IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

No. 6056 of 1997

PLAYCORP PTY LIMITED — Plaintiff

V

TAIYO KOGYO LIMITED — Defendant

JUDGE:	Hansen J
WHERE HELD:	Melbourne
DATE OF HEARING:	24, 27-30 November & 4 December 2000, 19-22, 26-30 November, 3-6, 12-14 December 2001
DATE OF JUDGMENT:	24 April 2003
CASE MAY BE CITED AS:	Playcorp Pty Ltd v Taiyo Kogyo Ltd
MEDIUM NEUTRAL CITATION:	[2003] VSC 108

Contract –Distribution agreement for supply of toys - Exclusive right to distribute in Australia and New Zealand for five years – Whether signature of defendant forged – Whether term of good faith in relation to all matters to be implied – Whether term as to limiting supply to be implied – Requirement of reasonable endeavours – Defective products supplied – Whether term of fitness for purpose or merchantable quality - Proper law – Whether *Goods Act* 1958 (Vic) or *Sale of Goods (Vienna Convention) Act* 1987 (Vic) applicable – Effect of defendant denying applicable law but not pleading or leading evidence of the law applicable – Whether supply of defective goods a breach – Whether purchaser entitled to claim for loss from supply of defective goods – Whether purchaser's claim a breach - Whether defendant's refusal to further supply goods unless its offer accepted an anticipatory breach – Rescission by purchaser – Whether purchaser ready, willing and able to proceed.

Damages –Loss of profits - Based on projections – Contingencies – Mitigation – Whether payments by third party to be set off – Character of payment – Onus of proof – Whether payment independent of claim – Whether relevant amount apportioned.

Damages – Defective goods – Measure of loss.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N Mukhtar, QC with Mr I G Waller	Clayton Utz
For the Defendant	Mr R C Macaw, QC with Mr M L Sifris	Hall & Wilcox

HIS HONOUR:

1 This case is brought by a Victorian Company, Playcorp Pty Ltd ("Playcorp") against a Japanese company, Taiyo Kogyo Co Ltd ("Taiyo"). In its business Taiyo manufactured toys and in particular radio controlled toys ("R/C toys"). For some years until 1996 Playcorp purchased such products from Taiyo for sale to retailers in Australia and New Zealand. When the companies commenced their dealings, and until 1991, Playcorp was known as George Tauber Imports Pty Ltd ("GTI"). At first the distribution arrangements were informal but by a written agreement stated to be made on 1 January 1993 and to commence on 1 July 1993 Taiyo appointed Playcorp as its exclusive distributor in Australia and New Zealand for the resale of products manufactured by or for Taiyo from time to time and Playcorp agreed to sell the products and existing Taiyo products in that territory. The agreement, which I refer to as "the distribution agreement", was expressed to continue in force until 31 December 1998 unless earlier terminated as therein provided. A deal of these products were designed by or for, and were manufactured by Taiyo under arrangement with, a United States company Tyco Industries Inc, referred to in correspondence as Tyco Toys and which I refer to as "Tyco". Although Playcorp achieved a high level of sales in Australia differences arose between Playcorp and Taiyo, and Tyco. It is Playcorp's case that in the circumstances Taiyo repudiated the distribution agreement by refusing to supply products and that on 26 or 29 March 1996 Playcorp accepted the repudiation and terminated the agreement. On 18 June 1997 Playcorp commenced this proceeding claiming damages in respect of two matters, namely, the profits it contends it would have earned if the distribution agreement had run its course, and the profit lost and repair costs incurred as a result of quantities of the products having been delivered in a defective state.

2 In final address Playcorp sought the following amounts as damages:

1. Loss of profits: $2,347,965.
2. Defective goods: $374,605 made up as to $365,311 profit lost on such goods and $9,294.00 as repair costs.

3 Tyco denies the claims thus raised, both on liability and quantum. There is no counterclaim.

4 The trial commenced on 24 November 2000. An amended statement of claim had been filed in May 2000. The defence and the reply were amended, and further particulars of each were provided, during the trial. On 4 December 2000, it seeming that Playcorp might be prejudiced if the hearing were to continue without time being granted to consider new matters, I adjourned the hearing to a date to be fixed in February 2001. I also vacated an order made earlier by the Listing Master that the evidence of a Japanese witness, Shohei Suto, the President of Taiyo, be taken by video link. As it transpired, the hearing did not resume until 19 November 2001.

5 By the end of the trial Playcorp had called seven witnesses and Taiyo six. They included, on each side, an accountant and a handwriting expert to give opinion evidence on the loss of profits claim and the authenticity of the signature of Suto on the distribution agreement respectively. In addition each side had tendered a witness statement, and Taiyo had tendered an affidavit, without the need to call the witness. There was also a significant amount of documentary material. More specifically, the witnesses called were:

(a) For Playcorp:

(i) Stephen William Grant, who had changed his name from Glatt on 29 July 1999. In the correspondence he is referred to by his former name. For that reason, and to avoid confusion, it is convenient to refer to him by his former name of Glatt. He became a director of Playcorp in 1985 and managing director in 1988. He ceased to be a director and employee of Playcorp in January 2000. Essentially, and critically for this case, he had been responsible for, and the central figure in, the trading relationship with Taiyo. He made three witness statements and gave evidence over several days. He was extensively cross-examined. His evidence was central to establishing the factual foundation for Playcorp's claim both on liability and quantum.

(ii) Harry Cooper, who between about 1986 and until 25 June 1999 was Chairman of directors of Playcorp. He was also a director of a number of companies in the Century Plaza Group of

companies which included Playcorp.

(iii) Yuki Tsugu Futamura, who commenced employment with Taiyo in about 1985, became director in charge of marketing in 1992 and who was dismissed from his employment by Suto on 20 May 1985. Suto did not give evidence. The reason for the dismissal was neither advanced in evidence by Taiyo nor put to Futamura in cross-examination. He was not attacked in his credit on that account; he was dismissed but I was not told why. In his position with Taiyo it had been Futamura's role to deal with Playcorp. In that context he dealt with Glatt, and they developed a strong personal relationship of mutual trust and respect. Futamura gave evidence as to the dealings between the companies, and with Tyco, and the signing of the distribution agreement by himself, Suto and Glatt.

In 1996 Playcorp sought to develop some R/C toys. For this purpose a company called Quantum Toy Concepts Pty Ltd ("Quantum") was registered on 12 July 1996 with Steven Lew, Futamura, Glatt and another person as directors. Futamura, who was then unemployed, assisted in the endeavour. The endeavour was unsuccessful, the activity was discontinued and Quantum was deregistered on 9 October 2000.

By reason of his concern that if he gave evidence Suto might bring civil proceedings against him in Japan without just cause, and thereby cause him financial harm, Futamura requested and Playcorp provided him with a written indemnity for costs if that should happen. The indemnity was received as a confidential exhibit.

(iv) Neil William Holland, a handwriting expert whose evidence supported the plaintiff's case that the signature of Suto on the distribution agreement was a genuine signature of Suto.

(v) Enzo Gatto, who gave evidence as to defects in toys supplied by Taiyo and as to repairing defects in Taiyo toys.

(vi) John Francis Redenbach, the merchandise director of Toys R Us (Australia) Pty Ltd, who has had extensive experience in the retail merchandising of toys in Australia for more than 20 years, who gave evidence of matters concerning the Australian market for R/C toys, Playcorp's role in it and other matters.

(vii) Aubrey Laurence Whitear, an accountant who gave expert evidence in support of Playcorp's loss of profits claim.

(viii) Monica Pinda, a Japanese translator, whose witness statements concerned her translation of a number of documents from the Japanese to the English language. Her statements were tendered without the need to call her.

(b) For Taiyo:

(i) Masafumi Itani, who since July 2001 has been the marketing director of Taiyo, the position formerly held by Futamura. Overall he has been in the employ of Taiyo for 10 years, always in the marketing department and until his employment ceased, working under Futamura. His evidence related to a number of aspects of the case.

(ii) Rie Imafuku, an interpreter and translator of the Japanese language. Her witness statement contained her translations of four witness statements from the English to the Japanese language, and certain other documents from the Japanese to the English language.

(iii) Noritsugu Sasahara, who since July 1992 has been employed by Taiyo as an auditor. His evidence was directed to the matter of Taiyo going public and whether that project required an agreement with Playcorp of the nature constituted by the distribution agreement. He also gave evidence of other matters including a lack of knowledge of such an agreement.

(iv) Gregory Pollard Meredith, an accountant who gave evidence as to the loss of profits claim.

(v) Gary Lindsay Storey, a handwriting expert who gave evidence as to the genuineness of the signature of Suto on the distribution agreement.

(vi) Takeshi Tomozawa, who commenced employment with Taiyo in 1992 and has worked throughout in the marketing department. He is now assistant manager to Itani.

(vii) Neil Tilbor, a resident of the United States, whose witness statement was tendered without the need to call him. In summary his evidence was concerned with the development of R/C toys for Taiyo, the manufacturer of toys by Taiyo, the adaptation or redesign and development of toys and the role of Taiyo and Tyco in these matters.

(viii) Noel James Batrouney, solicitor for Taiyo, whose affidavit was tendered without the need to call him. The affidavit was relied on to answer a suggestion of recent invention in relation to Taiyo's allegation of forgery of Suto's signature on the distribution agreement. The suggestion had been made in cross-examination of Itani.

6 It is convenient to note the position of Suto. He founded Taiyo. He is President and his wife is the Vice President of the company. In addition to them there were

seven other directors, all employees of the company, each of whom was responsible for an area of the business. The areas were banking, accounting, research and development, tooling, production, purchasing and marketing. Futamura, and now Itani, was the director responsible for marketing. The directors rarely met as a board. Suto controlled the company. No major decision could be made without his approval. Such a decision would be whether to enter into an agreement such as the distribution agreement. Further, Suto would have to sign such an agreement. Hence, while a matter such as the distribution agreement was within Futamura's area of responsibility, the agreement could not be made without the approval of Suto. Although Tyco has had an ownership interest in Taiyo since 1992 or 1993,[1] what I have described as the manner of operation of the business was the position at all material times.

7 Taiyo's solicitors filed a witness statement and a supplementary witness statement for Suto in October and November 2000 respectively. Among other things the statements denied that he had signed the distribution agreement. This was to support Taiyo's case that his signature thereon was a forgery. In accordance with practice Suto had not signed the witness statements. They were in draft form and would not constitute evidence until adopted by him in chief.

8 Prior to commencement of the trial in November 2000 an order had been made by the Listing Master that Suto's evidence be given by video link from Japan. Suto was resident in Japan and not in good health. However, it was preferable for Suto to give his evidence in court in Melbourne and in case that became possible, and in order to ensure the matter was considered afresh, I vacated the video link order on the adjournment in December 2000.

9 In the course of the resumed hearing in December 2001 Taiyo's counsel again raised the matter of how Suto's evidence could be taken. Relying on up-to-date materials concerning Suto's health which indicated he was in hospital and could not leave it

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1 There is some vagueness, indeed conflict, as to the extent of the interest but it is accepted that Tyco has such an interest. From the evidence of Itani and Sasahara it seems that Tyco acquired an interest in 1992 or 1993. The interest was either 19% or "probably" 10% increasing to 19% by September 1995.

until the end of the year, and that a video link to the hospital could not be arranged, counsel sought an order that I, and the parties representatives, travel to Japan to take his evidence. It quickly transpired that this was not possible for the reason that Japan did not permit such action by an Australian judicial authority. Evidence by video link was also precluded. In the end, following the completion of all other evidence, Taiyo's counsel did not press the matter further and closed Taiyo's case without evidence from Suto.

Issues

10 It is convenient to identify the issues or areas of contention counsel left for determination. Summarily stated they are:

1. Was Taiyo bound by the distribution agreement? It is common ground that this depends on whether Suto signed the document or his signature was placed thereon by another person without his knowledge or authority. Taiyo was bound in the former case but not in the latter.

2. If Taiyo was bound by the distribution agreement:

   (a) What products was Playcorp able to purchase under the agreement? This is to be considered as at the date of rescission (26 or 29 March 1996) and subsequently within the period of the agreement (that is, prior to 31 December 1998). The issue involves reference to events between Playcorp, Taiyo and Tyco and their impact or likely impact on Playcorp's business in the R/C toy market.

   (b) Did Taiyo repudiate the agreement, and was Playcorp entitled to rescind? Whether Taiyo did repudiate the agreement involves a consideration of the parties' actions in relation to Playcorp's defective product claim. Their actions are to be assessed in the context of the relevant circumstances. Playcorp contends that Taiyo refused to supply it with products under the agreement and that the terms and circumstances of the refusal constituted a repudiation of its obligations

under the agreement. That entitled Playcorp to rescind and it did so by a letter on 26 or, alternatively, by a further letter on 29 March 1996. Taiyo contends the defective products claim was false, grossly exaggerated and unreasonably made, that it constituted an attempt by Playcorp to force new terms of trade on Taiyo, and that the pressing of the claim was a breach of an implied obligation to deal in good faith. In those circumstances Taiyo contends it was entitled, as it did, to conditionally refuse to supply products until the claim was settled. Thus its conduct was not repudiatory. Taiyo further, and alternatively, contends that Playcorp was not ready and willing to perform its obligations under the distribution agreement and, that being so, Playcorp was not entitled to rescind.

(c) What damages is Playcorp entitled to receive? The claim for loss of profits involves a consideration of what Playcorp would have done after March 1996 in the conduct of its toy business. The case as to what it would have done including what products it would have purchased and sold was based on evidence of Glatt which Taiyo attacked. In addition to issues as to the amount of any damages including a contention of Taiyo that no loss was shown, there is an issue whether two amounts received from Tyco should be brought to account in reduction of any damages.

3. The second head of damages concerning the defective products claim raised issues as to the relevant terms of sale and the applicable law in that respect, and as to the proper calculation of the claim.

Background

11 Before Glatt joined GTI in 1985 the man behind the company, George Tauber, had developed business contacts with manufacturers of toys in Japan. One of those manufacturers was Taiyo. At this time R/C toys had been introduced to the market in Australia and GTI was dominant in that market. Such toys were small replica

models of luxury vehicles such as Porsche and Mercedes Benz. They were indoor toys which performed simple movements without high speed, performance or agility. GTI was the exclusive distributor in Australia for R/C toys manufactured by Taiyo and two other Japanese manufacturers, Nikko and Yarezawa.

12 When Glatt joined GTI in 1985 its principal business activity was the importation and distribution of toys in Australia and New Zealand. He identified the business opportunity of developing for the Australian toy market a R/C toy of a different nature, namely, a larger vehicle with a motor which could be used "off road", ride over obstacles, and which could be used by children. He worked to develop the idea with a view to high volume sales promoted by television advertising.

13 Accordingly, in May 1985 Glatt went to Japan with Tauber to meet suppliers and find a product suitable for promotion on television. He met Taiyo executives including their director of sales and marketing and his assistant Futamura (who later became director).

14 As a result, in 1986 GTI marketed a Taiyo R/C toy in Australia called Jet Hopper. It was marketed through retailers under the Metro brand which was owned by GTI. It was heavily promoted on television. It was fast, agile, able to clear obstacles and be used outdoors. It achieved phenomenal sales, about 130,000 units in 1986. That led to Tyco distributing the toy in the United States in 1987 under the name Turbo Hopper, with great success. Naturally, Playcorp's success advanced the business relationship between GTI and Taiyo. It is also led to many other R/C toys being successfully marketed in Australia by GTI and later Playcorp.

15 The R/C toy market developed, new toys were introduced and the range was increased. Briefly, in 1987 Jet Hopper was an even greater success selling more than 150,000 units, and Taiyo introduced a version on a smaller scale called Mini Hopper, two-thirds of the size and price of Jet Hopper. It did not possess the same performance levels, was cheaper and appealed to younger children. It sold in large quantities without affecting sales of the bigger R/C toys. In 1988 a third category or

section of the R/C toy market was created when Taiyo introduced the Micro Hopper which was smaller again, and cheaper with lesser performance abilities, and which appealed to even younger children. Thus, by 1988 there were three distinct categories of R/C toy in the market in Australia, and that continued to be the case. They were the full or normal size high performance vehicle, the mini and the micro. Within that market there was a difference between toys that were promotional and those that were not, the former being the latest or a prior very successful toy to be promoted through various media including television commercials, at substantial expense. Some R/C toys held their appeal and could be sold steadily for some years. In some cases Taiyo would redesign a toy such as by a change of colour, decal, body shape or type, or other features to retain or create appeal.

16 In 1987, reflecting its success in the Australian market, GTI decided to distribute only Taiyo manufactured R/C toys. Over time GTI (and Playcorp) devoted substantial sums and effort promoting Metro R/C toys obtained from Taiyo. While the toys were developed by Taiyo from time to time Glatt's opinion was sought about their concept. It is evident that Glatt possessed a keen sense of what would appeal in the market. It was no coincidence that by the early 1990's Playcorp, to use Redenbach's words

> "… continued to be the dominant supplier of radio controlled toys in the Australian market. It was well known in the industry. There was no other company … aggressively marketing and heavily promoting radio controlled toys in Australia".

It was not every toy that was the subject of such promotion. The pattern each year was to choose a new product or two considered likely to have substantial appeal and heavily promote such product. These were called lead items, the product possessing some special features which gave it special appeal. Playcorp would have other Taiyo R/C toys in the three categories mentioned of normal, mini and micro, which might be a mixture of new and old and include redesigned toys.

17 Taiyo also manufactured R/C toys for Tyco. In this relationship Taiyo developed products from concepts introduced by Tyco. Such toys were part of the line of toys

presented by Taiyo each year and from which Playcorp selected items for distribution in Australia. In his witness statement Glatt described these as Tyco/Taiyo toys. In respect of such toys a royalty of about 5% was included in the purchase price charged to Playcorp, and which Taiyo remitted to Tyco for itself or the inventor.

18 GTI sold all toys under the Metro brand. Tyco did not sell its Tyco brand R/C toys in Australia. From about 1987 Taiyo allowed GTI (and later Playcorp) to use certain Tyco packaging and promotional items to advertise Tyco/Taiyo toys in Australia. In 1992 the arrangement was changed in that Tyco required Playcorp to pay an annual fee of $10,000 for the use of Tyco's packaging, art work and $6,000 per Tyco commercial.

19 I have referred to the close relationship that developed between Glatt and Futamura. They were in frequent (Glatt said weekly) contact concerning the development, ordering and supply of R/C toys. It was an informal arrangement, in that there was no written agreement by which Playcorp was granted a distribution right, and hence the personal relationship with a common sense of purpose and understanding was of fundamental importance to, indeed underlay, the ongoing successful commercial relationship between the companies. Itani agreed that the good relations between Glatt and Futamura were in the interests of each business, and that it was a business relationship in an industry in which personal relations were unavoidable. The fact of the matter was that, notwithstanding the absence of a formal agreement, GTI (and later Playcorp) was the sole distributor of Taiyo toys and Tyco/Taiyo toys in Australia and New Zealand.

20 Once a year, on a visit to Japan, Glatt would meet with Suto. They had a cordial business relationship. It is a reflection of the relationship and in particular of Suto's confidence in and regard for Tauber and Glatt that they were asked to become, and accepted appointment as, directors of two companies associated with Taiyo called Taiyo Toy (Hong Kong) Company Limited and Taiyo Engineering Services Co Ltd. They also held shares in the former company. Later, in 1991, it seems David Wolfe

Joel, financial controller of Playcorp, became a director of the latter company. I accept Glatt's evidence that he did not really know what the companies did, but Futamura told him they needed foreign directors and that Suto trusted him. Suto was chairman or President and conducted the affairs of the companies without reference to Tauber or Glatt who signed documents sent by Suto via Futamura. In the case of the former company and I assume the latter Suto provided them with a written indemnity for any personal liability as a director.

21 In June 1992 Glatt met the President of Tyco, Richard E Grey in New York. In the course of Playcorp's business Glatt travelled overseas and frequently met Grey and other Tyco executives at trade fairs and other occasions. Glatt had an "excellent" personal relationship with Grey and most of Tyco's senior sales and marketing executives. At their meeting in June 1992, Grey told Glatt that Tyco intended to establish its own distribution company in Australia in 1993 to distribute its toys in Australia, but not Tyco/Taiyo toys. As Playcorp, Taiyo and Tyco had a good relationship, Tyco was content for Playcorp to remain the sole and exclusive distributor in Australia and New Zealand for R/C toys manufactured by Taiyo including Tyco/Taiyo toys. As long as Playcorp continued to do a good job with these products, he saw no need to change that arrangement. Later in June Glatt received from Futamura a copy of a letter dated 17 June 1992 from Grey to Futamura which concerned the matters discussed with Glatt. Glatt regarded the letter as consistent with the discussions. Nevertheless the letter should be set out as its terms reflect a developing attitude by Tyco towards distributing its products and it is part of the context in which future events are to be understood. It also discloses that Tyco required annual review of the arrangement whereby Playcorp could distribute Tyco/Taiyo toys. The letter (and Futamura's reply dated 18 June 1992) also reflects the importance and effect of the close personal relationship between Futamura and Glatt. The letter dated 17 June 1992 stated:

> As you know, I met with Steve Glatt in New York last Thursday. We had discussions about several things, including future distribution in Australia of radio control and our Illco pre-school toys.

> Tyco has become a large toy company and our international operations are important to the overall financial health and growth of the company.
>
> As President of Tyco, I have the obligation to our employees and shareholders to do what is best for Tyco. This includes protecting Tyco's distribution rights, particularly where we have our own subsidiary company. At the same time, we want to be considerate and fair to our special friends.
>
> We expect to have our own distribution company in Australia in 1993. I've told Steve that all Tyco products, including Illco pre-school, will be marketed by Tyco beginning in 1993. This is normal procedure.
>
> We should also do this with those ratio control products "created" by Tyco. However, I recognise the close relationship of Yuki-san and Taiyo with Steve. Because of this, we agree that Playcorp can continue distribution of all Taiyo radio control, including Tyco-designed products, in Australia.
>
> Each Year, Taiyo and Tyco should review this. If Playcorp is performing up to reasonable levels by using heavy TV promotions, etc., then the arrangement should continue. Otherwise, perhaps we should consider a change.
>
> Yuki, although Playcorp pays royalty on Tyco-designed items and reasonable charges for the use of Tyco-style packaging and Tyco TV commercials, our people feel that Tyco should do its own marketing worldwide. However, I recognise your difficult position. Since we are more than business associates I am happy to help you this way at this time".

22 In the wider context, the position with the overseas distribution of Taiyo products was that Tyco was the major distributor in the United States, Asahi Corporation distributed Taiyo products in Europe and GTI (Playcorp) distributed Taiyo products in Australia. These were Taiyo's three major distribution regions outside Japan. Taiyo's relationship with Tyco developed in the 1991/1992 period. Tyco wished, and Suto approved, Tyco taking over distribution in Europe from Asahi. The views expressed by Grey in his letter are consistent with this change in distribution arrangements.

23 Then, on 1 October 1992 Futamura sent a facsimile to Glatt in which he referred to the preparation of documents necessary for Taiyo to go public. In that connection he wanted to know Playcorp's capital and number of employees. It is the fact that

Taiyo did give consideration to going public and that over a period work was undertaken accordingly. Nomura Securities was engaged as adviser and underwriter. As an auditor Sasahara was engaged on the project. There were issues about this but having considered the evidence I find that Sasahara did ask Futamura to obtain a written agreement with Tyco and Playcorp for the purpose of the float. I should record that I found Futamura to be an honest and reliable witness. I do not consider that his evidence was affected by any ill-will towards Taiyo or Suto. I note too, as mentioned above, that Taiyo's counsel were not prepared to allege anything adverse against Futamura in relation to his dismissal. Nor were they prepared to allege directly that he had forged Suto's signature on the distribution agreement. By contrast I was not impressed by Sasahara. The important position of Playcorp as an overseas purchaser of Taiyo product was made obvious in cross examination. So too was Taiyo's case affected by a combination of an evident lack of organisation of its contemporaneous documents and a tardy discovery of documents which, considered overall, left me with an absence of confidence in Taiyo's evidence as to critical documents not being in its possession. This was reflected in not merely the late production of documents but, for instance, the omission to discover the letter from Itani to Grey dated 28 September 1995. An element in the tardiness on discovery was, I find, a concern as to finding, and then having to produce, documents that might not be helpful to Taiyo's position. I find too that the witnesses remaining in the employ of Taiyo were much affected by the dominant role and power of Suto whose obvious wish was to defeat Playcorp in the litigation. Sasahara's evidence was affected by these factors and, I find, relevantly tailored to suit the case desired to be advanced by Taiyo. Sasahara was not a reliable witness. Wherever his evidence conflicts with the evidence of Futamura or Glatt I reject it. I add that the above finding that Sasahara asked Futamura to obtain a written agreement is one that, regarding the evidence overall, accords with the probabilities.

24 In accordance with Sasahara's request, in 1993, Glatt states that in or around April, Futamura told Glatt that for the purposes of the float it was necessary for Taiyo to

enter into written agreements with its international distributors. Futamura asked if Playcorp could prepare a first draft and Glatt agreed. There was also to be an agreement with Tyco.

25 Playcorp's case is that this conversation led to the impugned distribution agreement which is dated 1 January 1993. The relevant events concerning it's making occur through to September 1994 when, on Playcorp's case, it was signed by Futamura and Glatt, it having already been signed by Suto. I return to the events when discussing whether Suto signed the agreement.

26 For the moment it is sufficient to say of the agreement that by its terms Taiyo appointed Playcorp as its exclusive distributor for the resale of products (defined to mean products manufactured by or for Taiyo from time to time) in Australia and New Zealand ("the territory") from July 1993 and, unless earlier terminated as therein provided, until 31 December 1998, and thereafter to be renewed by agreement. By cl 3, concerning "Supply of the Product", Playcorp agreed to send all orders for the products to Taiyo's office in Tokyo or such other address as may subsequently be notified by Taiyo, in writing, for acceptance or objection by Taiyo,[2] and Taiyo agreed that upon receipt of orders Taiyo shall use all reasonable endeavours to meet the delivery date.[3]

27 For its part, by the agreement Playcorp agreed to distribute and sell the products and existing Taiyo products in the territory,[4] not to appoint another person in the territory as a distributor or agent for the products in the territory or supply any of the products to any other person in the territory for use or resale,[5] and to use its best endeavours to promote the sale of the products in the territory and satisfy market demand.[6] As to payment the agreement provided:

> "4.3 Playcorp shall pay to Taiyo the minimum sum of $US 1,000,000 during the first calendar year of the Agreement in payment of

2 Cl 3.1.
3 Cl 3.2.
4 Cl 2.2.
5 Cl 2.3.
6 Cl 6.1.

> Products. In the event that the earned payments during the first calendar year do not equal or exceed $US 1,000,000 then Playcorp shall pay such additional sum, which together with the earned payment will equal $US 1,000,000 prior to 31 December, 1993.
>
> Thereafter, subject always to Taiyo being able to continue to offer to Playcorp a range and depth of Products not less than those available 1992/3, Playcorp shall pay to Taiyo the minimum sum of $US 4,000,000 for the balance of the Term in payment of Products. In the event that the earned payments during the period until 1 January, 1998 do not equal or exceed $US 4,000,000, then Playcorp shall pay such additional sum, which together with the earned payment will equal $US five million prior to 31 December, 1997.
>
> 4.4 Playcorp shall account to Taiyo of all sales of Products in the Territory on an annual basis."

28 For its part, by the agreement Taiyo authorised Playcorp to use the Taiyo trademark and copyrights in the territory on or in relation to the products for the purpose of exercising its rights and performing its obligations under the agreement.[7] Taiyo further agreed to provide Playcorp with samples, catalogues, brochures and up-to-date information concerning the products as Taiyo considered appropriate or Playcorp reasonably required to assist with the sale of products, and endeavour to answer as soon as practicable any technical enquiries concerning the products made by Playcorp or its customers.[8] Clause 8.9 provided that the agreement shall be binding upon and enure to the benefit of the parties and their assigns and successors except that if Glatt is no longer the managing director of Playcorp, Taiyo may terminate the agreement on six months' notice. The agreement was also liable to termination if either party is in default of an obligation and did not cure such default to the satisfaction of the other party within 30 days of notice to do so,[9] or (to summarise) a party became insolvent.[10] Finally, by cl 8.9 it was provided that the agreement shall be construed in accordance with the laws of Australia.

29 On 14 January 1994 Taiyo and Tyco recorded a written distribution agreement. The

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7 Cl 7.
8 Cl 6.2.
9 Cl 5.2(c).
10 Cl 5.2(a) and (b).

document was in the form of a letter to Futamura from Grey of Tyco and was signed by Suto by way of agreement by Taiyo. It provided for Taiyo to manufacture radio controlled toys for distribution by Tyco on an exclusive basis world wide excluding Japan and Australia. It is important and I set it out;

> "This will confirm our Working Agreement, whereby Taiyo Kogyo Co. Ltd. Of Japan ("Taiyo") will continue to manufacture radio control toy products for Tyco Industries, Inc. and its worldwide subsidiaries and affiliates ("Tyco"), as follows:
>
> 1. This Agreement shall be in effect until December 31, 1994. Thereafter, this Agreement shall be automatically renewed on a year-to-year basis unless either party gives written notice of its intention to terminate this Agreement not less than six months prior to the end of any calendar year. Such termination shall become effective on the last day of that calendar year.
>
> 2. Taiyo shall manufacture certain radio control products for distribution by Tyco on an exclusive basis worldwide, excluding Japan and Australia. Taiyo shall continue to offer other (non-Tyco) radio control products to Radio Shack stores. Taiyo shall continue to have the right to offer the full line of radio control products (Tyco and non-Tyco) to Sheng Tai Toys in Singapore, New Zealand Playcorp in New Zealand and United Trading Estates in the United Arab Emirates. In addition, Taiyo shall continue to offer to Asahi the nine items previously agreed to, but only until February 28, 1995. Thereafter, sales to Asahi will cease.
>
> 3. Tyco will continue to use its best efforts to develop new product ideas for radio control toys to be manufactured by Taiyo, including soliciting product ideas from outside inventors. When royalties are due to outside inventors, Tyco will be responsible for all royalties in the countries that it sells these items, and Taiyo will be responsible for Japan, Australia, and any other countries in which it sells to someone other than Tyco.
>
> 4. Each year Taiyo and Tyco shall meet and negotiate in advance the price for the products Taiyo intends to sell to Tyco the following year. Taiyo shall bill Tyco at prices and terms negotiated between the parties.
>
> 5. …
>
> 6. …
>
> 7. If this agreement is terminated as described in Paragraph 1, then Taiyo agrees not to sell any items developed by Tyco to any

> other customer worldwide except Japan, without the written consent of Tyco."

30 In early 1994 Glatt raised concerns with Futamura about Tyco's distribution of R/C toys in Australia. It is not necessary at this point or later to detail all the communications. I note that Futamura took the matter up with Grey and that Grey wrote to Futamura on 24 March 1994 saying;

> "Regarding Australia, you are correct that our agreement is for Playcorp to continue to sell all Tyco/Taiyo R/C items, and so I'm sorry if I've made you concerned. As you have stated, however, other items such as Matchbox or Preschool R/C are not part of the agreement, and will be sold by Croner-Tyco.
>
> The question of licensed properties was not considered when we made our original agreement. For example, where we have the master toy license for a property like Looney Tunes or X-Men or Viper, and we have the basic toy line, we feel R/C should be part of our basic line. In fact, many retailers sell the licensed R/C in the same area of the store with other licensed toys, like Looney Tunes R/C with other Looney Tunes merchandise, not with other R/C.
>
> Yuki, this should not trouble you. For this year, we have already agreed that Playcorp can handle our licensed R/C. And for future years, we have time to discuss it further so we can explain in detail why we believe licensed R/C is separate from Tyco/Taiyo R/C."

31 Futamura and Glatt communicated about these matters.

32 In June 1994 Tyco informed Futamura of not being able to find Playcorp R/C toys in New Zealand and Futamura queried Glatt about performance.

33 In late 1994 Playcorp found a number of items were being returned as defective. This concerns the defective products claim to which I refer later. I also pass over a difficulty that Playcorp had of obtaining supply of a R/C toy called Rebound.

34 It is convenient to move then to 16 May 1995 when Futamura informed Glatt that he would be leaving Taiyo "suddenly as at May 20". Glatt replied by facsimile the following day expressing shock and requesting that Futamura arrange an appointment with Suto to discuss the future of the Australian and New Zealand distribution of Taiyo products. At Futamura's request Itani arranged an

appointment and Glatt met Suto in Japan on 26 May. I return to this meeting in dealing with the forgery issue.

35 On 9 August 1995 Grey wrote to Glatt and Suto. The letters are important. They followed and reflected discussions between Taiyo and Tyco. The letter to Glatt advised of a new policy regarding Tyco developed R/C products. From 1996 Tyco would take over distribution of all new Tyco developed R/C items in Australia and New Zealand. In view of the importance of the letter I set it out:

> "I wanted to write to you personally to let you know our new policy regarding Tyco developed R/C products.
>
> In the past because of your long relationship with Taiyo, we have agreed for Playcorp to distribute Tyco-developed R/C items in Australia and New Zealand, even though Tyco was distributing them directly in the rest of the world.
>
> However, we have told Taiyo that beginning in 1996, we must take over the distribution of all new Tyco-developed R/C items in Australia and New Zealand.
>
> Suto-san proposed that the balance of the Taiyo line, that is, all R/C items you are currently distributing in 1995, including Rebound, you can continue with in 1996 and we have agreed. Hopefully, this will give both Croner-Tyco and Playcorp exciting Taiyo R/C to sell in 1996.
>
> I wanted to let you know before either of us committed to any customers for 1996, or showed any Australian customers our 1996 line.
>
> We appreciate our long relationship and hope you understand that we must make this change at this time. We wish you the best of luck in the future".

36 The letter to Suto was in the following terms:

> "In the past, when we have discussed distribution in Australia and New Zealand, you have told us that Playcorp has been a good distributor for Taiyo, and that Taiyo feels loyalty to Steve Glatt and Playcorp.
>
> Until now, we have agreed to let Playcorp distribute items developed by Tyco because of Steven Glatt's long relationship with Taiyo. However, beginning in 1996, we must take over distribution of all new Tyco-developed R/C items in Australia and New Zealand.

> We agree to let Playcorp continue for 1996 with all the items they are distributing in 1995, including the Rebound, so they will have a strong Taiyo R/C line to sell.
>
> I intend to send a letter directly to Steven explaining that Tyco must do this at this time. We want to let him know now, so that he has time to make his plans for 1996.
>
> Suto-san, we thank you for your understanding and your continuing cooperation."

