IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CIV-2015-442-000028
[2018] NZHC 3176

BETWEEN	JAMES JOSEPH MURREN as trustee of the JAMES J MURREN SPENDTHRIFT TRUST First Plaintiff
	DANIEL LEE Second Plaintiff
AND	GLENN SCHAEFFER Defendant

Hearing:	29 October 2018 to 31 October 2018 and 2 November 2018; 5 November 2018 to 7 November 2018
Counsel:	A J Horne with A E Simkiss and J J K Spring for Plaintiffs A R Shaw with C W Martin (29 October to 30 October 2018) and with S J Stewart (31 October and 2 November 2019; and 5 November 2019 to 7 November 2019) for Defendant
Judgment:	5 December 2018

JUDGMENT OF COLLINS J

PART I

INTRODUCTION

[1] The gravamen of this proceeding is whether Mr Schaeffer should be held liable for representations he made to Mr Murren and Mr Lee that they say led them to invest in a vineyard. At all relevant times, Mr Schaeffer owned 80 per cent of the shares in the company that owned the vineyard.

[2] I have concluded that Mr Schaeffer made negligent misstatements to Mr Murren and Mr Lee for which he is liable. I have also concluded that Mr Schaeffer is liable in relation to causes of action brought under the Fair Trading Act 1986 and the Nevada Deceptive Trade Practices Act. None of the affirmative defences alleged by Mr Schaeffer have merit. Accordingly, I find Mr Schaeffer is liable for the damages sought plus interest. Judgement is entered in favour of Mr Murren for USD 1,600,813.92 plus interest and USD 700,406.96 plus interest for Mr Lee.

PART II

BACKGROUND

The vineyard

[3] The focal point of this litigation is a vineyard in the Tasman region of the South Island of New Zealand. Originally the vineyard was called "Woollaston Estates", but in 2015 its name was changed to "Mahana Estates". For convenience, I will refer to the land and the assets used to produce wine as "the vineyard".

[4] At its peak, the vineyard was spread over several sites and comprised more than 100 hectares of land in and around Moutere and Hope. The principal buildings on the vineyard are a four-level gravity-fed winery with a restaurant and reception facility designed by a well-known American architect and a villa, which is described in advertising literature as "featuring seven bedrooms, seven bathrooms, wine cellar, library and art gallery".

The parties

[5] Mr Murren, Mr Lee and Mr Schaeffer met each other in the 1980s. At the time, Mr Murren was an equity analyst on Wall Street. He moved to Las Vegas in 1998, where he became the Chief Financial Officer, and subsequently the Chairman and Chief Executive Officer, of MGM Grand Casino Inc (MGM). When Mr Lee first met Mr Schaeffer, he was also working on Wall Street, as a research analyst. In 1992, Mr Lee moved to Las Vegas to take up positions as the Chief Financial Officer, Treasurer and Senior Vice President of Finance and Development at Mirage Resorts,

a hotel and casino enterprise. He is currently the President and Chief Executive Officer of Full House Resorts, a public company that operates five casinos, several hotels and other casino related businesses. Mr Schaeffer's early career was also on Wall Street. He joined the Las Vegas casino company, Circus Circus (later called the Mandalay Bay Group), in the early 1980s and eventually rose to be the Chief Executive Officer and President of that company before it was acquired by MGM in the early 2000s.

[6] When Mr Lee and his family moved to Las Vegas in 1992, their home was two doors from Mr Schaeffer's family home. The bonds of friendship between the three men and their respective families continued to flourish during this period. They vacationed together and Mr Murren and Mr Schaeffer jointly pursued art investments, which was a particular passion of Mr Schaeffer.

[7] In about 1996, Mr Schaeffer purchased a bed and breakfast establishment in Nelson. He and his then wife, Renee Schaeffer, were considering becoming permanent residents in New Zealand. It was about this time Mr Schaeffer met Mr Woollaston, who owned a vineyard at Hope, about 17 kilometres southwest of Nelson. Mr Schaeffer and Mr Woollaston decided they would purchase some land and establish a new vineyard and winery to be called Woollaston Estates.

The various corporate entities

[8] A company called Woollaston Estates Ltd was incorporated on 30 November 2000 to own and operate the vineyard. On 18 January 2006, its name was changed to Woollaston Estates Holdings Ltd (WEHL). It is this company that owns the land and buildings that make up the vineyard. Mr Schaeffer held 80 per cent of the shares in WEHL, and Mr Woollaston held the balance.

[9] On 22 December 2005, a company called Woollaston Estate Operating Ltd was incorporated. The name of that company was changed to Woollaston Estates Ltd on 18 January 2006, the same name as was first used in relation to WEHL. The name of Woollaston Estates Ltd was then changed again to Mahana Estates Ltd on 8 May 2015. For convenience, I will refer to this company as "Mahana". It is this company that

managed the winery business. When Mahana was first incorporated, Mr Schaeffer owed 80 per cent of the shares and Mr Woollaston the remaining 20 per cent.

[10] Mr Woollaston was the managing director of WEHL and Mahana up until approximately 2009.

Investment discussions

[11] Mr Schaeffer was keen to encourage other investors in the vineyard. He knew a number of wealthy American businessmen, including Mr Murren and Mr Lee.

[12] During the course of 2001, Mr Schaeffer discussed with Mr Lee and Mr Murren the possibility of them investing in the vineyard. Mr Schaeffer said to Mr Lee and Mr Murren that, "investing in Woollaston would act as an inflation and currency hedge because of the favourable exchange rate between the US dollar and the New Zealand dollar at the time". He also told Mr Lee "that buying land in New Zealand was a smart move because [of] the low value at that time of the New Zealand dollar compared to the USA dollar" and that "the market value of a harvest acre of vineyard land in New Zealand was much lower than the market value of comparable acres of vineyard land in the Napa Valley in California or Oregon, so that it was significantly cheaper to produce a comparable wine product in New Zealand". Mr Schaeffer's expectations in relation to both these matters proved to be well founded as the New Zealand dollar appreciated against the US dollar during the period to which this proceeding relates. The price of high quality vineyard land in New Zealand also escalated during this period.

[13] In 2002, Mr Murren and his wife stayed with Mr Schaeffer at his bed and breakfast establishment in Nelson. During that visit, Mr Schaeffer reinforced to Mr Murren his views about the merits of investing in the vineyard.

The 2002 Agreement

[14] To facilitate investments in the vineyard by Mr Murren, Mr Lee and others, Mr Schaeffer circulated a draft Limited Partnership Agreement. That document was never signed by some of the persons and entities named in it as Limited Partners. I

will, however, follow the practice of the parties and refer to that document as "the 2002 Agreement", even though it is questionable whether it ever became a genuine agreement. The 2002 Agreement was forwarded to Mr Murren and Mr Lee in 2002.

[15] The 2002 Agreement stated that:

> The purpose of the partnership is to invest in, own, develop and commercially explore interests in the Phillip [Woollaston] vineyards and winery in or near Nelson, New Zealand, and to conduct such other activities as may be incidental or desirable in connection with the ownership, development, and exploitation of such interests.

[16] The Limited Partnership was to be called "Kiwi Ventures" and was to be registered with the Secretary of State of Nevada in accordance with the Uniform Limited Partnership Act.[1] The agreement was to be governed by Nevada law. Mr Schaeffer was named as the General Partner of the partnership. Mr Murren, Mr Lee and seven other individuals and entities were named as Limited Partners. Those named as Limited Partners in the 2002 Agreement included "The Bank of America Limited Partnership Group", "The Citigroup Limited Partnership Group" and "The Deutschebank Limited Partnership Group", which were investment partnerships comprising persons associated with, and employees of, those three banks.

[17] The 2002 Agreement provided it would have USD 8,000,000 as initial capital and that Mr Schaeffer would contribute 23.34 per cent of the initial capital "in cash, real property, or such other consideration" as he determined appropriate. The capital contributions of the Limited Partners were stipulated in the agreement. Mr Murren and Mr Lee were each to contribute five per cent of the initial capital of the partnership, meaning their respective contributions were to be USD 400,000.

[18] The 2002 Agreement stated that the partnership would be managed by the General Partner and that, subject to the terms of the agreement, the General Partner would have the full and exclusive right and authority to manage and control the business of the partnership. I explain the relevant management powers of the General Partner at [38].

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[1] NRS § 88.350.

[19] Clause 4.2 of the 2002 Agreement set out the voting rights of the partners and provided that the General Partner and the Limited Partners could determine certain matters by a majority vote, including the sale of assets of the partnership and the raising of additional capital.

[20] Mr Lee read the 2002 Agreement and made a number of changes to it before signing the document and returning it to Mr Schaeffer. Mr Murren also signed the 2002 Agreement and returned it to Mr Schaeffer. Mr Schaeffer said in his evidence that he also signed the 2002 Agreement, but unbeknown to Mr Lee and Mr Murren at the time, none of the other Limited Partners ever signed the 2002 Agreement. Nor was the 2002 Agreement registered with the State authorities in Nevada.

[21] On 13 September 2002, Mr Schaeffer sent the first capital call letter, which asked Mr Lee and Mr Murren to pay USD 102,000. In that letter, Mr Schaeffer made numerous references to Mr Lee and Mr Murren's ownership of an interest in the vineyard. For example, Mr Schaeffer said:

> … *we* have accumulated roundly 150 acres of top quality property … *Our* major blocks … To *our* advantage over Oregon, Moutere has more dependable sunshine hours … *Our* vineyards for Pinot Noir … *Our* vines … By the time *our* winery operations are in full swing … *our* vineyards should represent a "franchise value" that matches or exceeds *our* total investment capital … *We* bought *our* land at approximately $10,000 U.S. per acre … By the time *we* get to a harvest acre, *our* cost will be nearly $30,000 U.S. … *our* land alone would likely represent value of $7.5 million U.S. in five years … *Our* operations will cover the four varieties of wine … *Our* CEO is Phillip Woollaston … As a partner in *our* venture, Phillip has contributed his family's small vineyard for his ownership interests … (emphasis added)

[22] On 18 September 2002, Mr Murren send Mr Schaeffer a cheque for USD 102,000, payable to Kiwi Ventures. In his evidence, Mr Murren said that, shortly thereafter, Mr Schaeffer told him that he had lost the cheque and he asked Mr Murren to send him a replacement cheque, payable to Mr Schaeffer. Mr Murren duly complied with this request. In his evidence, Mr Schaeffer denied ever losing a cheque or saying that he had done so.

[23] On 13 February 2003, Mr Lee sent Mr Schaeffer a cheque for the same amount, payable to Mr Schaeffer in person. That cheque was also cashed by Mr Schaeffer.

[24] On 22 October 2003, Mr Schaeffer issued a second capital call request addressed to "Kiwi Venture Partners". Again, the covering letter referred to the partners' interest in the vineyard by referring to, for example, "*our* own operation" and "*our* vineyard manager". In response, Mr Murren sent Mr Schaeffer a cheque dated 14 November 2003 for USD 223,000, payable to Mr Schaeffer in person.

[25] On 20 July 2005, Mr Schaeffer sent a letter addressed to the partners of the Kiwi Ventures, in which he referred again to "*Our* first trial shipment of sauvignon"; "*our* new four-level, gravity-fed winery"; "*our* investment" and "*our* capital worth".

[26] On 15 November 2005, Mr Schaeffer sent similar letters that bore the "Kiwi Ventures" letterhead, addressed to each of Mr Murren and Mr Lee personally. Those letters, which each contained a call for further capital (but for different amounts), contained references to the vineyard as "*Our* winery". This was the fourth capital call letter.[2]

[27] Mr Murren sent Mr Schaeffer a cheque for USD 1,075,724.66 in late 2005 in response to the calls for capital he had received from Mr Schaeffer. In making this payment, Mr Murren increased his contribution to the winery to 10 per cent of the Kiwi partnership. He said in his evidence that he did so because of Mr Schaeffer's confidence that the value of the vineyard land was likely to increase.

[28] For completeness, I note Mr Strawbridge, who since February 2018 has been the accountant for WEHL and Mahana, said in his evidence that Mr Murren paid USD 797,184.66 on 18 February 2005 and a further USD 279,000 on 2 December 2005. Nothing hinges on the minor discrepancies between Mr Strawbridge's evidence and Mr Murren's evidence as to when payments were made and exactly how much was paid on each occasion. I examine Mr Strawbridge's evidence in further detail under the heading "Accounting Evidence".

[29] By late 2005, Mr Lee had paid Mr Schaeffer USD 102,000 in response to the capital calls made under the 2002 Agreement. By the end of 2005, Mr Murren had

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[2] The parties have not located a copy of the third capital call letter, but agreed one was sent.

made several payments, totalling USD 1,400,724.66, in response to the calls for capital from Mr Schaeffer.

2006 Agreement

[30] In early 2006, Mr Schaeffer sent Mr Murren and Mr Lee a new partnership agreement, referred to in the evidence as "the 2006 Agreement". This development occurred soon after Mr Lee had learnt in late August 2005 that the 2002 Agreement had not been finalised.

