Set I:

IN THE HIGH COURT OF NEW ZEALAND A. 84/82

PALMERSTON NORTH REGISTRY

BETWEEN: ERIC JOHN LANGRIDGE and IRENE LANGRIDGE his wife both of Palmerston North, Managers

Plaintiffs

A N D: DARCY EVERTON NICHOLLS of 109 Ruahine Street, Palmerston North, Motel Proprietor

First Defendant

A N D: TENNANT EDWARD WILSON of 59 Cambridge Terrace, Wellington, Chartered Accountant

Second Defendant

Hearing: 7, 8, 9, 10, 13 and 23 May 1985

Counsel: H.S. Lusk QC and P. Easther for Plaintiffs
J.R. Wild for First Defendant
S.S. Williams for Second Defendant

Judgment: - 6 JUN 1985



JUDGMENT OF JEFFRIES J.

The plaintiffs in this case are a married couple and in March/April 1982 signed a contract with a third party to purchase chattels and the lease of a motel business situated at 118 Ruahine Street, Palmerston North, known as the "Sunglow Motel". The contract document itself has many unsatisfactory

features about it including no date, and for the court, no satisfactory evidence of its execution and amendment to a very material term being the length of the lease. It is worth stating here a witness who could have shed considerable light on this area was the Langridges' solicitor, Mr H.J. Davidson of Waipukurau, who acted for them in the purchase. A dubious advantage of the adversarial system is the right of a party not to call an available witness on a material issue, but it presents the court with an ungraspable situation. For the plaintiffs it was Mrs Irene Langridge who was the negotiator for the purchase of the lease and chattels, and her husband, who throughout was engaged in full-time employment in the city, apparently executed the contract for the purposes of security but had little else to do with the whole affair. At all stages in the negotiation, to be detailed hereafter, it was intended Mrs Langridge would operate the motel business, and that she and her husband would live on the premises of the motel in one of the 7 units.

The first defendant in early 1982 was the owner of the freehold property on which the motel is situated, and he had conducted the business of a motelier there for about 16 months prior to the transactions about to be described. At the time he owned and ran the Sunglow Motel he had the lease of a group of motel units on the opposite side of Ruahine Street close to the Sunglow, named the Aztec. For most of the time he had control of both motels he ran them as one business. The second defendant was throughout the material period accountant to the first defendant. His exact role in these proceedings will emerge from the analysis of the evidence.

The plaintiffs sued the first defendant in tort alleging in the first cause of action fraudulent misrepresentation, and in the second, and alternative cause of action, negligent misrepresentation. The evidence was

completed on the basis of those 2 causes, but at the legal argument sometime later, Mr Wild for the first defendant conceded his client owed the Langridges a duty of care. With that concession, Mr Lusk for the plaintiffs was prepared to seek judgment on the second cause of negligent misrepresentation alone. Negligent representation is unintentional misrepresentation, with fraud and deceit intentional misrepresentation. Therefore the 2 causes are within the broad genre of fraud and deceit requiring for each the same sort of factual analysis. The second defendant was sued for negligent misrepresentation in tort and contract. The contractual remedy sought against the second defendant was also the subject of change in legal argument. The plaintiffs, as an alternative cause, alleged a contract but gave evidence which in effect denied it. The second defendant in his evidence was of the view he had a contract with Mrs Langridge. At legal argument Mr Lusk abandoned the claim for a contractual remedy. The net result is that both defendants face the same cause of action, but there was no concession of duty of care on the part of the second defendant. Before analysing the evidence in detail it might be to the advantage of this judgment if I first recount in a general way the transactions which took place between the defendants and the plaintiffs, and a third party with whom the actual contractual arrangements were reached by the plaintiffs. The plaintiffs and first defendant never concluded a contract between themselves.

The outline of the transactions giving rise to this litigation is as follows.

In February 1982 Mrs Langridge and the first defendant, Mr Nicholls, were acquaintances. Mrs Langridge had on a temporary basis from time to time managed another motel in Palmerston North for short periods for its owners. She had also cleaned in motels. Her past involvement functionally with

motels was as an employee, barely on the management side, and then on a temporary basis. In February negotiations were undertaken and which are described in greater detail hereafter, between Mrs Langridge and Mr Nicholls for the lease of the Sunglow Motel. Collaterally other negotiations conducted by Mr Nicholls culminated in him contracting with a Mrs Kah Hong Tan for the sale of the total motel complex, including chattels, for the sum of $175,000. For the Nicholls/Tan contract the chattels were valued at $50,000 with such figure supported by a written valuation from a Palmerston North firm of real estate agents dated 3 March 1982 and attached to their contract. Annexed to the letter is a schedule which simply lists chattels in the seven motel units and storeroom. The only valuation figure is contained in the letter itself which states:

> 3 March 1982
>
> Sunglow Motel
> Ruahine Street
> PALMERSTON NORTH
>
> Comprising 7 units in the older style but in very tidy condition. All floor coverings, drapes, blinds, light fittings, built-in furniture and bathroom fittings are included as are the comprehensive chattels per the attached list.
>
> We consider that the chattels have a present value of $50,000.
>
> P.J. Robinson (signed)
>
> P.J. Robinson"

Mrs Langridge said she had never seen that valuation until it was produced from the U.D.C. file at a conference after the motel business was in deep trouble. The list of chattels was attached to the Tan/Langridge contract, but not the valuation letter. The contract for sale by first defendant to Mrs Tan was dated 3 March 1982, the same date as the above letter. The plaintiffs entered into a contract with Mrs Tan, on a date unknown, whereby they took a lease of the motel premises for a term of eight years commencing on 1 April 1982 for the total consideration of $60,000, being divided as to $10,000 for goodwill and $50,000 for the chattels. More will be said of the chattels. The annual rental was fixed at $19,000.

The brief description of how this arrangement was brought about is that Mr Nicholls wished to sell the freehold on which the motel business was run and he found a buyer in Mrs Tan, but she apparently viewed a purchase by her as an investment and did not wish to involve herself in the motel business. To effect Mr Nicholls' purpose of selling the total freehold property, including chattels, to Mrs Tan, it was contractually incumbent upon him to obtain for his purchaser a suitable lessee of the motel business at a rental and on terms included in the contract with Mrs Tan. The contract between Mr Nicholls and Mrs Tan was conditional upon him finding a future lessee for a total term of 15 years, but this was changed as we shall see. It is important to note that Mrs Tan's interest in the chattels themselves as owner was minimal. It was for her a skip pass because she virtually sold them as she received them. Mrs Tan had at that time no interest in ensuring she was obtaining value for money in regard to the chattels, although she may have regretted her lack of interest as events turned out.

From that brief account it can be seen that Mr Nicholls stood to achieve his purpose of sale only if he could arrange a lessee on given terms for his purchaser. Therefore, in the transaction of sale by Mr Nicholls to Mrs Tan, it was required that there be a contract to lease the motel and purchase of chattels at a stipulated price from Mrs Tan, by prospective lessees, who it turned out were the plaintiffs. The central allegations of the plaintiffs against the first defendant are that arising out of those transactions there were negligent misrepresentations by Mr Nicholls on two vital areas, namely the income of the business, and the cost of electricity supply. The allegations against the second defendant concern advice he gave to the plaintiffs by way of production of a cash flow budget in the course of negotiations, and for the specific purpose of their borrowing.

