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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 983/82

1472

BETWEEN

LYNETTE SHAREE GAUTIER
and ALAN ROBERT GAUTIER
both of Auckland, Hotel
Proprietors.

PLAINTIFFS

A N D

FRANK ROTHERAM of
Auckland, Land Developer

FIRST DEFENDANT

A N D

JOHN BARRY MOORE of
Waihi, Farmer

SECOND DEFENDANT

A N D

JAMES GAVIN DONOVAN of
Howick, Solicitor

THIRD DEFENDANT

Hearing : 24th, 25th & 26th October 1984
Counsel : C.B. Littlewood for plaintiffs
 Mather for first defendant
 Mrs. Hinton for second defendant
Judgment : 7th November 1984

JUDGMENT OF SINCLAIR J.

This civil action is probably the most bizarre case I have heard in nearly 7 years on the Bench. Certain aspects of it are so unbelievable that one could be forgiven for thinking that the scenario was written by Lewis Carroll. The action has its origins in the purchase by the plaintiffs

of a hotel business known as Remuera House Private Hotel, such purchase being made from the second defendant, with the first defendant being alleged to be the second defendant's agent for the purposes of sale.

The first cause of action is against the first defendant only and is founded in fraud on the basis that at the time negotiations were entered into for the purchase of Remuera House it was represented to the plaintiffs that a budget prepared by Messrs. Wilson, Clark & Partners, chartered accountants, was an accurate and fair reflection of the business associated with Remuera House. In addition it was alleged that the principal customer of Remuera House was the Post Office which would continue to patronize the premises following upon the sale by the second defendant to the plaintiffs. It was alleged that each of those representations was untrue in that at the time when the representations were made the Post Office had, in fact, withdrawn its patronage from Remuera House and that the budget was not an accurate and fair reflection, at that time, of the business which was carried on at the address in Remuera Road.

The second cause of action was based on the Hedley Byrne principle and I do not need to refer to that at the moment. The third cause of action was against the second defendant and it repeated the allegations of fraud and it was contended that they were made by the first defendant as the agent of the second defendant in circumstances which rendered the second defendant liable for the fraudulent misrepresentations of the first defendant.

The fourth cause of action was also against the second defendant, alleging breaches of certain terms of the contract and for the purposes of this judgment there is no necessity for me to traverse the allegations in respect of that cause of action.

The fifth cause of action was in respect of the third named defendant but, at the commencement of the hearing, by the consent of all parties, the third defendant was dismissed from the suit and there is no necessity to consider the allegations made in that cause of action at all.

So far as the plaintiffs' allegations are concerned, the evidence in the main came from the two plaintiffs, both of them stating that they had some prior knowledge of the business carried on at Remuera House and, from Mrs. Gautier, it appeared that she had initially been to the premises to make investigations on behalf of her parents as a place where, possibly, they might reside permanently. Later, Mrs. Gautier stated that she came into contact with the then proprietor, Mrs. Brain, and had certain discussions with Mrs. Brain concerning the lease which Mrs. Brain had of the premises and, in a general way, discussed the nature of the business carried on, being informed that the Post Office used the premises as a place to board members of their staff whilst undergoing training in Auckland. From Mrs. Gautier's evidence it appeared that the discussions which she had with Mrs. Brain were on a semi-

friendly basis and were not directed towards a business enterprise at all as Mrs. Brain disclosed, during the course of the conversation, that she was in the process of selling Remuera House and that it was already under offer to a purchaser.

At a later stage the plaintiffs themselves became interested in acquiring a guest house business and through the agency of a Mr. Hislop they were shown a property in Wellington Street which was also patronized by the Post Office for its trainees and, in addition, they were taken to a private hotel known as The Towers in Market Road, Remuera. During the course of discussions with Mr. Hislop, Mrs. Gautier indicated that she had some interest in Remuera House, in consequence of which Mr. Hislop communicated with Mr. Rotheram, the first defendant, and from there negotiations were entered into for the purchase of the business by the plaintiffs. Both Mr. and Mrs. Gautier deposed to the fact that they visited the premises on the 15th or 16th February 1981, the precise date being not within the memory of either party but it is apparent from the evidence that it was a Monday that the visit was made to the premises. Both plaintiffs stated that they went to the premises with Mr. Hislop on that first occasion and there met Mr. Rotheram, with Mr. Gautier taking the major part in the discussions as Mrs. Gautier had her baby with her and had her attention diverted to the child from time to time so that she left the majority of the enquiries to her husband.

