Mr Smith maintained that on the evidence, there was no doubt that the gate recorder records were totally inadequate as a time recording system and would have "grossly under-recorded" the time spent on the site by the first defendant's employees. He argued that it followed, as a matter of logic, that if the gate recorder records had been accurate, the hours recorded as worked by the first defendant's employees would have been considerably higher. If so, then any amount deducted on the basis of supposed hours overcharged would have to be considerably lower than claimed.

[57] The original statement of claim had sought payment of $1,930,000. That figure, Mr Smith maintained, had been based upon the gate recorder records. If that

lower figure was wrong, then the plaintiff's current claim for a higher amount must, *a fortiori*, also be overstated.

[58] He contended that the Court was in fact in no position to assess whether any overcharging had taken place. In that respect, he relied on evidence that the defendants called from their own forensic accountant, Mr Hatten. Mr Hatten had been asked to review the first defendant's accounts to ascertain the validity of the amounts invoiced to the plaintiff during the relevant period. He had full access to the discovered documents.

[59] At the outset, he expressed the view that neither his nor Mr McLennan's analysis of the financial transactions could be anything other than a hypothesis based on certain assumptions. Although documents could be referred to in some cases, some documents no longer existed and in those cases, it was necessary to make assumptions. Most importantly, documents which he referred to as "the timesheets" which had been presented to the plaintiff with each invoice were no longer available. Mr Hatten was the only witness who referred to these documents as "timesheets". It appears from other evidence that with the invoices, the first defendant would often forward dockets which were attached to the invoices. The invoices themselves contained relatively sparse details. More information was contained in the dockets, including detail as to hours worked and numbers of employees involved. Mr Purchase gave evidence that the dockets were destroyed soon after receipt of the invoices. Mr Nahal did not keep the duplicates. Mr Hatten expressed the view that without those documents, any statements as to hours charged for any time must be a matter of conjecture.

[60] Mr Hatten recorded that the first defendant provided both labour services and other services of a "project management nature" to the plaintiff. The latter would include the provision of independent sub-contractors and management services for specific projects as requested. From time to time, suitably skilled labourers or sub-contractors independent of the first defendant were employed to complete the work involved. Mr Hatten recorded Mr Nahal's advice to him that work of that nature was normally quoted and agreed with the plaintiff prior to commencement, either in writing or verbally. This latter category of work was, according to Mr Nahal,

provided to the plaintiff with mark-ups of between 10% and 100% on its cost to the first defendant.

[61] For the years 2003 and 2004, Mr Hatten calculated the annual total hours worked by the first defendant's employees by dividing the total wages paid during the year by the average hourly rate paid to employees. The average hourly rate was calculated by selecting three periods at random and calculating the weighted average hourly rate. The average hourly rate so derived was then applied across the full financial year. The payments made to Mrs Purchase were excluded, on the basis of Mr Nahal's advice that they were not remuneration for services provided.

[62] Mr Hatten then estimated that the first defendant was entitled to bill approximately 15% of the total hours at the supervisor rate of $25 per hour (plus GST) as provided for in the Services Agreement. The remaining 85% were assumed to be chargeable at the contract rate of $22.50 plus GST per hour. Then, the normal hourly rate of $22.50 plus GST had been increased from December 2004 onwards to $24 plus GST on the basis of a letter that the first defendant had provided to the plaintiff. That letter was dated 18 December 2004, and had been addressed to Mr Wood at Pacific Steel. The body of the letter reads as follows:

> Nahal Labour Hire Limited has been engaged in contract work for your company for past few years. Our original contract was for production cleaning only but this has now expanded to include general repairs and maintenance and production rework extra in addition to the cleaning.
>
> For our business to continue being viable and efficient whilst retaining our experienced staff we now find it is necessary to increase our hourly contract price.
>
> Our envisage (sic) hour current rate of $22.50 per hour we would request you to be increased to $24.00 per hour.
>
> We will be happy to discuss this matter with you.

[63] The letter was signed by Mr Nahal who claimed in evidence that Mr Wood had told him that the increased rate could be used from the date of the letter. Mr Wood denied that, and I shall return to that contested question of fact later in the judgment.

[64] Mr Hatten made a separate allowance in respect of Mr Nahal's personal supervisory time. He adopted the rate of $35 plus GST per hour and also on the basis of Mr Nahal's advice to him that he spent considerable time at the first defendant's premises, often working in excess of 12 hours, seven days per week. Mr Hatten assessed that he should make the allowance on the basis of 70 hours per week, for 50 weeks of the year.

[65] Then, he made an adjustment to the total amount calculated to this point to recognise that not all wage expenses could be attributed to work carried out for the plaintiff. The adjustment was made on the basis of an annual calculation of the invoices rendered to the plaintiff as a percentage of the first defendant's total income. A minimal allowance was also made for remuneration for Mrs Nahal who, although not employed on a formal basis, nevertheless, according to Mr Nahal, had carried out cleaning and delivery work for the plaintiff on an "as required" basis.

[66] Another important aspect of Mr Hatten's approach was based on advice that Mr Nahal gave him that it had been agreed with the plaintiff's "management" that the first defendant would provide the "additional services" and also be paid allowances for the use of a utility vehicle, a trailer allowance, a mileage allowance when one of the first defendant's vehicles was used offsite for the plaintiff's work, a safety harness allowance where safety harnesses needed to be worn by the first defendant's employees, a grinder allowance, and a cleaning machine allowance. Further matters which Mr Nahal told Mr Hatten had been agreed with the plaintiff's "management" were that he would carry out the reading of water meters on a daily basis for a set fee (initially $22.50 on week days or $25 on weekends but later increased to $40 per day) and that the first defendant would be entitled to charge for "call-outs" on the basis of a three hour minimum period. Mr Nahal provided Mr Hatten with estimates of the number of times per week these call out events would occur and Mr Hatten calculated appropriate charges for inclusion in his analysis accordingly. The cleaning machine was purchased in November 2004 for a cost of $30,160.44.

[67] Mr Hatten expressed the professional opinion that the allowances were all reasonable and appropriate. He maintained that the purchase of materials and the

provision of independent subcontractors were not services provided pursuant to the Services Agreement and could be invoiced independently of it. He then recorded advice given to him by Mr Nahal that when provided, the services were marked-up in the invoices issued to the plaintiff. Mr Hatten's analysis showed that they had been marked-up on an "ad hoc" basis, no standard mark-up rate being applied.

[68] In the circumstances, he applied an average mark-up to all expenditure of that nature. Taking a selection of quoted or on-charged jobs for that purpose, he calculated the average mark-up applied at 30.97%. He then applied that mark-up to purchases, subcontractors and any other expenditure that he considered to be directly related to contracting income. He then made an adjustment to take account of the fact that not all purchases or subcontractors directly related to the plaintiff; the adjustment was on the basis of the amounts billed to the plaintiff as a percentage of the first defendant's total income.

[69] Leaving aside the admittedly false invoices that the first defendant had issued, the result of Mr Hatten's analysis was a discrepancy of $653,488.05 between what Mr Hatten considered had been justifiably billed to the plaintiff and what had in fact been billed. He observed that his analysis was not to be interpreted as an indication that overcharging had taken place. Rather, the results that he had arrived at supported the defendants' stance that the plaintiff's analysis, and that of Mr McLennan were inaccurate. In the absence of the "job sheets" the correct position could not be established.

[70] It will be seen from the summary that I have given that to a large extent the differences between Mr Hatten's approach and that of Mr McLennan were based on various categories of charges that Mr Nahal claimed had been approved by the plaintiff through its managers, which were not taken into account by Mr McLennan. Given that, and the different stance adopted by the plaintiff on many of the relevant charges, it has been important for the Court to form a view on Mr Nahal's credibility. To that subject, I now turn.

Mr Nahal's credibility

[71] As I have earlier recorded, Mr Nahal was convicted of fraud on the basis of the admitted provision to the plaintiff of 57 false invoices totalling $288,815.40. He maintained, however, that that was the extent of the false invoicing that had been carried out.

[72] In the circumstances, where there have been disputes as to matters of facts between the plaintiff's witnesses and Mr Nahal, I have thought it important to approach those disputes by making an objective assessment of the rival claims, and not to make findings contrary to Mr Nahal simply on the basis that he has previously admitted fraud. The latter approach would be unfair. It would also risk error and fail to take into account that where a plaintiff alleges deceit a higher than normal standard of proof is required. It was said in *Johnson v Felton & Ors* (CA32/00, 13 December 2000) at 32:

> With respect to the standard of proof, Goddard J referred to 'adequate authority to indicate that the requisite standard of proof is little less than proof beyond reasonable doubt'. There was no argument on the appeal that the judge applied incorrect legal principles in respect of the tort of deceit.

[73] Another general observation should perhaps be made at this point. Mr Nahal was born and raised in India, where he obtained both Bachelors and Masters of Arts degrees in economics from a university in Amritsar. He read his brief of evidence with reasonable fluency, although English is plainly not his first language. Generally, he also responded to questions with a reasonable degree of understanding. However, when pressed in cross-examination, he sometimes appeared not to have understood the question, or if he had understood it, he chose not to answer it. As just one example I quote the following exchange from his cross-examination by Mr Fulton:

> Every false invoice is therefore dated after the purchase order is that right … I think it is the same date as order number.
>
> You are aware aren't you of Mr Palmer's evidence that the vast majority, 85% of purchase orders, were raised after the invoice … I handed invoices on Monday morning normally.

[74] However, when questions were put to him again, Mr Nahal generally answered them. Overall, I do not think that there is any issue involving a lack of facility with the English language which makes assessment of his credibility problematic.

[75] Having made those preliminary observations, I now record my view that there were aspects of Mr Nahal's evidence that were most unsatisfactory. Given the first and second defendant's stance that the list of admittedly false invoices represented the sum total of the over-billing, it might have been expected that Mr Nahal would give cogent evidence as to the way in which he had identified the invoices in the list. His evidence was anything but cogent on that subject. In his evidence-in-chief, he stated at paragraph 54 that:

> The invoices that were false were not able to be identified by looking at the invoice. What had to be looked at was the timing of the invoice and when payments were made to Dean Purchase and working back from there.