The principal factual evidence of the plaintiffs against both defendants, came from Mrs Langridge. She stated she first discussed the possibility with Mr Nicholls of her becoming involved in the business of Sunglow Motel in early February 1982, but at that stage the negotiations came to nothing because Mr Nicholls wished to sell and Mrs Langridge was in no position to buy. Some 1 or 2 weeks later Mr Nicholls took the initiative by communicating with Mrs Langridge with a proposition that she become the lessee of the business, as apparently he had already entered into negotiations for the sale of the land to Mrs Tan. At the time Mr Nicholls re-opened with Mrs Langridge he admitted he had a "verbal agreement" with Mrs Tan for sale, which I take to mean the main terms were settled and were as largely contained in their final written agreement. The written agreement between them provided the lessee would have a lease term of 10 years with right of renewal for 5. In circumstances that were most unusual, and will be described hereafter, the final term agreed upon between plaintiffs and Mrs Tan was 8 years.

The discussions on this second occasion opened with a sale price of chattels and goodwill (presumably for the lease) at $60,000. As the purchase price to be paid by the plaintiffs I am satisfied Mr Nicholls never waivered in the slightest degree from the figure of $60,000. Throughout all the machinations that followed it was never even supposed that that figure was negotiable. It was fixed rock solid by Mr Nicholls, and had to be paid if Mrs Langridge was to get the motel business. The most obvious explanation of that posture on Mr Nicholls' part was that he had no room in which to manoeuvre because of his "agreement" with Mrs Tan. To shift on that would at least jeopardise the sale, and in all probability end it. That figure of $60,000 was multi-functional in all these transactions. First, it represented an important block of the bargain between Mrs Tan and Mr Nicholls. In reality Mrs Tan was never effectively to own the chattels so it appears she took little interest in their value. She wanted a lessee and she unloaded onto Mr Nicholls, clearly a very anxious seller, the obligation of finding one. The important parts of this block to Mrs Tan were the term of the lease and the rental. The net result of the bargain to her was the ownership of a freehold block with a motel complex erected thereon leased for a term at a yearly rental acceptable to her, paying the net sum of $115,000. Secondly the figure of $60,000 was the income Mr Nicholls said would be derived from six units at the motel available to let to the public. I leave to later in the judgment whether this was in law a representation as to a past or existing material fact, or a prediction of what could be achieved. Thirdly, $60,000 represented consequentially the purchase price in the contract between the Langridges and Mrs Tan on the purchase of chattels and lease. That was pre-determined, of course, and completed the circle of transactions. I add here that global figure of $60,000 was cut $50,000 for chattels and $10,000 for lease in the Nicholls/Tan contract and also in the Tan/Langridge contract. From the

evidence it is unfathomable now which of the two functions identified above of purchase price and the revenue was the base figure. The agents had the property for sale at $180,000 and at $175,000 Mr Nicholls was getting almost his asking price. The inference from that is having achieved nearly his asking price, he was obliged to agree to get the absolute top price for the skip transactions of sale of chattels and lease. How he arrived at $175,000 with Mrs Tan is not known, but he was fixed with the $60,000 and he then set about getting it.

It is convenient now to give a little of the history of the Sunglow prior to recounting exact detail of the negotiations between Mrs Langridge and Mr Nicholls. Mr Nicholls in 1979 took a lease of the Aztec Motels in Ruahine Street. This is a modern 16 unit motel of a superior standard. Across the road is the Sunglow Motel which was possibly the first commercial motel in New Zealand. It originally was a house and by addition the owners expanded the buildings to provide 7 units. The impression gained by the court was of a motel complex not originally constructed as one but it grew to be one with, at best, a middle grade appearance and standard. It was established by people called Woods and operated by them throughout until the sale in about October 1980 to the first defendant. Mr Nicholls gave evidence that he was a reluctant purchaser but at the time Mr Wood was terminally ill and a sale apparently was urgent. Mr Nicholls agreed to buy for $85,000 of which he paid $40,000 in cash, and the vendor left a mortgage of $45,000 interest free for 9 years. The mortgage was discharged on settlement of the sale to Mrs Tan. Mr and Mrs Nicholls commenced the running of the Sunglow at the beginning of November 1980, as a separate business from the Aztec with its own individual set of accounts, until end of March 1981. From then on the two motel complexes were conducted as one business. Mr Wilson, the second defendant, recommended the decision to combine because

he said, significantly, he could not satisfactorily separate the revenue. Apparently all bookings for the Sunglow were through the Aztec, the former having no separate telephone connection. Breakfasts and laundry were all done at the Aztec and taken across the road. Throughout the Nicholls' operation of the Sunglow the number of units available to the public was 7.

Sometime, probably mid-February 1982, Mrs Langridge and Mr Nicholls began negotiating seriously about a lease of the motel. At the very beginning of the session it was stated quite firmly by Mr Nicholls she would have to pay $60,000 and then the discussion centred on how it was justified, and how it could be met. Mr Nicholls prepared a rough budget, apparently as they talked. It was produced in evidence and I reproduce it.

"Turnover approx 60,000
Rent 20,000
Bal 40,000

Operating expenses
Say 3000 Per unit 18,000
Bal 22,000

Say you borrow 30,000
UDC Payments will be
45000 over 5 years 9,000

13,000 PROFIT
250 PER WEEK

RENT FOR HOUSE 4,000"

I think it worthwhile emphasising again the sum of money to be paid by Mrs Langridge was fixed, although

apparently at that stage she did not appreciate its true significance, or have any knowledge of the background to that figure, and why it was so vital to Mr Nicholls it be that. With that as the base, or platform, the focus was directed to justification and how the $60,000 could be found by the Langridges. From thereon justification and finance were inextricably intermingled, naturally, as one so sharply affects the other as will be seen. I should add here it was always accepted in the discussion Mrs Langridge and her husband would occupy one of the 7 units making only 6 available for renting to the public.

I pause here to make some observations. On many occasions I have stated in judgments on a variety of subjects, the very first perceptions, and reasonably drawn conclusions, exercise considerable control and influence on subsequent events. Ordinary people negotiating with each other are more inclined than professionally trained persons to leave much unsaid and to draw inferences. For whatever reasons, and there are many, such people do not usually have as an object elimination of ambiguities feeling perhaps they lack the techniques to accomplish precision without appearing rude or disbelieving. I think these observations would have applied particularly to Mrs Langridge who overall lacked commercial experience or knowledge.

The budget notes made by Mr Nicholls and the evidence of Mrs Langridge satisfies the court at that first serious discussion Mr Nicholls represented to Mrs Langridge the revenue available to her would be approximately $60,000 from the 6 units. I think he represented that to her as an existing fact about his receipts from the motel for 6 units. His words at that meeting written down on the notes are "Turnover approximately $60,000". I think he used that figure to justify his asking price of $60,000 showing how it was a reasonable

figure exclusive of cost of borrowing yielding to her a surplus of $22,000. The word "approximately" I think was used not for the purpose of incorporating a material modification or qualification, but to avoid the foolishness implied in an exact figure in that bracket. The word was used to cover small variations up and down on the stated figure. The arithmetic on the expenses proves 6 units were in the contemplation of both parties. At this stage it does not seem attention was directed by Mr Nicholls to the alternative way of calculating the purchase price of $60,000 by dividing that figure between chattels and goodwill. As far as can be understood from all the evidence, $60,000 was justified as an asking price because it was the annual turnover which can be cut into thirds (rent, expenses, surplus) as the figures very roughly show. Ultimately the contract between the Langridges and Mrs Tan cut it $50,000 for chattels and $10,000 for goodwill, precisely the figures contained in the Nicholls/Tan contract. It is highly debatable whether the goodwill was worth $10,000, but beyond all question the chattels were not worth anywhere near half that sum. During Mr Nicholls' ownership they were insured for $12,500.