[31] The key changes between the 2002 Agreement and the 2006 Agreement include changes in the identities of the partners:

(1) Mr Schaeffer was no longer named as the General Partner. Instead, the General Partner was "Constellation Partners, LLC" (Constellation), an investment company that Mr Schaeffer had established in 2003 or 2004 with Renee Schaeffer. I refer at [118] to [127] to the legal relevance of Mr Schaeffer's role in Constellation.

(2) Only Mr Lee and Mr Murren's family trust, the James J Murren Spendthrift Trust (the Trust), continued to be Limited Partners, of those named as such in the 2002 Agreement. The other Limited Partners in the 2006 Agreement included NAKP Investments, LLC, Mr Newby's family trust, Mr Varnell, Mr Smith's family trust and Mr Scott's family trust.[3]

[32] Although the 2006 Agreement names the Trust as a Limited Partner, it is convenient to refer to Mr Murren in this judgment as a Limited Partner under the 2006 Agreement, rather than the Trust, as for all intents and purposes he controls and directs the Trust.

[33] The stated purposes in the 2006 Agreement also differed from the purposes in the 2002 Agreement. The 2006 Agreement stated:

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3 Mr Newby, Mr Varnell, Mr Smith and Mr Scott were originally part of The Bank of America Limited Partnership Group under the 2002 Agreement.

> The purpose of the partnership is to invest in, own, develop, and commercially exploit interests *in a New Zealand entity which, in turn, owns 80% of the Phillip Woollaston Estates vineyard and winery* in or near Nelson, New Zealand, and to conduct such other activities as may be incidental to or desirable in connection with the ownership, development, and exploitation of such interests. (emphasis added)

[34] The partnership was to continue to be called Kiwi Ventures. Unlike the 2002 Agreement, the 2006 Agreement was registered with the Secretary of State of Nevada. This appears to have happened on 4 January 2006, before the agreement was actually signed by Mr Lee and Mr Murren. The 2006 Agreement also stipulated that it was to be governed by Nevada law.

[35] Under the 2006 Agreement, the initial capital was to be USD 14,008,000. The General Partner was to:

> … contribute 70.00% of the Initial Invested Capital of the Partnership, in cash, real property, or such other consideration as the General Partner shall determine, to be valued at fair market value and to be contributed in Capital Calls in such increments and at such times as the General Partner shall determine.

[36] Mr Murren's capital contribution, through the Trust, was to be 10 per cent of the initial capital. Mr Lee's contribution was to remain at five per cent.

[37] The 2006 Agreement also differed from the 2002 Agreement in that it stipulated an 80 per cent majority of the partners (calculated by reference to the percentage interest of each partner in the partnership at the time of the vote) was required:

> (a) To sell all or substantially all of the assets of the Partnership, to merge the Partnership with any other entity, or to acquire all [or] substantially all of the assets of another entity;
>
> …
>
> (c) To raise additional capital for the Partnership.
>
> …

[38] Most of the other provisions of the 2002 Agreement, including the provisions governing the powers of the General Partner, were carried over into the

2006 Agreement. In particular, the management powers of the General Partner replicated those contained in cl 3.1 of the 2002 Agreement and stated:

> The General Partner shall have all the rights, powers and authority conferred by law and by the provisions of this Agreement. The General Partner's authority specifically includes, without limitation, the power to:
>
> (a) Acquire, purchase, renovate, improve, own, and sell any assets that the General Partner determines is necessary or appropriate or in the best interests of the business of the Partnership, and to acquire options for the purchase of any such asset;
>
> …
>
> (g) Perform all other acts the General Partner deems necessary or appropriate to the Partnership business.

[39] The 2006 Agreement, like the 2002 Agreement, imposed reporting obligations on the General Partner. Those obligations were contained in cl 5.3 of both documents and required the General Partner to send reports to each of the Limited Partners each year. The reports were to "contain a year-end balance sheet, an income statement, and a statement of changes in financial position for the fiscal year".

[40] Both agreements provided that capital accounts were to be maintained for the General Partner and each Limited Partner. The capital accounts were to record each partner's original contribution of capital increased by their individual share of the partnership's operating income and gains on sale of partnership assets, and decreased by their individual share of distributions and partnership losses.

[41] Clause 13.7 of the 2006 Agreement, like the 2002 Agreement, contained an "entire agreement" clause. It provided:

> This agreement constitutes the entire agreement of the parties with respect to the subject matter hereof. All prior or contemporaneous agreements, representations, warranties, and understandings relating to the subject matter of this agreement, between or among the parties, whether written or oral, are hereby superseded and shall be of no force or effect … There are no representations, warranties, or agreements other than those set forth in this Agreement.

I examine this clause when considering the affirmative defences.

[42] Clause 9.6 of both the 2002 and 2006 Agreements provided:

> The General Partner shall have no personal liability for the return of any capital contributions to the Limited Partners.

I examine the effect of this clause at [232] to [235].

[43] Mr Lee explained in his evidence that he had been concerned that he had not received any documentation recording his investment in the vineyard, following his execution of the 2002 Agreement. He said that although he was concerned about some of the changes made in the 2006 Agreement, he signed the new agreement as he wanted to receive a formally executed partnership agreement signed by all parties.

[44] Mr Murren said he signed the 2006 Agreement on behalf of the Trust so he could provide evidence of his investment to various gaming authorities to whom he had to report each year. Mr Murren said he "relied on the 2006 Agreement as a commitment from [Mr Schaeffer] that he would be a proper custodian of [the Trust's] investment in Woollaston Estates".

The 2006 binders

[45] One of the factual disputes in this case concerns the distribution of binders of material relating to the vineyard and WEHL to the Limited Partners named in the 2006 Agreement. It was Mr Schaeffer's evidence that those binders were distributed to the Limited Partners either at, or in conjunction with, an event held in Las Vegas to promote the vineyard.

[46] Ms Bulgatz, a certified public accountant based in Las Vegas, became Mr Schaeffer's personal accountant in late 2003 or early 2004 and at the same time she was appointed the accountant for Kiwi Ventures, a role she continues to discharge to this day.

[47] Ms Bulgatz said in her evidence that, in anticipation of the 2006 Agreement, she began to assemble current and historical financial information relating to Kiwi Ventures and WEHL for the Kiwi Ventures investors. Ms Bulgatz said that she took great pride in preparing the binders because "many of the investors in

Kiwi [Ventures] were high-ranking executives in the gaming industry", including Mr Murren whom she particularly wished to impress.

[48] Ms Bulgatz said in her brief of evidence that she either personally delivered or couriered the binders to Mr Murren's and Mr Lee's offices in 2006. In her oral evidence, Ms Bulgatz went further and said that she could recall personally delivering one of the binders to Mr Murren at a meeting between Mr Schaeffer and Mr Murren, which she also attended.

[49] Mr Newby, an investment banker in California whose family trust is named as a Limited Partner in the 2006 Agreement, provided evidential support for Ms Bulgatz' recollection of distributing the binders to the Limited Partners named in the 2006 Agreement. Mr Newby retained a copy of the binder that he received and he explained its contents during the course of his evidence.

[50] The binder retained by Mr Newby contained the following documents:

- Promotional photographs of the vineyard and buildings, including a "wedding reception" room in the principal winery building.

- The 2006 Agreement signed by, amongst others, Mr Schaeffer for Constellation, Mr Murren for the Trust and Mr Lee.

- A balance sheet entitled "Kiwi 2004", and dated 31 December 2004, that recorded the partnership at that stage owned "Class A shares in Woollaston" with a book value of USD 3,044,728. The balance sheet recorded contributions of USD 6,442,825.99 from Constellation, USD 325,000 from Mr Murren and USD 102,000 from Mr Lee.

- Financial statements for WEHL for 2004. That document listed the shareholders of WEHL as being G Schaeffer 5,988,000 shares, P Woollaston 1,500,000 shares and two employees of the company, who each owned 6,000 shares.

- A strategic plan for WEHL for 2004 to 2010.

- A tax return for WEHL for the year ending 31 December 2004.

- Capital expenditure, operating expenditure and cashflow budgets for WEHL for 2005 to 2007.

- A shareholders' agreement for WEHL between Mr Schaeffer and Mr Woollaston.

- United States Inland Revenue Service (IRS) documents prepared by Deloitte, in Las Vegas.

[51] Included in the common bundle of documents, but not, apparently, in the binder retained by Mr Newby, were IRS documents prepared by Deloitte for, amongst others, Mr Murren and Mr Lee. As WEHL was, for United States tax purposes, a foreign company, the partners in Kiwi Ventures were required to file IRS "K-1" tax returns in relation to WEHL. The statements prepared by Deloitte that accompanied the IRS documents referred to Mr Murren and Mr Lee as each being "considered a constructive owner of Woollaston Estates Limited".

[52] Both Mr Lee and Mr Murren were very certain they had not been provided with the 2006 binders by Ms Bulgatz. Their evidence was that they first became aware of the 2006 binders during the process of discovery in relation to this proceeding.

[53] I am, however, satisfied Mr Lee and Mr Murren are likely to have received the binders prepared by Ms Bulgatz in 2006. The reasons for this conclusion are:

(1) Ms Bulgatz provided convincing evidence about her recollection of preparing and distributing the binders and her enthusiasm for that particular project.

(2) It would be highly unlikely Ms Bulgatz would have only sent a binder to Mr Newby in 2006. There is no logical reason why all of the named

Limited Partners in the 2006 Agreement would not also have been sent binders.

[54] I am satisfied Mr Murren and Mr Lee can now no longer recall having received the binders prepared by Ms Bulgatz. That is understandable. Both are very busy chief executives of significant companies. In the 12 years that has elapsed since the binders were prepared by Ms Bulgatz, much has happened in the commercial world inhabited by Mr Lee and Mr Murren, not the least of which was the global financial crisis. It is very understandable why they now cannot recall receiving the binders distributed in 2006.

Payments made post the 2006 Agreement

[55] On 6 April 2006, Mr Lee sent Mr Schaeffer a cheque for USD 598,406.96 in payment of the second, third and fourth capital calls that had been made by Mr Schaeffer under the 2002 Agreement, but which Mr Lee had not paid. Mr Lee claimed in his evidence that Mr Schaeffer told him that the cheque had been lost and that he requested Mr Lee to send a cheque made out to him personally. Mr Lee said that he deposited the funds in Mr Schaeffer's personal bank account by electronic funds transfer on 8 June 2006. Mr Schaeffer again denied that he lost the cheque. This time, Mr Schaeffer located the cheque and provided a copy of it. The records for Kiwi Ventures' Bank of America account show that a deposit of some description was made on 8 June 2006 in the amount of the cheque, which suggests that Mr Lee's original cheque was, in fact, received.

[56] On 22 May 2007, Mr Schaeffer sent to Mr Murren a further call for capital. The amount sought on that occasion was USD 75,000 and was described as being required as a contribution to the purchase of 10 hectares of land. There is no record of Mr Murren having paid that sum to Mr Schaeffer.

[57] On 22 January 2008, Mr Schaeffer sent further capital call letters seeking USD 200,000 from Mr Murren, and USD 100,000 from Mr Lee, for "Additional Land Purchase & Operating Expenses". That call for capital was made pursuant to a "resolution and consent to action without meeting of partners". That resolution was required to be signed by partners holding 80 per cent of the "Partnership Interests".

There is no evidence as to whether the requisite number of partners signed that resolution. There is, however, evidence that Mr Murren signed that resolution and that he forwarded USD 200,089.26 in response to the call for further capital. Mr Lee, on the other hand, was not impressed by the call for further capital, which was made during the global financial crisis. He did not send any further payments to Mr Schaeffer.

[58] Ultimately, Mr Murren paid a total of USD 1,600,813.92 and Mr Lee paid a total of USD 700,406.96 in response to the calls for capital made by Mr Schaeffer. Those are the sums that they seek by way of damages in this proceeding.

Events during 2008 and 2009

[59] Although Mr Schaeffer obtained New Zealand residency in 2006, he continued to spend most of his time in the United States up until 2013. During part of that time, he was the President and Chief Executive Officer of Fontainebleau Resorts LLC (Fontainebleau), a hotel and casino company that, in approximately February 2007, commenced constructing one of the largest hotel and casino facilities in Las Vegas. It was at the time reported to be a construction project that would cost in the vicinity of USD 3-4 billion. The project, however, struck financial difficulties in 2009 when Fontainebleau Las Vegas LLC filed for bankruptcy protection.[4] The collapse of the Fontainebleau project in Las Vegas was a very significant commercial failure in the United States during the global financial crisis. Years of litigation ensued, some of which involved Mr Schaeffer.

[60] No further capital call and reporting letters were sent to Mr Murren and Mr Lee after 2008. At that time, all three men were heavily preoccupied with their principal commercial responsibilities. Mr Murren and Mr Lee assumed that the vineyard was being properly managed and that, in due course, they would receive returns on their investments in Kiwi Ventures. They assumed that through Kiwi Ventures they owned shares in a New Zealand entity that owned 80 per cent of the vineyard.

