HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 33
on appeal from:

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Hamilton and others (Appellants)
v.
Allied Domecq plc (Respondents) (Scotland)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Neuberger of Abbotsbury

Counsel

Appellants:
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Respondents:
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Douglas Fairley
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Hearing dates:
11 and 12 June 2007

ON
WEDNESDAY 11 JULY 2007

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LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry, and for the reasons he gives I too would dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry, and for the reasons he gives I too would dismiss this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

3. The first pursuer, Mr John Stewart Hamilton, and his business associate, Mr Kalo, were at one time shareholders in the Highland Spring company which successfully developed the well known brand of mineral water, based on a spring in the area of the village of Blackford

in Perthshire. For a number of years Mr Hamilton held a senior position in the company, but eventually left as a result of a dispute.

4. The Gleneagles Maltings Company also owned premises and water rights in the village of Blackford, but it lacked the capital to develop them. Mr Hamilton was introduced to Gleneagles Maltings and, from his knowledge of the area, he advised that the water sources in question were unsatisfactory for commercial development. He considered, however, that two big springs on the Gleneagles Estate were suitable for such development if the necessary rights could be acquired.

5. Mr Hamilton and Mr Kalo were shareholders in Stebbings Inc, the second pursuers, a company incorporated in Panama. To take the potential development of the big springs forward, Gleneagles Maltings agreed to sell its premises and spring to the Gleneagles Spring Waters Company Limited ("Gleneagles") in return for a 3% shareholding in Gleneagles, the remaining 97% being held by Stebbings Inc. (The 3% holding was eventually bought out and does not feature further in the story.) By about 1990, Gleneagles had concluded potentially valuable agreements for the supply of water from the springs on the Gleneagles Estate and had begun producing a small quantity of water to be sold under the Gleneagles brand name. But the company was not in a position to take the development of the business forward by itself.

6. One possibility was that Gleneagles would sell out completely to another company, such as Evian. Another was that it would enter into a distribution deal with another company that would provide the necessary distribution network for Gleneagles water. The third possibility was that Gleneagles would join with another company that would invest in Gleneagles, but would also provide a suitable distribution network.

7. Mr Hamilton considered that Gleneagles water should be marketed as a high quality brand. He therefore favoured following the example of Perrier who had first successfully established their brand in hotels, restaurants and public houses – the "HORECA" Hotels, Restaurants and Catering sector, or "on-trade". They had then used this success to build up their "off-trade" sales in supermarkets and other grocery and off-licence outlets. The general idea was that, if you had enjoyed drinking the product in a congenial atmosphere on an evening out, this experience would persuade you to select the product when you later saw it on the shelves of your supermarket. Mr Hamilton favoured a similar strategy for Gleneagles water.

8. On Mr Hamilton's view, therefore, it was critical to have the necessary arrangements in place from the outset for distributing the water to the on-trade. So, when contemplating the various possible business strategies under which the pursuers would retain an interest, the arrangements for distribution were important for him. In particular, this was so when – after a potential buy-out had fallen through - he decided, in December 1991, to try to find a company to take a stake in Gleneagles.

9. Mr Derek Douglas of Fraser & Partners (Business Managers), who had already been involved in the affairs of Gleneagles, put together a Business Plan. At Mr Hamilton's suggestion Mr Douglas contacted the defenders, who were then known as Allied-Lyons. Allied-Lyons were interested and one of their directors, Mr David Beatty, was asked to carry on discussions on their behalf. Initially, he was corporate development director of their subsidiary, The Hiram Walker Group Ltd, which ran their wines and spirits division, but in March 1992 he became deputy chairman of J. Lyons and Company Limited ("Lyons"), a wholly owned subsidiary of the defenders, which ran their food manufacturing sector. The defenders admit on record that Mr Beatty was given authority to bind them and to make representations on their behalf in his discussions with Mr Hamilton, who acted both in a personal capacity and for the second pursuers.

10. In fact, to begin with, Mr Hamilton's discussions were with Mr Stan Walters whom Mr Beatty had asked to evaluate the commercial and financial prospects of Gleneagles. Mr Beatty may have been present, however, for part of a meeting towards the end of March 1992. From then onwards the discussions were between Mr Hamilton and Mr Beatty.