The rent at $20,000 deserves close attention. Mrs Langridge says Mr Nicholls insisted that was fair and justifiable it seems on the so-called thirds rule. Mrs Langridge did not argue. Why Mr Nicholls insisted on $20,000 on this occasion is unclear. The final figure in the contract he signed with Mrs Tan was $19,000. How it got to that will be taken up later.

This first negotiating session between Mr Nicholls and Mrs Langridge ended in a cordial way. I think it is somewhat of a misnomer to call it negotiation because it had much more of the tone of adhesion for Mrs Langridge. However, it must not be overlooked Mrs Langridge agreed in cross-examination she

was in effect a keen purchaser. Mr Nicholls stipulated $60,000 as the purchase price, and the only issue from thereon was how that amount could be raised. It was agreed Mrs Langridge would not sell their home but rent it, such being reflected in the note. I do not think the yearly rental was a factor which received the attention it should have. After the meeting attempts were to be made to raise the entire purchase price by way of loan from an institution. Mr Nicholls undertook to take charge of that for Mrs Langridge by arranging for her to see his lawyer, Mr H.J. Davidson in Waipukurau, who had specialised knowledge in financing motel transactions and then seeing his accountant in Wellington, the second defendant. Finally there was little real dispute about this session apart from the true interpretation of the $60,000 turnover figure and on that I reiterate my finding it was a representation of an existing fact and could carry no other realistic construction from all the facts so revealed by the evidence. Despite some slightly contrary facts which will be dealt with in due course, I think that representation by Mr Nicholls controlled the subsequent dealings right down to binding contracts.

As stated Mr Nicholls recommended Mr Hugh Davidson as solicitor to act for Mrs Langridge in the purchase and the raising of the total purchase price of $60,000 by way of borrowing. Mr Nicholls took Mrs Langridge and her daughter to Mr Davidson at Waipukurau and the proposal was outlined to him. The issue of the level of rental at $20,000 was raised at this meeting by Mr Davidson as being too high, but Mr Nicholls said $20,000 was a reasonable figure to pay. The meeting ended with Mr Davidson undertaking to make an application to U.D.C. for the loan monies of $60,000. It was necessary that with the application there be supplied a cash flow budget to support it. To obtain this Mr Nicholls arranged on another day for his accountant, the second defendant, to prepare such a budget. He informed Mrs Langridge he was to see his accountant who

operated from Wellington, and he would obtain from him such a budget and that she could go to see Mr Wilson if she wished, but it was not necessary. In the event Mrs Langridge decided to go and Mr Nicholls, with his wife and Mrs Langridge's daughter, took the party to Mr Wilson's office. The date of this meeting was said by Mr Wilson to be 24 February 1982. There, Mrs Langridge said, Mr Nicholls outlined the proposal and Mr Wilson undertook to prepare the cash flow budget on the basis of the figures given to him by Mr Nicholls in writing in the presence of those attending at that appointment. Reflecting the decision of Mrs Langridge to attempt to borrow the full purchase price Mr Nicholls before the journey commenced had prepared himself a document which could be described as a cash flow budget for Mr Wilson to base his professional document on. Mr Nicholls' document is of such importance I reproduce it in full.

"SUNGLOW MOTEL

ANTICIPATED T/OVER $60,000 1.4.82 - 31.3.83

PURCHASE CHATTELS & GOODWILL $60,000 SAY 50 & 10

| | | | |
|---|---|---|---|
| RUNNING COSTS = 6 UNITS @ $2,000 PER UNIT | | 12,000 | |
| ANNUAL RENTAL | | 18,000 | |
| DEBT SERVICING 60,000 @ 13% | | | |
| INTEREST | 7,800 | | |
| PRINCIPAL AMORTISING | | | |
| 5 YEARS. | 12,000 | 19,800 | 380 P.W. |
| | | 49,800 | |

BALANCE AFTER ALL PAYMENTS $10,200.

AS THIS IS A SMALL MOTEL (ONLY 6 UNITS) MOST, IF NOT ALL DUTIES WILL BE CARRIED OUT BY LESSEE INCLUDING LAUNDRY. ALL COLOUR TV SETS WILL BE OWNED AND ARE IN GOOD REPAIR, THEREFORE NO RENTAL CHARGES. THE LESSEE'S HUSBAND WILL BE CARRYING ON HIS USUAL OCCUPATION. AS THERE ARE NO TELEPHONES THIS IS A BIG SAVING

| | | |
|---|---|---|
| RATES | 1,000 | |
| POWER | 700 | |
| | 1,700 | THESE ARE THE 2 HIGHEST CHARGES. ALL INSURANCES ARE LESS THAN 1,000 |

WEEKLY T/OVER $1200

| | | | |
|---|---|---|---|
| WEEKLY RUNNING COSTS | 231.00 | 12012 | |
| RENTAL | 346.00 | 18000 | |
| MORTGAGE | 380.00 | 19760 | |
| | 957.00 | 49772 | 243.00 OVER" |

The first point I dispose with is the top line "Anticipated T/Over $60,000 1.4.82 - 31.3.83". The facts are these about past turnover, but the figures were never directly disclosed to Mrs Langridge, or drawn to her attention. The day book (which was taken to Mr Wilson) shows the turnover for 12 months ending 31.1.82 at $59,670 for 7 units. It is reasonable to accept that figure was before Mr Wilson, as he says, when he prepared his budget. The turnover to the end of March 1982 for 7 units was in fact $58,413. In the budget prepared by Mr Wilson which went to Mr Davidson under cover of a letter dated 25 February 1982, it is stated "Gross Income (6 Units) 60,000". In the covering letter Mr Wilson said, inter alia,

this:

> "In the preparation of the budget we have taken into account possible increases in expenditure although the income is based on the actual figures for the past year when seven motels were available for letting. (Italics added)
>
> We believe that the potential gross income has the capacity to be increased in the following areas:
>
> (a) Increase in tariff per night
> (b) Increase in breakfasts with owner living in
> (c) Increase in occupancy percent by at least 10%-15%"
>
> His letter concluded:
>
> "It is our opinion that the purchase of the lease of the Motel is a viable proposition for Mrs Langridge and she will be able to meet her committments (sic) on any advance over a five year period."

I return to the $60,000 figure for turnover. It is an indisputable fact the actual figures for the past year (whichever 12 months is used) never reached $60,000 for 7 units. I accept Mr Wilson's evidence that to adjust the figure of $59,670 for 6 units does not mean a reduction of one seventh but something less. He suggests $4,000 which, not without hesitation, I will accept. That brings the turnover back to $56,000 and in effect wipes out the cash surplus of $4,200 which was literally the bottom line of Mr Wilson's detailed budget. I need only add Mr J.P. Stockdale of U.D.C., who ultimately lent the $60,000 on the basis of Mr Wilson's budget sent to his company by Mr Davidson, said the advance would not have been made if the cash surplus of $4,200 was not there. I accept that as true, and entirely to be expected.

In evidence Messrs Nicholls and Wilson sought to overcome the actual figures by claiming the $60,000 in fact took account of several factors such as inflation, expected increases in tariffs, and increase in business through more personal attention. Mr Wild, for Mr Nicholls in legal argument sought to lay some emphasise on the word "anticipated" to which I will return in a moment. In this court's view a very important evidential aspect must be settled with a court finding. Mrs Langridge never was told the $60,000 was an adjusted figure to take account of such matters as inflation, increased tariffs, etc. She was told the $60,000 was the actual figure for 6 units. Apparently she was never shown Mr Nicholls' budget which was handed to Mr Wilson for him to prepare the official budget. I accept Mrs Langridge was never told how the $60,000 was arrived at as now claimed by both defendants in their evidence.