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[4] United States Bankruptcy Code 11 USC.

[61] In late 2008, Mr Lee and Mr Schaeffer spent time together at a resort in Napa Valley. Mr Lee's evidence was that during their return to Las Vegas on a private jet, Mr Schaeffer continued to reassure him about his interest in "*our* winery" and how well it was performing.

Further acquisition of land by WEHL

[62] Mr Woollaston continued to be the managing director of WEHL and Mahana during this period. On 23 December 2008, Mr Woollaston, on behalf of WEHL, applied for consent from the Overseas Investment Office (OIO) to purchase 19.6 hectares of land at Moutere and 10 hectares at Hope. Approvals for these purchases were issued in late March and early April 2009.

Mr Schaeffer's home on the vineyard

[63] From September 2005 to August 2006, WEHL appears to have made a number of advances to Mr Schaeffer's family trust. Those loans were identified by an accounts administrator employed by WEHL in an email that she sent to Ms Bulgatz as being "the ones where Woollaston Estates lent monies to the Schaeffer Family Trust for the renovation of [Mr Schaeffer's] house".

[64] When cross-examined about this evidence, Mr Schaeffer said it was never his intention to mingle his money with the investors and that he relied on accountants to ensure the accounts were properly maintained. It appears from the materials presented in evidence that Mr Schaeffer's family trust received approximately NZD 1.3 million from WEHL in relation to projects associated with his house on the vineyard.

Purchase of land from WEHL by Constellation

[65] In 2009, Constellation purchased approximately two hectares of land from WEHL, which was the land upon which Mr Schaeffer's home had been built. It appears that Constellation paid NZD 300,000 for this piece of land. Before the sale took place, however, there were expressions of concern from the lawyers then acting for WEHL that "the acquisition value will be less than the market value" of the land in question. When asked about having acquired a valuable asset from WEHL at below

market value, Mr Schaeffer denied any wrongdoing and said that Mr Woollaston handled the transaction.

Transfer of shares in Mahana

[66] In January 2009, Mr Schaeffer transferred his shares in Mahana to Renee Schaeffer. He explained he did so in order to address regulations in the United States associated with his role as the Chief Executive Officer of Fontainebleau. The following year, Renee Schaeffer transferred the same shares back to Mr Schaeffer. Mr Schaeffer explained that the shares were returned because he was advised that he could in fact hold the shares in Mahana without infringing the regulations.

[67] When asked in cross-examination why he did not arrange for the transfer of his shares in Mahana to Kiwi Ventures in accordance with the 2006 Agreement, Mr Schaeffer said that he did not think about it at the time, but that the transfer did not change anything because Constellation still owned the shares, through Renee Schaeffer. Mr Schaeffer did not explain precisely how that would work as a matter of law.

Acquisition of art works

[68] Mr Schaeffer continued to maintain his interest in art and, in particular, sculptures. He had previously signalled in his second capital call letter that he intended to pay for sculptures that he would commission using his own funds. It transpired, however, that WEHL paid for a number of very significant sculptures located on the vineyard. Evidence to support this can be found in the 2015 Annual Report for WEHL.

Mr Murren and Mr Lee start to become concerned

[69] In his evidence, Mr Lee said that in 2011 he saw Renee Schaeffer at a restaurant in Las Vegas. He was surprised to see her as he thought she was at that stage living in New Zealand. In his evidence, he said that Renee Schaeffer expressed her concerns about being able to refinance the vineyard's debt, which she said was approximately USD 5,000,000. Mr Lee said he was surprised to learn there was any debt as he understood the vineyard would be fully funded from capital contributions from the

partners of Kiwi Ventures. Soon after these events, Mr Murren said that he became concerned about Mr Schaeffer's approach to an art investment fund that they participated in, and his treatment of funds from an apartment in Auckland that they had owned.

[70] In late 2011, Mr Murren met with Mr Schaeffer to discuss the investment in Kiwi Ventures. Mr Murren said that Mr Schaeffer continued to reassure him that "we" owned assets including a share in the vineyard. At about this time, WEHL sold part of its land to a Mr and Mrs Ewers. Mr Lee and Mr Murren said they were unaware of the sale of any of the land owned by WEHL.

[71] Mr Lee met with Mr Schaeffer in early 2013 during which time, according to Mr Lee, he was told the debt referred to by Renee Schaeffer was more likely to be about USD 3,000,000, but that the vineyard had a negative cashflow.

[72] Mr Lee's mounting concerns led him to send an email to Mr Newby on 26 April 2013, suggesting a comprehensive investigation into the financial affairs of Kiwi Ventures and WEHL.

[73] On 11 May 2013, Mr Lee sent an email to the Limited Partners saying he was troubled by the absence of information from Mr Schaeffer. Three days later, Mr Lee sent a further letter to the Limited Partners saying that Mr Schaeffer had told him that the investors owned "pieces of some operating company with no real assets".

[74] On 4 June 2013, the United States attorneys for Mr Murren and Mr Lee sent an email to Ms Bulgatz asking for information about the financial affairs of Kiwi Ventures.

[75] Matters reached a critical point on 8 July 2013 when Renee Schaeffer sent Mr Murren an email in which she said, amongst other things:

> Kiwi owns no shares in Woollaston. Glenn Schaeffer, as an individual and holding a resident's visa with prior approval of the Overseas Investment Office of the NZ government owns 79.66% or 5,974,000 shares in [WEHL]. And he owns 80 shares or 80% of [Mahana] …

[76] Renee Schaeffer also revealed that WEHL had a current bank loan of approximately NZD 4.5 million.

[77] Following a meeting with Mr Lee about Kiwi Ventures, Renee Schaeffer sent a second email to Mr Lee on 9 October 2013, in much the same terms as the first. In this email, Renee Schaeffer assured Mr Murren that none of the investors' money had been used by Mr Schaeffer or her for personal use. She explained in her email to Mr Murren that he still owned "a share of the winery" and that she and Mr Schaeffer intended "to honour [Mr Murren's] percentage of profits or residual value if and when we make a profit or sell".

[78] The second email also contained further information from Mr Schaeffer about the winery's financial position in which he explained the financial difficulties that had been incurred and the challenges that had been encountered in trying to sell wine in the United States.

[79] This proceeding was commenced on 15 June 2015.

Use of WEHL as a source of security

[80] On 22 September 2015, Mr Schaeffer, Renee Schaeffer and others executed a security sharing deed under which they took security over WEHL's assets, "in consideration of [them] providing or agreeing to provide, financial services to … WEHL". There is no reference to the interests of Kiwi Ventures in that deed, and no consent was sought from the Limited Partners.

[81] Around the same time, Mr Schaeffer arranged for Renee Schaeffer to take a security over WEHL to secure a USD 325,000 debt he owed her as part of their matrimonial settlement. This transaction also involved a novation to Mr Schaeffer of Renee Schaeffer's interest in a debt owed by WEHL to the two of them. Again, there is no reference in those arrangements to the interests of Kiwi Ventures in WEHL. Nor was consent sought from the Limited Partners.

Transfer of some shares to Kiwi Ventures

[82] On 14 December 2015, Mr Schaeffer transferred 24 per cent of the shares he owned in Mahana and 23.55 per cent of the shares he owned in WEHL to Kiwi Ventures.

[83] This was the only occasion any shares in WEHL or Mahana were transferred to Kiwi Ventures and appears to have been undertaken as a strategy to address the issues raised in the proceeding commenced by Mr Murren and Mr Lee.

Further sales

[84] On 28 October 2016, WEHL sold part of its land to a company called "Cheviot Holdings 2016 Ltd". Mr Murren and Mr Lee say they were unaware of that transaction.

[85] On 16 August 2018, Mr Schaeffer signed sale and purchase agreements for the balance of the land owned by WEHL and the winery business. That purchase did not proceed. I have suppressed publication of the sale and purchase price recorded in those contracts. Suffice to record that all accept the purchase prices in those agreements were substantially below the amount of money owed by WEHL and Mahana to their respective creditors.

Receivership

[86] On 1 October 2018, WEHL and Mahana were placed into receivership. It is accepted by the parties that, absent an unforeseen miracle, the shares of WEHL and Mahana have no value and the shareholders' current accounts are very negative.

Accounting evidence

[87] As mentioned earlier, Mr Strawbridge's firm became the accountants for WEHL and Mahana in February 2018. Mr Strawbridge was instructed to examine the financial records for WEHL and Mahana to determine, amongst other things:

(1) The balances of the shareholders' capital and current accounts for WEHL for the financial years ending 2000 to 2008 inclusive.

(2) The movements of Mr Schaeffer's shareholding and shareholder current account in WEHL from 30 November 2000 to 31 December 2008.

(3) The source of funds reported to be credited to Mr Schaeffer's capital and current accounts in WEHL.

(4) The proportion of the funds that were received into Mr Schaeffer's capital and current accounts that were contributed to by Mr Schaeffer, Mr Murren, Mr Lee and the other Limited Partners in Kiwi Ventures.

[88] Mr Strawbridge's evidence can be summarised in the following way:[5]

(1) As at 31 December 2008, Mr Schaeffer's paid up capital in WEHL was NZD 5,988,000. His shareholders current account at that time was NZD 18,887,497.

(2) The capital contributions of Mr Murren through Kiwi Ventures were:

2002 – USD 102,000.00
2003 – USD 223,000.00
2005 – USD1,076,184.66
2008 – USD 199,629.26

Total – USD1,600,813.92

5 For reasons that are not apparent, some of Mr Strawbridge's numbers do not match up with the amounts referred to by Mr Murren and Mr Lee in their evidence. The total amounts, however, are the same.

(3) The capital contributions of Mr Lee through Kiwi Ventures were:

2002 – USD	102,000.00
2006 – USD	598,406.96
Total – USD	**700,406.96**

(4) The capital contributions of Mr Schaeffer through Kiwi Ventures were:

2002 USD	2,239,764.00
2003 USD	1,008,838.00
2004 – USD	3,194,223.00
2005 – USD	2,737,975.58
2006 – USD	625,000.00
2008 – USD	1,399,896.83
Total – USD	**11,205,697.41**

[89] It was accepted by Mr Strawbridge, and Mr Shaw, senior counsel for Mr Schaeffer, that Mr Strawbridge was unable to trace the payments made by Mr Murren and Mr Lee into WEHL. Mr Shaw submitted, however, that this was not important as the payments made by Mr Murren and Mr Lee were accounted for by Mr Schaeffer holding his shares and current account in WEHL for the benefit of the Limited Partners.

[90] In his evidence, Mr Strawbridge said that his analysis treated the capital contributions by the Limited Partners as reductions in Mr Schaeffer's shareholder current account balance in WEHL, with a corresponding increase in the amount of the total investment attributed to those Limited Partners. Mr Strawbridge acknowledged, however, there was no contemporaneous evidence to demonstrate this was the way the Limited Partners' money was actually accounted for at the time. Mr Strawbridge also acknowledged his reconstruction mirrored Mr Schaeffer's explanation of what had been done with the monies invested by Mr Murren, Mr Lee and the other Limited Partners. Surprisingly, Mr Strawbridge's reconstruction of the accounts did

not address the transactions concerning the funding of the house that Mr Schaeffer built at the vineyard.

[91] Mr Strawbridge did not endeavour to reconcile the balance sheets for Kiwi Ventures. Copies of those balance sheets for the financial years ending 31 December 2004 to 31 December 2013 were produced in evidence. They showed that in 2004 Kiwi Ventures assets included "Investment in Woolaston Estate" valued at USD 3,395,393.78. For the following years, the balance sheets for Kiwi Ventures listed its assets as including USD 3,044,728 of "Class A Shares in Woolaston" and advances to "Woollaston" ranging from USD 8,984,530 to USD 12,618,867.58.

Summary of evidence

[92] By 2008, Mr Murren had invested USD 1,600,813.92 and Mr Lee USD 700,406.96 in Kiwi Ventures. They did so believing their investments were used to acquire part of an entity that owned 80 per cent of the vineyard. They also believed that Mr Schaeffer's investment in the vineyard was through Constellation's role as the General Partner of Kiwi Ventures.

[93] It was only on 8 July 2013 that Mr Murren and Mr Lee learnt for the first time that Kiwi Ventures had no shares in WEHL or Mahana and that, up until 2015, Mr Schaeffer had retained ownership in his name of 80 per cent of the shares of both WEHL and Mahana.

[94] The evidence demonstrates also that, between 2006 and 2015, investments made by Mr Murren, Mr Lee and others through Kiwi Ventures were applied towards the purchase of some significant sculptures on display at the vineyard. In addition, major decisions were made in relation to the management of WEHL without reference to Mr Murren or Mr Lee. Those decisions included the development of Mr Schaeffer's home at the vineyard, the sale of WEHL land to Mr Schaeffer, the sale of WEHL land to third parties and the use of WEHL assets as security for personal liabilities incurred by Mr Schaeffer as part of the arrangements entered into concerning the relationship property agreement he reached with Renee Schaeffer.