[76] In cross-examination however, Mr Nahal began by asserting that he had been able to identify the false invoices on the basis that Mr Purchase had assigned the false order numbers to specific areas of work:

> What criteria did you use to identify a false invoice… I knew when Dean Purchase created a false order number he had specific area he booked that money to, but not always.
>
> What was that area … He booked quite a bit on waste materials and a bit on safety.
>
> I think it's common ground that there were 56 [in fact, there were 57] invoices you admitted to be false… Correct.
>
> If you discovered most of the false invoices, are most of those false invoices reflecting the areas you've just discussed… Correct.
>
> As a percentage of the 56 how many would you say you could identify drawing on that basis of identification… Not clear on the question.
>
> You said before that you used some work areas that Mr Purchase would tell you to use in a false invoice… He won't tell me he would give me an order number.
>
> In His Honour's notes, page 95 line 27, I asked you a question, 'What criteria did you use to identify a false invoice'.

You answered, 'I knew when Dean Purchase created a false order number he had specific area he booked that money to, but not always.' … I didn't know until he had given me an order number.

Did he give you that order number before or after you issued your invoice… After.

At line 30 when I said, 'What was that area', you said, 'He booked quite a bit on waste materials and a bit on safety'.

Remember that… Yeah.

Are you saying that your invoice reflected the work that Mr Purchase was telling you he would raise the purchase order for… Yep. He used commonly one word like sludge disposal.

Coming back to my question about the percentage, of the 56 you said you identified most of them as false. I take it you identified most of them as false using the criteria you've just described to His Honour. Is that right… Most of the 56 invoices, like he would book on waste disposal or safety and others.

The Court – Mr Fulton is asking you if can estimate a percentage of those, you say most, he is asking you the percentage.

Mr Fulton – Half, three quarters … I'm not quite sure probably three quarters.

Can you please reconcile for me what you just said with what you stated in para 54 of your brief of evidence where you said the invoices that were false were not able to be identified by looking at the invoice. What had to be looked at was the timing of the invoice and when payments were made.

That's completely different isn't it… You didn't ask me that specific question, you wanted me to identify the invoices and English is my second language as well.

Paragraph 54 is completely at odds with what you just told me was the basis you used to identify a false invoice isn't it… That's what I said, I was not very clear on your question.

Do you now understand that what you said here in paragraph 54 that is if you look at the timing of the invoice and the timing of the payments, you now understand that that is simply not a possible way of working out a false invoice… I put all my effort to find these invoices.

[77] Mr Fulton continued to ask questions on this issue in the following passage:

Mr McLennan gave evidence in his brief of evidence that he could not see any correlation between what you said was a false invoice and payment, remember that evidence you said was made to Mr Purchase… Yes

He wasn't challenged on that, so I take it you agree you cannot match up the timing of an invoice that you said is false with the timing of the payments

> you say were made to Mr Purchase. They don't match do they… I'm not sure.

[78] And later:

> Do you say and hold your evidence that the false invoices can be identified by reference to the payments made to Mr Purchase, that true or false… It can be.
>
> You say it can be… Yes.
>
> You said in evidence a few moments ago that the purchase order would be raised for a false invoice and then you would issue the invoice. Correct… Correct.
>
> It's not true is it… It is true.
>
> Every false invoice therefore is dated after the purchase order. Is that right… I think it's the same date as the order number.
>
> You are aware aren't you of Mr Palmer's evidence that the vast majority, 85% of purchase orders were raised after the invoice… I handed invoices on Monday morning normally.
>
> That wasn't my question. You yourself said about 80% of purchase orders came after the invoice… Correct.
>
> The evidence of Mr Palmer was more mathematical. Based on all the records, was that it was about 85%. You would not dispute that… No.

[79] At this point, Mr Fulton referred Mr Nahal to a particular invoice selected from the list of admittedly false invoices, pointing out that it was dated 30 November 2002, but the purchase order had in fact not been raised until 6 December 2002. After some further questions and answers, Mr Nahal proffered that it was possible the invoice was not a false invoice at all, and that he had wrongly admitted it as such. Mr Fulton then put to him 19 further invoices from the list of admittedly false invoices where, in all cases but one, Mr Nahal accepted that the purchase order had been raised after the invoice, although he attempted to resile from that position asserting (incorrectly) that both the invoice and the purchase order had been created on the same day. At a subsequent stage of the cross-examination, Mr Fulton again asked Mr Nahal whether he had in fact identified false invoices by means of reference to the nature of the work. Mr Nahal agreed that he had. Mr Fulton asked Mr Nahal to identify for the Court what the areas of work were that he had used to identify the false invoices. Mr Nahal's unconvincing response was that he would

have to go through each invoice by invoice. Shortly after that, however, he then reconfirmed what he had said at paragraph 54 of his evidence, to the effect that the invoices that were false were not able to be identified by looking at the invoices.

[80] Mr Smith reminded me that Mr Purchase had given evidence in which he said that he would issue a purchase order creating fictitious details of the work to be carried out and either approve or get it approved by a manager with authority. It was at that stage that Mr Nahal would then submit a false invoice through Mr Purchase which would be paid as a matter of routine along with all other invoices. However, that evidence appeared to be at odds with the analysis carried out by Mr Palmer which showed that of the 57 admittedly false invoices, 38 had been rendered before the purchase orders had been raised, and that was the case in respect of 85% of all of the relevant invoices. Mr Palmer was not cross-examined on that evidence, and indeed it was little different from Mr Nahal's own statement in evidence-in-chief estimating that 80% of the invoices would have had purchase invoice numbers written on them after the job was completed. In the result, the fact is that Mr Nahal was not able to give a coherent or consistent account of the method that he had used to select the 57 admittedly false invoices in the list that he provided to the plaintiff in December 2005. Given the importance of that issue to the case, in view of the first and second defendant's assertion that the list was complete, Mr Nahal's evidence on these matters had an inevitably adverse impact on his credibility.

[81] I was troubled also by some other aspects of Mr Nahal's evidence. He stated that Mr Purchase had effectively pressured him into the fraudulent scheme. This had arisen when in mid-2002, Mr Purchase had asked him for a loan which Mr Nahal had refused. The request and refusal were repeated several times. Mr Nahal said that each time he refused, the amount of hours of work that was allocated to or requested of the first defendant "dropped quite dramatically".

[82] However, it was Mr McLennan's evidence that from June 2002 to March 2003 the payments made by the plaintiff to the first defendant remained at a fairly constant level to 4 September 2002.

[83] Mr Nahal stated that he did not want to lose the work of Fletcher Steel and for this reason, he eventually agreed to make a loan to Mr Purchase. However, it is plain on the evidence that Mr Nahal had a good relationship with other persons in the plaintiff's management team, more senior to Mr Purchase, such as Mr Gould and Mr Wood. No explanation was given as to why he had not simply raised the issue with other persons, rather than bending to the alleged pressure put on him by Mr Purchase.

[84] It was Mr Nahal's evidence that he eventually made a loan to Mr Purchase by making various payments to him and paying accounts on his behalf totalling $25,300 in the period 20 June 2002 to 4 September 2002. He said that there was an agreement that the money would be repaid in October 2002, but when the time came for repayment, Mr Purchase told him he did not have the money. It was at that point that Mr Purchase had suggested that he should raise a false purchase order, and that Mr Nahal should bill the company for an amount that Mr Purchase would specify. After deducting such sum as was necessary to cover GST and the tax to be paid, the balance was to be used to pay "the $40,000 advance".

[85] There was no explanation of how the sum owing to Mr Nahal had swollen to $40,000 by October 2002. On the basis of the admitted list of payments to Mr Purchase, an advance of $40,000 would not have been made until about August 2003. Yet the false invoices allegedly commenced on 11 October 2002, when the sum of $40,000 had plainly not been advanced. Perhaps there is an explanation for these discrepancies, but it is not plain on the evidence.

[86] Of more importance for present purposes is Mr Nahal's evidence that when the $40,000 had been repaid, Mr Purchase wanted to continue raising the false purchase orders and that Mr Nahal felt he had to continue the scheme. After deducting amounts necessary for taxation and GST, all of the money falsely invoiced was allegedly paid to Mr Purchase, and it was Mr Nahal's evidence that he received no personal benefit from it whatsoever other than the return of the $40,000 originally leant to Mr Purchase. That evidence I simply find implausible. Given his relationship with the other plaintiff's managers, and the apparently high regard in

which he was held by them, there was no objective reason why he should acquiesce in pressure put on him by Mr Purchase, if that is what occurred.

[87] It was Mr Purchase's evidence that both were in the scheme "together". Mr Wood spoke of a number of occasions during the relevant period when Mr Nahal had approached him for advice in relation to issues he was having with staff, and how he had helped him sort through those issues in an amicable manner. He spoke of his disappointment that Mr Nahal had not approached him in a similar vein if as was alleged, Mr Purchase had influenced him into the fraudulent scheme. Further, the first defendant had recently been appointed under the Services Agreement, replacing Pollock Engineering & Maintenance Services Limited and with the approval of the relevant managers. I do not find it plausible that anything said or done by Mr Purchase could have forced Mr Nahal to be an unwilling participant in a fraud from which he did not benefit and I consider it more likely than not that Mr Nahal did benefit personally (or through the first defendant) from the scheme.

[88] Finally in this part of the judgment, I note that even on Mr Hatten's approach, there is an unexplained variance of $653,488.05 between what his analysis showed the first defendant could legitimately have billed and what was in fact billed. Given the breadth of the matters that he took into account, it is very difficult to understand what explanation there could be for that variance other than false billing as the plaintiff claims. While I understand Mr Hatten's argument that it is not possible to be completely accurate without a full audit of the work undertaken and represented in the various invoices, the absence of any suggestion as to even a category or categories of explanations which might explain the variance is disturbing. For present purposes, I note that no explanation was proffered by Mr Nahal for this variance.

[89] For the various reasons I have addressed I have not felt able to accept assertions made by Mr Nahal on contested issues of fact, in the absence of corroborative material available from other sources.

The causes of action against the first and second defendants

[90] In order to succeed on a course of action in deceit, the plaintiff must establish that the defendant made a representation of fact, in the knowledge that it was false, with the intention that it be relied upon by the plaintiff and that the plaintiff acted in reliance on the representation, suffering damage as a result: *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, 211; *Johnson v Felton & Ors* (CA 32/00, 13 December 2000). In the present case, the plaintiff asserts, effectively, that each false invoice contained a representation of fact that the work and services purported to be charged for had in fact been carried out, and that the plaintiff was obliged to pay the amount for which it had been billed. It is of the essence of its claim that the first and second defendants knew that the invoices were false, and that the invoices were issued with the intention that the plaintiff would rely upon the representations that they each contained. The plaintiff demonstrated its reliance by paying the invoices and it suffered damage as a result. I did not understand Mr Smith to challenge the availability of that approach; the contest was on the facts.