During the course of discussions both Mr. and Mrs.

Gautier stated that Mr. Rotheram produced a budget which had been prepared for the previous owner, Mrs. Brain, by Messrs. Wilson & Clark, a firm of chartered accountants in Auckland. Mr. Gautier deposed to the fact that he was somewhat interested in the budget as he, himself, was a qualified accountant and that budget, which had been prepared as at the 30th September 1980, was on the basis of an 80% occupancy rate with an annual turnover of \$82,000. The budget showed, on an annual basis, a net cash surplus, before depreciation and tax, of \$41,520. Both Mr. and Mrs. Gautier deposed to the fact that they regarded that budget as having a marked effect on their considerations in relation to the purchase of the property, particularly as Mr. Rotheram stated that by reason of the Post Office using Remuera House as a hotel to place its trainees during training, that he fully anticipated that the budget would truly reflect what the plaintiffs could expect the turnover to be.

Mr. Gautier stated that he had a look at the register which was kept by the defendants and, from that, it appeared to him that Mr. Rotheram had been in charge of the property for about 9 weeks prior to the meeting in February 1981 and that, having regard to the fact that there were no Post Office trainees there during December and January, that it appeared that from the business which had been transacted by Mr. Rotheram up until mid February 1981 it justified an acceptance of the budget, bearing in mind that it had been explained that the Post Office used the premises for its trainees between the months of February

and November.

On the occasion of the first meeting Mr. Gautier stated that he asked for a copy of the budget but was informed by Mr. Rotheram that he did not have a spare copy at that time but that he would deliver one to the plaintiffs within the course of the next few days. It was the plaintiffs' evidence that the following weekend Mr. Rotheram called at their home and delivered to them a photostat copy of the budget and, once again, went over that budget with them and confirmed that, with the Post Office business, the budget would give a true representation of the nature of the business then being carried on at Remuera House. Additionally, Mrs. Gautier, stated that she had, up until she and her husband took possession of the premises, quite considerable contact with Mr. Rotheram and that he always spoke in complimentary terms about the business which was carried on at Remuera House which confirmed her belief in the budget.

At this point I wish to refer to the evidence of Mr. Rotheram on this initial meeting because it was the plaintiffs' evidence that by reason of the production of the budget and the assurances which they had received from Mr. Rotheram, as to the business from the Post Office, that they were induced into making an offer for the business. In other words, they indicated that they felt assured by Mr. Rotheram's representations that the Post Office business would continue and they had no reason to suspect otherwise and, with that business continuing, the contents of the

budget reflected the true nature of the operations of Remuera House.

However, when Mr. Rotheram gave evidence, he said that Mrs. Gautier, alone, was at the premises on the first occasion with the agent and that Mr. Gautier played little or no part in the negotiations at all, it being Mr. Rotheram's contention that Mrs. Gautier knew all about the business at Remuera House from her prior knowledge of it from Mrs. Brain and that there really was no necessity for him at all to acquaint Mrs. Gautier with the nature of the business which was carried on because she was already fully informed on this aspect. In addition, Mr. Rotheram stated, that the budget was not produced on the occasion of the first visit and that it played no part whatever in negotiations and that, in fact, it was not delivered by him to the Gautiers until some time after the agreement for sale and purchase was signed on 1st March 1981.

The significant aspect of those contentions is that not one of them was put in cross-examination to either Mr. or Mrs. Gautier and yet this was the foundation of the plaintiffs' claim against the defendants. On this aspect of the case, if Mr. Rotheram's contentions were correct, then the plaintiffs had manufactured their entire case and yet they were not subjected to the cross-examination which they ought to have been subjected to if that part of their evidence was under any real sort of challenge at all. Additionally, it must mean that the Gautiers, according to

Mr. Rotheram, manufactured their evidence in relation to the delivery of the photostat copy of the budget on the weekend following the first meeting of the parties.