[95] There was a high degree of unorthodox merging of Mr Schaeffer's personal interests with the assets of WEHL and Mahana and a striking failure to properly record the investments made by Mr Murren, Mr Lee and the other Limited Partners in Kiwi Ventures.

The causes of action

[96] Five causes of action are pleaded:[6]

(1) negligent misstatement;[7]

(2) deceit;

(3) fraudulent misrepresentation;

(4) breaches of the Fair Trading Act 1986; and

(5) breaches of the Nevada Deceptive Trade Practices Act (NRS § 598.092).

Negligent misstatement

[97] There are four key elements to the tort of negligent misstatement:[8]

(1) a false or misleading statement negligently made by the defendant;

(2) in circumstances where a duty of care is owed to the plaintiff;

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6 Except for the cause of action based on the Nevada Deceptive Trade Practices Act, all the causes of action were based on New Zealand law, despite both the 2002 and 2006 Agreements being governed by Nevada law. This was a result of Mr Murren's and Mr Lee's election not to plead foreign law, in which case the Court will apply domestic law irrespective of whether it would have been the applicable law had choice of law rules been engaged: *Equiticorp Industries Group Ltd (in stat man) v The Crown (No 47)* [1998] 2 NZLR 481 at 679.

7 Another aspect of this case is that the causes of action in negligent misstatement and deceit, insofar as they relate to pre-contractual representations, are not barred by s 6(1)(b) of the Contractual Remedies Act 1979 (now s 35(1)(b) of the Contract and Commercial Law Act 2017). This is because s 14A of the Contractual Remedies Act (now s 58 of the Contract and Commercial Law Act) stipulates that the Act does not apply to any contract governed by foreign law.

8 *Carter Holt Harvey Ltd v Minister of Education* [2005] NZCA 321 at [112].

(3) where the plaintiff reasonably relies on the statement; and

(4) where the plaintiff suffers loss as a consequence.

[98] Mr Murren and Mr Lee say Mr Schaeffer made the representations summarised at [99]. It is their case that the representations were misleading, that they reasonably relied upon the representations and that they suffered loss as a consequence. There is no dispute about the second element of the tort of negligent misstatement in this case. Mr Schaeffer accepts he owed a duty of care to Mr Murren and Mr Lee as General Partner under the 2002 Agreement. That was an appropriate concession. I explain in [115] to [127] why Mr Schaeffer continued to owe a duty of care to Mr Murren and Mr Lee after the 2006 Agreement. Mr Schaeffer denies, however, that the representations were false or misleading or that Mr Murren and Mr Lee reasonably relied on the representations. Mr Schaeffer also says Mr Murren and Mr Lee did not suffer any loss that is now recoverable from him.

[99] The primary representations that Mr Schaeffer is alleged to have made were summarised in the following way by Mr Horne, senior counsel for Mr Murren and Mr Lee:

(1) In the 2002 Agreement, Mr Schaeffer said that he, as General Partner, would "co-invest" with Mr Murren and Mr Lee and others in the Kiwi Ventures partnership; and in the 2006 Agreement he said that his investment vehicle, Constellation, would co-invest with Mr Murren, Mr Lee and other Limited Partners in the Kiwi Ventures partnership.

(2) In the 2002 Agreement, Mr Schaeffer represented that the capital investments of Mr Murren and Mr Lee, and other investors, including Mr Schaeffer, would be made through Kiwi Ventures and that Kiwi Ventures would "own" the vineyard; and in the 2006 Agreement, he represented that the capital investments of Mr Murren, Mr Lee and other investors would, together with the investments of Constellation, be made through Kiwi Ventures and that Kiwi Ventures would own 80 per cent of an entity that owned the vineyard.

(3) In the 2002 Agreement, Mr Schaeffer represented that he would have a minority interest in Kiwi Ventures and that the other investors would together have more than a 75 per cent majority of the voting rights; and, in the 2006 Agreement, he represented that the Limited Partners' investments in Kiwi Ventures would entitle them to a 30 per cent ownership stake in Kiwi Ventures while Constellation would invest the other 70 per cent of its capital.

(4) In the second capital call letter, in 2003, Mr Schaeffer represented that the partners' capital contributions had been and would be utilised to purchase capital assets, such as land and buildings for the winery and vineyard.

(5) In the 2006 Agreement, Mr Schaeffer represented that 80 per cent approval of the partners was required for significant transactions, including raising additional capital and any related party transactions.

(6) In the first and second capital call letters, in 2002 and 2003, Mr Schaeffer represented that he would personally fund a "wine cottage", being a luxury lodge onsite for the use of Limited Partners in the Kiwi Ventures, and that he would personally fund notable sculptures throughout the vineyard.

(7) In the 2002 Agreement, Mr Schaeffer represented that Mr Murren and Mr Lee were investing alongside a number of other reputable investors from the United States.

(8) At various times, Mr Schaeffer represented that, consistent with the representations that Mr Murren and Mr Lee were investing in land and winery assets, the value of the investments would appreciate (and had appreciated) with the increase in the value of the vineyard assets and the appreciation in the value of the United States dollar against the New Zealand dollar.

[100] Mr Schaeffer does not deny making most of those statements, rather he contends that those statements did not represent what Mr Murren and Mr Lee claim they did. In particular, Mr Schaeffer claims that his language was consistent with him owning shares in WEHL and Mahana for the benefit of the Kiwi Ventures partners.

Deceit

[101] There are four elements to the tort of deceit:[9]

(1) a false representation by the defendant as to a past or existing fact;

(2) that is made by a defendant who knew the representation to be untrue or did not believe in its truth, or was reckless as to its truth;

(3) where the defendant intended that the plaintiff should act on the representation; and

(4) where the plaintiff relies on the representation and suffers loss as a consequence.

[102] The law of deceit is distinguished from negligent misstatement by the requirements of knowledge and intention on behalf of the defendant. In *Akerhielm v de Mare*, Lord Jenkins explained in the following way the application of those elements in a case where the meaning of the representations is contested by the defendant:[10]

> The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it, albeit erroneously, when it was made.

[103] Mr Murren and Mr Lee say that all of Mr Schaeffer's representations upon which they relied were false statements of fact that Mr Schaeffer knew to be untrue, or had no belief in their truth, or was reckless as to their truth. Mr Murren and Mr Lee

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9 *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [46]–[55].
10 *Akerhielm v de Mare* [1959] AC 789 (PC) at 805.

also plead that Mr Schaeffer intended that they should act on his representations, that they did so and as a consequence suffered loss. Mr Schaeffer denies all elements of the tort of deceit.

Fraudulent misrepresentation

[104] A claim for fraudulent misrepresentation is a form of deceit. The elements of the tort of fraudulent misrepresentation replicate those of the tort of deceit, except that the relevant representation is an inducement to enter into a contract. Mr Horne candidly acknowledged that this cause of action was pleaded out of an abundance of caution in case I should find that the representations made by Mr Schaeffer induced Mr Murren and Mr Lee to enter into the 2006 Agreement.[11]

Fair Trading Act 1986

[105] Mr Murren and Mr Lee plead that Mr Schaeffer's representations amount to misleading and deceptive conduct in trade contrary to s 9 of the Fair Trading Act. They seek a declaration under s 9 of the Fair Trading Act and relief under s 43, being an award of damages equal to the value of their investments, with interest.

[106] The Supreme Court has provided the following two-step guideline in relation to claims under ss 9 and 43 of the Fair Trading Act:[12]

> (1) It must first be determined whether there has been a breach of s 9. This requires the Court to determine whether, objectively, the conduct was misleading.
>
> (2) Once a breach is established, the Court moves to s 43 to determine whether the plaintiff has suffered loss or damage. This requires an assessment of whether the plaintiff was misled or deceived by the conduct.

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[11] Again, Mr Murren and Mr Lee were only able to plead this cause of action, which was effectively replaced by the Contractual Remedies Act 1979, because that Act expressly does not apply to contracts governed by foreign law.

[12] *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

[107] The measure of compensation is assessed on the basis of loss suffered in reliance upon the representation. An award of damages is intended to restore a plaintiff to the position they would have been in if the misleading statements had not occurred.[13]

Nevada Deceptive Trade Practices Act

[108] Mr Murren and Mr Lee alleged that Mr Schaeffer committed consumer fraud contrary to the Nevada Deceptive Trade Practices Act, which is framed in similar terms to s 9 of the Fair Trading Act.

[109] As the Nevada Deceptive Trade Practices Act involves the application of foreign law, the plaintiffs called Judge Pro as a witness, a retired Federal Court Judge from Nevada, who explained the relevant provisions of the Nevada legislation. Judge Pro explained the key principles that govern the Nevada law in the following way:

(1) The Nevada Deceptive Trade Practices Act is a consumer protection statute designed to address allegations of false or misleading misrepresentations or deceptive trade practices.

(2) The Nevada statute creates a private right of action for the recovery of monetary damages, equitable relief, costs and attorney's fees for "any person who is a victim of consumer fraud", which is defined to include deceptive trade practice.

(3) "Deceptive trade practice" is defined in NRS § 598.092 as encompassing the following:

> A person engages in a "deceptive trade practice" when in the course of his or her business or occupation he or she:
>
> …
>
> 5. Advertises or offers an opportunity for investment and:

13 *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA).

…

(c) Makes any untrue statement of a material fact or omits to state a material fact which is necessary to make another statement, considering the circumstances under which it is made, not misleading;

…

(4) Actions brought pursuant to the Nevada statute are tort claims.

(5) A victim of consumer fraud under the Nevada statute need not be a "consumer" of a defendant's goods or services.

(6) As a minimum, a plaintiff must prove that an act of consumer fraud has been perpetrated by the defendant, which has caused damage to the plaintiff.

(7) To recover for a claim of deceptive trade practices under the Nevada statute, a plaintiff must also prove he or she reasonably relied on an affirmative representation by the defendant that was material to the transaction in question.

(8) A fair measure of damages under the Nevada Act is the amount of money invested by the plaintiff, together with pre-judgment interest.

Affirmative defences

Limitation defences

[110] Prior to the hearing, two affirmative defences were pleaded on behalf of Mr Schaeffer. First, that all five of the causes of action are barred by limitation provisions. In particular, it is pleaded that:

(1) The tort claims needed to be brought within six years from the accrual of the cause of action.[14] It was also pleaded that the provisions of s 28

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[14] Limitation Act 1950, s 4(1)(a). The 1950 Act applies to this proceeding by virtue of s 59 of the Limitation Act 2010.

of the Limitation Act 1950 (the Limitation Act), which suspend the limitation period in certain circumstances, are not engaged.

(2) The cause of action based upon the Fair Trading Act needed to be commenced within three years from the date the loss or damage was discovered or ought reasonably to have been discovered.[15]

(3) The claim under the Nevada Deceptive Trade Practices Act needed to be commenced within four years from the date on which the facts constituting the deceptive trade practice should have been discovered with due diligence.[16]

[111] It was pleaded that none of the causes of action were brought within the time periods prescribed by law and that none of the causes of action can therefore succeed.

Entire agreement clause

[112] Second, Mr Schaeffer pleads, as an affirmative defence to all five causes of action, that any claims based on alleged pre-contractual representations prior to the 2002 or 2006 Agreements are barred by the entire agreement clauses in those contracts, which I have set out at [41].

Estoppel

[113] On the first morning of the trial, Mr Shaw made an application to file a further amended statement of defence introducing the affirmative defence of estoppel. This defence alleged that Mr Schaeffer relied on Mr Murren's and Mr Lee's execution of the 2002 and 2006 Agreements and that they are therefore estopped from suing in relation to any of the causes of action that are pleaded.

[114] For reasons which I will explain when analysing each of the causes of action, I am granting the application to file the further amended statement of defence. It will

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[15] Fair Trading Act 1986, s 43(5) (prior to 18 December 2013) and s 43A (from 18 December 2013)
[16] NRS § 11.190(2)(d).

become apparent, however, that the defence of estoppel is of no assistance to Mr Schaeffer in this case.

PART III

ANALYSIS

Negligent misstatement

Duty of care

[115] Although there was little reference to this issue during the hearing, it is appropriate to record why Mr Schaeffer owed Mr Murren and Mr Lee a duty of care. It is axiomatic that a partnership is based on the mutual trust and confidence of each partner in the integrity of every other partner. Partners owe each other obligations to act with fairness and good faith.[17] Those fiduciary obligations may even arise between parties who have already embarked upon the partnership business but have yet to finalise the terms of their partnership agreement,[18] and between parties who are negotiating entry into a partnership.[19]

[116] This means that, at all relevant times, Mr Schaeffer was under an obligation to act with fairness and good faith towards Mr Murren and Mr Lee. At the time of entering into the 2002 Agreement, Mr Schaeffer was negotiating entry into a partnership. At the time Mr Schaeffer sent the first four capital call letters, even though the 2002 Agreement was not signed by all the intended parties, he had embarked upon the partnership business. It is also likely that, even though a limited partnership never came into existence because it was not registered with the Secretary of State of Nevada, an ordinary partnership had been formed. Whether or not a partnership came into existence is a question of mixed fact and law.[20] The essential requirement is that there must be an agreement between the partners to engage in a business with a view to profit.[21] All the parties in this case proceeded on the basis that there was such an

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17 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [74].
18 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, (1985) 60 ALR 741.
19 *Simms v Conlon* [2007] EWCA Civ 1749, [2007] 3 All ER 802.
20 *Gilmer and Maguire v Dwyer* (1908) 27 NZLR 744 (CA); and *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462 (CA).
21 *Green v Beesley* (1835) 2 Bing NC 108, 132 ER 43. See also Partnership Act 1908, s 4(1).

agreement. Accordingly, there can be no doubt that Mr Schaeffer owed duties of good faith to Mr Murren and Mr Lee in the period leading up to the 2006 Agreement.

