IN THE DISTRICT COURT
AT AUCKLAND

CIV 2010-004-000113
CIV 2011-004-001053

BETWEEN	TAMARA SPA LIMITED Plaintiff/Cross Claim Defendant
AND	ESPLANADE PROPERTY HOLDINGS LIMITED First Defendant/Cross Claim Plaintiff
AND	ANDREW VAN DER PEET Second Defendant
AND	NEELUFAR AMEEN Second Defendant (to cross claim)
AND	WASIM AHMED Third Defendant (to cross claim)

Hearing: 16 November 2011

Appearances: Michael Keall for Tamara, Ameen and Ahmed
Sam Carey for Esplanade and van der Peet

Judgment: 28 February 2012

JUDGMENT OF JUDGE RODERICK JOYCE QC
[ON CROSS CLAIMS ARISING OUT OF A LEASE]

Background

[1] Tamara Spa Limited (Tamara) operates a spa business offering Ayurvedic massage and beauty treatments for the face and body. Most of its clientele are women. It began and continues its business at 16 Blake Street, Ponsonby, where it commenced its enterprise in January 2008.

[2] On 22 August 2008 Tamara entered into a lease agreement with Esplanade Property Holdings Limited (Esplanade) that gave Tamara occupancy and use of a first floor room at the Esplanade Hotel in Devonport equipped with en suite facilities at an annual rental of $22,000 plus GST.

[3] The room was to be used by Tamara as a "Spa Treatment and Wellbeing Studio". The lease agreement was guaranteed jointly and severally by Neelufar Ameen (Ms Ameen) and Wasim Ahmed (Mr Ahmed).

[4] The party to this litigation so far unmentioned, Andrew van der Peet, was and is a director and shareholder of Esplanade.

Cross claims

[5] Differences arose concerning Tamara's inability to make anything like a profitable go of the Esplanade facility and that led to these (which are consolidated) proceedings.

[6] The cross claims essentially raise these issues:

- The extent (if any) of the liability of Tamara[1] to Esplanade for rent unpaid under the lease agreement.

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[1] It was accepted at the outset of the hearing that neither Ms Ameen nor Mr Ahmed was in a position to contest the efficacy of their guarantee of Tamara's obligations should those be sustained.

- The liability (if any) of Esplanade and/or Mr van der Peet for Tamara's wasted expenditure in setting up the hotel room as a spa facility and endeavouring to trade it as such.

Misrepresentation?

[7] The pivotal to the resolution of those issues question was whether Tamara was led into the lease agreement by a misrepresentation that Esplanade enjoyed a 50% occupancy rate.

Accord on approach to damages

[8] At the hearing it was made plain for Tamara that, if that question came to be resolved in its favour, recompense was sought in terms of wasted expenditure rather than relief in any other measure. And, on the other side of the case, there was no suggestion that that approach would be appropriate.

[9] So although that was not the way in which Tamara's claim was clearly framed at the outset, but it became obvious that that was not a problem for the parties.

[10] In fact no issue at all was taken with Tamara's stance that wasted expenditure would be a - or the - proper basis for any award of damages and (save for one or two almost inconsequential quibbles) the computation of that expenditure was not in dispute.

Legal remedies

[11] Tamara first called in aid the Contractual Remedies Act 1979 (its case being that it had become entitled to cancel the lease agreement on account misrepresentation and in reliance on ss 7(3)(a) and 7(4)(b)(ii) of that Act).

[12] In parallel terms, it sought an order under s 43 of the Fair Trading Act declaring the lease agreement void ab initio (s 43(2)(a)).

[13] It also sought relief on account allegedly wasted expenditure incurred in reliance on misleading and deceptive conduct – see s 43(2)(d).

[14] On the other hand Esplanade simply sought recovery in contractual terms of rent left unpaid under the lease agreement.

[15] As regards Mr van der Peet (he whom Tamara also sought to hold liable for its woes) the case was that he had participated directly in the lease negotiations and had actually made the alleged misrepresentation in terms denying him the ability to claim that he was simply acting on Esplanade's behalf, or as a conduit for it.

Misrepresentation/Misleading conduct?

Mrs Ameen

[16] The principal witness for Tamara was Ms Ameen. She, with her husband Mr Ahmed, is a director of Tamara. In 2008 Tamara had investigated the possibility of setting up a spa business within a hotel or resort in order to target hotel or resort guests and thereby access the tourist market. Mrs Ameen spoke of meetings at the Formosa Golf Resort and with the Stamford Plaza management. The Stamford approach had gone as far as the proffering of a formal proposal, but nothing positive had come out of that or, for that matter, from the Formosa approach.

[17] Ms Ameen then got in touch with Mr van der Peet of Esplanade. Esplanade owns the Esplanade Hotel building in Devonport but the actual hotel business is operated by Esplanade Hotel Limited (Esplanade Hotel). The latter is described as a small boutique hotel and function venue. Mr van der Peet is also a shareholder in, and director of, Esplanade Hotel.

[18] Ms Ameen met Mr van der Peet for the first time in May 2008. She outlined to him Tamara's ambition to set up a spa inside a hotel for the primary purpose of serving hotel guests. She was not cross examined so as to suggest that that had not been the focus of her discussion with Mr van der Peet.

