IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2007-404-6558

BETWEEN	MOTORWORLD LIMITED (IN LIQUIDATION) First Plaintiff
AND	LLOYD JAMES HAYWARD AND KAREN BETTY MASON Second Plaintiffs
AND	NICHIBO JAPAN TRADING COMPANY LIMITED Third Plaintiff
AND	TURNERS AUCTIONS LIMITED Defendant

Hearing: 2, 3, 4, 9 and 10 November 2009

Appearances: Mr G Blanchard and Mr J Cochrane for plaintiffs
Mr S Hunter for defendant

Judgment: 17 February 2010

JUDGMENT OF LANG J

This judgment was delivered by me on 17 February 2010 at 10.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..…

Solicitors:
Kensington Swan, Auckland
Gilbert Walker, Auckland
Counsel:
Mr G P Blanchard, Auckland

[1] Between 1998 and 2006 the first plaintiff, Motorworld Limited ("Motorworld"), traded as a motor vehicle importer, wholesaler and retailer. It purchased used motor vehicles in Japan through the agency of the third plaintiff, Nichibo Japan Trading Company Limited ("Nichibo"). Motorworld then re-sold many of those vehicles at auctions organised in New Zealand by the sixth defendant, Turners Auctions Limited.

[2] On 6 November 2006 Motorworld was placed in liquidation and the second plaintiffs were appointed as liquidators. As at that date Motorworld owed Nichibo approximately NZ$2.6 million in respect of motor vehicles that it had purchased but not paid for. Its total liabilities as at that date exceeded the value of its assets by approximately NZ$3.6 million.

[3] Mr Alastair McGregor was the sole director and shareholder of Motorworld. He was originally a defendant, but he has now been adjudicated bankrupt and the proceeding against him has been stayed as a consequence.

[4] Queen City Autos Limited ("Queen City") and Freedom Wholesale Vehicles Limited ("Freedom") also imported motor vehicles from Japan through the agency of Nichibo. Mr Eric Millar and Mr Harley Paterson were shareholders and directors of Queen City and Freedom respectively. Mr McGregor also held 50 per cent of the shares in Freedom and was a director of that company.

[5] Both Queen City and Freedom made motor vehicles available to Motorworld for auction by Turners. The procedure that the parties adopted in this context was that Motorworld would select the vehicles that Freedom and Queen City were to supply to it for sale by auction. Motorworld would then arrange for the vehicles to be auctioned in its own name by Turners. After the auction Motorworld advised Freedom and Queen City of the amount for which Motorworld would purchase each of the vehicles from them. Freedom and Queen City would then send invoices to Motorworld in those amounts and Motorworld would arrange for the invoices to be paid.

[6] The plaintiffs allege, and there really can be no dispute, that Mr McGregor managed Motorworld's affairs in such a way that it often made losses on the motor vehicles that it sold through Turners. The losses occurred because Mr McGregor permitted Motorworld to sell vehicles for less than it had paid to purchase them and have them made ready for sale in New Zealand. The plaintiffs contend that the root cause of the problem was that Mr McGregor consistently sold vehicles for less than their market value.

[7] The plaintiffs allege, and again there can be no dispute, that Motorworld also regularly suffered losses when it sold the vehicles that it acquired from Queen City and Freedom. These arose because Mr McGregor routinely asked Queen City and Freedom to send it invoices for amounts that were greater than the sale prices that Motorworld had actually achieved for the vehicles at auction.

[8] The plaintiffs originally alleged that Mr McGregor had entered into an arrangement with Mr Millar and Mr Paterson that involved Queen City and Freedom receiving a benefit at Motorworld's expense. For that reason they were originally defendants in this proceeding. The plaintiffs' claims against Queen City, Freedom, Mr Paterson and Mr Millar were settled, however, at a commercial mediation last year, and they played no part in the trial.

[9] The plaintiffs' claims against Turners are therefore the only aspects of this proceeding that have proceeded to trial. Turners faces two causes of action, one by Nichibo and the other by Motorworld and its liquidators. Nichibo alleges that Turners committed the tort of conversion when it sold the vehicles on Motorworld's behalf. It therefore claims the value of those vehicles (up to the value of the debt that Motorworld owes it) from Turners by way of damages.

[10] The liquidators and Motorworld contend that Turners should also refund the fees that it charged Motorworld when it sold the vehicles, because it knew when it received those fees that Mr McGregor was misappropriating funds belonging to Motorworld. That is an equitable claim that I shall refer to for convenience as the claim in knowing receipt.

[11] Before considering the two causes of action that the plaintiffs rely upon in greater detail, it is appropriate to describe the manner in which Motorworld operated its business and the contractual relationship that it had with Nichibo.

The manner in which Motorworld operated its business

[12] Motorworld commenced its business relationship with Nichibo in August 2002. That relationship continued until Motorworld was ultimately placed in liquidation in November 2006. During that period Motorworld sold 768 motor vehicles that it had purchased from Nichibo at auctions that Turners conducted.

[13] The cars that Motorworld sold through Turners came primarily from three separate sources. First, Motorworld itself purchased second hand vehicles from Nichibo in Japan and then imported those vehicles to New Zealand for resale, almost exclusively through Turners. Motorworld also sold vehicles through Turners that it obtained from Queen City and Freedom. Those companies had in turn purchased the vehicles from Nichibo in Japan.

[14] Motorworld operated at the top end of the import market. It sold vehicles that were relatively new and that therefore fetched prices between $10,000 and $20,000.

[15] Nichibo would arrange for the vehicles to be shipped from Japan to New Zealand. Motorworld was responsible for meeting the costs of freight, insurance and the GST payable in respect of the vehicles once they arrived in New Zealand. It was also responsible for meeting the costs of registering the vehicles and ensuring that they complied with New Zealand road safety standards. Most of these expenses were fixed on a per vehicle basis, but compliance costs would obviously vary according to the condition of each vehicle when it arrived in New Zealand. Investigations that the plaintiffs have undertaken confirm, however, that these costs would generally amount to approximately $2,200 per vehicle. After the vehicles arrived in New Zealand they were registered in Motorworld's name.

[16] Generally speaking, it would take anywhere between two and six weeks for vehicles to meet compliance requirements and be groomed for sale after their arrival in New Zealand. Motorworld had no premises of its own. For that reason it arranged for its vehicles to be delivered directly to Turners' Trade Auction Centre in Penrose once they had been registered and certified as compliant. Motorworld then sold the vehicles at "dealer only" auctions that Turners conducted two or three times every week. The only persons who were permitted to attend these auctions were motor vehicle dealers. They purchased vehicles at the auctions for on-sale to retail customers.

[17] During the period with which this proceeding is concerned Turners permitted eight or nine major importers to sell vehicles through its dealer only auctions. It charged each importer a flat fee for the services that it provided. In the case of Motorworld, Turners charged a flat fee of $400 per vehicle.

[18] After each vehicle was sold at auction, Turners would obtain payment of the purchase price from the purchaser. It would also use its specialised computer software to carry out a check to ensure that the vehicle was not subject to any security interests registered on the Personal Property Securities Register. In the case of vehicles that Motorworld had purchased from Nichibo, the search of the Register did not generally reveal the existence of any security interests. If it found a registered security interest Turners would use the proceeds of sale to obtain a discharge of that interest. It would then attend to the transfer of the vehicle into the name of the purchaser. Once that had been done, Turners would deduct its fee and account to the vendor for the balance of the purchase price. Dealers who purchased vehicles at the dealer only auctions were able to take delivery of the vehicles directly from Turners' premises once payment had been made.