[117] In the circumstances of such a special relationship, the law presumes an assumption of responsibility, which gives rise to a duty of care under the *Hedley Byrne* principle.[22] For the reasons I will outline in the following section, I am also satisfied that this duty of care continued into the period governed by the 2006 Agreement.

Relevance of Constellation as the General Partner

[118] It is convenient at this juncture to briefly consider an argument advanced on behalf of Mr Schaeffer that Constellation, and not Mr Schaeffer personally, was responsible for any representations in the 2006 Agreement, and any subsequent representations.

[119] Constellation is a limited liability company of which Mr Schaeffer is a director. While a director will not automatically be liable for the torts of their company by virtue of being a director, their position equally does not shield them from personal liability for torts they themselves commit.[23] This issue was discussed by the Court of Appeal in *Trevor Ivory Ltd v Anderson*, where, for slightly different reasons, the various members of that Court refused to hold a director of a one-man company liable for negligent misstatements concerning horticultural herbicides that he had made on behalf of his company.[24]

[120] Cooke P's judgment, with which Hardie Boys J essentially agreed, was heavily influenced by the company law concept of attribution identified by the House of Lords in *Tesco Supermarkets Ltd v Nattrass*, that a person may be so identified with a company as to be its "directing mind and will" as opposed to a mere agent.[25] Cooke P concluded that "[i]f a person is identified with a company vis-à-vis third parties, it is reasonable that prima facie the company should be the only party liable."[26]

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22 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).
23 For a helpful summary of the position, see Daniel Kalderimis and Chris Noonan "Company Directors: Risk of Civil Liability to Third Parties" (paper presented to ADLSI CPD Seminar, Auckland, March 2016) at [38]–[72].
24 *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).
25 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 152 (HL).
26 *Trevor Ivory Ltd v Anderson*, above n 24, at 520.

[121] McGechan J, for different reasons, ultimately arrived at the same conclusion. McGechan J's reasoning is captured in the following passage:[27]

> When it comes to assumption of responsibility, I do not accept a company director of a one-man company is to be regarded as automatically accepting tort responsibility for advice given on behalf of the company by himself. There may be situations where such liability tends to arise, particularly perhaps where the director as a person is highly prominent and his company is barely visible, resulting in a focus predominantly on the man himself. All will depend upon the facts of individual cases, and the degree of implicit assumption of personal responsibility, with no doubt some policy elements also applying. I do not think this is such a case, although it approaches the line. While the respondents looked to his personal expertise, Mr Ivory made it clear that he traded through a company, which was to be the legal contracting party entitled to charge. That structure was negotiated and known … There was no representation, express or implicit, of personal involvement, as distinct from routine involvement for and through his company. There was no singular feature which would justify belief that Mr Ivory was accepting a personal commitment, as opposed to the known company obligation. If anything, the intrinsic high risk nature of spray advice, and his deliberate adoption of an intervening company structure would have pointed to the contrary likelihood. On the present facts, I see no policy justification for imposing an additional duty of care. In this particular one-man company situation, and against the established trading understandings, I would not view such as just and reasonable.

[122] Subsequent cases and numerous commentators have found difficulty with the reasoning in *Trevor Ivory Ltd v Anderson*, in particular the reliance on the concept of attribution from *Tesco Supermarkets Ltd v Nattrass*. That concept, which has since been overtaken by "rules of attribution",[28] was focused on the situations in which a company could be held liable for the actions of its agents. It was not concerned with the reverse question of when the agent will be liable for that same conduct. In two subsequent decisions, the House of Lords has distanced itself from the reasoning in *Trevor Ivory Ltd v Anderson* based on the "directing mind and will" principle.

[123] In *Williams v Natural Life Health Foods Ltd*, Lord Steyn treated McGechan J's judgment as the ratio of *Trevor Ivory Ltd v Anderson*, and considered whether on the facts of the case before him the director of a one-man company could be held to have personally assumed responsibility to the third party.[29] This approach treated the

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27 *Trevor Ivory Ltd v Anderson*, above n 24, at 532.

28 See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1992] 3 NZLR 7 (PC); *Stone & Rolls Ltd (in liq) v Moore Stephens* [2009] UKHL 39, [2009] AC 1391; and *Bilta (UK) Ltd (in liq) v Nazir* [2015] UKSC 23, [2016] AC 1.

29 *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577 (HL).

conclusion in *Trevor Ivory Ltd v Anderson* as a factual finding that Mr Ivory had not personally assumed responsibility, rather than as a legal rule that only the company could be liable in such a situation.

[124] In *Standard Chartered Bank v Pakistan National Shipping Corporation*, the House of Lords confirmed that *Williams v Natural Life Health Foods Ltd* (and, by extension, *Trevor Ivory Ltd v Anderson*) had nothing to do with company law, but rather was an application of the law of principal and agent to the requirement for an assumption of responsibility under the *Hedley Byrne* principle.[30] Lord Hoffmann remarked that it would have made no difference if the principal was a natural person rather than a company.

[125] This line of authority has subsequently received approval by a minority of the Court of Appeal in *Body Corporate 202254 v Taylor* in the context of a strike-out decision.[31] William Young P termed the approach taken by the House of Lords as the "elements of the tort" approach. This approach essentially recognises that an agent may assume responsibility, for the purposes of the tort of negligence, on behalf of their principal without also personally assuming responsibility. An analogy can be drawn with agents contracting on behalf of their principal but not themselves. This appears to be very similar to what McGechan J had in mind in *Trevor Ivory Ltd v Anderson* and is the approach I shall follow.

[126] It is worth emphasising a point made by William Young P in *Body Corporate 202254 v Taylor*, mirroring similar comments by McGechan J in *Trevor Ivory Ltd v Anderson*:[32]

> … to preserve the existing framework of the law of contracts and the idea that a corporation has a legal identity which is separate from those of the individuals involved in it, considerable caution is required before concluding that an employee has assumed personal responsibility.

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30 *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] UKHL 43, [2003] 1 AC 959 at [23].

31 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [23]–[44] per William Young P and Arnold J, with Chambers J explicitly refusing to reach a conclusion on the issue and with Glazebrook and Ellen France JJ making no comment on the issue.

32 At [33].

[127] On the facts of the present case, I have no hesitation in concluding that Mr Schaeffer personally assumed responsibility to Mr Murren and Mr Lee when he made his representations to them in the 2006 Agreement by signing that contract on behalf of Constellation. There are four reasons for this conclusion:

(1) Mr Schaeffer was previously named as the General Partner under the 2002 Agreement, and accordingly owed a duty of good faith to the Limited Partners in his personal capacity as a result of that agreement.

(2) Mr Schaeffer had prior to the 2006 Agreement made numerous representations in capital call letters in his personal capacity, and had intimately been involved in the partnership, also in his personal capacity.

(3) Mr Schaeffer does not appear to have distinguished between himself and Constellation in his dealings with Mr Murren and Mr Lee. In the letters he sent on 22 May 2007 and 22 January 2008, Mr Schaeffer signed off in his own name followed by "Managing Partner". No mention was made of Constellation in either letter. Mr Schaeffer even continued to refer to himself as the General Partner under the 2006 Agreement throughout this litigation, and advanced arguments on that basis.

(4) In cross-examination, Mr Strawbridge said that he treated the contributions to WEHL from Constellation and Mr Schaeffer as being from the same entity.

What representations were made by Mr Schaeffer?

[128] When analysing the first cause of action it is important to ascertain what representations were made by Mr Schaeffer. Mr Murren and Mr Lee have pleaded multiple misstatements. I have set out at [99] Mr Horne's summary of those alleged representations. Rather than examine each of the representations that have been pleaded in the amended statement of claim, it is more profitable to focus on the key representations that form the basis of the first cause of action.

[129] As already mentioned, Mr Schaeffer acknowledges making many of the statements attributed to him by Mr Murren and Mr Lee. Aside from his affirmative defences, Mr Schaeffer's case primarily hinges upon the meaning to be attributed to the words he used.

[130] Three principal representations were contained in the 2002 Agreement, namely:

(1) The purpose of the Kiwi Ventures partnership was to "invest in, own, develop, and commercially exploit interests in the Phillip [Wollaston] Estates vineyards and winery". Of crucial importance to Mr Murren and Mr Lee was that Kiwi Ventures was to "own" interests in the vineyard.

(2) The other named Limited Partners of Kiwi Ventures were to also be investors with Mr Murren, Mr Lee and Mr Schaeffer.

(3) Certain key decisions, including the selling of all, or substantially all, of the assets of the partnership and raising additional capital, required approval of a simple majority of the Kiwi Ventures partners.

[131] Mr Schaeffer's various capital call letters represented that Mr Murren and Mr Lee had some kind of ownership interest in the vineyard. Mr Schaeffer's letters were replete with collective possessive pronouns.

[132] Mr Schaeffer acknowledged using the possessive pronouns "our" and "we" in his letters calling for capital, and his reporting letter of 20 July 2005. He said, however, that this language was "colloquial and imprecise" and that it was consistent with him owning shares in WEHL and Mahana on behalf of the Kiwi Ventures partners. Mr Schaeffer similarly contended that the word "own" used in the purposes clause of the 2002 Agreement was imprecise, as it did not distinguish between legal and beneficial ownership.

[133] I am satisfied that a reasonable person reading the purposes clause in the 2002 Agreement would have understood it to be referring to legal ownership. This is because the investors in Kiwi Ventures, including Mr Schaeffer, are hardly likely to have intended that their investment be exposed to Mr Schaeffer's personal liabilities. Beneficial ownership of the kind Mr Schaeffer sought to rely upon is far from ordinary business practice, and so if that really was the parties' intentions, it was incumbent upon them to clearly stipulate it in the contract. The fact this was not done weighs heavily against interpreting the word "own" as encompassing an undocumented trust.

[134] While I accept that the use of collective pronouns in the various letters that Mr Schaeffer sent to Mr Murren and Mr Lee are not decisive, they do provide some support to the conclusion I have reached.

[135] The 2006 Agreement contained two principal representations, namely:

(1) Kiwi Ventures was to "invest in, own, develop and commercially exploit interests in a New Zealand entity which, in turn, owns 80% of the Phillip Woollaston Estate vineyards and winery".

(2) A super majority of 80 per cent of the partnership (based upon partners' contributions) was required to approve certain transactions, including:

- selling all or substantially all of the assets of the partnership;
- raising additional capital; and
- engaging in related party transactions.

[136] The conclusion I have reached at [133] equally applies to the word "own" in the 2006 Agreement. However, a further issue concerns the meaning of the part of the purposes clause of the 2006 Agreement that said Kiwi Ventures would own interests "in a New Zealand entity, which in turn, would own 80% of the Phillip Woollaston Estates vineyards and winery".

[137] In his evidence, Mr Schaeffer said that the "entity" referred to in the purposes clause of the 2006 Agreement had not been decided upon. It was also suggested on behalf of Mr Schaeffer that he, Mr Schaeffer, could legitimately be the entity that owned 80 per cent of the vineyard through his retention of 80 per cent of the shares in WEHL and Mahana. This argument was advanced in part, on the basis of cl 3.1 of the 2006 Agreement, which replicated the same provision in the 2002 Agreement. As explained at [38], that provision conferred upon the General Partner very wide powers to structure the affairs of the partnership. It was claimed that cl 3.1(a) and (g) — which gave the General Partner "full and exclusive right and authority to manage and control the business of the partnership", to "acquire, purchase, … own and sell any asset that the General Partner determines is necessary" and to "[p]erform all other acts the General Partner deems necessary", authorised Mr Schaeffer to retain in his own name the shares he initially owned in WEHL and Mahana.

[138] The arguments advanced to justify Mr Schaeffer's retention of 80 per cent of the shares in WEHL and Mahana do not withstand scrutiny. The reasons for this conclusion can be summarised in the following ways.

[139] First, at the time the 2006 Agreement was executed, Mr Schaeffer owned 80 per cent of the shares in WEHL and Mahana. It was clearly intended at the time that Kiwi Ventures would acquire Mr Schaeffer's interests in WEHL and Mahana and that the proportion of each partner's ownership of the shares in those companies would mirror their proportion of the capital contributions they had made to the Kiwi Ventures partnership.