Returning to the evidence of the plaintiffs they stated that on the night of the first visit to the premises, the agent, Mr. Hislop, called at their home with an agreement which Mr. Gautier went over and to which he added four clauses with the result that an offer of \$50,000 was made for the business. Subsequently they were informed that \$50,000 was not acceptable and that the price would have to be increased and that there was a Mr. White who was also interested in purchasing at a price of \$55,000. It was explained to the plaintiffs that Mr. Moore, who owned the business, wished to get back his purchase price, his expenses and something more, before he would sell and the plaintiffs decided, having regard to what had been disclosed in the budget and what had been represented to them, to increase their offer to \$55,000. In consequence, an agreement was signed at that figure, such agreement bearing date 1st March 1981. That agreement was prepared by Mr. Rotheram and, of some significance, is the fact that clause 10 of the agreement warranted that the turnover of the business had averaged not less than \$1,000 per week for the period of 2 months immediately preceding the execution of the agreement.

Subsequent to the execution of the agreement Mrs. Gautier deposed to the fact that she was at the premises on a number of occasions, particularly towards the end of

March 1981, as the staff, who had been employed by Mr. Rotheram, had left. During the course of her being at the premises she stated that she requested Mr. Rotheram on more than one occasion to get confirmation from the Post Office that the April intake of trainees would be arriving in accordance with an earlier booking arrangement which had been made by the Post Office and that Mr. Rotheram promised to do that but, according to Mrs. Gautier, he failed so to do. However, during the course of those conversations, Mrs. Gautier learned that the contact at the Post Office was a person named Janice and, just prior to the plaintiffs' taking possession of the premises, Mrs. Gautier rang that person and ascertained that the Post Office had withdrawn their patronage from Remuera House. That prompted Mrs. Gautier to write a somewhat bitter letter to the Post Office and that letter was produced to the Court. In the course of the letter she refers to the fact that Mr. Rotheram explained to her that the Post Office trainees, who used the hotel, constituted some four-fifths of the income of the business and she expressed her distress to find that the custom had been removed in the manner which she terms as arbitrary and unjustified. .

However, the purchase proceeded and some short time after taking possession Mrs. Gautier stated that Mr. Rotheram appeared on the premises to remove the last of his belongings and he enquired how the business was progressing, to which Mrs. Gautier stated that she replied that it was shocking and that Mr. Rotheram knew it was, whereupon Mr. Rotheram queried why he should know and Mrs.

Gautier informed him that the Post Office had withdrawn their patronage. Mr. Rotheram, according to Mrs. Gautier, denied all knowledge of that fact.

During the course of his evidence Mr. Gautier stated that having seen the budget and the register book he enquired whether there were any other books and was informed by Mr. Rotheram that the register was his official book but, in addition, he was shown the reservation system which was employed in the office. When considering the budget Mr. Gautier stated that he, himself, came to rely upon it having regard to the assurance from Mr. Rotheram that the Post Office used the premises for 10 months in the year and that for the remaining 2 months, over the Christmas period, the premises were used by tourists and sporting groups, such as bowlers, and that there was some evidence of such patronage. He did acknowledge that Mr. Rotheram informed him that some trouble could be expected from the Post Office trainees as they were young people and attempted to break the rules by bringing alcohol onto the premises.

Both Mr. and Mrs. Gautier stated that by reason of the withdrawal of the Post Office business the entire operation of the business had to be altered and, instead of operating a guest house, the operation became that of a tourist hotel, which was much more demanding in nature and resulted in increased costs. Those increased costs resulted from having to change bed linen more often with the resulting increase in wages for staff and, because it was not known from time to time how many guests would be in the

hotel, increased costs arose through having to make provision for food at all times.

Eventually, in 1983, the plaintiffs sold at a price of \$55,000 with \$30,000 being allowed for plant, fittings and fixtures and \$25,000 for goodwill. This is in contrast to the agreement under which they had purchased under which \$30,000 was for goodwill, including the benefit of the tenancy of the premises, while \$25,000 was for plant, fittings and fixtures. Both Mr. and Mrs. Gautier were subjected to a searching cross-examination by Mr. Mather on various matters, many of which were not central to the main issues. I record, however, that both of them came through that cross-examination unscathed and exhibited themselves as being trustworthy, reliable and truthful witnesses.