The contractual relationship between Motorworld and Nichibo

[19] The contractual relationship between Motorworld and Nichibo was governed by a Vehicle Supply and Security Agreement dated 4 February 2004. Under clause 6 of this agreement Motorworld granted Nichibo a security interest under the Personal Properties Securities Act 1999 ("PPSA") in all vehicles that it obtained from

Nichibo. The same clause provided that the vehicles were to remain the property of Nichibo until Motorworld had made payment in full. Motorworld acknowledged that, until that occurred, it held the vehicles as bailee for Nichibo. In order to perfect its security interest Nichibo registered a financing statement on the Personal Properties Security Register on 24 March 2004.

[20] The agreement required Motorworld to pay Nichibo the full purchase price for all vehicles that it purchased within 30 days of the vehicles being landed in New Zealand. Virtually from the outset, however, this arrangement was honoured in the breach. From an early stage Motorworld fell behind in payments. It was consistently in breach of its obligation to make payment in full within 30 days of the vehicles being landed in New Zealand.

[21] Nichibo's President, Mr Nobuya Yamanaka, explained that the manner in which Nichibo dealt with Motorworld was consistent with the way in which Japanese agents have traditionally treated their customers. He said that Japanese agents had been prepared to extend generous credit to their customers, and particularly to dealers in the New Zealand market, because that market has traditionally been considered to be one of reasonably low risk. Nichibo's competitors were prepared to offer generous terms to customers and Mr Yaminaka took the view that, if Nichibo was not prepared to take a similar approach, it would run a real risk of losing business to other competitors.

The claim in conversion

[22] Nichibo contends that it had a possessory interest in all of the vehicles that Motorworld purchased from it. It alleges that Turners committed the tort of conversion when it sold the vehicles to third parties at the dealer only auctions.

[23] The elements necessary to prove the tort of conversion are now well understood. In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (HL(E)) Lord Nicholls of Birkenhead said at [39]:

> In general, the basic features of the tort [of conversion] are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or

> other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods.

[24] Nichibo did not have physical possession of the vehicles at the point at which they were delivered to Turners for sale. By that stage Motorworld had possession of them and it was also the registered owner. In order to establish a claim in conversion Nichibo must therefore demonstrate that it had a possessory interest in the vehicles at that point.

Did Nichibo have a possessory interest in Motorworld's vehicles?

[25] In relation to this issue, Nichibo points to the fact that, as between Motorworld and itself, Nichibo remained the owner of each vehicle until such time as Motorworld paid for it in full. Nichibo also relies on s 109 of the PPSA, which provides as follows:

> **109 Secured party may take possession of and sell collateral**
>
> (1) A secured party … may take possession of and sell collateral when –
>
> (a) The debtor is in default under the security agreement; or
>
> (b) The collateral is at risk.

[26] Nichibo contends that at all times material to this proceeding Motorworld was in default of its obligations under the agreement because it had failed to pay for vehicles within 30 days of them being landed in New Zealand. For that reason it submits that it had the right under s 109 to take possession of and sell the vehicles. It contends that this possessory right is sufficient to permit it to sue in conversion.

[27] I accept that Nichibo may have had a possessory right in relation to the vehicles up until the point at which they were sold. At that time it remained the equitable owner of the vehicles because Motorworld had not paid for them. It also had the right under s 109 to take possession of them. Thereafter, however, the impact of s 45 of the PPSA needs to be considered. Section 45 provides as follows:

> **45 Continuation of security interests in proceeds**

(1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds—

(a) Continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and

(b) Extends to the proceeds.

[28] In the present case the vehicles that Motorworld purchased from Nichibo were the collateral under the security agreement. They were obviously "dealt with" in terms of s 45, because they were delivered to Turners and subsequently sold to third parties. The issue is whether Nichibo's security interest and possessory right remained in existence at the point of sale. This depends on whether Nichibo expressly or impliedly authorised the dealing in terms of s 45(1)(a).

[29] Nichibo accepts that Motorworld was permitted to sell vehicles within its inventory notwithstanding the fact that it had not paid Nichibo for them. It says that this entitlement arose by virtue of an implied term in the agreement. The implied term permitted Motorworld to sell vehicles before it paid for them so long as Motorworld did so in the ordinary course of its business. In support of this proposition Nichibo relies upon a line of authority to the effect that, where a creditor holds a security interest over a debtor's inventory, the debtor will have implied authority to deal with the inventory in the ordinary course of its business: *Estevan Credit Union Ltd v Dyer* (1997) 146 DLR (4th) 490; *Insurance Discount Corp Ltd v Motorville Car Sales* [1953] 1 DLR 560 (Ontario High Court) affirmed [1953] 4 DLR 576 (CA) and *MacDonald v Canadian Acceptance Corp Ltd* [1955] 5 DLR 344 (Ontario CA).

[30] Nichibo contends that the way in which Motorworld conducted its business, and in particular the manner in which it consistently sold vehicles at a loss, meant that the sales through Turners were not sales that Motorworld made in the ordinary course of its business. As a result, Nichibo did not expressly or impliedly authorise the sales. It therefore continued to hold a security interest (and possessory right) in the vehicles at the time that Turners sold them to third parties on Motorworld's behalf.

[31] In *McNeill v Gould* (2002) 4 NZ ConvC 193,557 the Court of Appeal considered the issue of implied terms. It adopted at [26] the following formulation of principle from *Chitty on Contract* Vol 1 para 13-004:

> [A] Court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, *and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties*. These two criteria often overlap and, in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both, however, depend on the presumed intention of the parties. (Emphasis added).

[32] The Court noted at [27] that the authors of Treitel, *The Law of Contract* (9th ed.) also took the view (at p 185) that the tests are to be viewed as being in the alternative. The Court then said at [28]:

> The way Chitty has formulated the test is important. Implicit in it is the proposition that the Court cannot simply add to the contract for the parties. The Court must be able to clearly infer "that the parties must have intended the stipulation in question".

[33] Applying this principle to the present case, I do not consider that the term for which counsel for Nichibo contends can be implied into the agreement between Nichibo and Motorworld. Mr Yamanako did not refer to his understanding of the arrangement between his company and Motorworld as being along those lines. He never referred to any belief that Motorworld would be subject to any restrictions at all in the way that it sold its vehicles or otherwise conducted its business.

[34] Mr Yamanaka confirmed that the terms of trade between Nichibo and Motorworld were dictated by the fact that his company needed to provide Motorworld with generous trading terms. That was necessary to enable Nichibo to match the terms that its competitors were offering. The terms of trade expressly permitted Motorworld to sell the vehicles that it purchased from Nichibo before it had paid for them. Both parties clearly understood that that was a necessary step that Motorworld needed to take before it would be able to pay Nichibo.

[35] Mr Yamanaka also agreed that, from the outset, Motorworld did not pay for vehicles until approximately four months after they had arrived in New Zealand. That was generally many weeks after it had sold the vehicles and received the proceeds of sale.