37 The letter to Glatt concerned him as it reduced the products available to Playcorp from those available under the arrangements stated in Tyco's letter dated 17 June 1992 and under the distribution agreement. In response, Glatt wrote to Suto and Grey on 15 September 1995 in terms settled by Cooper. The letters referred to and relied upon the distribution agreement, requiring it to be performed.

38 On 19 September 1995 Itani wrote to Playcorp saying that "we are unable to locate the contract document you are talking about in our Tokyo office". He asked if Playcorp could fax the document. On 26 September Grey wrote separately to Glatt and Suto saying he was unaware of the agreement and requested a copy by fax. Glatt went overseas on 27 September and thereafter in 1995 and 1996 matters concerning the distribution agreement and the legal implications were handled by Cooper (who is a lawyer).

39 I do not set out all the communications that followed concerning the distribution agreement. I note that on 28 September Cooper faxed a copy to Itani, and, on the same day, Cooper faxed a letter to Grey stating that he consented to Taiyo releasing a copy of the agreement to him but that he considered he could not do so without Taiyo's permission. On 28 September Itani faxed the agreement to Grey with a letter stating:

> "We just received fax copies of the agreement from Playcorp. Since Suto san does not remember he might have put his signature on it without knowing too much about the deal. We appreciate you helping us on this matter.
>
> Thank you and best regards,"

It is important to note that this letter was not discovered by Taiyo; it was obtained by Playcorp from Tyco following an application to the Court. On 29 September Grey wrote to Cooper making points about the distribution agreement and stating that for reasons outlined it was consistent with Tyco's intentions.

40 At this time and continuing there are communications concerning defective products and the supply of spare parts, further toys required by Playcorp, issues between Tyco and Playcorp, and from time to time the distribution agreement. It is not necessary to set it all out, and in particular I defer further reference to the distribution agreement. In the course of this Tyco and Taiyo communicated and Tyco proffered advice to Taiyo as to how it should deal with Playcorp, in particular on the defective products claim and the matter of future supply to Playcorp. It is evident their relationship was becoming closer and stronger and that since the departure of Futamura, and doubtless having regard to the far greater amount of business done with Tyco, Suto allied Taiyo with Tyco and supported its interest against Playcorp.

41 There are seen to be two lines in the parties dealings. There is the dispute between Playcorp and Taiyo over Playcorp's defective products claim and requests for supply and that leads to the issue of breach of the distribution agreement by Taiyo, repudiation and rescission. The other concerns issues between Playcorp and Tyco which arose out of Playcorp's claim of rights under the distribution agreement and how that affected Tyco and Tyco's desire to sell products in the Australian market.

42 Without going into all the details or tracing every step I refer to some of the events.

43 On 2 October 1995 Glatt wrote to Suto making a claim for US $268,943 for defective products. The letter had been preceded by a deal of effort on Glatt's part to deal with the matter. The letter stated:

"Dear Suto-San,

Re: CLAIM FOR DEFECTIVE PRODUCTS

As we have indicated to you <u>over several months</u>, the repair and

return rate of both Triple Wheels, 6V Python and other categories has been unacceptably high. Through our repair agents and returns to our warehouse we have incurred high expenses and a warehouse full of faulty product.

We have listed below our claim which does not take into account the loss of goodwill Playcorp has suffered as a result of the problems incurred due to a fault with the product. This matter now requires attention and finalisation and can no longer be delayed.

RETURNS	**US $**	
Quantity returned		7,184
FOB cost	22.35	
Freight	1.21	US$ 23.56
Total		US$ 169,255
REPAIRS		
Quantity		5,864
Total cost of repairs		US$ 99,688
TOTAL CLAIM		**US$ 268,943**

Should you wish us to return to you the faulty product, shipment can be arranged. You should be aware that faulty product is continuing to be returned as the remaining portion of stock is sold through by the retail trade.

We look forward to a quick and positive response in order to finalise this matter".

The amount claimed as the cost of repairs is an average cost of US$17 per unit.

44 Itani responded to the claim on 5 October 1995 in terms drafted by Tyco. He said he wanted to finalise the matter in a way that was fair to Playcorp and Taiyo. For this purpose he requested further information. He requested confirmation that the returns were for Triple Wheels and Python, and how many, and whether any 6V Scorcher had been returned and how many. As to repairs, how many were for

Triple Wheels and Python, and could Glatt explain how the average cost was $17? That seemed very high as Taiyo had supplied parts for repairs and it cost less than $17 to make and package a new product. Glatt responded with the following letter on 30 October:

> "Thank you for your fax of 5th October, 1995. In response to your queries please find the following information:
>
> RETURNS TO 10TH OCTOBER, 1995
>
> | | | |
> |---|---|---|
> | Triple Wheels | 4,546 | |
> | Python | 1,686 | |
> | 6.0V Scorcher | 20 | |
> | 9.6V Scorcher | 452 | |
> | Wave Albatross | 228 | |
> | FX4 | 63 | |
> | Harley Davidson Pick-Up | 132 | |
> | Rebound | 43 | |
> | Firepower | 14 | We are expecting more returns on Firepower with time |
> | | 7,184 | |
>
> The cost of repairs is due to the fact that in Australia labour is very expensive. It is not viable for our repair agents to fix a defective product for less than $17.00, excluding parts. This is a negotiated agreed minimum fee with all our service agents. They charge Playcorp a fixed minimum labour charge per vehicle. The split up of repairs is as follows:-
>
> | | |
> |---|---|
> | Triple Wheels | 3,428 |
> | Python | 1,074 |
> | 6.0V Scorcher | 80 |
> | Other | 1,282 |
> | | 5,864 |
>
> Hopefully with this information you have requested, this matter can now be settled. I look forward to your prompt response."

45 While this was happening, and there were communications about spare parts and supply, on 27 October 1995 Playcorp sought information from Taiyo of products available to it in 1996 including any new Taiyo developed products. That was to facilitate planning and the placing of orders for the first half of 1996.

46 Also on 30 October, Glatt wrote to Suto requesting a formal response to his letter dated 15 September (referred to at [37]) which referred to the distribution agreement.

47 Finally on 30 October, Cooper wrote to Grey taking issue with his letter dated 29 September (referred to at [39]) and threatening litigation to protect Playcorp's interest unless there was a compromise. The letter stated that Taiyo would be in breach of the distribution agreement if it did not supply Playcorp with product as defined in the agreement. That included Tyco developed products.

48 In the subsequent on-going communications between the parties, in the course of which Taiyo and Tyco communicated including as to Taiyo's responses to Playcorp, the parties edged closer to disputation. In this process the issues between Playcorp and Taiyo on the one hand and Playcorp and Tyco on the other hand were sought to be isolated by Playcorp, and it would seem Tyco, but the underlying commercial perspective of Taiyo led to it conflating the issues and in that respect Tyco's interest was on the Taiyo side. As matters progressed Suto took Taiyo more and more to Tyco's side, and in the course of doing so Taiyo sought from Tyco, and obtained, guidance as to how to deal with Playcorp.

49 On the matter of the defective product claims, Taiyo stalled. That led to Glatt, on 15 and 27 November 1995 writing to Itani requesting a response to the claims for faulty merchandise. In the latter letter he observed that he had discussed the matter with Itani for many months, and that Itani had advised him not to officially forward a claim until Tyco had negotiated on the same matter. (That referred to the fact that Tyco, like Playcorp, had made claims on Taiyo in respect of faulty merchandise.) Glatt further observed that he had delayed for several further months because of Itani's advice that Suto had other concerns.

50 On 10 November 1995 Grey wrote to Cooper responding to his letter dated 30 October. He expressed interest in finding a way to resolve their differences in a businesslike and reasonable fashion. However Cooper had to understand that Tyco was committed to expanding its 1995 entry into the Australian R/C market with

additional items for 1996. Tyco had developed two new promotional items for 1996, the 6.0v Dagger and the 9.6v Mutator. Tyco would be prepared to discuss making one of those available for Playcorp, plus the related advertising and packaging materials, for 1996 in exchange for the return of some of the older Taiyo products for distribution by Tyco through Croner-Tyco.

51 Cooper responded with a letter to Grey dated 24 November 1995. He objected to cease trading in any old items as stock was still held in store, and stated that as Taiyo produced both Dagger and Mutator, Playcorp was entitled to them under its agreement with Taiyo. A consequence was for Playcorp to be given the rights to one additional new product each year commencing with Dagger in 1996 conditional upon Taiyo settling Playcorp's faulty product claim, and on Taiyo and Tyco acknowledging that all past models which may be re-launched in their original or a revamped form still belong exclusively to Playcorp in Australia and New Zealand. Cooper asked Grey to discuss the matter with Taiyo.

52 Grey responded by letter dated 1 December 1995. Among a series of points he said the following. Tyco would prefer Playcorp to distribute Mutator, and Croner-Tyco to distribute the Dagger. Playcorp could use the advertising and packaging materials for Mutator on the same terms as previously given and have the distribution rights for the remaining period of the Taiyo agreement. He noted that Playcorp had not paid Tyco's fees for use of advertising and packaging materials for 1994 and 1995 and asked that accounts for those fees totalling $44,000 (which were sent separately that day) be paid. He said that beyond 1996 Tyco could not offer any further new Tyco developed R/C toys after Mutator. However, Grey said, that would give Playcorp time to develop its own new items for 1997 and beyond. The matter of Playcorp's faulty product claim was between it and Taiyo and it was not appropriate for Tyco to intervene. As to past models (distributed by Playcorp in 1995 and prior), while Tyco could not agree not to distribute new or revised items using some common parts or features, it did not intend to introduce during the remainder of Playcorp's agreement with Taiyo items substantially similar to

Playcorp "past models". Finally, Grey proposed that Tyco take over New Zealand distribution in 1996.

53 On 4 December 1995 Cooper suggested to Grey that Playcorp have Dagger instead of Mutator. Grey replied saying that was acceptable if all the other points in his letter dated 1 December were acceptable.

54 Cooper replied on 8 December 1995 stating that a non-negotiable requirement of the settlement was attention to Playcorp's faulty product claim, to which there had been no meaningful response. He also asked for costs of Dagger and Mutator and some samples.

55 Tyco responded on 8 December with letters to Itani and Cooper. The letter to Itani stated that Tyco was trying to avoid a lawsuit with Playcorp over distribution in Australia and what Tyco had offered Playcorp. The letter asked Itani to send Cooper the FOB costs of Dagger and Mutator. The letter also referred to Playcorp's faulty product claim stating that Playcorp was anxious to settle it, and that it would be helpful if Taiyo could make some offer in settlement. The letter to Cooper provided some information concerning Dagger and Mutator, stated that Tyco had asked Itani to respond on the faulty product claim but there was nothing further Tyco could do on that claim, and assumed that Playcorp otherwise agreed to the terms in Tyco's letter dated 1 December 1995.

56 Taiyo's response to the prod from Tyco was a letter from Itani to Glatt dated 11 December 1995 stating that Taiyo had not neglected the faulty products issue and that "a little more time" was needed. Glatt responded on the following day stating that the time now elapsed in dealing with the claim was "beyond being acceptable" and requested a conclusion. Glatt noted that Taiyo had settled similar issues with Tyco "quite some time ago".

57 In a response to Glatt later on 12 December Itani referred both to the faulty products matter and to a request of Playcorp concerning distribution in 1996. The letter stated:

> "I talked with Suto san today once again and passed your urgent request on these outstanding issues. Believe it or not, Suto san does not remember at all that he signed over the Agreement even after Mr. Cooper previously faxed us the copy of it while you were away. He wants to conclude the quality claims and 1996 Australian distribution issues when he actually sees the original Agreement where you can prove it was certainly made between you and Suto san. Would you please mail us the original Agreement as soon as you can? As we previously advised, this paperwork is not officially filed at Taiyo Tokyo or anywhere in our company, while we see the Agreement with Tyco is officially filed by our managing director."

58 This letter was the first time that Taiyo linked a conclusion on the issue of the faulty product claim to distribution under the agreement. It should also be mentioned that in his evidence Itani said that the letter was intended to convey a strong statement that Suto had not signed the agreement and that Taiyo was not bound by it. He also acknowledged being aware that Tyco and Playcorp were negotiating in relation to distribution of products in Australia and New Zealand. He was so aware from the ongoing communications between Taiyo and Tyco. It was thus natural, and reflective of their relationship, that on 12 December Itani provided a copy of this letter to Tyco.

59 Tyco returned a letter to Itani by facsimile later that day (12 December). The letter provided information on the FOB cost of Dagger and Mutator to assist advice to Playcorp. The letter stated that Tyco felt that Taiyo should act on the two outstanding issues of supply and faulty product:

> "[A]s quickly as possible, however, we suggest you address them as two separate issues. We don't feel they should be mixed or connected in any way, since they are different topics. If you would please respond to both in separate faxes, this would help keep them apart. Playcorp would then file them in separate folders. I hope you understand."

The letter then referred to claims by Tyco for faulty products, namely the items Triple Wheels and Python, for which debit notes were enclosed for US$285,507.50. Tyco then suggested Taiyo offer Playcorp a market share percentage of what Taiyo paid Tyco. On the basis that in its best year, 1994, Playcorp had about 4-5% of Tyco's market, it was suggested that Taiyo offer 5% of $285,507.50, or a settlement of

$14,275.37. Adding a little to show "[Y]ou are nice, reasonable guys and want to resolve this issue" Taiyo "might consider a settlement of $18,000 or $20,000 to see what they say."

60 Further communications occurred on 13 December 1995. Itani sent a facsimile to Tyco which commenced with thanks for passing Suto's request to Grey and then stated:

> "As you know, Suto san is now ready to set his Patriot Missiles to protect Tyco/Taiyo business. We look forward to Grey san's response.
>
> …
>
> 1. Re: Playcorp Issue.
> Thank you and Mark san for giving us helpful suggestions on the outstanding issues. Suto san does not want to give up on these issues as he is saying Grey san does not have to offer any kind of compromise for them, but he will handle all by himself, if Grey san treats him to dinner in Hong Kong. Again, we look forward to Grey san's response."

61 Notwithstanding that he was the author of the letter, and, as I find, it reflected a discussion he had had with Suto, in cross-examination Itani was evasive as to what the reference to "Patriot Missiles" meant. The cross-examination had been preceded by questions in his cross-examination the previous afternoon (28 November 2001) as to the intended meaning of the expression "patriot arm" in a letter Itani sent to Tyco on 28 March 1996. In that letter Itani advised that, in relation to dealing with Playcorp, "Suto san has another idea/patriot arm to protect ourselves with". Itani said he did not know what "patriot arm" was. Although he wrote the letter he could not remember "right now" what "patriot arm" was. He did not know if Suto told him what it was. He was not sure exactly what Suto said, adding that "[H]e told me similar things and I just interpreted in this way". In short, his evidence left one unenlightened as to the intended meaning of the words or as to the course of action which they were intended to convey or Suto had in his mind. I thought at the time, and on reflection in light of all the evidence I consider now, and find, that Itani's evidence was deliberately evasive and non-responsive. In short, I find that the

evidence was deliberately false.

62 I conclude in the same way in respect of the evidence he gave the next day as to the intended meaning of the expression "Patriot Missiles" in his earlier letter to Tyco dated 13 December 1995. I interpolate that the production of this letter by Taiyo only occurred over the lunch break on 29 November 2001 during Itani's cross-examination. It was an example, among others, of Taiyo's lax observance, or perhaps disregard, of the requirements of discovery of documents. In any event, when asked as to the meaning of the expression "Patriot Missiles", Itani skirted around without stating what Suto had in mind, which I find Itani knew. He said that Suto was very upset and that he was "going to talk to some press people here or something". He also said that Suto complained that "somebody forged my signature". According to Itani, Futamura's wife was related to Suto's wife, and Suto had said he would talk "to his relative or whatever, something like that". Itani then agreed that Suto was thinking of a tactic to shut Playcorp down from the Australia market. He was then asked if the tactic was to say to Playcorp take $20,000 (for faulty products) or no more supply and he answered "I think that was something that Mr Suto was trying to tell me". These answers exposed what in any event I would have found was the reason for Itani's disinclination to state the intended meaning of the expressions "Patriot Missiles" and "patriot arm". The reason was that an honest answer, which I find lay within Itani's knowledge to give, would have exposed Suto's state of mind as to the approach to be taken by Taiyo in dealing with Playcorp, in particular to out-manoeuvre Playcorp and bring their relationship under the alleged distribution agreement to an end.

63 Finally on 13 December 1995, Tyco sent a facsimile to Itani. The letter was from the marketing manager. He had met with Grey to discuss Itani's telephone call to Suto and "our call last night". The letter dealt with a number of matters commencing with Playcorp. He set out revised FOB costs for Dagger and Mutator. He requested that they not be sent to Cooper until Suto and Grey "decide whether we will offer Playcorp any product or not".

64 On 14 December Cooper sent a letter to Itani, with a copy to Grey. The letter pressed for resolution of the faulty product claim, which was independent of Playcorp's 1996 distribution rights. He refused to send Itani the original of the distribution agreement but offered the opportunity for inspection in Playcorp's office. As to 1996 distribution, the letter said that based on representations from Tyco and Playcorp's fault claims being met in full, Playcorp was prepared to be reasonable with the balance of the agreement. For that purpose he requested the FOB costs of Dagger and Mutator, and the relevant samples and videos.

65 Grey replied to Cooper on 15 December. He provided costs for 1996 of Dagger and Mutator and asked some questions relevant to the resolution of differences.

66 On 19 December Cooper wrote to Grey (with a copy to Itani) and to Itani (with a copy to Grey). The letter to Grey was in furtherance of negotiating a settlement. The letter to Itani noted that Tyco's price for Dagger and Mutator was too high and requested a realistic price.

67 Grey responded on 22 December. Tyco wished to settle the issues with Playcorp. However, if Playcorp will not agree Tyco will assume no settlement can be reached and begin distributing all Tyco-developed R/C in the Australian and New Zealand markets in 1996. Cooper responded on 28 December stating that settlement must be achieved with Taiyo, and that if Tyco sued, Playcorp would counterclaim for breach of the Taiyo agreement.

68 On 18 January 1996 Sullivan, Tyco's vice president, marketing, sent a letter to Itani which recorded some thoughts and statements of Suto. They record that Suto was sure he did not sign the Playcorp agreement, that Suto would ask Glatt to visit Yamagata (in Japan) with the original agreement and discuss returns with him, and that Suto had recently suggested another strategy regarding Playcorp which Tyco will discuss and respond to next week.

69 In February and March 1996 a good deal of correspondence passed between the parties. On 5 February Sullivan wrote to Itani advising that Tyco's lawyers in

Australia were going to write to Playcorp for payment of the amount of $44,000 and threatening other action. The letter contemplated settlement on the matter of distribution. Tyco expressed agreement with suggestions of Suto that Tyco not try and take over distributing all R/C items in Australia in 1996. Tyco "agree[d] that it may be better not to fight Steven for the distribution this year". The letter concluded with a request for advice of Suto's thoughts "about our plans".

70 As foreshadowed, on 7 February Australian lawyers for Tyco, Cowley Hearne, wrote to Playcorp. They sent two letters. One letter demanded payment of the $44,000 within seven days. The other letter gave three months' notice of termination of the licence to use Tyco's television commercials and packaging designs in promoting the sale of R/C products.

71 Also on 7 February, Cooper sent a letter to Itani with a copy to Grey. To Itani, he requested a reply to his facsimiles of 14 and 19 December 1995, stated that Playcorp was prepared to settle along the lines suggested by Grey but required a firm quote for Dagger and Mutator so as to elect the product to market in 1996 as part of the compromise, requested Taiyo confirm it was willing to supply these products and requested resolution of the faulty product claim.

72 Later on the same day (7 February) Tyco sent a facsimile to Itani with proposed responses by Taiyo to Playcorp. On the matter of the faulty goods, the proposal was as stated on 12 December 1995 to offer $20,000. On the matter of Dagger and Mutator prices were proposed to be offered to Playcorp.

73 On 8 February 1996 Itani sent a letter to Cooper in which he offered US$20,000 for the faulty product claim, and provided the FOB costs of Dagger and Mutator. The letter was on the lines proposed by Tyco. In relation to the defective products claim Itani stated (as Tyco suggested) that Playcorp's market share percentage was about 4-5% of Tyco's and that Playcorp should bear some of the responsibility as Tyco did.

74 Cooper responded with letters to Itani and Grey on 26 February. In the letter to Itani, inspection of the faulty products was invited and compensation in full was

requested (Tyco's position being irrelevant), the willingness of Taiyo to supply Dagger and Mutator was acknowledged and the prices were accepted and samples were requested; concern was expressed that Taiyo was deliberately refusing to respond to Playcorp's orders for spare parts for the repair of faulty units.

75 With his letter to Grey dated 26 February Cooper sent a copy of his letter to Itani. Cooper made two proposals for settlement, each alternate to the other. Under Alternative A Taiyo would grant Playcorp a full credit for its warranty claims, whereas under Alternative B Playcorp would pursue that claim against Taiyo through the courts. In addition under Alternative B, the Taiyo agreement remained on foot until resolution of the court case, Playcorp would pay Tyco $44,000 and distribute Dagger and Mutator. Alternative A also included a package of terms.

76 Passing over facsimiles between Tyco and Taiyo on 27 and 28 February, Grey responded to Cooper's letter on 28 February. He rejected Alternative A as that required Taiyo to grant a full credit for Playcorp's warranty claims, and did not involve Tyco. But Tyco could agree to Alternative B, with certain qualifications. Grey outlined, in addition, an Alternative C under which Playcorp pursued the claim against Taiyo for faulty product, paid Tyco the $44,000, and Tyco paid Playcorp $100,000 in exchange for Playcorp terminating its agreement with Taiyo, giving Tyco the right to sell all Taiyo products in 1996.

77 It was then Itani's turn. On 29 February he wrote to Cooper rejecting Playcorp's proposal on faulty products and insisting that $20,000 was reasonable and fair. Itani added that:

> "At the same time, we are afraid that your present attitude toward the settlement of defective product may result in an irreconcilable sort of situation between Playcorp and Taiyo in terms of the 1996 R/C business."

Finally, Itani denied that Taiyo was deliberately refusing spare parts.

78 Cooper responded with letters on 8 March. In a short letter to Itani, he rejected Itani's offer on the faulty product claim as insulting, repeated offers to Taiyo to

inspect the goods, and stated that Playcorp would pursue the claim "without interference to our 1996 RC business. Any attempt by you to link the two will only compound the breach of our existing agreement." He requested advice by return whether Taiyo was prepared to supply Playcorp with 1996 product while Playcorp separately pursued the old claims.

79 In his letter to Grey, Cooper rejected Alternative C. That left Alternative B as a basis for settlement. Playcorp was prepared to commit to spending on further advertising in Australia in order to promote the product instead of paying Tyco a recoupment of the 1996 packaging and advertising expenditure. In a reply the same day Grey rejected Cooper's proposal and suggested that a version of Alternative C giving Tyco the right to distribute all Taiyo products in Australia and New Zealand might be the best resolution.

80 The correspondence was resumed a few days later on 11 March. Dealing first with Taiyo, Itani sent a facsimile to Cooper which, apart from an introductory paragraph, repeated his letter sent on 29 February. In the introductory paragraph Itani stated that Taiyo did:

> "[N]ot have a suspicion about the returns in your warehouses, but we just feel your claim is totally unreasonable."

Cooper responded immediately stating, in particular, that Playcorp was ready, willing and able to commence marketing for 1996 and requesting samples of Dagger and Mutator for showing at the Toy Fair. He warned Taiyo not to repudiate the agreement.

81 In his letter to Grey dated 11 March Cooper suggested that Tyco supply Playcorp with the Dagger and Mutator commercials as part of an "all in" settlement with Playcorp continuing to have the Australian rights pursuant to its agreement with Taiyo until the faulty product claim was settled. As to Alternative C, Cooper said that if Playcorp was to step out of the picture immediately and completely, Playcorp required US$500,000 which would cover Playcorp's loss of profits on the three years remaining under the agreement, Tyco's claim of $44,000 and Playcorp's defective

products claim against Taiyo.

82 On 15 March Grey wrote offering to pay $156,000 net now or $200,000 payable by three equal annual instalments commencing now. Then, following a telephone conversation concerning settlement on 17 March, Cooper sent a letter to Grey expressing shock, in the circumstances of the state of the negotiations, to learn that Croner-Tyco had commenced marketing Dagger and Mutator in Australia. He sought an explanation and made a further proposal for resolution of the matter.

83 Also on 18 March, Itani sent a letter to Cooper repeating Taiyo's attitude to the faulty product claim and stating that:

> "We strongly feel your claim for the '95 returns/high-priced repairs and our '96 business are very much interlinked. We would prefer to resolve last year's problem before proceeding with '96 shipments."

84 Finally on 18 March, Cooper sent a facsimile to Itani demanding pursuant to cl 6.2 of the agreement, that Taiyo provide Playcorp with samples of Dagger and Mutator "failing which we shall have no alternative but to take action to enforce our rights under the Agreement".

85 On 19 March Cooper wrote to Grey after they had spoken on the telephone. Cooper expressed his preference to settle on Alternative A, and confirmed that Grey had agreed to instruct Croner-Tyco to withdraw from the offer of Dagger and Mutator. (Under Alternative A, Playcorp was to have Dagger and Mutator in 1996.) On that being done Playcorp would pay the $44,000 and not sue Tyco or Croner-Tyco. Grey was also to tell Taiyo that he would not offer those goods for sale in order not to infringe Playcorp's agreement. Cooper then made an offer on Alternative C, as a second preference. The offer was, further to the letter dated 11 March, to abandon all future new products from Tyco for $500,000 minus AUD$250,000 being Playcorp's claim against Taiyo. But Playcorp would retain its action against Taiyo and its right to continue to buy spare parts and old Taiyo products assuming Taiyo would be willing to supply.

86 Also on 19 March Cooper wrote to Itani referring to his conversation with Grey as to

withdrawing Dagger and Mutator, and offering an independent arbitration of the defective product matter in Australia. Cooper requested that Itani immediately agree to supply Playcorp in accordance with the agreement.

87 On 20 March Grey wrote to Cooper confirming withdrawal of Dagger and Mutator. He assumed Playcorp could now send the $44,000. Then, as to Alternative B he pointed out that he could not assure that Taiyo would supply Dagger and Mutator. That issue, combined with the cost to Playcorp of producing new commercials, packaging and samples, made Alternative C worth considering. Grey made a final offer of $260,000 (or $216,000 net of $44,000).

88 Having thus heard from Grey, on 20 March Cooper sent a letter to Itani asking whether he would now agree to supply Dagger and Mutator in accordance with the agreement. In reply, on 21 March, Itani wrote saying:

> "Please let us summarize our direction on the defective R/C's and our '96 business once again in this fax.
>
> 1. Defective R/C's and Returns
> We feel your claim is totally unreasonable because:
> 1.) The defective items Playcorp has indicated as compensation had been repaired all by yourself without Taiyo's agreement.
> 2.) The problem like this should typically be settled timely. Playcorp should not have accumulated the defectives or compensation figures from previous years to report Taiyo.
> 3.) Playcorp did not officially report anything from their incoming inspections.
> 4.) In order for Taiyo to admit your indication on the faulty goods is genuine, Taiyo feels they all must be inspected by a Japanese lawyer, not by an Australian lawyer.
>
> Therefore, we strongly feel our offer of US$20,000 for your claim is very reasonable.
>
> 2.) '96 R/C Business
> As previously mentioned, we would like to stress that the returns/high priced repairs and our '96 business are very much interlinked. In other words, unless you agree to our approach for the defective R/C's and returns, we are very sorry we can not offer any R/C's including the new items, Mutator and Dagger. We just hope you have not been showing any of Taiyo R/C's during the Toy Fair. Another thing we would like to make clear about is that what Mr. Richard Grey has advised you only indicates Tyco's decision

> toward Playcorp, not Taiyo's decision. We would like to stress that "Tyco is not Taiyo". We hope this will help you understand better on this matter.
>
> Again, we are sorry that we can not agree to supply you any items, we naturally include Mutator and Dagger, as long as you do not accept our offer of US$20,000 as a quick settlement."

89 In an attempt to find a point at which compromise might be reached, on 22 March Glatt spoke to Itani and offered to settle the defective product claim for US$150,000. Itani then sent a facsimile to Glatt in which he rejected the offer. Itani said he had spoken to Suto and that the offer was "far too high for us to consider". There was no counter-offer.

90 26 March was a significant day. A number of events occurred. Itani rang Glatt at Playcorp's office in North Melbourne during the morning and advised that because of Playcorp's unreasonable attitude concerning its defective product claim Suto no longer wished to do business with Playcorp.

91 Separately, and working from his Collins Street office, Cooper prepared and sent a letter to Grey in response to his letter dated 20 March. Cooper rejected the Alternative C offer. Alternative B could not come into play because of Taiyo's attitude. As a result Playcorp was continuing with its agreement with Taiyo still on foot. Playcorp would continue to use every possible means to secure continued supply for the remainder of the agreement. The amount of $44,000 was being sent to Tyco "today" in payment of Tyco's claim. It is to be noted that earlier in March (it would seem on 13 March 1996) Tyco had served a statutory demand on Playcorp for the debt (in AUD$57,926).

92 Later in the day Karsten Malmos of Tyco, who was then in Melbourne, contacted Glatt and Cooper. The three men met at Playcorp's office in the afternoon. Prior to the meeting Glatt advised Cooper of his conversation with Itani that morning.

93 The meeting with Malmos occupied several hours. Malmos said he wished to resolve the issue of Tyco distributing Tyco/Taiyo toys in Australia and New Zealand. There was a negotiation. An agreement was reached. It was written out

by hand in point form, dated 26 March, and signed by Malmos, Glatt and Cooper. It was agreed a formal document would be prepared recording the agreement. The document stated:

> "- Tyco will immediately refund US$44,000
>
> - Tyco will pay US$305,000 for Playcorp not to interfere with Tyco distributing in Aust Dagger + Mutator or any other 'new' Taiyo developed product. Payment to be made in seven days.
>
> - Playcorp retains all its rights against Taiyo
>
> - Playcorp has no claim to N-Z market
>
> - Playcorp retains rights for any 'old' product it has marketed from Taiyo in the past."

As I understood it, it was accepted before me that the reference to "new Taiyo" was intended as a reference to "new Tyco".

94 Following the meeting Cooper asked Glatt to telephone Itani in Japan. Cooper wanted confirmation of Itani's advice earlier that day. Glatt rang and he and Cooper jointly spoke to Itani on the speaker telephone. They gave evidence that Itani said that Suto no longer wished to do business with Playcorp. In his witness statement Cooper added that Itani further said, in substance, that Taiyo would not supply Playcorp with any products. According to Cooper, they told Itani they accepted the situation and would take appropriate legal action against Taiyo. In his witness statement Itani said that Cooper spoke with an aggressive tone and pressed him to say that Taiyo would not supply products in 1996. Itani said that he would not commit to such a position but wanted to resolve the claim for defective products before discussing supply.

95 The witnesses were taxed on their account of this conversation in their oral evidence. It is not necessary to set the evidence out. It was clear to me on Itani's evidence, and I in any event find it to be the fact, according as it does with Suto's established prior position and the probabilities, that Itani's response, in substance, was that unless Playcorp accepted Taiyo's offer of $20,000 for the defective product claim Taiyo

would not supply in 1996. Itani confirmed that that was Suto's position at the time. I reject Itani's evidence in his witness statement in so far as it is contrary to this finding.

96 Immediately following the conversation Cooper dictated a letter to Itani which he and Glatt signed and sent by facsimile to Itani. The letter, dated 26 March, states:

> "I am writing this facsimile together with Stephen Glatt after his conversation with you a little earlier, and our subsequent joint conversation. You have advised that Suto san does not wish to do business with us, and will not supply us. You further offered that if we were to accept $20,000 in full settlement of our defective products claim you would again approach Suto san and try to convince him to supply us with Dagger and Mutator for 1996.
>
> As I indicated to you on the phone this is not acceptable. We do not agree to relinquish our claim for defective products for a token sum of $20,000. Moreover at this point in time Suto san will not supply us under any circumstances. We do not require you to appeal that decision. We will make other arrangements for 1996 and take immediate legal action against you for the following:
>
> 1. Defective products claim – US$268,943 as at 26/3/1996.
> 2. Damages claim for loss of profits and wrongful termination of contract.
> 3. Legal and other costs.
>
> Unless the full amount of US$268,943 is paid to us within 7 days we have no other choice than to proceed against you on all the above claims. Please advise us within 24 hours of your acceptance or otherwise. Your payment now of our justified claims in full will save you unnecessary legal costs and very high damages if we are forced to proceed to court."

97 On 27 March Sullivan sent a letter to Itani advising that Tyco had resolved the issue of distribution of new Taiyo/Tyco product in Australia and New Zealand. Tyco had paid Playcorp "some money to secure the distribution of new items". Taiyo's issue with Playcorp regarding defective returns was not addressed. Taiyo would have to handle that issue. The letter concluded with a suggestion that:

> "[J]ust to protect yourselves, you may want to make clear to Playcorp that you would distribute product to them if the issues regarding defectives was resolved. That way, they cannot blame you for breaking the contract."

98 In a facsimile sent to Sullivan on 28 March Itani responded, in relation to the resolution concerning new Taiyo/Tyco product, that he had informed Suto who had said "That is exactly what I wanted to see". Suto also said that Taiyo would resolve the defective product issue. As to the suggestion in Sullivan's letter concerning distribution, Itani advised that Taiyo had deliberately held off responding to the last fax at least until they (Playcorp) called again. Taiyo, Itani said, is "trying to see what move they make because Suto San has another idea/patriot arm to protect ourselves with. Thank you for your suggestion."

99 In the meantime Tyco's solicitors Cowley Hearne prepared a deed of release in relation to the handwritten agreement, and forwarded it to Cooper on 28 March for his consideration. Cooper responded with comments on 29 March.

100 On 29 March Cooper sent the following facsimile to Itani concerning termination of the distribution agreement. The letter states:

> "Your refusal to supply us with products, which you are obliged to do under the distribution agreement dated 1 January, 1993 ('the agreement'), constitutes a repudiation of the Agreement which we have accepted, or alternatively hereby accept.
>
> We record that our acceptance of your repudiation and the consequent termination of the Agreement is without prejudice to our claim for damages which we have and will suffer as a consequence thereof. In this regard, our rights are reserved."

