HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

PLACER (GRANNY SMITH) PTY LTD APPELLANT

AND

THIESS CONTRACTORS PTY LTD RESPONDENT

Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd
[2003] HCA 10
11 March 2003
P60/2001

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the whole of the order of the Full Court of the Supreme Court of Western Australia made on 14 April 2000 and, in lieu thereof, order that the respondent's appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation:

J Gilmour QC with C M Duncan for the appellant (instructed by Mallesons Stephen Jaques)

D F Jackson QC with P G Clifford for the respondent (instructed by Hollingdales)

CATCHWORDS

Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd

Damages – Breach of contract – Proof of damage – Calculation of damages – Joint venture mining contract – Respondent carried out mining operations for appellant – Rates based on genuine estimates of cost of operations – Respondent inflated cost estimates – Whether breach of contractual obligation of good faith – Whether sufficient evidence from appellant to prove damage – Whether sufficient evidence for trial judge to make a calculation of damages on proper principles – Significance of respondent's admission that cost estimates exceeded actual bona fide estimates of costs – Continuing obligation during litigation to correct fraudulent conduct.

1 GLEESON CJ, McHUGH AND KIRBY JJ. This appeal arises out of complex and protracted litigation in the Supreme Court of Western Australia in relation to a contract pursuant to which the respondent agreed to carry out mining operations for the appellant at rates based on genuine estimates, reviewed from time to time, of the cost of such operations. After relations between the parties broke down, the appellant alleged that, in breach of a contractual obligation of good faith, the respondent had inflated its cost estimates and, in consequence, had been overpaid. By way of counterclaim in proceedings commenced by the respondent, the appellant sought to recover the overpayments. The trial judge awarded the appellant $4,853,000.

2 The contractual provisions, and the relevant facts, appear from the reasons for judgment of Hayne J and Callinan J.

3 The Full Court of the Supreme Court of Western Australia rejected an argument that the appellant had failed to make out a case of overpayment. Accepting that the best evidence of the respondent's true estimates of its costs was to be found in its internal plant department rates, the Full Court said:

> "In consequence of Thiess' breaches of contract, Placer paid Thiess remuneration based on rates higher than those that would otherwise have been agreed. Placer is therefore entitled to damages for breach of contract represented by the difference between the remuneration paid by it to Thiess and the remuneration it would have paid had Thiess not breached the contract. On the evidence, the remuneration Placer would have paid had Thiess not breached the contract is to be calculated by reference to the plant department rates. Placer is entitled to its damages for breach of contract, calculated on this basis."

4 The Full Court then went on to consider the evidence, and the method of calculation of damages adopted by the trial judge. The Court concluded that the trial judge's method was erroneous, and that there was insufficient evidence to enable a calculation on proper principles to be made. In the result, the Court held that there "was a critical lacuna in [Placer's] damages formula", that "Placer did not prove its damages", and that it was therefore entitled only to nominal damages.

5 However, there was an admission on the pleadings that fell squarely within the principle stated in the passage quoted above. The contract covered a period from 1992 to 1995. The admission covered part of that period. It was admitted that, for the period between January 1994 and June 1995, the difference between Thiess' internal plant department rates and the amount it charged Placer on the basis of those rates was $2,713,940. That admission was evidently not

drawn to the notice of the Full Court. On that basis alone, the appellant was entitled to substantial, and not merely nominal, damages.

6 Furthermore, we agree, for the reasons given by Hayne J, that, when due allowance is made for the fact that the calculation of damages was necessarily based on information that was primarily within the knowledge of Thiess, and involved matters of estimation as well as calculation, the assessment made by the trial judge was not shown to be in error.

7 We agree that the appeal should be allowed with costs and consequential orders made as proposed by Hayne J.

8 HAYNE J. The Granny Smith goldmine is in the Mt Margaret mineral field in the Laverton district of Western Australia. It is an open pit mine which, at the times relevant to this matter, was operated as a joint venture between the appellant ("Placer") and Granny Smith Mines Ltd. Placer was project manager for the joint venture.

9 In 1989, Placer made a schedule of rates contract with the respondent ("Thiess Contractors") for mining at Granny Smith. That contract was for a fixed term expiring on 31 December 1992. In 1991, before the contract expired, Placer proposed a new form of contract with Thiess Contractors. Under the proposal, which the parties referred to as a proposal for a "partnering" contract, the parties would agree upon the costs of carrying out mining operations. Placer would pay Thiess Contractors charges based on those costs, to which there would be added an agreed profit margin of 5 per cent. What was proposed was that rates for carrying out the various mining operations (drilling and blasting the ore body, excavating material, loading it into trucks and hauling it to the crusher or waste dumps) would be derived from an "open book system". That is, the proposal was that Thiess Contractors would open its books to Placer and disclose the way in which it derived its rates for using particular pieces of equipment and carrying out particular work. Calculation of the rates would take account of costs of owning and operating equipment and of the conditions encountered in performing the work. Rates would be adjusted periodically.

10 The proposal was eventually accepted. The parties did not execute their new contract until 27 July 1993, but there is now no dispute that from 1 August 1992 the parties' rights and obligations were governed by the terms that were later recorded in the written agreement. One of those terms was:

> "The successful operation of this Contract requires that [Thiess Contractors] and [Placer] agree to act in good faith in all matters relating both to carrying out the works, derivation of rates and interpretation of this document."

11 In June 1995, Placer gave written notice to Thiess Contractors cancelling the contract. In September 1995, Thiess Contractors commenced action in the Supreme Court of Western Australia alleging that the termination of the contract was wrongful and claiming damages for breach. Placer counterclaimed alleging, among other things, that it had overpaid Thiess Contractors because, in breach of the contract, Thiess Contractors had deliberately inflated its estimates of costs to be incurred in carrying out the contract work.

12 In its counterclaim, Placer characterised this conduct in several different ways. It alleged that it constituted breach of contract, breach of fiduciary duty, the tort of deceit, and misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act* 1974 (Cth). The core of all of these allegations was that Thiess Contractors, when bound to act in good faith in deriving rates to be

charged and, thus, bound to disclose its actual bona fide estimates of costs to carry out the works, had deliberately inflated them. It is not necessary to consider the various ways in which the conduct was characterised. The appeal in this Court proceeded on the basis that it was sufficient to consider only the claim which Placer had made in contract.

13 Neither in this Court nor in the courts below was there any question about the certainty and enforceability of the stipulations requiring the parties to make agreements about rates to be charged for work to be done. It has been assumed that they are certain and enforceable. In this Court it was not disputed that Thiess Contractors had not disclosed its actual bona fide estimates of costs to carry out the works and had therefore breached the contract. The several questions I have just mentioned can, therefore, be put aside and attention confined to the consequences of Thiess Contractors' failure to disclose its actual bona fide estimates of costs.

14 The trial judge (Templeman J), after a trial that occupied more than 55 days, dismissed the claim by Thiess Contractors and gave judgment for Placer on its counterclaim. He found that, in breach of its obligations under the contract, Thiess Contractors submitted rates to Placer which were not a genuine estimate of Thiess Contractors' costs. He assessed damages for this breach in the sum of $4,853,000.

15 Thiess Contractors appealed to the Full Court of the Supreme Court of Western Australia both against the dismissal of its claim that Placer had wrongfully terminated the contract, and against the judgment it had suffered on Placer's counterclaim. The appeal against dismissal of the claim for wrongful termination of the contract failed[1]. Thiess Contractors succeeded, however, in its appeal against the judgment entered on the counterclaim. The Full Court held that, contrary to the contention of Thiess Contractors, the contract obliged it to provide Placer with a genuine estimate of its costs[2] and that, in consequence of Thiess Contractors' breaches of contract, Placer paid it remuneration based on rates higher than those that would otherwise have been agreed[3]. The Full Court held, however, that the method adopted by the trial judge for calculation of damages was flawed[4] and was not a method that had been pleaded or propounded

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1 *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102 at [16]-[19].