11. In their pleadings, the case for the pursuers was that in the course of their discussions "Mr Beatty repeatedly represented that the defenders' distribution arrangements and facilities would be made available in the knowledge that the pursuers were placing reliance on the said representation...." This formulation of the alleged misrepresentation makes no specific reference to distribution in the on-trade. Nevertheless, Mr Hamilton's evidence at proof – which the Lord Ordinary (Abernethy) accepted - was, in essence, that he had explained to Mr Beatty the need for distribution to both the on-trade and the off-trade from the outset, the strategy being that success in the on-trade would breed success in the off-trade. As he saw it, the defenders were to assist Gleneagles to have their product distributed to the on-trade,

especially through Britvic – by which he meant Britvic Soft Drinks Limited.

12. The case for the pursuers as advanced in submissions on their behalf after proof was that Mr Beatty had represented that the defenders would indeed follow that strategy. By contrast, although Mr Beatty had difficulty in remembering the discussions, as will be seen in more detail later, his clear position was that the initial move on distribution was always intended to be into the off-trade. The Lord Ordinary resolved this issue in the pursuers' favour in a short passage at the end of para 45 of his judgment:

> "Having considered the evidence on this critical point I am satisfied that Mr Beatty did not communicate to Mr Hamilton that this was his strategy. On the contrary, I am satisfied that Mr Beatty led Mr Hamilton and Mr Douglas to believe that he agreed with Mr Hamilton that Gleneagles should try to penetrate the on-trade from the beginning as well as the off-trade and that the defenders' distribution arrangements and facilities for both the on- and off-trades would be made available to Gleneagles. Had it been otherwise I am satisfied that Mr Hamilton would not have entered into the Agreement of 24 November 1992."

As the Lord Ordinary says, a subscription agreement was concluded on 24 November 1992 under which Lyons became the majority shareholders in Gleneagles, the pursuers together retaining a minority shareholding.

13. Thereafter, preparations got under way for the development of Gleneagles water. After some trials, the product was eventually launched on the market in March 1994. Mr Beatty had retired early in 1993 and so had nothing to do with the business after that. Leaving all kinds of other matters on one side, the defenders accept that, when Mr David Potter was seconded to Gleneagles in about August 1993, his brief was to promote the product initially in the off-trade. Development in the on-trade would follow later. Again, the Lord Ordinary stated his conclusion shortly, at para 58

> "In any event, whatever the reason all I can say is that on the evidence the defenders did not assist Gleneagles in getting access to Britvic or to the on-trade in general."

14. Unfortunately, the business of Gleneagles did not prosper and in February 1998 Gleneagles was put into administration. By that time the pursuers' shareholding was virtually worthless.

15. In their pleas-in-law in the present proceedings the pursuers claim damages by way of reparation for the loss and damage which they say they suffered as a result of the fault and negligence of Mr Beatty, for which the defenders are liable, in inducing them to enter into the subscription agreement. Although these pleas-in-law are not very informative, the pursuers' case before both the Lord Ordinary and the Inner House was based on alleged negligent misrepresentation by Mr Beatty in the course of his discussions with Mr Hamilton which led to the subscription agreement. As I have pointed out, the specifics of that alleged misrepresentation developed somewhat between the drafting of the pursuers' averments on record and the formulation of their case after proof. Essentially, they claimed that, relying on what Mr Beatty had told Mr Hamilton, they entered into the subscription agreement on the basis that Lyons would assist them, from the outset, to have their product distributed to the on-trade through Britvic. This did not happen and the business failed, so making their shareholdings virtually worthless.