101 Itani responded by facsimile on 1 April. He acknowledged the last facsimile but disagreed with the content. As to the statement in the 26 March facsimile that Suto and Taiyo were refusing to sell Playcorp product in 1996, Itani said:

> "What we have consistently said is that, until we resolve the issue of returns, we can not ship you more product and risk further unreasonable damage claims.
>
> We hope you understand our bottom line on this matter."

102 Cooper responded on 3 April with a facsimile to Itani stating that the claim in respect of defective products is a separate and distinct issue from supply of product under the distribution agreement. Taiyo had refused to supply Playcorp with product.

103 Tyco did not make payment of the amount of US$349,000 as provided in the agreement made on 26 March. Nor had the deed of release been agreed and signed. On 18 April Cooper instructed solicitors, Clayton Utz, to commence proceedings against Tyco for recovery of the amount due. Following a letter of demand a writ was filed in this Court, and served, on 6 May seeking judgment against Tyco for US$349,000.

104 The writ provoked a renewal of discussions concerning the deed of release. Terms were agreed and the deed, which was duly signed by Tyco and Playcorp, states that it is made on 30 May 1996. It is necessary to refer to relevant provisions of the deed. I shall do so in as summary a way as possible.

105 Tyco agreed to pay Playcorp AUD$459,006 with interest from 5 April 1996 until the settlement date which was 31 May 1996 or such other time as may be agreed.[11] It was then agreed as follows:-

> "3. THE AGREEMENTS
>
> 3.1 The parties agree that as from the settlement date Playcorp does not have any authority or licence to distribute in New Zealand and will not distribute in New Zealand any Tyco toy.
>
> 3.2 The parties agree that as from the settlement date Playcorp does not have any authority or licence to distribute in Australia and will not distribute in Australia any of Tyco's New Products.
>
> 3.3 Tyco agrees that Playcorp may (without payment of any fee or royalty) continue to have the exclusive right to distribute in Australia (but not in New Zealand) Tyco toys other than Tyco's New Products and (subject to clause 3.12 hereof) to use the Intellectual Property Licence in Australia in respect of Tyco toys other than Tyco's New Products without payment of any fee or royalty.
>
> 3.4 Without prejudice to the rights of Playcorp against Taiyo for damages in respect of any termination of the Distribution Agreement by Taiyo, Playcorp agrees that as from the settlement date Playcorp must not seek nor will it seek any licence or authority from any person (including Taiyo) to distribute in Australia (other than as set out in Clause 3.3) any Tyco toys.

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11 Cl 2.1.

3.5 Playcorp agrees that as from the settlement date Playcorp must not seek nor will it seek any licence or authority from any person (including Taiyo) to distribute in New Zealand any Tyco toys.

3.6 Playcorp agrees that it will not take any legal action against Taiyo for specific performance of the Distribution Agreement.

3.7 The parties agree that as from the settlement date the Intellectual Property Licence will terminate without prejudice to the rights of Playcorp set out in Clause 3.3.

3.8 The parties agree that as from the settlement date Tyco shall have the exclusive right in New Zealand to the exclusion of Playcorp (whether on Tyco's own account or through Tyco's authorised agent) to distribute Tyco toys.

3.9 The parties agree as between themselves only that as from the settlement date Tyco shall have the exclusive right in Australia to the exclusion of Playcorp (whether on Tyco's own account or through Tyco's authorised agent) to distribute Tyco's New Products.

3.10 Playcorp agrees that if within the 90 day period commencing on the settlement date, Tyco pays to Playcorp a further sum of US$195,000 then Playcorp will immediately:

(a) covenant never to commence any proceedings against Taiyo in respect of the Taiyo Claim; and

(b) terminate any proceedings commenced against Taiyo in respect of the Taiyo Claim on the basis that no orders be made other than to dismiss the claims of Playcorp.

3.11 Playcorp will take no action to prevent Taiyo supplying Tyco (or its authorised agents) with any Tyco products to be distributed by Tyco (or its authorised agents) pursuant to the terms of this Deed.

3.12 Nothing in this Agreement gives Playcorp any right or licence to use the trademark or tradename 'Tyco' or any variation or combination of it."

106 The expression "Tyco's New Products" was defined in cl 1.3 as follows:

"For the purposes of this Deed, except where the context of this Deed otherwise requires Tyco's New Products means those Tyco toys that:

(a) Prior to 31 December 1995 have never been distributed or sold by Playcorp in either Australia or New Zealand or in both Australia and New Zealand; or

(b) Prior to 31 December 1995 have been distributed or sold by Playcorp in either Australia or New Zealand or in both Australia and New Zealand and on or after the settlement date have been re-designed by or on behalf of Tyco.

For the purposes of this clause, 're-designed' means altered in any manner but does not include:

(a) a mere alteration to the decals of a toy;

(b) a mere alteration to the colour of a toy;

(c) a mere alteration to the name of a toy; or

(d) an insubstantial alteration to the shape of a toy such that the altered toy is substantially similar to the original toy."

The expression "Taiyo Claim" was defined to mean a claim against Taiyo for loss and damage suffered as a result of Taiyo's repudiation of the distribution agreement and for defective products supplied by Taiyo under the agreement.

107 The Distribution Agreement referred to in cl 3.4 and cl 3.6 is the distribution agreement between Taiyo and Playcorp made 1 January 1993.

108 The reference to the Intellectual Property Licence in cl 3.7 referred to the agreement whereby Tyco authorised Playcorp to use Tyco packaging, designs and advertising relating to Tyco toys.

109 The deed of release provided that in consideration of Tyco's payment and the provisions of the deed the parties mutually released and indemnified each other from claims, and Playcorp agreed to discontinue the Supreme Court proceeding.[12] Tyco duly paid the settlement sum of $459,006 but did not pay the further amount of US$195,000 referred to in cl 3.10.

110 The deed of release did not, however, settle all matters between Playcorp and Tyco. Problems arose as to whether a product was "new" or "old" within the meaning of the expression Tyco's New Products. The issue had the potential to arise when a Tyco toy distributed before 31 December 1995 was "re-designed" and introduced to

12 Cl 4.1.

the market for distribution. Clause 1.3 dealt with "re-design" but not in an all-inclusive sense. It stated four respects which did not constitute "re-design" but the clause left it as a matter of judgment as to whether a "re-design" was "a mere alteration" to the decals, colour or name of the toy, or "an insubstantial alteration to the shape of the toy", and did not otherwise define the criteria by which to determine whether a toy had been "re-designed".

111 On 7 August 1996 Cooper received a letter from R Michael Kennedy, senior vice president and general counsel of Tyco, seeking Playcorp's approval to market an old product, Rebound, in Australia. He offered a royalty for the right to do so.

112 On 1 October 1996 Cooper wrote to Tyco complaining that, in breach of the deed of release, Tyco had distributed in Australia certain old products. He requested that such distribution cease and that Playcorp receive an account of profits.

113 Not having received a proposal from Tyco, on 2 December Cooper wrote to Cowley Hearne threatening to issue proceedings unless a satisfactory offer was received. The managing director of Croner-Tyco wrote to Glatt on the subject on 20 December. He proposed that in relation to two items, Scorcher 4x6 and Wild Thing 11, Croner-Tyco pay Playcorp the net amount representing the profit made on their sales plus an additional amount of compensation as consideration for a release from claims in relation to any future product launch that could be construed to have come from an old product. Croner-Tyco believed that from a practical point of view Playcorp will no longer be able to source product from Taiyo. Taiyo sold 90% of its product through Tyco's subsidiary. If Playcorp did not accept the offer Croner-Tyco would litigate. But, in addition, it was prepared to offer an Olympics project to Playcorp. Playcorp did not accept the offer.

114 On 5 January 1997 Cooper wrote to Cowley Hearne advising that any offer must be within the magnitude of US$300,000 since a settlement is to cover all future "old" Taiyo products to be reintroduced to the market.

115 The dispute was not resolved. On 14 May 1997 Playcorp commenced a proceeding

in this Court against Tyco alleging a breach of the deed of release by distributing in Australia Tyco toys other than Tyco New Products and/or causing or permitting Croner-Tyco to sell, offer for sale or distribute such toys in Australia. The relief claimed was an injunction to restrain Tyco from distributing in Australia R/C toys not being Tyco New Products and damages. In the course of the proceeding, on 22 July 1997 Playcorp provided particulars of its loss and damage and, on 9 September 1997, provided further and better particulars of its loss and damage.

116 The proceeding was settled in December 1997. The settlement was effected by a deed of settlement made in December 1997 and a deed of termination and assignment made in February 1998. The parties to the deeds were Tyco of the first part, Playcorp of the second part, and Croner-Tyco, Mattel Inc, Mattel Pty Ltd and Matchbox Collectables Pty Ltd of the third part.

117 By the deed of settlement Tyco agreed to pay Playcorp AUD$37,000 on or before 5 December 1997 as a contribution towards Playcorp's costs of the proceeding.[13] Tyco duly paid the settlement amount of AUD$37,000. In consideration of that payment Playcorp released Tyco and the parties of the third part from all claims in the proceeding.[14]

118 By the deed of termination and assignment Tyco agreed to pay to Playcorp AUD$340,000 on or before 5 December 1997 in consideration of Playcorp entering into the deed.[15] Tyco and Playcorp agreed that from the date of payment Playcorp's exclusive right to distribute Tyco toys in Australia other than Tyco's New Products, and to use the Intellectual Property Licence referred to in cl 3.3 of the deed of release, is terminated and all rights or obligations arising under or in relation to that exclusive right are terminated.[16] From the payment date Playcorp had no right or entitlement to sell or distribute Tyco toys in Australia.[17] It was further agreed:

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13 Cl 2.1.
14 Cl 3.1.
15 Cl 2.1.
16 Cl 3.1 and cl 3.2.
17 Cl 3.5.

(a) That from the payment date the unwritten agreement dated 26 March 1996 and all rights thereunder is terminated.[18]

(b) That Tyco and the parties of the third part had no right to use any intellectual property of Playcorp.[19]

(c) That, with the exception of Playcorp's rights to the intellectual property in the Metro trademark, on the payment date Playcorp assigned all its right title and interest in any intellectual property of or in relation to Tyco toys held by Playcorp.[20]

Finally, by way of completely concluding any issues vis-à-vis Playcorp and the other parties, Playcorp released Tyco and the parties of the third part from all claims whatever relating to the right referred to in cl 3.3 of the deed of release, the Intellectual Property Licence, the unwritten agreement dated 26 March 1996, and the purchase, sale or distribution of Tyco toys in Australia.

The distribution agreement – a forgery?

119 This issue arose on the pleadings in the following way. In the statement of claim Playcorp pleaded that by an agreement made on 1 January 1993 Taiyo granted Playcorp the exclusive right to sell and distribute in Australia and New Zealand the toys and R/C products manufactured by or for Taiyo. In particulars the agreement was stated to be in writing constituted by a document dated 1 January 1993. That is the distribution agreement.

120 Taiyo's pleading to the agreement changed from its initial defence dated 26 March 1998 to the fourth amended defence dated 27 November 2000. In the initial defence Taiyo admitted supplying products to Playcorp but otherwise denied the allegation. Thus, the agreement was put in issue. An amended defence dated 15 September 1999 added a number of specific grounds to the general denial of the agreement. These included that the signature of Suto to the document relied on by Playcorp is a

18 Cl 3.5.
19 Cl 3.7.
20 Cl 3.8.

forgery. The fourth amended defence abandoned all these specific grounds with the exception of the plea of forgery. In its final form Taiyo's defence to Playcorp's plea of the distribution agreement is in the following form:

> "3. The defendant:
>
> (a) admits that during the period April 1994 to December 1995 it supplied toys and radio control products to the plaintiff for re-sale in Australia and New Zealand;
>
> (b) otherwise denies the allegations in paragraph 3 and says further that the alleged Distribution Agreement bears a signature on behalf of the defendant that is a forgery.
>
> **Particulars**
>
> The Distribution Agreement relied on by the plaintiff bears, on page 7, two signatures of directors purporting to execute the document on behalf of the defendant. The first of those signatures is a forgery of the signature of the President of Directors of the defendant, Mr Suto. The second signature is that of Mr Yuki Futamura, who was until 1995 a director of the defendant. The defendant is unable to say who placed the purported signature of Mr Suto on the document or when it was placed on the document save to say that it was not Mr Suto, who did not sign the document and has never done so."

121 In a reply dated 29 November 2000 Playcorp denied the allegations in para 3(b) of the fourth amended defence.

122 It is an unusual feature of the case that the person whose signature is alleged to have been forged, did not give evidence. Furthermore, at the trial counsel for Taiyo did not put to any witness that he had forged, or been involved in the forging of, Suto's signature. While this may be regarded as being consistent with the particulars in the defence, it is significant that in the course of lengthy cross-examination it was not put to either Futamura or Glatt that he had forged the signature or was in any way involved in the forgery. The failure to put the allegation to Futamura was significant, considering the seriousness of the issue raised by Taiyo, which is an allegation of dishonest conduct of a most serious type, and as the thrust of the issue as to the making and validity of the agreement was directed at Futamura. On

Futamura's evidence it was he, and he alone, who introduced the matter of the agreement with Playcorp, who negotiated the agreement with Playcorp, and placed it before Suto who ultimately returned it to him duly signed. Counsel for Taiyo challenged the factual correctness of Futamura's account in cross-examination, and by the evidence of witnesses called by them. He was attacked on his credit with a view to establishing a finding that his evidence, where challenged, not be accepted. This included his evidence as to the agreement and what he did with it at Taiyo, and his communications on the matter with Suto.

123 An important, if not essential, part of the substratum on which the allegation of forgery rested was the relationship between Glatt and Futamura. The inference seemed to be that the circumstances made understandable the forging of Suto's signature. Yet, if Suto's signature was forged, and it was not forged by Futamura with or without the involvement or knowledge of Glatt, who had written the signature or had an interest in doing so? Neither Taiyo, nor the evidence, pointed to any other person. On the evidence, the only reasonable hypothesis would seem to have been that the signature was written or caused to be written by Futamura with or without the involvement or knowledge of Glatt. The inference was that the relationship between Futamura and Glatt should be regarded as providing the interest which produced the agreement (alleged not to have been required by Taiyo or in its interest) and the forging of Suto's signature thereon.

124 Yet Taiyo did not put to Futamura that he had written, or caused to be written, Suto's signature on the agreement, or to put an allegation of involvement or knowledge to Glatt. I find as a fact on the evidence that the only persons who might have had an interest to write Suto's signature on the agreement were Futamura and Glatt. It is of course true that Taiyo was, apart from seeking to establish the plea of forgery, entitled to put Playcorp to its proof of the agreement, and that included establishing that the impugned signature was that of Suto. Yet, allowing for that, it was, in my view, too artful for Taiyo to seek to build up clouds of suspicion and doubt by reference to a range of matters directly concerning those persons, but to

avoid putting the fundamental allegation to them. It may be said (as I have first pointed out) that the failure to put the allegation was consistent with the terms of the defence, and with an insufficiency in instructions, and I do not overlook the limited terms of the defence. However, the reality of the conduct of Taiyo's case was a heavy attack on the credit of Futamura and Glatt, in order to demonstrate unreliability in their evidence, in particular as to the agreement and its signing.

125 I conclude on this point concerning the way in which Taiyo conducted its case of forgery by pointing out that in his evidence in chief Futamura stated that:

> "The signature on the distribution agreement is Mr Suto's. I did not forge it."[21]

Futamura was not cross-examined on his evidence that he did not forge Suto's signature. He was cross-examined on many things, and his credit was challenged in many respects, but he was not cross-examined on that evidence.

126 In support of the submission that the signature on the distribution agreement was not signed by Suto, Taiyo's counsel relied on a range of matters which were the subject of evidence or inferences arising therefrom. In a nutshell, in Taiyo's written submission the following was contended: certain evidence of Storey was to be preferred to that of Holland; from Taiyo's point of view, there was no good reason for Suto to have signed the agreement; the agreement had not been filed at Taiyo or Playcorp; Glatt's evidence as to the signing of the agreement was pure reconstruction; Futamura's account of Suto having signed the agreement was incredible; non-performance under cl 4.4 of the agreement was inconsistent with execution in 1994; Glatt's failure to mention the agreement at his meeting with Suto in May 1995 was inconsistent with the agreement having been signed by Suto; and, allowing for cultural differences, Taiyo's reaction when the agreement was asserted was consistent with Suto not having signed. Of course I have regard to the full terms of the written submission and counsel's oral address.

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21 Exhibit Y, para 43.

127 In turn, Playcorp's counsel provided a written submission of considerable elaboration. I have regard to it all, and to the oral submission although, as with Taiyo's submission, I do not set it all out.

128 Taiyo's submission commenced with the evidence of the handwriting experts, Holland and Storey. It was submitted that I should accept Storey's evidence that the "hen", being the squiggly "S" like stroke which descends through "Suto", was written first in the disputed signature whereas it was written second (after "Suto") in the control or genuine signatures. This was an issue of sequence – in what sequence in the writing of the disputed signature was "Suto" written in relation to the descending "hen" stroke?

129 On a plain reading of his witness statement, Holland's view appeared to be that the "hen" came second in the control signatures,[22] whereas in his oral evidence he said that on stereomicroscopic examination he could not determine the sequence of the intersections in the "Suto" and the descending "hen". He was of the same opinion in relation to the disputed signature, which he also examined microscopically. The evidence was inconclusive as to which came first, and thus did not permit him to express a conclusion. When he had said in his witness statement, having analysed the construction of the signature "Suto", that the pen had been lifted and "a separate stroke has been made near the middle of the signature that cuts across the "u" formation of the surname "Suto", he explained in cross-examination that he was not implying that one was cutting over the other, he was just saying there was an intersection.

130 Prior to the trial, after becoming aware of Storey's opinion that the "hen" had been written first in the disputed signature, Holland re-considered the matter, including conducting another microscopic examination, and adhered to his opinion. He did not provide a supplementary report.

131 In his evidence in chief Holland did not refer to having twice undertaken a

22 Exhibit D.

microscopic examination to determine the sequence of the signature. The matter of sequence was an important issue. It was also a difficult issue, he considered "probably one of the most difficult and challenging areas of a document examiner". When pressed in cross-examination as to why he had not referred to his examinations and opinion on the matter of the sequence of the signature he said it was "maybe an oversight" but the reason was that he "couldn't offer any evidence because it was inconclusive, so that's probably why I didn't go to … paper in a report or even in my witness statement".

132 On the other hand, Storey was of the opinion that in the genuine signature Suto had written the "hen", which he described as a descending double "S" formation, over the "uto" of "Suto", whereas in the disputed signature the reverse had occurred.[23] He had first examined the disputed signature on 29 June 1998 at the office of Playcorp's solicitors. At that examination he had a magnifying glass and a stereoscopic microscope. He formed the opinion then that the "hen" had been written first. He also formed the opinion that the signature was a forgery. Shortly thereafter the genuine signatures were made available and he examined them and compared them to the disputed signature. He adhered to his initial opinion.

133 In the course of his re-examination I permitted Storey to produce and explain the operation of the stereoscopic microscope which he had used in his examination of the documents, and which had an associated light on a flexible arm to better enable examination from various angles. He placed the signature page of the agreement under the microscope and demonstrated what in substance he did when he examined the document. He said that he was of the opinion that the image in the microscope demonstrated that the "hen" was written first. The "hen" intersected "Suto" at six points. He conceded that at one of those points it appeared that the "hen" was written second, but in his opinion the other five intersections showed it was written first.

134 In a short adjournment Playcorp's counsel looked at the image in the microscope.

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23 Exhibit 15 paras 16 and 17.

As they wished to then cross-examine Storey further I looked at the image in the microscope. I did that for the purpose of better enabling me to understand the evidence.

135 In further cross-examination following the demonstration Storey was asked why his report to Taiyo's solicitors, dated 6 July 1998, made no reference at all to the order in which the "hen" had been written. His answer was to repeat what he had said earlier, that he did not record all his observations in the report. He adhered to his notes made in July 1998 having recorded his then view that the "hen" had been written first. Subsequently, in 2000, he conducted a further examination under controlled light. It was following that examination that, in a supplementary statement pursuant to Order 44 dated 20 October 2000 Storey stated that the "hen" had been written first. Storey agreed that this was "the first document, at least the first court document in which it is said that the evidence [he proposed] giving is that the 'hen' appears underneath the "uto".

136 The position of Storey on this aspect is somewhat similar to the position of Holland in relation to his omission to disclose his view that the sequence could not be determined. But there is a difference in their position. Storey's notes made at his original examination record that the "hen" was "done 1st". Holland did not produce notes referring to his view. What is more significant concerning Holland is that his witness statement was misleading on the point. In para 5 he referred to having used a stereomicroscope to examine "the line structure and stroke sequence … in detail at various magnifications". That, he said, allowed "the signature construction to be established including: pen lifts, stroke direction, unsteadiness, hesitations and the type of writing instrument and ink used". He then proceeded, in para 6(a)-(g), to describe the characteristics in signature construction revealed by the microscopic examination of the control signatures. It was in the concluding para 6(g) that he made the statement referred to above that the "hen" "cuts across the 'u' formation of the surname 'Suto'". The impression given is that the "hen" was written second. Then, in para 8, he stated that the signature of Suto on the distribution agreement

exhibited the same structural features referred to in para 6.

137 This evidence indicated that Holland's opinion was that in the disputed signature the "hen" was written second. In cross-examination Holland disavowed possessing any such opinion. It is significant to note that in his oral evidence in chief counsel took Holland to and had him elaborate on a number of matters, in the course of which he was taken to para 6(a)-(f). But counsel stopped at para 6(f), and then moved to another area without giving Holland the opportunity to comment on para 6(g). Later in his evidence in chief counsel took Holland to the matter of the sequence of the writing of the "hen". The evidence which Holland then gave concerned the disputed signature, as distinct from the control signatures, in the course of which a number of magnified photographs were referred to and tendered. Holland stated that the sequence could not be determined.

138 It was not until cross-examination that Holland disclosed that he was unable to determine the sequence in the control signatures. The evidence was not wrung out of him. He gave it immediately on being asked the question. He also said, correctly and fairly in my view, that in evidence in chief he was "just following the line of questioning". He went on to say that looking at it now he should have expressed para 6(g) differently as he was not meaning to state the sequence in which the "hen" had been made.

139 It is obvious enough that in his witness statement Holland should have clearly and directly stated his view on the matter of sequence. He knew it was a relevant consideration. He accepted that the words in the witness statement were his, and that they did, or had the tendency to, give a misleading impression of his view. By the time he gave evidence Storey's view on the matter of sequence was known, and, therefore, Holland might have provided a supplementary witness statement dealing with the matter or counsel could have had him state his position on the point in oral evidence in chief. But neither course was followed and as a result Holland was exposed to unnecessary attack in cross-examination. I say unnecessary because in my view Holland was an honest witness and he would have stated his view in

evidence in chief, and thereby corrected any wrong impression of para 6(g), if counsel had taken him to the issue. But counsel chose not to do so. What counsel did was avoid para 6(g) and, at a later point, ask Holland questions about sequence in the disputed signature. I should add that I accept Holland's evidence in explanation of the matter.

140 I further accept that the ascertainment of the sequence followed in the writing of a signature is difficult, and was in the case of the disputed signature in the context of the structure of the signature, the writing instrument and the paper. In their evidence Holland and Storey analysed the sample signatures and the disputed signature. In doing so they referred in detail to various characteristics in formation and writing. I find on the evidence that Suto's signature is complex. In addition, there are variations in the writing of the sample signatures. The disputed signature was not traced. It was written freehand with speed and good pen control. It was not written with tremor in the hand or uncertainty.

141 In the end the perhaps predictable position of the handwriting experts is that their opinion as to the genuineness of the disputed signature favoured the party who retained and called them. That is not to indicate that I have approached a consideration of their evidence with an overly cynical view as distinct from an open mind fairly appraising all that they said. Having considered the evidence I do not find either of them to have been dishonest. Indeed, as I have said, I found Holland to be an honest witness. He, like Storey, stated his views. That is, they stated what they perceived, and their views derived, on examination. But I am not bound to accept either perception and view as correct on the balance of probabilities, or as ultimately determinative of the issue of forgery. It is part of the evidence to be considered in determining the probability of whether the signature of Suto was, or was not, forged.[24] In that process of determination the evidence of the handwriting experts is not to be given a dominant role in relation to the other evidence bearing on

24 See generally in relation to expert evidence *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

the probability that the signature was genuine or a forgery.[25]

142 Storey's opinion that the disputed signature was forged was based on several grounds in addition to the matter of sequence. In addition to his view on the matter of sequence, he referred to a hesitation and pen lift in the primary "S" of Suto, to a "gross" difference in the descending staff of the "u" and the ascending stroke of the "t", and to the axis of the "hen" in the disputed signature being different from the control signatures. In final address Taiyo's counsel did not rely upon these additional grounds to support the submission that Suto's signature was a forgery. In fact counsel made no reference to them in his submission on the issue of forgery, and in submitting that I should prefer the evidence of Storey to that of Holland. It was understandable that counsel took this course.

143 Storey's evidence on hesitation and pen lift lacked persuasion. It impressed me as lacking a sufficient basis, as not taking account of striations and an apparent skip of the pen at the point of the sharp change of direction, as suffering an internal inconsistency as to the area of pen lift, and as being argumentative for the sake of supporting Taiyo's case. The lack of substance, and argumentative nature, of the other grounds is readily seen in the fact that the feature in question is seen in a genuine signature. None of the additional grounds supported the allegation of forgery. Even if it might be considered that they did provide some support, they represent no more than the view of Storey with which Holland disagreed. In that circumstance the position would be like that described by Glass JA in *Gawne* that the confidence of one expert that the signature was forged was equalled by the conviction of the plaintiff's expert that the signature was genuine.[26] That was a factor which in that case led to a conclusion that the handwriting evidence failed to carry conviction to the mind. In any event, as I have said, counsel did not rely on the additional grounds.

144 It is appropriate to consider these weaknesses in the foundation for Storey's opinion

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25 *Gawne v Gawne* [1979] 2 NSWLR 449 at 453.

26 *Gawne* at 455.

of forgery, in considering his evidence on sequence. While I accept that he gave evidence of what he considered he saw, I am not persuaded by it whether it be considered alone as a matter of handwriting or in the context of relevant objective or circumstantial matters. Just from the handwriting aspect, it was accepted that ocular examination could not identify the sequence, and hence microscopic examination was turned to. However, regarding the matter overall in my view Storey's evidence did not establish that the "hen" had been written first. I am quite unpersuaded by his evidence as to that. I am not satisfied on the balance of probabilities that his perception, or assessment based on his examination, that the "hen" was written first, is correct. I find that Storey strained a reasonable appreciation of what may be seen on examination of the disputed signature in arriving at that conclusion, influenced, subconsciously I apprehend, to arrive at a conclusion favourable to Taiyo.

145 It was accepted that there will be variations in a person's signature. Any of a number of reasons may account for such variations, such reasons including the age and health of a person, the writing surface, the writing instrument and the circumstances in which the signature was made. In this case there are variations in the sample signatures. Some of the variations are seen in the disputed signature. In fact, on examination there is a resemblance between the disputed signature and the sample signatures. While visual examination can detect differences between the signatures, the disputed signature is not evidently different in the sense of not being that person's signature.

146 I reject the allegation of forgery based on the evidence of Storey.

147 I now turn to the objective or circumstantial material.

148 The first of the points made by Taiyo in this respect was that there was no good reason for Suto to have signed the distribution agreement. That was because, in the first place, the agreement was not required for the purpose of the proposed public offering. Secondly, the agreement was of little or no benefit to Taiyo. Thirdly,

there were compelling reasons for Taiyo not to make the agreement. I consider these three contentions in turn.

149 The first point has no substance in view of my finding that Sasahara asked Futamura to obtain a written agreement with Playcorp for the purpose of the float. He also asked Futamura to obtain an agreement with Tyco. Futamura attended to each request.

150 In support of the second point counsel relied on the fact that the amount payable under the minimum purchase clause (cl 4.3)[27] was appreciably less than the actual value of Playcorp's purchases. Clause 4.3 required that US$1M be paid in respect of the period to 31 December 1993 and thereafter, in respect of the period to 31 December 1997, a further total amount of US$4M. That represents a total amount of US$5M or, it might be regarded, US$1M per year. This level of minimum payment was exceeded by the amount of actual purchases, which were:

- 1992 US$1,435,743.98
- 1993 US$2,092,096.04
- 1994 US$2,528,226.36
- 1995 US$1,937,979.40[28]

The figures provide an overview of the sales by Taiyo to Playcorp in those years. Of course, while the agreement is dated 1 January 1993 to commence on 1 July 1993, the evidence of Futamura and Glatt is that the agreement was signed in September 1994. Regarding the matter around that time, there is a letter from Taiyo to Playcorp dated 8 July 1994 in which it is stated that the 1994 sales "so far" totalled $2,308,596. These figures would indicate that, all things continuing to be equal, the minimum requirement was not an onerous obligation for Taiyo to have required of Playcorp. The submission, in other words, is that Taiyo should have sought to do better for itself by requiring a higher target of minimum sales. In relation to the submission, it should be remembered that the obligation in respect of the last four years was

27 See at [27].
28 Court Book Vol 2 p 438-439.

conditional on Taiyo being able to continue to offer to Playcorp a range and depth of products not less than those available in 1992/1993. Hence, if purchases fell below the minimum Playcorp might have resorted to an argument based on that condition to justify no or a lesser sum in respect of part of the period. Taiyo's counsel did not rely on the latter point. He relied on the amount of actual sales as highlighting that the minimum purchase requirement was not onerous to Playcorp, being evidently readily achievable. He emphasised in that respect that when the agreement was signed in September 1994 the actual sales experience until that time was known.

151 Furthermore, counsel pointed out, while Playcorp was granted exclusivity as distributor, it did not provide Taiyo with matching exclusivity in return.

152 The third point, that there were compelling reasons for Taiyo not to make such an agreement, rested on two points. First, the fact that Taiyo depended heavily on Tyco business, the quantity of business with Playcorp being relatively small by comparison. Second, was Tyco's expressed interest to commence its own distribution in Australia and New Zealand, this commencing (for these purposes) with Grey's letter to Futamura dated 17 June 1992.[29] Counsel emphasised the impermanent nature of Tyco's then position to restrict itself in the Australian market. The arrangement was subject to an annual review of Playcorp's performance. Further, the last paragraph of the letter indicated that Tyco's then decision turned on personal relationships. Later, in March 1994, it could be seen that Tyco was demonstrating interest in beginning its own distribution in Australia. It would not have been, and it was not to Cooper, surprising that Tyco had such interest in pursuing its commercial interest.

153 Of course, the second and third points cannot be considered in isolation from the fact that the Playcorp agreement was required for the purposes of the proposed public float. That being the case, Taiyo's attack must be that better terms should have been struck. Futamura was cross-examined on these matters, and generally concerning his evidence as to the agreement, with a view to his evidence not being accepted.

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29 See at [21]

But I have preferred, and have accepted, his evidence on a most critical point, and I accept his evidence on these matters also.

154 Futamura stated that the minimum purchase provision was in Taiyo's interest. The point was not to make the quantity "as much as possible", which would be difficult to comply with. He further observed that the economy "comes back and down and down and up, so we only need to make sure the business going on, that's all".

155 In all the circumstances it cannot be said that Futamura's explanation lacked reasonable sense or that it was an approach that no business person in his position might have taken in the conduct of the commercial relationship. Indeed, in my view it was readily understandable in the overall context including the commercial relationship between Taiyo and Playcorp, and the then relationship with, and attitude of, Tyco. It is in this context that, for his part, Glatt described the requirement as a "fair target", it being "certain business" for Taiyo. It is also readily seen that it was not the actual but the minimum. After all, it was in Playcorp's interest to purchase from Taiyo as much product as it could, assuming a profit on resale was obtainable. Playcorp's interest was to achieve the highest level of sales commercially possible. Futamura understood this. He said also, on the point that Playcorp did not give Taiyo exclusivity, that Playcorp did not buy from others. Perhaps the agreement might have offered mutuality and exclusivity but that was not an issue. Further, in the overall assessment of the matter the personal relationship was an important factor which influenced the terms, and in the way Futamura sought to, and did, protect Playcorp's interest in his dealings with Tyco. This included not informing Tyco of the Playcorp agreement. I concluded that Futamura considered he would be able to aid in achieving a pragmatic resolution of the situation between Tyco and Playcorp. I also accept that Playcorp had achieved well for Taiyo in the Australian (but not New Zealand) market, and that the success was in Taiyo's interest to be maintained. There was no obligation on Futamura to inform Tyco, although the reason why he did not do so lay in his relationship with Glatt. But that did not mean that the Playcorp agreement was a fiction, something

never entered into.

156 A further factor relied on by Taiyo was that Playcorp had not accounted to Taiyo pursuant to the obligation in cl 4.4 of the agreement. In cross-examination Glatt said that Playcorp had never provided an account in writing. But, he said, there were discussions and meetings with Taiyo in which sales were discussed, and these were more frequent than annually. I accept this evidence.

157 Counsel for Taiyo then moved to attack the evidence of Glatt and Futamura as to the signing of the agreement. In addition, Futamura was attacked on the matter of his claimed handling of the agreement at Taiyo and his evidence as to the signing by Suto.

158 As mentioned at [126], Taiyo's counsel submitted that Futamura's account of Suto having signed the agreement was incredible. Counsel did not go through Futamura's evidence. Having described the evidence as being incredible he referred to the following aspects: the agreement not being in Taiyo's interest; that Futamura did not mention it to Tyco; that Futamura did not inform the auditors of the agreement; and that Futamura left the agreement on an unidentified desk in Taiyo's office with no record being made of its execution or filing. I have already referred to the first two matters. Consistently with the admirable brevity with which counsel approached the submission, I shall as briefly as seems possible refer to Futamura's evidence as to his handling of the agreement at Taiyo, in particular in relation to Suto, and to the evidence of Taiyo's employees on the matter, all of which I take into account. I should say again that I am left with no confidence in the reliability of Taiyo's record keeping and its proper production of documents in accordance with its obligation to make discovery or that it made appropriate endeavours to locate all discoverable documents. The failure of Taiyo to discover Itani's letter to Grey dated 28 September 1995[30] is a most significant omission in that regard, and a singular (but not the only) instance of want of proper discovery.