[91] The claim based on the false invoices are also advanced as breaches of the Services Agreement. In particular, the conflict of interest provision is relied on. The plaintiff says that presentation of the false invoices created a conflict of interest. Had the first defendant complied with its obligation to advise the plaintiff of such conflicts of interest, the plaintiff would not have paid on the invoices, and would not have sustained the losses that it did. In addition, the plaintiff relies on the implied term to be derived from clause 6.3 of the Services Agreement that any sums overpaid pursuant to the Services Agreement must be repaid to the plaintiff. It asserts further that the first defendant's practice of charging for minimum hours per call out was in breach of the agreed method of charging pursuant to the Services Agreement.

[92] Once again, I do not understand Mr Smith to raise any legal issue with the way the plaintiff's contractual claim has been formulated. The issues raised are ones of fact, it being asserted that the overcharging did not occur and that in the case of the minimum hours issue, the first defendant's practices were approved by the plaintiff's managers.

[93] The claims for breaches of contract are advanced solely against the first defendant. The claim against Mr Nahal is in deceit, he having been the managing director of the first defendant at all material times, and the person who implemented the issuing of false invoices by the first defendant. It was also alleged against him that he took part in a conspiracy to defraud together with Mr Purchase.

[94] I have already referred to the high standard of proof which applies in the case of claims of deceit. If that test is able to be met, then plainly the other causes of action advanced against the first and second defendants will also succeed. Given the argument on this part of the case, I do not think that any more extensive discussion of the law is necessary.

Evaluation

[95] I turn then to the factual contest between the parties. I have already summarised the respective positions of the forensic accountants called. Before dealing with the detail of their disagreements, it is appropriate to note that there were two broad issues raised by Mr Smith in defence of the plaintiff's claim.

Gate recorder records

[96] The first of those issues was the reliance placed by the plaintiff on the gate recorder records. As earlier mentioned, his submission was that because on the evidence the gate recorder records would have under recorded the hours spent on the site by the first defendant's employees, then the plaintiff's claim for a higher amount than the gate recorder records would justify must be wrong. The steps in his reasoning were as follows.

[97] First, Mr Smith maintained that Mr McLennan in cross-examination had stated that the amount claimed in the original statement of claim was based on the gate recorder records. The original statement of claim had claimed the sum of $1,930,000. Mr Smith then argued that because the gate recorder records were inadequate as a time recording system, the hours would have been "grossly under-

recorded". It follows from this that if the gate records had been accurate and covered the entire site, the hours recorded for the first defendant's employees would have been considerably higher. If the hours recorded were considerably higher, the amount deduced on the basis of supposed hours overcharged would have to be considerably lower than the $1,930,000 originally claimed. If the figure of $1,930,000 is wrong and too high, then it follows that the claim for $2,088,155 (some $158,155 more than the original claim) must also be wrong.

[98] I have already indicated that I accept that the gate recorder records would be an unreliable basis for assessing the numbers of hours worked by the first defendant's employees. I think it also correct to say that the gate records would have recorded less hours than were in fact worked. However, I do not think it necessarily follows that the plaintiff's claim for $2,088,155 must, for that reason, be wrong. I say that for a number of reasons.

[99] First, to the extent that Mr Smith's argument was based on Mr McLennan's evidence in cross-examination, I do not think it accurately reflects what Mr McLennan said. Mr Smith's reference was evidently to what Mr McLennan said on page 73, lines 21 to 28 of the notes of evidence, which I again set out:

> I put it to you again, if the gate recording material is wrong the answer derived from that must also be wrong… In respect of the original statement of claim. Yes.
>
> If that figure is wrong and you got the same figure it's also wrong… No my figure was derived totally independent of the gate recording or of Fletcher's analysis.
>
> I know you came by a different way but you got to much the same figure didn't you… Yes.

[100] In my view, were Mr Smith's argument to have substance, it would have to be based on what the original statement of claim in fact asserted, rather than on what Mr McLennan said about it in the passage just quoted. The original statement of claim was filed on 3 February 2006. It is correct that the relevant claim against the first and second defendants at that stage was for the amount of $1,930,000. That sum was derived on the basis of allegations that the first defendant had falsely been paid $2,151,000, from which the sum of $221,000 was then deducted on the basis

that at that time the plaintiff had refused to pay on invoices totalling $221,000 issued in October 2005. Both figures can be compared with the current claim which has as a starting point $2,088,155 from which deductions were then made to bring the net figure down to $1,404,936 as previously explained. The point to note though is that, insofar as the allegation of false invoicing was concerned, the plaintiff's claim then was based on a higher false billing than is currently the case.

[101] Secondly, I observe that in the allegations contained in the first statement of claim, there was no reference whatsoever to the gate recorder records. Rather, the plaintiff relied then on the "Nahal documents", described at paragraph 21 as:

> A range of documents and records of NCL, Nahal Properties and Holdings. This material included bank account statements, financial statements, payroll records (which demonstrate the hours paid to NCL employees for work at Fletcher Steel) and other material.

[102] In context, the reference to "other material" must be a reference to documents sourced from the defendants. Consequently, it seems that the alleged starting point for Mr Smith's argument in the original statement of claim does not exist.

[103] An amended statement of claim was filed on 21 April 2006, in which reference was made to the gate recorder material. However, then as now, the statement of claim was purportedly based not only on the information gleaned from the gate recorder, but also on the information disclosed in the "Nahal documents". I consider that the pleading in the present statement of claim could properly be relied upon on the basis that Mr Fulton put it: the plaintiff's claim was based on the documents and other material assessed by Mr McLennan and what was obtained from the gate recorder could be seen as some corroboration for the overcharging which occurred.

[104] The extent to which the gate recorder information was inaccurate is unknown and cannot now be demonstrated. I think the appropriate response to the information derived from that source is simply to put it on one side. I do not see, however, how that should affect the overall validity of the plaintiff's approach. If it can be demonstrated independently of the gate recorder records that there has been gross over-billing, I do not see how an inaccurate source of information such as the gate

recorder can detract from conclusions which can and should be reached from other, more reliable, sources of information.

Absence of dockets

[105] A second broad issue pursued by Mr Smith, and indeed by Mr Hatten, concerned the absence of dockets which were attached to invoices and on which more extensive details were given of the work being performed, the number of persons involved and the hours that they worked. It seems to be common ground that such dockets accompanied the invoices when they were sent by the first defendant to the plaintiff. Mr Purchase gave evidence, however, that he routinely disposed of the dockets and Mr Nahal said that he did so as soon as invoices were paid. It is the absence of these documents on which the first and second defendants rely to assert that there can now be no complete picture presented or accurate reconstruction given of the events which transpired.

[106] Once again, I do not consider that that point is as significant as the defendants would maintain. After all, the theory of the plaintiff's case is that the invoices were false. They were a summary in effect of the fuller information contained in the attached dockets. If the plaintiff is correct, the dockets must also have been false. It would plainly have been a very difficult task, had the dockets been available, to demonstrate in any individual case that the work charged for was either completely fictitious or had been overcharged. It can be assumed I think for present purposes that seeing he was forwarding the dockets contemporaneously with the invoices, Mr Nahal would have avoided falsehoods which were obvious, such as charging for the time of a named employee who was not in fact employed.

[107] It is to be recalled also that the recipient of most of the invoices and dockets was Mr Purchase himself. He had already sought whatever approvals were necessary for the work by the time he had raised a purchase order. Unless any enquiry were carried out roughly contemporaneously, it is difficult to see what further purpose might have been served had the dockets now been made available. Mr Hatten did not explain why the absence of the dockets meant that the methodology adopted by the plaintiff to assess the extent of the overcharging was

necessarily flawed and I do not accept that that was the case. Overall, I am of the view that Mr McLennan's methodology, subject to some specific criticisms made by Mr Hatten to which I will now turn, was an acceptable basis for demonstrating that there had been overcharging to an extent much greater than that represented by the list of 57 admittedly false invoices. I reiterate at this point what I have already said about the unsatisfactory evidence Mr Nahal gave about the basis upon which he selected the invoices on that list, and record now my rejection of his evidence that the list of false invoices that he proffered was correct.

Key differences

[108] Mr Waller gave a helpful summary of the differences between the results arrived at by Messrs Hatten and McLennan in the form of a schedule that was set out in a brief of evidence given in reply. I now reproduce that schedule:

Brief of Evidence of Geoffrey Stewart Hatten **Summary of Variances to the** **Brief of Evidence of Ian McLennan**	**Attached Schedules**	**31-Mar-03**	**31-Mar-04**	**31-Mar-05**	**30-Nov-05**	**Total**
Overall Variance (Gross - including "admitted fraud")						
Overcharge per IM Brief of Evidence	1	278,109	394,872	665,558	749,613	2,088,152
Variance per GH Brief of Evidence	1	61,523	192,089	341,738	353,691	949,042
		216,585	**202,783**	**323,820**	**395,922**	**1,139,110**
Represented by						
Calculation Variances						
Employee chargeable	2	27,867	29,535	28,956	58,456	144,814
Balvir Supervisory	3	68,549	50,968	48,487	30,565	198,569
Purchases		4,941	(1,714)	(6,777)	(3,719)	(7,269)
Subcontractors		(11,250)	(24,137)	(40,686)	(11,127)	(87,200)
		90,108	**54,652**	**29,980**	**74,176**	**248,915**
Additional Charges						
Balvir Nahal's wife's hours		5,062	5,062	5,062	3,543	18,729
Other Allowances claimed	4, 5, 6	80,666	91,656	193,914	148,214	514,450
Overhead Expenses claimed as onchargeable		17,466	7,285	762	26,472	51,986
Creditors Paid Post 30 November 2005		-	-	-	35,998	35,998
Margin on Purchases (30.97%)		3,815	15,861	36,765	23,600	80,041
Margin on Overheads (30.97%)		14,061	26,011	57,100	70,593	167,765
Margin on Creditors Paid Post 30 Nov 05		-	-	-	11,149	11,149
Unreconciled (immaterial - roundings)		(0)	(0)	(0)	(0)	(0)
		126,479	**148,131**	**293,840**	**327,768**	**896,218**
						-
Fletchers Invoicing		-	-	-	(6,022)	(6,022)
						-
Total Variance		**216,585**	**202,783**	**323,820**	**395,922**	**1,139,110**

Note: *The summarises of both IM's & GH's Briefs of Evidence above include the admitted fraudulent invoices of approximately $325,000 in the overall estimate of overcharging*

[109] As can be seen from that table, the main differences in the results were in respect of the amounts he estimated to be chargeable for employees, Mr Nahal's

supervisory time, and additional charges for allowances and margins on non-employee costs.