16. On 1 August 2003 the Lord Ordinary held in favour of the pursuers. Having considered the various factors involved in the failure of Gleneagles' business, he concluded, at para 78:

> "On an overall view of the evidence it is impossible in my judgment to avoid the conclusion that if, following the agreement of 24 November 1992, the strategy which Mr Hamilton had been led to believe would be followed had been followed, it would have made a major difference to the company's fortunes. This would have been all the greater if, with the defenders' assistance, Gleneagles had succeeded in gaining access to Britvic but even without that, if the defenders had made available their distribution arrangements and facilities for supply to the on-trade in other ways, it would have been substantial. So while there is no doubt a multiplicity of causes, great and small, which

> led to the failure of the company, the failure to follow the strategy which Mr Hamilton had been led to believe would be followed was in my opinion at least a major, if not the major, contributing cause."

The Lord Ordinary awarded the first pursuer damages of £1 million and the second pursuer damages of £2 million.

17. The defenders reclaimed and on 1 November 2005 the Second Division (the Lord Justice Clerk (Gill), Lord Hamilton and Lord Marnoch) allowed the reclaiming motion and assoilzied the defenders: 2006 SC 221. The Lord Justice Clerk drew attention to a number of potential difficulties in the pursuers' case relating to causation. But the decision of the Division was that the Lord Ordinary had erred in holding that, on the evidence, the pursuers had proved the misrepresentation by Mr Beatty on which their entire case hinged. The pursuers have appealed to your Lordships' House.

18. Both in the appellants' written case and in his helpful submissions at the hearing, Mr Clark sought to argue that, not only was Mr Beatty under a duty to take reasonable care not to misrepresent the strategy that would be followed, but he was, alternatively, under a duty to take reasonable care to make clear to Mr Hamilton that the active use of facilities to penetrate the on-trade must await, and perhaps be contingent upon, the successful development of the brand in the off-trade. Mr Clark referred to this alternative formulation as a "duty to speak". It is convenient to address it first.

19. Mr Clark accepted, of course, that Mr Hamilton and Mr Beatty had been engaged in an arm's length commercial negotiation with a view to a possible subscription agreement. Such an agreement was not a contract uberrimae fidei and so no duty of disclosure would normally arise. But, even assuming that Mr Beatty knew or ought to have known that Mr Hamilton regarded access to the on-trade from the outset as essential, was he under a duty of care to make clear that the first stage would be for distribution to the off-trade, with distribution to the on-trade only following later?

20. Doubtless, if Mr Beatty knew that this was Mr Hamilton's position, a failure on the part of Mr Beatty to speak might be regarded as

morally questionable. But that is different from saying that he was under a legal duty to speak.

21. In *Peek v Gurney* (1873) LR 6 HL 377 a prospectus for an intended company was issued by promoters who were aware of the disastrous liabilities of the business of Overend & Gurney which the company was to purchase. The prospectus made no mention of a deed of arrangement under which those liabilities were, in effect, to be transferred to the company. The appellant bought shares in the company and, when it was wound up, he was declared liable as a contributory and had to pay almost £100,000. He sought an indemnity against the directors, alleging misrepresentation and concealment of facts by the directors in the prospectus. His action failed because he had not in fact relied on the prospectus but had purchased the shares in the market. In the course of his speech, however, Lord Cairns expressed his agreement with the observations of Lord Chelmsford and Lord Colonsay that mere silence could not be a sufficient foundation for the proceedings. He continued, at p 403:

> "Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of share, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

22. Mr Clark accepted that something more than mere silence would usually be required to found a delictual claim for damages, but he argued that in certain circumstances a duty to speak would arise. In such cases a failure to speak would be negligent in law and a claim for damages could arise. For support, he pointed to the passage in the decision of the Court of Appeal in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, 794H-795A where Slade LJ said:

> "We can see no sufficient reason on principle or authority why a failure to speak should not be capable of giving rise

> to liability in negligence under *Hedley Byrne* principles, provided that the two essential conditions are satisfied."

Slade LJ had already identified the two essential conditions as being "that there has been on the facts a voluntary assumption of responsibility in the relevant sense and reliance on that assumption." He added, at p. 794E-F:

> "These features may be much more difficult to infer in a case of mere silence than in a case of misrepresentation."