[36] In reality, therefore, Nichibo had no interest in the manner in which Motorworld sold its vehicles. How it disposed of the vehicles was entirely up to it. Nichibo's only interest was in being paid for them. This is reflected in the fact that Nichibo never took any steps whatsoever to maintain oversight or vigilance over the manner in which Motorworld dealt with its inventory. Instead, it effectively gave Motorworld free rein to sell the vehicles after they arrived in New Zealand.

[37] I acknowledge that, where a creditor holds a security interest over a debtor's inventory, both parties will generally accept and understand that the debtor may only deal with that inventory in the ordinary course of business. In the unusual circumstances of the present case, however, I do not consider that the Court can imply such a term into the contract between Nichibo and Motorworld. The effect of such a term would be to limit or restrict the manner in which Motorworld dealt with the vehicles that it purchased from Nichibo. I am satisfied that the parties did not intend or anticipate that Motorworld would be subject to any limitation at all in the way that it disposed of vehicles once they arrived in New Zealand. If a term can be implied into the contract at all, it was to the effect that Motorworld would pay for the vehicles that it purchased from Nichibo as soon as it was reasonably able to do so after it had sold them. Nichibo appears to have accepted that this would generally mean that Motorworld was not required to pay for the vehicles for about four months.

[38] My conclusion on this point means that Nichibo has not established that Motorworld sold its vehicles in breach of an implied term that it would only do so in the ordinary course of business.

[39] Nichibo cannot, and did not, contend that s 45 of the PPSA applies only to dealings that occur in the ordinary course of business. Section 45 does not refer to that issue at all. The wording used in s 45 differs significantly in this respect from

that used in s 53. Section 53 provides protection in certain circumstances to a purchaser who acquires goods that are subject to a security interest. A purchaser who acquires such goods will take the goods free of the security interest if he or she acquires them in the ordinary course of business. The protection that the section provides will only be lost if the purchaser acquires the goods in the knowledge that the sale of the goods constituted a breach of the security interest.

[40] Nichibo refers to s 53 in pleading its cause of action based in conversion, and its counsel also referred to it extensively in his closing submissions. Section 53 is not, however, relevant to the issues to be determined in the present case. This case does not relate to the position of a purchaser of goods that are subject to a security interest. It is concerned instead with the status of the holder of a security interest at the point where the collateral is dealt with and thereby converted into proceeds. For that reason s 45 is the relevant provision, and the only issue to be determined in relation to it is whether the sales occurred with Nichibo's express or implied authority.

[41] Both counsel referred in this context to *Lanson v Saskatchewan Valley Credit Union Ltd* (1999) 14 PPSAC (2d) 71 (Sask CA). In that case the plaintiff took a security interest over a mobile home to secure monies that he had loaned the owner of the home to fund its purchase. The lender knew that the debtor was buying the mobile home with the intention of re-selling it or renting it to a third party. The issue on appeal was whether, in terms of Canadian legislation identical in terms to s 45 of the PPSA, the creditor continued to have a security interest in the mobile home after the debtor had sold it. The Saskatchewan Court of Appeal held that the lender had lost his security interest in the home because he had expressly authorised the debtor to re-sell it.

[42] I consider that similar considerations determine this point in favour of Turners in the present case. Nichibo always knew that Motorworld was selling its vehicles through the auctions that Turners organised. Its New Zealand representative, Mr Robert Young, knew that Motorworld did not have its own premises. He also knew that Motorworld sent its vehicles directly to Turners' premises once they were ready for sale. Furthermore, he knew that Motorworld sent

the vehicles to Turners' premises for the express purpose of being sold at dealer only auctions. Mr Young personally attended those auctions periodically and was able to observe Motorworld's vehicles being sold at them.

[43] Neither Mr Young nor Nichibo's representatives in Japan ever raised any issue about Motorworld selling its vehicles through Turners' auctions. That is not surprising, because the only way in which Nichibo could be paid was from the proceeds of the sale of the vehicles through Turners' auctions.

[44] Given those undisputed facts I take the view that it is now impossible for Nichibo to argue that it did not, either expressly or impliedly, authorise the sale of Motorworld's vehicles through Turners' auctions. It follows that Nichibo ceased to hold a security interest, and consequently a possessory right, in respect of those vehicles at the point at which they were sold. That is fatal to its claim in conversion.

[45] This conclusion also raises another hurdle to Nichibo's claim in conversion. It relates to the issue of whether or not Nichibo consented to the sale of the vehicles.

Did Nichibo consent to the sale of Motorworld's vehicles at Turners' auctions?

[46] In order to establish the tort of conversion the plaintiff must show that the defendant has wrongfully interfered with the chattels in which the plaintiff has a possessory interest. Counsel for Turners referred me to the following passage of the judgment of the Supreme Court of Canada in *Bank of Montreal v Ernst & Young Inc.* (2002) 220 DLR (4^{th}) 193 at 196:

> [9] An owner's right of possession includes the right to authorize others to deal with his or her chattel in any manner specified. As a result, dealing with another's chattel in a manner authorized by the rightful owner is consistent with the owner's right of possession, and does not qualify as wrongful interference. The principle is aptly stated in R.D, Bowers, *A Treatise on the Law of Conversion* (1917), at §10:
>
> > It will be noted that the deprivation must be wrongful, for without the element of wrong no tort can be committed and conversion cannot occur; and to be wrongful, it must be wholly without the owner's sanction or assent, either express or implied. So, where the owner has given to another, or permitted him to have control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property or exercises such

> dominion over it as is warranted by the authority thus given. Otherwise expressed, it has been said that a rightful interference with the chattels of another cannot constitute a conversion. [Footnotes omitted.]

The principle is reiterated in A. Grubb, ed., *The Law of Tort* (2002), at para. 11.170:

> No action lies in conversion or trespass to chattels for consensual interferences with goods: the nature of these torts involves *wrongful* interference with goods and an interference that is consented to cannot be wrongful. Consent may be express, as in a contract or agreement for bailment or lease, or it may be implied from the circumstances. [Emphasis in original].

[47] A recent example of this principle being applied is *PGG Wrightson Ltd v Wai Shing Ltd* HC AK CIV-2003-404-6579 23 February 2006. In that case the plaintiff, trading through its subsidiary Fruitfed, was a wholesaler of fruit and vegetables. It operated through several branches, each of which had its own manager. Each manager was responsible for setting the prices that Fruitfed would charge within the manager's area of responsibility, and had some flexibility in doing so,. One of Fruitfed's managers sold produce to customers in his area at prices considerably below those that he ought to have charged. Fruitfed sued the customers in conversion, and sought by way of damages the difference between the price that they had paid for the produce and the price that Fruitfed considered they ought to have paid. The claim failed, with the Judge holding (at [56]) that voluntary delivery of the goods was fatal to a claim in conversion.

[48] In its statement of claim Nichibo alleges, by way of particulars of the acts that allegedly constitute the conversion, that Turners "took possession of the vehicle, carried out services in respect of the vehicles at or following auction, and gave possession of the vehicles to third party buyers". These acts are all clearly established by the evidence. It is equally clear, however, that Turners did all of them with the knowledge and consent of Nichibo. Turners also accounted to Motorworld for the sale proceeds minus its agreed fee. Having consented to the delivery to and sale of the vehicles by Turners, Nichibo is now precluded from arguing that Turners converted them, or Nichibo's interest in them.