[19] In cross-examination, she related that she asked him how much business Tamara might get from the hotel and his response had been "a lot", particular mention being made by him of it catering for weddings and conferences. According to her, he said that there would be a very lucrative market for Tamara at the Esplanade itself.

[20] Counsel for Esplanade put to Ms Ameen a subsequent 24 June 2008 email in which she had asked questions including "How much business do you think we may get from the hotel?". Counsel asked why, if Mr van der Peet had told her what she said he had in May, she would be posing such a question in June. Her response to that was that it was a matter so important to the project that she had asked him again via email. That response struck me as eminently real and rational.

[21] There was a second meeting on 24 July 2008. Mr Ahmed was also present on this occasion. Ms Ameen said that one of the first things they asked Mr van der Peet about was the level of hotel occupancy and that his response was that it enjoyed a 50 percent occupancy. That, she said, "captured our attention very strongly".

[22] She said that he had expressed the view that they would get a lot of business from hotel guests, catering as the hotel did for weddings and conferences; that guests had requested spa services and there would be good support for from hotel reception.

[23] Ms Ameen said that Mr van der Peet had originally suggested an annual rental of as much as $37,000 plus GST, with her response being in terms of $20,000 plus GST – see, for example, her 24 June email.

[24] At a third meeting Ms Ameen explained to Mr van der Peet, so she said, that based on the related to her by him hotel occupancy she calculated that Tamara could not agree to an annual rental of more than $20,000 plus GST. He had responded by emphasising the benefits of having support from the hotel reception. A rent of $22,000 plus GST (that in fact captured in the lease agreement) was then agreed.

[25] The lease agreement itself is dated 22 August 2008 and Tamara was ready to commence business by 1 November.

[26] When Mr van der Peet gave evidence, Mr van der Peet acknowledged the meetings in May and July 2008. In his written brief he had spoken of meeting Ms Ameen and Mr Ahmed in the May to discuss a lease proposal and had recorded that Ms Ameen alone had been at the July meeting: but in court came the concession that it had been the other way around.

[27] His evidence-in-chief was that at no point in either of these meetings was there any discussion about occupancy rates for the hotel. He was emphatic that he did not suggest it had a specific occupancy level, either generally or over any specific period.

[28] Likewise, said he, that there was no discussion – no questions were raised - about the clientele of the hotel apart from him mentioning that its restaurant and function facilities catered for weddings, with guests booking accommodation in the hotel.

[29] He said that neither he nor the hotel's manager Mr Cangir would have been able accurately to predict occupancy rates. The hotel was predominantly a short stay establishment (one or two nights) with most business coming from direct inquiry by individuals or walk-in customers. The busiest periods were weekends and those when there were special events on in Devonport.

[30] It was apparent to me when Mr van der Peet was giving his evidence-in-chief that he was quite determinedly seeking to distance himself from what happened on a day to day basis in terms of the operation of the hotel. He wanted the emphasis to be on his directorship role with Esplanade rather than Esplanade Hotel, and to persuade the Court that the day to day at the latter was not of regular interest to him.

[31] Given that Esplanade's sole, or at least a principal, interest would be in the returns that would be available to it from Esplanade Hotel, I found this puzzling to an extent detracting from any ability to form a positive impression of the reliability of Mr van der Peet's evidence.

[32] I certainly acknowledge that it was obvious that the Esplanade enterprise was and is but one cog in the wheel of his business interests. Nevertheless Mr van der Peet professed a detachment from that enterprise that lay beyond the probable realities: especially when it emerged in cross-examination that, after Esplanade took the property over in 2003, its focus was on minimising overheads so as to gain a better profit margin from revenue.

[33] It was asserted by Mr van der Peet, and had been put to Ms Ameen, that she had spoken to him in terms of seeing the North Shore area in general as an opportunity, as many of her Shore-based clients were reluctant to cross the bridge to Ponsonby.

[34] Her entirely rational response was that if that had been the objective Tamara would not have chosen small and expensive premises on the first floor of a hotel. Instead, it would have looked for less expensive, and more expansive, ground floor premises in, say, Takapuna.

[35] There was this of real significance in the cross-examination of Mr van der Peet:

> Q If someone was seeking to set up a business inside a hotel, isn't a question about the occupancy rate precisely the kind of question that you would expect from such a person?
>
> A If they were looking to set up the – a business in the hotel to service the hotel you mean?
>
> Q Yes.
>
> A I think that would be a reasonable question to ask.
>
> Q And obviously they weren't setting up a law firm or any such thing like, they were setting up a spa services, you would accept that that was a service which might well be compatible with the needs of customers staying at the hotel from time to time?
>
> A Yeah, it could be compatible.
>
> Q Given the compatibility between the customer's needs and the services offered, I'll say again isn't a query about room occupancy precisely the kind of question you'd expect to get?
>
> A Precisely, well I mean it would be a question I would personally ask, yes.

Q Because Tamara Spa say, particularly through Ms Ameen, says that was one of the first questions that they asked you on the 24th of July in the course of the meeting with you, that was the one of the first things they wanted to know. Do you accept that that's what happened?

A No, I don't.