2 [2000] WASCA 102 at [147].

3 [2000] WASCA 102 at [153].

4 [2000] WASCA 102 at [176].

by either party to the litigation[5]. It further held that the method of calculation advanced by Placer at trial not only had failed[6], but was bound to fail[7], to provide an accurate measure of what had been lost. The Full Court, therefore, held that Placer had not proved its damages. The Court refused to order a retrial[8]. Rather, the judgment entered on the counterclaim was set aside and it was ordered that Placer have judgment for the nominal sum of $100.

16 By special leave, Placer now appeals to this Court. The central question is whether the Full Court was right to conclude that Placer had failed to prove the damages it had sustained as a result of Thiess Contractors' now undisputed breach of contract.

Admitted loss

17 When understood in the light of findings made by the trial judge, the pleadings in the action reveal that Thiess Contractors admitted that the estimates which it provided to Placer for the period from January 1994 to June 1995 exceeded its actual bona fide estimates of costs to be incurred in performing work under the contract by $2,713,940. There being no dispute that Placer's payments to Thiess Contractors were based on the estimates that Thiess Contractors provided, it follows from the admitted facts that Placer overpaid Thiess Contractors for work done between January 1994 and June 1995. The amount admittedly overpaid was $2,713,940 plus 5 per cent, which was the agreed profit margin.

18 The significance of the admission of Thiess Contractors may not be immediately apparent on first reading the pleadings. The text of the relevant pleadings is set out in the reasons of Callinan J. The allegation admitted was that the amount of $2,713,940 was the difference between the "internal plant department rates" of Thiess Contractors and the amount it charged Placer on the basis of the rates agreed between the parties. This allegation and its admission, takes its significance from the trial judge's finding that the internal plant department rates of Thiess Contractors were, in fact, the bona fide estimates made by it of the costs which it would incur in performing its obligations under the contract.

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5 [2000] WASCA 102 at [178].

6 [2000] WASCA 102 at [195].

7 [2000] WASCA 102 at [202].

8 [2000] WASCA 102 at [197].

19 The attention of the Full Court was not drawn to this admission. That is regrettable. It is neither possible nor productive to explore how or why that happened.

20 Given the admission that was made, it follows that the orders of the Full Court, substituting an award of nominal damages for the judgment entered by the trial judge, must be set aside. On its own pleadings Thiess Contractors admitted that Placer had suffered damage of at least $2,713,940 plus 5 per cent. On this basis alone, the appeal to this Court must be allowed. It is, nonetheless, necessary to consider the basis on which the Full Court reached its conclusion that the trial judge had erred in his conclusions about damages. If the trial judge did not err, the appeal to the Full Court against the judgment entered on the counterclaim should have been dismissed. If the trial judge did err, the question in this Court would be what consequential orders the Full Court should have made.

21 In order to deal with those questions it is necessary to refer to first, how payments to be made for work done by Thiess Contractors were calculated; secondly, the way in which Placer sought, at trial, to prove its damage; thirdly, the trial judge's findings about damage; and, finally, the Full Court's criticisms of the case Placer had sought to make and the findings made by the trial judge.

Calculating Thiess Contractors' remuneration

22 As is apparent from what has been said already, calculating the amount to be paid by Placer to Thiess Contractors under the contract began with identifying Thiess Contractors' bona fide estimates of costs it would incur in performing work under the contract. Those costs included the costs of owning and operating various pieces of equipment, some of it large earthmoving equipment. To obtain a cost that could be expressed as an amount of money per unit of material moved, or unit of time worked, it was necessary to take account of such matters as the type of material that was being moved, how far it was being moved, how difficult the trip from loading to unloading would be, how long that trip would take and other similar considerations. The contract stipulated that those calculations would be made using an identified computer program. Because the calculations were made periodically (in some cases monthly) and were made for several different pieces of equipment executing different kinds of work over the period of alleged overpayments by Placer, calculating the amount due from Placer to Thiess Contractors was a large task requiring many separate calculations. All of those calculations required the identification of an amount properly identified as Thiess Contractors' bona fide estimate of costs, but many required the identification of other factors determined by reference to the work that was to be done.

23 On its face, a recalculation of the amount properly payable by Placer to Thiess Contractors would appear to have required prolonged examination of

documents or matters of account of a kind that might properly have been referred[9] to a referee. No order of that kind was made and Placer did not attempt to adduce evidence of the result of such a recalculation. Rather, Placer sought to arrive at the amount which it had overpaid by, in effect, working backwards from the amount which it had paid.

Placer's proof of damage at trial

24 At trial, Placer sought to arrive at the amount it had overpaid as a result of Thiess Contractors' breach, by deducting from the amount of money which it had paid the amount of profit that Thiess Contractors had, in fact, made in performing the contract during the relevant period. This, so it was alleged, would leave the amount of cost which Thiess Contractors had, in fact, incurred during the period. Under the contract, the agreed profit allowance of 5 per cent was to be calculated on estimated costs. Placer's calculation of its damages at trial took 5 per cent of actual rather than estimated costs and treated the difference between the profit actually earned and profit calculated as 5 per cent of the actual costs as the amount which it had overpaid.

25 Identifying the amount of profit which Thiess Contractors had earned during the relevant period was an important step in the calculation. Placer gave particulars of its loss which identified various percentages of profit that Thiess Contractors had made during the different periods of performing the contract. Those percentages were derived from internal estimates which Thiess Contractors made of the profit it expected to make from performing the contract. Estimates of the profit which Thiess Contractors had made from performing its work at the Granny Smith mine were contained in project forecast and contract valuation reports (the "forecast and valuation reports") which Thiess Contractors' staff produced each month. Thiess Contractors considered these reports to be very important. Its internal procedures manual said that "[t]he Project Manager's ability to accurately forecast the final project revenue and final project cost (*hence project profit*) is essential to the statutory reporting obligations of the Company's financial position" (emphasis added).

26 At trial, however, Thiess Contractors sought to suggest that the forecasts made in its forecast and valuation reports might not have been accurate or reliable. Subject to one important qualification, the trial judge rejected each of the reasons proffered by Thiess Contractors' witnesses in support of the contention that the reports were inaccurate or unreliable. The qualification was that profit which had been earned under the earlier, 1989, contract was deferred (for internal management reasons which are not now important) and was not recognised in the forecast and valuation reports until the new partnering

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9 *Supreme Court Act* 1935 (WA), s 51(1).

agreement took effect from August 1992. For that reason the trial judge concluded that the profits recorded in the forecast and valuation reports prepared for use within Thiess Contractors could not be "relied on (without adjustment) as providing an accurate assessment of the profit [Thiess Contractors] expected to earn from the new contract alone".

27 It followed that the trial judge did not accept that, as Placer had pleaded in its counterclaim, the amount of profit earned by Thiess Contractors could be calculated by applying profit percentages derived from the forecast and valuation reports to the amounts which Placer had paid as progress payments under the 1992 contract.

The trial judge's assessment of damages

28 The trial judge accepted evidence called by Placer from an expert accountant (Mr L A Berrey) who had inspected and analysed the financial records (including the forecast and valuation reports) that had been disclosed on discovery. The trial judge said that he accepted "as generally accurate" the various reports which Mr Berrey prepared and were tendered in evidence.