23. My Lords, the simple truth is that Mr Clark was unable to point to anything in the facts or evidence to show that, in this particular commercial negotiation, there had been any voluntary assumption of responsibility on the part of Mr Beatty. Nor have I been able to find any. In these circumstances the *Banque Keyser* decision does not provide a basis for holding that Mr Beatty was under a duty of care to tell Mr Hamilton about the defenders' distribution strategy if it differed from the one favoured by Mr Hamilton. Mr Clark did not suggest that such a duty could be founded on anything other than a voluntary assumption of responsibility. The alternative way of putting the pursuers' case must therefore be rejected. So, if they are to succeed, it can only be on the basis that there was a negligent misrepresentation by Mr Beatty.

24. The first thing to be decided is what, if anything, on the evidence, Mr Beatty actually said which could amount to a misrepresentation. It is convenient to identify the Lord Ordinary's conclusion on this matter by setting out again the passage from the end of para 45 of his opinion, together with further passages from paras 46 and 47. Having referred to Mr Beatty's evidence that the initial move was always going to be into the off-trade, the Lord Ordinary continued in para 45:

> "Having considered the evidence on this critical point I am satisfied that Mr Beatty did not communicate to Mr Hamilton that this was his strategy. On the contrary, I am satisfied that Mr Beatty led Mr Hamilton and Mr Douglas to believe that he agreed with Mr Hamilton that Gleneagles should try to penetrate the on-trade from the beginning as well as the off-trade and that the defenders' distribution arrangements and facilities for both the on-

> and off-trades would be made available to Gleneagles. Had it been otherwise I am satisfied that Mr Hamilton would not have entered into the Agreement of 24 November 1992."

After explaining the position adopted by the solicitor advocate for the defenders in her closing submissions, the Lord Ordinary continued in para 46 and at the beginning of para 47:

> "Mr Beatty's strategy certainly was that *initially* distribution would be to the grocery sector, the off-trade, and that would be done through the defenders' food manufacturing sector, which in practice was Lyons Tetley, and in the event there was assistance from Lyons Tetley in certain areas, although not distribution on the evidence. However, as I have found, that was not what Mr Beatty represented to Mr Hamilton was the defenders' strategy and, in any event, his own strategy envisaged attempting to penetrate the on-trade at a later stage. (How that was to happen was not explored.)
>
> 47. What I have found Mr Beatty did represent to Mr Hamilton is essentially the case that the pursuers make in the first sentence of article 4 of the condescendence."

The relevant averment in article 4 of condescendence is of a representation "that the defenders' distribution arrangements and facilities for supply to the on-trade would be made available to Gleneagles."

25. It must be said that, on a strict reading at least, there is a certain inconsistency in the Lord Ordinary's exposition of his findings. On the one hand, in para 45, he finds that Mr Beatty led Mr Hamilton to believe that he agreed that Gleneagles should try to penetrate the on-trade as well as the off-trade "from the beginning". On the other hand, in para 47 he finds that Mr Beatty represented that the defenders' distribution arrangements and facilities for supply to the on-trade would be made available to Gleneagles – with, crucially, nothing being said about this happening "from the beginning". Presumably, however, the Lord Ordinary is just reflecting the way that the pursuers' case developed in the course of the proof, and he should be regarded as holding that Mr Beatty represented that Lyons would follow a strategy in which Gleneagles would be assisted to penetrate the on-trade as well as the off

trade “from the beginning”. Certainly, in his submissions before the House, Mr Clark accepted that, in order to succeed, the pursuers had to show that Mr Beatty had represented to Mr Hamilton that this strategy would be followed from the beginning.

26. Before turning to look at the evidence, it is useful to stand back and notice what the pursuers’ case really amounts to. As Mr Hamilton acknowledged in cross-examination, in the documentation making up the subscription agreement, which was revised by solicitors for both sides, there is quite simply nothing said about the distribution strategy that is to be followed. On any view, this is a striking omission if, from Mr Hamilton’s point of view, that strategy was a key element in his decision to enter the agreement. Therefore, in substance, the pursuers are arguing that, though nothing was said about the matter in the subscription agreement, Lyons were actually under an obligation to follow that distribution strategy. Prima facie, one might have expected commercial men to frame their agreement in a more businesslike manner so as to cover the point, if this was what they intended.