Q But her evidence on the point is very detailed, she says, "One of the first things we asked him was the level of hotel occupancy. In response he advised us the hotel enjoyed 50 percent occupancy." Do you recall that?

A No, I don't recall saying that. I didn't say that the hotel enjoyed 50 percent occupancy.

Q But it is the kind of question you accept you would have asked if you had been standing in her shoes?

A Well, if I was setting up a spa for the hotel it would certainly be a relevant question.

Q She goes on to say, "He also said," meaning you, "that he thought we would get a lot of business from hotel guests as the hotel catered to weddings and conferences." Do you recall saying that?

A I certainly did say that the hotel caters to wedding guests and conferences, yes.

Q And that they would get a lot of business from –

A I don't recall saying that –

Q - such occasions?

A They would get a lot of business, I mean –

Q Is it possible you said it though?

A No, it's not possible that I said they would get a lot of business.

Q I see when the discussion turned to possible start dates, "We said we were thinking about starting the following year in April," and at that point she says, "Mr van der Peet encouraged us to start immediately to have the benefit of higher hotel occupancy over the summer months." Do you recall saying that?

A I didn't suggest to them to start immediately because we had a meeting in July but I did, I can certainly recall talking about starting for the summer.

Q And what would be the advantage of starting in the summer?

A Well the occupancy of the hotel is certainly much higher in the summer time compared to the winter.

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Q Well surely you would accept that that comment about the summer months was linked to occupancy when you made it?

A Um, well yeah there's more business in the summertime in the hotel.

Q Hmm?

A So I guess that would translate to there's more people which is occupancy, yes?

Q So to that extent at least you agree that you raised the question of hotel occupancy?

A Well I think the whole essence of the hotel was people staying in the hotel so, yeah, we would have talked about people staying in the hotel.

Q And of course they say you said to them quite simply the hotel enjoyed 50 percent occupancy. Are you sure you didn't say something to that effect?

A No, I didn't say anything to that effect.

[36] I also note that, on 12 June 2009 when clientele problems were self-evident, Ms Ameen emailed Mr van der Peet in terms including:

> When we took the premises from you, you said that the hotel had a 50 percent occupancy and that we would get reception support ...

[37] Ms Ameen's evidence was that she never got a direct response to that email and there was no denial of that. There was no suggestion in Mr van der Peet's prepared brief of any response to the email, written or oral: there was nothing but the (arising in the above cross-examination) reference he made to a conversation with her on the telephone and a subsequent meeting.

[38] The clear impression I got from the cross-examination of Mr van der Peet was that confronting Ms Ameen's claim about the 50 percent hotel occupancy issue was something Mr van der Peet sought studiously to avoid.

[39] I found his responses to questions about why he had not replied to the pertinent here email troubling, this being an example:

> ... I didn't agree with it and, um, the first time that I saw the number 50 percent was on this email, on the 12th of June. So I had a number of

> previous emails which were complaints about various things, this just seemed to be another thing that was coming through... Suddenly out of nowhere came 50 percent.

[40] So, seeking to give Mr van der Peet the opportunity fully to explain himself, I intervened with:

> Well I think what Mr Keall is trying to promote with you is the idea that if that took you by surprise you would have exhibited that surprise in the form of some response, saying, "I never said any such thing", that kind of result.

[41] That elicited this response:

> Well, I could see we were going down a track where there was a problem and so, you know, I'd already written to her on the 9th of June and explained to her. And then I, then subsequently I said we would deal with all matters when the rent was brought up to date. I didn't, yes you're right, I didn't specifically refer to the 50 percent occupancy.

[42] Mr Keall himself pressed on with the topic including with this question:

> Q If you really thought that there was no truth to that serious allegation, surely you would have written back, the simplest thing in the world, send an email straight back saying I never said that?
>
> A Um, that's one way it could've been handled. But I was dealing with her in correspondence, as you can see, all the way through with different things about the lease.

Mr Ahmed

[43] I turn to Mr Ahmed's evidence. This was short but to the point. He had made a diary note of the fact of the meeting with Mr van der Peet on 24 July 2008.

[44] He was as persuasively emphatic as had been his wife in saying that Mr van der Peet had told them in the course of the meeting that the hotel enjoyed 50 percent occupancy.

[45] That advice matched and met their plan to target hotel guests. It was - said he just as convincingly as had she - the statement most relied on by them in deciding to go ahead and sign the lease agreement.

[46] When Mr Ahmed was cross-examined there was a focus on the concession that neither he nor his wife had pressed Mr van der Peet as to what period the reference to 50 percent might have related. Mr Ahmed's response was he had taken it to relate to a business financial year - a not unreasonable response it seemed to me.

[47] To a disinterested but reasonably informed bystander, such a percentage occupancy reference would surely be taken to convey that it was arrived at by reference to a truly meaningful period of time.

[48] Ms Ameen and Mr Ahmed made a very positive impression on me as witnesses. I found each of them to be truthful people respectively doing their sincere (and entirely satisfactory) best to relate as accurately as they could recollect the events in question.

[49] Moreover - and as Mr van der Peet really had no choice but to acknowledge - if the Tamara intention was to rely principally on trade from hotel guests (as I find was the case) then the issue of occupancy had to be paramount.

[50] When it came to the crucial issue of what was said by him at the May and July meetings, Mr van der Peet's evidence did not strike positive chords with me.