In support of their claim the plaintiffs called a Mrs. Carey, who was employed by the Post Office, and at the critical time in 1981 was responsible for arranging accommodation for Post Office trainees. She deposed to the fact that on the 4th February 1981, that is before the negotiations between the plaintiffs and Mr. Rotheram commenced, she visited Remuera House with her superior, Mr. Winston Palmer, and as a result of a complaint which had been received from trainees, informed Mr. Rotheram that the Post Office were withdrawing their custom from Remuera House. She advised Mr. Rotheram that the complaints related to overcrowding and in relation to the food which was served to the trainees and that 10 trainees were removed that day and the remainder would have been removed but for the fact that at short notice it was impossible to obtain any other

alternative accommodation. She confirmed that later she received a telephone ring from Mrs. Gautier and informed her that the Post Office had withdrawn its patronage and that that prompted Mrs. Gautier's letter of the 1st April 1981 to the Post Office.

Mrs. Carey was cross-examined on the basis that Mr. Rotheram may well have believed that if the complaints were attended to and rectified that the Post Office patronage would continue. While Mrs. Carey conceded that possibly Mr. Rotheram may have believed that, from the totality of her evidence I am satisfied that she conveyed unequivocally to Mr. Rotheram that so far as Remuera House was concerned he could not expect any further patronage of any description from the Post Office. That, to my mind, explains why Mr. Rotheram did not communicate with Mrs. Carey, whose christian name, incidentally, is Janice, and it explains why no further trainees were ever sent by the Post Office to Remuera House.

A land agent, Mr. White, also gave evidence to the effect that some time before 19th February 1981 he had had a discussion with Mr. Rotheram which resulted in Mr. White re-listing Remuera House for sale at a price of \$55,000, being informed by Mr. Rotheram that the clientele consisted of permanent guests and Post Office trainees. He was not told that the Post Office was no longer sending trainees to the premises.

On the question of damages, the plaintiffs called two witnesses, a Mr. Carr, a land agent, and Mr. Topliss, an accountant. Mr. Carr gave evidence that if the budget had come to fruition then he would have considered that the business could have sustained a figure of \$30,000 for goodwill but, as there was no profit at all in the operations which were carried out for the year ended 31st March 1982, that there was no goodwill in his view in relation to the business but he considered that the lease, which had something over 30 years to run, had a value of \$10,000. He made it plain that his evidence was based on market value and was not necessarily the sort of evidence which one might expect from an accountant. He observed that if the budget figures had been attained it would have reflected a business similar to that which was to be expected from a good average type of guest house business. He went on to say that some of the value of the business could well relate to the fact that it was situated in Remuera but, notwithstanding that, having regard to the performance of it in 1981/82, he could not see any goodwill in the business at all.

Mr. Topliss stated that when the Post Office ceased its patronage the business itself was no longer profitable and no goodwill figure could be ascribed to it. If, however, the budget figures had been attained then he would have considered the figure of \$30,000 for goodwill as being reasonable, although he went on to say that he did not ascribe any value to the lease at all and was considering

but the business itself. He, therefore, was inclined to go a little higher so far as goodwill was concerned in relation to the budgetted figures than was Mr. Carr. However, he made it plain that from an accountant's point of view, if there was no profit, then one could not expect to obtain any goodwill on a sale.

On the question of value the first defendant called an accountant, Mr. Ellis, who was of the view, and I consider with some justification, that, really, what would be paid for a particular business was that which would be paid by a willing buyer to a willing seller. However, Mr. Ellis was prepared to concede that if a particular business was making a reasonably good profit, it would command a greater price on the market than one showing a lower profit. Unfortunately, the budget referred to in this action was not put to Mr. Ellis for his comment, nor were the 1981/82 figures from the plaintiffs' balance sheet put to him. Thus, I do not have the benefit of his comments in relation to the goodwill of Remuera House at, or about, the time of sale, having regard to the loss of the Post Office patronage.