27. The position is all the more striking when two further aspects of the context of the alleged representation by Mr Beatty are considered.

28. First, Mr Beatty was just a few months away from retirement and must have known that he would not be the person in charge of distribution by the time that the business was up and running. So he was by no means well placed to make authoritative pronouncements about the distribution strategy that would be followed.

29. Secondly, and more significantly, Mr Hamilton’s position in evidence was that access to the on-trade was to be through the distribution network of Britvic – Britvic Soft Drinks Ltd. That company was owned by Britvic Holdings Ltd, 90% of the shares in which were held by Britannia Soft Drinks Limited (“Britannia”), the other 10% being held by Pepsi. Bass plc had a majority shareholding in Britannia, with a subsidiary of the defenders, Allied Breweries Ltd, and Whitbread plc holding approximately 25% each. In his evidence in chief Mr Hamilton said that, at the time of their negotiations, Mr Beatty had been a director of Britannia. But it emerged in cross-examination – and was confirmed when Mr Beatty gave evidence – that, in fact, he had never been a director of that company. However the misunderstanding may have arisen, it seems at least possible that Mr Hamilton’s belief that Mr Beatty was on the board of Britannia may have coloured his

understanding of what Mr Beatty said about access to the on-trade through Britvic, as opposed to access through companies in the defenders' group. The evidence of both Mr Hamilton and Mr Douglas showed that, certainly so far as the companies in the defenders' group were concerned, on the day the subscription agreement was being finalised, Mr Beatty was at pains to make sure that Mr Hamilton understood how little Lyons could do to provide Gleneagles with distribution through them.

30. In fact, however, access to Britvic's distribution network was never going to be easy. As the shareholding shows, the dominant force in Britannia was Bass and Mr Walter gave evidence that they were very protective of their own products. The potentially difficult climate is shown by the fact that the conclusion of an agreement between the pursuers and defenders was delayed from June until November 1992 because of a problem which had arisen between the defenders and Britannia. The evidence about that problem was a little vague. It seems, however, that, by reason of the arrangement under which Allied Breweries held their shares in Britannia, the defenders were precluded from themselves engaging in the bottled water market. A solution was eventually found about the end of October 1992. On 3 November the defenders' main board gave approval for the deal with the pursuers to go ahead. In the ensuing subscription agreement the solution was reflected in clause 7.6 which allowed Lyons to transfer all their shares to Britannia at any time before the end of 1993.

31. Against that background I turn to consider the evidence about the alleged representation by Mr Beatty. The Second Division reversed the Lord Ordinary's finding that Mr Beatty had represented that Lyons would follow a strategy in which Gleneagles would be assisted to penetrate the on-trade as well as the off-trade from the beginning. Essentially, the Division did so on the ground that, properly analysed, the evidence as set out in the transcript did not support the finding. Before the House it was not disputed that the Division had been entitled to interfere with the Lord Ordinary's finding, if indeed the evidence did not justify it.

32. In his examination in chief Mr Hamilton gave evidence that Mr Beatty had made his representation about the strategy to be followed at a meeting in the offices of Maclay Murray & Spens on 4 May 1992. The pursuers' pleadings contained an averment to similar effect. But, in her cross-examination of Mr Hamilton, Mrs Swanson, the solicitor advocate for the defenders, pointed out that Mr Beatty had not been

present at that meeting. In re-examination, having referred to his diary, Mr Hamilton concluded that the occasion in question might actually have been a visit by Mr Beatty to Blackford on 27 May. In his opinion, the Lord Ordinary in effect held that Mr Hamilton's evidence of what Mr Beatty had said was reliable, even though he had been mistaken about the occasion on which Mr Beatty said it.