[140] Second, it is implausible to suggest that Mr Schaeffer personally was to be the "entity" referred to in the purposes clause of the 2006 Agreement. There are two reasons why this is so. First, this theory advanced on behalf of Mr Schaeffer is inconsistent with the plain language of the purposes clause, which refers to Kiwi Ventures owning the entity that would have an 80 per cent interest in the vineyard. It is inconceivable that those who executed the 2006 Agreement intended that they would "own" part of Mr Schaeffer. Second, for the reasons I have already explained at [133], the investors in Kiwi Ventures are hardly likely to have intended that their investment be exposed to the personal liabilities of Mr Schaeffer.

[141] Mr Schaeffer's arguments that the General Partner's powers to manage the partnership justified him retaining the ownership of the shares in WEHL and Mahana is also fundamentally flawed. The reasons for this are:

(1) The management powers contained in cl 3.1 of the 2006 Agreement are "[s]ubject to the limitations stated in [that] Agreement". In cross-examination, Mr Schaeffer properly accepted that the purposes clause in the 2006 Agreement would be a "limitation" for the purposes of cl 3.1.

(2) The right to manage provisions in cl 3.1 of the 2006 Agreement relate to "the business of the Partnership" rather than the ownership structure of the partnership. The power to perform acts that are necessary or appropriate to the partnership business is limited to managing its business, not determining how the ownership of those assets will be structured.

(3) The management powers must be exercised in the best interests of the partnership.[33] Allowing the General Partner to retain ownership of 80 per cent of the shares in WEHL and Mahana would not be in the best interests of the partnership.

[142] For these reasons, I am satisfied that in the 2006 Agreement Mr Schaeffer represented that Mr Murren would, through Kiwi Ventures, acquire 10 per cent of Mr Schaeffer's 80 per cent interest in both WEHL and Mahana; and that Mr Lee would, through Kiwi Ventures, acquire five per cent of Mr Schaeffer's 80 per cent interest in those companies.

Were the representations false or misleading?

[143] Mr Schaeffer accepts that he held, in his own name, 80 per cent of the shares in WEHL and Mahana until 14 December 2015. Given the conclusions I have reached about the meaning of Mr Schaeffer's representations, it is obvious that those

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33 *Chirnside v Fay,* above n 17, at [74].

representations were plainly not correct. Kiwi Ventures never owned any shares in the entity that owned the vineyard until 14 December 2015.

[144] Nothing in the partnership agreement authorised Mr Schaeffer to deal with the Kiwi Ventures partnership assets in the manner he did. Mr Schaeffer knew he was holding Mr Murren's and Mr Lee's investments but he failed to ensure the investments were applied in accordance with the agreement. Nor did he inform Mr Murren and Mr Lee of the true position.

[145] Mr Schaeffer continued to represent to Mr Murren and Mr Lee that they were all co-owners of Kiwi Ventures and that they had the same type of interest in the vineyard, albeit different percentages of the ownership.

[146] The evidence from Mr Strawbridge was that Mr Schaeffer needed to issue capital calls to Kiwi Ventures Limited Partners to fund further acquisitions and operating expenses, whereas the accounting evidence showed that the monies obtained from Mr Murren, Mr Lee and the other Limited Partners were used to refund Mr Schaeffer for the money he had already spent at the vineyard.

[147] It was only on 8 July 2013 that Mr Schaeffer acknowledged to Mr Murren and Mr Lee that Kiwi Ventures owned no shares in either WEHL or Mahana. It is striking that Mr Murren and Mr Lee only learned of the true position after they put pressure on Mr Schaeffer and Renee Schaeffer for information about their investments.

[148] For completeness, I record that the representations were made negligently by Mr Schaeffer because they were not those that a reasonable person in his position would have made knowing what he knew at the relevant time.

Were the shares in Mr Schaeffer's name held on trust?

[149] I also record that, even if Mr Schaeffer's representations had been consistent with him holding all the relevant assets in his name in an undocumented trust for the investors in Kiwi Ventures, I would not have found in favour of Mr Schaeffer for the simple reason that he has been unable to demonstrate the existence of such a trust.

[150] Mr Schaeffer's "trust" argument has changed considerably during the course of this litigation. His statement of defence was that he held a proportion of his shares in the two companies for the Kiwi Ventures investors. Mr Schaeffer then thought he had remedied his default by transferring some of his shares in WEHL and Mahana to Kiwi Ventures. More recently, Mr Schaeffer has altered his approach and now says that he has always held all of the shares in his name on behalf of the Kiwi Ventures partnership.

[151] Mr Schaeffer also says that approximately USD 17,000,000 held in his shareholder current account with WEHL is attributable, in part, to the Kiwi Ventures investors who are to be treated as being in the same position as if they had an equity investment. A shareholder loan is, however, quite different from owning equity and, in any event, Mr Schaeffer never told Mr Murren and Mr Lee that their investments would be treated as a shareholder loan. It is also notable that it was only when Mr Schaeffer was providing evidence to the Court of Appeal in August this year, in relation to an interlocutory phase of this litigation, that he claimed that the shareholder loan was held by him on behalf of Kiwi Ventures investors.

[152] Mr Strawbridge's analysis did not ultimately assist Mr Schaeffer, because his reconstruction of the WEHL accounts was not supported by the contemporaneous evidence of the way the accounts for WEHL and Mahana were actually constructed. Mr Strawbridge's reconstruction, which relied substantially on Mr Schaeffer's explanation of what had happened, demonstrated that the investments made by Mr Murren and Mr Lee were not actually used to acquire an interest in WEHL or Mahana until 14 December 2015.

[153] Critically, Mr Strawbridge acknowledged in cross-examination that the money flowing into WEHL, or recorded as being expended on its behalf, was from Mr Schaeffer, his family trust or Constellation. None of Mr Murren's or Mr Lee's investments, or the investments of the other Kiwi Ventures Limited Partners, were shown to have formed part of the advances that had been recorded in Mr Schaeffer's shareholder current account.

[154] The interest that Mr Schaeffer now says Mr Murren and Mr Lee have in his shareholder loan was never recorded, and has only been asserted in recent times. Mr Strawbridge's evidence is at best a reconstruction of events as they would have been if Mr Schaeffer had been treating the Limited Partners' investments in the way he now claims he had been.

[155] Mr Schaeffer has not acted in the way a trustee should have acted if he were genuinely holding Mr Murren's and Mr Lee's monies in an undocumented trust. He did not account for the funds paid to him. He mingled his own financial interests with the monies paid by the Limited Partners and he participated in a number of transactions that were clearly self-dealing. This weighs heavily against a finding that there was an undocumented trust of the sort now belatedly claimed by Mr Schaeffer.

[156] It also weighs against Mr Schaeffer's undocumented trust argument that he did not declare such an arrangement to the OIO when WEHL sought approval for its land purchases in 2008 and 2009.

[157] Finally, Mr Schaeffer referred to the K-1 tax forms signed each year by Mr Murren and Mr Lee, which referred to them as being "constructive" owners of WEHL. I am satisfied that the reference to "constructive" ownership in the tax forms merely referred to the fact that Mr Murren and Mr Lee were only to have indirect ownership in the vineyard, as Limited Partners of a partnership that in turn owned 80 per cent of the entity that owned the vineyard. In light of the surrounding context, the reference to "constructive" ownership in the K-1 tax forms cannot properly be construed as referring to an undocumented trust, and does not support Mr Schaeffer's argument for the existence of such a trust.

Were the representations reasonably relied upon?

[158] Mr Murren and Mr Lee said they relied upon Mr Schaeffer's representation that they would own a share in the vineyard, or an entity that owned 80 per cent of the vineyard, when they made their investments pursuant to the 2002 Agreement and the 2006 Agreement.

[159] They also said that they relied upon the capital call letters when they made their respective contributions to Kiwi Ventures, believing their investments would result in their ownership of either part of the vineyard (pursuant to the 2002 Agreement) or part of the entity that owned 80 per cent of the vineyard (pursuant to the 2006 Agreement).

[160] Mr Schaeffer acknowledged in cross-examination that he knew Mr Murren and Mr Lee would rely on his representations in the 2002 Agreement and the 2006 Agreement and on his capital call letters when making their investments. He contended, however, that Mr Murren and Mr Lee are experienced businessmen who were capable of looking after their own interests. Mr Schaeffer referred to Mr Murren and Mr Lee in his evidence as "captains of industry" and said that they should have made themselves aware of how their investments were structured.

[161] In particular, Mr Schaeffer places weight on the contents of the 2006 binder to advance the proposition that Mr Murren and Mr Lee should have appreciated that Mr Schaeffer held the shares in WEHL and Mahana rather than Kiwi Ventures.

[162] The difficulty with this aspect of Mr Schaeffer's case is that the 2006 binder contained financial statements for WEHL for the year ending 31 December 2004. Those financial statements showed that Mr Schaeffer owned 80 per cent of the shares in WEHL. While that information may have alerted Mr Murren and Mr Lee to the fact that Kiwi Ventures did not own shares in WEHL as at the end of 2004, the 2006 Agreement clearly represented that Kiwi Ventures would own 80 per cent of WEHL and Mahana. Thus, irrespective of what conclusions could reasonably be drawn from the 2004 financial statements for WEHL, those conclusions would not mean that Mr Murren and Mr Lee acted unreasonably when they relied upon the 2006 Agreement to conclude that Kiwi Ventures was to own an entity that in turn owned 80 per cent of the vineyard.

[163] Mr Schaeffer also placed reliance on the references to "constructive" ownership in the K-1 tax forms, which he suggested should have alerted Mr Murren and Mr Lee to the existence of his undocumented trust. For the reasons I have already

provided at [157], those forms would not have alerted Mr Murren and Mr Lee to the fact that Mr Schaeffer personally held the shares in WEHL and Mahana.

[164] Thus, I am drawn to the conclusion that Mr Murren and Mr Lee reasonably relied upon the representations that their investments would lead to them having ownership of part of the vineyard or ownership of an entity that owned 80 per cent of the vineyard.

[165] There is no room to doubt the evidence from Mr Murren and Mr Lee that they would not have invested in Kiwi Ventures had they known that Mr Schaeffer continued to hold in his own name 80 per cent of the shares in WEHL and Mahana after the execution of the 2006 Agreement. As experienced investors, they would not have wished to have their investments mingled with Mr Schaeffer's personal assets and liabilities. Although the three men were friends, neither Mr Murren or Mr Lee would have invested in Kiwi Ventures unless they were sure they were acquiring a tangible interest in the vineyard, in particular, ownership of part of an entity that owned 80 per cent of the vineyard.

[166] Any suggestion from Mr Schaeffer that Mr Murren and Mr Lee were content to leave everything in Mr Schaeffer's control because of their friendship ignores the fact that they were receiving periodic updates from Mr Schaeffer about the status of their investment. There is no basis to conclude that Mr Murren and Mr Lee treated their investments in Kiwi Ventures as anything other than a commercial endeavour, or that they did not expect measures to be put in place to provide some level of protection for their investments. Mr Schaeffer emphasised in his evidence what he called the "lifestyle" nature of the investment, and said he believed that Mr Murren and Mr Lee were more concerned with "opening the way to living in New Zealand". Mr Lee emphatically rejected that he ever wanted to become a New Zealand resident. He said that he made his investment "purely for financial reasons". Mr Murren similarly said that he never had any desire to relocate to New Zealand, as his family and career are all in the United States.

Loss

[167] Mr Murren and Mr Lee claim as their loss the amount that they have invested in Kiwi Ventures and interest on that sum. Importantly, their claim is not for breach of contract. Accordingly, their claim for damages is to be assessed on the basis that the Court awards as compensation the sum of money required to put Mr Murren and Mr Lee in the position they would have been in if they had not been misled by Mr Schaeffer's misrepresentations. In other words, their claim in tort requires the Court to place them in the position they would have been in if the tort had not been committed.[34] The relevant law is summarised in the following way:[35]

> It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect to come in, but it is an action in tort – it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss.

[168] The shares that Mr Schaeffer transferred to Kiwi Ventures in 2015 cannot impact on the quantification of damages because, at the time those shares were transferred, they had no value.

[169] Thus, subject to consideration of Mr Schaeffer's affirmative defences, I am satisfied that the first cause of action succeeds and that Mr Murren and Mr Lee are entitled to the damages they have claimed plus interest. That is because, given their evidence that they would not have invested in Kiwi Ventures had they known the true nature of their investments, the position they would have been in would have involved them retaining the full amount of their capital contributions.

Deceit

[170] Mr Murren and Mr Lee allege that Mr Schaeffer made the following misrepresentations as to past or existing facts:[36]

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[34] *Gardiner v Metcalf* [1994] 2 NZLR 8 (CA) at 12 per Hardie Boys J.

[35] *McConnel v Wright* [1903] 1 Ch 546 (CA) at 554–555, cited with approval in *Amaltal Corporation Ltd v Maruha Corporation*, above n 9, at [57].

[36] *Amaltal Corporation Ltd v Maruha Corporation*, above n 9, at [47].