[51] He got off to an unpersuasive start with his endeavours this way and that to distance himself from what matters. His responses were of a kind that would glide away from the points in question.

[52] While he was under no obligation to respond to such as what Ms Ameen said in the 24 June 2008 email, one would have expected an astute businessman (as I certainly took Mr van der Peet to be) who was in fact in a position to take issue with what Ms Ameen claimed had been said to have done just that if it was truly disputable.

[53] The way he sought to explain away the absence of any response by suggesting it was just one amongst a number of matters arising between the parties did damage to my ability to treat him as credible and reliable on the crucial issues.

[54] I add that it made no sense for Esplanade to suggest that it could ever have been rational for Tamara to take an en suite hotel room as a North Shore clientele in general facility. In other words, common sense said that Mr van der Peet's narrative was unreal.

[55] Representation was made and relied upon. For the reasons that will be evident from the above, I find that Mr van der Peet made the representation of 50% occupancy in the terms and in the context asserted by Tamara's Ameen and Ahmed and that that undoubtedly persuaded Tamara to enter upon the lease agreement: in fact, and on the evidence, no other view makes any kind of sense.

Consequences of hotel customer insufficiency

[56] By early March 2009 Ms Ameen and Mr van der Peet were exchanging emails about arrangements for a meeting concerning the marketing of the by then struggling hotel spa facility.

[57] On 5 March Ms Ameen emailed Mr van der Peet in terms including:

> I want to discuss more in detail about how we can get more bookings from the guest staying at the hotel and also those who book for functions etc.
>
> At this stage I feel that all the customers are coming from the marketing we do and being in a hotel is not really helping us in any way. We get about one or two guest a month and they also use an introductory $50 voucher and that is really not good enough for us.
>
> So please let us know what you can do as it is a bit slow with the current economic conditions and we need more to survive in the hotel.

[58] On 11 May 2009 Ms Ameen emailed Mr van der Peet raising issues about reception (hotel reception that is) support and so on. That, and signage, were still live issues a week or so later.

[59] On 8 June 2009 Ms Ameen emailed Mr van der Peet (this obviously following a meeting) to say:

> ... It is six months since we opened and are still losing money and really hard to divert customers there. We are not in a position to put any more

> money towards it to keep it afloat so will pull out of it end of this month... We will take our things out on 30 June from there.

[60] The theme of losing money was repeated in a further email to Mr van der Peet later the same day: one that was apparently prompted by a response to the first from Mr van der Peet referring to the lessee's obligations under the signed lease agreement.

[61] Those were matters Mr van der Peet pressed the day following in a letter pointing out that the lease expiry date was 31 October 2010 where he said:

> Your email message does not constitute formal notice as there is no provision for early termination of the lease. We expect Tamara Spa Limited to continue to meet all terms of the lease agreement until the lease expiry date.

This communication was in obvious response to that that Ms Ameen sent him "You said that the hotel had a 50 percent occupancy" email on 12 June 2009.

[62] In August there were exchanges between the parties about the possibility of modifying the rent: these included an email from Ms Ameen saying this:

> We are not able to sustain this lease at this price any more as it is unreal, unrealistic and not in accordance to market value. No business from the hotel to sustain it at a premium price.
>
> The spa was opened to cater to hotel guest and as you know there are no guest in the hotel and hence a huge (loss) for us.
>
> The only way we can continue our term and complete it is with a rental reduction. We are happy to finish our term at 10,000 annually starting from 01 Aug 2009.
>
> Other than this there is nothing much we can do as we do not have any funds or assets to pay. We have seeked legal advise on the matter and have to debate it legally if you do not accept the above.

[63] On 21 August 2009, Keegan Alexander laid the foundations for the current proceeding when they wrote to Esplanade on behalf of Tamara:

> On 22 August 2008 Esplanade Property Holdings Limited and our client entered into a lease agreement in respect of Room 109 of the Esplanade Hotel ("the Lease"). The purpose of our client doing so was to run a spa treatment and well being studio from the premises.

Prior to entry into the lease, you met with one of our client's directors, Ms Neelu Ameen, separately and then, immediately prior to 22 August 2008, both directors together, namely Ms Ameen and Mr Wasim Ahmed. At that meeting our client's directors confirmed their interest in operating a branch of Tamara Spa Limited's established business from the Esplanade Hotel and expressed interest in doing so from March or April 2009. You recommended that the business be commenced in time for the 2008/2009 summer. The obvious implication being that the hotel occupancy would be higher in the summer months as opposed to the Autumn and Winter months.

Clearly the question of hotel occupancy was very material to our client because it would be reliant on hotel occupancy to provide it with patronage of its spa business.

The discussion, as a consequence, moved to the question of hotel occupancy at which point you told our client's directors that, at the time, the Esplanade Hotel enjoyed 50% occupancy. You did not expand on that in any way and clearly intended our client to believe that, at that time, half of the 18 rooms in the hotel were occupied by guests. The obvious implication being that our client could expect such occupancy to continue. Our client relied upon that representation to calculate likely revenue its new business might achieve and the viability of it. Based on that calculation, our client agreed to enter into the Lease.