30 See at [39].

159 At [24] I referred to Glatt having undertaken to prepare and provide Itani with a draft distribution agreement. Glatt so advised Cooper who was himself an experienced commercial lawyer. They discussed the terms of the agreement. Cooper instructed Monica Vinson, a lawyer in the employ of the Century Plaza Group, to prepare a draft. On 16 July 1993 Glatt sent a fax to Futamura advising that he was working on the proposed distribution agreement and would forward a draft very shortly. In late September 1993 Glatt travelled to Japan. While in Tokyo he received a first draft of the agreement from his office in Melbourne, the draft having been prepared by Vinson and reviewed by Cooper. Glatt spoke to Vinson and requested the deletion of cl 5.2(d). On 30 September 1993, while he was still in Tokyo, Glatt received from Vinson a revised draft agreement and gave the draft to Futamura.

160 On his return to Australia on 19 October 1993, Glatt sent a letter to Futamura asking for his comments on the proposed contract. On 20 October Futamura replied saying that he had ordered Itani to translate the contract draft for internal review, that Itani had not completed the task, and he would get back to Glatt. It will be necessary to refer to the evidence of Futamura and Itani and some other Taiyo witnesses as to the relevant events at Taiyo, and to make findings. Otherwise, as far as the Playcorp side of things is concerned, I state the facts as I find them to be.

161 On 10 November 1993 Futamura sent Glatt a letter with queries concerning, and amendments to, the draft agreement. Glatt passed the letter to Cooper who discussed the amendments with Glatt and Vinson. On 1 December 1993 Vinson sent Glatt a draft letter for completion and sending to Futamura. The letter commented on the amendments and requested Futamura's response as soon as possible so that the agreement could be finalised. Glatt completed the letter and sent it by facsimile on 1 December.

162 Within a matter of days Glatt and Futamura spoke by telephone about the terms. Futamura said that the term of the agreement had to be five and not ten years, and that the termination clause in cl 8.5 should be six and not twelve months. Glatt

agreed and asked Vinson to prepare a final draft. Vinson provided the draft on 8 December. On 11 December Glatt sent the draft agreement to Futamura, and requested advice of any other amendments. On 14 December Futamura wrote to Glatt asking for "a couple of weeks to settle internally. There should not be a trouble."

163 At this point it is convenient to note that while Taiyo's head office was in Tokyo, where Futamura, Itani, Sasahara and Tomozawa, among others, worked, there was also a tooling, research and development plant at Yamagata, 400 kms north of Tokyo. Suto lived at Yamagata and rarely came to the Tokyo office. Hence, matters or documents requiring his approval or signature were usually sent by facsimile or courier by the company delivery trucks which travelled each day between Tokyo and Yamagata. If a document under the responsibility of a particular director or manager needed Suto's signature, the system was to place the document in an envelope usually with a covering letter. The envelope showed who the document was from. There might be a prior telephone call advising Suto of the pending delivery. The envelope was returned by the courier. There was no record of the items carried by the delivery truck.

164 Futamura's evidence is that on 15 December 1993 he sent a note to Suto attached to the distribution agreement which had been translated into Japanese by an employee, Mr Montegi. The covering note stated:

> "This part has come from GTI/Metro. The stipulation in case Stephen William Glatt ceases to be the Managing Director was inserted at my request. I do not know about the legal validity but there is a relation to Tyco Australia, and emphasising the relationship of personal trust with Steve may also help save face for the Chairman Mr Grey if anything occurs, as well as making clear our position, which is why it was added.
>
> I don't think there is any problem with the content and with your agreement I will obtain the original contract from GTI and send it to you for signing."

As to this evidence, three points should be noted. The first is that while Futamura had initially asked Itani to translate the draft document to Japanese, and that Itani

had commenced the task, it was finished by Montegi. Itani denies the request to translate and that he did any translation; I refer to his evidence below. Montegi did not give evidence. The second point concerns how the note and agreement were sent to Suto. Futamura said in evidence that he believed he sent the documents in an envelope by the company delivery truck to Yamagata. He further believed he may have sent it to Suto by fax around that time. That was how he would normally have done things. There was no separate record of the sending by the truck or of the facsimile transmission. The third point is that also on 15 December Futamura sent Suto a facsimile concerning the proposed agreement with Tyco. In part the facsimile said:

> "We have been requested to produce agreements with overseas business associates as part of preparation for public listing, and we have been asking Tyco and GTI/Metro to produce drafts. We have received the following draft proposal from Mr Grey, Chairman of Tyco."

The reference to GTI/Metro is to be noted. It is to be noted (see [29]) that the written agreement between Taiyo and Tyco is dated 14 January 1994 and that it was signed by Suto for Taiyo without any other Taiyo signatory or the company seal being affixed.

165 Futamura said that he spoke to Suto between 15 and 25 December 1993, that Suto asked if it was alright for Taiyo to make the agreement with Playcorp and whether this would upset Grey, to which Futamura said there was nothing to worry about. Suto said (in Japanese) "OK". Futamura then, on 25 December, sent a letter to Glatt in which, inter alia, he asked Glatt to send the original copies of the agreement "for us to sign on". Glatt informed Cooper of Futamura's letter. Later, in mid March 1994, when he was in Tokyo, Glatt gave Futamura two original copies of the final draft of the distribution agreement for signing by Taiyo. It had not been signed by Playcorp. Futamura said he would arrange for Suto to sign the agreement.

166 Futamura said that on 17 March 1994 he sent a facsimile to Suto and the other directors of Taiyo concerning Tyco Italy and Playcorp. It was addressed as follows:

"To the President/Messrs Gotoh (Director), Usami (Executive Director), Baba (Director), Sasahara (Auditor)". Futamura said that he also sent it by the delivery truck. It was his usual practice to do so, and that was the basis of the evidence. In a section concerning Playcorp he advised that Glatt had made a hurried visit and that he:

> "… brought with him the agreement that was requested as part of preparation for public listing (of which I have been sending [you] translations since last year, the content of which we have had amended somewhat for sections we have noted, and which has finally been completed). I shall therefore keep it with me, to request a signature when the President comes to Tokyo at the end of this month."

167 On 3 May 1994 Glatt sent a facsimile to Futamura asking him for news about the distribution agreement. In a reply dated 7 May Futamura advised that he had been holding the contract, that he thought there was no problem, he had been busy and Suto "does not come to the office so often. So, please give us a little more time to have his Signature. I will try to get it in next week. Just for your information, I and Suto san will visit Hong Kong and China from May 12th to 15th."

168 Futamura went on in his evidence to say that he took two copies of the Playcorp distribution agreement on the May trip to Hong Kong and showed them to Suto to sign. Suto said he would sign later. Futamura retained the documents, unsigned, and returned to Tokyo with them. He then placed yellow stickers on the last page of each copy and made a note on the stickers showing Suto where to sign. He placed the copies in an envelope addressed to Suto and placed the envelope in a carton for delivery to Yamagata. A short time later he received an envelope from Suto from Yamagata which contained the agreements duly signed by Suto. It was normal for company documents to be signed by Suto in this way, without Board or other formal process. Futamura said that the distribution agreement only passed between Suto and himself, and was not anyone else's responsibility or business. He did not tell Itani, Tomozawa or Tyco. There was no reason not to, but it was his responsibility and there was no reason to do so. As to Tyco, it was not necessary to inform the company and it was not its business.

169 Concerning this evidence, the following should be noted. There was no covering note attached to the agreements when they were sent or returned, and no other record that they had been sent or returned. Futamura explained the absence of a covering note from himself on the basis that the matter had already been discussed. Futamura did not say in his witness statement, but he did venture in cross-examination, that he thought he sent a translation with the document. Suto does not speak English. Then, as to Suto not signing the agreements in Hong Kong and Futamura retaining them, Futamura explained that the trip was for another purpose and that Suto only wanted to handle that. He said he would sign when they got back. Futamura retained the documents as he considered it would not have been courteous to have asked Suto to have done so, as he (Futamura) could carry them and later send them to Yamagata. I was particularly impressed by Futamura's demeanour when he gave that evidence, and the tenor of it, and the sense of hierarchy of staff which then and at other times in the evidence was conveyed, which made Futamura's action in retaining the documents understandable.

170 Futamura said that a short time after receiving the agreements from Suto, he spoke to Glatt and told him that Suto had signed. Futamura did not have a record of this conversation, but Glatt himself gave evidence of such advice. Glatt did not have a record of the conversation and could not recall when it occurred. He believed it was in the 25 July 1994 period. He thought he would have advised Cooper but he had no recollection of doing so, and nor did Cooper.

171 On 25 July 1994 (following, as I find, the advice of signing) Glatt sent a letter to Futamura saying he was waiting for a copy of the signed agreement, and requesting advice when it will be dispatched. Itani replied advising that Futamura was then away from the office.

172 Then, Glatt left on an overseas trip on 30 August, ultimately arriving in Tokyo on 29 September 1994. Futamura met Glatt at his hotel, the Imperial. He brought with him both copies of the distribution agreement signed by Suto. They went to

Glatt's room to sign it. Glatt looked at the documents and saw that the last page of each had a signature which he believed was Suto's. He noticed that it referred to being executed under seal. He did not have Playcorp's seal with him. He told Futamura he had better call Cooper in Australia to ask what he should do. Glatt rang Cooper from his hotel room, explained where he was and that he was about to sign the agreement but that he did not have Playcorp's seal. He also said that Futamura did not have Taiyo's seal, and that Suto had already signed the agreement. Cooper told Glatt to strike out each sealing clause and to write in lieu "Signed for and on behalf of" Playcorp and Taiyo respectively and to initial the changes. Glatt told Futamura what Cooper had said and amended the documents as advised. The changes were initialled by Glatt and Futamura and Glatt signed as a director of Playcorp and Futamura signed as a "Director" of Taiyo which word Glatt wrote in the execution clause in place of "Secretary" which he crossed out. Glatt retained one copy of the signed agreement, and Futamura retained the other.

173 In cross-examination Futamura said he did not have a record of the meeting with Glatt at which the agreement was signed. Glatt's evidence is that the meeting occurred on 29 September 1994. He did not have a record of the meeting. Nor was he aware of any record of the receipt of Playcorp of the signed agreement, or any record of the fact of its signing and receipt. He was cross-examined as to the fact of the agreement including its execution. He said that Playcorp's board did not approve the agreement, as Glatt explained he handled the matter by and under the Chairman of the board of directors. He acknowledged that in answers to interrogatories sworn on 12 April 1999 he had said that the agreement was signed by him at the Imperial in Tokyo and that he had no personal recollection of the precise date, but after making enquiries he believed it was in the first half of 1994 and may have been between March and May 1994. He had believed that to be true. He could not say if he had enquired of Cooper for the purpose of answering the interrogatories. He explained that having made further investigations, by checking his passport and correspondence and recalling he had signed in Japan, he believed the agreement was signed in September 1994. He did recall the events at the

signing. I note that in his evidence, which I accept, Cooper said that Glatt had not made enquiries of him prior to answering the interrogatories. Having considered the evidence, I find that the answer to the interrogatory was in error as to the time of signing. I accept Glatt's evidence and find that greater enquiry and reflection was brought to bear for the purpose of his evidence than had been the case for the interrogatory, and that the former correctly stated the position.

174 Futamura said that he did not advise employees in his department of the signing. This accords with evidence of Itani and Tomozawa. Futamura said that he passed it "through to our law department" but he did not remember to whom he passed it. A covering note was not necessary. He did not remember sending it to Sasahara or informing him of it. He dealt with the Tyco agreement in the same way.

175 In his evidence Itani said he did not recall a distribution agreement with Playcorp being submitted for review or approval by Suto, and that there was no copy of the distribution agreement in Taiyo's records (unlike Taiyo's agreement with Tyco). He said that Futamura had not ordered him to translate a draft contract, and that he did not do so. He was surprised when Glatt told him of the agreement in September 1995. Glatt had not referred to the agreement at the meeting with Suto in May 1995 (to which I refer below). Itani said that a document such as the agreement must be explained and approved and a copy kept. He said that once he had a copy of the agreement from Cooper on 28 September 1995 he translated it and, when the opportunity arose, spoke to Suto about the document. I interpolate that Itani's facsimile to Grey on 28 September 1995 in which he states that Suto did not remember the agreement but might have signed it, reflects an earlier conversation with Suto, which Itani recognised in his evidence.

176 Itani was in the witness box for some three days during which he was extensively and rigorously cross-examined. Due to its length I do not set out all his evidence but I have regard to it. In the course of this cross-examination Itani confirmed that it was Futamura's responsibility to handle a matter such as a commercial contract with a customer, and obtain Suto's approval. It is consistent with his evidence that

Futamura might not necessarily have informed him of the agreement and its signing. He was asked about the translation of the agreement which he said he prepared following receipt of the agreement from Cooper, which had not been discovered by Taiyo, and said he had translated the agreement. He was asked a number of questions about that document and other documents that Taiyo had not discovered. In the course of explaining this Itani said "we had a hard time" locating documents. He further said that he could not explain why Taiyo had not discovered his letter to Grey dated 28 September 1994. He agreed that Taiyo's records were not kept in very good order. There was reference to documents in a warehouse (further to which see the evidence of Tomozawa referred to below). He agreed that it was possible that the disorder of Taiyo's files explained why he had not been able to find the distribution agreement. I interpolate that that was a telling concession and, I find, reflective of the true situation. Later in the cross-examination Itani said that he did a lot of translation work for Futamura. He did not think that Futamura asked him to translate the agreement or that he started but did not finish the task. It was possible that that had happened, but this would have been unusual, it was not something he did every day, "so if he asked me to do this kind of thing, I mean I don't know he long he asked me or I just did the one sentence, it could be possible but I don't think so, I don't remember I did anything like that". He was overworked and it was possible he could not get beyond starting the translation but he doubted that. He agreed that a person called Montegi had worked in his section; he was no longer employed by Taiyo.

177 Sasahara, to whom I have already referred at [23], provided a short witness statement and gave relatively short oral evidence. I do not repeat the discussion and findings at [23]. He said he had no knowledge of the Playcorp distribution agreement prior to it being signed. I have found however that he did ask Futamura to obtain an agreement with Playcorp. In his witness statement he said that he found no document "in my file relating to our going public which mentioned as to making a written agreement with Playcorp" and he had no recollection and no filing of Futamura's letters dated 15 December 1993 and 17 March 1994. As to the former,

in cross-examination he said that it was probably true that he had not seen the 15 December 1993 note and translation of the agreement because they were sent direct to Suto. As to the latter, Sasahara said that he never saw the translation.

178 In cross-examination Sasahara said that it was Futamura's responsibility to make a contract subject to Suto approving and signing it. He (Sasahara) may not see a commercial contract. I do not refer to his evidence on the issue whether he had asked Futamura to obtain an agreement with Playcorp, for I have already found that he did.

179 In his evidence Tomozawa stated that Futamura "was always giving higher priority to Playcorp than other customers", and in that respect instanced the supply of spare parts to Playcorp in preference to Tyco. I can say at once that I accept Futamura's evidence in explanation as to how he managed the supply of product in terms of managing production runs and as to the priority concerning spare parts which related to Playcorp effecting repairs. At the same time it is evident that the good relationship which Futamura enjoyed with Glatt resulted in favourable consideration of Playcorp's requirements by Futamura, but the context was still commercial and Futamura managed it in Taiyo's best interests as he considered them to be.

180 Tomozawa went on in his witness statement to say he had never seen any distribution agreement with Playcorp, or a translation thereof, before one was sent from Australia in relation to the court proceeding. (In cross-examination he clarified that to mean when Playcorp sent the agreement in September 1995.) He had never heard it discussed apart from a comment of Futamura in 1993 that Glatt was worried about Tyco taking over the Australian market and that he wanted to make a contract with Taiyo as soon as possible. Tomozawa did know about the Tyco agreement, and he reviewed it in draft regarding the clause concerning Radio Shack. He also said that since June 1992 when his employment commenced he attended meetings with Tyco, with Suto, Futamura and Itani, held about three times a year, at which he never heard anything about a distribution agreement with Playcorp.

181 In cross-examination he affirmed the hierarchical structure in Tyco, and said, inter alia, that it depended on the issue whether he would receive a copy of anything, and that he mainly assisted Futamura with Tyco and Radio Shack. "Mainly", he said, he was not involved in Playcorp business; sometimes he helped as an assistant as for example if Futamura and Itani were away from the office and he would reply to Playcorp to be patient. Playcorp was the special responsibility of Futamura. He (Tomozawa) was "only like observer about Playcorp business". The Playcorp distribution agreement was never his area of responsibility. He agreed that Futamura was very successful in marketing Taiyo toys. Then, as to the nature of the meetings which he said he attended, they were internal meetings usually concerned with sales, production or technical matters.

182 Tomozawa described the layout of Taiyo's premises in Tokyo. I interpolate that this evidence significantly aided in understanding the layout and how the office operated and earlier evidence of Itani as to difficulty in locating, and whereabouts of, documents. There are two floors. The office is on one floor. It is an open plan office with the various departments, marketing, domestic, international, accounting, shipping, spare parts and production all located there. All employees concerned work in this one room at desks next to one another. On the same floor is a room which is the showroom, and another room which holds books and documents. On an adjoining floor is an area referred to by Itani and Tomozawa as a "warehouse" and in which documents and files of Taiyo were stored. This evidence was significant because it destroyed an impression one might otherwise have had that the "warehouse" containing relevant documents was physically apart and distant from the office thus rendering more difficult the task of locating discoverable documents. But, far from that being the case, the discoverable documents were either on the office floor or the warehouse floor. Of course there may also have been documents at Yamagata. In addition, I find, as indicated by Itani, that Taiyo's records were in a state of disorder and that this may have been a factor in tardy discovery and failure to locate Taiyo's copy of the agreement.

183 This seems a sufficient reference to Tomozawa's evidence in cross-examination although as with the other witnesses I have regard to all of his evidence.

184 It is important to bear in mind the reality, in terms of the size of the office and the relative proximity to each other of employees working at Taiyo. What Futamura did was to pass the document from himself to the desk of another person in the same room. Why is it to be supposed that in such a matter a covering note was necessary? The recipient could have asked for any necessary information. Then, it is clear on the evidence that there was no reason in the employment of Itani, let alone Tomozawa, which required that they be informed. Further, as to not advising Itani that the agreement had been signed, Futamura said that Itani had seen it earlier for translation purposes. There is an issue as to this matter of the translation, but I accept Futamura's evidence in preference to that of Itani who I considered a partial witness.[31]

185 Then there is the facsimile referred to at [166] which Futamura said he sent to Suto and the other directors of Taiyo on 17 March 1994. The December and March notes reveal a consistency in approach by Futamura in the way of sending information to Suto. But, more important are the following points. First, the reference to having sent translations of the Playcorp agreement is consistent with Futamura having sent the translation on 15 December 1993. Second, of the directors named in the 17 March 1994 facsimile only Sasahara gave evidence. In his witness statement he said that he "never saw such translation" and never examined the translation of a draft agreement as referred to in the facsimile. It was not in his file relating to the possible float of Taiyo. He did not say that he did not receive the 17 March 1994 facsimile. I have already made an adverse finding concerning Sasahara as a witness; see at [23]. But, apart from that, it is consistent with his evidence that Futamura did send the agreement direct to Suto, and it is consistent with his and other evidence concerning the lack of order in Taiyo's documents and Taiyo's unsatisfactory approach to discovery, that the agreement and the 17 March 1994

31 See the earlier findings concerning Itani at [60]-[61] and [94].

facsimile were sent but placed in a different file or area of document storage to do with marketing, or misplaced and forgotten, or ignored. Further, regarding the matter overall, the external indicators provided by the communications between Futamura and Glatt support their evidence. They are consistent with two companies in an existing commercial situation entering into a written agreement in aid or furtherance of their dealings, as Taiyo did with Tyco. The written communications concerning the agreement were a fact and there is discovery of such communications by Playcorp and Taiyo. As counsel for Playcorp submitted, the chronology of events with so many written communications, and conducted over a substantial period of time, belied clandestine conduct suggestive of a forgery. Futamura's evidence that he sent the note dated 15 December 1993 on that date together with a translation of the agreement to Japanese, is supported by the fact that Taiyo made discovery of the note and translation in its affidavit of documents affirmed by Itani on 17 November 1998. Further, the notes dated 15 December 1993 are consistent and show that Futamura was dealing with Playcorp and Tyco at the same time in relation to an agreement, and keeping Suto informed.

186 I now refer to the matter of Glatt's meeting with Suto in May 1995 which I mentioned at [34]. On 16 May 1995 Glatt received a facsimile from Futamura stating that he would be leaving Taiyo on 20 May 1995. On 17 May 1995 Glatt sent a facsimile to Futamura in which he asked him to arrange a meeting with Suto in late May. In part the letter stated:

> "Before you leave I would appreciate your assistance in a very important matter. I wish to discuss the future of Australian and New Zealand distribution of Taiyo products with Suto san. Would you kindly arrange an appointment for me. I would be pleased to visit him in Yamagata. I believe the meeting would only take about one hour at most. I have some information for Suto san, which I believe is important and useful for Taiyo."

187 The meeting was arranged and Glatt travelled to Tokyo on 25 May 1995. Itani drove him to Yamagata and acted as interpreter at the meeting. Glatt and Itani differed in their accounts as to what was said.

188 Glatt said that the meeting was very short. He told Suto he had come to see him because of concerns as to the large number of defective R/C toys supplied during the last ten months and Taiyo's failure to provide spare parts for these toys, Futamura's sudden departure, Taiyo's inability to meet Playcorp's orders of Rebound, and because he had been told that Tyco was pressing Taiyo to supply all available units of Rebound to the US market. Suto said he should not be concerned. Suto also said that Tyco was not pressing him at that time. That was his evidence in chief in his witness statement.

189 The account of Itani in his witness statement was that Glatt asked Suto for his support and for Taiyo to protect Playcorp from Tyco distributing products in Australia and New Zealand. Glatt did not mention the existence of a distribution agreement. Glatt said that Futamura had looked after Playcorp's interests and provided protection from Playcorp. Suto was President and in an even better position to look after Playcorp's interest. Suto said he could not promise to protect Playcorp but would do his best.

190 In cross-examination Glatt denied that the principal point of his concern was to discuss the security of Playcorp's ability to exclusively distribute Taiyo R/C toys in Australia against the prospect that Tyco may wish to do so. Glatt said that he wanted the meeting to understand the state of affairs in Taiyo in relation to Playcorp because recently things had changed or seemed different and he wanted to get a feel for what was happening. He was naturally concerned that Futamura's departure may have an impact and he wanted to get a feel for what to expect in the future. He could not recall what was the "very important matter" referred to in his letter. It had occurred to him that he should go and see Suto. He denied Itani's evidence that he asked Suto for Taiyo's support and protection from Tyco distributing in Australia and New Zealand. He agreed (as I understood his evidence) with Itani's evidence that he did not say anything about the existence of a written distribution agreement. Counsel put to Glatt Itani's evidence that he said to Suto that Futamura had looked after Playcorp's interests and protected it from Tyco, to which Glatt said he believed

he referred to Futamura as the man who in virtually all instances handled the business issues and he was very concerned that he was no longer there. He denied saying that Suto was President and more powerful and in a better position to look after Playcorp's interests. He denied that Suto said he would do his best.

191 In his cross-examination Itani said that Suto was a person who appreciated being treated with respect and that at the meeting Glatt conducted himself in a very respectful way. He agreed that the substance of the meeting was to ensure that Futamura's departure would not change things.

192 The particular submission of Taiyo's counsel about this meeting was that Glatt's failure to mention the distribution agreement was inconsistent with the agreement having been signed by Suto. Reliance was also placed on Glatt's inability to explain what he meant by his request for assistance in a "very important matter" and his "wish to discuss the future of Australian and New Zealand distribution of products with Suto".

193 In considering this submission it is important to place the meeting in context. The context was the sudden departure of Futamura and the substantial commercial relationship between the companies which depended very much on the strength of the personal relationship between Futamura and Glatt. In my view Futamura's sudden departure was in itself reason enough why Glatt would have travelled to Japan at short notice to see Suto. Glatt's concern would have been, and plainly was, to ensure continuity in the business relationship. But, in addition there were the matters of concern which he said he raised with Suto, and they were understandable in light of the facts. They were matters of current concern and it would be understandable if he raised them. It would also be understandable in the context and having regard to Suto being Japanese, older than Glatt, and the founder and controller of Taiyo, that Glatt would have addressed him in a polite and well-mannered way. With Futamura going Glatt had to ensure a smooth transition to a hopefully continuing successful business relationship. Itani's evidence as to Glatt conducting himself in a very respectful way stated the probability in my view,

and what I would have found in any event. It does not seem to me to be at all likely that at the meeting it would have been diplomatic for Glatt to seek to emphasise or speak of enforcing the distribution agreement, for several reasons. There was the matter of approaching and speaking to Suto in a respectful and appropriate way, and in a context in which Tyco and not Playcorp was Taiyo's largest customer. Further, there was no issue or dispute about the agreement as far as Glatt was concerned, Suto had signed it and was aware of it. Why should Glatt not treat it as part of the assumed background in a very short meeting?

194 I find no criticism of Glatt in his lack of memory of what he had in mind in writing his letter. It seems reasonable to conclude that he used terms which he thought most likely to result in Suto agreeing to meet him. A reasonable reading of the letter is that the very important matter was the future of Playcorp's distribution of Taiyo products. Hence, notwithstanding the cross-examination in which Glatt said he could not remember what he had in mind as a "very important matter", Taiyo's submission does not support the proposition that Glatt's failure to mention the agreement is indicative of the agreement not having been signed by Suto. I observe that it must be implicit in that submission that Glatt knew or had reason to believe that Suto had not signed the agreement. That was not put to Glatt. I find that Glatt had no such knowledge and no such reason to believe. I should add that I reject Itani's evidence that Glatt asked Suto for protection from Tyco. Not only in my view is it highly improbable that he would have spoken to Suto in that way, but I prefer Glatt's evidence. I find that Itani's evidence to that effect was a distortion of Glatt's approach. I find that Taiyo's submission concerning Glatt's meeting with Suto does not provide support for the submission that Suto did not sign the agreement.

195 A factor relied on by counsel for Playcorp was what they called the absence of a prior consistent complaint. That is, the absence of a complaint by Suto, once he had seen the agreement sent by Playcorp, of a complaint of forgery. The immediate reaction of Suto is expressed in Itani's facsimile to Grey on 28 September 1995

(referred to at [39]) in which he states that Suto did not remember, he might have signed the agreement without knowing too much about the deal. A few months later, on 12 December 1995, Itani said in a letter to Glatt that Suto did not remember signing the agreement (see at [57]). Again, there was no protest of forgery. Playcorp's written submission went into much detail in seeking to substantiate the submission of an absence of a prior consistent complaint. Counsel for Taiyo submitted that, allowing for cultural differences, Taiyo's reaction when the agreement was asserted was consistent with Suto not having signed. In fact, it was submitted, the 12 December letter was intended as a strong statement. I interpolate that if that is so it indicates how the use and meaning of language may differ between cultures. It is of course true that what is conveyed by a word or set of words in one culture may differ from that conveyed in another culture. And it takes no great understanding to appreciate how diplomatic and respectful Glatt had to be in his meeting with Suto. In any event, counsel for Taiyo pointed to times when Suto was reported to have said he did not sign the agreement. Having considered all that the parties referred to, in my view it is open and reasonable to observe that the statements and reactions of Taiyo do not manifest the vigour and indignation that might have been expected of Suto if he truly believed that he had not signed the agreement.

196 Finally, the affidavit of Batrouney was filed to counter Playcorp's contention that the allegation of forgery was a recent invention (see at [5(b)(viii)]). This sought to show that while the specific allegation of forgery took a while to get into the defence there was a history of correspondence and pleadings which showed that the defence of forgery was not a recent invention. I do not find it necessary to rule on that issue.

197 I come then to conclude on the issue of forgery. I accept the evidence of Futamura and Glatt in preference to that of Itani, Sasahara and Tomozawa wherever they conflict. I do not repeat my previous adverse findings concerning Taiyo's witnesses. It is sufficient to record at this point that they were unreliable witnesses. Their evidence was tailored to suit the case. I find both on the balance of probabilities,

and because I accept Futamura's evidence, that it was Suto's signature on the agreement, that Suto did sign the agreement and that Taiyo is bound by it as a result. In reaching these conclusions I have considered all that counsel for Taiyo submitted and found that none of the matters relied on, whether regarded individually or as a whole, lead to the conclusion, on the balance of probabilities, that Playcorp failed to establish that Suto signed the agreement or that his signature was forged.

Breach, repudiation and rescission

198 At [10] I outlined the issues raised in relation to these matters. Before developing the issues it is necessary to refer to the pleadings.

199 The statement of claim proceeds in this way. By the distribution agreement Playcorp was the exclusive Australian and New Zealand distributor for the resale of products manufactured by or for Taiyo from time to time from 1 January 1993 to 31 December 1998. There were terms of the agreement that Playcorp would send orders for product "for acceptance or objection by Taiyo", and that upon receipt of orders Taiyo would use all reasonable endeavours to meet the delivery date. At all material times Playcorp was ready, willing and able to perform its obligations under the agreement. Notwithstanding its obligations, on or about 21 March 1996 and 26 March 1996 Taiyo refused to supply product to Playcorp. Such refusal was constituted by Itani's letter dated 21 March 1996 (referred to at [88]) and Itani's conversation with Cooper and Glatt on 26 March 1996 (referred to at [94-95]). By that conduct Taiyo evinced an intention not to be bound by the agreement and thereby repudiated its obligations under it. Playcorp accepted the repudiation and terminated the agreement by Cooper and Glatt's letter dated 26 March 1996 (referred to at [96]) or by Cooper's letter dated 29 March 1996 (referred to at [100]). As a result Playcorp has suffered loss and damage in the nature of lost profits in the sum of $10,621,260; by the conclusion of the trial the amount claimed under this head was $2,347,965. Further, during April 1994 to December 1995 Taiyo sold and delivered products to Playcorp which in breach of terms implied by s 19 of the *Goods Act* 1958 (Vic) or the *Sale of Goods (Vienna Convention) Act* 1987 (Vic) were not reasonably fit

for their purpose or of merchantable quality, as a result of which Playcorp has suffered loss and damage in the sum of $503,956.46; by the conclusion of the trial the amount claimed under this head was $374,605.

200 By its fourth further amended defence Taiyo alleged that there were implied terms of the agreement that Taiyo would continue to supply new Tyco product to Playcorp only for so long as Tyco consented thereto, and that Taiyo and Playcorp would at all times act in good faith in relation to all matters the subject of the agreement. Whereas the latter term was to be implied by law, the former term was to be implied from several facts and matters specified in the defence and by reason of the need to give business efficacy to the arrangements. Tyco did not consent to Taiyo continuing to supply new Tyco products to Playcorp in and from 1996 and notified Playcorp of that fact by the letter dated 9 August 1995 (referred to at [35]), and Taiyo's obligation thereafter to supply such products ceased. Playcorp was not at all material times ready, willing and able to perform its obligations under the agreement. And, while Taiyo admitted that it refused to supply products to Playcorp until the faulty products claim had been resolved, it denied that such refusal constituted a breach or repudiation of its obligations under the agreement. Further,

(a) Playcorp's claim for faulty products was unjustified and wholly unreasonable in that:

(i) it assumed that Taiyo was liable for all faulty product, whenever returned and whether or not timely notice of return had been given to Taiyo;

(ii) a repair cost of US$17 per unit was claimed whereas the average actual repair cost was less than A$17 per unit;

(iii) by its letter to Tyco dated 19 March 1996 (referred to at [85]) Playcorp valued the faulty products claim at $250,000.

(b) In making and persisting with the faulty products claim and insisting that payment be a condition of further dealings between the parties, Playcorp:

(i) breached the implied term to act in good faith in relation to all matters the subject of the agreement;

(ii) asserted an obligation on Taiyo for the future which was not that under the agreement. That is, the assertion that Taiyo was liable for all faulty product whenever returned, and whether or not timely notice of return was given to Taiyo, and that the repair charge was US$17 per unit.

(c) In these circumstances Taiyo was entitled, as it did, to conditionally refuse supply.

201 The defence went on in para 8 to deal with the effect of the agreement which Playcorp made with Tyco on 26 March 1996. The agreement limited the products which Playcorp could obtain from Taiyo, and that affected Playcorp's ability to perform its obligations under the agreement. It was alleged that by reason of not being able to obtain new Tyco products manufactured by Taiyo, Playcorp was not ready or willing to perform its obligations under the agreement and was thereby unable to rely on Taiyo's alleged repudiatory conduct to terminate the agreement. It is important to note that in the course of final addresses counsel for Taiyo did not rely on the pleas in para 8(a), (ddd) and (e).

202 In the balance of the defence it was denied that Playcorp had suffered loss and damage. It was alleged that any claim for damages for loss of profits was limited to loss from the distribution of "old" Taiyo products in Australia (and not New Zealand) during the period from 29 March 1996 to 5 December 1997. This limitation followed from the agreement dated 26 March 1996 (referred to at [93]), the deed of release dated 6 June 1996 (referred to at [104-109]), the deed of settlement made in December 1997 (referred to at [116-117]), and the deed of termination and assignment made in February 1998 (referred to at [116] and [118]).

203 The final pleas to note are denials that the agreement was subject to implied terms that goods supplied be reasonably fit for the purpose or of merchantable quality, or that any such terms were broken.

204 Playcorp filed an amended reply to Taiyo's fourth further amended defence. The pleas that are made in it will be dealt with as necessary in considering the submissions.

205 It is not to put the cart before the horse to identify, at the outset of the consideration of the issues, when Playcorp rescinded. That is to say, assuming repudiation by Taiyo, when, if at all, did Playcorp accept that repudiation and rescind the agreement? Counsel for Playcorp submitted that the obligation to supply was an essential obligation – which it undoubtedly was – and that by Itani's facsimile on 21 March 1996 (referred to at [88]), and his oral advice to Cooper and Glatt on 26 March 1996 (referred to at [94 and 95]), Taiyo manifested an intention no longer to be bound by the agreement, by refusing to supply product under it.

206 Playcorp's counsel submitted that Playcorp rescinded the agreement by its letter dated 26 March 1996 and confirmed it by the letter dated 29 March 1996. In my view neither the terms of the letter nor the conversation of 26 March 1996 constituted advice of rescission. Playcorp's statements on 26 March 1996 are properly to be understood as threatening legal proceedings for damages and costs unless Taiyo advised within 24 hours its acceptance or otherwise of Playcorp's offer to accept payment of US$268,943 within seven days. No such advice being forthcoming, and there being no advice from Taiyo that it would supply product, Cooper wrote the letter dated 29 March 1996 which purported to rescind the agreement.