[49] The fact that Motorworld ultimately found itself unable to pay Nichibo the amount that it owed is irrelevant to the issue of Turners' liability on the claim in conversion. The claim in conversion must fail for this reason also.

The claim in knowing receipt

[50] Nichibo is not a party to the second cause of action. Instead, it is a claim in knowing receipt advanced by Motorworld and its liquidators. These plaintiffs allege that Turners received fees from Motorworld in circumstances where it knew that Mr McGregor was breaching his fiduciary duty to Motorworld by misappropriating Motorworld's funds. The plaintiffs do not, and cannot, suggest that Mr McGregor ever used funds, in the sense of money, belonging to the company for improper or unauthorised purposes. Rather, they say that he misappropriated the company's funds by virtue of the manner in which he often sold Motorworld's vehicles at a loss. The plaintiffs seek relief under this head in the form of an order requiring Turners to return all of the fees that it received for selling vehicles on Motorworld's behalf.

[51] It has to be said that this is a bold claim. It seeks the return of monies that Motorworld paid for auction services that Turners provided pursuant to a formal contractual arrangement. The arrangement required Turners to provide Motorworld with clearly defined services in return for the payment of a set fee. The services went well beyond the auction process itself. They included providing parking spaces for Motorworld's vehicles prior to and after each auction, preparing written material for the information of those attending the auction, preparing documentation in relation to each sale, receiving payment from the purchaser, carrying out computer checks to ensure that the purchaser would receive clear title and transferring the vehicles into the names of the purchasers.

[52] The fee that Turners charged for its services was set by arms-length negotiation between the parties, and the quantum of the fee ($400) was influenced by the volume of vehicles that Motorworld was required to present for sale at the auctions. The amount of the fee that Turners charged Motorworld was broadly similar to that which Turners charged other motor vehicle dealers who used its auction services. It also appears to be accepted that Turners performed the functions

that entitled it to charge the fees that it received. Taken together, those factors do not provide a promising start for a claim based in knowing receipt.

[53] In order to establish this claim the plaintiffs must show that Mr McGregor operated Motorworld's business in a manner that breached his fiduciary duties to the company.

Did Mr McGregor breach his fiduciary duties to the company?

[54] There is no doubt that, as a director of Motorworld, Mr McGregor owed fiduciary duties to the company. He also owed concurrent common law and statutory duties regarding the way in which he conducted the company's affairs. Both counsel accepted, however, that not every breach of duty by a fiduciary will amount to a breach of a fiduciary duty. The distinguishing obligation of a fiduciary is an obligation of loyalty: *Chirnside v Fay* [2007] 1 NZLR 433 (SC) at [15].

[55] In relation to the scope of fiduciary duties counsel referred me to the following well-known passages from the judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1996] 4 All ER 698 at 710-712:

> I would endorse the observations of *Southin J. in Girardet v. Crease & Co.* (1987) 11 B.C.L.R. 2(d) 361,362: 'the word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. […] But to say that simple carelessness in giving advice is such a breach is a perversion of words. […]
>
> It is similarly inappropriate to apply the expression to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties. […]
>
> …
>
> A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict. He may not act for his own benefit or the benefit of a third person without the informed consent of his principal.
>
> …
>
> Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty."

[56] There can be no doubt that the manner in which Mr McGregor operated Motorworld's business caused it to become insolvent. He did not sell every vehicle at a loss. During some months he sold more vehicles at a profit than he then sold at a loss. During the last six months before the company ceased trading, however, there is a consistent pattern of cars being sold at a loss and the level of the losses became progressively larger. This meant that ultimately the debt to Nichibo ballooned and Motorworld had insufficient vehicles in stock to have any prospect of repaying it in full. This unchallenged fact is not sufficient on its own, however, to establish a breach of fiduciary duty on Mr McGregor's part.

[57] In order to determine that issue it is necessary to examine what Mr McGregor did in greater detail. In particular, it is necessary to consider whether he sold vehicles for less than their market value, and whether his dealings with Queen City and Freedom amounted to a breach of his fiduciary duties. It may also be of assistance to endeavour to ascertain what caused Mr McGregor to act in the way that he did.

[58] I am handicapped significantly in all of these undertakings by the fact that I did not hear evidence from Mr McGregor himself regarding the manner in which he conducted Motorworld's business. It was open to the plaintiffs (and the defendant) to call Mr McGregor as a witness but they elected not to take that step. As a result, I am left to draw my conclusions from such other evidence as is available.

Did Mr McGregor sell Motorworld's vehicles for less than their true market value?

[59] This allegation lies at the heart of the plaintiff's case. They contend that Mr McGregor sold Motorworld's vehicles for less than they were worth. In doing so he effectively misappropriated Motorworld's funds, because its assets dissipated but the company did not receive full value for them.

[60] In this context the plaintiffs rely principally upon the evidence of Mr Peter Johnston. He is the owner and operator of a company that imports motor vehicles, and he is clearly a person with vast experience in the motor vehicle industry. Mr Johnston has been importing cars from Japan for many years, and his company

currently imports around 2,500 vehicles every year. It was the original and only vendor when Turners began its dealer only auctions. Mr Johnston made it clear in his evidence that the present proceeding has required him to divide his loyalties, because he has very close business and personal connections with both Nichibo and Turners.

[61] Motorworld was one of Mr Johnston's competitors. For that reason he naturally kept a close eye on it as it emerged as a significant vendor of imported vehicles at the dealer only auctions. Mr Johnston said that he first became concerned about Motorworld in 2004, when he began to notice that it was regularly selling vehicles at what he described as unprofitably low prices. He said that his concerns increased in 2005 and 2006 as Motorworld sold vehicles for prices that he knew could not have been profitable.

[62] He said in this respect:

> 18. By way of example, Motorworld would sell a vehicle for $17,000 that I knew could not have been landed in New Zealand for less than $20,000. Sales like this would occur on numerous occasions. After the auctions Mr McGregor would say that he had had a good night even though he had sold a lot of vehicles at prices that could not have been profitable.
>
> 19. I simply could not understand how Motorworld could sell at such low and unprofitable prices. As I explain below, I was not alone in this. I had many conversations with other vendors at the auctions about Motorworld. I and others repeatedly complained to Turners about Motorworld. But Turners allowed Motorworld to continue selling at the auctions despite our protests.
>
> 20. I continued to be concerned as to how Motorworld could sell so cheaply until well after it went into liquidation in November 2006. It was in fact only after I was approached in mid 2008 to assist in relation to this litigation that I was told exactly what Mr McGregor had been doing. I learnt that Motorworld had sold numerous vehicles for less than landed cost.

[63] Viewing Mr Johnston's evidence as a whole, I consider that these passages accurately reflect Mr Johnston's key concern about the way in which Mr McGregor was selling Motorworld's cars. They reflect numerous other statements that he made in the course of his evidence. His concern, and that of other vendors at the auctions, was that Motorworld was selling its vehicles too cheaply. It was doing so, however,

in the sense that it was selling them for prices that meant that it could not be making a profit on the sale.