Our client's experience, and subsequent inquiries, have now revealed that it is extremely unlikely that, immediately prior to 22 August 2008, the Esplanade Hotel enjoyed anything resembling 50% occupancy. Accordingly, there has been a material misrepresentation that permits our client to cancel the Lease. Our client is considering its options in that regard.

In addition, such misrepresentation of the occupancy of the hotel at the relevant time amounts to misleading and deceptive conduct in terms of the Fair Trading Act 19868. Under that Act our client is entitled to the rescission of the Lease and compensation for losses incurred as a result of being induced into entry into it. It is considering its options under the Fair Trading Act 1986 also.

Our client will not be paying any rent pursuant to of the Lease until it has elected whether to exercise its right of cancellation or to affirm the Lease.

As part of that consideration, our client has approached you with a view to negotiating new rental terms that might enable it to complete the term of the Lease. However, that will only be possible if agreement is reached to the effect that, from 1 September 2009 to the expiry date, the agreed annual rental for the premises is $10,000 plus GST. Irrespective of whether or not that compromise is attractive to the landlord, it is the only basis upon which our client believes it could refrain from exercising its legal rights.

Our client requires a response to this letter within seven days.

[64] Mr van der Peet replied on 28 August 2009 in these terms:

We are in receipt of your letter dated 21 August 2009, sent to us by email.

> The allegations made by your client towards the Esplanade Hotel and Esplanade Property Holdings Limited are totally incorrect and have no substance. Our records of the lease negotiations make no reference to the occupancy levels of the hotel. It is clear however that at the time the lease was negotiated, discussion was held over the need for Tamara Spa to establish a presence in Devonport with a view to servicing its North Shore clientele.
>
> Tamara Spa's extensive marketing efforts in the local area have been directed at local residents, which also reaffirms their original intention to operate as a local Spa business in Devonport. To suggest the Spa was established to service the hotel guests only is in complete contrast to the business they have been conducting to date. There have been no marketing efforts by Tamara Spa in respect of attracting hotel guests to their business. In fact Ms Ameen has asked that our hotel reception staff not talk to guests about her business in the hotel.
>
> As Landlords, we cannot control how Tamara Spa conducts its business in regards to its marketing and promotion. A decline in business is no reason to default on a lease.
>
> Your client has no options; they have a lease and need to comply with its terms.
>
> We have made efforts to assist Tamara Spa Limited in relation to their business, including entering negotiations with regards to the lease.
>
> It was made clear to your client that we are only prepared to discuss any such assistance where the rent is continuing to be paid. This position continues.
>
> Our company as Landlord holds a valid lease with Tamara Spa Limited. We require Tamara Spa to bring the rental arrears up to date immediately, and to comply with the terms of the lease forthwith. From Wednesday 2nd September 2009, Tamara Spa Limited is in default of two months rent being $4,125.00 including GST. Upon receipt of the outstanding amounts, we are prepared to discuss Tamara Spa's situation further.
>
> Meantime, if required we will take any steps necessary to ensure that the lease terms are complied with, and accordingly remind your client again, that we will be seeking to recover any costs incurred by us in doing so from them.

[65] Each of these two letters had been marked 'Without Prejudice" but that the parties each included their letter in their bundle demonstrated a waiver from each side of the case.

[66] There were then some direct but unsuccessful negotiations for a compromise between the parties themselves. These came to naught and on 24 September 2009 Keegan Alexander wrote to Esplanade as follows:

> Further to our letter of 21 August 2009, we are aware that there have been some direct, but unsuccessful, negotiations between you and our client.
>
> The failure of those negotiations requires our client to make its election as to whether it will cancel the lease, or continue with it, in light of the pre-contractual misrepresentations it says induced it to enter into the relevant contract. Our client has made that election and hereby gives notice that it cancels the lease pursuant to s 7(3)(a) of the Contractual Remedies Act 1979. It will remove its chattels from the leased premises by 30 September 2009.
>
> While under no obligation to do so, our client intends to make a gratuitous payment that will have the effect of bringing the rent otherwise payable pursuant to the lease up to date to 30 September 2009. We do note, however, that the making of such gratuitous payment is without prejudice to our client's right, should it choose to exercise it, to bring proceedings to recover damages for the difference in revenue it could reasonably have been expected to recover, had the pre-contractual representations made been true, and that derived in the actuality over the term of the lease. Our client is in the process of calculating those losses and will make its decision, at a later date, as to whether any further action ought to be taken by it.

[67] The current proceedings ensued.

Esplanade Occupancy levels

[68] Following an earlier Court direction, Esplanade had supplied records of the Esplanade Hotel's occupancy levels for the period 1 March 2008 down to 30 September 2009.

[69] Those records showed the following average monthly levels of room occupancy:

March 2008	51.1 percent
April 2008	51.89 percent
May 2008	20.34 percent
June 2008	16.63 percent
July 2008	13.17 percent
August 2008	20.73 percent
September 2008	15.98 percent
October 2008	23.35 percent
November 2008	31.5 percent
December 2008	26.52 percent
January 2009	35.68 percent
February 2009	46.25 percent
March 2009	32.97 percent
April 2009	38.62 percent
May 2009	16.77 percent
June 2009	18.08 percent
July 2009	27.92 percent

August 2009	30.97 percent
September 2009	29.82 percent

[70] It will be noticed that while the occupancy rates for March and April 2008 were something over 51 percent in each case, those for May and June were very much lower, and July itself the lowest of all.