207 It is then important to note the category of products which were available to Playcorp under the agreement. This changes from time to time, and the position and changes may be noted as follows:

(a) Under the distribution agreement Playcorp was entitled to "such products as are manufactured by or for Taiyo from time to time". The

evidence established, and in the end there was no dispute, that the great majority of such products were developed by Taiyo for Tyco,[32] that is they originated with Tyco.

(b) By its letter dated 9 August 1995 (referred to at [35]), Tyco advised Playcorp that beginning in 1996 Tyco would take over distribution of all new Tyco developed R/C items in Australia and New Zealand, but that in 1996 Playcorp could distribute all R/C items it was currently distributing including Rebound. It is to be noted that the agreement between Taiyo and Tyco made 14 January 1994 was terminable on six months' notice. If Tyco had given such notice it would have been entitled to prevent Taiyo from selling Tyco originated (or "developed") products to Playcorp. A portent of such action was contained in Tyco's letter to Taiyo dated 17 June 1992 (referred to at [21]).

(c) By the agreement made on 26 March 1996 (referred to at [93]) Playcorp gave up its right to distribute in Australia Dagger, Mutator and any new Tyco developed products. It gave up totally its right to distribute any product in New Zealand. This meant that Playcorp was free to distribute in Australia any Taiyo product and old Tyco product.

(d) The deed of release made 30 May 1996 (referred to at [104-109]) confirmed this position but defined what was a new Tyco product and thus clarified what products Playcorp could sell in Australia. The definition appears at [106]. The definition establishes 31 December 1995 as the date at which it is to be determined whether a toy is a Tyco New Product within the meaning of cl 1.3 of the deed of release. Although cl 3.2 provides that from the settlement date, which was 31 May 1996, Playcorp had no authority or licence to distribute Tyco New Products in Australia, counsel for Playcorp treated the agreement in the deed of release as flowing back to 26 March 1996. Hence, as

[32] See Sasahara's witness statements Exhibit 10 pp 12-14 and 20-21.

from that date, what remained in the basket of goods available to Playcorp were:

(i) all toys manufactured by Taiyo and devised by Taiyo, whether new or altered toys, and

(ii) all Tyco toys manufactured by Taiyo that Playcorp had distributed or sold prior to 31 December 1995 and which had not been "re-designed" within the meaning of the definition of Tyco's New Products.

(e) For completeness, by the deed of termination and assignment Playcorp gave up, from 5 December 1997, its right to distribute in Australia Tyco toys other than Tyco's New Products. Hence, from 5 December 1997, Playcorp had no right to distribute or sell any Tyco toys in Australia.

208 I now turn to the matter of the defective products claim.

209 The first issue is whether Taiyo's refusal to supply product amounted to a breach of its obligation to supply under the distribution agreement. Taiyo's case is that it was entitled to conditionally refuse supply, for the reasons stated in the summary of the defence at [200]. In this part of the case Taiyo's counsel did not deal with the issue which Taiyo raised on the pleadings (see at [203]) as to whether the agreement was subject to implied terms of fitness for purpose and merchantable quality. Taiyo's counsel developed their submission on that issue at a later point in their address when dealing with the issue of damages for the faulty product claim (as distinct from the loss of profits claim). On the other hand, Playcorp's counsel dealt with the issue in the course of dealing with repudiation and recision.

210 The distribution agreement provides for Taiyo to supply Playcorp with goods by way of sale. Playcorp purchased the goods as and in the capacity of a distributor for Taiyo products in Australia and New Zealand for the purpose of selling to retailers at a profit, such retailers then selling the goods to the public in the condition

in which they were received from Taiyo and sold by Playcorp save for branding with the Metro name. It was fundamental, to the point of going without saying, that when delivered by Taiyo the goods be in working order fit for their use by the ultimate consumers. That was the fundamental basis of the supply arrangement. All of this is obvious, when the matter is regarded in context, although the agreement itself contained no express provision concerning Taiyo's obligation in relation to the quality of the goods.

211 The absence of an express provision as to quality of the goods gave rise to Playcorp's pleading that the sale and delivery of products by Taiyo to Playcorp was subject to the implied terms of fitness for purpose and merchantable quality. As I have said, Taiyo denies the existence of any such terms. In that part of the defence which makes that denial (para 12), the defence alleges, further:

> (a) that if the *Goods Act* is applicable, the implied conditions in s 19 are excluded by s 61 by reason of the following course of dealing, namely, during 1985 – 1994 no claim was made by Playcorp for defective goods notwithstanding that some defective product was supplied, and
>
> (b) the *Sale of Goods (Vienna Convention) Act* was not applicable because Japan is not a party to the Convention or a contracting State and Taiyo's place of business is in Japan.

212 The defence did not positively plead a term as to quality to which products supplied by Taiyo were subject or were required to meet. In para 12 Taiyo made the plea referred to in (a) above. And in para 7 it made the plea referred to at [200] (a) (i) and (b) (ii). These pleas did not, however, positively plead a term as to quality which the product sold by Taiyo was required to meet, or otherwise identify whether the law pertaining to Taiyo's obligation in that regard was the law of Australia or of some other place and, if the latter, what the relevant law of that place was. The submissions of Taiyo's counsel took the same tack.

213 It is logical to commence by considering the issues raised by the pleadings as they concern the identification of Taiyo's obligations as to the quality of the products sold to Playcorp.

214 As I have said, the distribution agreement itself did not include an express provision as to quality of the product supplied. Furthermore, it was not suggested that any order or invoice or other document pertaining to a particular sale transaction included any relevant terms.

215 It was in the nature of the products that from time to time they would be found to be defective in some respect or other. It was foreseeable, and it occurred in practice, that fault was found in the mechanism or body parts of an R/C toy, and that such toys would be returned for repair.

216 In his evidence Itani identified instances in the years 1985 to 1988 inclusive when Taiyo, at its expense, repaired faulty products sold to Playcorp (or GTI to be precise). In one instance, in 1985, when, as Glatt said, the whole shipment was faulty and none of the product worked, Taiyo sent two engineers to Australia who repaired the defective toys. In other instances in 1985 to 1988 inclusive, when there were large return rates, Playcorp at Taiyo's suggestion, returned defective toys to Taiyo who repaired and returned them to Australia. Spare parts also were sent to Playcorp for Playcorp to be able to carry out repairs. Itani's evidence was based on what he had found in looking through old records. The evidence accords with Glatt's evidence. The evidence reflects how the parties worked, without necessarily being exhaustive of every occasion on which repairs were carried out on defective toys or spare parts supplied.

217 Glatt described how in about 1989 Playcorp established a procedure for the repair of defective R/C toys returned by a customer to a retailer. This procedure was to enable repairs to be effected in Australia, if possible. This would facilitate a speedier turn around of repairs and even of resale of the toys. For this purpose Playcorp appointed repair agents across Australia. If a R/C toy was defective the customer would be directed to take it to a repair agent who would assess the toy and where possible repair it. This almost always involved fitting spare parts which were supplied by Taiyo. If the repairer determined that the fault in the toy was the result of customer abuse or carelessness the repair cost was charged to the customer.

If the repairer determined that the defect was the result of design or manufacturing fault, the cost was charged to Playcorp. Glatt said that the repair agents charged Playcorp a fixed minimum labour cost for every R/C toy repaired. Between July 1990 and about March 1995 Gatto owned, and himself conducted, the major repair agency for Playcorp in Australia. From February 1996 to June 1999 he was employed by Playcorp as a storeman and repair technician. Gatto's evidence as to the agency repair set up and how matters were handled substantially accorded with Glatt's evidence.

218 Glatt added that Playcorp would report products with design or manufacturing defects to Taiyo, and return samples to Taiyo for testing. It was of course in Taiyo's interest to remedy defects, and this process of testing and remedying products returned happened with markets other than Australia.

219 Not all items were able to be handled by the repair and return of the item to the customer or resale. Sometimes retailers returned R/C toys to Playcorp and, while some were repaired from 1994, many remained in Playcorp's warehouse. Playcorp's standard policy was to refund to a retailer the purchase price paid by the retailer when R/C toys were returned to Playcorp. In his witness statement[33] Glatt identified Schedule "C" to Playcorp's further and better particulars as setting out the identity and quantity of defective R/C toys returned by retailers between 1994 and 1996. This schedule was replaced, during the trial, by an amended schedule, Exhibit S. The schedule is attached to the judgment as Schedule A. It sets out in relation to eight products including Triple Wheels and Python, in respect of the period 1994 to the end of 1996, the quantities of defective products returned by retailers to Playcorp and in respect of which a credit note was given, the quantities or defective products remaining in the warehouse as per a count by Gatto in 2000, the average wholesale price of the products counted in the warehouse in 2000, and the price lost on the goods in the warehouse. The credit notes refunded the purchase price paid by retailers for those defective R/C toys. The refund was invariably made by way of a

33 Exhibit A para 44

set-off of the price against future purchases. As stated in Exhibit S, credit notes were raised for 7,313 R/C toys returned, and 6,418 returned products were counted in the warehouse. The figures in Exhibit S are admitted by Taiyo. Taiyo also admits the amounts stated as the wholesale price and the calculation of the lost price in the last two columns of Exhibit S. The total figure in the last column, $365,311, is the amount claimed for defective products. The amount of $9,294 for repairs is separately stated. It is seen that the amount of $365,311 is the product of the quantities counted in the warehouse multiplied by the relevant unit cost.

220 Among the R/C toys returned in this period (1994 to 1996) two were most prominent, Triple Wheels and Python. According to Exhibit S, the quantities of these toys returned by retailers and in respect of which credit notes were issued was 3,783 and 1,537 respectively, and the quantities counted in the warehouse were 4,139 and 1,402 respectively. It was the problems with those two toys that led to the faulty product claim, in my view. Glatt said, and there is no doubt that he was correct, that the level of returns for Triple Wheels and Python due to defects in the quality of materials and manufacture or assembly was abnormally high. It was, I find, quite unusual and beyond any reasonable expectation of the parties based on past experience. There were, in addition, the other returns and repairs quantified in Exhibit S aggregating to the total numbers referred to above. Glatt said that the number of customer returns for, and dissatisfaction with, Triple Wheels and Python, was so great that retailers would refund money to customers, return the toy to Playcorp for credit and cancel outstanding orders of that product. Further, the high rate of returns, particularly for Triple Wheels and Python, produced a greater need for spare parts from Taiyo. For the sake of clarity, Triple Wheels and Python were by far the worst, but were not the only toys causing trouble. Glatt's point about dissatisfaction leading to lost sales is seen demonstrated when in January 1995 Playcorp cancelled an order for 2,400 Mini Triple Wheels. That was because the quality control problems with Triple Wheels had affected sales of Mini Triple Wheels.

221 Tyco also experienced defects in Triple Wheels and Python. Tyco sought, and obtained, financial redress for loss suffered as a result of being supplied these faulty products. I referred to this at [59].

222 Futamura explained how, as a result of the complaints of Playcorp and Tyco, Taiyo carried out improvements to Triple Wheels. One improvement was to change the material for the transmission from ABS plastic to polycarbonate. He stated, and I accept, that the defect in Triple Wheels was discovered after most of Playcorp's orders for it had been completed, whereas most of Tyco's orders were manufactured after improvements were made to the transmission. Futamura also referred to the problems with Python.

223 There was some evidence of the rate of return of faulty R/C toys. Itani said that in his experience the need for repairs or rectification of faults arose in less than five per cent of total sales, and that this was factored into a distributor's pricing and profit margin on sales. That was said in his witness statement, but in terms which produced an objection to admissibility. Consequently, counsel sought elaboration in Itani's oral evidence in chief. On being asked what the basis of his "experience" was, Itani responded that for the special feature sophisticated R/C toys the return rate would "be more, at least five per cent, is a standard return rate". He was asked what experience he had which enabled him to say that the rate of return is factored into a distributor's pricing. His answer commenced by saying that "everybody knows" there are returns, at which point there was an objection. The objection was properly made. Itani's evidence of his "experience" was a generalised assertion as to the rate of return, and there was no admissible evidence, or evidence of any weight, to establish the assertion as to distributors' pricing. As I understood Itani's evidence, he had not discussed the rate of returns with Glatt, but in a discussion about returns Glatt had said that as long as Taiyo kept a good relationship with Playcorp "he wouldn't specially bring up the subject".

224 Glatt was cross-examined about the rate of returns. He said that the rate of return experienced was "somewhere less than" five per cent. He did not recall or believe

that Playcorp included a specific percentage in its pricing to allow for returns of faulty product, warranty costs, or costs associated with having Taiyo remedy faulty products. Nevertheless, Glatt agreed, Playcorp's pricing took account of, or factored in, the overhead costs of running the business, and an item of such costs was Playcorp's "warranty costs experience". He was referred to Exhibit 2, which was a document prepared for Cooper on 20 March 1996, and specifically to the item "warranty costs", in response to which he said that he could not recall that selling costs were constructed with a provision for warranty costs, as distinct from their being an understanding of the overhead costs of the business.

225 Cooper agreed that rates of return "of the order of something up to [five per cent] were the norm". He said that such rate of return was not factored into Playcorp's pricing. Playcorp did not have a policy that it "would just take in and write off" the first five per cent or up to five per cent, otherwise Playcorp would not have kept the returned product in its warehouse.

226 He said further that returns "might have been accepted reluctantly without further recourse in an ongoing and healthy relationship with Taiyo, but we kept them because we had – our policy was to send them back for repairing and ultimately get them back. We never wrote anything off." Playcorp kept product and if it could be repaired, and there was a sufficient number to send them back in a container, "we hoped to send them back and have them repaired and then bring them back and sell them as refurbished stock". This evidence reflected how Playcorp had operated with Taiyo over the years.

227 I prefer the evidence of Glatt and Cooper as to the rate of returns and on the matter of the costs associated with returns being taken into account as part of the overhead costs. I find that the rate of returns was something less than, but up to, five per cent. However, as a result of the way returns were dealt with, it does not necessarily follow that Playcorp actually lost that five per cent.

228 The claim made by Playcorp on 2 October 1995 (see at [43]) was the first claim by

Playcorp for financial recompense for faulty product. At Itani's request the claim was particularised in Glatt's letter dated 30 October 1995 (see at [44]). The claim was for all faulty product returned and in the warehouse at 10 October 1995. The claim made no allowance for (what counsel referred to in cross-examination as) normal rates of return of product. Glatt said that there had never previously been any need for such a claim "because Taiyo offered us a solution one way or another". And there had never been such a "massive failure rate" as Playcorp experienced with multiple products in 1995 particularly with Triple Wheels; "it never happened before in that kind of volume". Cooper explained the position thus – "in the past they had always come to the party by repairing our faulty product one way or the other".

229 While the distribution agreement itself does not contain a term as to the quality of the product to be supplied under it, it is plain that Taiyo manufactured and supplied the products on the basis that they be fit for their intended use as toys. It is also plain that Playcorp relied on Taiyo's ability, by reason of its skill and experience in the design and manufacture of such toys, to provide toys that were fit for the purpose of being sold to and used by members of the public. Not only is this plainly the case but it is consistent with, if not confirmed by, the way in which the parties acted in relation to faulty products. Allowing for the fact that Playcorp, for commercially sensible reasons, undertook and expedited the repair process, from the outset of the relationship Playcorp relied on Taiyo (as the manufacturer, possessing the necessary and associated research and quality control departments) to effect or facilitate repairs, identify and rectify faults and return such products to Playcorp, and provide spare parts. What Taiyo did was to recognise and accept responsibility for faults in the product it had supplied, knowing that it was relied on to provide product that was fit for its intended use.

230 Playcorp pleaded that Taiyo sold the faulty products on implied conditions that they be reasonably fit for their use and of merchantable quality. Taiyo's pleading denied that allegation. No allegation was made by Taiyo, and none was developed in final address, that for some reason or other the implied conditions in s 19(a) and (b) could

not have been applicable or satisfied. That is to say, there is no argument that addressed the terms of s 19(a) and (b) and contended that some element or other of those provisions was not satisfied by the facts of this case. For instance, on the faulty products claim, it was not submitted by Taiyo that the relevant goods were not defective. Taiyo could hardly have done that as it had steadfastly refused to undertake any inspection of the returned product in Playcorp's warehouse.

231 Subject to the discussion that follows concerning Taiyo's defences, I am of the view that in the present circumstances a term of fitness for purpose was to be implied in the supply contracts whether by reason of the facts or circumstances of the case and because it is a proper case for the implication of such a term, or by implication of the condition in s 19(a). It is unnecessary to consider whether the condition of merchantable quality would also be implied.

232 The only positive plea concerning the applicability of the conditions implied by s 19(a) and (b) was that they were excluded by the operation of s 61 of the *Goods Act* by reason of the course of dealing between the parties. Section 61 provides that:

> "Where any right duty or liability would arise under a contract of sale by implication of law it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage if the usage be such as to bind both parties to the contract."

233 Taiyo relied on the second leg of the section, of a course of dealing between the parties. That is, Taiyo did not contend that the parties made an express agreement that no implication under s 19(a) or (b) be made, and it did not seek to establish a usage that bound the parties to the same effect. Only the second leg of a course of dealing between the parties was relied on. In particulars, Taiyo stated that the course of dealing was that during the period 1985 to 1994 no claim was made by Playcorp for defective products notwithstanding that some defective product was supplied.

234 In my view the reliance on s 61 is utterly without substance. The reason why no claim was made was that Taiyo, recognising its responsibility for defective products,

which it had supplied to Playcorp who had relied on Taiyo's skill and judgment to supply product that was fit for the purpose, voluntarily came to Playcorp's assistance and attended to repairs and provision of spare parts. The actions which Taiyo took were adequate and sufficient in the context of the ongoing commercial relationship to lead Playcorp to not make a claim for financial recompense. In these circumstances no question of a "right, duty or liability" arose between the parties, let alone any reference by Playcorp to s 19(a) or (b). Taiyo's actions saw to that. But that state of affairs could subsist, or was only likely to subsist, as long as Taiyo continued to act in the commercial relationship in that way. There is not the slightest indication in anything that either party said, or did, regarded in context, that indicated that if Taiyo were to cease acting in the way that it had been, the implied conditions in s 19(a) or (b) were to be treated as excluded by the course of dealing. For these reasons the plea based on s 61 fails.

235 It will be recalled that Playcorp relied on art 35 in the Convention set out in Schedule 1 to the *Sale of Goods (Vienna Convention) Act* to establish the implied conditions of fitness for purpose and merchantable quality. It is also to be noted that under s 6 the provisions of the Convention prevail over any other law in force in Victoria to the extent of any inconsistency. It was not suggested that there was any material difference or inconsistency between the provisions of art 35 and s 19(a) and (b) and because of that and the way the case was conducted, it is unnecessary to consider whether there is. As I understood it, counsel proceeded on the basis that there was no material difference or inconsistency. As a matter of logic, the provision in s 6 would lead one to consider the Convention before the *Goods Act*. Nothing turns on the fact that I have reversed that order in the present discussion. I have simply followed the order in the pleadings.

236 Article 1(1) provides that the:

> "Convention applies to contracts of sale of goods between parties whose places of business are in different States:
>
> (a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State."

237 In the defence Taiyo stated that the Convention was not applicable because Japan was not a Contracting State. (Of course, the respective places of business of Playcorp and Taiyo were in different States.) It was accepted that Japan was not a Contracting State. Hence, para (a) is not satisfied and, subject to the position under para (b), the Convention is not applicable. Under art 1(1)(b), however, the Convention will apply if the rules of private international law lead to that application.

238 Counsel for Taiyo submitted that the *Goods Act* did not apply to the contracts by which Taiyo sold product to Playcorp. This was because the law of Victoria was not the proper law of the contract, or at least was not the proper law in respect of matters of performance. Counsel did not expressly state that the submission was made also in relation to art 1(1)(b) of the Convention, but I take the submission as extending to that.

239 This issue as to the proper law of the contract was not mentioned in the pleading. It was introduced by Taiyo and included as part of its contentions at trial. The contention was argued in a negative way in the sense that while submitting that the *Goods Act* (and art 35 of the Convention) was not applicable, it was not suggested which foreign law was the relevant proper law and no evidence of the content of any such foreign law was given or established.

240 The course of Taiyo's submission may be summarised as follows. The preferable law was the law of the place of performance.[34] The goods were ordered by purchase orders sent from Melbourne; under each contract the goods were shipped FOB Malaysia or Singapore, where the goods had been manufactured, to Playcorp in Melbourne; Taiyo invoiced Playcorp from Japan, and payment was normally secured

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34 As to which counsel referred to *Benaim and Company v Debono* [1942] AC 514 at 520 (PC); *N V Handel MY J Smits Import Export v English Exporters (London) Ltd* [1955] 2 Lloyds LL Rep 317 at 322 –323; *The Nile Co for the Export of Agricultural Crops v H & JM Bennett (Commodities) Ltd* [1986] 1 Lloyds L R 555 at 580-581.

by letters of credit in US dollars which were probably drawn down in Japan.

241 In these circumstances performance was complete when the goods were placed on board, which, it was further submitted, probably also constituted acceptance of Playcorp's orders. It was submitted that cl 8.9 of the distribution agreement, which provided that the agreement be construed in accordance with the Laws of Australia, merely related to construction of the agreement and did not govern matters of performance. Even if cl 8.9 might be taken as indicating an intention that Australian law governed performance, it was only one indication of the parties intention and it was outweighed by the combination of the place of making the contacts and the place of performance.

242 Counsel for Playcorp submitted that the issue of defective products was governed by Victorian law. The sales of goods took place under the aegis of the distribution agreement which by cl 8.9 was to be construed in accordance with Australian law. The question was whether upon the proper construction of the agreement the Court may properly infer that the parties intended their agreement to be governed by reference to a particular system of law.[35] If the agreement is to be construed in accordance with Australian law, it can scarcely be doubted that the parties intended that their rights be governed by the Australian law, referring to the language of Upjohn J in *In re Claim by Herbert Wagg*.[36]

243 Apart from the fact and force of cl 8.9, it was submitted by Playcorp's counsel that the system of law with which each sale had its closest and most real connection was the law of Victoria.[37] On delivery in Victoria the toys were rebadged "Metro", and sold to retailers and then to consumers. Damages were suffered in Victoria. Repairs were effected and refunds were made in Victoria. These factors are not outweighed by the foreign factors relied on by Taiyo. The place of shipping was concerned with Taiyo's obligation to supply, risk and title passed on shipment, and

35 *Akai Pty Ltd v Peoples Insurance Co Ltd* (1996) 188 CLR 418 at 441.
36 [1956] Ch 323 at 340 – 341.
37 See *Bonython v Commonwealth of Australia* (1950) 81 CLR 486 at 498; *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418 at 434.

payment was purely a financial arrangement.

244 Finally, Playcorp's counsel stated that the issue is academic for the reason I mentioned earlier. Taiyo had neither pleaded nor proved the content of some foreign law as the system of law which it said governed the question. If one scans Taiyo's submission, Australia, Malaysia, Singapore and Japan are referred to as countries in which some act occurred. But the references were not by way of a submission that identified, and sought to establish, that the law of one or other of those countries governed the question. Taiyo's submission did not condescend to that point. It was merely negative in the sense of contending that the proper law of the contract was not Victorian law. In this situation it is well established that Victorian Law is the law to be applied. The legal position is conveniently stated in *Dicey and Morris on The Conflict of Laws*:[38]

> "(i) *Foreign law must be pleaded*. The general rule is that if a party wishes to rely on a foreign law he must plead it in the same way as any other fact. Unless this is done, the court will decide a case containing foreign elements as though it were a purely domestic English case.
>
> **(4) Burden of proof.** The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence or insufficient evidence, of the foreign law, the court applies English law."

245 The application of this principle of private international law means that either the *Goods Act* or the Convention applied to the sales contract. It is thus unnecessary to consider the earlier submissions as to the proper law of the contract. As I have stated, the Convention has the benefit of paramountcy over the *Goods Act* in the event of any inconsistency between the two. As I have said, no such inconsistency was suggested, and having regard also to the way in which the case was conducted, it is appropriate to proceed on the basis that there is none.

246 I now consider Taiyo's contention that its refusal to supply products to Playcorp did not constitute a breach of its obligation to supply under the distribution agreement.

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38 13th ed, Vol 1, p 221-232; and see *Australian Private International Law*, Sykes and Pryles, 3rd ed, p 276-277; *Cross on Evidence* 6th ed at [41005].

I referred to the relevant parts of Taiyo's defence at [200]. In short, Taiyo admitted that it had refused to supply products to Playcorp "until a claim for allegedly faulty products had been resolved" (para 6 and 7 of the defence), and alleged that for the reasons and in the circumstances referred to at [200] it had been entitled to conditionally refuse to supply (para 7 of the defence).

247 The first point to clarify concerns the reference in the defence to the products the subject of Playcorp's claim being "allegedly" faulty. I reject the allegation of "allegedly". While the respective number of items of product in Exhibit S differs from the number in Playcorp's letter dated 30 October 1995,[39] the fact is that there were faults in a range of the products and, as I have said, Taiyo admitted the figures in Exhibit S of the quantities in respect of which Playcorp gave a credit note on the return of the product, and of the quantities of product in the warehouse. Even apart from that evidence and the admissions, it is apparent that in the period 1994 to 1996 a deal of the items, and in the case of Triple Wheels and Python a very great deal, proved faulty. That was the experience in other markets. It did not simply manifest itself in the case of Playcorp. It happened elsewhere. Quite simply, it is not a question of "allegedly", the fact is that Taiyo supplied Playcorp with faulty product.

248 Essentially, what changed was the magnitude of the problem caused by the abnormally high rate of defects, and returns, in Triple Wheels and Python. Notwithstanding that, as the contemporary correspondence shows, Taiyo supplied (at Playcorp's request) spare parts (particularly for Triple Wheels and Python) to enable faulty products to be repaired, and Taiyo worked on rectifying defects. However, the nature and extent of the problem exceeded anything that had occurred in the past and that Playcorp was reasonably able to manage.

249 Taiyo's counsel made a point that it was not until the letter dated 2 October 1995 that Playcorp made a claim for financial recompense, and that no such claim had ever

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39 The letter dated 30 October 1995 lists returns to 10 October 1995 whereas Exhibit S includes credit notes issued up to 31 December 1996 and quantities counted in the warehouse in 2000.

previously been made. But the letter stated that Playcorp had indicated to Taiyo "over several months [that] the repair and return rate of both Triple Wheels, 6V Python and other categories has been unacceptably high". It is without dispute that Taiyo was aware of the faults being found in toys, as it was in the ordinary course for such information to be provided by Playcorp. (Moreover, as mentioned, faults were being experienced in other overseas markets.) Such advice of defects was of the essence of the relationship in which Playcorp relied on Taiyo's skill and experience in the design and manufacture of R/C toys, and Taiyo wished always to remedy defects in its products. In his evidence Futamura said that:

> "[I]f faulty product was reported, I reported to our R & D and Mr Suto all about what is reported by Mr Glatt and waited their response. What is the problem and what the reason of the faulty. If the faulty belongs to Taiyo we discussed internally how to fix it. If we cannot understand the reason of the faulty we asked them to send samples to make sure what is problem. That is what I did.
>
> Was there any special problem so far as you were aware with faulty products at the time you left in May 1995? - - - I was told the returns of Python and Triple Wheels was substantial, that's what I was told before I leave.
>
> Mr Glatt told you that, did he? - - - Yeah."

250 Glatt said in evidence that prior to sending the letter dated 2 October 1995 he had, over a period of months, continually raised Playcorp's claim in relation to defective products directly with Itani. He was taxed on this in cross-examination. He stated that apart from requests for spare parts for several other items, Triple Wheels and Python were the object of the correspondence listed in para 45 of his first witness statement.[40] That is, insofar as Playcorp brought the problem of defects and returns to Taiyo's notice by written communications to Taiyo between August 1994 and February 1995 the products in question were Triple Wheels and Python. Then, at another point in his cross examination, Glatt was asked what report had been made to Taiyo of problems with products other than Triple Wheels and Python. Glatt answered that he could recall "some telephone calls about odd issues with … the

40 Exhibit A.

Scorcher". That, he said, was about all he could recall "at this time". It is clear from this evidence, and in any event I find, that it was the problem with Triple Wheels and Python that caused Playcorp's substantial concern.

251 Tyco experienced the same faults with Triple Wheels and Python as Playcorp had encountered. Itani told Glatt not to pursue Playcorp's claim but to wait until Tyco had finished negotiating its claim for defective products. Glatt referred to this in a facsimile to Itani dated 27 November 1995. Glatt had waited and, after Taiyo's negotiations with Tyco finished he delayed several further months because Itani said that Suto had other pressing concerns and he (Itani) did not want to raise it then. I note that, as stated by Taiyo's counsel, Tyco settled its claim against Taiyo in respect of faulty Triple Wheels and Python in July 1995; I referred to the debit notes which Tyco raised against Taiyo at [59].

252 In his letter dated 11 March 1996 Itani stated that Taiyo did not have a suspicion about the returns in the warehouse, but felt that the claim was totally unreasonable. In his evidence Itani said he had been dealing with Playcorp about problems with Triple Wheels and Python but was "surprised by the size of the amount claimed and suspicions of the claim". He said that Playcorp's level of problems and quantity of returns were not experienced to the same extent in other markets. In his witness statement, for instance, he compared the return rate of Triple Wheels and Python in Japan of 2.494 per cent and 2.875 per cent with Australia of 12.67 per cent and 6.72 per cent respectively. He also said that Playcorp's claim for the cost of repairs was larger than that experienced in Japan or by Tyco in the United States. No other rates of return were significant. Itani wrote to Glatt on 5 October 1995 (referred to at [44]) and asked for further details. He received the reply dated 30 October 1995.

253 To summarise, Taiyo knew there were defects in Triple Wheels and Python, just as it knew when other toys had defects. It was continually engaged in quality control, and the problems with Triple Wheels and Python were addressed by Taiyo's research and development section. Taiyo also provided free spare parts to Playcorp and other distributors to try and overcome the problem.

254 This is a sufficient reference to expose Taiyo's position. It did not dispute the fact that items were defective. It did not bother to have anyone inspect the products returned to Taiyo, or Playcorp's records for the light they might throw on the quantity of returned product, the condition of returned products, credit notes passed, or repairs effected. On several occasions as Playcorp pressed for a resolution of the claim, it suggested that Taiyo undertake an inspection, but Taiyo never did. On 19 March 1996 Cooper offered arbitration, but that was rejected. And Itani's evidence made it clear that Taiyo rejected any idea of passing credit notes against future purchases.

255 Reference may be made in this context to Cooper's letter to Itani dated 7 February 1996 in which he referred to having reiterated on a number of occasions that the faulty products were available for inspection at Playcorp's warehouse, or that Playcorp would ship them back to Taiyo on confirmation that Playcorp would receive full compensation. I accept the statements in the letter as being correct.

256 In this context it is pertinent to note that on 8 November 1995 an employee of Tyco (Hong Kong) Ltd suggested to Itani that he ask Playcorp to ship back the returns to Taiyo in Malaysia and that Taiyo repair them and send them back to Playcorp. The labour costs would be lower than in Australia and Itani would get the benefit of being able to analyse "a large defect population in order to determine where and how the problems are occurring". Itani did not take up that suggestion. Clearly, it was not a course that Taiyo wished to take. The probability is, in my view, and I so find, that Taiyo took the view, knowing that Playcorp had a substantial number of defective toys, that if it commenced to inspect them it might become enmeshed in a process that would be hard to control and which would result in an undeniable liability on its part. The preferable course was to sit tight, string Playcorp along and then stick to the offer of US$20,000. This is consistent with Taiyo's objective, as it became clear and which I referred to at [62], of seeking to out-manoeuvre Playcorp. In this situation no great harm would be done if Playcorp accepted the offer. The faulty product claim would be resolved inexpensively, and the strategy of cutting

Playcorp out of the picture could continue.

257 In the defence it was stated that Playcorp's claim was unjustified and wholly unreasonable for the reasons set out at [200]. In their submissions counsel for Taiyo expanded the plea. The claim was described as a false and grossly exaggerated one, the making of which was unreasonable. This was based on the following matters:

(a) The claim was for all returned product in the warehouse, dating from January 1994 in the case of the 9.6V Turbo Scorcher, and with no allowance for the ordinary rate of returns.

(b) The repair cost per unit was much less than the claimed agreed minimum repair charge of US $17 per unit.

(c) Playcorp had at trial only proved repair charges of $9,294 as compared to the claimed repair charges of US$98,688.

(d) Playcorp had at trial proved that a lesser number of Triple Wheels and Python were returned than had been claimed in the letter dated 30 October 1995. The differences were, for Triple Wheels, 4546 claimed compared to 3783, and for Python, 1686 claimed compared to 1537. The lesser numbers are referred to in Exhibit S.

(e) Playcorp could have repaired product for resale at a fraction of the cost of returned product stated in Playcorp's letter dated 2 October 1995. On the basis of Gatto's evidence, the returned Triple Wheels and Python could have been repaired for $80,628 as against the cost of the product of US$169,225.

(f) Taiyo relied on a further matter which showed that the claim was unreasonable. In the letter to Taiyo dated 19 March 1996 (referred to at [85]) Cooper had valued the faulty products claim at AUD$250,000. This may be compared to Glatt's offer of US$150,000 on 22 March 1996. Further, the amount of US$195,000 in cl 3.10(a) in the deed of release dated 30 May 1996 included the defective products claim.

258 What is the position in relation to these matters? As it is stated, point (a) is correct, but something should be said by way of explaining how the claim is put (as set out in Exhibit S). The claim is based on, or limited to, the quantities of defective product inspected and counted by Gatto in Playcorp's warehouse. The claim is not calculated on the basis of the defective products for which a credit note was issued. The latter figure (which totals 7,313) in Exhibit S goes in aid of establishing or supporting the case. But it is because the claim is based on, or limited to, defective product remaining in the warehouse that the numbers in the two columns in Exhibit S differ. They also differ from the numbers in Playcorp's letter of claim dated 30 October 1995. As I have already noted, Taiyo accepts the accuracy of the figures in Exhibit S. I find that Exhibit S correctly states the quantities of product and the other matters stated therein. I also find that the quantity recorded as being counted in the warehouse in 2000 does not necessarily equate to all items of each product returned. That is seen in the fact that in some instances credit notes were issued for more items than were counted in the warehouse. The fact is that the claim is based only on those items of defective product which remained in the warehouse when Gatto did his count. And, more particularly, the claim is limited to toys of the type listed in Exhibit S. In this respect it is important to note that the lists in Exhibit S and Playcorp's letter dated 30 October 1995 do not entirely correspond; some toys are in one but not in the other. On this point, Attachment B to Taiyo's written submission purports to chart returned products, for which credit notes were issued, commencing in 1994. Again, this list does not correspond with the list in Exhibit S.