Chargeable hours of employees

[110] The first of those variances was explained in a further table which Mr Waller provided and which I now set out:

Brief of Evidence of Geoffrey Stewart Hatten Variances to the Brief of Evidence of Ian McLennan Employee Chargeable Variance	**31-Mar-03**	**31-Mar-04**	**31-Mar-05**	**30-Nov-05**	**Total**
Variance per summary	**27,867**	**29,535**	**28,956**	**58,456**	**144,814**
Represented By					
Difference in calculated chargeable hours	60,253	49,247	29,291	37,925	176,716
GH assumption of 15% at "supervisory" rate	13,096	16,486	21,953	14,658	66,193
Increased rate from 18 December 2004	-	-	21,744	49,778	71,523
Error in application of increased rate			31,063	-	31,063
Variance due to % age basis	(45,411)	(36,105)	(74,969)	(43,779)	(200,264)
Unreconciled (immaterial - roundings)	(71)	(93)	(127)	(126)	(417)
	27,867	**29,535**	**28,956**	**58,456**	**144,814**

[111] As can be seen, the difference in relation to calculated chargeable hours was $176,716. It will be recalled that Mr Hatten's approach had been to take gross wages for the period of the Services Agreement from the first defendant's financial accounts and then calculate an average hourly rate based upon three sample weekly payrolls during each of the periods ending 31 March 2003, 31 March 2004, 31 March 2005 and 30 November 2005. The average hourly rate was then applied across the appropriate financial year in full. In cross-examination, Mr Hatten said that approach had the advantage of recognising the wages paid to non-IRD registered employees.

[112] Mr McLennan's methodology had been to calculate gross wages for each employee derived from the first defendant's monthly PAYE schedules submitted to the Inland Revenue Department, and to apply the hourly rate of each employee from the first defendant's payroll records. Mr Waller expressed the view that Mr McLennan's approach was more robust and detailed, because it considered all employees on an individual basis both in terms of their hourly rate and gross wage amounts. Furthermore, his calculations were made on a monthly basis.

[113] But for the issue concerning the employees not registered with the Inland Revenue Department, I would have thought that Mr Waller's observations were plainly correct. I note that there was no attempt by Mr Hatten to quantify the number of employees in that category. Nor did Mr Nahal give evidence-in-chief on that subject. It was in cross-examination that he made the suggestion that there would have been "four or five or six" persons in that category, but he was not specific and did not descend into any details such as the names of the persons concerned.

[114] The plaintiff had delivered interrogatories to Mr Nahal which he answered in an affidavit dated 30 January 2007. One of the interrogatories asked:

> In any month during the period June 2002 to November 2005, is the number of hours reflected in the payments being made to employees by the Contractors and declared to IRD significantly less than the equivalent hours being billed to the plaintiff for the same period? Answer: No, not in respect of employees. There may be a slight difference for the odd worker who had no IRD number.

[115] The balance of the answer raised issues concerning subcontractors' costs on-charged, and the issue of minimum three hour charges. Those issues will be addressed later. For present purposes, however, the answer given would not suggest that there ought to be any significant difference based on this factor between the figures arrived at by Mr McLennan and those reached by Mr Hatten.

[116] Ultimately, I prefer Mr McLennan's approach on this issue for the reasons put forward by Mr Waller.

[117] The next reason for a difference between the results arrived at by Messrs Hatten and McLennan was Mr Hatten's estimate that the first defendant was entitled to bill approximately 15% of the total hours charged at the supervisory rate of $25 per hour plus GST. Mr McLennan on the other hand proceeded on the basis that the signed Services Agreement appeared to provide for supervision by Mr Nahal only, his name appearing in the schedule at differing rates depending on the site that the work was based at.

[118] Mr Hatten did not go into detail as to the basis upon he had arrived at the figure of 15% of the total hours. There was no documentary evidence to support that figure. Nor were the individuals who had allegedly undertaken the supervisory work, apart from Mr Nahal, identified. Nor was any detail given as to what the supervisory work consisted of.

[119] The typed schedule 2 to the Services Agreement simply referred to a "Supervisor Rate" in respect of the three separate parts of the site, as previously mentioned. The document attached to the contract, on which the individual unit managers had written "Balvir" and in one case "Balvir/supervisory service" suggested that they thought that Balvir would be the supervisor, but in my view, the fact that schedule 2 simply refers to "supervisor" leaves open the approach that Mr Hatten adopted. In the circumstances, I do not think that I can properly hold that charging for supervisors other than Mr Nahal would have been in breach of the contract or deceitful. On the other hand, to assign a figure as high as 15% of the total hours worked to the category of supervisory hours does not seem justified. If I needed to determine the issue, I would reduce that figure to 10%, but I will return to that issue later.

[120] The next element of the variance was the fact that Mr Hatten had applied an increased rate from 18 December 2004, as he put it:

> In accordance with the letter Mr Nahal states NCL provided to FSL.

[121] I have already referred to the terms of that letter. It was Mr Nahal's evidence that he raised the question of an increase in rates with Mr Gould, who had responded that he would need to get "sign off" from the other managers. Mr Nahal said that he then spoke to Mr Wood about it and that was when he presented the letter requesting the increase. He said that after two or three weeks had passed, Mr Wood told him that he could use the increased rate from the date of the letter. He had not been given any signed document, but from then on, he had used the increased rate. He observed in his written brief, read to the Court, that the new rate was noted on the invoices and had never been questioned. However, in giving supplementary evidence-in-chief, he changed that evidence to say that the rate would have been on the dockets which were provided with the invoices.

[122] It was Mr McLennan's evidence that he could find only five invoices recording an hourly rate of $24 per hour (he had reviewed all of the invoices), and that could very well have been "invisible" to the plaintiff's management. If it was on the dockets of course, they were destroyed by Mr Purchase who would not have been motivated to do anything about the increased rate.

[123] Mr Wood accepted that he had had a discussion with Mr Nahal when the letter dated 18 December 2004 had been handed to him. It was his evidence that he told Mr Nahal that the same business unit managers who had signed the contract needed to approve any increase in the rates. If they agreed, then he would put the agreement to him in writing. He then said he passed on the request to the relevant managers, but they did not agree to any increase. The increase in the rate had never been approved.

[124] There was of course no formal variation of the contract recording any increase in rates. As has previously been noted, clause 16 of the Services Agreement provided that no alterations of the terms of the agreement would be binding unless in writing and executed by both parties. There was no such written variation for an increase in hourly rates. Theoretically, that is a provision that could have been waived, but Mr Wood's evidence satisfies me that that was not the case. On this issue, I prefer Mr Wood's evidence to that of Mr Nahal and accordingly find that Mr McLennan's approach is to be preferred to that of Mr Hatten.

[125] As the table set out above shows, there was also an error in the calculation of the increased rate, which Mr Waller referred to, in the sum of $31,063. In an amended schedule to his evidence, Mr Hatten corrected the figures to take account of that error.

[126] I observe next, however, that the greatest difference arising from the rival approaches of Mr Hatten and Mr McLennan was that Mr Hatten based his calculations on the proportion of the first defendant's overall billings represented by the work done for the first defendant. In the year ended 31 March 2003, the billings to the plaintiff represented 94.3% of the first defendant's revenue. The figures for

the next two years were respectively 96.4% and 94.6%. For the period between 1 April and 30 November 2005, the figure was 95.35%.

[127] Mr McLennan, however, carried out his calculations on the notional basis that all of the first defendant's revenue should be attributed to the plaintiff. As I understand it, Mr McLennan adopted his approach simply because it was easier to do so. The result, however, was to present a position which was substantially in the first defendant's favour. Mr Waller calculated that if the appropriate adjustment were made to Mr McLennan's calculations, the plaintiff's claim would increase by $240,351. He was not cross-examined on that evidence.

[128] The table set out above shows a total variance of $144,814. I have rejected Mr Hatten's position with respect to the difference in calculated chargeable hours, and that finding alone would be more than sufficient to extinguish the variance in respect of employee charges. I have also rejected the claimed increased hourly rates and have expressed the view that 15% for supervision would be too high. If a figure of 10% were adopted, that would reduce the figure of $66,193 set out in the table, but the calculation becomes unnecessary because the variation has already been extinguished for the reasons given. In summary, on the question of the amounts estimated to be chargeable for employees, I am satisfied that the approach taken by Mr McLennan should be upheld.

Mr Nahal's supervisory charges

[129] Insofar as Mr Nahal is concerned, both Mr Hatten and Mr McLennan used the higher of the two rates allowed in the Services Agreement for supervision, in other words, $35 per hour plus GST as opposed to $25 per hour plus GST. They made different assumptions, however, about the number of hours worked.

[130] Based on what Mr Nahal told him, Mr Hatten took into account 70 hours per week for 50 weeks per year. Mr McLennan based his calculation on 40 hours per week for 52 weeks per year. Mr Nahal was adamant that he worked long hours on the contract. But he could point to no documentary evidence to support a claim for hours as high as those on which Mr Hatten had proceeded. It is to be noted also that

if he was working for such long supervisory hours, then time spent in otherwise managing the first defendant's business and attending to its affairs (time spent on administration, on attending to the preparation of the accounts of the company, paying employees and banking) would notionally have been carried out at other times. The Services Agreement would not of course allow such matters to be charged to the plaintiff, even if by far the majority of the work carried out by the first defendant was on behalf of the plaintiff. Neither Mr Hatten nor Mr McLennan allowed for holiday or other leave, and statutory holidays.

[131] There is self-evidently a built in factor in favour of Mr Nahal by virtue of the use of the $35 per hour figure. It applied at the Rolling Mill, where Mr Nahal estimated that 80% of the work was done. That would mean that in respect of 20% of his supervisory time, the $25.00 per hour figure should have been charged.

[132] There is a paucity of evidence upon which to base any calculation of the supervisory hours actually worked. However, I have the distinct impression that Mr Hatten's calculation of the number of hours involved must be overstated. The difficulty is in assessing to what extent that is the case. The plaintiff has the burden of proof, and must meet a high standard on its allegation of deceit. I cannot be satisfied on the state of the evidence that Mr McLennan's figure for Mr Nahal's supervisory time was in fact correct. That does not mean, however, that I must accept Mr Nahal's assertions as to the hours he worked, which formed the basis for Mr Hatten's calculation.