The word "anticipated" itself is a troublesome one, and notorious for its misuse. It is no part of a court's function to decide important aspects of a case by imposition of high grammatical standards, but words used must be given their proper meanings. To anticipate something is to look ahead and prepare for it and against the whole background of the evidence the word is really used correctly by Mr Nicholls. It is not precisely a synonym for expected, which allows the $60,000 to be regarded as a hope, which brings it back to something quite vague and indefinite. In my view, the turnover at $60,000 was used as an actual figure on which the preparation of the future budget was grounded. It is not to be overlooked elsewhere in Mr Nicholls' budget there is "weekly t/over $1200" which if multiplied by 52 gives the figure of $62,400. The figure of $60,000 was wrong and, therefore, so was the budget at that date on 25 February 1982.

I make some further observations relevant to this aspect of the case. It was very much the evidence of both defendants that as at February 1982 the business of the Sunglow Motel had "spare capacity" into which Mrs Langridge could move and exploit. The witnesses did not use those exact words but that is what their evidence implied. It was part of their contention the turnover could be expanded to $60,000 for 6 units. I can see no reasonable basis for such an extravagantly optimistic view. To begin with there was not available to the defendants at February 1982 a completed year's accounts for, or including, the Sunglow operation. Mr Nicholls was a very experienced motelier conducting the Sunglow from the base of a modern superior motel. I accept much of the evidence of Mr H.C. Henderson, a motel broker called on subpoena by the plaintiffs, that the Sunglow could have been receiving material assistance from the Aztec in many important ways. He was careful to say he did not know whether that was a fact or not, but saw the potential for this. I infer Mr Nicholls would have known this aspect full well. On several occasions in his evidence Mr Wilson mentioned the advantage Mrs Langridge would possess in the operation of the business by being "on the spot". With Mr Wilson's intimate knowledge of the background of Mr Nicholls' affairs, in my view, in preparing his budget he should not have just examined the advantages for Mrs Langridge, but also the disadvantages when a business previously conducted as a division of a larger one in future is to go it alone. I think I should say something specific about Mr Nicholls' claim the figure of $60,000 was to take account of inflation, he said, then running at about 15%. This is a faulty way of using that corrosive malady afflicting us. Inflation is not to be applied as a credit to boost revenue figures without examining its total effect. I say no more as it is unnecessary. I am satisfied as persons who owed Mrs Langridge a duty of care (I say why in the case of the second defendant hereafter), they both failed to put before Mrs Langridge a true and accurate picture of the Sunglow Motel, not only as it had been conducted, but the future dangers when it would battle alone.

I deal now briefly with the allegation of misrepresentation over the electricity account. I say immediately in my view this has been established by the plaintiffs as a misrepresentation of an existing fact. The figure in Mr Nicholls' budget is $700. He said he got that from the figure of $240 included in the 5 months' accounts from November 1980 to March 1981 of the Sunglow when it was run as a separate business, but increased it. Mrs Langridge knew nothing of this. This was a figure actually queried by Mr Wilson and he adjusted it further upwards to $900. It must be remembered Mr Nicholls by February 1982 had at least 5 (two monthly) statements from the electricity supplier for the preceding 10 months, but rather than use those as his basis he reached back over a year beforehand to the summer months and adjusted that figure. Also, apparently cooking of breakfasts and laundry were then being done at the Aztec. For this misrepresentation I think Mr Nicholls alone must take the responsibility. In my view his advancing of $700 was absolutely inexcusable. I thought it significant that he sought to justify his estimate in the way he did when it was clearly open to him to produce the actual accounts for electricity for a full year ending January 1982, as he did for the turnover. When Mrs Langridge started to become concerned at her two monthly electricity accounts about June/July 1982, she approached Mr Nicholls for his ones for Sunglow to compare but he rebuffed her and it could only have been on the grounds he knew what they would reveal. Her electricity accounts for a full year to 31 March 1983 were calculated at approximately $2,947.

I mention briefly here the rental which went into Mr Wilson's budget at $18,000, which figure was supplied to him by Mr Nicholls. The court is by no means satisfied it was told the complete story about the rental, for clearly a large area

remains unexplored and I refer to the negotiations over this between Mrs Tan and Mr Nicholls. At the session between Mrs Langridge and Mr Nicholls and again in Mr Davidson's office, he stuck to $20,000 as a reasonable rental. Mr Davidson queried this at their first meeting as being too high. For reasons not clearly put before the court, it was reduced by Mr Nicholls to $18,000 for Mr Wilson's budget. That was the typed figure in the Nicholls/Tan contract but it had been amended by writing to $19,000, but when is not known. As will be revealed the figure finally was raised to $19,000 for the Langridges at Mrs Tan's insistence.

Mr Wilson did prepare the cash flow budget on the basis of the figures given to him by Mr Nicholls and as instructed sent it to Mr Hugh Davidson who was acting for Mrs Langridge.

After seeing Mr Wilson Mrs Langridge said she received a message through Mr Nicholls that Mr Davidson wished to see her and she went to see him that afternoon. He presented her with the offer of finance from UDC in the sum of $60,000. Before Mrs Langridge took over the motel she was advised by Mr Nicholls that Mrs Tan would not accept $18,000 for the rental and demanded $19,000. I pause here to observe although the formal contract for purchase of the chattels and lease of the premises was between the Langridges and Mrs Tan, they never met each other over this period which emphasises the central position of Mr Nicholls in the negotiating. Mrs Langridge said in her evidence Mr Nicholls offered to mitigate the demand of $19,000 a year for rent by offering Mrs Langridge $1,000 in notes for the first year, but at the same time indicating she was free to apply it as she chose. Mr Nicholls denies that he gave her the $1,000 for rent but that it was to purchase new linen for the motel as they intended to take all linen for themselves. I do not accept Mr Nicholls' evidence this was a late decision on his part taken a short time before

settlement. It was an undisputed fact the list of chattels attached to the Tan/Langridge contract did not include the linen, towels, etc, but Mrs Langridge did not realise that at first. The court prefers Mrs Langridge's evidence on this as being the true one. Mr Nicholls had not included the linen and kindred items in the list of chattels which was sold to Mrs Tan and that very same list was made part of the contract between Mrs Tan and the Langridges. There was simply no legal obligation at all on Mr Nicholls' part to reimburse Mrs Langridge. Mr Nicholls was not able to support his contention by any evidence of an agreement with Mrs Langridge whereby she released the linen for $1,000. At some point it must have been realised by Mrs Langridge she had not bought linen and that she was forced to accept that. As the facts reveal without further elaboration, there was a forceful reason on Mr Nicholls' part to have Mrs Langridge accept $19,000 per annum for rental.