29 The evidence of Mr Berrey, which the trial judge accepted, disclosed four things:

(a) the total amount which Placer had paid Thiess Contractors for progress claims under the 1992 contract – $72.189 million;

(b) the total of Thiess Contractors' costs for performing the work that it did under the 1992 contract – $62.243 million;

(c) the amount of a 5 per cent margin applied to Thiess Contractors' costs – $3.112 million;

(d) the total profit which Thiess Contractors earned from performing both the 1989 and the 1992 contracts – $25.282 million.

The trial judge did not accept that the profit made from the 1992 contract could be calculated by finding the difference between progress claims and costs (that is, by subtracting item (b) from item (a) which would produce a difference of $9.947 million[10]). First, he made an allowance of $100,000 for some cost overruns. Secondly, in order to exclude profits that had been deferred from the 1989 contract into the 1992 figures, it was necessary to dissect the total profit earned by Thiess Contractors under both contracts. The trial judge (and Mr Berrey)

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10 The difference of $1,000 is a rounding difference.

accepted that the amount of profit referable to the earlier contract was the amount calculated by Thiess Contractors' expert witness – $17.058 million. Finally, the total profit which Mr Berrey calculated Thiess Contractors had earned under both contracts ($25.282 million) was a little less than the total profit figure which Thiess Contractors' final forecast and valuation report gave ($25.623 million). The trial judge took the latter figure to arrive at a finding that the total profit which Thiess Contractors made from the 1992 contract alone, adjusted for cost overruns, was $8.465 million. (Total profit of $25.623 million less $17.058 million attributable to the earlier contract less $100,000 for cost overruns.) The profit of $8.465 million exceeded 5 per cent of actual costs ($3.112 million referred to in item (c) above) by $5.353 million[11].

30 At trial, Thiess Contractors had contended that it was entitled to charge Placer the amounts which it had. Those charges were calculated on estimated costs greater than Thiess Contractors' internal plant department rates. The trial judge rejected this contention and it is not now contended that he erred in doing so. At trial, Thiess Contractors sought to explain the amount of profit it was shown to have made from performing work under the 1992 contract as profit resulting not only from what the courts below found to be the inflated rates it charged, but also from improvements it had made in productivity. That is, Thiess Contractors submitted that its estimated costs of the work to be done were higher than the actual costs it incurred. Actual costs were lower than estimates because of productivity gains it had made. It was necessary for the trial judge to deal with this contention about increased productivity. While it was common ground at trial that there had been some productivity increases, the parties differed about the size of the increase.

31 The trial judge concluded that there was some increase in productivity for at least part of 1993 but that it was not "significant". In this respect, he accepted the evidence of Placer's mine superintendent (Mr Morriss) that production followed "closely what we had predicted". Nonetheless, the trial judge allowed $500,000 on this account thereby making an allowance for the difference between the profit that Thiess Contractors was entitled to have earned on its estimated costs and a profit calculated as 5 per cent on its actual costs. Accordingly, having allowed for increases in productivity, the trial judge assessed Placer's damages at $4.853 million. That sum was arrived at as follows:

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11 The trial judge's reasons contain a typographical error when he restated Thiess Contractors' profit as $3.712 million rather than $3.112 million. This error was then reflected in subsequent calculations in the reasons but it was corrected before the judgment was taken out.

Total profit under 1989 and 1992 contracts			$25.623 million
Less	(a)	1989 contract profit	17.058 million
	(b)	cost overruns	0.100 million
	(c)	productivity gains	0.500 million
	(d)	5 per cent of actual costs	3.112 million
Excessive profit			$4.853 million

The trial judge's calculation and Placer's pleadings

32 The Full Court concluded that the method of calculation of damages which the trial judge adopted was one not previously raised at trial and was a method markedly different from the case pleaded by Placer[12]. I do not accept that the method of assessment which the trial judge adopted was not open to him, or differed in any fundamental way from the case which was foreshadowed by Placer's pleadings.

33 One of the principal ways in which Placer sought to plead its case was as a claim for damages for breach of contract. Its other claims may, as I have said earlier, be put to one side. Placer alleged that the damage it had suffered as a result of Thiess Contractors' breach was the amount which it had overpaid because Thiess Contractors had not provided it with actual bona fide estimates of costs to be incurred in performing the contract. The particulars which Placer gave of that allegation did say that the profit actually earned by Thiess Contractors could be deduced by using certain percentages. Those percentages had been derived from Thiess Contractors' forecast and valuation reports. But at trial, apparently without objection, Placer's expert gave evidence of another method of calculating the profit that Thiess Contractors had earned. If Thiess Contractors contended that this evidence was not relevant or was inadmissible it should have objected to its reception. Once in evidence, it was open to the trial judge to rely on it to calculate Thiess Contractors' profit. In other respects, the trial judge's assessment of Placer's damages commenced by following the method which Placer had described in its particulars.

34 I say that the trial judge's assessment "commenced" at this point because he found it necessary to make some adjustments to the result. Those adjustments reduced the amount which Placer had shown in its particulars as the amount of profit which Thiess Contractors had obtained by inflating the rates which it charged Placer. Each of the adjustments made reflected an aspect of the argument which Thiess Contractors had mounted in support of its claim for damages for wrongful termination. Thiess Contractors alleged that it had suffered damage because it had been denied the opportunity to make profit from

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12 [2000] WASCA 102 at [190], [195], [199].

the contract that, overall, would have been greater than 5 per cent of its costs because of productivity gains and despite cost overruns. Otherwise, however, the trial judge adopted a method of calculating Placer's damages which did not differ significantly from the method Placer had proposed.

The Full Court's criticisms

35 The Full Court considered[13] that the method adopted by the trial judge for calculating Placer's damages "did not adequately take into account the potential for efficiencies and other productivity gains in areas of the contract not considered by him". As I have said, the trial judge did adjust the amount he fixed as damages by reference to productivity gains and cost overruns. Thiess Contractors pointed to no other explanation for its profit exceeding 5 per cent whether in seeking to make out its claim for damages for wrongful termination of the contract or in answer to Placer's counterclaim. Yet the Full Court concluded[14] that the trial judge was wrong to proceed on the basis that the profits made by Thiess Contractors did not result from anything other than its inflated rates and whatever productivity gains it made.

36 After referring to some aspects of Thiess Contractors' pleadings and the way in which, at trial, it had conducted its case, particularly its claim for damages for wrongful termination of the contract, the Full Court said[15] that those matters did not "[justify] an inference that, in regard to Placer's claim for damages, Thiess [Contractors] *intended to admit* that its increased profitability did not result from 'anything other than the differential rates and improved productivity'" (emphasis added). The reference to an absence of an intention of Thiess Contractors to make an admission reveals the error underlying this part of the Full Court's reasoning. It suggests that the Full Court considered that Placer had to negative any and every possible explanation for Thiess Contractors' profit exceeding 5 per cent of its actual costs before it could demonstrate that, more probably than not, it had suffered damage in the amount which its calculations revealed. As the Full Court said at the end of its reasons[16], the burden was on Placer to prove "the sources" of Thiess Contractors' profits.

37 Placer undoubtedly bore the burden of proving not only that it had suffered damage as a result of Thiess Contractors' breach of contract, but also the amount of the loss it had sustained. It goes without saying that it had to prove

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13 [2000] WASCA 102 at [176].

14 [2000] WASCA 102 at [186].

15 [2000] WASCA 102 at [186].

16 [2000] WASCA 102 at [202].

these matters on the balance of probabilities and with as much precision as the subject matter reasonably permitted[17].

38 It may be that, in at least some cases, it is necessary or desirable to distinguish between a case where a plaintiff *cannot* adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff *has not* adduced such evidence. In the former kind of case it may be that estimation, if not guesswork, may be necessary in assessing the damages to be allowed[18]. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can[19] may find their most apt application in cases of the former rather than the latter kind. This case did not invite attention to such questions. Placer sought to calculate its damages precisely.