259 It is to be noted that Exhibit S discloses that the 6,418 items counted in the warehouse comprise eight different toys, and Triple Wheels (4,139) and Python (1,402) account for 5,541 or about 86.5 per cent of the total. In relation to credit notes, about 72 per cent were issued in respect of Triple Wheels and Python. But, more particularly, the shipping history in Schedule B enables a calculation of the quantities of defective product returned on the basis of the quantities in Exhibit S. If one is to take, in relation to each item, the higher figure in the first or second column in Exhibit S, only Riptide, Triple Wheels and Python exceed or are greater than five per cent. But

there is a difficulty in making the calculation, and that is in equating the figures in the two columns. Furthermore, there is Itani's evidence as to the level of Playcorp's returns of Triple Wheels and Python (see at [252]) which exceeds five per cent. It does not seem to me to be possible, on the evidence, to be able to satisfactorily ascertain, in relation to each product, the actual quantity of defective items that were returned. Furthermore, the concept of allowing for an "ordinary" rate of returns was one thing, but how was it to operate fairly and reasonably in the changed trading conditions constituted by the exceptional rate of defects and returns and Taiyo's changed attitude to dealing with defects? By crediting the wholesale price Playcorp had lost that price and hence any profit on that item which, in view of the number of returns, affected the fairness or reasonableness of Playcorp bearing an "ordinary" rate of returns. The significant underlying factor in the claim being made for all returned product in the warehouse was that Taiyo changed the commercial relationship from that of a reasonable amount of give and take on both sides, leaving Playcorp with significant purchases of defective products.

260 Point (b) is correct. The amount of US$17 is the average cost of the amount stated for repairs in Playcorp's letter dated 2 October 1995, and the subsequent letter dated 30 October 1995 affirmed that as the "negotiated agreed minimum fee with all our service agents". That was not a correct statement. All that Playcorp established by evidence was that which Gatto deposed to. In his evidence Gatto set out a fixed price scale for labour costs for the repair of Taiyo R/C toys. That ranged from $10 for a transmitter repair to $18 for a circuit board repair. Spare parts were additional. Whatever the cost might have come to, from the point of view of Playcorp, Gatto was speaking in Australian dollars. There was no evidence that Playcorp had negotiated an agreed minimum fee of US$17 per unit with its service agents, as stated in Playcorp's letter dated 30 October 1995. Nor was there a minimum figure per vehicle. There was a range of figures, and they were in Australian dollars. It may have been that the costs to Playcorp worked out to be at or somewhere near AUD$17 per unit, but not US$17 per unit on the evidence. The calculation which produced the figures in the 2 October 1995 letter was not put in

evidence. The suggestion in the evidence of Glatt and Cooper was that they relied on information provided to them by an employee of Playcorp, David Joel who headed the accounting department. (It is a reasonable inference that he would be the David Wolfe Joel referred to at [20]). Glatt said that the figures in his letter dated 2 October 1995 were provided to him by Joel, and that he relied on them. Glatt's subsequent letter dated 30 October was also based on information provided to him. Playcorp did not call Joel, nor any other person who could establish the facts stated in those letters. The failure to call Joel or any other such witness, to establish these matters, in particular the US$17 figure, was significant. Glatt and Cooper could not establish the matters stated in the October letters from their knowledge. I conclude that the claim was put on the high side, in US dollars, for bargaining purposes. Beyond that, the figure of US$99,688 was not established. It is a reasonable inference that it could not be.

261 Point (c) is correct. It compares the amount claimed for repairs in Playcorp's letter dated 2 October 1995 with the amount proved at trial. While allowing for the difference between the US dollar amount in the claim and the Australian dollar amount proved at trial, the claim proved at trial did not, I find, represent all repair charges in Australia. It represented what was established by Gatto, the one witness called to substantiate repairs and their cost. It is also to be noted that initially in the statement of claim endorsed on the writ the amount claimed for repairs was AUD$118,671 and this was increased by $2 in subsequent particulars. This was less than AUD$17 per unit repaired, and very much less than the US dollar amount claimed on 2 October 1995. Following on from point (b), Playcorp did not establish how the amount of US$99,688 was calculated or arrived at. Playcorp rested on the admitted proof of its repair claim at $9,294. It is clear that Playcorp was not, by admissible evidence, able to establish a claim in the amount of US$98,688 or even the particularised claim of AUD$118,673.

262 Point (d), I find, represents no more than different numbers in terms of proof at trial. What has happened in relation to points (c) and (d) is often found in claims of the

present type. As a dispute gets closer to a trial, and proof on the balance of probabilities is required by the lawyers, the claim and the amount or number of items concerned can be reduced. Further, as mentioned, the quantity in respect of credit notes is not necessarily every defective product returned, as I understand it.

263 Point (e) relied on some evidence of Gatto in relation to the value of goods returned as stated in Playcorp's letter dated 2 October 1995. It was submitted that Cooper wanted to repair product for resale and that on Gatto's evidence the returned product could have been repaired at a fraction of the amount claimed by Playcorp as the purchase cost of 7,184 items of returned product. This point relates to point (b). The point assumes that it was practicable to repair and resell every item or defective product, which having regard to the poor market reputation of Triple Wheels and Python must be doubtful at the least. Indeed I am satisfied that in the circumstances such an apparently simple solution was not practicable.

264 Point (f) refers to no more than amounts which Playcorp put forward in seeking a resolution of the defective products claimed.

265 Taiyo's submission was that Playcorp's claim was "false and grossly exaggerated". It is necessary to understand what was happening. Playcorp was seeking to deal with a problem of Taiyo's making. It was not Playcorp's fault or responsibility that it had purchased from Taiyo numbers, which reached abnormally high levels, of defective goods. It was not Playcorp's fault or responsibility that Taiyo determined to shun its prior manner of dealing with Playcorp and not address the situation in a manner which produced commercial satisfaction and, in the process, accept responsibility in relation to defective products. If Taiyo had acted as it had in the past, or as it did with Tyco in giving appropriate credits, the situation would likely have been resolved. Taiyo strung Playcorp along, and while that was happening Cooper could sense that the actions, or forces, of Tyco and Taiyo were moving in the direction of closing the door on Playcorp's future distribution. The circumstances provoked a monetary claim. I find that Taiyo's conduct led Playcorp to put the claim at the highest level for the purpose of subsequent negotiations to resolve the

claim. It is indisputable that there were defective products and, in my view, in the circumstances it was not unreasonable for Playcorp to make, and press, a monetary claim. While the figures at trial turned out to be less than those claimed on 2 October 1995, especially in relation to the cost of repairs, the quantity of returned product and the repair costs were always verifiable and would have been expected to be verified in the ordinary course. It was in the nature of the claim that it was likely to be subjected to a process of verification, discussion and negotiation. It is not surprising that Playcorp would open the process at the top end of a possible range. But, in the context of the commercial relationship between these parties, is Playcorp's claim fairly to be described as false, grossly exaggerated and unreasonably made? I do not consider that the differences in the actual quantities of returned product in respect of which the claim was made in October 1995 and the claim as it is now put, could fairly warrant the claim being characterised as false, grossly exaggerated or unreasonably made. The real sting, in my view, lies in the area of the claim for the cost of repairs, which was based on the unestablished average figure of US$17 per unit. Not only was it not established by evidence, there was no attempt to establish it. As I have pointed out, or would find, the repair costs were not more than AUD$17 per unit. And, in the end, all that was proved was AUD$9,294, an amount so much less than US$99,688 as, without explanatory evidence, to make one wonder how it could have been arrived at. I accept that it was advised to Glatt and that it had some basis but in the absence of evidence I can make no conclusion as to the cogency of that basis. As events have transpired it appears a very considerable exaggeration. I must refer however, to the earlier finding that Playcorp incurred repair costs greater than the $9,294. How much greater I am unable to find.

266 I have not overlooked Taiyo's plea of an implied term that the parties would at all times act in good faith in relation to all matters the subject of the distribution agreement. Counsel referred to *Commonwealth Bank of Australia v Renstel Nominees Pty Ltd*[41], and *Bamco Villa Pty Ltd v Montedeen Pty Ltd.*[42] By its reply to this plea,

41 [2001] VSC 167 at [47] where Byrne J refers to several cases including *Hughes Aircraft Systems*

Playcorp denied any such implication and alleged that if a term is to be implied by law it is that each party would do all such things as were reasonably necessary on its part to enable the other party to have the benefit of the distribution agreement. Counsel for Playcorp referred to *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd,*[43] and to a number of cases in some of which a term of good faith and fair dealing had been implied, and in some of which it had not. I have regard to the various authorities referred to.

267 In my view the term contended for by Taiyo is not properly to be implied by law in this case. The term is of such width and uncertainty as, in the circumstances, to belie its implication as a matter of law. The present is a commercial contract between two independent parties providing for the international sale of goods. Each party is a substantial organisation well able to attend to its own interests.[44] It is not a contract under which, relevantly, one party is to consider whether, and how, to exercise a power that will affect the ability of the other party to have the benefit of the contract, as, for instance, in *Renard Constructions (ME) Pty Ltd v Minister for Public Works.*[45] And it is not a contract in which, relevantly to the present issue, there is a need to imply a term of good faith. The case concerns no more than the supply of goods, some of which were defective, and, consequently, a claim by one party against the other for monetary compensation. The party against which the claim is made is a substantial international manufacturer and supplier of such products which had been, and remained, well able to consider its course of action and take all such investigative steps it considered appropriate. Taiyo was well able to look after its own interests. Taiyo could have, but advisedly chose not to, undertake any check or verification of Playcorp's claim. If Taiyo had acted reasonably in its own interests by checking Playcorp's claim, it could readily have ascertained the true position concerning quantities and quantum.

International v Airservices Australia (1997) 146 ALR 1, and *Alcatel Australia v Scarcella* (1998) 44 NSWLR 349.

42 [2001] VSC 192.

43 (1979) 144 CLR 596 at 607.

44 See *GSA Group Ltd Siebe* (1993) ATPR 41, 240 at 41,260.

45 (1992) 26 NSWLR 234.

268 For these reasons I hold that the distribution agreement was not subject to the alleged term to act in good faith. If I was wrong in that conclusion I would nevertheless hold that the term was not broken in Playcorp's making of the claim. I would also hold that a term or duty of the type referred to in *Secured Real Estate* was not broken by Playcorp in making the claim.

269 Taiyo's case, assuming there was a term to act in good faith, was that in making, and persisting in, the faulty product claim, and insisting that payment be a condition of further dealings between the parties, Playcorp breached the term of good faith.

270 The first step in the case is that the claim was false, exaggerated and unreasonably made. For reasons discussed above, this contention could have substance only in relation to the part (the lesser part) of the claim that sought the repair costs. The balance of the claim was not unreasonably made. It was provoked in the circumstances, and while items other than Triple Wheels and Python were raised, Taiyo had been well able to receive and deal with such matters in the past, and could well have dealt with the matter of returns. As to the claimed US dollar cost of repairs, this is, as I have said, an exaggeration but to an extent I am not able to determine. It may be said to have been unreasonably made, in the sense that it was considerably more than the actual costs (which were not established). But while exaggerated in that sense, the claim was not false in the sense of there being no basis for a claim of that type. And if the exaggeration meant that it could be said the claim was unreasonably made, that went to quantum (as it often does with such claims) and not to a total denial of the claim as though it were a bogus claim. It did not mean that the claim was made in bad faith. Furthermore, as I have said, the claim was readily able to be checked. Moreover, accepting for present purposes that the repair cost component of the claim was unreasonably made, it was made in the context of Taiyo's unreasonable approach to receiving Playcorp's claim and failure to deal with it fairly on the merits. There was as much, if not a greater degree of, unreasonableness on Taiyo's side as there was on Playcorp's.

271 I further find, contrary to Taiyo's submission, that in pressing its monetary claim

Playcorp did not insist that payment of it was a condition of further dealings between the parties. For its part Playcorp was at pains to keep separate, and to have Taiyo deal separately with, the matters of the faulty product claim and future supply. That is the very thing that Taiyo ultimately would not do. It was Taiyo that linked the two, not Playcorp. Taiyo did so over Playcorp's protest. It was Taiyo, and not Playcorp, who insisted that resolution of the claim be a condition for further dealings. Moreover, in making and pressing its monetary claim Playcorp did no more than a party might do in such circumstances. It sought recovery and, quite obviously, a commercial resolution by negotiation. Taiyo could have accepted orders for further supply. The critical differences in the situation were the high level of returns for Triple Wheels and Python and Taiyo's changed approach to the commercial relationship. But for the latter, Playcorp's claim would readily have been negotiated, in my view. Even were there a term of good faith, or a requirement to do that which was reasonably necessary to enable Taiyo to have the benefit of the agreement, neither the term nor such requirement was broken in the way alleged.

272 This conclusion means that a further plea of Taiyo must fail. That is the plea that by making and persisting with the faulty products claim and insisting that payment of that claim be a condition of further dealings between the parties, Playcorp asserted an obligation on Taiyo in the future which was different from the obligations it had under the distribution agreement. As the premise of this plea does not exist, the plea must fail.

273 These conclusions remove the factual basis relied on by Taiyo in its pleading for the allegation that Taiyo was entitled to conditionally refuse supply. I would in any event find that Taiyo had not been entitled to refuse supply as it did. In insisting that further dealings between the parties depended on Playcorp accepting its offer on the faulty products claim, which it had not genuinely or reasonably considered, Taiyo was in breach of the distribution agreement. At one point Taiyo's counsel submitted that Taiyo's offer of US$20,000 was reasonable "given that the discussion

had become focused on monetary compensation". In part, the submission that the offer was reasonable was based on its being calculated by reference to the market share of Playcorp in relation to Tyco's share (see at [73]). This assumed, it would seem, that the comparison was in all respects equal. That is, there was no factor which might have meant that Tyco received no greater percentage of defective Triple Wheels and Python than Playcorp. But at least in respect of the instance referred to at [222] this was not the case. Furthermore, the offer was the suggestion of Tyco, whose interest was adverse to Playcorp, and did not reflect an informed appreciation by Taiyo of the value of Playcorp's claim. Indeed, it could not have been an informed offer, as Taiyo had put aside undertaking an investigation of Playcorp's claim. It was thus that the discussion was focussed on monetary compensation. That was the direction in which Taiyo's approach took the matter. In the circumstances, the offer of US$20,000 on 8 February 1996 can be described as "a reasonable proposal" only in the context of being a low offer, unrelated to the actual experience or loss of Playcorp, in an attempt to dispose of a claim admittedly arising out of the supply of defective product. In that sense, perhaps the same as Playcorp's excessive figure for its claim for repair costs, the proposal was reasonable. But that did not mean that it represented the reality or a fair figure.

274 Of course, Taiyo's position was clear on 29 February 1996 when Itani insisted that the US$20,000 offer was reasonable and fair and he stated that Playcorp's attitude may result in an irreconcilable sort of situation in terms of 1996 business (see at [77]). In so stating Taiyo's position Itani was reflecting the attitude of Suto. This is disclosed by the facsimiles between Tyco and Taiyo on 27 and 28 February 1996 referred to at [76]. The facsimile of 27 February was from Sullivan of Tyco to Itani. In summary, Sullivan said that having reviewed the facsimiles between Cooper and Grey he would like to pass on his thoughts to Suto. It was not worth spending a lot of time and money fighting Playcorp in court regarding distribution and returns. "We should concentrate on building R/C sales around the world - including Australia - and put Playcorp issues behind us." Tyco's lawyers believed it would be difficult to prove the distribution agreement was a fake and that Playcorp could probably sue

Taiyo and win. Playcorp could probably also win on the repairs issue. It did not seem fair for Playcorp to expect 100 per cent repayment for the Triple Wheels and Python problem, but it would waste Taiyo's time and money to fight in court. Sullivan proposed a settlement under which Playcorp would receive half of the claimed US$268,943, on the basis that Taiyo and Tyco pay half each. It was understood that Playcorp would take Taiyo's payment as a credit towards orders of Dagger. Sullivan requested an answer the next day.

275 Itani replied to Sullivan on 28 February 1996 in the following terms:

> "Please thank Grey san for the suggestion and kind offer for Suto san. I just talked with Suto san over the phone and passed your word to him. Unfortunately, he said that he still wanted me to write Playcorp exactly what he told me yesterday. He wanted me to write 'We do not want to deal with a company who demands that kind of totally unreasonable payment/settlement any more'. He is not actually afraid of being sued by them. I guess this is what I will write them tomorrow. I hope you understand. Thank you anyway."

276 Itani's facsimile disclosed Suto's intention. Playcorp had made an unreasonable claim and Suto will no longer deal with Playcorp. One has to remind oneself that Playcorp's claim had a legitimate basis and that Taiyo had deliberately not investigated it. The fact which I would have found, objectively, quite apart from this facsimile, is that Suto decided to quit Taiyo of Playcorp and that he decided to use the faulty products claim as a means to achieve that end. Hence, as Itani said in evidence, Suto decided to link the supply of product in 1996 with the faulty products claim. The linkage being made, the offer on the faulty products claim was one which Playcorp was unlikely to accept. If it did accept the offer, not much would be lost in the long run.

277 In all of the circumstances, the state of affairs that existed on 29 March 1996 was that Taiyo was, and had for some time been, in breach of the agreement by reason of supplying defective products and leaving Playcorp to bear the burden. Furthermore, Taiyo made clear its position that it would not supply product under the distribution agreement if Playcorp did not accept its offer of US$20,000 for the

faulty product claim. The supply of product was essential to the operation of the agreement. The two matters, supply and the faulty product claim, were separate, as Playcorp stated. Taiyo's linking of them was a pretext for achieving a purpose that was contrary to the continued operation of the agreement according to its terms and purpose. Indeed the object was to bring the trading relationship to an end. This was manifested, if anything, by the fact that the offer on the faulty product claim was not calculated on the basis of an investigation or an informed assessment of the claim. Together with the fact that Taiyo was in breach, the condition attached to supply was a strong arm tactic applied to force a situation on Playcorp. The conclusion is inescapable, in my view, having regard to all of the relevant circumstances, that Taiyo's conduct evinced an intention no longer to be bound by the essential obligation to supply.

278 Taiyo's counsel submitted that even if Taiyo's conduct was repudiatory, Playcorp was not entitled to rescind. It was submitted that Playcorp, on 29 March 1996, was not ready, willing or able to perform under the distribution agreement for the following reasons.

279 By the agreement made on 26 March 1996 Playcorp gave up its right to distribute Dagger, Mutator, and any new Tyco developed products, in Australia, and all of its rights to distribute in New Zealand. The products left available for Playcorp were any Taiyo product and old Tyco products. It was critical to the performance by Playcorp of its obligations under the distribution agreement that it should have available new Tyco products to sell. This was recognised in the evidence of the importance to Playcorp of each year being able to present to the market promotional toys with innovative or special features. Such toys, and advertising, led the market. In practice the majority of the R/C toys obtained from Taiyo were originated by Tyco. And whether or not Exhibit 1 was admissible, it is clear enough that the greater number of promotional special feature toys were new Tyco toys. Taiyo's counsel submitted that, regarding the circumstances overall, Playcorp had rendered itself incapable of performing the distribution agreement. That was because sales of

Tyco originated special feature toys were central to the products supplied under the agreement. It was further submitted that when, on 26 March 1996, after making the agreement with Tyco, Cooper pressed Itani to say that Taiyo would not supply, Cooper was seeking to establish a basis on which to construct a claim against Taiyo. Counsel relied on Itani's evidence concerning that conversation; I note my conclusion concerning that evidence at [95]. Thus, by 29 March 1996, when it purported to rescind, Playcorp had deprived itself (for a substantial consideration from Tyco) of the ability to sell new Tyco product in Australia and had given up New Zealand totally. That significantly reduced Playcorp's ability to perform its obligations under the distribution agreement.

280 It was further noted that after 26 March 1996 Playcorp did not attempt to obtain old Tyco product from Taiyo which, it was submitted, suggested that it did not consider such product alone could enable it to trade profitably. And that suggested that Playcorp probably did not intend, as at 29 March 1996, to continue to deal with Taiyo at all. At that time Playcorp's concern was to extract money for the faulty product claim.

281 Thus, even if it be assumed that Taiyo's conduct did amount to a repudiation, Playcorp was not entitled to rescind. It was not ready, willing or able to perform its obligations at the time of acceptance. As to the relevant principles concerning repudiation and rescission counsel referred to *D T R Nominees Pty Ltd v Mona Homes Pty Ltd*[46] and *Foran v Wight*.[47] I have regard to them and the authorities referred to by counsel for Playcorp.

282 Counsel for Playcorp submitted that the 26 March 1996 agreement was the culmination of negotiations between Cooper and Grey after Tyco told Playcorp that beginning in 1996 Tyco would take over the distribution of all new Tyco developed R/C items in Australia and New Zealand. Tyco's letter to Playcorp, dated 9 August 1995, advising of this position, stated that Suto proposed that Playcorp could

46 (1978) 118 CLR 423 at 433-434.
47 (1989) 168 CLR 385 at 397-402, 406-408, 423-425 and 451-453.

continue with the balance of the Taiyo line including Rebound in 1996 and that Tyco had agreed to that. I find that in discussions between Tyco and Taiyo preceding that letter, Suto had agreed to Tyco's proposal on the basis stated in the letter. Cooper objected and wrote to Suto and Grey accordingly. The point to be made is that Taiyo concurred with what Tyco stated was to be the position. This position was unilaterally imposed, or sought to be imposed, on Playcorp. Taiyo never withdrew from that position. It did of course lie in Tyco's power, subject to its agreement with Taiyo referred to at [29], to give six months notice of withdrawal of its licence to Taiyo. Tyco's letter may have been effective for that purpose in relation to Playcorp to the extent stated, because it stated Tyco's position and Taiyo concurred in it. On that basis the new arrangement was to operate from the beginning of 1996. Taiyo's defence (para 4B) appears to contend that the letter did so operate. However, the case was, I think, conducted on the basis that for practical purposes the change may be treated as made on 26 March 1996. For this reason I consider that it is not necessary to deal with the issue whether there was an implied term of the distribution agreement (alleged in para 4A of the defence) that Taiyo would continue to supply new Tyco product to Playcorp only for so long as Tyco consented thereto.

283 Unsurprisingly, Tyco's letter dated 9 August 1995 led to commercial negotiations. They resulted in the 26 March 1996 agreement. In the period from August 1995 to March 1996 inclusive Tyco and Taiyo maintained regular contact, informing each other of what was happening with Playcorp. They were aware of what was happening in their respective communications with Playcorp. The course that Tyco took with its letter dated 9 August 1995 and the agreement made on 26 March 1996 met with Taiyo's approval. It suited Taiyo that the restriction on supply of Tyco products came from Tyco, having regard to the distribution agreement. In the circumstances, it was too narrow and unrealistic a proposition for Taiyo's counsel to describe Playcorp's action in agreeing to give up new Tyco products as a unilateral decision under the distribution agreement. Further, at 29 March 1996 Playcorp was still able to order under the distribution agreement any Taiyo product and old Tyco

product.

284 I find that were it not for the repudiation by anticipatory breach of the essential term of supply and Playcorp's rescission, Playcorp would have ordered product in 1996 and thereafter under the distribution agreement with a view to making a profit. The evidence shows that Playcorp was preparing for orders for the first half of 1996, and had sought supply of product. The evidence establishes that Playcorp intended to trade in 1996, and it maintained that position into March 1996.

285 Playcorp had made profits from its trade in Taiyo supplied R/C toys in the past and I find, accepting evidence of Glatt and Cooper, that it would have continued to seek to do so in the future. I find that Playcorp would have applied its undoubted skill and expertise in ordering and marketing the products available to it. It would make no sense for Playcorp not to have done so, as against giving up a profitable situation. Indeed Playcorp's subsequent attempts in the market support that likelihood. I accept the evidence of Glatt and Cooper that Playcorp would have sought to continue to purchase goods under the distribution agreement.

286 I do not overlook any of the submissions of Taiyo, including as to the importance of Tyco originated toys. It is correct that they were important in driving the market and in achieving profit for Playcorp and Taiyo. Nevertheless, their unavailability to Playcorp did not prevent performance under the distribution agreement in accordance with its terms. The agreement could operate, even if at lower levels of sales, and Taiyo had the protection of the minimum purchase provision. That provision was always Taiyo's protection. I reject the submission that by the 26 March 1996 agreement Playcorp rendered itself incapable of performing under the distribution agreement, or placed it in the position that it was not able to perform its obligations under the agreement.

287 Taiyo made a further submission on the issue of whether Playcorp was ready, willing and able to perform under the distribution agreement. This submission concerned the credibility of Playcorp's claim that after 26 March 1996 it would have

sought to continue to purchase product from Taiyo under the distribution agreement. The submission subjected evidence of Whitear and Glatt to critical analysis. It was submitted that the projections in the evidence of the sales that Playcorp would have achieved were based on false assumptions, incorrect facts, and a failure to allow for changed business circumstances, among other things. The net result was that Playcorp's evidence of sales that would have been achieved was unreliable and should be rejected. In these circumstances, it was submitted, even if the test of ability to perform under the distribution agreement was to be judged by reference to whether Playcorp could have re-arranged its business affairs so as to continue to trade profitably as it claimed, it was plain that it could not do so. I do not accept that submission. I find that Playcorp was ready, willing and able to continue to perform under the agreement, that it would have exercised reasonable endeavours in doing so, including seeking to maintain a profitable line of business, and that in the course of doing so it would have adjusted its manner of conducting the business as necessary and as it was reasonably able to do in the circumstances.

288 A further point that should be mentioned arose in Cooper's cross-examination. He was asked if his letter to Cowley Hearne dated 29 March 1996 (referred to at [99]) was sent before or after his letter to Itani on the same date (referred to at [100]). The letter to Itani was the letter rescinding the distribution agreement. But the letter to Cowley Hearne, which commented on, and suggested changes to, the deed of release, in particular cl 3.6, was inconsistent with the distribution agreement having been rescinded. That is, in the Cowley Hearne letter Cooper was writing on the basis that the distribution agreement was still on foot. Thus the question as to which letter was sent first. In answer Cooper said that he could not remember. I am not satisfied, on the balance of probabilities, that the letter to Cowley Hearne was sent after the letter to Itani.

289 I find that Playcorp was ready, willing and able to perform its obligations under the distribution agreement. Rather than affirm, it took the course open to it of electing to rescind the agreement by accepting Taiyo's unequivocal anticipatory breach of the

essential term of supply.

Damages – loss of profits

290 In the statement of claim endorsed on the writ, Playcorp claimed $10,621,260 as damages in the nature of profits lost as a result of the termination of the distribution agreement. That was the sum which it would have earned as profit if the agreement had run its course from April 1996 to 31 December 1998. Playcorp advised of an increase in the amount claimed to $11,792,617 in further and better particulars dated 5 May 1998. It was alleged that that sum represented the aggregate of the loss of profit for the financial years ended 1995 to 1997 inclusive, and the six month period ended 31 December 1998.

291 Expert accounting evidence to substantiate Playcorp's claim for loss of profits was given by Whitear. He provided three reports dated February 2000, 4 May 2000 and 8 June 2000 (being a correction to the 4 May 2000 report), all of which were attached to his witness statement which was admitted as Exhibit DD. In the report dated February 2000, Whitear calculated Playcorp's loss of profits on three different scenarios as being $3,082,620, $5,531,115 and $6,621,466. The calculation was based on the erroneous assumption (which Whitear had been asked to make) that Playcorp continue to be entitled to sell all R/C toys manufactured by or for Taiyo. In the 4 May 2000 report, Whitear re-calculated these estimates and made an alternative calculation of Playcorp's loss. As re-calculated, the above figures reduced to $2,415,169, $5,265,668 and $5,611,922. The alternative calculation was $4,546,592. The calculations in this report were based on a number of assumptions including the restricted range of toys available to Playcorp as a result of the May 1996 deed of release and the 1998 deed of termination.

292 As a result of discovery of documents by Taiyo shortly before the resumption of the trial in 2001, Playcorp's advisers realised that the claim for loss of profits had to be considered and calculated afresh. That was because it was apparent from the discovered documents that Playcorp (by Glatt), and thus Whitear in his calculations, had proceeded on an erroneous basis as to which products were Taiyo and which

were Tyco originated within the meaning of the deed of release and the deed of termination. In short, Playcorp and Whitear had to consider and prepare a case on the basis of the facts thus disclosed.

293 The result was that when Glatt resumed his evidence in November 2001 he provided a third witness statement dated 19 November 2001 which was admitted as Exhibit U. The purpose of this evidence was, as Glatt said, "to deal some more with the question of future trading". He went on to state that if the agreement had not been terminated in March 1996, Playcorp "would have chosen to order from Taiyo and sell and distribute in Australia a selection of" toys which the discovered documents showed Taiyo offered for sale from 1996 to 1998. He went on to identify the particular toys, the quantities that Playcorp would have ordered and the approximate wholesale prices. This evidence was used by Whitear as the basis for a schedule setting out Playcorp's sales (Appendix 5 to the report) and a schedule calculating the net profits that Playcorp would have earned from the sale of the products in Appendix 5 (Appendix 6). The calculation in Appendix 6 was based on the assumption that all products ordered by Playcorp would have been sold in the years in which they were ordered, and certain percentages which Whitear had agreed with Meredith. On these bases, Playcorp's loss was $2,347,965.

294 It is in these circumstances that Playcorp's claim for lost profits was reduced to $2,347,965, calculated as appears in Appendixes 5 and 6 on the assumptions referred to and on the basis of Glatt's evidence in his third witness statement. That is not to say that there is not relevant evidence in Glatt's first witness statement, but the third witness statement is relied on to establish how Playcorp would have acted in the purchase and sale of goods after March 1996. For convenience, Appendixes 5 and 6 are attached to the judgment as Schedules C and D.

295 In view of the fact that Whitear's reports in Exhibit DD were based on false premises, Playcorp abandoned reliance on Whitear's calculations of lost profit in those reports. In lieu, Playcorp relied only on Whitear's Appendixes 5 and 6.

296 I referred earlier to Meredith who Taiyo called to give expert accounting evidence. He prepared reports dated 20 March 2000 and 14 June 2000 which, together with a witness statement, were admitted as Exhibit 13. A supplementary report dated 1 December 2000 was admitted as Exhibit 14. These reports addressed Whitear's reports and recorded Meredith's opinions as to the profits lost by Playcorp. Of course, as was later recognised, Whitear's reports were based on false premises and relevant misunderstandings as to the products available to Playcorp. False premises also affected Meredith's initial calculation. In addition, there were differences in approach between the two accountants. It is not necessary to set out the various calculations of Meredith. One, however, should be mentioned. That was his old product calculation in the 1 December 2000 report which produced either a net loss of $54,185 for the period April 1996 to December 1998 or, alternatively, a net profit of $72,461. The calculations took account of the reduced range of products available to Playcorp after the 1996 deed of release and the 1998 deed of termination. The alternative calculation was arrived at after eliminating Triple Wheels and Python and treating the battery pack products as derivative products of the 6V promotional products. The effect of excluding Triple Wheels and Python was to increase the gross profit margin for the 1995 calendar year from 31.68 per cent to 38.97 per cent.

297 The old product calculations were based on a product life analysis of Meredith. The analysis was of Playcorp's sales of particular products between 1992 and 1995. The analysis purported to record the yearly sales of each product. From the analysis, Meredith drew conclusions as to the extent of the life of products in the market. He concluded that products had a relatively short life. Commencing with sales in the first year being 100 per cent, where products were subsequently sold, the records showed that in the second, third and fourth years of sales respectively, the level of sales was 13.50 per cent, 6.83 per cent and minus 0.03 per cent of the sales in the first year. An alternative calculation without Triple Wheels, Python and the 6V battery pack and charger produced the same figures, with the exception of the second year in which sales were 12.62 per cent.

298 It became clear that Meredith's product life analysis was factually flawed and unreliable. It misapprehended and incorrectly reflected Playcorp's actual purchase and sales experience in each year. The result was that the analysis did not, as in fact Playcorp submitted, present a true picture of the saleability of Playcorp's range of R/C toys between 1992 and 1995. Indeed, the picture presented was of a negative and misleading nature. It ignored the fact that each year Playcorp sold a very high proportion of what it purchased, which reflected favourably on Playcorp's ability to market R/C toys. The matter is explored in Playcorp's written submission.

299 In essence, the purpose of the analysis was to establish Playcorp's past trading pattern and, on that basis, to project what would have happened after March 1996. Hence, there are two elements to the exercise. The first element concerns the accuracy of the information in the analysis. As I have said, the factual bases and structure of the information is flawed, thus resulting in an unreliable analysis.

300 The second element concerns the application of the analysis as a means of projecting sales and profits or losses after March 1996. In that respect too, for reasons in Playcorp's written submission, the approach was flawed. For one thing, the negativity in Meredith's conclusions stands in stark contrast to the facts as to Playcorp being the market leader in R/C toys in Australia with a well experienced and successful business including a sales force and necessary infrastructure. In each of the years 1992 to 1995, Playcorp had purchased from Taiyo between US$1.5 and $2.5M worth of R/C toys. Allowing, as Meredith should have, for Playcorp's willingness and ability to adapt to the limited product range, in order to seek to continue earning profits from this established line of business, a small net loss or profit in the area opined by Meredith was not likely.

301 Prior to the trial, Whitear and Meredith met pursuant to orders of a Master with a view to finding common ground. This resulted in a statement of agreed facts dated 9 October 2000 which was signed by Whitear and Meredith and filed as a document in the case. There was agreement as to the following matters, which were set out in the statement:

(a) The actual gross sales by Playcorp of all R/C toys manufactured by Taiyo and sold by Playcorp in the period July to December 1992, and in the years 1993 to 1996 inclusive (that is, on a calendar year basis which Meredith contended was the appropriate basis for the purpose of calculating the loss of profits).

(b) The actual gross sales by Playcorp of Taiyo R/C in the financial years 1992/1993 to 1994/1995 and in the nine month period 1 July 1995 to 31 March 1996.

(c) The weighted average of sales by Playcorp of Taiyo R/C expressed as a percentage of total sales by Playcorp of Taiyo was –

(i) in July to December in the calendar years 1992 to 1994, 80.5 per cent;

(i) in April to June in the calendars years 1993 to 1995, 18 per cent.

(d) Historical gross profit figures expressed in Australian dollars and as a percentage of total sales by Playcorp of Taiyo R/C toys:

(i) on a calendar year basis, and

(ii) on a financial year basis.