33. At the hearing of the reclaiming motion the defenders' counsel submitted that Mr Hamilton's mistake about the date and place tended to suggest that the Lord Ordinary should not have relied on his recollection of what was said. Lord Marnoch considered that, at the very least, this was a matter that must be taken into account when assessing the reliability of his evidence. Since there was nothing to show that the Lord Ordinary had taken the point into account, Lord Marnoch considered that the matter was at large for the Division and he, for his part, would have found it difficult to attach any importance at all to Mr Hamilton's evidence on the point: 2006 SC 221, 257, para 122. By contrast, while aware of these criticisms of Mr Hamilton's evidence, Lord Hamilton proceeded on the basis that, so far as it went, it was both truthful and accurate: 2006 SC 221, 246, para 97. The Lord Justice Clerk agreed with both Lord Hamilton and Lord Marnoch. In adopting his approach, Lord Hamilton had regard to the fact that, in cross-examination, Mrs Swanson had adopted what he described, at p 243, para 88, as

> "a somewhat relaxed approach to the places and dates of meetings, concentrating more on the terms and substance of what may have been said, wherever and whenever that may have been."

Considering the opportunity which the Lord Ordinary had to observe Mr Hamilton giving evidence, and considering also the attitude adopted by Mrs Swanson at the proof, I prefer to approach the matter in the same way as Lord Hamilton. Proceeding, therefore, on the assumption that Mr Hamilton's evidence is to be regarded as truthful and accurate so far as it goes, what does he say that Mr Beatty said on the matter?

34. The first important passage comes in his evidence in chief where he was asked what he had said to Mr Beatty about why the pursuers wanted to go into the deal with the defenders:

> "That Allied was bringing the power of its distribution to this deal, and we were bringing the technology of the water business.
>
> Yes. When you spoke about it bringing its power of distribution, did you discuss within that concept any particular area of distribution, to any part of the trade? Were you looking at retail, at HORECA or what? - We were very definitely discussing HORECA.
>
> Discussing HORECA? - Yes.
>
> Yes. So you were looking for Allied to bring in access to HORECA? - Yes.
>
> Yes. And was that made quite clear to Mr Beatty? - Oh, it was crystal clear to him.
>
> And what was Mr Beatty's response to the suggestion that you were looking for Allied to bring access to HORECA to the deal? - His answer to that usually was that it was in Allied's interests to cover the distribution in all sectors.
>
> Yes? - And this was something they could do.
>
> Could do or would do? - 'Would do' was the implication .
>
> Yes. Well, you were saying they wanted your expertise, you wanted their distribution to HORECA ...? - Yes.
>
> … in particular? - Yes.
>
> And whatever exact words were used, they were giving you the impression that they would do it? - Yes."

Although the point was taken up in cross-examination, Mr Hamilton's later evidence added nothing of significance.

35. Taking this passage in his evidence at its highest in favour of the pursuers, it merely shows that Mr Beatty said that it was in Allied's interests to cover the distribution in all sectors and that this was something that they would do. The reply is hardly surprising: since the defenders were going to put £6 million into a company that hoped to sell large quantities of bottled water, it would plainly be in their interest to cover distribution in all sectors. What is missing is any indication that the defenders would distribute the product to both the on-trade and off-trade sectors simultaneously from the outset. I respectfully agree with Lord Hamilton's analysis of the passage: 2006 SC 221, 247, para 99.

36. Mr Clark suggested that an inference that there would be distribution to the on-trade immediately could be drawn from another passage in Mr Hamilton's evidence in chief where he was discussing the Britannia problem. Mr Hamilton said that he had discussed this problem with Mr Beatty

> "to the extent that, had he got it in his Water Division, would there be a problem in getting Britannia for the distribution in the HORECA trade? I was given an assurance that that would not be a problem once he had got the matter resolved, and it was really a courtesy to sort out the problem with Britannia, and he was choosing his moment, his timing and his method of handling it with the other parties.
>
> Right. So there was the shareholding problem? - Yes.
>
> But, on the back of that, on the back of whatever deal he struck with Britannia on shareholding....? - Yes.
>
> There was the understanding from him...? - Yes.
>
> That once the deal was in place you would get access to the HORECA trade? – Yes."

Mr Clark said that there was no suggestion of a gap in time between any deal over Britannia and the pursuers getting access to the on-trade. The simple fact, however, is that the passage does not contain anything which shows Mr Beatty actually saying that the strategy would be that Gleneagles would have access to the on-trade as well as to the off-trade from the beginning.