[133] I think it is likely that the 70 hour figure which Mr Nahal asserts must include time that was spent on the general management related tasks in respect of the first defendant's affairs. It is difficult to see how he could have attended to those matters unless they were within the 70 hour per week/50 weeks per year which formed the basis of Mr Hatten's calculations. I consider that a reasonable adjustment to make would be one which reduced the figure of 70 hours per week to 60 hours per week. It would reduce the hours able to be charged from 12,950 (Mr Hatten's calculation) to 11,100 hours over the term of the Services Agreement, compared with the 7,280 hours used by Mr McLennan. Mr Hatten's calculation of course reflected the percentage of the proportion of the first defendant's billings referable to the

plaintiff's work. Making the same adjustments to the figure of 11,100 hours for that purpose would reduce the hours to 10,561. On the basis of the evidence given by Mr Nahal that approximately 80% of the work was carried out at the Rolling Mill, 20% of the work should have been supervised at the lower rate of $25 plus GST per hour. If these adjustments are made, the sum of approximately $392,098 can be derived to represent the charges properly referable to Mr Nahal's supervisory time. That is to be compared with the sum of $509,971 used by Mr Hatten and $286,650 by Mr McLennan. Those are of course assessments by each of the forensic accountants as to what could legitimately have been billed based on the assumptions they made. The calculation that I have done falls between those two figures.

[134] It is not possible to say with any certainty that the figure of $392,098 is absolutely accurate. I consider however that it is a reasonable estimate, calculated on the basis that I have described. The difference between the figure which I have arrived and that employed by Mr Hatten is the sum of $105,448. The plaintiff's claim must be reduced by that amount.

Other allowances claimed

[135] The next significant area in which the evidence of Mr McLennan and Mr Hatten diverged concerned a number of allowances that Mr Nahal had advised Mr Hatten were chargeable and had been invoiced to the plaintiff, in the sum of $514,450. The claim is based on Mr Nahal's oral advice that the plaintiff's "management" had agreed to the charges. In the circumstances, the first and second defendants say the various charges were legitimately made by the first defendant to the plaintiff.

[136] Mr Nahal is not specific as to who the agreement had been reached with. Further, Mr McLennan made the general observation that given the alleged frequency with which these charges were made by the first defendant, and the amounts involved, reference should have been made to the charges in the invoices. That had not occurred, except in the case of the use of a sweeper machine. He commented also that if the charges had in fact been made:

> …there also should be available basic supporting records to the charges such as vehicle log books, and notes as to the location and usage of the equipment by employee or by job.

[137] The first defendant was able to produce an invoice in which there had been a half day charge for a sweeper machine and dockets illustrate charges on one occasion for the supply of safety equipment and on another for the use of a car for towing (exhibits "A" and "B") but generally, there was a dearth of documentary evidence justifying the charges in this category. Apart from the one invoice reference, in respect of the sweeping machine, no invoice among the many before the Court was referred to concerning any of the charges.

[138] The other general observation that can be made at this point is that the Services Agreement made no provision for the payment of such charges. It seems that, generally at least, the contractual provisions envisaged that to the extent that equipment was necessary for the carrying out of the agreed services, then that would be provided at the contractor's expense. The only contractual provision for the recovery of costs by the first defendant was in respect of the expressed hourly rate, save in the case of work carried out for the "Site Services" business unit, in respect of which there was to be a specific negotiation for each job.

[139] The first set of charges that can be analysed concerns charges claimed in respect of the use of a van, utility vehicle ("ute") and trailer. A separate charge was also allegedly made in respect of offsite use of the ute. In Mr Hatten's analysis, the total referable to these various items was $97,277.

[140] Mr Nahal did not actually give evidence to justify these charges except for a brief observation that he had charged for mileage offsite in respect of the use of the ute at $1.00 per kilometre. Apart from that, there was no real basis proffered for the assumption that Mr Hatten made that the ute had been used for 25 hours per week throughout the course of the agreement, and the van, when purchased had been used for 20 hours per week. The fact that there had been an agreement to pay these items was not in fact put to any of the plaintiff's witnesses, and at no stage was there any allegation about which of the plaintiff's managers had allegedly agreed that the charges could be made.

[141] In relation to another item for which an allowance is claimed, Mr Smith put to Mr Wood that where there was machinery such as the sweeper provided, the plaintiff should be paying for it. Mr Wood accepted that would be the case, but only if it had been agreed by the plaintiff. He continued (in relation to the sweeper) that if it was provided to the plaintiff on a basis that was intended to be ongoing, then it should have been included within the scope of the Services Agreement, as an appendage to it. It will be necessary to deal with the sweeping machine shortly. My present purpose is simply to explain that I do not accept that ongoing charges of the magnitude claimed would have been agreed to by the plaintiff as heads of additional expenditure under the Services Agreement, without there being contractual provision for it. Further, in terms of clause 16 of the Services Agreement, a written agreement would have been required. I have concluded in the circumstances that there was no agreement that these charges should be made and I am also not able to find that the charges were in fact ever made. Consequently, I reject this head of the allowances claimed.

[142] Another claimed allowance was in respect of a truck. It was said that $94,212 was referable to a truck. According to Mr Hatten's evidence, Mr Nahal advised him that the truck was purchased "during" the 2004/2005 financial year. However, Mr Hatten's assumption was that it had been used throughout the year ended 31 March 2005 for 17½ hours per week, and that the usage had been charged for at the rate of $55 plus GST per hour.

[143] This claimed allowance is to be compared with occasions when on the basis of invoices referred to by Mr McLennan prior to 31 March 2004, the first defendant had in fact hired a truck and straightforwardly on-charged the cost of doing so at rates varying between $85 and $115 per day together with a mileage allowance of .50¢ per kilometre, plus GST.

[144] Both Mr Hatten and Mr Waller made the point that there is no record in the first defendant's accounts of the purchase of a truck at the time claimed. Otherwise, the position is exactly the same as that which applied to the use of the ute and van. On the state of the evidence, I am not prepared to find that charges were in fact made

for the use of a truck, or that there was any agreement by the plaintiff that such charges could be made.

[145] The sum of $77,355 was allegedly charged in respect of the use of safety harnesses over the period of the agreement. In this case, it was Mr Nahal's evidence that he had at least four harnesses and other safety equipment and that he charged for each unit when it was being used. He said that a minimum of two harnesses were used nearly every day. Mr McLennan made enquiries of Hirequip, a company from which the plaintiff regularly hires equipment. He was advised that, without any discount for the plaintiff, the charge was $11.55 per day plus GST. This would equate to the sum of $29,826 (GST inclusive) for the relevant period, based on the use of 12 harnesses per week.

[146] Amongst the exhibits produced by the first defendant (exhibit "V") was a docket (number 237381) on which there was a charge for the supply of safety equipment, in the sum of $435. I think it unlikely that that can have been for safety harnesses, given the size of the sum involved. Given the rates for which the plaintiff could have secured safety harnesses from Hirequip, I consider it most unlikely that it would have agreed to charges being made of the magnitude now suggested. I think it much more likely that there was no agreement for these charges to be made and I record in this case too that there is no evidence, other than Mr Nahal's assertion, that charges were made for safety harnesses.

[147] The next allowance concerns grinders. Mr Hatten assumed a usage of 28 days per week throughout the term of the Services Agreement at a rate of $12 per day plus GST. According to Mr Hatten, Mr Nahal advised him that he had four grinders which had been used every day until a point in 2005 when the plaintiff purchased its own large-scale grinder. The daily charge had allegedly been agreed with the plaintiff's management. This claimed allowance ($58,968) is in exactly the same category as those already discussed and on the same basis, I reject it.

[148] The next claim is in respect of the sweeping machine, which according to Mr Nahal had been purchased at a cost of approximately $31,000. Mr Hatten said that the machine was acquired on 7 November 2004. He assumed that it was used at

the rate of five months per financial year. Mr Nahal told him that it was on-charged at $700 per day in accordance with an agreement with the plaintiff's management. In the result, a sum of $88,200 had allegedly been charged for the use of his machine.

[149] In respect of this item, as previously noted, the defendant was able to refer to an invoice (INV 02065, dated 9 May 2005) in which there had been a charge for a sweeper, used for half a day for $350.

[150] In his supplementary evidence-in-chief, Mr Nahal in fact produced the invoice relating to the purchase of the machine in question. The invoice was dated 17 August 2004 and required payment by 20 September 2004. The GST inclusive cost of the machine was $29,679.80. Mr Waller observed that the claimed allowance of over $88,000 represents recovery of approximately three times the cost of the machine. Not surprisingly, Mr Palmer gave evidence that had the plaintiff been aware that the first defendant was charging such high rates, it would have made a capital investment and purchased one of the machines itself. He noted that the company had a controlled process for making an evaluation of whether such a purchase should be made when it had notice of high costs of hireage.

[151] Mr Palmer also obtained a quotation from Hirequip for what he thought was the cost of hiring the same machine as the first defendant had used. He was advised that such a machine could be hired for a total of $607.50 per month, although he conceded that that figure included the normal discount which the plaintiff was able to obtain when hiring equipment from Hirequip. He also approached Kleentech New Zealand Limited, which had sold the machine to the first defendant. That company advised him that it could be hired at a monthly cost "to Fletchers" of $1,000 per month.

[152] Mr McLennan too made enquiries of Kleentech New Zealand Limited in relation to the purchase price and rental cost of a sweeper which he said was the same piece of equipment supplied to the first defendant. The costs quoted as at 26 June 2007 were respectively $31,1098.19 (GST inclusive) and $1,557.83 plus GST ($175.31 per month).

[153] Mr Nahal, under cross-examination, asserted that the machine, the subject of the quotations obtained by Mr McLennan was not the same machine, and he might be right in that inasmuch as the quotation concerned a model number "5700XP", whereas according to the invoice on which the first defendant purchased its machine, the model number was "5700XPES". Eventually, however, he accepted that the machines were very similar, the only difference being an additional brush at the back of the first defendant's machine. In the circumstances, I infer that the hireage costs would have been approximately those in the quotation which Mr McLennan obtained.

[154] Also under cross-examination, Mr Nahal maintained that the $700 per day charge which the first defendant had made included the cost of the operator. That was not a matter that Mr McLennan had enquired into, and his assumption had been that the cost was simply charged in respect of the use machine. Mr Nahal further maintained that the cost had been agreed at a meeting of the plaintiff's managers and although not at the meeting, he had been advised by Mr Purchase that it had been agreed that he could charge $700 a day for the use of the machine. Even allowing for inclusion of operator costs (presumably they would have been at $22.50 per hour, in accordance with the Services Agreement), the result of the basis upon which the machine was allegedly charged for was exorbitant. There is no evidence apart from Mr Nahal's allegation that the plaintiff's managers agreed to charges at this rate. I find the assertion that they had a meeting and agreed to such a high rate implausible.