39 As I have said earlier, Placer sought to prove its damages by attempting to work backwards from what it had paid to the amount it had overpaid. It was not suggested that there was only one way in which the amount of Placer's damages could be established. It may be that, as the Full Court suggested, another method which replicated the calculation of remuneration using proper rates would have been better than the method that was adopted. But the method adopted was not, as the Full Court held[20], fatally flawed. It was a method which sought to compare the profit in fact earned with the profit that should have been earned. The profit that should have been earned was 5 per cent of *estimated* costs. The calculation that was made took *actual* not *estimated* costs into account.

40 Once it was accepted, as the trial judge found, that estimated costs closely approximated actual costs, the profit that should have been earned could be calculated with considerable, and for present purposes, sufficient precision. If

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17 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, 83-84 per Mason CJ and Dawson J, 138 per Toohey J, 153 per Gaudron J, 161 per McHugh J; *Ratcliffe v Evans* [1892] 2 QB 524.

18 *Fink v Fink* (1946) 74 CLR 127; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *Jones v Schiffmann* (1971) 124 CLR 303; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 per Mason CJ and Dawson J, 138 per Toohey J.

19 *Fink v Fink* (1946) 74 CLR 127 at 143 per Dixon and McTiernan JJ; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 411-412 per Dixon and Fullagar JJ; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 per Mason CJ and Dawson J.

20 [2000] WASCA 102 at [202].

there were any error in the calculation it would flow from the fact that estimated costs may have differed from actual costs. But, as the trial judge said, "the internal plant rates were accurate predictions of the operating costs" and the contractual provisions for reviewing rates used in calculating Thiess Contractors' remuneration were designed to bring estimates of cost into line with actual costs in relatively short order.

41 Once Placer demonstrated that Thiess Contractors' estimated costs closely approximated its actual costs, it was for Thiess Contractors to show why some further adjustment of the figures was necessary. It raised only two matters – cost overruns and productivity gains. The trial judge made adjustments for these considerations in accordance with evidence adduced by Placer. Only if Thiess Contractors introduced into the debate some new or additional occasion for adjustment was it for Placer to go beyond the proof it adduced of the excessive profit which Thiess Contractors had received. Especially was that so where Placer demonstrated not only that there was a very wide discrepancy between profit in fact earned and 5 per cent of actual costs incurred, but also that any productivity gains during the period when Thiess Contractors asserted that they were made were not "significant". It was not enough for Thiess Contractors to answer this evidence by saying that there *might* have been some other unidentified reason for its profit being as large as it was, or by pointing to the possibility of adopting some other method of assessing Placer's damages. Yet in essence it was these two propositions that underpinned the Full Court's conclusion that Placer had not proved the amount that it had lost as a result of Thiess Contractors' breach. The proof tendered by Placer, and accepted by the trial judge, supported the conclusion that the trial judge reached: that Placer had paid $4.853 million more than it would have paid if Thiess Contractors had not breached its contract.

Conclusion

42 The Full Court erred in concluding that the method of calculating damages which the trial judge used was wrong. The appeal to this Court should be allowed with costs, the whole of the order of the Full Court made on 14 April 2000 set aside and in its place there be an order that Thiess Contractors' appeal be dismissed with costs.

CALLINAN J.

Facts and previous proceedings

43 The appellant ("Placer") is the operator of the business of the Granny Smith Joint Venture, a gold mine near Laverton in Western Australia in which it has a 60% interest.

44 On 7 July 1989 the respondent ("Thiess") and the appellant entered into a schedule of rates contract for mining work at the mine, to commence on 1 August 1989 for a fixed term expiring on 31 December 1992. The work included the drilling, blasting, excavation, loading and hauling of materials.

45 In 1991 the appellant proposed a different form of contract for the work. Its proposal was for a "partnering" contract requiring the disclosure by the respondent of confidential information about the way in which it would derive its rates for carrying out the various aspects of the work under what would still be a schedule of rates contract. Those rates were to be based upon genuine estimates by the respondent, being the respondent's "internal rates charged by the plant department" having regard to historical data. The contract provided for the recovery by the respondent of a margin of 5% on the estimates. Any gains or losses by reason of productivity improvements or shortfalls were to be brought to account prospectively following monthly reviews under the contract. The respondent was to be entitled to retain the benefit of any productivity gain or to suffer a detriment for productivity shortfalls until a new rate based upon actual cost was adopted following a monthly review. This was substantially the means by which the respondent might earn profits of more than 5%, or suffer losses from time to time.

46 Rates for a period of three years, including plant operating costs per hour, were submitted by the respondent to the appellant in late April 1992 (the "April 1992 submission"). Unbeknown to the appellant, the plant operating costs per hour for 1993 and 1994, and consequently the base rates and revenue to be derived from them had been inflated by the respondent for profit unrelated to productivity gains, of $1.2 million.

47 The respondent provided to the appellant various rates, including plant operating rates per hour derived by it. They were set out in the schedules to the respondent's letter dated 15 July 1992 and were revised versions of earlier rates provided in the April 1992 submission to the appellant.

48 In January 1993, the respondent's internal plant rates were reduced. In a site memo in January 1993, the respondent set out the 1993 rates for a 984 excavator, 773 dump truck and a PC1600 excavator. The rates then proposed by the respondent were not based in fact on expected operating costs.

49 In March 1993 the respondent sent to the appellant proposed plant operating costs per hour for new CAT 785 trucks which were to be operated at the mine in the same way as CAT 777 trucks had been used. The rates proposed were set to ensure that a particular level of profit was maintained by the application of the respondent's formula. The purpose was to ensure that the respondent maintained the same differential revenue as it had been earning from the CAT 777 trucks before replacement by the CAT 785s. The respondent did not inform the appellant of that fact, or that the plant rates it was proposing for the trucks exceeded the genuine estimates by its internal plant department by approximately $40 per hour. On a predicted usage of 4,000 hours the excess could amount to approximately $160,000 per truck per year. The respondent used nine CAT 785 trucks at the mine from time to time.

50 The new contract was executed on 27 July 1993. It was to be operative from 1 August 1992. Plant rates for 1993 were included in the appendices to the contract based on rates the respondent had submitted up to that time, including rates for new plant such as a 984 excavator and a PC1600 excavator. The contract contained terms as follows:

> "The successful operation of this Contract requires that [the respondent] and [the appellant] agree to act in good faith in all matters relating both to carrying out the works, derivation of rates and interpretation of this document.[21]
>
> …
>
> Equipment operating costs per hour shall be formulated which are based on relevant historical data or Manufacturer's Handbook figures including long term rebuilds and other values as agreed between both parties. Allowance is to be made for movement of machines during and between shifts and maintenance …[22]
>
> Labour hourly costs which shall reflect actual costs to [the respondent] (with due allowance for add on costs and labour multiplier) shall be formulated and agreed ….[23]"

51 On 23 September 1993 and 24 February 1994, the respondent notified the appellant of the plant rates it proposed to charge in 1994, and that it had made some major adjustments to rates submitted and calculated in July 1992 but to

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21 Clause B1.1.5.

22 Clause C2.1.3.

23 Clause C2.1.4.

which in fact it had made merely arbitrary adjustments. The respondent had not in truth carried out any considered review and the rates bore no relationship to the respondent's genuine estimates, the internal plant rates. As to rates quoted by the respondent to the appellant in February 1994 the trial judge found that these "were set with a view to maintaining the rates fixed in 1992" and to "have been done without regard to [the respondent's] actual operating costs."