Mr. Moore deposed to the fact that he had taken no part in the negotiations at all, a fact which was acknowledged by the plaintiffs. But his evidence was truly remarkable for what he did not know rather than for what he did know. It became apparent that Mr. Moore had, for some time, owned some flats in Auckland and they had been managed by a firm of land agents known as Stan Gillam Ltd. by whom Mr. Rotheram was employed. Having experienced some

trouble with tenants in the flats, Mr. Moore stated he decided to dispose of them and on Mr. Rotheram's recommendation bought Remuera House. It was arranged through Mr. Gillam, by Mr. Moore, that Mr. Rotheram would manage Remuera House and in return Mr. Rotheram would receive a half share of any profit on sale. According to Mr. Moore, the first he knew of any proposed sale was when Mr. Rotheram rang him with an offer of \$55,000 and the suggestion that he purchase The Towers for \$175,000. However, according to Mr. Rotheram on this particular point, he was approached on a Sunday, which was the day before the Gautiers visited the premises, by Mr. Hislop, who stated that he had a possible purchaser and that he then immediately rang Mr. Moore, at Mr. Hislop's insistence, informing him that there was a possible buyer for Remuera House. But, if one accepts Mr. Moore's evidence, that statement by Mr. Rotheram is incorrect because Mr. Moore went on to say that once he received the offer of \$55,000 he immediately came to Auckland to sign the agreement.

Mr. Moore, according to his evidence, played no part whatever in the management or control of Remuera House and stated that no budget was prepared in relation to the operations carried on there and he was unable to explain how particulars of takings and expenditure arrived in his accountant's hands in Waihi, nor could he explain to whom certain monies were paid and which were referred to in the balance sheet as manager's salary. He claimed that Mr. Rotheram had a cheque signing authority, a fact which Mr. Rotheram denied, stating that at the particular time he

was bankrupt and could not operate a cheque account.

Following the sale of Remuera House, Mr. Moore purchased The Towers and on its sale he apparently took a house in Green Lane in part payment which became registered in his name and that of Mr. Rotheram's wife. Mr. Moore had difficulty in explaining how it came to be that the property was registered in Mrs. Rotheram's and his name and it appeared to me that Mr. Moore was distinctly uneasy at having to go into the witness box at all.

When queried as to why he signed a document with an assurance that the turnover had been at least \$1,000 per week in respect of Remuera House for the 2 months prior to its sale in March 1981, he simply said that he never checked the figures at all and must have relied upon what he was told. I gained the impression that Mr. Moore was far from frank with the Court and that he knew much more than he was prepared to divulge and that he deliberately adopted a facade of a convenient memory. I find that he was devious to an extreme and totally unreliable and unacceptable as a witness.

Mr. Rotheram acknowledged that originally he had sold Remuera House for Mrs. Brain to a Mrs. Mowbray and in relation to the budget he claimed that he was directed by Mrs. Brain to Mr. Clark, an accountant and obviously a partner in Messrs. Wilson, Clark & Partners, who was totally unable to produce any balance sheets to support the budget. He endeavoured to persuade the Court that from his point of

view he regarded the budget as a worthless piece of paper and that it could not, and was not, used as a basis for inducing anyone to purchase the business. As already recorded, it was his contention that Mrs. Gautier arrived with Mr. Hislop, alone, after having dropped her children off at school and that Mrs. Gautier knew everything about the hotel, her information having come from Mrs. Brain. He maintained that some days later Mrs. Gautier returned with her husband and, as earlier recorded, he maintained that the budget was not given until some time after the 1st March 1981 and that it played no part in the negotiations at all.

It was his evidence that Mrs. Gautier was the motivating force in the purchase of Remuera House and in his own words she was "hell bent" on getting it. He maintained that Mrs. Gautier informed him that Mrs. Brain had sold to him only because Mrs. Brain had lost Mrs. Gautier's telephone number. He maintained, in his evidence, that he could not give any assurance in relation to the Post Office trainees because there was no contractual arrangement but that he understood that that patronage was to continue. In the course of his evidence he stated that he knew there was to be no intake in April 1981 and that he had rung Mrs. Carey on that particular fact at a time when Mrs. Gautier was present in the kitchen when he put through the telephone call. There was another matter which was not put at all to Mrs. Gautier but it was quite evident that Mr. Rotheram was endeavouring to convey the impression that Mrs. Gautier was fully informed in relation to the intake of Post Office trainees.

Mr. Rotheram was at pains to insist that the budget played no part in the negotiations at all and at page 77 he had this to say when asked whether he commented upon the budget to Mr. and Mrs. Gautier :-

"It played absolutely no part to my recollection of the thing and when I heard that Mr. and Mrs. Gautier had come to the first meeting on the Monday and spent 45 to 60 minutes analysing the budget I thought that my memory had gone."

My finding is that his memory had gone but it was a convenient and deliberate aberration.