(1) that he intended to transfer his interest in the vineyard to Kiwi Ventures; and thereafter (arising from the 2002 and 2006 Agreements)

(2) that the interest in the vineyard was owned by Kiwi Ventures and not Mr Schaeffer (arising from the various letters and oral communications).

[171] It is also alleged that when Mr Schaeffer made those representations he knew they were false or was reckless as to whether or not they were false because, respectively:

(1) he did not intend to transfer any of his interests in the vineyard to Kiwi Ventures; and

(2) he knew he had not transferred any of his interests in the vineyard to Kiwi Ventures.

[172] The evidence clearly establishes the factual representations set out at [170]. It is not necessary to repeat the reasons for this conclusion, which have been traversed when considering the negligent misstatement cause of action. The first of those, which refers to Mr Schaeffer's intention, arises from the promises made under the 2002 and 2006 Agreements. A promise is not a representation as to a past or existing fact as it refers to something to be done in the future. Nevertheless, a promise can be accompanied by a representation of an intention to fulfil it, and an intention is an existing fact.[37]

[173] Problematic for Mr Murren and Mr Lee is their allegation that at the time the 2002 and 2006 Agreements were entered into, Mr Schaeffer had no intention to transfer any of his interests in the vineyard to Kiwi Ventures.

[174] In my assessment, the more likely scenario that unfolded is that when the 2006 Agreement was executed, Mr Schaeffer probably did intend to transfer his interests in WEHL and Mahana to Kiwi Ventures. He was, however, very confident that the

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[37] *Buxton v The Birches Time Share Resort Ltd* [1991] 2 NZLR 641 (CA) at 646.

vineyard would be a success and that Mr Murren and Mr Lee would, in due course, be very happy with their investments. Mr Schaeffer probably did not think it was all that important or necessary to transfer his interest in WEHL and Mahana to Kiwi Ventures.

[175] As time went on, however, it should have been abundantly clear to Mr Schaeffer that his failure to comply with the 2006 Agreement placed Mr Murren's and Mr Lee's investments at risk. Rather than inform them of the truth about their exposure, Mr Schaeffer deflected their inquiries and misled them into believing there was no difficulty with their investments. That, however, is not sufficient to satisfy the requirement of the law of deceit in relation to the representation set out at [170](1).

[176] As I am not satisfied that, at the time he made his key misrepresentations, Mr Schaeffer had no intention of transferring his interests in the vineyard to Kiwi Ventures, the deceit cause of action based upon the representations set out at [170](1), cannot succeed.

[177] It is clear that Mr Schaeffer knew he had not transferred any of his interests in the vineyard to Kiwi Ventures at the time he made his factual representations. There was no evidence Mr Schaeffer ever thought he had transferred any of his interests in the vineyard to Kiwi Ventures. On the contrary, his actions throughout were entirely consistent with his continued ownership of 80 per cent of the shares of WEHL and Mahana up until 2015.

[178] Mr Murren and Mr Lee must, in relation to the allegation of deceit set out at [170](2), rely solely on the various representations made by Mr Schaeffer in which he referred to them having an interest in "*our*" vineyard and similar statements. I have concluded, by the narrowest of margins, that those representations were not sufficiently decisive by themselves so as to have the meaning contended by Mr Murren and Mr Lee.

[179] Even if that meaning was conveyed, there is room for doubt that, in line with *Akerhielm v de Mare*, Mr Schaeffer appreciated at the time of making those representations that they would be understood in a similar way to the conclusions I have reached at [133] and [140] in relation to the meaning of the statements in the

2002 and 2006 Agreements.[38] The deceit cause of action based upon the representations set out at [170](2) cannot, therefore, succeed.

Fraudulent misrepresentation

[180] The same analysis applies in relation to the allegation that Mr Schaeffer's factual misrepresentation constituted the tort of fraudulent misrepresentation. For completeness, it is recorded that Mr Murren and Mr Lee have not discharged the high threshold of establishing this cause of action.

Fair Trading Act 1986

Jurisdiction

[181] There is a jurisdictional issue concerning the application of the Fair Trading Act that arises because most of Mr Schaeffer's representations were made to Mr Murren and Mr Lee when they were residing in the United States.

[182] Section 3(1) of the Fair Trading Act provides:

> **3 Application of Act to conduct outside New Zealand**
>
> (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.
>
> …

[183] The phrase "carrying on business" is not defined in the Fair Trading Act. However, "business" is defined in the following way in s 2:

> …
>
> **business** means any undertaking—
>
> (a) that is carried on whether for gain or reward or not; or
>
> (b) in the course of which—
>
> (i) goods or services are acquired or supplied; or

[38] *Akerhielm v de Mare*, above n 10.

(ii) any interest in land is acquired or disposed of—

whether free of charge or not

[184] Mr Schaeffer was carrying on business in New Zealand from 2001 until when WEHL and Mahana were placed in receivership. He acquired shares in WEHL and Mahana and through them he acquired land for the vineyard, acquired associated assets and grew grapes, produced wine and operated a hospitality/events business and associated activities. Accordingly, the representations Mr Scheaffer made in relation to that business will fall within the ambit of s 3 of the Fair Trading Act if they relate to the supply of goods or services or the granting of interests in land in New Zealand.

[185] While the phrase "granting of interests in land" is not defined in the Fair Trading Act, the words "interests in land" should be interpreted consistently with the purpose of the Fair Trading Act, namely to protect the interest of consumers.[39] In my assessment, Mr Schaeffer's conduct "relate[d] to" his "granting of interests in land" to Mr Murren and Mr Lee when he accepted their investments to acquire ownership of part of the vineyard (pursuant to the 2002 Agreement) or to acquire ownership of an entity that owned 80 per cent of the vineyard (pursuant to the 2006 Agreement).[40]

[186] Even if Mr Schaeffer's misrepresentations were not related to granting an interest in land, his representations related to producing wine and providing hospitality services and, therefore, related to "supplying goods or services".

[187] Thus, there is no jurisdictional impediment to the Fair Trading Act applying in this case.

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[39] Fair Trading Act 1986, s 1A(1)(a); and see also *Commerce Commission v Colony Resorts Ltd* HC Wellington AP153/90, 19 September 1990.

[40] Compare *Churchill Group Holdings Ltd v Aral Property Holdings Ltd* HC Auckland CP574-IM01, 30 September 2003 at [63].

Section 9 of the Fair Trading Act

[188] Section 9 of the Fair Trading provides:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[189] The issue, therefore, is whether Mr Schaeffer was in trade, and engaged in conduct that was misleading, deceptive, or likely to mislead or deceive.

[190] For much the same reasons as noted at [184], it is clear Mr Schaeffer was engaged in trade. The word "trade" is defined in the Fair Trading Act as follows:

> **trade** means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land

[191] The phrase "in trade" has been given a wide interpretation by the Supreme Court:[41]

> This is a broad term encompassing all kinds of commercial dealing by the party whose conduct is under examination. The section applies to transactions between large, sophisticated corporations as well as to those of persons dealing with consumers.

[192] Mr Schaeffer was engaged in the ownership, development and marketing of the vineyard at the time he made his representations to Mr Murren and Mr Lee. That conduct constitutes either a business, an activity of commerce, or an undertaking relating to the acquisition of any interest in land and/or the supply or acquisition of goods or services.

[193] I have also previously determined that his representations were misleading or, at the very least, likely to mislead. It is unnecessary to repeat the reasons for this conclusion, which are covered in relation to the negligent misstatement cause of action.

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[41] *Red Eagle Corp Ltd v Ellis*, above n 12, at [26], n 13.

Section 43 of the Fair Trading Act

[194] Having found a breach of s 9 of the Fair Trading Act, the final step requires consideration of s 43 to determine whether or not Mr Murren and Mr Lee have suffered loss or damage by Mr Schaeffer's breach of s 9. This requires an assessment of whether Mr Murren and Mr Lee in particular were misled or deceived by Mr Schaeffer's conduct.[42]

[195] This requirement is also satisfied because, as I have concluded in relation to the negligent misstatement cause of action, Mr Murren and Mr Lee relied on Mr Schaeffer's representations. Mr Schaeffer accepted that he knew Mr Murren and Mr Lee would rely upon the partnership agreements and his capital call letters. The measure of compensation should be assessed based upon the same considerations as apply to the claim for negligent misstatement.[43] The purpose of such an order is to restore Mr Murren and Mr Lee to the position they would have been in if the misleading statements had not occurred.

[196] I am satisfied that, if Mr Schaeffer had not made the representations I have traversed in relation to the first cause of action, then Mr Murren and Mr Lee would not have made their investments. For this reason, I am satisfied that it is appropriate to make the award of damages sought under s 43 of the Fair Trading Act.

Nevada Deceptive Trade Practices Act

[197] The requirements of the cause of action based upon the Nevada Deceptive Trade Practices Act are set out at [109].

[198] There is a high degree of overlap between the tort of negligent misstatement and an action under the Nevada statute. In particular, the definition of consumer fraud includes "deceptive trade practice", which includes "any untrue statement of a material fact" made by a person when in the course of his or her business or occupation that involves the offering of an opportunity for investment. This closely resonates with the making of a negligent misstatement at common law.

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[42] *Red Eagle Corp Ltd v Ellis*, above n 12, at [29].

[43] *Harvey Corp Ltd v Baker* [2002] 2 NZLR 213 (CA).

[199] In light of my findings in relation to the first cause of action, I am satisfied Mr Schaeffer, in the course of his business, offered an opportunity for investment to Mr Murren and Mr Lee. In making that offer he made an untrue statement of a material fact, namely that Kiwi Ventures would acquire ownership of the vineyard (2002 Agreement) or ownership of an entity that owned 80 per cent of the vineyard (2006 Agreement). Those representations were untrue and were relied upon by Mr Murren and Mr Lee.

[200] Mr Schaeffer did not call evidence to contradict the evidence of Judge Pro. His unchallenged evidence leaves me in no doubt that the requirements of the Nevada Deceptive Trade Practices Act have been satisfied by Mr Murren and Mr Lee and, subject to the limitation defence, they are entitled to relief under the fifth cause of action.

PART IV

AFFIRMATIVE DEFENCES

Limitation defences

[201] Mr Schaeffer has pleaded that all five causes of action are time barred.

Negligent misstatement

[202] The negligent misstatement cause of action is governed by the Limitation Act. Thus, there is a six-year time limit in which Mr Murren and Mr Lee had to commence their proceeding calculated from when the cause of action accrued,[44] unless s 28 of the Limitation Act applies.

[203] The relevant provisions of s 28 of the Limitation Act state:

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

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[44] Limitation Act 1950, s 4(1)(a).

> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid;
>
> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud … or could with reasonable diligence have discovered it:
>
> …

[204] The issue at this juncture is whether the claim for negligent misstatement was able to be commenced in 2015, on the basis that the pleading fits within s 28(a) or (b) of the Limitation Act.

[205] This aspect of the case for Mr Murren and Mr Lee was advanced by Ms Simkiss, who submitted that if I found that the cause of action in negligent misstatement otherwise succeeded, but the causes of action in deceit and fraudulent misrepresentation failed, then the focus of my analysis would be on s 28(b) of the Limitation Act. That is to say, Mr Murren's and Mr Lee's case is that their right of action was concealed by Mr Schaeffer's fraud.

"Concealed by the fraud" in s 28(b) of the Limitation Act

[206] "Fraud" in the context of s 28(b) of the Limitation Act stems from the equitable concept of "unconscionability".

[207] The phrase "concealed by the fraud" in s 28(b) of the Limitation Act has been examined by a number of English authorities when considering the equivalent provisions of s 26(b) of the Limitation Act 1939 (UK).

[208] In *Beaman v ARTS Ltd*, the Court of Appeal of England and Wales explained that "fraud", as that term was used in s 28(b), was not necessarily confined to the common law of deceit, and may involve no moral turpitude.[45] In *Kitchen v Royal Air*

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[45] *Beaman v ARTS Ltd* [1949] 1 KB 550, [1949] 1 All ER 465 (CA).

Forces Assoc, a case concerning a solicitor's failure to disclose material matters to his client, Lord Evershed MR said that equitable fraud:[46]

> … covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

[209] The relevant law was summarised in the following way by Lord Denning in *Applegate v Moss* when, after referring to amongst other cases *Beaman v ARTS Ltd* and *Kitchen v Royal Air Forces Assoc*, he said:[47]

> Those cases show that "fraud" is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time. The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action, in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim. Applied to a building contract, it means that if a builder does his work badly, so that it is likely to give rise to trouble thereafter, and then covers up his bad work so that it is not discovered for some years, then he cannot rely on the statute as a bar to the claim. The right of action is concealed by "fraud" in the sense in which "fraud" is used in this section.