There was a further event more disturbing than even the sudden increase in rental of $1,000 per annum, and it was a reduction in the term of the lease from 10 years with a right of renewal for 5, to a straight lease of 8 years with no right of renewal. Mrs Langridge in her evidence said this came about by Mrs Tan's solicitor, coming to see her at the motel and obtaining from her a signature on the contract to the reduction. The contract certainly reveals that alteration to the document as originally typed. Apparently this major alteration from 15 years to 8 years took place on Saturday 3 April 1982 after Mrs Langridge had actually taken up residence at the motel. That was Mrs Langridge's evidence, and not contradicted. As an illustration of the way some evidence was put before the court the actual lease (containing the 8 year term) was dated 2 April 1982. The alteration, of course, must have had a very material flow on effect because the lender required a mortgage over the lease on the basis it was a 15 year total term. This change would have very materially

affected the lender's security. Apparently those securities were executed on Friday 2 April 1982 when Mr Davidson's wife took the documents to the Langridges at the motel. The court knows almost nothing of the circumstances of this final act against the Langridges' interests apparently without it being put to their solicitor at the time it was done and, therefore, is guarded in comments on it. Because the whole transaction collapsed entirely the act of reducing the term of the lease by almost half seems to have become part of the history. As the incident was put to the court, with hardly any details because it could not be expected to be known by the defendants as it was not their responsibility, it nevertheless could be described as disturbing.

The 1st of April was a Thursday and Mr and Mrs Nicholls continued to run the Sunglow Motel from the Aztec over the following weekend because the Sunglow had no independent telephone service, the connection being through the Aztec. It seems Mrs Langridge took full control on Monday 5 April. She said in her evidence in chief on that day Mr Nicholls brought to her the day book and records, giving the occupancy rate of each motel unit, and the income derived from each. However, later in her evidence she conceded the record of the day book might have been offered to her for examination prior to that day. He then left with her the day book indicating she would be wise to follow his system. He also left with her his own sheets from November 1980 through to March 1982. In addition there was a graph given to her for the period November 1980 to November 1981, again setting out the occupancy. These documents were not studied by Mrs Langridge at the time they were passed to her, but she certainly did so later when it dawned on her the units were not providing the promised income. It is an accepted fact that for the year ending March 1982 the total yield on 7 units was $58,413, or $8,344 per unit.

The first month of April was very quiet but at this early stage Mrs Langridge was not alarmed. The second month of May was the month of school holidays and her results were very good, and in fact she never had as good a month as May 1982 in the 14 months in which she ran the motel business. Apparently by June and July the alarm bells were ringing insistently and she found she could not meet her outgoings, particularly rental and borrowing from UDC. Naturally she began to question the Nicholls and started apparently with the power bill. She asked for the previous power bills but she said she was not given them. Her power bills were more than twice that budgetted for. Toward the end of July 1982 the full impact had apparently dawned upon her and she consulted a Palmerston North solicitor. On her behalf that solicitor carried out investigations and wrote to the Nicholls a letter dated 3 December 1982 which canvassed some of what has already been stated in this judgment, and threatened legal action for fraudulent misrepresentation and negligent misrepresentation. It was also necessary for the solicitors to negotiate with Mrs Tan's solicitors because she was pressing for repayment of rental arrears. Needless to say, the lender, UDC, was also complaining that the Langridges were not meeting their liabilities. U.D.C. have a 2nd mortgage over the matrimonial home as part of their security. The first solicitor acting on behalf of Mrs Langridge when the trouble broke was replaced by another solicitor who has continued to act for her down to today's date. Mrs Langridge obtained a report through a motel broker, Mr H.C. Henderson, already mentioned. That report revealed that there was no way Mrs Langridge could possibly extricate herself from the invidious situation to which she had arrived. In April 1983 she was served with a notice to quit on behalf of Mrs Tan the lessor, and also she and her husband were sued for arrears of rent amounting to $7,798.24.

I turn now to deal in some detail with the question of the chattels which were purchased by the plaintiffs actually from Mrs Tan. As stated the valuation was $50,000 which excluded linen and towels which cost Mrs Langridge over $1,000. The valuation was done on Mr Nicholls' instructions to a man who at the time had been engaged in real estate sales for about a month. The valuation consisted of a list of chattels not individually valued but attached to a covering letter already reproduced. Of the purchase price of $60,000 the chattels represented 83%. The chattels when purchased by Mr Nicholls in October 1980, some 16 months before, were included in that contract at $20,000. Mr Nicholls' evidence from the box on the money he spent on chattels after his purchase, but especially the colour television sets, simply damaged his credibility. During Mr Nicholls' ownership of the chattels they were insured for $12,500. When the chattels were purchased by Mrs Tan exercising her right under the lease in 1983 in respect of the Langridges, she paid $20,000 for them after an arbitration.

Part of the security given by the Langridges to U.D.C. for the borrowing consisted of a chattels security. Mr Stockdale from U.D.C. stated the valuation at $50,000 was accepted by his company at its face value and the advance to the Langridges made on the basis of it. He stated if he had been aware of the true value his company would not have made the advance. That seems commercial commonsense.

To the facts recounted above the court needs to make little comment because the figures effectively state that the Langridges on the chattels concluded a very poor bargain. The justification advanced from the witness box by Mr Nicholls was as follows. In reality the proper focus in the sale concluded with the Langridges was not to value assets sold to reach the asking price, but to concentrate on how those chattels could

used to make a profit. In his evidence Mr Nicholls took an utterly detached, even cynical, view of valuations of chattels. He said this in his evidence under cross-examination:

> "Were you present in court when ... Mr Clarke Henderson gave his evidence? Yes. And you recall his valuation of substantially the same chattels, a few extra, at $21,000? Yes. Did that surprise you? Not really because any half a dozen people could value the chattels in any motel and come up with half a dozen answers. If he thinks they're worth $21,000 good he's right, if I think they're worth 50 I'm right."

The court entirely rejects that approach. Because it is so obviously deeply wrong, extensive reasons are unnecessary. I have already referred to evidence in this very case from a widely experienced witness in the commercial world, the U.D.C. representative, Mr Stockdale. Mr Nicholls' stated approach would turn valuations into lotteries. Mr Nicholls' view supports observations made earlier in the judgment he fixed on getting $60,000 for the motel business; and he was not only uninterested in how that figure was justified, he was not worried if it could not be justified at all on the basis of valuation of actual assets.

In the narrative of facts the next question is whether the Langridges suffered damage arising out of the purchase of the motel. The story to this point makes the question really superfluous, but it must be dealt with. From June 1982 onwards Mrs Langridge's decline could be described as financially disastrous. Because of the decisions on liability I will need to return to deal directly with the damages question. For whatever reason, and I will need to face some of the reasons advanced by defendants, the motel simply did not generate the business required to support anywhere near the rent and cost of

borrowings. Mrs Langridge's evidence was that after May 1982 she had to have resort to other money to meet the liabilities. Mr Henderson, the motel broker, was called in to report in April 1983, which he did in writing and it was placed before the court in evidence, clearly demonstrated at the rental she was obliged to pay and the cost of borrowing her position was hopeless. Mr Henderson confirmed in evidence his business could not attempt to sell the lease because in no way could he justify the business. Mr C.R. Coleman, the Langridges' accountant, produced ample evidence to show losses suffered by them.

I turn now to the pleadings and the law applicable. There were 2 causes against the first defendant and they were pleaded in the alternative. As the cause in fraud is not pursued, I say no more about it. The factual base for the allegations of negligence are that the first defendant supplied to the second defendant, who prepared what might be called the official budget, particulars which showed:

(a) that the gross annual income of the Sunglow Motel for 6 units was not less than $60,000, and;

(b) that the charges for heat, light and power had not and/or would not exceed $900 per annum.

I need to say something of the pleadings in the amended statement of claim which had some unsatisfactory aspects. Surprisingly the original pleading of the misrepresentation against the first defendant was framed in these words:

> "...[T]he First Defendant the said Darcy Everton Nicholls represented that the annual gross income of the motel in the occupation of himself and his said

wife was approximately $70,000 for 7 units and thus not less than $60,000 for 6 units, assuming that the Plaintiffs would reside in one of the units at the motel."