[71] Presumably because his stance was that there had never been any discussion about occupancy rate levels at all, Mr van der Peet had nothing to say on the subject of the percentage figures in his brief of evidence.

[72] He did not, for example, go back – as one can reasonably infer he could have – beyond March 2008 to produce figures for the first part of that year and back into 2007: he did not go back to any figures as might have justified (as accurate even in broad terms) the representation that I have found he made.

[73] Ms Ameen's evidence was that if the levels shown above had been disclosed by Mr van der Peet (who at that stage could only have accessed, in terms of complete months, a period to the end of June 2008) Tamara would never have signed the lease agreement and set up the spa facility in the en suite room. As already heralded, I accept that to be the case.

Tamara's Esplanade experience

[74] Tamara's records indicated that for the 11 months following commencement of business at the hotel spa customer appointments emanating from the Esplanade itself were 14, but producing a gross revenue of but $1,907.

[75] In its endeavours to make a go of Esplanade, Tamara adopted the artificial expedient of redirecting customers from Blake Street to the hotel premises so that staff there would be occupied: but these were customers who could have been readily served at Blake Street. That expedient lifted revenue earned at the hotel site to $37,865.

Money gone to waste

[76] Annexed to Ms Ameen's brief was a schedule in three parts, the first section being headed up "Tamara Spa Esplanade Set Up Costs".

[77] This section set out a series of items of expenditure totalling $18,258.84. Ms Ameen was not cross-examined on these at all.

[78] The schedule recorded that Tamara had sold some items of equipment on Trade Me for approximately $2,500, and that what were called the 'ongoing' costs over the period came to $27,367.73, the bulk of these comprised the rent for 11 months.

[79] Other items related to a footpath sign, Post Office box drops, printing of vouchers, legal fees and telephone and internet charges incurred. Again, Ms Ameen was not cross-examined on any of these.

Discussion

[80] I have already made clear that I much prefer the evidence for Tamara on the misrepresentation issue over that for Esplanade.

[81] In the circumstances as I find them to have been, it beggars belief that Tamara would have entered upon the lease of an en suite hotel room for the rental agreed had it not been persuaded by what had been conveyed to it on behalf of Esplanade that the hotel enjoyed an average occupancy of at least the level I find Mr van der Peet to have wrongly said was the case.

[82] Given how obvious it must have been that he was in a position knowledgeably to speak for Esplanade, it was entirely reasonable for Tamara (through Ms Ameen and Mr Ahmed – the former particularly) to take Mr van der Peet at his word (as I find it to have been) in that respect. All in all, I hold there to have been a distinct and substantive causative link between what I find Mr van der

Peet to have said and the decision of Tamara to take up the lease. Ms Ameen and Mr Ahmed cannot be criticised for taking Mr van der Peet at his word.

[83] As was said in *Vining Realty*[2] at [53]:

> ...
>
> (a) Under the Contractual Remedies Act a representation of the kind made operates in effect as a warranty. While this is subject to reliance on the representation being reasonable, where a clear and unequivocal representation is made, the representee should normally be able to take it at face value.
>
> (b) To put this another way (and to repeat a point just made), it does not normally sit well in the mouth of someone who has been guilty of misrepresentation to blame the other person for believing the misrepresentation.

[84] The latter point is particularly significant in the present case given that Mr van der Peet himself acknowledged that an inquiry as to occupancy rates was the very kind of thing he would have made had he been in the position of Tamara.

[85] As to the plea for the recognition of justifiable cancellation of the lease agreement it will be obvious from the facts as I have found them to be, set against the burdens imposed by the lease agreement, that the effect of the misrepresentation was substantially to increase those burdens. Thus Tamara's case for cancellation is, so I find, made out in terms of s 7(3)(a) and 7(4)(b)(ii) of the Remedies Act.

[86] With no prospect, as it turned out, of any meaningful business from hotel guests the lease represented a considerable outgoing obligation with nothing but trivial incomings to match it. The business conducted at the hotel as a result of the transfer of appointments from Ponsonby to the Esplanade did not, on the evidence, result in more appointments at Ponsonby to fill the gap.

[87] There was no evidence (such as might have operated to demonstrate an abatement of the effect of setting up and running the Esplanade facility) that Esplanade was other than a drain on Tamara's books with the lease payments going out for virtually nothing in return.

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2 *Vining Realty Group Limited v Moorhouse and Ors* [2010] NZCA 104

[88] The cost to Tamara was not simply significant it was considerable. When its solicitors wrote in terms giving notice of cancellation by Tamara, they wrote with every justification for doing so.

[89] The effect of s 8(3) and (4) of the Remedies Act is that cancellation relieves the parties from further performance but with cancellation not of itself divesting any party of monies paid.

[90] Thus there is no automatic obligation on Esplanade to refund rental paid. That kind of outcome (see s 8(4)) is left to damages remedies. And s 9 is there to alleviate any injustice that an insistence on a cancelling party still meeting outstanding at time of cancellation obligations. I will come back to these matters when I deal with issues of remedy.