[155] I have earlier referred to Mr Wood's evidence as to what would have been the appropriate manner of dealing with a piece of equipment which was to be acquired and used for the purposes of the Services Agreement and that any agreed cost would be included by way of variation to the contract. I simply find it most unlikely that the plaintiff would have agreed as alleged to the first defendant's claimed charges on an ongoing basis, notwithstanding the bald reference to "sweeper" in the one invoice which contained such a reference. For these reasons, I reject Mr Hatten's provision for this item.

[156] The first defendant contended that an allowance should be made in respect of water meter reading carried out on the plaintiff's premises by Mr Nahal. The sum

referred to was $53,291. Mr Nahal advised Mr Hatten that he commenced reading the water meters during the 2002/2003 financial year. This was done at the plaintiff's request, and for a fixed fee. Accordingly to Mr Nahal, the agreed rate for reading the water meters was $40 per reading. There were four such meters initially, but the number was later reduced to three. Mr Nahal said that once it was established where a leak had existed, the reading of the meters was reduced to one a day. In his evidence, he gave no specific date at which the various changes in this task occurred.

[157] Mr Hatten's calculations assumed that the meters were read five days a week and twice at the weekend. The initial weekday rate applied was $22.50 plus GST, and after 31 March 2003, $40 plus GST. With respect to the weekend readings, Mr Hatten applied the rate of $25 plus GST during 2003, and thereafter the rate of $40 plus GST.

[158] Mr Nahal's assertion that an extra fee had been agreed with the plaintiff in respect of this work was again unsubstantiated by reference to any named person with whom the agreement was reached. Strictly speaking, the work was not amongst the items covered by the Services Agreement. However, it would not be work requiring particular skill and there would seem to be little justification for charging at a rate greater than that provided for in the contract of $22.50 per hour. If it is then remembered that Mr Nahal claimed to be on the site for 70 hours per week and, in accordance with the discussion earlier in this judgment, I have allowed 60 hours per week, it is to my mind difficult to justify any further amount being claimed for this work. Once again, there is no suggestion of an invoice having been rendered in respect of it. I am not prepared to accept Mr Hatten's provision for this allowance either.

[159] The final allowance made by Mr Hatten concerns a minimum call-out fee. According to Mr Hatten, Mr Nahal advised him that if the first defendant received a "call-out", he would charge for a three-hour minimum, regardless of the time spent on the call-out. He also advised him that he agreed with the plaintiff's "management" a minimum charge for working on the water treatment planton the site.

[160] In his calculations, Mr Hatten appears to have dealt with both of these together, allowing for minimum call-out fees estimated at $70 plus GST per call-out. He noted Mr Nahal's advice that he would get a minimum of two call-outs per week. Mr Hatten thought that a conservative allowance would be to allow a margin of two hours occurring three times per week.

[161] If charges were made on the basis of a minimum number of hours, presumably the first defendant would have rendered invoices showing the minimum number of hours. If that is the case, all hours claimed to be worked in this category would already be captured in the calculation of hours worked by the first defendant's employees. If the charge was intended to relate to Mr Nahal himself, then it would be included in the charges already referable to him for the hours he worked every week. To allow further charges under this heading would in my view be double counting. It perhaps goes without saying that there was no independent documentary support for the claims made under this head.

[162] In the result, having considered the various allowances which Mr Hatten included in his calculations, I have not been able to find support for any of them beyond Mr Nahal's assertions, which I am not prepared to accept.

Margin on non-employee costs

[163] Another element of the difference in the approaches of Messrs McLennan and Hatten arose from the allocation of an average mark-up of 30.97% in respect of the purchase of materials and the provision of independent sub-contractors to perform work not covered by the Services Agreement. Mr Hatten observed that his analysis indicated that they had been marked-up on an "ad hoc" basis, with no standard mark-up rate applied. In the absence of such a standard, he calculated an average mark-up and then applied it to all payments. The figure of 30.97% was arrived at on that basis.

[164] It was applied to purchases, sub-contractors and any other expenditure considered to be directly related to contracting income having regard to the first defendant's general ledger. The admitted fraudulent payments to Mr Purchase were

eliminated from the calculations. Once again, Mr Hatten applied his calculation on the basis of the percentage of the first defendant's overall revenue represented by the billings to the plaintiff in each year. He expressed his professional opinion that it was reasonable for the mark-up to be applied in this way, and that to do so was normal in a commercial environment.

[165] The result of Mr Hatten's approach was to add the sums of $23,285.48 by way of mark-up in respect of materials, sub-contractors and other costs on-charged to the plaintiff for the year ended 31 March 2003; $44,128.03 for the year ended 31 March 2004; $94,100.63 for the year ended 31 March 2005 and $113,540.55 for the period ending November 2006, when the Services Agreement was cancelled. The total of these sums is $275,055.

[166] Mr McLennan challenged Mr Hatten's approach on a number of bases. First, he observed that he could not find any documentary evidence of any of the quotes on which Mr Hatten had relied for his calculation of the average margin. Second, he was critical of the fact that only the costs from the third party contractor had been considered in calculating the margin. He observed that the quotes and invoices were not specific as to the involvement that the first defendant's own staff had had in relation to each job. Depending on that input, the margin may or may not reach 30.97%. Third, he expressed the opinion that the mark-up of 30.97% would never have been knowingly agreed to by the plaintiff in the context of the overall relationship between the parties. Given the volume of work involved in the Services Agreement, he expressed the view that any agreed mark-up would be more modest. In his view, a margin of 10% would be appropriate, but nothing more. Had the plaintiff known that margins of the magnitude charged were in fact being charged, it would have sought quotes from third parties. Further, given the environment of an admitted fraud, it was dangerous and wrong for Mr Hatten to have adopted the approach he did.

[167] Mr Waller also expressed the view that the method that had been used to establish the margin was inappropriate, essentially for the same reasons as Mr Hatten. He illustrated the potential difficulty arising from the lack of detail in the

invoices by reference to two of the invoices on which Mr Hatten had relied for the purposes of calculating his average 30.97% margin.

[168] One invoice, numbered 2798, was dated 22 October 2005. The GST exclusive total of the invoice was $316. In his analysis, Mr Hatten assumed a supplier cost of $236, and a margin of $80 (33.90%). However, as Mr Waller pointed out, if reference is actually made to the invoice itself, it can be seen that there were two separate items. One was for the supply of a concrete cutter in the sum of $236, and the other was for work, namely drilling a hole in a wall to drain oil, for a cost of $80. Mr Waller observed what Mr Hatten treated as an $80 margin was in fact a labour related component of the invoice, with the supply costs being on-charged with a nil margin.

[169] The other invoice to which Mr Waller referred was invoice 2802, dated 29 October 2005. The GST exclusive total of that invoice was $3,025. Mr Hatten's calculation was on the basis that there was a cost of $2,300 in respect of digging and laying concrete for a vehicle entrance, that work being carried out by a company called MCL Services, with a margin of $725 added (31.52%) to bring the total up to $3,025. However, on the invoice, the figures given were $2,750 for the digging and laying of the concrete, with $275 assigned to further work, namely digging an extra trench. Mr Waller referred to the associated quotation of $2,750 which had been given for the work. On that quotation were the words "Max's '$2,300.00'" handwritten below the quotation detail. He took the view that the maximum amount intended to be charged above the supplier cost had been $450, a margin of 19.57%.

[170] He added, that there was insufficient detail to determine whether and to what degree the labour component of the work had been performed by the first defendant's employees, or whether the charge incorporated supervision by Mr Nahal. As a result, it was not possible to establish that any difference between the supplier costs and the amount charged to the plaintiff represented margin on the job.

[171] It was also Mr Waller's evidence that in his experience, a margin at 30.97% was most unlikely to be knowingly accepted by a customer such as the plaintiff in the context of the overall contract with the first defendant.

[172] I agree with Messrs Mr McLennan and Waller that it is not possible to have confidence in the robustness of Mr Hatten's 30.97% margin.

[173] Mr Fulton submitted that the fact that a quotation was obtained does not mean that it was ever accepted. Second, he argued that if a quotation had been accepted, it was noted on an invoice, but Mr Hatten had made no attempt to quantify the number. He argued that the Court could not be satisfied that the first defendant had "raised any sufficient evidential basis" for the Court to consider that the lack of detail of the sum quoted might in some way explain the "variances" (by which I understood him to mean the variance between employee hours paid by the first defendant, and employee hours charged to the plaintiff). The question at this point, however, is not whether the variances have been explained in that sense but whether and to what extent the plaintiff has met its burden of establishing to the high standard required in cases of deceit, that all of the sums that it seeks are properly owing. In that respect, I would need to be satisfied that Mr Hatten had wrongly selected invoices to which he had applied an incorrect margin. I was not really presented with any comprehensive argument that Mr Hatten had erred in the first respect. The focus of the plaintiff's evidence was simply to raise a question as to whether he had, and then to criticise the margin that he applied. To accept such an approach would be to reverse the appropriate burden of proof.

[174] If the point is reached where the appropriate invoices to which to apply a margin have been selected, the question then is whether the margin should be the figure Mr Hatten calculated or some lower margin. A margin of 30.97% applied across the board is indeed a very high one. Had it been disclosed, I am in no doubt that the plaintiff would not have accepted it. Rather, since the margin was allegedly applied in the case of quoted jobs it would likely have chosen to look elsewhere or engaged in some competitive process before allocating particular jobs. In my view, the only basis upon which such a margin could have been claimed and paid was on the basis that the margin was undisclosed. It is not too difficult to imply a term, whether in the Services Agreement itself or in notional contracts that may have been entered in respect of each quoted job, that any margin charged by the first defendant in respect of third party costs for materials supplied would have been a reasonable one. Further, presentation of invoices containing undisclosed marginal costs could

be seen as a false representation of fact that a reasonable margin was all that was sought. I would have thought that once a margin of approximately 15% was passed, the first defendant's conduct in submitting invoices for a greater margin would have amounted to deceit.

[175] In these circumstances, I would not allow any more than half the sum claimed as an "allowance" by the first defendant under this head. That amounts to the sum of $137,528 and the plaintiff's claim should be discounted by that additional amount.