There was no pleading about electricity. At the close of the plaintiffs' case Mr Wild moved for non-suit, and specifically requested the court to decide on the motion instead of reserving it. Mr Williams supported for the second defendant. The point was the plaintiffs had given no evidence of the allegation of $70,000 for 7 units but of $60,000 for 6 units which was the "and thus" part, or the deduction from the primary allegation of $70,000 for 7 units. Much evidence had been given about the electricity charges, but no formal pleading. Indisputably this was poor pleading but at that stage the evidence to support negligent mis-statements, at least, was before the court. The court had little doubt justice to the plaintiffs required dismissal of the non-suit motion. The manner of conducting the defence to that point demonstrated the defendants were not perplexed at all about the case they faced. The original pleading about revenue was inappropriate, but not more. If facts justifying imposition of liability on a defendant are alleged and proved, the defendant cannot call in aid refined, and peripheral, pleading points.

After the ruling on the non-suit motion, plaintiffs' counsel sought amendment to the allegations to include (a) and (b) above. The amendment was not opposed and accorded with the evidence.

The allegations against both defendants are negligence. The first defendant concedes a duty of care based on his financial interest in the transaction. See Richardson and Another v Norris Smith Real Estate Ltd and Others [1977] 1 NZLR 152. I think that was a concession very properly made in the circumstances of this case.

The second defendant refused to make the same concession. It seems to this court as a matter of law the second defendant, in the circumstances of this case, had a clear duty of care towards the plaintiffs. See Anns v Merton London Borough Council [1978] A.C. 728; Scott Group Ltd v McFarlane and Others [1978] 1 NZLR 553; JEB Fasteners Ltd v Marks Bloom & Co. [1983] 1 All E.R. 577 and Junior Books Ltd v Veitchi Co. Ltd [1982] 3 All E.R. 201. I add this. The second defendant himself in his evidence stated he considered he had a contract to supply professional services to Mrs Langridge in February 1982, for in October 1982 he sent to her an account for those services. That is telling evidence to support a duty of care.

The pleadings against the first defendant for negligent misrepresentation are as follows.

> "13. THAT in the circumstances set forth in paragraphs, 2,3,4,5 and 6 hereof the Plaintiffs relied on the skill and judgment and the knowledge of the First Defendant as a motelier of some fifteen years standing and as the then proprietor of the motel and that by reason thereof the representations of the First Defendant set forth in paragraph 6 and 6A hereof were true and as a result the Plaintiffs entered into the agreements including the lease referred to in paragraphs 2, 3 and 5 hereof.
>
> 14. THAT in the circumstances referred to in the previous paragraph hereof the First Defendant owed a duty of care to the Plaintiffs in making the representations set forth in paragraph 6 hereof.
>
> 15. THAT the First Defendant made the said representations negligently, not caring whether they were true or false, and as a result the Plaintiffs have suffered loss and damage and will continue to suffer loss and damage in the future."

The pleadings against the second defendant in negligent misrepresentation are as follows.

"16. THAT the Plaintiffs relied on the skill and judgment of the Second Defendant to prepare a cash-flow budget which correctly, fairly and properly represented the expected income and expenditure at the motel.

17. THAT the cash-flow budget prepared by the Second Defendant and referred to in paragraph 4(c) hereof did not correctly or fairly or properly represent the expected income and expenditure for the motel, and was prepared and forwarded to the said Hugh John Davidson by the Second Defendant negligently not caring whether it was true or false to the intent that the said Hugh John Davidson and the said UDC Finance Limited and the Plaintiffs would act upon the same.

18. THAT had UDC Finance Limited known that the cash-flow budget did not correctly or fairly or properly represent the expected income and expenditure at the motel it would not have entered into the said loan arrangements with the Plaintiffs.

19. THAT had the Plaintiffs known that the cash-flow budget did not correctly or fairly or properly represent the expected income and expenditure at the motel they would not and/or could not reasonably have entered into the said loan arrangements with UDC Finance Limited.

20. THAT as a result of the negligence of the Second Defendant the Plaintiffs have suffered loss and damage and will continue to suffer loss and damage in the future."

The first defendant did not plead contributory negligence, but the second defendant did so plead. The decision I make for the second defendant means the contributory negligence allegations need not be faced. Moreover, whether contributory negligence can be pleaded at all in cases of negligent misrepresentation must remain moot.

I deal first with what in law is the standard of care required. In the circumstances of this case, negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do in the circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. The amount of caution required of a seller or a chartered accountant in the exercise of ordinary care depends upon the conditions apparent to them, or that should have been apparent to reasonably prudent sellers and accountants under the circumstances similar to those shown by the evidence. See generally, McLaren Maycroft & Co. v Fletcher Development Co. Ltd [1973] 2 NZLR 100, Richmond J. at 108; Gold Star Insurance Co. Ltd v Dominion Adjusters Ltd [1982] 2 NZLR 38 (C.A.):Whitehouse v Jordan [1981] 1 All E.R. 267 (H.L.), Lord Edmund-Davies at 277 citing Bolam v Friern Hospital Management Committee [1957] 2 All E.R. 118, 121; Ashcroft v Mersey Regional Health Authority [1983] 2 All E.R. 245 at 247; and Clark v MacLennan [1983] 1 All E.R. 416. More particularly on negligent misrepresentation, I refer to Spencer Bower and Turner, Actionable Misrepresentation, 3rd Edition.

Although the defendants between themselves did not file notices of contribution pursuant to Rule 99N of the Code, I was asked by both counsel to assume that procedural step had been taken and if it became necessary for me to consider them as joint tortfeasors, then to make the appropriate findings.

First Defendant

The ingredients the plaintiffs must establish against the first defendant in negligent misrepresentation are as follows.

1. The first defendant must have made representations as to past or existing material facts.

2. The representations must have been untrue.

3. Regardless of his actual belief, the first defendant must have made the representations without any reasonable ground for believing them to be true.

4. The representations must have been made with the intent to induce the plaintiffs to rely upon them.

5. The plaintiffs must have been unaware of the falsity of the representations: they must have acted in reliance upon the truth of the representations, and they must have been justified in relying upon representations.

6. Finally, as a result of their reliance upon the truth of the representations, the plaintiffs must have sustained damaged.

I deal first with 1 and 2 together, for I have already made some findings pertaining to them. I reiterate the first defendant did make the representations about gross revenue and the electricity charges in such a way that they were to be understood by plaintiffs to be past or existing facts, and I have also said why. However, I want to add some observations

to dispose of counsel's argument. In legal argument Mr Lusk for the plaintiffs tended to lay greater emphasis on the intial budget prepared by Mr Nicholls as he and Mrs Langridge were conducting their first serious discussions. That budget has been reproduced. On the other hand, Mr Wild sought to lay a similar emphasis upon the final budget prepared by Mr Wilson, and directed his arguments to justifying that budget. I have already stated it is my view the very first budget, Mr Nicholls probably composed as he and Mrs Langridge were talking, is the more important of the two. Mr Wild submitted that Mr Nicholls' forecasts as handed to Mr Wilson were what Mrs Langridge should achieve with 6 units in the year ahead, 1 April 1982 to 31 March 1983. On the more serious of the representations, namely revenue, Mr Wild sought to argue the representations were a mere expression of opinion as to what could be attained by diligent attention to the business. I readily accept in the ordinary conduct of commercial negotiations, expressions of opinion are not to be treated as representations of fact so as to ground a claim for actionable misrepresentation. However, it must also be qualified. Here it could hardly be denied Mr Nicholls was holding himself out as possessing material knowledge and information about the very subject of the representations. Mr Nicholls, I am satisfied, had an accurate assessment of the type of person Mrs Langridge was, and that she was also so situated she would have uncritically, and quite reasonably, relied upon his representations as matters of fact and not as expressions of opinion. Also, I think the manner in which Mr Nicholls dealt with Mrs Langridge would have led her to believe, on reasonable grounds, it was a representation of fact and not of opinion. He never explicitly told her it was his opinion and the circumstances do not permit an inference to that effect. On what might be said to the lesser allegations concerning the electricity charges, the court cannot avoid finding there was some concealment of the true situation. Power supply charges to any business are a major item of