52 In March 1994 the respondent created an account which came to be known as the Plant Variance Account. This account was credited with the revenue derived, and to be derived by the respondent from the differential between the rates charged to the appellant and the internal plant department rates. The respondent's project managers regarded funds standing to the credit of the Plant Variance Account as profit.

53 In both September 1994 and January 1995 the respondent made no genuine attempt to estimate its operating costs for the relevant equipment for 1995. It chose instead to increase its internal plant rates arbitrarily and dishonestly without making any genuine estimate of those costs in the light of historical data.

54 The respondent's internal plant department did in fact calculate average estimated operating costs on the basis of historical data for each item of equipment used at the mine. These were the costs to be recouped by charges provided to the respondent's staff at the mine. The department's costs included no component for profit. These costs, as the primary judge found, should have been utilised to calculate the base rates for load and haul, drill and blast, and ancillary works.

55 The litigation was precipitated by a notice of termination given by the appellant to the respondent on 15 June 1995. The respondent contended that the appellant was not entitled to terminate the contract unless, or until the former ceased mining. The respondent claimed that if the true construction of both contracts were not to that effect, they should be rectified. It further contended that the notice of termination was given in breach of the appellant's contractual obligation to act in good faith in fulfilment of its contractual obligations. Further, the respondent contended that the appellant was estopped from terminating the contract. The respondent brought an action in the Supreme Court of Western Australia on 29 September 1995 to vindicate its claims. It claimed damages for loss of profits it would have earned had the current contract not been terminated. It also claimed damages for the loss of an opportunity to enter into another contract with the appellant to mine another pit, "Sunrise" which has been developed subsequently. There were further claims for breach of fiduciary duty, and misleading and deceptive conduct.

56 By its defence, the appellant maintained that it had an unqualified right to terminate the contracts. It denied that there was any basis for rectification or

estoppel. Although it was unaware of some of the material facts when it served the termination notice, the appellant claimed to have learned subsequently, from the material disclosed on discovery, that the respondent had made material and fraudulent misrepresentations, or at least negligent misrepresentations, which induced it to enter into both contracts. The appellant alleged further that the respondent had acted in bad faith with the result that the appellant had been overcharged. It accordingly counterclaimed for damages, for breach of contract, fraud, negligence, misleading and deceptive conduct and breach of fiduciary duty.

57 It is necessary to set out some parts of the extensive pleadings that the parties exchanged. Paragraphs 95(xiv) and 96 of the appellant's (defendant's) counterclaim contained these particulars:

> "95
>
> …
>
> (xiv) For the period January 1994 to June 1995 the difference between the plaintiff's internal plant department rates and the amount it charged the defendant on the basis of the said base rates was $2,713,940 plus 5% for profit.
>
> …
>
> 96
>
> …
>
> **Particulars**
>
> (a) Deceit, negligence and misleading and deceptive conduct. If the representations had not been made the defendant would have obtained from the plaintiff its actual bona fide estimate of costs to complete the works which would have resulted in lower base rates for calculating [sic] of the costs of completing the works which base rates would have been reviewed at the dates set for quarterly reviews. The defendant's loss is calculated as follows:
>
> 1 Period 1 August 1992 - 31 December 1992
>
> (i) Total of progress claims paid to the plaintiff
>
> $10,675,067
>
> (ii) Less 10.5% being the plaintiff's estimated profit it would make under the GSM [Granny Smith Mine]

Contract as at the time it entered into the contract to reflect the plaintiff's bona fide estimate of its costs

$9,554,184

(iii) If a bona fide estimate had been used for the calculation of rates the plaintiff would have received $9,554,184 plus 5% profit of $477,709

$10,031,893

(iv) Difference between total of progress claims and bona fide estimate plus profit

$643,172

2 Period 1 January 1993 to 31 March 1993

(i) Total of progress claims paid to the plaintiff

$6,067,804

(ii) Less 16.15% being the plaintiff's estimated profit it would make for the balance of the GSM Contract as at January 1993

$979,950

$5,087,854

(iii) Bona fide estimate of $5,087,854 plus 5% profit of $254,392

$5,342,246

(iv) Difference between total of progress claim and bona fide estimate plus profit

$725,558

3 1 April 1993 to 30 June 1993

(i) Total of progress claims paid to the plaintiff

$7,066,186

(ii) Less 16.21% being the plaintiff's estimated profit it would make for the balance of the GSM Contract as at April 1993

$1,145,428

$5,920,758

(iii) Bona fide estimate of $5,920,758 plus 5% profit of $296,037

$6,216,795

(iv) Difference between total of progress claims and bona fide estimate plus profit

$849,391

4 July 1993 to June 1995 (during which time the plaintiff's forecasts of its profits remained virtually the same so as not to require adjustment of base rates under the Contract)

(i) Total of progress claims paid to the plaintiff

$45,977,401

(ii) Less 14.20% being the plaintiff's estimated profit it would make for the balance of the GSM Contract as at July 1993

$6,570,170

$39,407,231

(iii) Bona fide estimate of $39,407,231 plus 5% profit of $1,970,361

$41,377,592

(iv) Difference between total of progress claims and bona fide estimate plus profit

$4,599,809

Total Overpayment	$643,172
	$725,558
	$849,391
	$4,599,809
	$6,817,930

(b) Breach of fiduciary duty and contract. The amount overpaid by the defendant to the plaintiff during the term of the GSM Contract being the difference between the amount charged by the plaintiff to the defendant and the amount the plaintiff would have received if the plaintiff's bona fide estimated costs of completing the works at the time of entering into the contract had been used to calculate the rates adjusted at the dates set for quarterly reviews of the base rates plus a profit of 5% calculated as in paragraph 96(a)."

58 In response, the respondent (plaintiff) pleaded as follows:

"80

…

(c) The plaintiff admits the allegations in paragraph 95(xiv) but says that overall its profits from January 1994 to June 1995 inclusive were close to 5% of its costs and that had the plaintiff's internal plant rate been used to derive base rates for 1994 and 1995 it would have suffered a loss at around $500,000.

81 The plaintiff denies the allegations in paragraph 96 of the counterclaim and says further:

(a) that the defendant relied on its own knowledge and experience in agreeing the base rates in July and August 1992 for the years 1992 to 1995;

(b) that it denies that it made the alleged estimates or any of them;

(c) that the new contract made in or about August 1992 and the GSM Contract permitted the plaintiff to earn profits in excess of 5% on its costs;

(d) that reviews of base rates were to be made with reference to the plaintiff's productivity in relation especially to ground conditions and if either party wanted a change in the rates it was incumbent upon it to say so and to justify the change;

(e) that neither the new contract nor the GSM contract entitled the defendant automatically to the full benefit of any savings in costs the plaintiff was able to achieve.

(f) that if the defendant recovers the sum of $6,817,430[24] claimed the plaintiff will have earned a margin of 1% only on its actual costs."

59 The trial judge, Templeman J, made a number of findings adverse to the respondent, as did the Full Court, although the latter reached a different conclusion on the issue of damages from his Honour.

60 Among the concurrent findings of fact are findings of breaches of contract and fiduciary duty by the respondent with respect to the provision of each of the sets of rates charged to the appellant. These were, it was held, no more than deceitful inflations of internal plant department costings. These holdings followed from the finding that the internal plant department rates were the genuine estimates of actual costs covered by those rates and were based on relevant historical data. One significant consequence of the deceitful conduct of the respondent in the estimation of costs in the April 1992 submission was that an amount of $1.2 million referred to in it was not a genuine estimate of the respondent's costs, and was the additional amount it expected to, and sought to gain by charging dishonest estimates. Further, the trial judge found, the difference between the internal rates (being the estimates of the respondent's costs) and the amount charged to the appellant was running at about $220,000 per month in February 1994. The trial judge found that this difference was unjustifiable.