Interim summary

[176] For the reasons I have given above, I would allow the plaintiff's claims against the first and second defendants save for deductions totalling $242,976. That sum is arrived at by adding the sums of:

a) $105,448 in respect of Mr Nahal's supervisory time;

b) $137,528 in respect of the margins added to costs on-charged.

[177] That would allow a total claim against the first and second defendants of $1,161,960.

Counterclaim

[178] By its counterclaim dated 3 May 2006, the first defendant sought judgment for $377,992, being the amount of outstanding invoices which it claimed were properly invoiced to the plaintiff at the time the Services Agreement was terminated.

[179] As has been seen, the plaintiff's claim for $1,404,936 was a claim advanced on the basis that it was the net of invoices (issued in October 2005) totalling $358,302 that the plaintiff had refused to pay.

[180] The plaintiff's statement of defence to the counterclaim consisted of a bare denial of the paragraph alleging an outstanding debt of $377,992, but then asserted that any invoiced sums unpaid by the plaintiff had already been offset against the plaintiff's claim with the consequence that the plaintiff had no liability to the first defendant.

[181] As has been seen, the calculation of the plaintiff's claim involved a deduction in respect of invoices issued by the first defendant, but unpaid. The sum deducted in respect of the invoices was $358,302. There is a difference between the parties in the sum of $19,690 as to the value of the outstanding invoices. In his closing submissions, Mr Smith sought the full amount of the counter-claim. Given the various findings set out above, it will not be appropriate for that approach to be adopted, as there is a substantial net amount owing to the plaintiff. The issue that needs to be resolved at this point is simply whether the amount to be deducted from the sum that would otherwise be payable to the plaintiff should be $377,992, as the first and second defendants assert, or whether it should be the lower figure of $358,302 used by the plaintiff in formulating its claim for $1,404,936.

[182] In arguing for the lower figure, Mr Fulton relied on evidence given by Mr McLennan that the amount of $19,690 reflected a short payment of invoices that the first defendant had issued after the termination of the contract in November 2005. He said that the plaintiff had advised him that an interim arrangement was agreed that allowed some of the first defendant's staff to continue with some work on the basis that the plaintiff would be charged a reduced rate for that work. It was his evidence that invoices totalling $44,894 had been raised, at a higher hourly rate than the agreed reduced rate, of which the plaintiff had paid $25,204 leaving $19,690 outstanding. Mr Fulton makes the point that Mr McLennan had not been cross-examined on that evidence.

[183] Mr Smith referred to the fact that in schedule F to his evidence (which was reproduced earlier in this judgment), Mr McLennan had assigned the sum of $377,992 to "Contractors Unpaid Invoices to FSL". However, on the face of it, that was simply a statement that there were unpaid invoices in that amount. Paragraph 94

of Mr McLennan's evidence-in-chief made it plain that the plaintiff disputed payment of the full amount of those invoices.

[184] Mr Smith nevertheless maintained that that paragraph was not challenged because of its hearsay nature, and because there was no documentation to support it. Mr Smith submitted that Mr McLennan had been called as an independent witness and not as a witness to primary facts. On the other hand, proof of the outstanding invoices in the sum of $377,992 had been given by Mr Nahal and he had not been challenged on his figure. Mr Smith complained of a difficulty in working out what invoices that were alleged to contain the alleged overcharging (post termination of the Services Agreement).

[185] I think I am bound to resolve this issue in favour of the first and second defendants. Mr Nahal was not cross-examined on his assertion that $377,992 was owing and Mr Smith is correct about the absence of any direct evidence from the plaintiff as to the invoices containing the overcharge, the quantum of the overcharge, and the reasons why it was alleged that there was an overcharge.

[186] In the result, the further sum of $19,690 must be deducted from the plaintiff's claim.

[187] Adding to that the sum of $242,976 in accordance with the conclusions earlier expressed results in a total deduction of $262,666 from the plaintiff's claim. Deducting that from the sum of $1,404,936, leaves a total due to the plaintiff of $1,142,270.

The claim against the third defendant

[188] The claim against the third defendant alleges that it owns four properties, together with a mortgage and loan to the fourth defendant in the sum of $440,000. The total value of those assets mentioned in the statement of claim was $1,540,026. Mr McLennan, in his evidence, referred to additional properties that had been purchased with funds sourced from the plaintiff bringing the total to $1,723,371. Although there was no amendment to the prayer for relief against the third

defendant, there did not need to be because it had referred to the sum of $1,540,026.00 “plus such other sum as may be shown as being derived from Fletcher Steel overpayments”.

[189] The third defendant did not contest Mr McLennan’s evidence that payments of $1,723,371, used to purchase the properties referred to, had been derived from the plaintiff. However, Mr McLennan himself recognised that not all of the monies could in fact be characterised as having been wrongly received by the first defendant. As the over-billing was not isolated to single invoices, each deposit from the plaintiff into the first defendant’s accounts was likely to have contained money which was the result of legitimate billing as well as a substantial portion of illegitimate billing. On the basis of the plaintiff’s case that $2,088,155 had been over-billed, and that there would have been approximately $750,000 of legitimate funds available to the first defendant to distribute (representing sums legitimately billed from the plaintiff, and third parties), he calculated that about 74% of the sums distributed by the first defendant would have represented sums over-billed to the plaintiff.

[190] The statement of claim originally sought judgment for the full amount of the funds that had been received from the first and second defendants and alleged that the assets purchased were subject to a constructive trust in favour of the plaintiff for that amount, or 74% of that amount. It seems plain from Mr McLennan’s evidence that, on his approach, the claim would hit a ceiling at 74% of the funds in question.

[191] Having regard to the findings made earlier in this judgment, the 74% figure needs to be adjusted. Making the necessary changes to the calculation to reflect the lesser extent of the over-billing that I have found, together with the slightly greater amount owing to the first defendant than had been allowed for in the plaintiff’s calculations, I calculate that 65% of the amounts used by the third defendant to acquire the assets represented sums wrongly billed to the plaintiff. Applying that figure to the $1,723,371 derived by Mr McLennan would give a total sum of $1,120,190.

[192] The plaintiff’s claim for a constructive trust was on the basis that the funds had been received by the third defendant in the knowledge that they had been

improperly gained. Mr Nahal was the controlling mind of both the first and third defendants. Mr Fulton referred to the observations of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] AC 669 at 715-716:

> *The stolen bag of coins*
>
> The argument for a resulting trust was said to be supported by the case of a thief who steals a bag of coins. At law those coins remain traceable only so long as they are kept separate: as soon as they are mixed with other coins or paid into a mixed bank account they cease to be traceable at law. Can it really be the case, it is asked, that in such circumstances the thief cannot be required to disgorge the property which, in equity, represents the stolen coins? Moneys can only be traced in equity if there has been at some stage a breach of fiduciary duty, i.e. if either before the theft there was an equitable proprietary interest (e.g. the coins were stolen trust moneys) or such interest arises under a resulting trust at the time of the theft or the mixing of the moneys. Therefore, it is said, a resulting trust must arise either at the time of the theft or when the moneys are subsequently mixed. Unless this is the law, there will be no right to recover the assets representing the stolen moneys once the moneys have become mixed.
>
> I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: *Stocks v. Wilson* [1913] 2 K.B. 235, 244; *R Leslie Ltd. v. Sheill* [1914] 3 K.B. 607. Moneys stolen from a bank account can be traced in equity: *Bankers Trust Co. v. Shapira* [1980] 1 W.L.R. 1274, 1282C-E: see also *McCormick v. Grogan* (1869) L.R. 4 H.L. 82, 97.

[193] Mr Fulton also relied on what Lord Browne-Wilkinson said in that case at 705:

> *The relevant principles of trust law*
>
> (i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).
>
> (ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust,

> or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.
>
> (iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.
>
> (iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

[194] To similar effect to what was said in paragraph (iv) are the observations of Lord Millett in *Foskett v McKeown & Ors* [2001] 1 AC 102, at 127:

> A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interests binds everyone who takes the property or its traceable proceeds except a bona fide purchaser for value without notice. In the present case, the plaintiff's beneficial interest plainly bound Mr Murphy, a trustee who wrongfully mixed the trust money with his own and whose every dealing with the money (including the payment of the premiums) was in breach of trust. It similarly binds his successors, the trustees of the children's settlement, who claim no beneficial interest of their own, and Mr Murphy's children, who are volunteers. They gave no value for what they received and derived their interest from Mr Murphy by way of gift.

[195] Mr Fulton also referred to observations by Millett L J in *EL Ajou v Dollar Holdings plc* [1993] 3 All ER 717 at 734 and the decision of the Court of Appeal in *NZ Limousin Cattle Breeders Society Inc v Robertson* [1984] 1 NZLR 41 at 44. The latter was a case involving misappropriation of funds by the treasurer of the plaintiff society. Somers J, writing for the Court, observed that if any of the stolen monies had been used to acquire or improve the defendant's home, then that would have given rise to an equitable interest and equitable lien on the whole.

[196] Mr Fulton submitted that in order to maintain a claim such as the present it is no longer necessary for it to be shown that the funds in question had passed through a person who was in a fiduciary relationship with the plaintiff. He referred to *Foskett v McKeown* (cited above) as authority for that proposition. He noted also that in that case Lord Millett, with whom Lord Browne-Wilkinson and Lord Hoffman agreed on this point said, at 128:

> Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough… . There is certainly no logical justification for allowing any distinction between them to produce capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship as a pre-condition for applying equity's tracing rules. The existence of such a relationship may be relevant to the nature of the claims which the plaintiff can maintain, whether personal or proprietary, but that is a different matter.

[197] That passage was quoted and applied in *Bracken Partners Limited v Gutteridge* [2003] 2 BCLC 84.

[198] However, Mr Fulton also submitted that in the present case, Mr Nahal had bribed an employee of the plaintiff, Mr Purchase who owed fiduciary obligations to the plaintiff because of his purchasing function. He pointed out that Mr Nahal had also (to the extent of the admittedly false invoices) admitted conspiring with Mr Purchase to commit the fraud. Beyond the admittedly false invoices, there was of course no admission. However, I am satisfied on that evidence that Mr Nahal and Mr Purchase did conspire together to defraud the plaintiff for the amount that I have held was over-billed. Without Mr Purchase's active or passive participation, the fraud would not have occurred.

[199] Mr Smith maintained that the plaintiff's claim against the third defendant is for a remedial constructive trust. He referred to the Laws of New Zealand, Trusts, Volume 29, at paragraph 484:

> A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust which is held by a person in circumstances where it would be inequitable to allow him or her to assert full beneficial ownership of a property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of this ownership or of dealings with that fiduciary property that he or she acquired a specific property subject to the constructive trust. A stranger who receives property in circumstances where he or she has actual or constructive notice that it is trust property being transferred to him or her in breach of trust will, however, also be constructive trustees of that property.