[64] I acknowledge that on several occasions Mr Johnston also said that Motorworld was selling vehicles for less than their true value. Usually, however, such assertions were immediately blurred by the fact that they were qualified by a reference to the fact that Motorworld could not have been recovering its landed costs on the vehicles that it sold. I refer by way of example to the following paragraphs from his brief of evidence:

> **Motorworld's unprofitably low prices**
>
> 50. As I have said, I was just one of a number of vendors who had serious concerns about the low and unprofitable prices at which Motorworld was selling. I now know that Motorworld sold numerous vehicles for below landed cost causing large losses to be incurred. It hardly needs to be said that for a vendor to continually sell its vehicles for less than cost over a long period of time thereby running up large losses is quite out of the ordinary. In all my years as a motor dealer I have never seen this before and I doubt whether I will see it again.
>
> 51. I and the other dealers had no doubt that Motorworld was selling its vehicles for below market value because it was selling for prices that none of the other dealers could match. Motorworld was selling its vehicles for prices that as far as the other vendors were concerned could not give rise to profitable trading.

[65] Mr Johnston made similar comments in his reply affidavit:

> 13. I agree that Motorworld's cars were high quality in the sense that they were late model, low mileage and often of good specification and therefore more expensive than the vehicles that other vendors sold. However, the problem was not that the other vendors were unable to purchase these cars. Anyone can go to Japan and purchase near new high quality low mileage vehicles. The point is that none of the other vendors could purchase these vehicles and then resell them in New Zealand profitably. I have no doubt that comments and complaints were made to Turners regarding the type of vehicles that Motorworld were selling. However, what Turners' witnesses omit to say is that the specific concern that the vendors had was that none of the other vendors could purchase these vehicles and resell them in New Zealand at a profit, or specifically, at the low prices that Motorworld were selling them for.

[66] These passages demonstrate that Mr Johnston's opinion that Motorworld was selling its vehicles too cheaply is intertwined inextricably with his belief that Motorworld was selling vehicles unprofitably. It was selling vehicles unprofitably

because it was selling them for less than landed cost. That is a very different proposition, however, to an assertion that Motorworld was selling its vehicles for less than market value.

[67] The witnesses for Turners pointed out that, by definition, an auction sets the market value for a vehicle on any given day. One of them, Mr Hiskens, also observed that the market values of similar vehicles could also vary from day to day. He said that a vehicle might sell for $20,000 one week and then a similar vehicle would sell for $19,000 a week later. Three weeks after that another similar vehicle might fetch $22,000. As a result, he found it difficult to know whether a vendor was receiving a good or bad price for its vehicles.

[68] There is no other evidence to support Mr Johnston's assertion that Mr McGregor was selling Motorworld's vehicles for less than purchasers might have been prepared to pay. He was not able to give any examples of individual vehicles being sold for less than they were worth. His evidence on the point remained extremely general, and I consider that its reliability was compromised by the extent to which it relied on the fact that Motorworld's sales could not have been profitable.

[69] I readily accept Mr Johnston's assertion that Motorworld was regularly selling its vehicles for less than landed cost. There is ample evidence to support that proposition and it is ultimately what caused the company to fail. The evidence leaves me with the overall impression, however, that Mr McGregor was not deliberately trying to make a loss on Motorworld's vehicles notwithstanding the fact that that is what he often did. It does not establish, either, that Mr McGregor was a "pushover" in negotiations with vendors or with Turners. Rather, Mr McGregor appears to have made genuine efforts to obtain the best price that he could for the vehicles that Motorworld offered for sale at the auctions. Like the witnesses for Turners, I find myself unable to say that Mr McGregor was selling Motorworld's vehicles for less than the market was prepared to offer on any given day.

Mr McGregor's dealings with Queen City and Freedom

[70] Perhaps the most curious aspect of Mr McGregor's conduct is the way in which he dealt with Queen City and Freedom. It appears that Motorworld paid Queen City approximately NZ$1.665 million more than it received at auction for the vehicles that it purchased from Queen City. Similarly, it paid Freedom approximately NZ$480,000 more than it received at auction for the vehicles that it purchased from it It is difficult to explain why Mr McGregor allowed Motorworld to pay those companies more for the vehicles that it obtained from them than it had been able to get for the vehicles when it on-sold them at auction. This is a matter of some significance because of the sums involved.

[71] There must be a reason why Mr McGregor acted as he did in his dealings with Queen City and Freedom, but the answer is not immediately obvious. The liquidators cannot shed any light on it notwithstanding their intimate knowledge of Motorworld's affairs and their discussions with Mr Paterson and Mr Millar. They rely solely on the fact that Motorworld sustained losses in its dealings with Queen City and Freedom. Moreover, the plaintiffs did not call Mr Paterson or Mr Millar to give evidence, although it was open to them to do so. They, along with Mr McGregor, are the only persons who could have assisted the Court to resolve this issue.

[72] In the end, I have determined that any conclusion that I might draw regarding it would be sheer speculation that would be devoid of any evidential foundation. The onus is on the plaintiffs to prove that Mr McGregor's dealings with Queen City and Freedom amounted to a breach of his fiduciary duties to Motorworld. On the evidence that they have adduced I find that they have not discharged that onus.

What caused Mr McGregor to act in the way that he did?

[73] Over the last three years the liquidators have had an opportunity to examine Motorworld's affairs in depth. They have reconstructed its accounts and have examined the manner in which Mr McGregor conducted the affairs of the company in minute detail. One would think, therefore, that they are uniquely placed to offer

an opinion as to why Mr McGregor acted in the way that he did. It seems, however, that they remain largely in the dark regarding this issue. Mr Hayward confirmed as much in his brief of evidence when he said:

> 33. The only real explanation that Mr McGregor has given was that he was attempting to operate a system of *"overs and unders"* or *"swings and roundabouts"* under which sometimes Motorworld would make a profit on a vehicle and sometimes it would make a loss but on average it would make a profit of approximately $500 per vehicle. He explained this during the examination on 10 May 2007. It is also contained in paragraphs 11 to 13 of an affidavit he swore on 9 May 2007 prior to legal proceedings being commenced. This affidavit was prepared and provided to my solicitors acting for Queen City, Freedom, Mr Paterson and Mr Millar.
>
> 34. Mr McGregor also said that when he first began to sell with Turners he had to sell 10 vehicles per week in order to be allowed to participate in the wholesale auctions but that over time this increased to 50 vehicles per week. He said that he was under pressure from Turners to meet this target. Turners also placed pressure on him to keep up Motorworld's "sale rate". (This is the percentage of vehicles sold by the vendor at the auctions. It is also referred to as the "hit rate" or "success rate", or "sell rate".) He explained this in the examination. I note that Turners' standard form contract with vendors required vendors to maintain a sale rate of at least 50% and to sell a certain number of vehicles or they would be suspended. This can be seen from an agreement signed by Mr McGregor on behalf of Motorworld on 9 September 2003. This shows that at this time Motorworld was required to sell between 15 to 25 vehicles.
>
> 35. When one looks at schedules one to three of the second amended statement of claim, it can be seen that Motorworld made losses on a very high proportion of the vehicles. In light of this Mr McGregor's explanation that he was attempting to make a profit through *"unders and overs"* does not seem credible.
>
> 36. **Mr McGregor's motive for doing what he did remains a mystery. He certainly does not seem to have gained by it personally. It may be that he was just extraordinarily incompetent. It has been suggested to me by a number of parties that he simply enjoyed the feeling of importance and status he got from being a significant player in the market. It certainly seems that over time he became the biggest seller of vehicles and therefore a major figure at the Turners auctions.** [Emphasis added]