61 When it came to the calculation of damages, both the appellant and the trial judge were confronted with, among other things, the unreliability of the project forecasts which precluded his Honour from using them as a basis for any assessment. In short, it was not possible for the assessment to be made in the way in which the appellant had contemplated and pleaded that it should be, and which the Full Court said at one point was a correct way of doing so, although later, it was to prescribe a much more elaborate method as *the* correct one.

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24 Note that there is a discrepancy of $500 between the amount claimed in the appellant's counterclaim and the respondent's pleadings in reply. This appears to be a typographical error.

62 The trial judge adopted this course. First, he calculated, on a global basis, the difference between the revenue actually derived by the respondent, and the respondent's costs, plus a margin of 5%. This he was able to do by reference to reports prepared on the basis of an analysis of the respondent's ledgers. He accepted that the total revenue from the current contract was $72.189 million and that the costs of performing all of the work amounted to $62.243 million. A margin of 5% on cost produces a profit of $3.112 million. The excess profit (subject to further adjustment) was therefore $72.189 million less $62.243 million, less $3.112 million, that is $6.834 million. The adjustments by way of reductions were of $100,000 for an understatement of some plant operating costs and $500,000 being an amount proved by the appellant as its entitlement to some productivity gains.

63 Although his Honour found that the respondent had been guilty of misrepresentation by not providing a genuine costs estimation, he thought that he could not award more than nominal damages in deceit because of the impossibility of assessing the amount by which the appellant would have been worse off by entering into the contract.

64 His Honour explained why he adopted the method of assessing damages that he used in this way[25]:

> "Three points need to be made about this approach. First, although the contract required [the respondent] to formulate its estimated operating costs, these proved to be very close to its actual costs, such was the expertise of the plant department.
>
> Secondly, the approach assumes that the rates submitted by [the respondent] in September 1992, and on all subsequent occasions by way of variation or for different equipment, would have been genuine estimates of its costs so as to result in it earning a profit of 5%.
>
> I assume that if [the respondent] had underestimated it would have sought either a variation in the rates, or (in accordance with [the Mine Superintendent's] preferred option) a lump sum payment. In putting forward any such claim, [the respondent's] obligation of good faith would, I think, have required it to give credit for its cost underruns, so as to honour the intent of the contract.
>
> Thirdly, I have accepted that [the respondent] was not in breach of contract or fiduciary duty in failing to disclose the true position so as to initiate a quarterly review. It follows that [the respondent] is entitled to

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25 *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* unreported, Supreme Court of Western Australia, 16 April 1999 at 232-233 per Templeman J.

retain profit derived not from the differential rates, but from any increases in productivity.

By approaching the assessment of damages in this way, it should be possible to put [the appellant] in the position it would have been in had the contract been performed. This will result in [the respondent] being required to repay profits derived from the differential between the plant rates and its actual costs. This is also the basis for assessing damages for breach of fiduciary duty."

65 As well as acknowledging that the method of assessing the appellant's damages as contemplated by its pleading was an acceptable one, the Full Court said this[26]:

"No argument as to method of assessment would have arisen had [the appellant] proved its damages in the following manner:

(a) Identify each item of plant in respect of which an inflated rate was used.

(b) In respect of each such item of plant, identify the plant department rate applicable thereto.

(c) Carry out an FPC [Fleet Production and Cost Analysis] simulation, in accordance with the contract, using the appropriate plant department rates for load and haul so as to establish the notional contractual rates applicable thereto.

(d) Calculate the notional contractual rates for the other items of plant referred to in (a), applying the appropriate plant department rates in accordance with the criteria laid down by the contract itself.

(e) Using the notional contractual rates so established, determine the revenue that would have been earned from the items of plant to which those rates applied.

(f) Determine the revenue in fact earned from the plant to which the inflated rates were applicable.

(g) Deduct the revenue determined in accordance with par (e) from the revenue determined in accordance with par (f).

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26 *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102 at [165].

> The formula we have outlined is the basis of calculating damages that ordinarily would be used by a party in the position of [the appellant]. This formula would produce the revenue that [the respondent] would have earned from the plant in respect of which inflated rates were used, and the resultant amount, when deducted from the revenue that [the respondent] in fact earned from the plant to which the inflated rates applied, would be [the appellant's] damages. Upon payment of the amount so calculated, [the appellant] would be put in the position it would have been in had [the respondent] not breached the contract. But [the appellant] made no attempt to prove its damages in this way."

66 I interpolate that, just as the appellant may have made no attempt at the trial to prove its damages by the method preferred by the Full Court, the respondent for its part neither pleaded nor submitted to the trial judge that such a method was appropriate. It was in the Full Court, and then in broad terms only, that the respondent suggested for the first time that the appellant should have proved its damages in the way that the Full Court was to hold, was effectively the only way in which it could and should be done.

67 The Full Court was critical in other respects of the method of assessment of damages. For ease of subsequent reference I will number the relevant paragraphs of that Court's reasons for judgment as follows[27]:

> "[i] In regard to this issue, it is necessary to reiterate that the Granny Smith contract was not a cost-plus contract. Although the contract contained mechanisms designed to ensure that rates were established from time to time by reference to the actual costs then obtaining, there would be periods throughout the contract when the actual costs would be less or more than the estimated costs. The estimated costs would be altered only after the reviews provided for by the contract. In the period between a particular agreement as to rates and the review thereof, it was open to [the respondent] to make profits over and above the agreed 5 per cent by productivity increases and savings in efficiency. By such means, the actual costs could be reduced to less than the genuinely estimated costs for at least the period until the next review.
>
> [ii] It was pointed out on [the respondent's] behalf that, although it was open to [the respondent] to make efficiency and productivity gains in virtually every area of the contract, the allowance of $100,000 for cost overruns and the allowance of $500,000 for productivity made by his Honour were in respect of load and haul work only. Load and haul was an

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27 *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102 at [171]-[178].

important but not major part of the contract. The revenue derived from load and haul was approximately $25 million out of a total contract sum of about $72 million, that is, about 35 per cent. This emphasises the significance of whether there were any other areas in the contract which could have allowed [the respondent] to make profits over and above those taken into account by the learned Judge.

[iii] [The respondent] contended at the trial that it had made productivity gains in the drill and blast section of its work. Those productivity gains were sought to be calculated by reference to increased drill and blast profitability. But the learned Judge found that other factors in addition to drill and blast productivity contributed to drill and blast profitability, and no evidence was led about those factors. That meant that his Honour was unable to assess productivity gains in the drill and blast category of work and, therefore, made no productivity allowance in respect thereof. The reason that no such evidence was led again relates to how the issue of damages was treated at the trial, an issue that we shall address in due course. Plainly, however, irrespective of that issue, there was potential for productivity gains in the drill and blast area. Additionally, productivity gains allowed for by the learned Judge concerned only the period July to December 1993. It was not alleged that [the respondent] committed any breach of contract in 1992, and it was open to it to have made productivity savings in that year. This does not appear to have been considered. The learned Judge made no express finding as regards productivity gains for the remaining periods of the contract.

[iv] Moreover, profits could have been derived from efficiencies (other than productivity) in areas such as site costs. No findings were made in regard to whether such efficiencies had been achieved. The fact is that this was not a live issue at the trial.

[v] [Counsel] submitted that on the evidence [the respondent] made no productivity gains other than those specifically found by the learned Judge. The merits of this submission, however, depend on credibility issues not resolved by his Honour, and this Court is in no position to make factual findings of the kind that would be necessary. In any event, the evidence in question concerns productivity gains alone, and not savings from efficiencies.