Fair Trading

[91] Insofar as the Fair Trading Act claim was concerned I was referred to *Red Eagle*[3] where the Court of Appeal said:

> [28] It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer or, to take an extreme case, towards an individual known by the defendant to have intellectual difficulties. Richardson J in *Goldsboro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it

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3 *Red Eagle Corporation Limited v Ellis* [2010] NZSC 20

> is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.
>
> [29] Then, with breach proved and moving to s 43, the court must look to see whether it is proved that the claimant has suffered loss or damage "by" the conduct of the defendant. The language of s 43 has been said to require a "common law practical or common-sense concept of causation". The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct. It does not follow from the fact that a reasonable person would have been misled or deceived (the capacity of the conduct) that the particular claimant was actually misled or deceived. If the court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach *the* effective cause or *an* effective cause? Richardson J in *Goldsboro* spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage. The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage. The claimant may, for instance, have been materially influenced exclusively by some other matter, such as advice from a third party.

[92] Subject to the points of difference (immaterial when it comes to the present case) noted by the Supreme Court in [28] of *Red Eagle*, it can be seen that these applicable to a s 9 claim (and thence, a breach be established to s 43) will operate in a case like the present to ends similar to a Contractual Remedies Act claim.

[93] Tamara, in the person of Ms Ameen and (playing a lesser part) Mr Ahmed, must have been recognised by the highly experienced businessman that Mr van der Peet is as enthusiastic about and dedicated to the business of Tamara but also as people lacking the hard head which he, so I find, enjoyed – and which is an expression I use non-pejoratively.

[94] On my apprehension of the evidence it is beyond room for argument but that Mr van der Peet's entirely misleading assertions of a 50 percent on average occupancy rate was the effective cause of Tamara's entry into the lease (not to forget its guarantee by Ms Ameen and Mr Ahmed).

Mr Carey's submissions

[95] In his submissions Mr Carey, especially when dealing with the Contractual Remedies Act aspect of the claim, sought to mount that which I have rejected, namely the proposition that the real intention of Tamara was to use the en suite hotel room as an operational base for promoting and extending its business on a Shore-wide basis. For as I have explained already, that proposition did not have any useful evidential support.

[96] He also submitted that discussions about rent levels corresponding with that finally settled upon had come before the alleged representations. But that was to miss the point that the misrepresentations were plainly made before the lease agreement was actually signed and guaranteed by Ms Ameen and Mr Ahmed and thus the rent quantum actually fixed.

[97] Mr Carey also argued that any reliance had been unreasonable. But Tamara had no reason to doubt Mr van der Peet's word and he himself added no caution or reservation. Moreover, I am confident that he would have come across to Tamara as worldly-wise and competent in a degree apparently rendering unnecessary any further inquiry or even quibble.

[98] So far as cancellation of the lease was concerned, Mr Carey referred to the *Jolly* case[4], suggesting that the burden of the lease agreement was somehow distinguishable from, and thus had no part in, the failure of the venture. I could not follow that submission for, as between the parties, the lease was at the heart of it all.

[99] As I could best understand his submission it was as if to say that there was some contract between Esplanade and Tamara (and Ameen and Ahmed) beyond the lease. I was unable to make any evidential sense of this proposition and a reading of *Jolly* makes clear how different its facts were.

[100] He also submitted (but this simply came back to the already discussed and disposed of the matter of reasonableness) an absence of due diligence on the part of

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4 *Jolly v Palmer* [1995] 1 NZLR 65.

Tamara and the operation of 'external forces' – the recession: but that was merely to speculate. For no supportive of 'external forces' driven consequences was on offer.

Mr Keall

[101] I thus readily accept Mr Keall's submission that his, a wasted expenditure, approach to damages has rendered even less capable of recognition as relevant any submissions concerning the perceived state of the economy over the period in question.

[102] When replying Mr Keall rehearsed the fact of the claim being a reliance interest one: one for compensation for loss arising from steps taken by the innocent party in reliance here upon the existence of a commercially useful contract and with the object being to restore the innocent party to the position they would have occupied had the contract not been made. In that respect he referred to *Newmans Tours*[5].

[103] Fisher J's discussion of s 9 in *Newmans Tours* is the subject of extensive replication by Burrows et al at 21.3.1 (pp 728-730). The discussion includes reference to subsequent cases as well as academic criticism of aspects of Fisher J's approach.

[104] The discussion generated by Fisher J's judgment is interesting and instructive but does not, in my view, require particular rehearsal in the circumstances of this case. For it was not suggested by counsel that, should the Court decide that Tamara (and, for that matter in respect of their guarantee obligations, Ameen and Ahmed) were entitled to relief, there was any reason to differentiate for the purposes of relief between or amongst common law/Contractual Remedies Act/Fair Trading Remedies Act[6].

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5 *Newmans Tours Limited v Ranier Investments Limited* [1992] 2 NZLR 68 at 86 discussed in *Law of Contract in New Zealand* 3rd Edn Burrows Finn and Todd at 21.2.2(a).

6 That the relief sought was not expectation damages avoids the Fair Trading Act claim ramifications of *Cox and Coxon Ltd v Leipst* [1999] 2 NZLR 15.