37. Mr Clark also drew attention to a passage in the cross-examination of Mr Hamilton:

> "Isn't that the case that when you were discussing distribution with Mr Beatty he talked about distribution through the existing sales networks that we have talked about previously, the spirits division or the food division, and said that Britvic would be a possibility, but he didn't give you any guarantees in that regard? - I have never had written guarantees, nor have I asked for them, but I have had discussions in which David Beatty told me that he was in fact organising the whole position to get us into Britvic, and it was being done by this device of presenting the

> option to Britvic to make the investment directly, or to take over the investment. This was part and parcel of his negotiating strategy."

Again, whatever the exact import of the passage may be, there is nothing which actually points to Mr Beatty having said that the defenders would arrange distribution to the on-trade through Britvic from the outset.

38. Mr Clark indeed acknowledged that there was only one place in the transcript where he could point to any specific words which might suggest that Mr Hamilton had referred to distribution to the on-trade being envisaged from the outset. The passage in question comes in Mr Hamilton's re-examination:

> "Now, before I come on to the completion meeting, if I may move back very briefly to the May, you have indicated that you can't say precisely which - you have told us there were several meetings in May? - Yes.
>
> You can't say precisely which meeting in May you spoke to David Beattie? - That is correct.
>
> Yes, but you spoke in chief about having put it to him - made it quite clear to him that you needed access to the on-trade; is that right? - Yes.
>
> To Britvic? - Yes.
>
> And what is your recollection at that meeting of his response? - Basically he understood that this was a component of getting the company off the ground.
>
> Yes. And did he say anything to you about his ability to do so, or anything of that nature, can you recall? - I have the - or had the - impression that this was something that he could achieve and deliver from the way he presented to me. To try to put specific words at this stage, I really couldn't do.
>
> Are you satisfied in your own mind, however, you put it to him that this was a necessary component ...? - Yes.
>
> ... of the deal you wanted to do? - Yes.
>
> Yes. And did he demur to that in any way? - He - there was an acceptance that this was a fact, that we needed this in the deal."

39. Both Lord Hamilton, 2006 SC 221, 248, para 102, and, indeed, Mr Clark in his submissions at the hearing seemed to think that the significance of the evidence was somehow reduced because it was given in re-examination. For my part, I would attach no particular importance to that factor: the value of evidence depends on its quality, not on the stage at which it is given.

40. On the other hand, I note that the question which elicited the important answer asked what Mr Beatty's "response" had been to Mr Hamilton saying that they needed access to the on-market. A response can come in various forms. Perhaps unsurprisingly therefore, the very first word of Mr Hamilton's reply ('Basically') immediately shows that he is not purporting to recall exactly how Mr Beatty responded - far less to give the exact terms of anything which Mr Beatty might have said. Mr Hamilton is just recalling that the purport of Mr Beatty's response was that he understood that access to the on-trade was a component of getting the company off the ground. A measure of interpretation by Mr Hamilton may well be involved.

41. Lord Hamilton considered, 2006 SC 221, 248, para 102, that "'getting the company off the ground' could equally refer to making Gleneagles a commercially viable entity (the ultimate objective), as it could to the strategy to be adopted from the outset to achieve that end.'" I doubt that. If - as Lord Hamilton thought and as may well be the case - Mr Hamilton was giving his interpretation of Mr Beatty's response, then his interpretation would undoubtedly have been that Mr Beatty was saying that there would be access to the on-trade from the outset. So Mr Hamilton would have used the words "off the ground" with that meaning. On the other hand, if Mr Hamilton was purporting to recall some specific words of Mr Beatty, I do not agree that they could "equally" refer to the ultimate objective of making Gleneagles a commercially viable entity. The phrase "off the ground" is a comparative newcomer to our language and must be a somewhat decayed metaphor from flying. Whatever its ultimate destination, a 'plane, or indeed a bird, gets off the ground at the beginning rather than at the end of its flight. In my view the more natural meaning of the evidence would be that Mr Beatty understood that access to the on-trade was to be a component of the strategy from the beginning.