(e) That the variable cost percentage to be applied in any calculation of Playcorp's lost profits on the sale of Taiyo R/C is 17 per cent.

302 Whitear used certain of the figures in the agreed statement of facts in his revised calculation in Appendix 6. They are the agreed percentages in (c) and (e) above. He also applied a gross profit margin of 41.47 per cent to the sales per year set out in Glatt's third witness statement. These percentages are stated at the start of Appendix 6. The calculation which produced the margin of 41.47 per cent is set out in para 8 of Whitear's second witness statement, as follows:

Year to 30 June	Gross Profit $	Gross Profit Margin on Sales %
1993	4,047,651	1,587,854
1994	4,517,579	1,865,153
1995	7,726,597	3,303,553

16,291,827	6,756,560	41.47

303 One of the issues on which Whitear and Meredith differed was whether the 1995 calendar year, or the 1994/1995 financial year, was the most appropriate representational year to forecast future sales. According to the statement of agreed facts, in the calendar year 1995 Playcorp's gross sales of Taiyo R/C products fell to $3,833,075 whereas in the 1994/1995 financial year gross sales were $7,726,597. These differences were reflected in the agreed figures of gross profit for those periods. And they produced variations in the gross profit margin as follows: for the calendar year 1995, 31.7 per cent, and the 1994/1995 financial year 42.8 per cent. Meredith favoured the calendar year approach whereas Whitear favoured the financial year approach.

304 In my view, the financial year approach is to be preferred. It is fairer and more representative, as it avoids distortions created by the problems with Triple Wheels and Python and lack of supply of Rebound.

305 Another issue was the gross profit margin to be used in the calculation of future profits. As mentioned, in his second witness statement Whitear calculated, on the basis of sales and gross profit in the financial years 1993 to 1995, a gross profit margin of 41.47 per cent. By contrast, Meredith arrived at a gross profit margin of 31.68 per cent in his report dated March 2000. Then, in his further report dated June 2000, Meredith calculated an alternative margin of 38.97 per cent after removing Triple Wheels and Python because of their abnormally high returns. Again, the elimination of these items for these purposes is reasonable and appropriate.

306 The issue remained however as to whether it was appropriate to use that margin to calculate profits to be derived from the sale of products after March 1996. In other words, was it appropriate to apply the margin derived from the historical experience up to March 1996 to the changed circumstances applying from then? For his part, Whitear considered it was and used the 41.47 per cent figure in Appendix 6. On the other hand, Meredith adopted no set gross profit margin. Instead, he used his analysis of historical sales and profit levels to project forward. I have concluded

that Meredith's approach was flawed and unreliable. But the issue remains as to the appropriateness of using the 41.47 per cent figure. Taiyo contends that it is not appropriate.

307 Taiyo also contends that in the changed circumstances of supply after March 1996 it is not appropriate to use the agreed variable cost percentage of 17 per cent. I return to this issue, and the issue as to the gross profit margin, later.

308 Consistently with my findings at [287] I find that if the distribution agreement had not been terminated, Playcorp would have sought to continue to obtain R/C toys from Taiyo and distribute them in Australia. They were Taiyo toys and old Tyco toys as defined in the 1996 deed of release and, after December 1997, only Taiyo toys. Playcorp was ready, willing and able to do so. As a result of the termination Playcorp lost the business opportunity it would have had under the agreement and hence suffered loss. That is clear as a matter of probability. The question is, what is the value of that loss? The principle on which damages for breach of contract are awarded is that the innocent party is to be awarded such sum of money as will place him or her in the same situation as if the contract had been performed.[48] The application of this principle requires a consideration of how Playcorp would have traded after March 1996 in the changed circumstances of supply under the distribution agreement. Glatt's third witness statement was designed to provide evidence to establish Playcorp's case on this aspect, and Whitear's Appendix 6 was designed to place a dollar value on the case thus made.

309 Glatt's third witness statement set out the evidence in the following way. On 14 November 2001 he was shown some documents obtained from Taiyo from which he saw that during 1996 and 1997 Taiyo was offering for sale the following toys (among others):

> "(a) 9408 Rebound;
> (b) 9342 6V Battery Pack and Charger;
> (c) 9340 6V Jet Turbo Battery Pack;
> (d) 9101 Micro Super Bandit;

48 *Robinson v Harman* (1848) 1 Ex. 850 at 855.

(e) 9109 Super Fast Traxx;
(f) 9123 Turbo Hammer;
(g) 9402 Rampage;
(h) 9401 Fire Power;
(i) 9409 Micro Scorcher;
(j) 8816 Micro Wild Thing;
(k) 9016 Ripe Tide Boat;
(l) 9015 Fast Traxx;
(m) 9030 Mini Traxx;
(n) 8901 Mini Blaster;
(o) 8817 Micro Nitro Invader."

Having identified those toys, Glatt said:

"9. Each one of those toys or products was a toy or product which Playcorp had sold and distributed in Australia prior to 31 December 1995. Under the agreement made with Tyco in 1996, Playcorp was entitled to sell old Tyco toys that it had sold or distributed prior to 31 December 1995 as well as old and new Taiyo toys.

10. As the person responsible, year by year, for deciding the range and variety of the goods to be ordered from Taiyo, I say that if the distribution agreement with Taiyo had not been terminated in March 1996, Playcorp would have chosen to order from Taiyo and sell and distribute in Australia a selection of those toys.

11. Throughout all of its trading with Taiyo, Playcorp each year selected a range of R/C toys for sale to retailers in Australia. Even if confined in 1996 and 1997 to old Tyco toys and old and new Taiyo toys, there is within the toys I have listed above the sorts of toys which would have made up a marketable range or basket of goods in which Playcorp could have traded in 1996 and 1997.

12. Each year, Playcorp ordered approximately 100,000 to 150,000 units of R/C toys from Taiyo. Under the distribution agreement Playcorp had to make minimum annual purchases of US$1,000,000.

13. I make the following comments about the toys listed above and the quantities that Playcorp would have ordered during 1996 and 1997:

(a) **Rebound**

In my first witness statement I described Rebound as a sensational R/C toy that I believed would capture the imagination of children and be a great success in the Australian market. My initial impression of Rebound turned out to be correct. I also said in my first witness

> statement that Rebound was the most popular toy in memory. In 1995 Playcorp purchased 24,000 units of Rebound. As I stated in my first witness statement, Playcorp would have purchased an additional 40,000 units of Rebound in 1995 if Taiyo had been able to supply them. As a result, Playcorp did not satisfy the market demand for Rebound in 1995. Based on my experience in the toy industry as described in my first witness statement, I believe that the demand for Rebound would have continued throughout 1996 and 1997. Accordingly, in 1996 Playcorp would have ordered a minimum of 40,000 units of Rebound based on the unsatisfied demand for the product in 1995. In 1997 Playcorp would have ordered at least another 30,000 units of Rebound. The wholesale price for which Playcorp sold R/C toys to retailers can be seen from Playcorp's Product Sales Reports which are contained in SCB 43-146. The wholesale price for which Playcorp sold Rebound was approximately $60 per unit."

310 Glatt then proceeded to refer to each of the above toys with the exception of Fire Power and, in relation to each, to give evidence along the lines of Rebound. In each case the evidence is brief. In fact, the evidence for Rebound is the more extensive, while that for Turbo Hammer is the most brief. In relation to Turbo Hammer he said:

> (f) **Turbo Hammer**
>
> In 1992 Playcorp purchased 1,360 units of this R/C toy. Playcorp sold these as an exclusive item to Myer. It was a large, chunky and robust toy. Playcorp would have ordered approximately 600 units of this toy in 1996. The wholesale price for which Playcorp sold Turbo Hammer was approximately $85 per unit."

311 That is sufficient to indicate the nature and extent of his evidence in relation to the period from April 1996 to December 1997. Glatt then turned to the products that were available in 1998. He ascertained from statements of Sasahara (and which were accepted by Playcorp) and Taiyo's 1997/1998 catalogue that Taiyo were offering for sale the following Taiyo R/C toys:

> "(a) 9614 Micro Blaster
> (b) 8831 Micro Nitro Invader
> (c) 9031 Porsche 911 Cabriolet

(d) 9416 Mini Hopper
(e) 9616 Mini Blaster
(f) 9502 Chevy Pick Up
(g) 9701 Off Road Tiger".

He then said that on the basis that these toys were Taiyo toys and available to Playcorp during 1998, Playcorp would have ordered quantities in 1998 as follows:

"(a) **Micro Blaster, Micro Nitro Invader**

Given that in 1998 Playcorp was not able to distribute any Tyco toys, Playcorp would have distributed a reduced range of micro R/C toys. It would have ordered approximately 6,000 units of micro R/C toys during that year. The wholesale price for which Playcorp sold micro R/C toys was approximately $15 per unit.

(b) **Porsche 911 Cabriolet**

Playcorp would not have chosen to order any Porsche 911 toys as Playcorp had not marketed any replica motor vehicle toys for some years.

(c) **Mini Hopper, Mini Blaster**

Playcorp would have ordered approximately 5,000 units of these mini R/C toys during 1998. The wholesale price for which Playcorp sold mini R/C toys was approximately $35 per unit.

(d) **Chevy Pickv Up, Off Road Tiger**

I am not familiar with these vehicles. It is unlikely that Playcorp would have ordered more than a few thousand of these items in 1998."

312 It is seen that Whitear based Appendix 5 on this evidence of Glatt. That is, he carried into Appendix 5 the quantities which Glatt stated that Playcorp would have ordered.

313 Counsel for Playcorp submitted that Glatt's projections provided the best guide as to how Playcorp would have traded after March 1996. His projections as to the particular products that Playcorp would have purchased in 1996 and 1997 were consistent with Playcorp's past practice. Furthermore, Playcorp had the necessary financial capacity, marketing expertise, sales force, infrastructure, relationship with retailers and the confidence of customers. It had the right to distribute the highly

successful Rebound which, as a lead item, would have brought with it sales of battery products and other past promotional, mini and micro R/C toys.

314 The tenor of the submission might have suggested that Playcorp was seeking to establish its damages on the balance of probabilities. But, in fact, Playcorp's counsel contended that having established that loss was suffered as a result of the loss of the business opportunity, the actual damages should be ascertained by reference to the principles concerning the ascertainment of damages for loss of a chance. The chance here being the business opportunity which Playcorp was not able to exploit. The applicable principles therefore were those stated in *Malec v J C Hatton Pty Ltd*;[49] *Commonwealth of Australia v Amann Aviation Ltd*,[50] and *Sellars v Adelaide Petroleum NL*.[51]

315 Taiyo's counsel disagreed that the present was a case of assessing damages for loss of a chance. He submitted that the issue was to be determined on the probabilities.

316 While Playcorp's counsel referred to several passages in the cases mentioned, the submission, I think, was that the present case was within the fourth example of the cases referred to by Deane J in *Amann Aviation*.[52] Deane J said:

> "[It] is neither desirable nor practicable to seek to formulate an exhaustive comprehensive rule defining the circumstances in which it is appropriate for a court to assess damages on the basis that what has been lost or inflicted is the probability or possibility of benefit or detriment as distinct from the benefit or detriment itself. It suffices for the purposes of the present case to say that damages should be assessed on that basis in a case where the extent of the final loss or injury actually sustained by reason of the repudiation or breach depends upon what would have happened or what will happen and the circumstances are such that the court can identify or estimate a precise or approximate proportionate chance of benefit or detriment but can do no more than speculate, on the basis of probabilities and possibilities, about what would have or will actually come about. Some examples of such cases are: … (iv) other cases where lack of information, insufficiency of current knowledge or the unpredictability of hypothetical or future conduct or events precludes

49 (1990) 169 CLR 638 at 643.
50 (1991) 174 CLR 64.
51 (1992) 179 CLR 332.
52 (1990) 174 CLR 64 at 120-121.

> a non-speculative finding about what would have actually occurred or will actually occur but evidence (e.g. expert opinion evidence), common sense or common experience enables an estimate of the approximate extent of the chance that a particular benefit would have been or will be actually obtained or that a particular detriment will be or would have been actually sustained."

317 Yet, at its threshold, the case rests on an acceptance of Glatt's evidence. His evidence, and its credibility, was heavily criticised by Taiyo's counsel who submitted that it, and what it sought to establish, should be rejected. In the first instance therefore, I turn to those matters.

318 There is no doubt that Glatt was highly successful and experienced in the R/C toy market. He was instrumental in Playcorp having attained the pre-eminent position in that market in Australia. Indeed, Playcorp was primarily responsible for developing that market. He had a very good sense, or judgment, of what toy would succeed in the Australian market. He was, for instance, correct in his assessment of the likely success of Dagger and Mutator. In all the circumstances, his opinion or prediction as to what Playcorp would have done is therefore given from a position of real knowledge and expertise of the relevant industry and market.

319 Redenbach gave evidence that was supportive of, or confirmed, Playcorp's position in the market. He stated that Playcorp was a very reliable supplier of R/C toys, that each year it offered a good range of products, and that they were competitively priced. By the early 1990's Playcorp continued to be the dominant supplier of R/C toys in the Australian market. There was no other company aggressively marketing and promoting R/C toys in Australia. Rebound was extremely popular and captured the imagination of the market. He said (as did Glatt) that R/C toys are an established category in the toy market and, as such, will continue to be purchased by consumers at fairly constant levels. Higher sales will be achieved where a good range of R/C toys are available which are heavily promoted, competitively priced and are fast, agile and durable. I accept Redenbach's evidence and find that Playcorp was successful in choosing products that met these requirements. That success reflected Glatt's expertise. Playcorp also marketed aggressively and Glatt

said that it would have continued to do that.

320 In their submissions counsel for Playcorp referred not merely to Playcorp's past profits as a relevant indicator of what it could achieve in the R/C toy business, but also referred to, and sought to gain some mileage from, Whitear's earlier calculations of lost profit. In his second witness statement Whitear re-calculated his earlier calculations taking into account the matters in the agreed statement of facts and using the gross profit margin of 41.47 per cent. The re-calculations were attached to his witness statement as Appendixes 1–4. In final address, Playcorp's counsel abandoned reliance on these calculations, and confined Playcorp's case to the calculation in Appendix 6. The calculations were abandoned because in the case of Appendixes 1–3, they were based on the erroneous approach of Glatt in his first witness statement, the effect of which was that the limitation on the products available to Playcorp was of no practical significance. That was because Playcorp was entitled to old and new Taiyo and old Tyco product and because it had the ability to have Taiyo make modifications to old products to make them "new". Appendix 4 was abandoned because it was based in part on the erroneous assumption that old toys which had been substantially modified remained old Tyco products. It follows that the abandoned calculations produced figures that are irrelevant simply because they did not address the situation that obtained after termination of the agreement.

321 It was only by Glatt's third witness statement that Playcorp addressed that situation. That is the situation created by the circumstance of restriction on availability created by the 1996 deed of release and the 1998 deed of termination. As a result of the deed of release, Playcorp had available Taiyo products and what is conveniently referred to as old Tyco product, which meant Tyco products which prior to 31 December 1995 had not been distributed or sold in Australia or New Zealand and which had not been "re-designed". There was, of course, a further limitation on the availability of old Tyco product which was that the product was actually manufactured by Taiyo in 1996-1998, and thus would have been able to be ordered

by Playcorp under the distribution agreement if it had subsisted. It was these matters which Playcorp finally came to appreciate and which were recognised in, and were the basis of, Glatt's third witness statement and Whitear's Appendix 6.

322 Counsel for Taiyo submitted that Playcorp's claim depends entirely on acceptance of Glatt's evidence in his third witness statement, and that unless that is accepted Playcorp's claim for lost profits must fail as there is otherwise no evidence of lost sales and profits. There are several aspects to this submission. First, a number of reasons were advanced as to why the claim should be considered unreliable. Secondly, these factors include that Glatt adopted a partisan approach in giving his evidence which should thus be regarded as unreliable. On that basis, the claim would not be supported by credible evidence. Thirdly, the ratio analysis reflected in the agreed statement of facts in relation to the gross profit margin and variable costs percentage could not apply in the fundamentally changed circumstances existing after March 1996.

323 The factors relied on by Taiyo to establish the lack of credibility or reliability in the claim are:

(a) Glatt's evidence was hindsight reconstruction.

(b) Glatt now states that Playcorp would have ordered certain toys which prior to termination it had ignored.

(c) Glatt's projected orders of Rebound were inconsistent with the projections for Rebound in Exhibit 9.

(d) Glatt's projections generally are inconsistent:

(i) with the previous proportions, purchased by Playcorp, of products distributed worldwide by Taiyo.

(ii) with the sales Tyco was able to achieve to September 1997 of items in respect of which Playcorp obtained compensation, and with the assertion that Playcorp would have made those sales.

(ii) with Playcorp's historical experience of sales of old products.

(e) Glatt's scenario would require a significant change of operation

by relaunching old products and undertaking substantial marketing and advertising of those products.

(f) There is no contemporaneous or other material evidencing attention to the conduct of the business in the changed circumstances including as to costs.

(g) Glatt assumed that the products listed are old Tyco products on the basis that old product numbers are retained.

(h) Playcorp never attempted to obtain old Tyco product from Taiyo.

324 This reasonably summarises the factors relied on by Taiyo's counsel, in addition to the second and third areas of argument referred to above. In case I have summarised to the extent that it might be thought a factor has been omitted, I add that I take into account all that Taiyo's counsel said in their written and oral submissions. I now discuss these matters in turn.

325 Points (a) and (f) are correct. There is no evidence at all that prior to rescission on 29 March 1996 or at any subsequent time until Glatt's third witness statement that Playcorp considered how it would or might have conducted business with Taiyo under the distribution agreement after March 1996 in light of the 1996 deed of release and the 1998 deed of termination. No business plan, or financial model, was ever developed or considered, or, if it was, it was not put forward in evidence. There is no contemporaneous note or discussion as to the approach that Playcorp would have taken if it had sought to continue business with Taiyo under the agreement. There are the exaggerated profit forecasts including that in the abandoned Exhibit 9. It was not until Glatt carried out his exercise in his third witness statement that Playcorp ventured a statement as to how it would have conducted business in the changed circumstances. It is evident from Glatt's witness statement that Glatt undertook this exercise only between 14 and 19 November 2001. That was well over five years after termination. And Glatt had not been involved in the toy industry since leaving Playcorp in January 2000. Even before his departure from Playcorp, following termination of the Taiyo agreement, Playcorp engaged in selling its stocks of toys obtained from Taiyo but never sought to purchase further product

from Taiyo. It went through the process, which Glatt was responsible for, via the company Quantum, of developing a R/C toy called Reactor; see at [5](a)(iii). The board of directors decided not to continue the project, it would seem with some displeasure directed towards Glatt. But, in summary, that was it. That part of Playcorp's business activities came to an end. It follows that since termination Playcorp had no experience of engaging in the R/C toy market, save to the extent mentioned, and thus there is no reference to or reliance on any such experience in Glatt's third witness statement. He has had to fall back on his experience and on that basis express his opinion as to what Playcorp would have done. Accordingly, Glatt's exercise is hindsight reconstruction. This must be weighed in the balance with Glatt's evident experience and knowledge of the Australian market. But a sense of the market is not the whole story, and Taiyo correctly points out that Glatt effectively had no present or recent experience of the cost of conducting such a business. Playcorp has left this aspect to Whitear and he has sought to cover the situation by using percentages derived from the agreed statement of facts.

326 This reference to costs leads to (e), for the following reason. The percentages used by Whitear were derived from the business as it was conducted prior to termination. Under that regime, for example, Playcorp had the advantage of Tyco advertising, and that was important because it was principally Tyco toys that were the lead or promotional items and which, as such, led the market. In addition, Playcorp paid for the preparation of advertising and promotions for toys. But, as new Tyco products came on to the market, including redesigned toys, Playcorp would not have access to such toys or the advertising relating to them prepared by Tyco. The likelihood to be faced was that Playcorp would have to undertake a significantly increased advertising and promotional budget to promote Taiyo toys. That is because Taiyo, unlike Tyco, did not provide (whether for a fee or otherwise) advertising of lead or promotional toys in the way that Tyco did. No account has been taken of this item in Appendix C. It has been assumed that the historic cost experienced would have been applicable.

327 I now turn to (b). The shipping history discloses the toys which Playcorp purchased in each of the years 1992 to 1995 inclusive. Each year Playcorp chose a selection of toys from Taiyo's current catalogue. The history reveals that each year Playcorp chose a number of new toys. Sometimes Playcorp did not choose a toy that it had purchased in a prior year, even though the toy might have been successful and available for the next or a subsequent year. Some of the toys which Glatt states that Playcorp would have purchased in 1996 to 1998 are in this category. Indeed, in Glatt's cross-examination it was clarified that all of the toys in Glatt's third witness statement were in this category with the exception only of Rebound and the battery packs and chargers which were purchased in 1995. It was submitted by Taiyo that it was open on the evidence to infer, and that it should be inferred, that the reason why Playcorp chose not to select these items in a year or years prior to 1996 was that it had assessed them as being not worthy of sale.

328 The relevant part of Glatt's cross-examination, in which the particular toys and Taiyo's point is referred to, is at pages 571 to 591 of the transcript. I take account of all that is said there, but rather than set it all out I state my views on the submission as follows.

329 Each toy in Glatt's list had been purchased by Playcorp and sold in Australia prior to 31 December 1995. That is a convenient date for this purpose as the shipping history records the sales on a calendar year basis. Australia was a relatively small market for R/C toys. In each of 1992, 1993 and 1995 only 11 types of toy were purchased, with the number in 1994 being 12. It is seen that in each year relatively much larger quantities were ordered of several toys than the quantities ordered of the toys constituting the balance of the basket. There was a balance between the mini, micro and larger promotional toy which was heavily advertised and led the market. The quantities ordered reflected Playcorp's assessment of the likely level of sales of the various categories of toy which appealed to different groups in the market. It is pertinent to note some evidence of Glatt which I accept. The special feature items, of which Jet Hopper and Rebound are but two examples, were the

subject of television promotion and in general sold better than the more basic items, and were more lucrative for Playcorp in that they sold at higher prices. Glatt referred to there being each year two or three television advertised items, or sometimes only one, and a lot of other little items and that the percentage of one to the other varied each year. But the bulk of the business was in the former category. Glatt further agreed that the special feature television promoted items were very significant to the ability of Playcorp being able to sell the full line. It is clear on this evidence that it was critical to Playcorp's ability to maintain its position in the market and achieve turnover and profit that it had the large selling promotional items. This indicates the importance of the loss of new Tyco products as the promotional television items had principally been Tyco products.

330 But it was not necessary that the promotional item be new to the market each year. Furthermore, it is apparent that in Australia and elsewhere particular toys, in light of their success, could be in Taiyo's catalogue for years, and that toys could be revived with or without new packaging, decals or change to the body or mechanics. It was then for a distributor such as Playcorp to decide which toys to include in its basket for the year. It may be that a toy was dropped from the catalogue for a year or years and was subsequently "revived". It could also have been that a toy previously available but not purchased by Playcorp was added to the Playcorp basket in a later year because of Playcorp's assessment of its likely sale success.

331 Taiyo's submission is to be considered in this context. As mentioned, Taiyo did not refer to Rebound and the battery packs and charger because the former had been purchased in 1995 and the latter is shown as having been purchased in 1994 and 1995. I accept Glatt's description of Rebound as a sensational toy and his evidence that the demand for it would have continued in 1996 and 1997. Indeed, this was confirmed by Itani who described Rebound as the most exciting item Taiyo ever had and agreed that it could have been a lead item for Playcorp in 1996 and 1997. Rebound, Itani said, was "very hot everywhere". He agreed that Rebound would bring with it other toys, meaning that it would lead to sales of other toys. I accept

Itani's evidence as stating the facts concerning Rebound. It is consistent with his evidence, and that of Glatt, that Taiyo's records reveal that Rebound was its most successful international toy in 1996 (with 616,864 units sold), and its second highest selling toy in 1997 (with 354,694 units sold). In all, Rebound was marketed and sold between 1994 and 1998. Bearing in mind that Playcorp was not supplied with the quantities of Rebound it had required in 1995, and, hence, that the market in Australia was under supplied in 1995, I accept as a sound judgement Glatt's evidence of the quantities which Playcorp would have ordered in 1996 and 1997. I note that Redenbach expressed the view that Toys R Us would have purchased 2,000 – 3,000 each year. As Rebound was an old Tyco toy it would not have been available after 1997.

332 The 6V battery products were marketed and sold by Taiyo between 1993 and 2000. These were sold in relation to 6V R/C toys such as Rebound, Fire Power and Rampage. Such toys were powered by a 6V battery which was not included with the toy. Accordingly, in most cases when such a toy was purchased a battery pack and charger was also purchased. Redenbach said that Toys R Us would purchase one battery pack and charger for every Rebound. Hence, there is a direct correlation between the quantity of 6V toys and battery pack and charger units. It took about four hours to recharge a 6V battery pack and in use it would operate a toy for about 8 – 10 minutes. Accordingly, some consumers bought extra battery packs to enable the toy to be operated for longer periods. Redenbach gave evidence consistent with this. Playcorp would generally order one extra battery pack for every four 6V toys ordered.

333 The point made about Fast Traxx was that whereas Playcorp had purchased it in the 1990 to 1993 period, it had not done so in 1994. It is to be noted that Glatt said the quantities purchased were 20,000 units in 1990, 30,000 in 1991 and 7,500 in 1993. The shipping history does not include 1990 or 1991, but lists 2,500 units in 1992 and 7,488 in 1993. The second point to note is Glatt's evidence that in October 1995, Glatt wrote to Taiyo asking if Taiyo was able to produce Fast Traxx even though it

was not in Taiyo's current catalogue. As it has transpired, Taiyo did manufacture Fast Traxx in 1996 and 1997. This is an example of a R/C toy that was reintroduced, obviously because of its popularity. Further, the fact that Playcorp enquired as to its availability in 1995, and that Taiyo did reintroduce the item, evidences the quality of Playcorp's judgement of the likely success of the toy. Another example of a toy that was reintroduced successfully by Taiyo was Mini Typhoon which was first sold in 1991 and reintroduced in 1996. At one point in cross-examination Itani agreed that "If you market it right" it was possible that some old toys could come back such as Typhoon, Micro Wild Thing, Fast Traxx and Riptide.

334 Taiyo's point concerning Fast Traxx was that Playcorp had not ordered it in 1994 when Taiyo's catalogue showed it was available. The fact is that Playcorp did write in October 1995 enquiring as to the availability of Fast Traxx. That indicated that Playcorp was considering reintroducing Fast Traxx in 1996, if it was available. I find that the reason it was not purchased in 1994 was simply that in the mix of products selected for that year Playcorp omitted it and went with other products. Taiyo did not make Fast Traxx available in 1995.

335 The next toy is Mini Traxx which Playcorp had purchased in 1992. Glatt said that if Playcorp re-launched Fast Traxx it made sense to relaunch Mini Traxx at the same time. Playcorp had not purchased Mini Traxx in 1993 although Glatt said that in 1993 Playcorp had purchased Mini Traxx Pick Up which was Mini Traxx with a pick up body on it. It is described in the shipping history as a new item and as having a model number different from Mini Traxx. That is an example of the way in which a toy could be changed. It is a pertinent example, but Playcorp purchased only 252 units of Mini Traxx Pick Up and that was for a particular customer. Mini Traxx was available in 1993 but Playcorp chose not to sell it. Taiyo's records reveal that Mini Traxx was available in 1996 and 1997, and that in 1996 Taiyo manufactured 2,500 units for Tyco Australia. Taiyo also sold the toy in 1997 and 1998. Glatt's evidence is that Playcorp would have purchased 6,000 units in 1996 and 4,500 in 1997. It had purchased 14,400 in 1992. Again, I do not draw an adverse inference from the fact

that Playcorp did not purchase the toy in 1993. It had other strong lines, and determined to proceed with a basket of toys that included only three out of the eleven toys in the 1992 basket.

336 The next toy is Super Fast Traxx. This toy too had been purchased only in 1992 and, like Mini Traxx, would have been ordered in 1996 if Fast Traxx was relaunched. And, like Mini Traxx, the toy was available in 1993 but was not purchased by Playcorp. The quantities in question here are small: Playcorp purchased only 660 units in 1992 and Glatt was speaking of 600 units in 1996. It was put to Glatt in cross-examination that Taiyo's minimum production run was of the order of 2,000 units. Glatt said he was not aware of that and that in practice he would have worked out with Taiyo what could be done. Save for what might have occurred in that regard, Super Fast Traxx is in the same position as Mini Traxx.

337 The next toy is Turbo Hammer, of which Playcorp purchased 1,360 units in 1992 as an exclusive item to Myer. Glatt said that Playcorp would have purchased approximately 600 units in 1996. Again, this item was available in 1993 but not chosen for sale by Playcorp. In my view this falls into the same category as the other toys. This is also an example of a toy that was reintroduced several years after its first introduction. First sold in 1992, it was reintroduced by Taiyo in 1996.

338 The next toy is Rampage, of which Playcorp had ordered 1,800 units in 1995. Glatt said that was the Turbo Scorcher with a truck body. Glatt said that he had not promoted trucks and that was probably because he thought they would not do well in Australia. He also said that there were "better options". Yet, as to ordering this toy, it was the Scorcher, which was a "fantastic" toy, but with a different body. Playcorp promoted the Scorcher. Rampage was available in 1996 but Glatt's evidence was that Playcorp would have relaunched it in 1997 to supplement orders of Rebound and Fast Traxx in that year. It would have ordered 6,000 units. Glatt was cross-examined as to why Playcorp would not have ordered Rampage in 1996. He explained he had prepared a plan of items from the Taiyo and old Tyco basket of items available to Playcorp and, in effect, this is how it turned out. It would not, he

said, have been "a clever plan to put every single item in the first year". He was confident Playcorp could have sold 6,000 units in 1997 even though the 1995 order had been for only 1,800 units. He based his confidence on Playcorp's marketing ability. For the relaunch, Glatt contemplated that there would have been new packaging, decals and advertising and it seems evident that in this case that must have been so. That would involve an unidentified cost factor although Playcorp always incurred costs on advertising and promotion and had a sales force. As to whether it had ever occurred that a product sold two years before, but not in the intervening year, was relaunched by Playcorp, Glatt could not answer although it had possibly occurred with a micro or mini, but there had been no reason to do so. I accept Glatt's evidence, but I consider that his view that Playcorp would have ordered Rampage in 1997, and not in 1996, and to the extent of 6,000 units, was the result of wanting to keep the quantities up and above 100,000 units in each year.

339 Next as a group are the four micro toys. Glatt said that between 1992 and 1995 Playcorp ordered approximately 20,000 to 30,000 units of micro R/C toys. He said that in 1996 and 1997 Playcorp would have ordered approximately 18,000 units from this group of four micros. It is to be noted that such toys have established longevity, Taiyo's records revealing that in 1996 Taiyo was manufacturing micro toys that were first sold in 1998 and 1991. None of the four micros was new. Glatt's projections were not made on the basis that the toys would be changed. Playcorp would take the toys as they were produced.

340 The next toy was Riptide Boat/Wave Albatross of which Playcorp purchased approximately 3,000 units in 1994. Glatt said that every few years Taiyo released and Playcorp ordered an aquatic R/C toy. He said that Playcorp would have ordered approximately 2,400 units of this toy in 1996 and 1,200 units in 1997. It had been available in 1995 but was not taken up by Playcorp. Glatt explained that Australia was a small market, that it was understood (with Taiyo) that he would concentrate on new items (which is supported by the profile in the shipping history), and that Playcorp had to make a selection. I accept Glatt's evidence.

341 The final 1996/1997 toy is the Mini Blaster, of which Playcorp purchased substantial quantities in 1990 and 1991. It was based on the very successful Jet Hopper style of R/C toy. It was an all terrain fast vehicle which sold at a moderate price point. Playcorp would have placed orders in 1996 and 1997 for quantities which were appreciably less than the earlier purchases. Taiyo's records reveal that Taiyo sold this toy from 1996 until 1998. This is another example of a toy having longevity, as it was developed in 1989. Glatt did not contemplate any changes being made to the toy when it was relaunched. I accept this evidence.

342 I turn then to Glatt's 1998 prediction. These concern two micro and two mini items. Glatt stated that as Playcorp was not able to distribute any Tyco toys, Playcorp would have distributed a range of micro R/C toys. Playcorp would have ordered approximately 6,000 units made up from Micro Blaster and Micro Nitro Invader. It would also have ordered 5,000 units made up from Mini Hopper and Mini Blaster. These are Taiyo toys which were available in 1998. Glatt referred to the Chevy Pick Up and Off Road Tiger, with which he was not familiar, and stated that it was unlikely that Playcorp would have ordered more than a few thousand in 1998. No allowance is made for any such orders in 1998 and I ignore these toys as a source of revenue. Meredith did not prepare any material to deal with these projections in Grant's third witness statement. That would seem to be because he was instructed to ignore 1998 in any old product loss of profit calculations he undertook.

343 Glatt said in cross-examination that what Playcorp would have been able to do in 1998 would have depended on the co-operation received from Taiyo including whether Taiyo was prepared to bring items back into production that were not otherwise being produced. What he meant was that if Taiyo was willing, old Taiyo products, of which there was a large bank, could be dusted down and relaunched with or without modification. That could produce an "infinite" range and the toys selected could be promoted to the market. This, he said, was a "possibility, if Taiyo would co-operate in the way a normal manufacturer would co-operate with a supplier".

344 This evidence of Glatt must be considered and weighed in the context of the differences that had arisen between Playcorp and Taiyo and existed at the time of rescission in March 1996, the fact that Tyco was a vastly more important customer to Taiyo than Playcorp, and that Taiyo preferred Tyco's interest and could be expected to have done so from April 1996 to December 1998. As against that, Taiyo also had the commercial interest to make profits and hence to co-operate with Playcorp to a reasonable degree. And Playcorp's claim, as put by Glatt, is based on what Taiyo had available in its catalogues and does not depend on Taiyo co-operating with Playcorp in a one-off way as by specially reviving and manufacturing a toy for Playcorp. The only possible exception to that is Rampage in respect of which Glatt referred to a change to the decals.

345 A further aspect of this matter of co-operation from Taiyo is whether Taiyo could actually supply all of Playcorp's orders predicted by Glatt. This issue concerns the physical problem of being able to satisfy all of the orders received from various distributors. Rebound provides an example of the situation that can arise, particularly perhaps with a successful product. Taiyo did not supply Playcorp with the quantities it ordered. It could not satisfy the various orders for the toys. In my view, Playcorp was left unsatisfied, not merely because of the pressure to fill orders for other markets, but because Tyco was a far more important customer and relations with Playcorp gradually deteriorated during 1995.