[74] I regard Mr Hayward's conclusion that Mr McGregor does not seem to have gained personally from the manner in which he conducted Motorworld's business as an important factor in determining whether Mr McGregor was in breach of his fiduciary duties. The liquidators would obviously have searched carefully for evidence suggesting that Mr McGregor may have manipulated Motorworld's affairs

for his own benefit. The fact that they have not been able to find any evidence of this type of wrongdoing is very significant. It removes any basis for the suggestion that Mr McGregor intended to benefit personally from the way in which he conducted the company's affairs. It also suggests that, whatever the reasons for Mr McGregor acting in the way that he did, he probably intended his actions to be for the benefit of the company.

[75] I consider that the way in which Mr McGregor presented to other people is also of some significance in this context. The witnesses from Turners were united in their view that he presented to them as an extremely conscientious and hard-working individual who was committed to the success of his business. Mr David Hiskens, the Branch Manager of Turners' Trade Auction Centre in Penrose from August 2003, dealt regularly with Mr McGregor between 2003 and 2006. In evidence-in-chief he said:

> 5. Motorworld was an importer of used vehicles from Japan. It began selling through the Trade Auction Centre in 2003 and grew into one of the Centre's largest vendors. I had regular dealings with Motorworld's principal, Alastair McGregor, between 2003 and 2006.
>
> 6. Motorworld sold high quality late-model vehicles. Its vehicles were always immaculately presented and were often of makes and models that were in high demand.
>
> 7. Alastair himself was hard working and very focussed on his business. He contacted the Centre on an almost daily basis to ensure that everything in relation to his cars and his sales was in order. If issues ever arose in relation to his vehicles, Alastair would invariably deal with them straight away.
>
> 8. Alastair sometimes gave me the impression that his business was doing very well. He told me that he owned a property in Australia and had an investment in a racehorse. I knew that Alastair lived in a block of four flats in Mission Bay; I live in Glendowie and in the weekend I would see Alastair's car (a Mustang) parked outside his house. He told me that he owned three of the four flats and was waiting for one person to move out so that he could buy the fourth one.

[76] Turners' Chief Executive, Mr Graham Roberts, had this to say:

> 25. I did not deal with Motorworld on a day-to-day basis but I was aware that it was one of the Trade Auction Centre's major vendors. I met Motorworld's principal, Mr McGregor, on a number of occasions as he was regularly present at the Trade Auction Centre.

> 26. Motorworld's cars were generally of a high quality and well groomed. I remember comments being made by other vendors at the time querying how Mr McGregor had managed to source such high quality cars. My general impression of Mr McGregor was that he ran a lean operation with lower overheads and that he was focussed on high turnover. As Mr Johnson says in his brief, Motorworld did not have its own premises or storage facilities and therefore did not incur the same overheads as its competitors.
>
> 27. Mr McGregor travelled regularly to Japan and I assumed that he had found his own source of cars which he then purchased through Nichibo. Mr McGregor appeared to me to be highly attentive to and devoted to his business.

[77] Ms Sarah Walker was the Office Manager for Turners' Trade Auction Centre between 2004 and 2006 and in that capacity she was responsible for the overall administration of the Centre. She said:

> 4. From 2004 to 2006 Motorworld was one of our top vendors in the Trade Auction Centre. I was the primary administrative contact at Turners for Alastair McGregor of Motorworld. I dealt with him on an almost daily basis.
>
> 5. My impression of Alastair was that he was very focussed on his business. He was very organised. His paperwork was always in order and provided well in advance of each auction. Alastair kept a very close eye on his sales. For example when he was in Japan he would expect me to keep him regularly updated with sales reports.
>
> 6. Alastair would often call from Japan. He would call me during an auction to see what lot number the auction was up to so that he knew when his vehicles would come up for sale. When his own vehicles were being auctioned, he would telephone the clerk to pass instructions to the auctioneer.
>
> 7. Alastair's cars were always of a high quality. On the few occasions that there was an issue with one of his cars, he would rectify it straight away.

[78] These witnesses were cross-examined extensively by counsel for the plaintiffs about many issues, but they were never challenged about their impressions of Mr McGregor's work ethic or the way in which he presented to them. It is also worthy of note that even Mr McGregor's strongest critic, Mr Johnston, did not take issue with Mr McGregor's commitment to and enthusiasm for his company's business. The evidence therefore suggests that Mr McGregor was fully committed to the success of that business.

[79] It was never going to be possible for Mr McGregor to sell every vehicle at a profit. That appears to be a dream that is beyond even the most experienced operators in this particular industry. It is clear, however, that Motorworld needed to sell more vehicles at a profit than it did if it was to be able to operate successfully in this very competitive environment.

[80] I am satisfied that at least part of the problem arose from Mr McGregor's failure to adhere to a system of setting reserve prices that recovered the landed costs of Motorworld's vehicles. He knew the price that he had paid for each vehicle in Japan, and he should also have been able to factor in currency movements that were likely to affect the purchase price. Shipping costs, GST and registration costs were fixed, leaving only compliance and grooming costs to be taken into account. He should therefore have been in a position to know exactly what each vehicle had cost by the time that it arrived on the auction floor. As Mr Johnston emphasised, the proper use of reserve prices is an essential weapon in the armoury of any motor vehicle dealer who sells vehicles at auction. It lessens the risk that vehicles will be sold at a loss. I therefore accept that Mr McGregor's failure to fix and adhere to adequate reserve prices clearly calls his competence into question. It does not, however, mean that he was acting in breach of his fiduciary duty to the company.

[81] The plaintiffs also suggested that the Court should draw an adverse inference from the fact that Mr McGregor sold a significant proportion of Motorworld's vehicles through negotiations that occurred after the auction rather than during the course of the auction itself. Mr Johnston said that he sold about 20 per cent of vehicles in that way. The evidence indicates that Motorworld ultimately sold up to 50 per cent of its vehicles through post-auction negotiations.

[82] This practice caused logistical problems for Turners, because its staff were involved to some extent in the negotiation process which required an additional commitment of resources. Turners would clearly have preferred Motorworld to sell all of its vehicles during the auction because that was a much tidier means of achieving finality quickly.

[83] I do not consider, however, that any adverse inference can be drawn from this aspect of Mr McGregor's modus operandi. The witnesses from Turners said that Mr McGregor operated in this way because he believed that he could achieve a better sale price if he negotiated directly with the purchaser after the auction. This may not have been the end result, but I am satisfied that that is what Mr McGregor believed. Mr McGregor was probably mistaken regarding his negotiating ability. The fact that he adopted this tactic suggests, however, that he was acting in what he perceived to be the best interests of the company.

[84] I have already indicated (at [69]) that I am satisfied that Mr McGregor did not deliberately set out to sell Motorworld's vehicles at a loss. Everything that I have heard about him suggests that he was a person who wanted others to see him as a successful businessman. Selling vehicles at a loss was probably the last thing that he wanted to occur. Why then did he allow that situation to develop?