expenditure, as Mr Nicholls' notes given to Mr Wilson and reproduced earlier, indicate. It is unarguable that the most recent cost is the one to which reference ought to be made. The ascertainment of costs of electrical supply over, say the previous 10 months, would have entailed a simple arithmetical calculation. Again, as with expression of opinion, I readily agree non-disclosure of material facts is not able to ground actionable negligence, but that is not the position in this case. The relationship of the negotiating parties was such that Mrs Langridge was entitled to rely on Mr Nicholls' representation on this point. It was him who put the power costs into the negotiations as an issue, and that gave rise to a duty to state them accurately. He was the party who knew the cost of power and he knew that cost was not known to Mrs Langridge. Mr Wild conceded that the figures of $700 or $900 were quite wrong, and significantly astray.

I go to 3. Regardless of his actual belief, did the first defendant make the representations without any reasonable ground for believing them to be true? This is the allegation of negligence. It was obligatory on the first defendant in the circumstances in which he found himself, to exercise the ordinary skill and competence one would expect from someone who knew and understood that particular Sunglow Motel business. A failure to discharge such duty, or obligation, subjects that person to liability for negligence. He knew the 7 units had never reached $60,000 in a 12 month period. At that point he had 9 years' background (not 15 as alleged) in the motel business. The problems which would face a virtual newcomer to the business would, or ought to, have been known to him. However diligently one searches the evidence, I cannot find a reasonable ground on the part of the first defendant for believing either the representation as to turnover at $60,000 for 6 units, or the cost of supply to be true. For electricity to go back over 1 year to the 5 months' ending 31 March 1981, does not offer a reasonable ground when he clearly must have had the most recent electricity accounts in his possession.

I deal now with 4. The central point here is the intent by the first defendant is to induce action on the part of the representee. Like the ingredient next to be dealt with, it has an element of reliance on the part of the plaintiffs which must be satisfied by the evidence. The court finds there is sufficient evidence of intent and that the plaintiffs were so induced and acted in reliance upon the representations.

I now deal with 5. This is an ingredient which is not without difficulties for the plaintiffs. There are 3 separate elements which must be satisfied under this heading which focusses attention on the representee. The first causes no particular problem. The plaintiffs, I am satisfied, were unaware of the falsity of the representations about turnover and supply. The issue of reliance is somewhat more difficult. A party who claims to have been induced to act by a false representation must have relied upon the representation; that is the representation must have been a proximate cause of her conduct in entering into the transaction, and without such representation she would not have entered into such transaction. That element may be satisfied by direct evidence, or may be inferred from the circumstances. I have reached the view that Mrs Langridge on behalf of herself and her husband, did in fact rely upon the representations made by the first defendant.

There is a further obstacle which must be overcome by the plaintiffs; and it is were they justified in relying on the representations? The plaintiffs claim to have been induced to act by the representations. It is accepted on the evidence Mrs Langridge did not make any attempt at all to carry out an independent inquiry or investigation. As far as the evidence reveals, she did not seek to test, or even look critically at what was being put before her. Was it reasonable for her to

adopt that course in all the circumstances as revealed by the evidence? In a few words, did she have a right to rely on the representations? The answer is an issue of fact. Mr Nicholls presented to the court as a shrewd and capable businessman, but particularly as an outstanding motel operator. He called evidence to that effect from witnesses. I do not deny that in several areas he was not a credible witness, but the court has no doubt about his ability. However, this particular aspect is mainly concerned with Mrs Langridge's intelligence, experience, and knowledge. She appeared to the court as a friendly, trusting woman, but also naive and ingenuous. The court decides that Mr Nicholls' initiative and management of the whole arrangement would have entitled Mrs Langridge to rely upon him. It is accurate to say he dominated the proceedings giving a true air of business knowledge and efficiency. He took it upon himself to click the various requirements into line for Mrs Langridge. The impression from the evidence is that Mr Nicholls went well beyond guidance to steering and positive direction.

Finally as to 6, I do not think there is any doubt that the plaintiffs suffered damage from reliance upon the truth of the representations.

Second Defendant

In deciding whether the second defendat was negligent, the same ingredients must be established. I think it is worth mentioning again the second defendant was acting in the course of his profession. The services of experts are sought because of their special skill and they have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge such duty will subject experts to liability for negligence. However, it is reasonable care and competence that is called for and no more.

As far as the second defendant was concerned, I deal with 1, 2 and 3: The source of Mr Wilson's factual knowledge about revenue and expenses of the Sunglow came from Mr Nicholls. On the $60,000 for 6 units Mr Wilson did make that as a representation of a past or existing material fact. The parts of his covering letter reproduced earlier establish that. It was untrue. I cannot find on the aspect of revenue that Mr Wilson had a reasonable ground for believing the revenue representation to be true.

I hold a different view in regard to the allegation concerning power supply. Mr Nicholls gave him the figure of $700 and he questioned that and raised it by an appreciable figure to $900. It turned out to be gravely astray, but I do not think Mr Wilson can be held responsible for that. He was entitled to rely upon Mr Nicholls' figure and he applied his professional mind to it and increased it. It was a representation as to a past material fact and untrue, but I think Mr Wilson had a reaonable ground for believing it to be true and, therefore, that allegation leaves the plaintiffs' case in respect of the second defendant.

I turn now to 4 to decide whether the representation on the $60.000 for 6 units was made by Mr Wilson with intent to induce plaintiff to rely upon it. As far as the evidence reveals to this court, looking at all the circumstances, I do not believe the second defendant had an intent to induce the plaintiffs to rely upon the representation. I think Mrs Langridge's inducement to purchase the lease had effectively come from Mr Nicholls, and that the representation made by Mr Wilson did not materially affect her. There is nothing in the evidence to suggest that Mr Wilson was acting any more than as Mr Nicholls' professional adviser assisting in that capacity. I cannot see any advantage to Mr Wilson which might reasonably

suggest to the court he was intending to induce the plaintiffs into the purchase of the motel. The central purpose of Mr Wilson's preparation of the budget was to pass to a possible lender, and it was not concerned directly with the entry into the contract itself. It must not be overlooked Mr Nicholls played a central role in negotiations toward the Langridges' contract. By the time Mrs Langridge was taken to Mr Wilson she had consulted a solicitor who was acting for her and this was known to Mr Wilson. I accept Mr Wilson's evidence that he knew Mr Davidson was experienced in motel financing. Although it is not necessary to examine closely reliance and justification, I think there the plaintiffs fail to establish other important ingredients in their cause in relation to Mr Wilson.

For those reasons I find the plaintiffs' case against the second defendant fails and, therefore, the court is not required to make a finding about joint tortfeasors.