He maintained that the Post Office did not inform him that it was withdrawing its business. In fact, he insisted that he was told to get his act together and that the Post Office told him how to do it. It was for that reason that he was putting in study facilities at the time Mrs. Gautier made her first visit. None of that was put to Mrs. Carey.

When questioned as to how the warranty came to be included in the agreement in the terms in which it was Mr. Rotheram acknowledged that the stated turnover was incorrect, being over-stated, and that all he could really say was that it had got into the second agreement as a consequence of it having been included in the same terms as in the first draft agreement: There was no evidence from Mr. Rotheram that he had bothered to check the register and, if he had done so, he would have found by a simple piece of arithmetic that the stated figure of \$1,000 per week grossly over-

stated the real facts.

His wife also gave evidence, mainly in relation to the visit of Mrs. Carey to the premises and, in relation to the complaint concerning the food, she maintained that Mrs. Wilson, who had been the cook at Remuera House, was called in to take part in the discussion but none of that was ever put to Mrs. Carey. I regret to say that I disregard Mrs. Rotheram's evidence in its entirety as I find its probative value to be nil.

Finally, the agent, Mr. Hislop, gave evidence and he tended to confirm Mr. Rotheram's evidence that on the Monday, which was the occasion of the first visit to the premises, only Mrs. Gautier was present to the exclusion of her husband, although his memory appears to be very much at fault. He recalled the register being produced to Mrs. Gautier, but he also recalled another book being produced which related to the expenses which had been paid out. No one else had referred to that book at all. It was his evidence that the plaintiffs did not place any great emphasis on the Post Office business at all and I gather the impression that he was inclined to the view that Mrs. Gautier was going to look to her husband's employer, an airline, as an avenue of possible business. He did confirm, however, that on the sale of the business to the plaintiffs there was an agency arrangement between his employer and Stan Gillam Ltd. as to the sharing of the commission and from Stan Gillam Ltd's portion of the commission Mr. Rotheram would have received a percentage. That was

accepted by Mr. Rotheram.

While it became apparent during the cross-examination of Mr. Hislop that there had, the day before he gave evidence, been certain contact with Mr. Moore and Mr. Rotheram, I entirely acquit him of any impropriety at all but I am of the view that his memory was at fault and that I cannot, in those circumstances, place any great reliance upon his evidence at all. One can excuse Mr. Hislop's memory because it is in respect of matters some 4 years old and he must, during the course of his business activities, have come into contact with many people within that period.

However, so far as Mr. Rotheram is concerned I am of the view that his evidence was totally unreliable and I go so far as to say, false. I am satisfied that both Mr. and Mrs. Gautier were present on the first occasion, on or about the 15th or 16th February 1981, and that on this occasion the budget was handed over by Mr. Rotheram and on the basis that, having regard to the Post Office business, it was stated by Mr. Rotheram to reflect the true nature of the business carried on in Remuera House. I am satisfied that at that meeting Mr. Rotheram knew the Post Office patronage had been withdrawn and that his representations were made deliberately to induce the Gautiers to purchase. I am satisfied that this was a wanton act upon Mr. Rotheram's part in an attempt to quit the business which had not been a financial success and so as to enable him to persuade Mr. Moore to invest in The Towers which, I suspect,

Mr. Rotheram wished to be involved with in a more substantial way. Indeed, his own evidence disclosed that he did become involved in a more substantial way in relation to that particular business.

I am satisfied also that Mr. Rotheram delivered a copy of the budget to the Gautiers on the Saturday following the 15th or 16th February 1981 and that he, again, re-affirmed the fact that the Post Office business would continue and that the Gautiers could expect a return along the lines of those projected in the budget. I am satisfied that Mr. Rotheram well knew, following the visit of Mrs. Carey, that the Post Office business had been withdrawn and that, because he knew that, he did not communicate with Mrs. Carey in relation to the April intake as requested by Mrs. Gautier because he well knew the answer. I find that Mr. Rotheram was an opportunist prepared to resort to any means whatever to attain his ends.

At the time he had a licence under the Real Estate Agents Act 1976, which licence, according to his evidence is at present with the Institute and is due for renewal next April. From the manner in which Mr. Rotheram conducted himself in relation to this particular transaction I am of the view that he is not a fit person to hold any licence under that Statute and I direct that a copy of this judgment be forwarded to the Real Estate Institute for it to take such action as it thinks fit.