[vi] In the circumstances, we are of the opinion that the method adopted by his Honour did not adequately take into account the potential for efficiencies and other productivity gains in areas of the contract not considered by him. In other words, there may have been sources of profit other than the agreed 5 per cent, cost underruns and productivity gains. Once [the respondent] could have earned profits under the contract from different sources, the method adopted was not a reliable means of

assessing damages. Due consideration needed to be given to the other sources so as to ensure that proper allowance was made for profits derived from them. This was not done.

[vii] It is to be emphasised, however, that the learned Judge did not conclude, by reference to the evidence, that the method he adopted catered for all sources of profit. In explaining why he used the method in question, the learned Judge said:

> 'It is not suggested by [the respondent] that its increased profitability resulted from anything other than the differential rates and improved productivity.'

In other words, his Honour was of the opinion that [the respondent] impliedly accepted that the profits made by it did not result from anything other than the inflated rates and improved productivity (to the extent alleged by it). The validity of his Honour's overall approach rests on this view. [Counsel] submitted that the learned Judge was justified in this conclusion as [the respondent] conducted its case on this basis. We accept that, were this submission to be upheld, the existence of other sources of profit would be immaterial.

[viii] Significantly, the learned Judge's method of assessment was not pleaded by [the appellant] as the basis of its claim for damages, it was not advanced by [the respondent] in any way as being applicable to [the appellant's] claim, no witness suggested that it should be utilised in regard to [the appellant's] claim, and it was not propounded by either [the respondent] or [the appellant] in the course of closing addresses."

The appeal to this Court

68 Some points should be made at the outset. First, this was a case in which deceit and breach of fiduciary duty were found against the respondent. The only reason why the trial judge did not assess damages for deceit was because the nature and extent of the mining enterprise changed so much that his Honour thought it impossible to do so on any informed basis. Because however the respondent was deceitful in respect of the very subject matter of the claim, no court should be too critical of imperfections in the proof of a claim by the party who has been deceived, and repeatedly so, in respect of its subject matter.

69 Secondly, notwithstanding that discovery and inspection had taken place, and that the appellant engaged experts who made calculations and gave evidence on the basis of the documents so inspected, the respondent, as the party which actually did the work and was in the business of doing that work, was obviously far better placed to prove the actual relevant amounts and respective entitlements, indeed the true nett financial position in respect of the performance of the earlier and the later contracts. This was especially so in this case, in which a finding

was made, that the appellant relied on the respondent's asserted but false costings of the work which were peculiarly within the knowledge and possession of the respondent.

70 Thirdly, it must be kept in mind that it was the respondent who started these proceedings. That does not mean that the appellant was relieved from the obligation of proving its case on the counterclaim, but it does mean that the initial framework for the case was constructed by the respondent. That framework involved a claim for damages by the respondent for future profits which it would have made but for the termination of its contract by the appellant. Some details of the future profits appear in the respondent's response to a request for particulars by the appellant. The respondent asserted then, and throughout the trial that it was entitled to make the charges (found by the trial judge to have been wrongly and deceitfully made) that it did make. It may therefore be safely inferred from the furnishing of the particulars, that it had made a relevant calculation, components of which would necessarily have included bona fide cost estimates, the profit of 5% to which it was entitled, and, productivity and efficiency gains (whatever the latter may have been) that it expected to make. Therefore, by a process of subtraction, the amounts which were in excess of those and therefore refundable to the appellant could readily have been calculated by the respondent. This inference gains strength from the respondent's positive assertion in its reply to the appellant's defence, and repeated in its own defence to the counterclaim, that the respondent had in fact been charging and was entitled to charge more than a 5% mark-up. This formed the basis for an allegation by the respondent that even though the appellant had not been told that that was happening, it should have been able to discern the true position from other information in, or coming into its possession from time to time.

71 Fourthly, despite what the Full Court said as to the orthodox and appropriate method of calculating damages, very often one method of calculation of damages may not necessarily provide the exclusive means of doing so. The remarks of, and examples provided by Gibbs CJ in *Gould v Vaggelas*[28], although directed to a case of deceit which that one was, that the rules in relation to the assessment of damages are not inflexible, are in point. His Honour's remarks have relevance here because the whole case alleged and proved against the respondent was that it engaged in a deliberate and prolonged process of obfuscation. Its defence was to deny that and to assert that it was entitled to do what it did. Persistence in that defence necessarily involved a continuation of the process of obfuscation. As the trial judge said the respondent's forecasts and contract valuations could not be relied on. The respondent nonetheless sought to maintain them at trial. The unreliability of the respondent's project forecasts and contract valuations lay at the heart of the problem of calculating overcharging

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28 (1985) 157 CLR 215 at 220-223.

and set-offs for both the appellant and the trial judge. This was the reason why his Honour was obliged to find a different way of assessing damages from that preferred and proposed by the appellant.

72 Fifthly, in assessing damages a court does the best it can. A judge relies on predictions and probabilities. Precision will rarely be possible with respect to future costs and profits, particularly when deceit by one party obscures the true position. Added to that here were the facts that the performance of the contract and the overcharging had been going on for a fairly long period in respect of a multiplicity of activities and items of equipment some of which were substituted for other items of equipment.

73 Sixthly, there was no doubt that even on the pleadings the appellant was entitled to succeed to some extent. This follows from the making of a distinct and unmistakable admission by the respondent on its pleadings of the allegations made by the appellant in par 95(xiv) of its defence and counterclaim:

> "For the period January 1994 to June 1995 the difference between the plaintiff's internal plant department rates and the amount it charged the defendant on the basis of the said base rates was $2,713,940 plus 5% for profit."

74 That admission would serve as a foundation for an award of damages of at least $2,713,940 subject to any reductions that the respondent might choose to, or be able to prove. Having made the admission, the respondent placed itself in a position of being liable to repay that amount unless it could either establish (which it did not) that it was entitled to keep it, or that it had an entitlement to a counterclaim or a set-off in reduction, or extinguishment of it. The only matters of this kind which the respondent did in fact make out to the trial judge's satisfaction could have resulted in reductions of $100,000 and $500,000 respectively only.

75 Seventhly, realistically, in this case, what the parties tried to do was to prove their respective nett advantages and disadvantages by reason of alleged breaches of contract on either side. The respondent was in a much better position to do this than the appellant. It could have been in no doubt that the outcome of the trial would depend upon what it could convince the trial judge was its entitlement to, among other things, legitimate productivity gains. In this regard it was for it to put its best foot forward. It should not be heard to complain now, that having failed to do so, the trial judge erred in doing the best he could in assessing damages in circumstances of some uncertainty and difficulty. The statement in the joint judgment in *Vetter v Lake Macquarie City Council*[29] is in point:

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29 (2001) 202 CLR 439 at 454 [36] per Gleeson CJ, Gummow and Callinan JJ.

> "As long ago as 1774 Lord Mansfield said[30] that all evidence is to be weighed according to the proof which it is in the power of one side to have produced and the power of the other to have contradicted."

76 This is a case in which precision was not possible without the cooperative participation of the respondent. And even then estimation rather than calculation was inevitable. As the respondent's own expert said:

> "You don't know how much load and haul you have got, how much drill and blast, how much ancillary plant you're going to have, what proportion they're going to be, how much is hard, how much is soft …"

77 Eighthly, his Honour was confronted with a number of different profit scenarios on the basis of the respondent's claims. For example, despite the respondent's assertion that it did not over charge, its "business unit" was at one point budgeting for a profit, not of 5% but of 8.5% regardless of productivity gains. At another, the objective was for a mark-up of 10.5% on costs. On one view, the profit on the first contract was about 15% and on the two contracts combined, as much as 16.5%.