42. Nevertheless, as Lord Hamilton notes, it is interesting to see that, after this particular answer, with a little further prompting, the witness said that there was an acceptance by Mr Beatty that the pursuers needed this in the deal. Yet, the one thing that is certain is that neither this nor

anything else about distribution was to be found in the deal as finalised in the subscription agreement.

43. Weighing up all these considerations, I do not regard this passage, even on its face, as providing a sufficiently clear basis for the Lord Ordinary's finding that, by what he said, Mr Beatty led Mr Hamilton and Mr Douglas to believe that he agreed with Mr Hamilton that Gleneagles should try to penetrate the on-trade as well as the off-trade from the beginning. It is much too oblique an answer. If it was to be the linchpin of the pursuers' case, the answer should have been clarified.

44. I am reinforced in that view by the fact that – as Mr Keen QC pointed out - when senior counsel came to cross-examine Mr Beatty, he did not put it to him that he had said that access to the on-trade would be a component of getting the company off the ground. Nor did he challenge his recollection that the strategy would be to concentrate on the off-trade and then move on to the on-trade:

> "And did you also discuss or do you remember rather whether you discussed the benefit of a branded presence in the HORECA trade which would give a spin-off into the branded retail sales? Do you remember discussing that? – I was always aware that Mr Hamilton had aspirations that the brand ought to be distributed in what I would call the on-trade as well as the off-trade. That was never in dispute.
>
> Yes, your position yesterday, your recollection yesterday was that there was an agreement almost from the outset that you would concentrate on the off-trade and then move on to the on-trade? – Absolutely.
>
> Now, to the best of your recollection, that was your understanding at the time, is that the position? – Yes.
>
> So, presumably, one would have to be in the on-trade for a period of months or a period of years...? – The off-trade.
>
> In the off-trade for a period of months or a period of years before one makes serious impact on the on-trade. You were envisaging brand building through the supermarkets and such things and then on the platform of that you would move into the on-trade because people, having seen it in the supermarket, you could say to the pubs and hotels, look, this is something that is very popular in the off-trade,

> you should be stocking it. Was it that sort of arrangement you envisaged? – That was the way I envisaged it.
>
> So the on-trade in a sense might be a couple of years down the line, is that really it? – It could be and, if it came forward earlier, then that is fine.
>
> But it was the secondary step? – As far as I was concerned, it was the least volume, the most difficult and carried with it the least amount of consumer awareness. People tend to order water in the on-trade and they get water. It doesn't really matter to the restaurateur, the pub owner or indeed the consumer what they get. If they go to a supermarket, they have a choice and they pick up the brand of their choice and that is the way I saw this operating.
>
> I see, and you are clear about that recollection? – Absolutely."

45. The Lord Ordinary accepted, at para 15 of his opinion, that Mr Beatty was a credible witness, but made no overall assessment of his reliability. He also noted, at para 45, however, that it was not suggested to Mr Beatty that he was mistaken in giving this unqualified evidence that the initial move was always intended to be into the off-trade. That being so, it is hard to resist the conclusion that, if Mr Beatty had in fact represented that there would be simultaneous distribution to the on-trade and off-trade from the outset, he would have been not merely negligent, but dishonest. Of course, there is no hint of an allegation of dishonesty or fraud in the pursuers' pleadings or in their conduct of the case. Moreover, as Lord Marnoch noted, any such conclusion would seem to be inconsistent with the certificate of credibility which the Lord Ordinary gave Mr Beatty: 2006 SC 221, 259, para 125. All this confirms that it would not be safe to rely on the single answer in Mr Hamilton's re-examination as a basis for finding that the pursuer has established the necessary misrepresentation by Mr Beatty.

46. For these reasons, which are, in very large measure, the same as those given by the Second Division, I am satisfied that the evidence did not warrant the Lord Ordinary's finding that Mr Beatty misrepresented the position to Mr Hamilton. I would accordingly dismiss the appeal. The appellants must pay the respondents' costs.

LORD WALKER OF GESTINGTHORPE

My Lords,

47. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry, and for the reasons he gives I too would dismiss the appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

48. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry, and for the reasons he gives I too would dismiss the appeal.