[200] Mr Smith argued that the "property" subject to the trust must be the money advanced by the first defendant and not the properties to which the money had then been applied by the third defendant. While the funds had been advanced by the first defendant to the third defendant, and that created a right in the first defendant to

demand repayment of the advances, that did not mean that the plaintiff had a right to trace its money into the property on which the advances had been expended. Further, Mr Smith submitted that unless the funds were illegally obtained, there could not be a charge over any other "fund" which received funds from the first defendant unless the first defendant had insufficient money to repay the amount due. Even then, Mr Smith argued that in the circumstances, the plaintiff had no interest in the assets of the third defendant.

[201] It is plain on the evidence that Mr Nahal was effectively in control not only of the first defendant, but also of the third defendant. There can be no suggestion on the facts that the third defendant would not have received the funds in question from the first defendant in the full knowledge that a substantial part of the payments were the result of the deceitful actions of Mr Nahal and Mr Purchase. If, as appears to be plain, and as Mr Smith appears to concede, the money advanced by the first defendant to the third defendant is properly subject to a constructive trust, then the plaintiff's proprietary interest will be enforceable against the third defendant notwithstanding that the money has been expended on substituted property. In my view, that follows from Lord Browne-Wilkinson's statement of the law in *West Deutsche Landesbank Girozentrale v Islington L.B.C.*, earlier referred to, as well as the other cases to which Mr Fulton referred. The position is that the third defendant never acquired the right to the $1,120,190 representing sums wrongfully billed to the plaintiff, as already explained. In my view, the plaintiff is entitled to judgment in that amount against the third defendant. It is also entitled to the declaration it seeks that the assets on which the money was expended are held by the third defendant subject to a constructive trust in favour of the plaintiff in the same amount. A constructive trust will attach to each of the assets in question on a pro-rata basis up to the level of $1,120,190.

The claim against the fourth defendant

[202] It will be recalled that the fourth defendant is a company owned by Mr Nahal, and Mr Gould, both of whom are directors of it. There is no basis for any finding that Mr Gould was, at relevant times, aware of Mr Nahal's misconduct.

[203] The claim relates to land at 230 Great South Road, Manukau City, which the company now owns, having acquired it on 10 August 2005 from the third defendant. The acquisition was funded by means of a loan from the third defendant in the sum of $440,000.00. The plaintiff asserts that when the fourth defendant acquired the property, by virtue of Mr Nahal's knowledge, the fourth defendant must itself have known that the third defendant had received substantial sums from the first defendant, which had been wrongfully obtained from the plaintiff.

[204] This cause of action must succeed, on the same basis as the cause of action against the third defendant. In this case, the prayer for relief seeks judgment in the sum of "$440,000 plus $701,730 as being derived from Fletcher Steel". Both of those amounts were also sought in the claim against the third defendant. Those amounts should be reduced in accordance with my earlier determination that only 65% of the funds received by the third defendant comprised sums wrongly billed.

[205] Subject to the necessary changes being made to the figures, there is no bar to judgment being obtained against both the third and fourth defendants, although obviously the same sums cannot be recovered twice. The situation is no different notionally from that which arises when two defendants are jointly and severally liable for the same debt.

[206] In the circumstances there should be judgment for the plaintiff against the fourth defendant for the sum of $751,124 (being $286,000 plus $465,124).

The claims against the fifth defendants

[207] The fifth defendants are sued as the trustees of the Nahal Trust. Two courses of action are advanced against the fifth defendants.

[208] The focus of the first is two properties acquired by the trust in 2004 and 2005. The plaintiff asserts, once again, that the properties were acquired with funds received from the first defendant. It is alleged that the Trust was fixed with knowledge of the first defendant's over-billing by virtue of Mr Nahal's own role as a trustee. The advances made in respect of the two properties were included in

Mr Hatten's computation of the $1.723 million representing the overall sum traced into the properties acquired by the third, fourth and fifth defendants.

[209] The claim is for the total amount of the money expended on these properties, namely $623,344 as well as a declaration that the fifth defendants hold the properties as constructive trustees for the plaintiff to the extent of that amount "or 74% of it". Once again, any judgment against the fifth defendants should be for 65% of the sums advanced, in accordance with the reasoning earlier set out. The figure therefore reduces to $405,174.

[210] The fifth defendants were separately represented, by Ms Sumich. She adopted the submissions that Mr Smith had made on behalf of the third and fourth defendants on the issues concerning the alleged constructive trusts. She pointed out that there was no dispute that the fifth defendants owed the sum of $623,344 to the first defendant. A judgment obtained by the plaintiff against the first defendant would likely result in the loan being called up. She suggested that the plaintiff had been "vindictive" in continuing its claim against the trust in the circumstances.

[211] Those submissions do not lead me to any different conclusion on this cause of action that it did in the case of the similar claims made in respect of the third and fourth defendants. In my view, for exactly the same reasons as applied in the case of the claims against those defendants, the plaintiff should have judgment against the fifth defendants on this first cause of action.

[212] The second cause of action against the fifth defendants concerns a cheque for $25,000 paid by the Trust (acting through Mr Nahal) to Mr Purchase. The plaintiff asserts that the payment, made on or about 7 October 2005, was essentially to Mr Purchase as a gift or bribe to procure his continued participation in the fraud, or to procure his continued support of the first defendant as a provider of services to the plaintiff. Although this claim was originally advanced, *inter alia*, under the Secret Commissions Act, Mr Fulton indicated that a claim under the Act is no longer pursued.

[213] It was Mr Nahal's evidence that the money paid to Mr Purchase was to fund their joint acquisition of a boat. According to Mr Nahal, Mr Purchase was enthusiastic about the idea of acquiring a boat in which they might both go on fishing trips. In about September or October 2005 Mr Nahal had gone to see a trailer boat that a friend of Mr Purchase, one Shane Heenan, wished to sell. It was Mr Nahal's evidence that he had gone to see the boat twice, both times in the company of Mr Purchase, at a property in Mangere Bridge. The asking price for the boat was $47,000, although it required further work.

[214] In October 2005 he had procured a cheque from the Trust in the sum of $25,000 made out to Mr Purchase. That cheque was to fund Mr Nahal's share of the boat. The cheque was made out to Mr Purchase, rather than to Mr Heenan, because the decision to buy that particular boat had not finally been made, but if that transaction did not take place, their intent was to buy another boat in that approximate price range. In fact, the purchase did not go ahead. By the time that he confessed to his part in the fraud in November 2005, the money had not been returned to him and he knew that there would be no point in asking for it back.

[215] Mr Purchase admitted receipt of the money. However, it was his evidence that it was part of the wider scheme of the fraud. He denied Mr Nahal's claim that the cheque was for his share of a boat. Although he admitted to having taken Mr Nahal to view the boat at Mr Heenan's property, he said that he could not afford it. He alleged that he had had a discussion with Mr Nahal about jointly purchasing a jet ski, but "not necessarily a boat". He maintained that the payment had been made "to do with [his] home".

[216] Ms Sumich submitted that Mr Nahal's explanation should be accepted, referring to the fact that the cheque stub and bank statement records had a notation "boat dep" (presumably, boat deposit). Mr Purchase's admission to having taken Mr Nahal to view a boat at Mr Heenan's property also went some way to corroborate Mr Nahal's claim.

[217] Mr Fulton relied on *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1, submitting that a constructive trust arose so as to enable recovery of a bribe

either from the Trust (which had acted through Mr Nahal) or from Mr Purchase; however, there was no obligation to take action against both. He pointed out that Mr Purchase had admitted receiving the money, knowing that he had no entitlement to it and that it was part of the wider scheme of the fraud.

[218] I have expressed my views on Mr Nahal's credibility earlier in this judgment. I concede at this point however that it is not easy to distinguish between Mr Nahal and Mr Purchase on that score. On this particular issue, however, I prefer Mr Purchase's evidence for a number of reasons. First, it was a concession by him that a payment had been received to which he had no entitlement. Second, there seems to have been no reason for Mr Nahal to write out a cheque for the purchase of a boat at a time when the boat that they were allegedly interested in was either not ready for sale, or at any event there had been no decision made to actually purchase it. Although Mr Nahal gave evidence about the possibility of other boats being purchased for around about the same price, his evidence did not mention any particular boat that was under consideration. Consequently, there seems to have been no pressing reason for the cheque to have been written at all at the time. There was no evidence either as to why Mr Purchase was to be in the role of stakeholder.

[219] In the circumstances, I think it much more likely than not that the payment was made to Mr Purchase for the purposes that the plaintiff alleges. It is accordingly recoverable by the plaintiff.

Result

[220] For the reasons I have given, there will be judgment for the plaintiff as follows:

a) Against the first and second defendants (jointly and severally) in the sum of $1,142,270 together with costs.

b) Against the third defendant, judgment in the sum of $1,120,190, a declaration that it holds the Nahal Property Assets as constructive trustee for the plaintiff to the extent of $1,120,190, together with

costs. For the purposes of this part of the judgment, the "Nahal Property Assets" include those properties identified at paragraph 88 of the amended statement of claim dated 14 June 2007, together with the additional properties detailed in the evidence of Mr McLennan.

c) Against the fourth defendant, judgment in the sum of $751,124 and a declaration that it holds the property at 230 Great South Road as constructive trustee for the plaintiff to the extent of that amount and costs.

d) Against the fifth defendant in the sum of $405,174, a declaration that the fifth defendants hold the "Birdwood" and "Gracechurch" properties mentioned in the amended statement of claim as constructive trustees for the plaintiff to the extent of that amount and judgment in the further sum of $25,000 together with interest and costs.

[221] I note that the prayers for relief against the first and second defendants also sought interest, compounding monthly (less $65,968 paid). Counsel did not address that aspect of the claim in their closing submissions and if it is now sought to advance that matter counsel for the plaintiff may file a memorandum within ten working days of the date of this judgment. His memorandum should explain the entitlement to interest compounding monthly as claimed in the prayers for relief. Counsel for the defendants may reply within a further ten working days of receipt of the plaintiff's memorandum.

[222] Insofar as costs are concerned, I express my tentative view that Category 2 and Band B should apply. If there is any dispute as to that, or any dispute as to the terms of an appropriate order to reflect the terms of this judgment, I will receive memoranda from counsel.