Damages

The question of damages is never easy, but for a case such as this where the plaintiffs entered a business and after approximately 14 months of disastrous trading left it very much the poorer, including liabilities of mounting interest charges, the assertion may positively be made that it is complex. In the final judgment in Kendall Wilson Securities Limited v Barraclough and Another (Unreported Auckland Registry, A1558/78, 3 September 1984), I said I received guidance from a speech of Lord du Parcq and ask to be excused at quoting a short extract from that judgment simply to introduce the extract of his speech.

> "In a tort case the damages question has material differences from a consensual action. See The Heron II, Koufos v C. Czarnikow Ltd [1967] 3 All E.R. 686.

The scope of general damages may be wider than what might be expected would arise naturally and logically from the tortious conduct. For special damages the wrongdoer in a tort action is charged with all injuries which naturally flow therefrom and were forseeable at the time of the misconduct. See Shaddock (L) & Associates Pty Ltd and Another v Parramatta City Council (1981) 36 ALR 385. High Court of Australia and State of South Australia v Johnson (1982) 42 ALR 161. High Court of Australia. But it is hard to better the speech, on a contract case, of Lord du Parcq in Monarch Steamship Co. Ltd v Karlshamns Oljefabriker (A/B) [1949] A.C. 196 at 232 for he tells a lower court how to go about its task, which is of inestimable value:-

> 'I do not doubt the wisdom of the judges who, in Hadley v Baxendale and the many later cases which interpreted or explained that classic decision have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend Lord Wright, and Lord Haldane in the passage cited by him, have emphasized, that in the end what has to be decided is a question of fact, and therefore a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be

careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them.'"

The plaintiffs claim general damages of $10,000 against the first defendant. The claim is based on the personal injuriousness to Mrs Langridge arising out of worry, fearfulness and kindred reactions to business failures. The court readily understands there would have been personal suffering, but there was simply no evidence of sufficient weight entitling a court to hold the claim established. There will be no award of general damages.

I turn to special damages which are the actual losses said to be suffered by the plaintiffs. Part of the claim is for $82,449 made up as follows which schedule was attached to the amended statement of claim.

"E J and I Langridge
Trading as Sunglow Motel

Profit and Loss Account for the Period 1st April 1982 to 1st February 1984

| | | |
|---|---|---|
| Accommodation and Meals | | 36833 |
| Cost of Supplies | | 2645 |
| Gross Profit | | 34188 |
| Less: | | |
| ACC Levy | 56 | |
| Accountancy | 905 | |
| Advertising | 412 | |
| Bank Charges | 183 | |

| | |
|---|---|
| Cleaning | 65 |
| Electricity | 3384 |
| Fire Extinguisher Service | 186 |
| Interest | 30713 |
| Insurance | 664 |
| Legal Expenses (re Lease, Purchase and Loans) | 2007 |
| Laundry | 335 |
| Licences and Permits | 80 |
| Postage | 12 |
| Rates | 789 |
| Rent 21866 | |
| Repairs and Maintenance | 2066 |
| Stationery | 60 |
| Telephone | 1384 |
| Vehicle Expenses | 1138 |
| Wages Proprietor | 10332 |
| Loss on Sale of Chattels | 30000 |
| Goodwill lost as of no value | 10000 |
| | 116637 |
| Loss to 1st February 1984 | 82449 |

Mr Coleman, its maker, was called to give evidence in support of it. Before making further decisions on the damages claimed I must return to the facts to deal with evidence and argument on 2 important areas, namely, competence of the Langridges as moteliers and obligation to mitigate damage. The first is the more important.

I start with some clearly established arithmetical facts. Once the Langridges took over the operation of Sunglow Motel in April 1982, its performance as a motel business declined very sharply from at least June onwards, and never recovered in the time they conducted it which ended in May 1983. The second defendant called an expert witness, Mr D.J. Griffin, a senior chartered accountant in practice in Wellington. Mr Griffin produced several charts and graphs which incontrovertibly showed the results of the Langridges in selling motel units to the public was palpably inferior to the Nicholls' results in the time they had it. Mr Griffin's evidence ended with this question put by me:

> "Basically your figures D1 and D2 here in the end boil down to fact that in the period the Langridges had it compared with period Nicholls had it the Langridges didn't sell nearly as many units as Nicholls did. That's the real effect of it, their prices were higher but they just didn't fill it, it is unexplainable to me, the fall off is too sudden and rapid, I just can't explain it, I can't explain why it's there."

It should be said earlier in his evidence Mr Griffin had canvassed some distinct possibilities of which incompetence was one among other factors.

Apart from Mr Griffin's exact evidence of comparative figures, there was evidence given from Mr and Mrs Nicholls, and local motel operators, that Mrs Langridge was at least lax in her attention to the business, which is notoriously known as a demanding one. The evidence of Mr D.M. Beech, who conducts a motel of not dissimilar standard to the Sunglow Motel, in the same street, showed a performance markedly superior to the Langridges'.

Such evidence which was not materially disputed must be given weight by the court, and the plaintiffs must not recover damages for injury which was not attributable to the first defendant's negligence. I think Mrs Langridge made some faulty estimates from the start. Temporary management and cleaning in motels is not adequate preparation for ownership and operation. Selling units to the public requires undivided attention and she was following a very successful operator, which she should have realised. I am satisfied Mrs Langridge's housekeeping at the motel was entirely adequate, but it was in the arena of trade catchment that her inexperience showed. To be fair, at the level of borrowing and rental payments even a highly skilled, active operator probably would have failed. I also think the suddenness of the failure must have had a disheartening effect on her management. Nevertheless, in the final analysis there was some failure on their part in the running of the business which I take into account in assessing the loss. In legal terms some of the damage claimed was too remote, or uncertain.

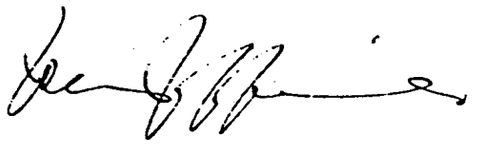
Mr Wild argued that the plaintifs had not mitigated their losses, or, to put it another way, taken steps to avoid consequences. I do not hold this could have been done. Once it became clear to Mrs Langridge the full effect of her action she consulted lawyers. She took advice from a motelier whose opinion was that she could not sell that lease. Admittedly she was possibly restricted by an 8 year lease, but I think the most damaging restriction on a sale was the rental at $19,000 per annum.

The approach of the court in damages is to give out-of-pocket loss to the plaintiffs arising out of the bargain. This is not such a case where the court can calculate the difference between the actual value of that with which the plaintiffs parted and the actual value of that which they

received. In the circumstances of this case it seems the court is obliged to examine the separate figures claimed as losses, and on the basis of the evidence decide whether they are properly payable by the first defendant.

To this point I have adopted Mr Wild's suggestion and given some broad indications about the approach to damages, but find on the evidence and argument I can go no further. In final argument there was no summation of the evidence about the plaintiffs' claim. I think care must be exercised to ensure the plaintiffs do not achieve double recovery. I find on the evidence the court has no alternative but to postpone fixing a final figure for damages and leave it to counsel to return to court if settlement cannot be achieved.

Counsel did not have an opportunity to address me on costs, and I therefore ask that they confer, and if unable to agree counsel may submit memoranda and, if necessary, deal with costs at a further fixture.



J.

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|---|---|
| Solicitors for Plaintiffs: | Barltrop Cobbe & Evans, Feilding |
| Solicitors for First Defendant: | J.R. Wild, Wellington |
| Solicitors for Second Defendant: | Young Swan Morison McKay, Wellington |