[105] It was, so I understood, accepted that so long as any compensation was truly that, and not to be seen as a windfall, then no differentiating niceties needed to be observed here.

[106] Here I add, too, that the observation of Burrows et al (at 730) that -

> Clearly s 9 was not meant to supersede damages, yet equally clearly it is perfectly capable of the wider meaning which has been given to it by the Courts. Certainly it cannot any longer be doubted that the statutory discretion allows the Court to give such remedy as is thought to be appropriate without being tied down by rules concerning common law damages and their relationship with equitable relief –

is one that appears well supported by the cases.

Tamara gains relief against Esplanade

[107] My analysis necessarily drives the conclusion, which I now specifically express, that Esplanade is liable to Tamara on account the 50 percent occupancy misrepresentation, that being the result whether the claim is viewed in light of the Contractual Remedies Act or the Fair Trading Act.

[108] In terms of the finding already recorded (see [85] above) Tamara's cancellation of the lease is upheld.

[109] It is clear beyond any room for doubt that had Tamara been given the real facts about occupancy the lease agreement would never have been made.

[110] Signing it, and embarking upon the business undertaking for which it was secured, put Tamara on to a path of continuing loss until, after giving the venture a good try, it sensibly called halt.

[111] Tamara should be compensated for what, on account taking up the lease agreement into which it was misled, it has lost[7].

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[7] *B VR Ltd v Otaki Tyre and Service Centre Ltd (In liquidation)* [2008] NZCA 575 at [42].

[112] Its damages need to cover the totality of the loss flowing directly from the misleading conduct[8]. Tamara's wasted expenditure claim can be comprehensively met if, but only if, all of the obligations incurred under the lease are as of now nullified.

[113] The original, and still formally subsisting at trial, notice of claim of Tamara was the work of its principal when, originally, it was an unrepresented litigant. But - I am glad to say - counsel for Esplanade (who was obviously well aware of the basis of the claim for relief actually to be run by Tamara) did not demur at the approach taken.

[114] The set up costs identified by Ms Ameen came to $18,258.84 and she was not cross-examined on these. Outgoings, including the rent, totalled $27,367.73. None of the items was challenged, at least not effectively.

[115] Recovery achieved by the sale of items on TradeMe amounted to $2,500. This was obviously not a precise figure and the reason why was explained. I would also credit against the losses the $1,907 earned from Esplanade site generated custom.

[116] For reasons already stated (see [75]) Esplanade can claim no credit on account the client work directed from Ponsonby. That income was really and simply Ponsonby work diverted to Esplanade.

[117] Thus, cancelling all of Tamara's otherwise left outstanding lease agreement obligations, I award Tamara (on the recognised on both sides of the case as the right approach if it succeeded in its claim) wasted expenditure basis.

Set up costs		18,258.84
Outgoings		27,367.73
		45,626.57
Less		
TradeMe recovery	2,500	
Earnings	1,907	4,407.00
		41,219.57

[8] *Joblin Insurance Brokers Ltd v ME Joblin Joint Insurance Ltd* [2001] 1 NZLR 753, 759.

Ameen and Ahmed – guarantee obligations

[118] It obviously follows that Ms Ameen and Mr Ahmed are relieved of all obligations under their guarantees of the lease agreement.

van der Peet – liable alongside Esplanade?

[119] My disposition of this question is driven by the "broad approach" identified by the majority in *Body Corporation 202254 v Taylor* [2009] 2 NZLR 17.

[120] Mr van der Peet, as a director of Esplanade (and of the hotel company too) could not be categorised as, or as if, a mere employee acting in the course of his employer's trade.

[121] Ms Ameen (and Mr Ahmed) had, on the evidence I heard, good reason to believe that he was Esplanade.

[122] Mr van der Peet himself (and I noted this earlier) sought (unsuccessfully) to distance himself from what it was said he had said.

[123] If that was to lay a "conduit only" foundation then it was one set in sand.

[124] It is my view that, in the circumstances as (earlier in this judgment) I have found them to be, it is plain that Mr van der Peet was personally acting in trade. I say that because I find those circumstances to drive the inference that he personally saw Tamara's interest as one to be cultivated with a level of assiduity sufficient to gain for his interests (he being a shareholder both of Esplanade and the hotel) the distinct advantage of a "semi permanently" let room.

[125] Thus, under the particular rubric of the Fair Trading Act, I find him liable along with Esplanade to the full extent of its just found monetary liability to Tamara.

Result

[126] There will be judgment for $41,219.57 against Esplanade and Mr van der Peet jointly and severally.

[127] The cross-claim of Esplanade is dismissed.

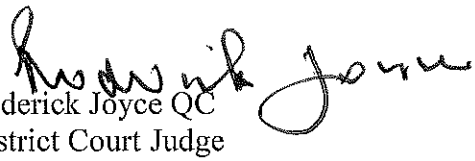
Interest

[128] Interest at the prevailing statutory rate will be payable on the $41,219.57 sum from the date of commencement of this proceeding down to the date of this judgment.

Costs

[129] Tamara will have costs (and disbursements as fixed by the registrar) against Esplanade and Mr van der Peet on a 2B basis.

Dated at Auckland this 28th day of February 2012 at 12 ~~am~~/pm.



Roderick Joyce QC
District Court Judge