[210] The English authorities were analysed and adopted by Mahon J in *Inca Ltd v Autoscript (New Zealand) Ltd*, when he explained that s 28 of the Limitation Act:[48]

> … in so far as it codified the equitable rules extending time limits, uses the word "fraud" in para (a) as meaning either fraud at common law or equitable fraud, and uses the same word in para (b) in the same sense. Paragraph (b) covers causes of action other than fraud, and the limitation defence will be barred for the appropriate period either where there is dishonest concealment of the cause of action, equivalent to common law fraud, or where there is non-disclosure occurring in such circumstances as to amount to equitable fraud. In either case the concealment must be wilful. …

Was the right of action "concealed" by Mr Schaeffer's "fraud" within the meaning of s 28(b) of the Limitation Act?

[211] Applying the equitable concept of fraud, as that term is used in s 28(b) of the Limitation Act, it is clear it would be unconscionable for Mr Schaeffer to avail himself of the benefit of the lapse of time between his misrepresentations and the

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46 *Kitchen v Royal Air Forces Assoc* [1958] 2 All ER 241 (CA) at 249.
47 *Applegate v Moss* [1971] 1 QB 406, [1971] 1 All ER 747 (CA).
48 *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC) at 711.

commencement of the proceeding in 2015. Mr Schaeffer did not simply remain silent about the true ownership of the relevant assets of the vineyard. He wrote letters and had conversations with Mr Murren and Mr Lee that reassured them about their investments in the vineyard. Mr Schaeffer's ongoing representations had the effect of deflecting Mr Murren and Mr Lee from inquiring into the truth of the status of their investments.

[212] As I have already explained in relation to the negligent misstatement cause of action, Mr Schaeffer was under a duty of care to Mr Murren and Mr Lee not to misrepresent the true nature of their investments. In reliance on Mr Schaeffer's misrepresentations, Mr Murren and Mr Lee did not make enquiries into the nature of their investments. In those circumstances, it would clearly be inequitable to allow Mr Schaeffer to rely upon the standard limitation period. His misrepresentations can therefore be said to have concealed the right of action.

Reasonable diligence

[213] *Inca Ltd v Autoscript (New Zealand) Ltd* was approved by the Court of Appeal in *Amaltal Corporation Ltd v Maruha Corporation*, in which the focus was upon whether or not the plaintiffs could have discovered the defendant's fraud "with reasonable diligence" as that term is used in s 28 of the Limitation Act.[49] The Court of Appeal endorsed the approach taken in *Paragon Finance plc v DB Thakerar & Co*, in which Millett LJ explained:[50]

> The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.

[214] The Court of Appeal in *Amaltal Corporation Ltd v Maruha Corporation* also examined the decision of the Court of Appeal of England and Wales in *Clef Aquitaine Sarl v Laporte Materials (Barrow) Ltd*,[51] and concluded that "what is required is

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[49] *Amaltal Corporation Ltd v Maruha Corporation*, above n 9.
[50] *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) at 418.
[51] *Clef Aquitaine Sarl v Laporte Materials (Barrow) Ltd* [2001] QB 488, [2000] 3 All ER 493 (CA).

reasonable diligence – not exceptional diligence" and that the English authorities simply articulate a "reasonableness" standard.[52]

[215] For completeness, I note that the Supreme Court allowed an appeal in *Maruha Corporation v Amaltal Corporation Ltd*, and in doing so, reinstated the judgment sum originally ordered by the High Court, which had been reduced by the Court of Appeal.[53] The propositions for which the Court of Appeal judgment is cited in the present judgment are not affected by the Supreme Court's decision.

Did Mr Murren and Mr Lee act with reasonable diligence?

[216] Mr Schaeffer maintains that Mr Murren and Mr Lee did not act with reasonable diligence, and that the extended limitation period under s 28 should therefore run from a time prior to when the fraud was discovered. He says they should have searched the New Zealand Companies Office records any time between 2006 and 2013 and had they done so they would have appreciated that Mr Schaeffer owned the majority of the shares in WEHL and Mahana and that Kiwi Ventures did not own any shares in those companies. There are a number of factors that weigh against Mr Schaeffer's argument on this point and which persuade me that Mr Murren and Mr Lee acted with reasonable diligence. Those factors are:

(1) Mr Schaeffer was a person who was well known to Mr Murren and Mr Lee. They were friends. They were entitled to rely, and did rely, upon him. Mr Schaeffer knew that they were relying upon him, particularly as Mr Murren and Mr Lee were at all times resident in the United States, and very rarely did they come to New Zealand.

(2) It was reasonable for Mr Murren and Mr Lee to trust Mr Schaeffer as being a responsible guardian of their interests and to carry out the terms of the 2006 Agreement.

(3) The terms of the 2006 Agreement were based upon Mr Schaeffer dealing with Mr Murren and Mr Lee fairly and in good faith.

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52 *Amaltal Corporation Ltd v Maruha Corporation*, above n 9, at [159]
53 *Maruha Corporation v Amaltal Corporation Ltd* [2007] NZSC 40, [2007] 3 NZLR 192.

Mr Murren and Mr Lee had no reason to believe, until about 2013, that Mr Schaeffer was not observing the terms of the 2006 Agreement.

(4) Mr Schaeffer sent regular, on-the-face informative, updates between 2002 to 2008 and, even after those updates ceased, he continued to be in touch with his friends to give them reassuring messages about their investments in the vineyard.

[217] Contrary to the submissions advanced by Mr Shaw on behalf of Mr Schaeffer, it was not "reasonable" to expect persons such as Mr Murren and Mr Lee to undertake a search of the New Zealand Companies Register simply to ensure that Mr Schaeffer had done what he had said he would do in relation to their ownership of the vineyard. I also note that Mr Murren gave evidence that he was unaware that New Zealand even had an online public register for company shareholdings, as such registers, he said, are not commonplace in the United States.

[218] Reasonable diligence requires that, when a person is put on notice of something being amiss, they must take reasonable steps to investigate the position. In this case, there was nothing to put the plaintiffs on notice until approximately 2013, when Mr Lee began to pursue further information from Mr Schaeffer. It was at about this time that Mr Murren and his wife also became suspicious of Mr Schaeffer. It was at this time that it may have been necessary for them to make further inquiries. That, however, is of no assistance to Mr Schaeffer. I am satisfied Mr Murren and Mr Lee did what was necessary in the circumstances to meet the standard of reasonable diligence.

Limitation under the Fair Trading Act

[219] Under the Fair Trading Act, the question is whether the loss or the likelihood of loss was discovered or ought reasonably to have been discovered within the three-year timeframe prescribed in that statute.

[220] Mr Murren and Mr Lee argued that it was only in 2013 when they were told by Renee Schaeffer that Kiwi Ventures owned no shares that they could reasonably have known about their loss or the likelihood of it.

[221] I am satisfied that the email from Renee Schaeffer to Mr Lee and other Limited Partners in Kiwi Ventures in 2013 was the point at which the loss or likelihood of loss ought reasonably to have been discovered. These proceedings were commenced well within three years of that date. They are, therefore, within the time limit as prescribed in the Fair Trading Act.

Time limit under the Nevada Deceptive Trade Practices Act

[222] The cause of action under the Nevada Deceptive Trade Practices Act is "deemed to accrue when the aggrieved party discovers, or by the exercise of due diligence should have discovered, the facts constituting the deceptive trade practice".[54] This test is broadly similar to that under the Fair Trading Act. The limitation period under the Nevada statute is, however, four years.

[223] Having concluded that the proceeding under the Fair Trading Act was commenced within the three-year timeframe prescribed in that statute, there is no basis for concluding that the proceeding was time barred by the Nevada Deceptive Trade Practices Act.

Entire agreement clause

[224] Mr Schaeffer pleads that all five causes of action based upon representations made prior to the 2002 or the 2006 Agreements are barred by the entire agreement clauses, the provisions of which I have set out above at [41].

[225] The principal deficiency with this argument advanced on behalf of Mr Schaeffer is that the entire agreement clauses do not purport to bar an action based upon representations within those agreements. Those representations are the gravamen of the action for negligent misstatement. They are also the key basis of the causes of action under the Fair Trading Act and the Nevada Deceptive Trade Practices Act. Nor do those clauses bar claims based on representations made after the agreements were entered into. There is a possibility that the entire agreement clause in the 2006 Agreement excludes any action for misrepresentations made in the

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[54] NRS § 11.190(2)(d).

2002 Agreement and the intervening period. However, this would not assist Mr Schaeffer, as the misrepresentations in the 2006 Agreement and thereafter would be sufficient to establish his liability.

[226] In any case, it is likely that the entire agreement clause in the 2006 Agreement does not apply to representations made by Mr Schaeffer. The relevant wording of that clause refers to prior representations "between or among the parties". Mr Schaeffer is not a party to the 2006 Agreement, rather Constellation is. Accordingly, as a matter of interpretation, that clause arguably was not intended to apply to his earlier representations.

Estoppel

[227] On the morning of the first day of the trial, Mr Shaw applied to amend the statement of defence to introduce estoppel as an affirmative defence. The essence of that pleading is that Mr Murren and Mr Lee are estopped from bringing all five causes of action because Mr Schaeffer's personal ownership of the vineyard was done in reliance on the 2002 and 2006 Agreements, and in particular on the wide management powers of the General Partner. In those circumstances, Mr Schaeffer pleads that it would be unconscionable for Mr Murren and Mr Lee to advance their claims.

[228] The essential elements of the defence of estoppel were explained by the Court of Appeal in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*.[55] In summary, a defendant who wishes to rely on an estoppel must establish:

(1) the creation or encouragement by the party against whom the estoppel is alleged of a belief or expectation by the defendant based usually upon a written or verbal representation;

(2) reasonable reliance on that representation by the defendant;

(3) detriment to the defendant as a result of that reliance; and

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55 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

(4) that it would be unconscionable for the party against whom the estoppel is alleged to go back on his or her word.

[229] Notwithstanding the extraordinarily lateness of the application to introduce a third affirmative defence, I have granted the application in the overall interests of justice.

[230] I am, however, satisfied that the defence of estoppel cannot succeed. My reasons for reaching this conclusion are:

(1) For the reasons already explained above at [141], the management powers in the 2002 and 2006 Agreements relied upon by Mr Schaeffer do not permit him to personally own the shares in WEHL and Mahana.

(2) Mr Schaeffer did not say in his evidence that he relied upon the claimed representation. It is also difficult to see what detriment Mr Schaeffer could point to, given the representations that I have found that he made to Mr Murren and Mr Lee concerning the nature of their interests in the vineyard.

[231] There is no basis to hold that Mr Murren and Mr Lee have acted unconscionably. On the contrary, it is Mr Schaeffer who has acted unconscionably in this case.

Clause 9.6

[232] This clause, which I have set out at [42], was not raised by the parties during the hearing. After the hearing, I invited submissions on this clause.

[233] For Mr Murren and Mr Lee, it was submitted that the clause is irrelevant because this proceeding concerns claims in tort, not in contract. The clause refers to the “return of capital”, which Mr Murren and Mr Lee do not seek. Mr Horne also submitted that Mr Schaeffer is not the General Partner under the 2006 Agreement, so could not avail himself of cl 9.6 in any case. Finally, Mr Horne submitted that the

clause was ineffective to contract out of the Fair Trading Act and Nevada Deceptive Trade Practices Act, and that it cannot affect claims that rely upon fraud.

[234] For Mr Schaeffer, it was submitted that cl 9.6 highlights that Mr Murren and Mr Lee were expected to undertake due diligence as there would be no recourse to Mr Schaeffer for return of their capital contributions. Mr Shaw also submitted that a return of capital contributions was essentially what Mr Murren and Mr Lee were seeking in this proceeding. He also pointed out that much of the capital contributions were provided under the 2002 Agreement, rather than the 2006 Agreement. Finally, he argued that cl 9.6 was relevant to the Court's discretion to grant a remedy under s 43 of the Fair Trading Act.

[235] I am satisfied that cl 9.6 does not bar the claims advanced by Mr Murren and Mr Lee. Those claims seek damages for misrepresentation. While the quantum of those damages is the same as the amount of their capital investments, that does not equate to those investments being "return[ed]". The wording of cl 9.6 specifically contemplates a return of the investment, as opposed to compensatory damages. It was aimed at signalling to investors that their investment would be final, it was not aimed at excluding liability for civil wrongdoing.

Quantification of loss

[236] Mr Murren and Mr Lee are entitled to judgement in relation to the causes of action for negligent misstatement, breach of the Fair Trading Act and breach of the Nevada Deceptive Trade Practices Act. The damages are to be assessed on the usual tort principle, namely the loss that they have suffered as a result of the misrepresentations made by Mr Schaeffer.

[237] In this case, the loss suffered by Mr Murren and Mr Lee is the amount that they invested in Kiwi Ventures, which they invested because they were misled by the representations made by Mr Schaeffer.

[238] In the case of Mr Murren, he is entitled to judgment in the sum of USD 1,600,813.92.

[239] In the case of Mr Lee, he is entitled to judgment in the sum of USD 700,406.96.

[240] Mr Murren and Mr Lee are entitled to interest.

Costs

[241] Mr Murren and Mr Lee have succeeded. Costs should follow the event. They are entitled to costs on a scale 2B basis. I certify that this is a case that justified two counsel.

D B Collins J

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