346 The distribution agreement did not make express provision for the situation where Taiyo had difficulty in filling orders for product. It was a two party agreement for the ordering and supply of products. It seems clear that there must have been reasonable limits on how the agreement could operate from the point of view of both parties. It could not have been that Playcorp could have been entitled to order whatever quantity of product it required, say of Rebound, and that Taiyo was bound to supply it, or be in breach of the agreement if it did not. There had to be a sense that orders would be satisfied, all things being equal, or, to put it another way, that Taiyo would exercise reasonable endeavours to do so but, having exercised such

endeavours, it would not be in breach of the agreement if it could not supply all or part of a particular order. The issue existed also in relation to the timing of production runs, and the ability to fit in a small Playcorp order.

347 Considerations such as these are relevant in an assessment of Playcorp's claim. That is because the claim assumes that whatever Playcorp ordered would be supplied by Taiyo as and when required. That might not have been able to occur in every respect. While saying this, it is important to bear in mind that the problem with the supply of Rebound had not previously been experienced. Hitherto, and while Futamura was at Taiyo, Playcorp's requirements had been satisfied.

348 I return to Taiyo's points, and to point (c), that Glatt's projections for Rebound were inconsistent with Exhibit 9. This point has no weight. Exhibit 9 was not explained by a witness. It is not at all clear where Rebound falls within it. It is an unexplained document which related to an abandoned claim.

349 Point (d) concerns several alleged inconsistencies. The first is to be found in an analysis of the proportion of products purchased by Playcorp in the past to products distributed worldwide by Taiyo. The analysis is Annexure C to Taiyo's written submission. The analysis relates only to seven products in Glatt's third witness statement. They are Rebound, battery pack and charger, Jet Turbo battery pack, Super Fast Traxx, Turbo Hammer, Rampage, and Chevy Pick Up and Off Road Tiger. The last two can be ignored as Playcorp's claim is not based on them. So there are four toys and two battery packs. The other toys are not included because the international sales chart does not list products with an identification number less than 9,101 and does not include micro products. Subject to that, the analysis generally, but not in every instance, is of Playcorp achieving greater annual sales of the products in the 1996 and 1997 years than previously. The analysis was relied on as an indication that Glatt's projections were unsound. That is, the projections were put at too high a level. The analysis cannot be accepted as a complete truth, as it were. It may amount to an indication of higher levels of sales of particular product in Australia than previously, but the comparisons are simplistic and must, for their

validity, be subject to a range of unknown factors. The figure for Rebound, for instance, is affected by a shortage of supply in Australia in 1995.

350 The next inconsistency was the level of sales Tyco was able to achieve to September 1997 of items in respect of which Playcorp claimed compensation, and with the assertion that Playcorp would have made those sales. The assertion relied on was made in particulars of loss and damage filed by Playcorp on 22 July 1997 in the proceeding it brought against Tyco; see at [115]. The particulars alleged that by reason of Tyco's breach of the deed of release, Playcorp was deprived of goods (being old Tyco toys) which had been sold in Australia and which, if given supply, Playcorp would have sold. Playcorp alleged that it would have been able to sell the toys in question and claimed a loss of profit. In subsequent particulars, Playcorp set out a list of toys including the quantity sold by Tyco in Australia, the information having been, as I understand it, provided by Tyco.[53] The list records total sales of only US$376,000 and includes only two old Tyco products which are included in Glatt's projected sales for 1996 and 1997. They are Micro Nitro Invader (9,006 units) and Mini Traxx (2,496 units). That, it was submitted, represented a radically different picture in terms of what Tyco did compared to what Glatt now states that Playcorp would have done. In other words, in the litigation in 1997, Playcorp alleged that it would have sold all of the items in the list if it had been given supply. But in the present litigation Playcorp has abandoned that position and relies on only two of the products in the list. Moreover, Playcorp's case is that it would have sold more product than Tyco did. The example is Mini Traxx of which Playcorp sold 2,496 but of which Glatt states that Playcorp would have ordered 10,500 units. On that point I find, relevantly, that Playcorp had a well established successful business operation whereas Tyco was more in the position of commencing in Australia. It is a vital difference. Nevertheless, there is the wider inconsistency mentioned. It is to be explained, I think, because in the 1997 litigation Playcorp sought the benefit of what Tyco had achieved in sales without actually undertaking the exercise which was required for the purpose of this case and which was finally undertaken by Glatt.

53 The list is at page 517 of the Court Book.

The course taken by Playcorp in the 1997 litigation was an easy, adventitious way of handling the matter.

351 The final inconsistency is with Playcorp's historical experience of sales of old products. It was submitted that even if Meredith's product life analysis was not precisely accurate it demonstrated the gap between historical achievement and Glatt's projections. The submission recognised that Meredith's analysis was flawed and I have made a finding as to that. One respect in which Meredith's analysis was flawed was his misapprehension of the fact that Playcorp achieved a very high level of sales of each toy in its year of purchase. That reflected Playcorp's good judgement in selecting toys for sale and its skill in achieving sales. These factors seem evident in the record with Turbo Scorcher. For one might suppose, and it was generally the case, that in years subsequent to the first year Playcorp would purchase a reduced, or reducing, quantity of a toy. But Turbo Scorcher shows that that could not be held to be an invariable situation. In 1993, 1994 and 1995 Playcorp purchased 41,996 units, 9,600 units and 12,000 units respectively. Furthermore, in making this submission Taiyo's counsel referred to the historical experience as providing the best indication of what would happen if Playcorp sought to change its business and tried to sell old product without the benefit of new product to sell. The submission overlooks the fact that Playcorp had the advantage of the especially successful Rebound as a lead item. Moreover, Glatt said, and I accept, that a lead item did not have to be a new item. Rebound was as good as a new item, particularly given that in Australia supply had been limited in 1995.

352 Point (g) is not a point of substance in my view. It was not submitted that Glatt had included in his 1996 to 1998 basket of toys any that were not within the category of toys available to Playcorp in that period.

353 Point (h) relied on the fact that following rescission Playcorp did not attempt to obtain old Tyco product from Taiyo. It was submitted that it may be inferred that it would have done so, even if both parties regarded the distribution agreement as terminated, if it could profitably have sold such product. It was submitted that

Glatt's projections of what Playcorp would have done were inconsistent with its failure in fact to seek to purchase product from Taiyo. Rather than attempt any such purchase it took the route of seeking money from Tyco. This submission is simplistic and erroneous in my view. It ignores the facts of the deteriorating relationship, that Taiyo stated it would not supply unless the offer for the faulty product claim was accepted, that the offer was not accepted, and that Playcorp rescinded the agreement. And Playcorp did not conduct its toy business on the basis of an odd purchase of product here or there on a non-exclusive basis hoping to make some sort of profit on such item or items as it might be able to procure. It was a substantial business and would most unlikely operate on such a basis. And, critically, there was not any evidence that Taiyo would have supplied product on such a basis or in the circumstances. Furthermore, the reality of the situation is seen in the course that Playcorp took. It sought to establish a product (Reactor) but was not able to do so to the satisfaction of the board of directors.

354 The next broad point was the attack on Glatt's reliability as a witness. It was submitted that he had adopted a partisan approach and advocated Playcorp's cause in his first witness statement. The assertion in that statement that loss of new Tyco products would have made no difference to Playcorp's business was untenable, it was submitted. The reason for, and strength of, his partisanship was said to have emerged at the conclusion of his cross-examination. Glatt was asked if he had an interest in the outcome of the case. He said that he did not have a financial interest and that he had not been remunerated for giving evidence. His interest, he said, was "in seeing justice done and in seeing the right outcome of this issue". He thought "that Taiyo dealt with Playcorp really badly after Playcorp really performed very well for Taiyo over a long period of time, and I think their behaviour was under-handed and I'd like to see justice done, and that's my interest". He agreed that he felt strongly about the matter. Finally, he was asked as to his relationship with those who owned Playcorp. He answered that the owner is Solomon Lew, who is married to his sister. He said that he had very little to do with Lew and that Lew's son is in the business.

355 At this point the cross-examination was concluded. Glatt was noticeably tired. In all, after commencing his evidence on 28 November 2000, Glatt had been giving evidence over five days. He had left Playcorp in January 2000, and the demands of giving evidence must have significantly intruded into his time. Notwithstanding that, over the time he gave evidence he was attentive to and concentrated on the task, and in my view answered questions in a responsible and considered way. I have already made findings concerning his evidence, and I do not repeat them. In making those findings, and accepting his evidence, I bore in mind the present attack on his credibility. I accept Glatt's evidence on the matter of whether he had an interest in the outcome of the case. I formed the view, having observed Glatt over a long period, that he was an honest man who had been somewhat bruised by the loss of the Taiyo business and the subsequent unsuccessful attempt to continue in R/C toys, and had a genuine sense of regret and disappointment at the turn of events which he considered should not have occurred having regard to Playcorp's high level of success in dealing with Taiyo. The views which he expressed as to the way in which Taiyo had dealt with Playcorp had a factual foundation. I do not consider that Glatt's statement as to seeing justice done rendered him a partisan witness in the sense of affecting the credibility and reliability of what he said. Why should an honest and reasonable person not be possessed of a feeling of injustice? He was entitled to. Nor do I consider that the family relationship, while I take it into account in assessing his evidence, led to him being partisan or argumentative. Certainly he sought to advance Playcorp's case but, whether the points of Taiyo's attack are regarded on their own or taken together, I reject the attack on Glatt's reliability.

356 That is not to say, however, that I accept his evidence of projected sales in every respect or detail. The projections are, for one thing, based on a very best case scenario and must be tempered somewhat. Relevant factors in respect of the projections include that Appendix 6 assumes that all products ordered by Playcorp would have been sold in the year of purchase. While Playcorp's historical record of sales indicated very high sales in the year of purchase, even in and around the 90 per

cent or so level, 100 per cent was an over-statement to an extent of less than approximately 10 per cent.

357 Another factor is that the projections assume that what is ordered will be supplied. The obligation on Taiyo in this respect would seem to have been that it was required to exercise reasonable endeavours to satisfy Playcorp's orders to ensure that Playcorp had the benefit of the agreement, but Taiyo was not a guarantor of supply. In the present exercise it could not be assumed that Taiyo would have been able to fill every order projected by Glatt, and as and when it was required. The competing demands of other distributors, and factors concerned with matters such as the manufacturing plant, may have meant that Taiyo could not satisfy every order.

358 Another factor is that with more reliance on Taiyo's products, and with competition from Tyco Australia, there would have been some addition to the advertising and promotion budget. A related factor is that without new Tyco products from 1996 to 1997 and then no Tyco products in 1998, and access to the related Tyco advertising, an appreciable or fundamental change had occurred. The question raised was what extra costs would have been occasioned as a consequence of seeking to continue the business with the more limited range. I accept Glatt's evidence that, all things being equal, Playcorp could have managed successfully, but that would have required extra effort and associated extra costs. While, in principle and as an approximation, an additional 10 per cent or so on the advertising and promotion budget might be allowed, the availability of Rebound must be taken into account. Rebound was already known and would have led the market. Further, its success by way of substantial sales would have drawn sales across the board. Playcorp would reasonably have anticipated this and been able to limit its advertising and promotion costs accordingly. I find that the consequence of Taiyo's inability to supply Rebound is that Playcorp would not have had to incur the additional 10 per cent or so, but an amount appreciably less, in the order of five per cent or so, in my estimation.

359 In addition, there are the matters of the appropriate application of the historic

percentages for the gross profit margin and variable costs. I now deal with those matters. On the former there is the fact that Playcorp's profit margin may have deteriorated with the change in available product. As I have pointed out, the highly successful Rebound was available and this must significantly make up for the loss of new products in Glatt's projection. Yet the fact is that the shipping history indicates that each year Playcorp introduced a number of new items along with including some old items to produce a successful mix. And there was evidence of Whitear that he was instructed that sales of new products involved a higher margin than old products. The significance of that point related, in particular, to the loss of new Tyco product, as Taiyo's counsel said. But Rebound was a Tyco product and it still had a very large unsatisfied potential in Australia. I do not consider that the projections in Appendixes 5 and 6 should be rejected because, by reason of the use of the historic gross profit margin, they assume the availability of new Tyco product which obtained a higher margin. While it may be that a margin somewhat less than 41.47 per cent should be considered more likely, the result that Playcorp's claim should be rejected in toto on this account would constitute an injustice that the due administration of justice should not readily permit. It would be a manifest and gross injustice. The same is true of the submission that unless Glatt's third witness statement was accepted in its entirety no evidence of lost sales and profit was offered by Playcorp. It was for the reason of pressing this submission that counsel for Taiyo submitted that Playcorp's case on damages is to be determined on the probabilities. Hence, unless Playcorp established the balance in its favour to an extent, say, of 51 per cent the claim must fail. That is not withstanding that it has clearly and indisputably suffered loss.

360 This is not a case in which a claim for lost profits must fail on account of a lack of evidence. This is a case in which, although attended with some difficulty and uncertainty of ascertainment, the Court, doing its best, can make an assessment which is just and reasonable in the circumstances. In *Fink v Fink*[54] it was observed by Dixon and McTiernan JJ that:

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54 (1946) 74 CLR 12 at 143.

> "Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages."

The approach of the common law reflected in that statement is apposite to this case.

361 The difficulty, which extends to a measure of uncertainty, is to assess that loss. Having regard to matters already discussed I am of the view that Glatt's projections must be regarded as suffering from over-optimism, and a failure to make due allowance for contingencies such as the inability to obtain supply to the extent and as and when required, and not selling all items in the year of purchase. Being old and proven products, it would not seem necessary to allow for the possibility of excessive returns as happened with Triple Wheels and Python. Furthermore, the projections in Glatt's third witness statement are based on taking products from Taiyo as they are manufactured and not altering them. The possible change to the decals on Rampage was not in that category of alteration.

362 On the matter of over-optimism, I was concerned with Glatt's evidence as to the order of 6,000 units predicted for Rampage. In my view that was overly optimistic or an exaggeration of the likelihood. I was simply unpersuaded by that part of his evidence. An order to the extent of more than 3,000 or so units was possible but not probable in my view. No such findings should be made in relation to the other products. But, including that reduction for Rampage, an allowance may and should be made, overall, for the various contingencies already mentioned, to arrive at a figure that reasonably measures the loss and is just and reasonable between the parties. I conclude, on balance, that an appropriate allowance is in the order of 40 per cent of the projected sales.

363 That leaves the percentages. I am satisfied that Taiyo's contention as to the inappropriateness of the historic margin exaggerates the effect of the changed business circumstances, especially having regard to the availability of Rebound. Taking all relevant matters into account I conclude that it is appropriate to adopt 40 per cent as the applicable gross profit margin that would have been achieved. That

margin is lower than Whitear's historic margin of 41.47 per cent and higher than Meredith's 38.97 per cent.

364 I also conclude also that the variable cost percentage to be allowed is 17 per cent. There are two bases for this conclusion. The first is that the agreed statement of facts states that the percentage to be applied in any calculation of Playcorp's lost profits on the sale of Taiyo R/C is 17 per cent. The statement was signed by Whitear and Meredith following a Court ordered meeting, and filed in the Court, with a view to narrowing the issues. The case was conducted on that basis. It would not be appropriate to permit Taiyo to resile from that agreement. The second basis is that I am satisfied, in any event, that even allowing for some differences in costs (including in relation to advertising and promotion) 17 per cent is a sufficient approximation of the variable cost percentage and it is reasonable and appropriate that it be adopted. If it were not for these matters, particularly the first, I would have required that in the recalculation process that is to be undertaken, a calculation be made on the basis of an additional five per cent for advertising and promotion costs. Such a calculation could readily be undertaken.

365 It will be necessary for Appendix 6 to be recalculated in order to arrive at the amount of lost profit.

Credit for Tyco's payments

366 Taiyo submitted that the amounts which Tyco paid Playcorp under the 1996 and 1998 agreements should be off-set against Playcorp's damages for lost profits. The amounts received were $459,006 on 31 May 1996 and $340,000 on 5 December 1997. It was submitted that these amounts were received as compensation for the same lost profits on sales of new and old Tyco profits that Playcorp now claims. The payments were for exactly the same losses which Playcorp now seeks to recover. It was submitted that no Taiyo products were worth considering for this purpose. In other words, it seemed to be said that to the extent that Playcorp is seeking profits lost in respect of sales of Taiyo product in its present claim, that part of the claim

should be ignored or treated as being a claim in respect of Tyco product. In support of the submission counsel referred to *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd*,[55] *Cade Pty Ltd v Simmons*,[56] *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited*,[57] and *Masters Dairy Limited v Gabor Martin Nagy*.[58] Counsel for Playcorp contended that on the facts Taiyo's submission must fail.

367 The issue thus raised turns on the character in which the payments were received. In *Wollington v State Electricity Commission (Vic) (No 2)*[59] Young CJ and Menhennit J said (at 98) that:

> "The answer to the question whether a particular receipt by a plaintiff does or does not diminish the liability of the wrongdoer must in our opinion in the absence of any other rule of law depend as a matter of principle upon the character of the receipt. In other words, it is necessary to ask whether the receipt is of such a character that it does diminish the liability of the wrongdoer."

368 Subsequently, in *Redding v Lee*[60] Mason and Dawson JJ said:

> "… the issue turns on the character and purpose of the particular financial benefit which the plaintiff receives: Was the benefit conferred on him independently of any right or redress against others and so that he might enjoy the benefit even if he enforced the right?"

369 It is therefore necessary to consider the terms of the agreements under which the payments were made.

370 The payment made under the May 1996 deed of release was made in consideration of Playcorp agreeing to cease the distribution of Tyco toys in New Zealand and to cease the distribution of Tyco's New Products in Australia. That, in summary, was the essence of what Playcorp gave up, although the deed contained, in addition, a series of further agreements by Playcorp. The provisions of the deed are referred to

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55 (1991) 33 FCR 1.
56 (1998) 71 SASR 571.
57 [1912] AC 673.
58 (1998) 156 ALR 262.
59 [1980] VR 91.
60 (1983) 151 CLR 117 at 137.

at [105] – [109]. It is important to note that in the extensive recitals to the deed it is stated that Tyco and Playcorp are in dispute as to Playcorp's claim to be entitled exclusively (until 31 December 1998) to distribute Tyco toys in Australia and New Zealand, and to a dispute between them as to payment of the licence fee, among other matters. It is also recited that Playcorp has said it intends to sue Taiyo for loss and damage which it has allegedly suffered and will continue to suffer as a result of Taiyo's repudiation of the distribution agreement and, further, for allegedly defective product supplied by Taiyo (called the Taiyo Claim). Then, cl 3.10 (set out at [105]) provided for an additional payment by Tyco which, if made, would have had the effect that Playcorp would not bring the Taiyo Claim. Tyco did not make the payment.

371 It is seen that the deed represented an agreement between Playcorp and Tyco on a composite of matters, and that the overall amount to be paid by Tyco was not apportioned to any of them. It was a single composite amount. Furthermore, the deed made separate reference to Playcorp's claim against Taiyo and Playcorp covenanted to give it up in consideration of an additional payment. That payment not having been made, the covenant never fell in.

372 Playcorp's counsel submitted that as Playcorp made no claim for profits from the sale of Tyco New Products in Australia or from the sale of Tyco toys in New Zealand, the amount paid by Tyco should not be off-set. In my view that result follows not merely for that reason but in consequence of the provisions in the deed and the clear reservation of the claim against Taiyo. Having regard to the complex of provisions in the deed it cannot be said that the amount was received in diminution of Playcorp's right against Taiyo. The amount was paid and received, in my view, independently of Playcorp's right to claim against Taiyo.

373 There is an additional and separate reason for this conclusion. The point that is taken by Taiyo is one of mitigation of loss on which it bears the onus. In this case, where there is a single payment in consideration of a series of covenants by Playcorp, the onus is on Taiyo to establish the extent (in dollar terms) that the composite

amount was received in diminution of the Taiyo claim.[61] Taiyo has not done so. That is, it has not identified a component of the total amount which represented the New Zealand side of the bargain on the one hand, and the Australian side of the bargain on the other hand, to reduce the complex of the agreement provisions to a simple analysis. The result is that no amount is, or on the evidence could be, established as representing the amount to be off-set.

374 The second payment was made under the February 1998 deed of termination. The payment was made in consideration of Playcorp entering into the deed. The deed provided that from the date of payment Playcorp's exclusive right to distribute Tyco toys in Australia other than Tyco's New Products is terminated. There are a number of terms but they are all directed to achieving that object. There was no reference to Taiyo.

375 Taiyo's counsel submitted that the payment under the deed was for Playcorp's loss of profits on old Tyco product. Playcorp's counsel submitted that the payment should not be taken into account as Playcorp made no claim in the proceeding for profits it would have made under the distribution agreement from the sale of old Tyco toys in Australia after 5 December 1997. As a result of the deed of termination Playcorp had (it is conceded) excluded old Tyco products from the basket of Taiyo products available to Playcorp. That was effective from the date of payment on 5 December 1997. The consequence was that in so far as Playcorp had a right to recover lost profits from Taiyo, from that date no loss could be attributable to old Tyco products. The payment made by Tyco was the price which Playcorp received for giving up any entitlement to distribute old Tyco product in Australia. In effect, Playcorp received that price in satisfaction of any claim it may have against Taiyo for profits lost in respect of old Tyco product. Playcorp's claim in respect of 1998 is confined to Taiyo product. It must follow, in my view, that Tyco's payment was received independently of Playcorp's right of redress against Taiyo in respect of Taiyo product.

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61 See *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd* (1991) 33 FCR 1 at 29 per Burchett J.

Damages - defective product claim

376 I have already largely dealt with the issues argued in relation to this claim. Playcorp concluded its arguments on this claim with a submission that the claim was flawed as a matter of approach and that, as a consequence, the quantum was not proved. For that reason the claim should fail.

377 The submission was put in this way. Playcorp was able to cheaply repair product. Cooper had referred to Playcorp's manner of conducting business in this regard, that is, in regard to repairing defective product with a view to it being returned to the consumer or re-sold. This was the purpose of Taiyo supplying spare parts. The vast majority of Playcorp's claim results from not having repaired returned defective product. The true measure of any loss is the cost of repair. Playcorp had not established that cost. It would seem, although it was not expressly stated, that it was conceded that Playcorp had established repair costs to the extent of the admitted $9,294 but no more than that.

378 Instead of establishing its loss, Playcorp had claimed the wholesale price of the goods. That is the cost to acquire the goods plus the full margin added to make up the wholesale price. If it were otherwise appropriate to claim a figure other than repair costs, it could not be the wholesale price. At most the claim could be for the purchase cost and loss of net profit less the value of the returned product. Playcorp had not established that loss, or even sought to do so.

379 Playcorp's submission was that as it had paid Taiyo the price to acquire the goods its loss was the sales price refunded to the retailer. Playcorp had refunded to retailers the wholesale price they had paid for at least the 6,418 items referred to in column B in Exhibit 5.

380 Several things may be said about these submissions. Taiyo's submission, which is one of mitigation, assumes that in the circumstances which confronted Playcorp it

was a practicable course, and one reasonably to be expected to be undertaken, for Playcorp to plough on regardless in the repair of all returned defective product for which the wholesale price was refunded. Playcorp's actions in this respect should be considered in the commercial context in which they occurred. It is sufficient reference to this context (which I have discussed at length earlier) to refer to the abnormally high rate of returns of Triple Wheels and Python, to Taiyo's failure to respond reasonably and in a timely manner to Playcorp's difficulties caused by the supply of substantial quantities of defective product, and to the bad reputation of those products in the market place. The very large numbers of Triple Wheels and Python in relation to the 6,418 items had the effect of swamping the balance of the toys, the problems with which may otherwise have been dealt or coped with. In short, the submission was premised on a commercial situation that did not obtain.

381 It was understandable, and not unreasonable, that Playcorp did not proceed to incur the cost of repairing the defective goods and seek to re-sell them. If they could not reasonably be offered to the market for resale it was hardly worth incurring the cost and effort of repairing them. The point is really one of mitigation and the answer to it is, first, that Playcorp was not contractually obliged to repair the defective goods and offer them for resale and, secondly, it was in the circumstances reasonable that Playcorp did not do so. It is a reasonable inference that in their returned defective condition the 6,418 toys had, and have, no resale value. They plainly could not be sold and used for the purpose for which they were supplied by Taiyo.

382 The next point is the measure of Playcorp's loss. In the first instance it is the cost of the acquisition of the goods. In addition Playcorp has lost its profit on resale. That is not the full gross margin. There must be an allowance for relevant costs in earning the profit. Playcorp's submission is therefore erroneous in claiming the full wholesale price. Playcorp's counsel did not identify the net profit in their submissions. Indeed the submission fairly clearly eschewed any attempt to do so.

383 There is evidence which enables Playcorp's purchase price of the goods to be ascertained. That should be done and I should be informed accordingly for the

purpose of fixing the amount for damages. Then, the average wholesale price of the goods is known and admitted, and there is the agreed variable cost percentage. If the evidence is not sufficient to enable a calculation of the net profit, it must follow that Playcorp has failed to establish that component of its loss. That would seem to be the situation having regard to the limited terms of Playcorp's submission. In that situation the damages will be limited to recovery of the cost of purchasing the goods plus the amount incurred on expenses, $9,294.

Conclusion

384 Playcorp is entitled to damages for loss of profits and in respect of defective products. The amount to be awarded under the former head is to be ascertained by a recalculation of Appendix 6 in accordance with these reasons at [362]–[364]. The amount to be awarded for the latter is to be ascertained by a calculation in accordance with these reasons at [382]–[383]. I will stand the matter over to a convenient time to enable the calculations to be made and I will then hear counsel as to the terms of the orders and costs.

SCHEDULE A

AMENDED PARTICULARS IN SCHEDULE
(see Court Book 33)

DEFECTIVE PRODUCTS

	A. Quantities returned (see credit notes)	*B. Quantities in warehouse as counted*	*C. Average wholesale price (see credit notes)*	*D. Lost price on goods in warehouse*
(Item 219) – Mini Scorcher (no. 9409)	578	324	AUD$46.01	$14,907
(Item 221) – 9.6V Turbo Scorcher (no. 9203)	386	6	$72.93	$437
(Item 227) – 9.6V Harley (no. 9336)	156	14	$77.84	$1,089
(Item 235) – Riptide Boat (no. 9016)	67	178	$51.80	$9,220
(Item 240) – 6 V Triple Wheels (no. 9335)	3,783	4,139	$56.34	$233,191
(Item 241) – 6 V Python (no. 9322)	1,537	1,402	$60.25	$84.470
(Item 244) – Fire Power (no. 9401)	417	181	$62.45	$11,303
(Item 246) – Rebound (no. 9408)	389	174	$61.46	$10,694
	7313	6,418		$365,311

PLUS repairs: $9294

SCHEDULE B

PLAYCORP. SHIPPING HISTORY (1992 – 1995)

1992

TOY#	DESCRIPTION	QUANTITY	AMOUNT	REMARK
			US$	
8813	9.6V TURBO BANDIT	144 SETS	3.391.20	NEW
8816	MICRO WILD THING	23,988 SETS	142,968.48	NEW
8901	MINI BLASTER	3,000 SETS	40,980.00	'91 ITEM
8915	MICRO BLASTER	4,800 SETS	28,244.00	'91 ITEM
9015	9.6V FAST TRAXX	2,600 SETS	67,756.00	'91 ITEM
9030	MINI TRAXX	14,400 SETS	215,280.00	NEW
9109	7.2V SUPER F/TRAXX	660 SETS	27,172.20	NEW
9116	MINI WILD THING	17,994 SETS	245,798.04	NEW
9117	MINI BANDIT	102 SETS	$1,604.46	NEW
9123	9.6 TURBO HAMMER	1,360 SETS	45,260.80	NEW
9912	9.6V WILD THING	27,926 SETS	617,308.80	NEW
TOTAL		***96,974 SETS***	***$1,435.743.98***	

1993

TOY#	DESCRIPTION	QUANTITY	AMOUNT	REMARK
			US$	
8816	MICRO WILD THING	3,600 SETS	21,168.00	'92 ITEM
8915	MICRO FX-4	24,000 SES	141,120.00	NEW
9004	NISSAN/FERRARI	5,982 SETS	61,016.40	NEW
9015	FAST TRAXX	7,488 SETS	89,856.00	'91 ITEM
9101	MICRO BANDIT	6,000 SETS	37,800.00	NEW
9106	MINI FX-4	9,600 SETS	134,208.00	NEW
9203	TURBO SCORCHER	41,996 SETS	1,122,973.04	NEW
9205	TURBO HI-JACKER	11,988 SETS	304,615.08	NEW
9212	TURBO FX-4	7,200 SETS	175,872.00	NEW
9326	MINI TRAXX PKUP	252 SETS	3,467.52	NEW
TOTAL		***118,106 SETS***	***2,092,096.04***	

1994

TOY#	DESCRIPTION	QUANTITY	AMOUNT	REMARK
			US$	
8915	MICRO FX-4	12,000 STS	70,920.00	'93 ITEM
9016	9.6V RIPTIDE	1,200 SETS	38,400.00	NEW
9101	MICRO BANDIT	3,600 SETS	22,788.00	'93 ITEM
9203	9.6V TURBO SCORCHER	9,600 SETS	255,508.00	'93 ITEM
9322	6V PYTHON	16,732 SETS	379,816.40	NEW
9328	MICRO HARLEY PKUP	4,800 SETS	64,032.00	NEW
9335	6V TRIPLE WHEELS	29,992 SETS	670,320.40	NEW
9336	TURBO HARLEY PKUP	2,392 SETS	73,554.00	NEW
9338	MICRO X-MEN	3,000 SETS	34,500.00	NEW
9340	6V BATT PACK	12,000 SETS	58,800.00	NEW
9342	6V BATT PACK/CHAR	48,000 SETS	393,600.00	NEW
9343	MINI SCORCHER	21,552 SETS	426,771.56	NEW
	WAVE ALBATOROSS	1,824 SETS	39,216.00	NEW
TOTAL		***166,692 SETS***	***2,528,226.36***	

1995

TOY#	DESCRIPTION	QUANTITY	AMOUNT	REMARK
			US$	
9203	9.6V SCORCHER	12,000 SETS	328,920.00	'93 ITEM
9306	6V SCORCHER	6,000 SETS	117,480.00	NEW
9322	6V PYTHON	4,260 SETS	96,702.00	'94 ITEM
9335	6V TRIPLE WHEELS	3,000 SETS	67,050.00	'94 ITEM
9342	6V BATT PACK/CHAR	36,000 SETS	301,500.00	NEW
9343	MINI SCORCHER	3,640 SETS	72,727.20	'94 ITEM
9401	6V FIRE POWER	9,600 SETS	195,480.00	NEW
9402	6V RAMPAGE	1,800 SETS	33,444.00	NEW
9408	6V REBOUND	24,000 SETS	544,800.00	NEW
9409	MICRO SCORCHER	17,994 SETS	109,892.20	NEW
9413	9.6V RAMPAGE	2,400 SETS	69,984.00	NEW
TOTAL		***120,694 SETS***	***1,937,979.40***	

GRAND TOTAL ***502,466 SETS*** ***US$7,994,045.78*** ***(1992-1996)***

SCHEDULE C

APPENDIX 5

PLAYCORP PTY LTD v TAIYO KOGYO CO LTD

SALES OF TAIYO PRODUCTS PER STEPHEN GRANT'S THIRD WITNESS STATEMENT

		1996		1997		1998	
Products	**Price**	**Quantity**	**Sales**	**Quantity**	**Sales**	**Quantity**	**Sales**
	$	**Units**	**$**	**Units**	**$**	**Units**	**$**
Rebound	60	40,000	2,400,000	30,000	1,800,000		
6V Battery Pack and Charger	26	40,000	1,040,000	30,000	780,000		
6V Jet Turbo Battery Pack	15	10,000	150,000	8,000	120,000		
Fast Traxx	65	9,000	585,000	6,000	390,000		
Mini Traxx	35	6,000	210,000	4,500	157,500		
Super Fast Traxx	95	600	57,000	-	-	-	-
Turbo Hammer	85	600	51,000	-	-	-	-
Rampage	58	-	-	6,000	348,000	-	-
Micro Super Bandit, Micro Scorcher, Micro Wild Thing, Micro Nitro Invader	15	18,000	270,000	18,000	270,000	-	-
Rip Tide Boat/Wave Albatross	47	2,400	112,800	1,200	56,400	-	-
Mini Blaster	47	7,500	352,500	5,500	258,500	-	-
Micro Blaster, Micro Nitro Invader	15	-	-	-	-	6,000	90,000
Porsche 911 Cabriolet	0	-	-	-	-	-	-
Mini Hopper, Mini Blaster	35	-	-	-	-	5,000	175,000
Chevy Pickup, Off Road Tiger	0	-	-	-	-	-	-
TOTAL		**134,100**	**5,228,300**	**109,200**	**4,180,400**	**11,000**	**265,000**

SCHEDULE D

APPENDIX 6

PLAYCORP PTY LTD v TAIYO KOGYO CO LTD

Profits calculation of sales of Taiyo products based on Stephen Grant's 3rd witness statement

Agreed Facts

Variable Cost as Percentage of sales	17%
April - June Weighted average sales	18%
July – Dec Weighted average sales	80.5%

If Court finds:

Sales Per Year based on:		Stephen Grant's 3rd witness statement
Gross Margin is:		41.47%
April – June 1996	**Rate**	**$**
Sales	18%	941,094
Less Cost of Goods Sold		550,822
Gross Profit	41.47%	390,272
Less Increase in Costs		
Variable Costs	17%	159,986
Loss of Profits		**230,286**

June – Dec 1996	**Rate**	$
Sales	80.5%	4,208,782
Less Cost of Goods Sold		2,463,400
Gross Profit	41.47%	1,745,382
Less Increase in Costs		
Variable Costs	17%	715,493
Loss of Profits		**1,029,889**

1997	**Rate**	$
Sales	100%	4,180,400
Less Cost of Goods Sold		2,446,788
Gross Profit	41.47%	1,733,612
Less Increase in Costs		
Variable Costs	17%	710,668
Loss of Profits		**1,022,944**

1998	**Rate**	$
Sales	100%	265,000
Less Cost of Goods Sold		155,104
Gross Profit	41.47%	109,896
Less Increase in Costs		
Variable Costs	17%	45,050
Loss of Profits		**64,846**

Total	**2,347,965**