The representations upon which the plaintiffs

rely, I find, were made deliberately and knowingly by Mr. Rotheram and were made by him knowing that they were false, for the express purpose of inducing the Gautiers to purchase the business and that they did so. In consequence I find that fraud has been established as against Mr. Rotheram, and Mrs. Hinton acknowledged that, having regard to the evidence, it was impossible for her to suggest that Mr. Rotheram was not the agent of Mr. Moore. He, in fact, was the agent of Mr. Moore who plainly had left everything in Mr. Rotheram's hands so far as dealing with Remuera House was concerned. Legally, Mr. Moore must accept responsibility for the actions of his agent.

During the course of his submissions, Mr. Mather attempted to obtain some comfort from a letter written by the Chief Postmaster in Auckland to Mrs. Gautier on the 9th April 1981. That letter tended to suggest that because of other accommodation, closer to the City, the likelihood of the Post Office sending trainees to Remuera House was receding. However, that letter is at variance with the evidence of Mrs. Carey and I have no way of knowing what prompted the letter to be written in the manner in which it was and without any evidence on that point I am not prepared to place any real value on the letter at all. Having regard to the tone of Mrs. Gautier's letter, which was somewhat strident, I can accept the Chief Postmaster has written a letter in a conciliatory manner in the hope that he might avoid unpleasantness.

I turn now to consider the question of damages.

On the evidence which is before me the business, as a business, had no value whatever following the withdrawal of the Post Office patronage. It was a mere shell compared with its former form but the lease, on Mr. Carr's evidence, had a value of some \$10,000.

It was suggested that the sale by the plaintiffs in 1983 indicated that there was still some value in the business but that overlooks a number of significant factors. Firstly, I have no evidence at all as to how the goodwill was arrived at in the sale in 1983 and the forms of the two agreements are different. On the occasion of the sale to the plaintiffs the goodwill of \$30,000 was stated to be the goodwill of the business including the benefit of the tenancy of the premises. In the 1983 agreement the goodwill was stated to be that of the business including the benefit of the premises. But the 1983 agreement was conditional upon the landlord consenting to the premises being used as a restaurant and also was subject to the purchaser being granted a tourist house licence. However, I am satisfied, on the evidence, that the whole nature of the business had changed between 1981 and 1983 and that what had originally been a guest house business had become, in reality, a tourist hotel. In those circumstances it seems to me to be impossible for me to have any regard to the 1983 agreement at all. I must therefore deal with the matter on the evidence as it was tendered to me. In accordance with that evidence the business, as a business, had no value and the only value was \$10,000 which is attributable to the lease. Accordingly, in my view, the loss sustained by the plaintiffs is \$20,000.

On behalf of the plaintiffs, Mr. Littlewood sought to recover in addition to damages calculated in accordance with the normal rules, aggravated damages in the event of fraud being found on the part of the defendants. There are certain types of actions, such as for libel and wrongful arrest, where aggravated damages could be regarded as being in issue from the moment the writ is filed. But that has not been the case in relation to actions having their origins in contract. In such cases, if aggravated damages are to be claimed, then, in my view, the defendants are entitled to notice that such damages are in issue. No such notice was given in this case and I, therefore, decline to make any such award.

There will, therefore, be judgment for the plaintiffs against both first and second defendants in the sum of \$20,000 with interest on that sum at the rate of 11% from the 1st April 1981 down to the date of the delivery of this judgment. In addition, the plaintiffs are entitled to costs according to scale together with disbursements and witnesses' expenses. I allow for two extra days and in addition allow \$150 to cover both discovery and inspection.

Under Rule 99N the second defendant sought indemnity from the first defendant in the event of any judgment being entered against him in favour of the plaintiffs. It was acknowledged by the first defendant that in those circumstances the second defendant was entitled to the indemnity sought. There will therefore be an order that the first defendant indemnify the second

defendant in respect of the judgment obtained by the
plaintiffs in this action.

B. D. W. J.

Solicitors :

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|------------------|---|--|
| Plaintiffs | : | Greig, Bourke, Kettelwell & Massey, Auckland. |
| First Defendant | : | Kensington, Haynes & White, Auckland. |
| Second Defendant | : | Hesketh & Richmond, Auckland. |