[85] I consider that several factors need to be taken into account in answering that question. The first is that Mr McGregor was operating in an area of the market in which it was much more difficult to regularly make a profit than is the case in other areas. Most importers, including Mr Johnston, concentrate on importing vehicles that are between six and nine years old. Mr Johnston explained the reasons for this in his reply affidavit as follows:

> 14. It may assist if I explain the reason why many of the vehicles that Motorworld was selling could not be profitable. The reason that the business model of importing Japanese vehicles from Japan works is that vehicles depreciate faster in Japan than in New Zealand. This is largely caused by the Japanese government policy designed to have older vehicles removed from the road in order to ensure that domestic consumption for new vehicles remains high. The purpose of the policy is to support Japan's huge car manufacturing industry. The main policy I am referring to is called "Sharken". Under Sharken a large fee needs to be paid to re-register vehicles that are 3 years old, and an even larger fee needs to be paid to re-register vehicles that are 5 years old. Because cars depreciate more quickly in Japan than in New Zealand, it is possible to buy cars in Japan that are around 3 to 5 years old and resell them in New Zealand at a profit. Because of the different depreciation rates in the two countries the same car imported from Japan can be purchased for less than it would be worth if it was a New Zealand new vehicle. However, the business model only works if the car is old enough that there has been time for depreciation in Japan to outstrip the depreciation of an equivalent New Zealand new vehicle in order to create a sufficient profit margin.

> 15. The late model vehicles generally being purchased by Motorworld had not depreciated sufficiently in order to be profitable. I could have purchased the same vehicles as Mr McGregor. However, I did not do so because I knew that they could not be sold profitably in New Zealand. I would have suffered a loss on them in most cases, had I tried. The other vendors, including Turners Fleet, were in the same position. Our concern was not that Motorworld could source these vehicles – anyone could – it was that we could not buy these vehicles cheaply enough to resell them in New Zealand profitably at the prices that Motorworld was accepting.

[86] Mr McGregor clearly saw a niche market involving the importation of newer and more expensive vehicles of newer vintage. Turners also saw value in the development of this market within its auctions because nobody else was operating within it at the time.

[87] Mr Johnston's observations demonstrate that it was probably a mistake for Mr McGregor to have committed Motorworld to operating in the top end of the market. It was probably always going to struggle to make a profit by doing so. That decision, however, was one that Mr McGregor was legitimately entitled to make provided he made it in good faith and with the best interests of the company in mind. There is nothing in the evidence to suggest that that was not the case. Mr McGregor therefore did not breach his fiduciary duty to the company by committing it to operate at the top end of the market.

[88] Secondly, it is clear that Mr McGregor's relationship with Turners played a part in his decision-making process. Turners put real pressure on all of its vendors, including Mr McGregor, to sell at least 50 per cent of all the vehicles that they put up for auction. It was obviously in Turners' interests to apply that pressure, because it maximised the turnover of vehicles at the auctions and thereby maximised Turners' income from the fees that it charged. Turners applied some of this pressure directly. Mr Hiskens accepted that he told Mr McGregor on occasions that, if Motorworld could not perform, Turners would find another vendor to take its place. Other forms of pressure were indirect. They included charging an additional fee for any sale that occurred at a later auction, thereby encouraging vendors to sell at the first opportunity.

[89] Turners' witnesses said that Mr McGregor was very focussed on turnover. Mr Johnston agreed with that proposition in his reply affidavit when he said:

> 17. At paragraph 26 Mr Roberts refers to Mr McGregor being focused on high turnover. Mr Hiskens says at paragraph 14 that Mr McGregor was very focused on turnover and getting the deal done. I absolutely agree with this. He was obviously far too focused on turnover. It has to be remembered that selling at the wholesale auctions was already a high turnover low margin business. Because he was even more focused on turnover than a normal vendor, he inevitably lost money.

[90] I consider that Mr McGregor's focus on turnover is likely to have been the result of several factors, one of which was the considerable pressure that Turners applied. This, too, this may be an indicator that calls into question Mr McGregor's competence, but it does not amount to a breach of fiduciary duty.

[91] The plaintiffs sought to suggest that Turners accorded favoured status to Motorworld because it was such an important player in its dealer only auctions. The witnesses from Turners denied that that was the case, however, and said that Turners always had other dealers who were anxious to take Motorworld's place as lead vendor at these auctions.

[92] My conclusion on this point is that Turners dealt with Motorworld in the same way as it dealt with all of its vendors at the dealer only auctions. The evidence establishes that the relationship between Turners and Mr McGregor was often fraught. The two clearly conducted business on an arms length basis, with both being prepared to take a stand when necessary. Mr McGregor was a person who had strong views about the way that things should be done, and he made those views known to Turners. Turners also stood its ground when it considered that Mr McGregor was acting unreasonably. By way of example, Mr McGregor would require Turners, at very late notice, to provide slots at an auction for all of the vehicles that he wanted to sell at that auction even if he had earlier told Turners that he would only be providing a much lesser number. This caused Turners significant difficulties in preparing for and carrying out the auctions, and its staff let Mr McGregor know their views on the matter.

[93] I also reject the suggestion that Turners changed its practice in relation to the market reports that it made available to all vendors about the prices achieved at earlier sales in order to assist Mr McGregor to cover up the losses that he was incurring. It is clear that at some stage, and apparently at Mr McGregor's request, Turners ceased to include the vendor's identity in respect of sales that occurred as a result of negotiations between the vendor and purchaser after an auction had concluded. Although the evidence about this topic is somewhat confusing, it seems that Mr McGregor sought to have this information excluded from the reports because he felt that it might provide his competitors with some form of advantage. Whatever the precise reason for the change in policy, I am satisfied that it did not involve any decision on Turners' part to assist Mr McGregor to cover up the losses that he was regularly making. And, as one of Turners' witnesses observed, the true value of the reports lay in record that they provided of the prices that vehicles had achieved at auction. The identity of the vendors was irrelevant to that issue.

[94] Thirdly, I have no doubt that pressure was created by the relentless supply of cars that Motorworld imported. Mr McGregor had to keep selling cars because there were always more on the way from Japan. Turners only had limited parking spaces at its Penrose premises, and Motorworld did not have any other facilities at which it could store unsold vehicles. This, too, would have provided Mr McGregor with an incentive to sell Motorworld's vehicles at the earliest opportunity.

[95] Fourthly, Mr McGregor would have been acutely aware of Motorworld's need to achieve cashflow to meet the debt that it owed to Nichibo. Mr Young was in constant contact with him about Motorworld's outstanding balance, and I have no doubt that pressure from Nichibo would have played a part in the way in which Mr McGregor operated Motorworld's business.

[96] Fifthly, Nichibo must bear some responsibility for the situation that developed. From the outset it allowed Motorworld's account to fall seriously into arrears. Alarm bells ought to have sounded when, from late 2004 onwards, Mr Young found it difficult to discuss the issue of payment with Mr McGregor. Mr McGregor's elusiveness when Mr Young tried to discuss that issue ought to have provided a clue at an early stage that there were issues about the way in which

Motorworld was conducting its business. The true position would have been revealed immediately if Nichibo had required Mr McGregor to submit an itemised stocktake of its inventory at any stage before Motorworld went into liquidation. Nichibo did not, however, take that step. Instead, Mr Young relied upon Mr McGregor's assertions that Motorworld held sufficient stock to meet the debt to Nichibo in full.