78 It is against the background of the matters to which I have referred that the Full Court's key holdings which I earlier numbered need be considered.

79 (i) The trial judge was conscious that the contract was not a cost-plus contract. He was also aware that the respondent could make productivity gains. Indeed he gave credit for such of these as the respondent proved. What the Full Court did not take into account was that there was at least an evidentiary onus upon the respondent to establish this. I am unable to accept, that in this case of which the respondent was the initiator, it was unaware that all of what I will, for convenience, call "the financials" were in the melting pot. If in its 145 pages of pleadings and particulars in their final form, and many further pages of written material it chose not to, or was unable to prove all of its productivity gains, then the trial judge is not open to criticism for assessing damages as best he could on the basis that he did.

80 (ii) If there were "other areas in the contract which could have allowed [the respondent] to make profits over and above those taken into account by the learned Judge" it was for the respondent, to prove these with as much precision as it could. Having had the trial, which, by initiating the proceedings it sought, and well knowing that its conduct and entitlement throughout to charge what it

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30 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]. See also *Weissensteiner v The Queen* (1993) 178 CLR 217 at 226-227 per Mason CJ, Deane and Dawson JJ.

did was under attack, it was extraordinary that it did not prove its off-setting entitlements then rather than to leave it to the appeal to make an unquantified submission that it was open to it "to make efficiency and productivity gains in virtually every area of the contract".

81 (iii) The same may be said of "other factors [if any, that may have] … contributed to drill and blast profitability." It was for the respondent to lead evidence of these, both in respect of the year 1993 and other years, and this it did not do. With respect to the Full Court's observations as to 1992 and earlier years, it is sufficient to make two points: enough evidence was before the trial judge to enable him to make a calculation of profit on the first contract; and that calculation indicated a profit far in excess of 5%, indeed as much as about 15%. It is true that the appellant did not claim damages for breach of the earlier schedule of the rates contract. But I do not understand that in making the assessment that he did the trial judge intended to award, or did award damages for any breach of it. The respondent's conduct during the performance of both contracts was however relevant. This follows from the issues raised by pars 68, 69 and 84 of the appellant's (defendant's) pleadings:

> "During January 1992, February 1992 and March 1992, the plaintiff supplied to the defendant the plaintiff's proposed costs of mining the balance of work to be carried out under its existing mining contract to the end of 1992, which would be applicable if it was awarded a new contract, together with information that supported those costs.
>
> At the time of making the submissions referred to in the previous paragraph, and in subsequent discussions with the defendant regarding those submissions on dates presently unknown to the defendant, the plaintiff … orally represented that the costs referred to in the previous paragraph were the plaintiff's estimated costs of mining the balance of the material identified in the mining schedule applicable at the date of the submission together with a margin for profit and off-site overheads.
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> …
>
> [T]he plaintiff was under a duty of reasonable care to ensure the representations pleaded in paragraphs 65, 67, 69 and 73 and the information supplied by the plaintiff to the defendant were true."

82 His Honour's starting point was the total revenue earned by the respondent under the relevant, later contract, and his reference to the profit under the earlier one was by way of a check or confirmation of his findings with respect to the later contract.

83 (iii), (iv), (v), (vi), (vii) and (viii) Legitimate gains from "efficiencies" were as much a matter for proof by the respondent as gains from productivity. I do not accept that the estimates, gains and losses made during the terms of the

contracts, and nett positions of the parties were not live issues. Whether, and the extent to which the respondent was entitled to damages or to claim a set-off was a matter for it to make out. Counsel for the appellant submitted in the Full Court that on the evidence the respondent made no productivity gains other than those found by the trial judge. The Full Court said that the merits of the submission depended upon "credibility issues not resolved by the trial judge". Their Honours do not state what these issues were. It is significant that no detailed quantification of gains was attempted at any level by the respondent. That it seems to me was a matter entirely of choice, and a consequence no doubt of the respondent's determined stance that it did not have to justify each item or the totality of its charges. Another way of viewing the respondent's submissions in the Full Court and in this Court is as a plea in the nature of a plea in mitigation of damages. The onus in this regard lies upon the party seeking the reduction[31]. Even though this is a case in contract, an analogy may be drawn between it and *Watts v Rake*[32] in which it was held that it was for the tortfeasor to identify and effectively isolate in the case of pre-existing and subsequently occurring damage, damage for which it was not responsible.

84 Having regard to the matters I have stated, the decision of the Full Court cannot stand. The questions remain however whether there should be a retrial on damages and, if there should be, whether some particular order for their assessment by the trial judge should be made, or whether his Honour's judgment should be restored. The respondent submits, without contradiction, that most but not all of the evidence required to make an assessment in the manner preferred by the Full Court is in evidence. The process of re-assessment on that basis however is hardly likely to be a simple one. It is probable that recourse would be necessary again to the contract valuation reports, and these the trial judge has already found to be unreliable. The trial itself lasted more than three months. Further proceedings are undesirable and should be, if in justice to the parties they can be, avoided. This depends upon whether the trial judge's method of assessment is sustainable in all of the circumstances. In my opinion it is for these reasons: the circumstances of difficulty of calculation confronting the trial judge were caused, or at least heavily contributed to by the respondent, in particular by its persistence in its claims of justification of its actions; the wide canvassing of costs and profits in the trial itself; the respondent's admission of overcharging by at least $2,713,940, a matter which is significant for two particular reasons: the appellant would be entitled to judgment for that sum unless the respondent had

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31 *Harding v Harding* (1928) 29 SR (NSW) 96 at 106 per Campbell J; *Bagnall v National Tobacco Corporation of Australia Ltd* (1934) 34 SR (NSW) 421 at 430 per Jordan CJ; Stephen J and Markell AJ concurring.

32 (1960) 108 CLR 158 especially at 160, 163-164. See also *Purkess v Crittenden* (1965) 114 CLR 164.

an equivalent counterclaim or set off; and, the fact that the admission was made provided an indicator of the detail to which the parties needed to descend to prove the respective cases, and it thereupon became a matter of obligation for the respondent to reduce the admitted liability on those accounts to the extent that it could; and, even though damages could not be readily assessed according to the measure appropriate to deceit, the case was one of deceit and calling therefore, for a degree of flexibility of the kind to which Gibbs CJ alluded in *Gould v Vaggelas*[33]. Furthermore, what the trial judge did here was reasonable. The approach that his Honour adopted was not unfair to the respondent: the calculation, on a global basis, of the difference between the actual revenue derived by the respondent, and the respondent's costs plus a margin of 5%. If in fact the respondent made or could have made (additional) efficiency gains such as by way of reduced site costs and other matters, his Honour's calculations still leave it with cost, plus a profit of 5%. Contrary to what the Full Court said as to "efficiency" gains, the respondent did not however establish at the trial that there were significant opportunities to make additional profits from other than improved productivity. The respondent was given full credit for the latter to the extent that the respondent made them out, $500,000 for increased excavation productivity and $100,000 for plant operating costs.

85 I am not in any event prepared to say that such a method of calculation of damages as the trial judge used would not have produced a reasonable measure of the damages being what the appellant would have been entitled to had the respondent honestly performed its obligations under the contract. Its breaches consisted not only of overcharging but also of systematically misrepresenting the true position. The contractual obligation to act in good faith "in all matters" should not be regarded as discharged on the commencement of proceedings or suspended during them.

86 It is unnecessary to say anything about the trial judge's view that the appellant was entitled to the same damages for breach of fiduciary duty.

87 I would allow the appeal with costs, and order that the respondent pay the appellant's costs of the trial and the appeal to the Full Court, and further that the judgment of the trial judge be restored.

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33 (1985) 157 CLR 215.