[97] Sixthly, Mr McGregor probably did not know exactly how dire Motorworld's position was at any given stage because, like many companies in financial difficulties, Motorworld did not have financial statements prepared for the last few years of its operation. The liquidators were obliged to reconstruct Motorworld's accounts for the 2004, 2005 and 2006 years. I accept, however, that he must have known at some point well before the company finally collapsed that Motorworld was never going to be in a position to repay Nichibo the amount that it owed.

[98] At that stage Mr McGregor was undoubtedly under statutory and common law duties not to permit the company to fall deeper into debt. When considering whether there was also a breach of fiduciary duty, however, human frailty needs to be taken into account. I suspect that Mr McGregor may well have continued to import and sell cars because he did not know, or want to know, how to break the cycle. It was probably easier, and infinitely more palatable, for him to keep going rather than to openly acknowledge the financial disaster that was imminent. It is not at all uncommon for persons in that position to harbour a belief that things will ultimately come right if they continue to carry on trading. That belief might be completely unjustifiable when considered objectively, but it is nevertheless genuinely held.

[99] A hint of this is to be found in the way that Mr McGregor reacted when Nichibo's representatives confronted him once they finally discovered the true situation in 2006. At that point Mr McGregor initially continued to deny that anything was wrong. It was not until he realised that Nichibo knew the full picture that Mr McGregor tearfully acknowledged Motorworld's financial predicament. I consider that Mr McGregor may well have believed, however naively, that somehow the situation would improve if Motorworld continued to trade.

Conclusion

[100] It is virtually certain that the way in which Mr McGregor conducted Motorworld's business was in breach of common law and statutory duties that he owed as its director. Taking all of the matters to which I have referred into account, however, I am not satisfied that the culpability of his conduct went further than that. He undoubtedly made wrong decisions and operated the company's business incompetently in significant respects. There is no evidence, however, that he put his own interests before that of the company or that his loyalty to the company was compromised in any other way. I have therefore concluded that he acted in good faith and in the (perhaps misguided) belief that he was acting in the company's best interests. For these reasons I am not satisfied that Mr McGregor breached his fiduciary duties to the company.

[101] Given that conclusion, the claim based on knowing receipt cannot succeed. In case I am wrong on that point, however, I propose to briefly consider whether Turners knew that Mr McGregor was selling Motorworld's vehicles regularly at a loss.

Did Turners know that Motorworld was regularly selling its vehicles at a loss?

[102] Had it been necessary for me to so, however, I would have found that Turners did not know that Motorworld was regularly selling its vehicles at a loss. I now give very brief reasons for my conclusion on this point.

[103] First, Turners is not primarily a car dealer or importer. Although it imports and sells cars in its own right, it operates in a different field of the market than Motorworld did. It was not interested in importing cars at the top end of the market. Turners is also primarily an auctioneer, providing an auction service to motor vehicle importers and dealers. The fact that it does so for a flat fee, and not on a true commission basis, means that Turners does not have any real interest in the prices that individual vehicles fetch at auction. Its interest lies instead in maximising the number of vehicles that importers present for sale. That is the only way that Turners can maximise its income. As a consequence, its staff cannot be expected to be

overly interested in the prices that individual importers obtain for their vehicles. Similarly, it has no interest in whether a vendor is selling at a profit or a loss. That issue is solely the concern of the vendor.

[104] Secondly, this is a field in which the returns are not great, at least on a per vehicle basis. This fact was demonstrated graphically by Mr Johnston. Mr Johnston has imported vehicles from Japan and sold them through Turners on a very large scale for many years. Between 2004 and 2006 his average profit per vehicle was just $265.00. Quite clearly the profitability of any vehicle importing business rests on the volume of sales that the business is able to generate. In many cases there must also be a fine line between selling a vehicle for a profit and selling it at a loss.

[105] Thirdly, Turners could not be expected to know the prices at which an importer was acquiring its vehicles in Japan. Having said that, I accept Mr Johnston's evidence that there will not be great variations in the long term between the prices at which individual dealers can acquire stock using Japanese agencies such as Nichibo. I also accept that Turners could be expected to have a reasonably good idea of the costs that an importer will incur in landing and selling a vehicle in New Zealand.

[106] Fourthly, the scale of Turners' operation needs to be remembered. In 2006 Turners was selling 450 vehicles per week by auction at its Penrose premises. Given the scale of its operation, and the logistics involved in running it smoothly, I consider that it would be virtually impossible for Turners to be able to tell at any given stage whether a vendor was trading profitably. This is demonstrated by the fact that several witnesses, including Mr Johnston and Mr Hiskens, were asked to compare the sale prices that vendors had obtained for seemingly similar vehicles at auction. On every occasion the witness found it virtually impossible to make a meaningful comparison between individual sales without knowing more about the vehicles in question.

[107] Fifthly, Turners had no knowledge of Motorworld's financial position and, in particular, the state of its account with Nichibo. Although it knew that Motorworld was acquiring vehicles from Nichibo, it knew nothing of the terms of trade between

those parties or the fact that Motorworld owed Nichibo a significant amount of money.

[108] Sixthly, I do not place the weight that the plaintiffs ask me to on the fact that other vendors expressed concern to Turners' staff about the manner in which Motorworld was operating its business. Although it is clear that this occurred from time to time, it needs to be remembered that the vendors were operating in a highly competitive environment. They also constituted a small and, I am sure, highly vocal community. It is not surprising, therefore, that Turners took their complaints with a grain of salt.

[109] Finally, both Mr Yamanaka and Mr Young said that they were extremely shocked when they discovered the extent of Motorworld's insolvency. They said this notwithstanding the fact that they had known for nearly two years that Motorworld was apparently unable to meet its payment obligations under the supply agreement. Mr Young's efforts to pin Mr McGregor down on this topic during this period had been singularly unsuccessful. It was therefore surprising to learn that none of Nichibo's staff questioned Motorworld's profitability or operating methods until just before it was placed in liquidation. If Nichibo did not suspect that anything was amiss given the information that it held, it is extremely difficult to see how Turners could have been expected to know more.

[110] All of Turners' witnesses said that they did not know that Motorworld was trading unprofitably. Having regard to the matters to which I have just referred I accept that evidence as being truthful. I am satisfied that Turners' staff and executives did not know that Mr McGregor was often selling Motorworld's vehicles at a loss. I am similarly satisfied that the circumstances relating to Motorworld's trading activities were such that Turners could not reasonably have been expected to know that that was the case.

Result

[111] Both claims are dismissed. There will be judgment for Turners in relation to each of them.

Costs

[112] There is no reason why costs should not follow the event. I have ruled earlier that this is a category 2 proceeding and my initial impression is that Band B is appropriate for preparation for trial and the trial itself. If either counsel takes a different view, he should file a memorandum to that effect within the next 14 days. I will then give such further directions as may be appropriate so that I can deal with the issue of costs on the papers.

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Lang J