IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2006 442 000481

	BETWEEN	THE DUNES CAFÉ AND BAR LIMITED Plaintiff
	AND	623 ROCKS ROAD LIMITED Defendant

Hearing: 21, 22, 23, 24 April 2008
28, 29, 30 October 2008

Counsel: 21-24 April 2008:
Gerard Praat for plaintiff
Simon E England with R Carter for defendant
28-30 October 2008:
Mrs Danielle Hampson for plaintiff
Simon E England for defendant

Judgment: 25 February 2009 at 3:30pm

RESERVED JUDGMENT OF HUGH WILLIAMS J

This judgment was delivered by
The Hon. Justice Hugh Williams
on

25 February 2009 at 3:30pm

pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

A. The plaintiff is entitled to judgment against the defendant on liability.

B. The plaintiff will be entitled to judgment against the defendant for the total of the sums allowed after discussion between the parties as directed, and either agreement on those sums or a decision on quantum following receipt of the directed memoranda.

C. The plaintiff is entitled to judgment against the defendant for interest on the total sum for which judgment is entered payable at the rate applicable under the Judicature Act 1908 from 5 December 2006 to the date of delivery of this judgment and from the date of delivery of this judgment to the date of payment.

D. The plaintiff is entitled to judgment for costs against the defendant but, given that it was not represented at the October 2008 hearing, the parties are to endeavour to agree on the sum for which judgment for costs is to be entered. The scale is 2B. The sum for costs is also to include disbursements, Court fees and witnesses' expenses (including expert witnesses' expenses, disbursements and travelling expenses). Leave is reserved to apply as mentioned if the parties are unable to agree on the sums for which judgment is to be entered.

E. All other claims by the plaintiff are dismissed.

F. The counterclaims by the defendant are dismissed and the plaintiff is entitled to judgment for costs on the counterclaim in the same terms as in (D) above.

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Introduction

[1] For a number of years prior to mid-2004 the plaintiff, The Dunes Café and Bar Limited ("Dunes"), ran a café, bar and casino in leased premises at 643 Rocks Road, Tahunanui, Nelson. With rights of renewal, its lease potentially ran until 2010.

[2] Mr Stephen Hampson was, over the period relevant to this claim, Dunes' sole director and shareholder but his wife, Ms Danielle Hampson, worked in the bar and was actively involved in management of the company over a number of years.

[3] In about May 2004 Dr Robert Donald, an experienced property developer who lives in Auckland and is sole director and shareholder of the defendant, 623 Rocks Road Ltd ("Rocks"), became interested in buying 643 Rocks Road and the accompanying building 623 Rocks Road (known as the "Setka" building) with a view to demolishing both and re-developing the entire site by erecting a building to be called the "Sands" comprising a number of shops on the ground floor with apartments and parking.

[4] Initially, Mr and Mrs Hampson were uninterested in Dr Donald's approach. Dunes had a well-established business and a lease with a number of years to run. However, Dr Donald persisted and ultimately the parties agreed to meet to discuss his proposition.

[5] Eventually, Dunes and Rocks entered into a Heads of Agreement ("HoA") dated 17 June 2004 (copy attached as *Annexure 1*). The principal effect was that Dunes agreed to surrender its lease and Rocks would lease Dunes a café and bar in the new premises. Arrangements were put in place as to how that would occur and, in particular, as to compensation Rocks would pay Dunes between closure of the bar and opening of the new premises. Unfortunately, as will be seen, the parties did not deal comprehensively with their respective rights and obligations concerning what was to be included in the new premises or at whose cost. This oversight lead in due course to significant contentiousness between the parties and, ultimately, to this litigation.

[6] As the new building was approaching completion differences arose between the parties as to their rights and obligations under the HoA and performance of its terms.

[7] Rehearsing the critical correspondence, on 1 August 2006[1] Donald Design Ltd, another company which Dr Donald controlled, faxed Mr and Mrs Hampson and others setting out Rocks' position concerning the fitout of the new bar, concluding by saying that:

> We look forward now to this key tenancy being complete and ready for opening on September 1.

[8] Those concluding passages were preceded by details of Rocks' position on the arrangements between the parties. In particular, the letter said that, apart from the items specifically mentioned in Appendices 2 and 4 of the HoA, Rocks would be providing Dunes "with an empty 'shell' as per the other shops in the complex" with the 'shell' including:

(i) perimeter walls lined with gib board and painted;

(ii) demountable modular tile ceiling on gib grid support;

(iii) concrete floor;

(iv) sprinklers (to a general layout for an open space);

(v) exterior glazing;

(vi) power to D[istribution] B[oard];

(vii) toilets fully operating;

(viii) water to a nominated outlet.

[9] All "interior partitioning … air-conditioning, extract systems, internal joinery, floor finishes, light fittings, plumbing fittings, etc. are supplied and paid for by the tenant" as was the difference between the special ceiling required for the bar as opposed to the "standard modular tile ceiling". The letter specifically said that Rocks' obligation under Appendix 4 was to pay "50% of the cost of a new gas fire, light fittings (but not reticulation thereto) and floor coverings (but not raised floors)" and specifically noted "there is no mention of 'air-conditioning' in these appendices". The water and plumbing wastes were required by Appendix 2 to be in

[1] All dates in this judgment are in 2006 unless otherwise stated.

"positions nominated by the tenant" but the letter went on to say they were "now installed to the tenants' original plan appended to the agreement". Rocks' obligation was to supply "basic timber cabinetry … plus timber shelving over …".

[10] Dr Donald said his fax of 1 August was as a result of "despair with nothing happening so we thought we would have to bring it to an end to set out what our position was and who paid for what".

[11] Mrs Hampson said that letter reflected both the deterioration in the relationship between the parties, exemplified by an acrimonious telephone call of 28 July, and also represented a change in attitude by Rocks and :

> … the apparent change in attitude regarding the extraction system, the continued reference to the gas fire when I thought we had agreed to use heat pumps, the suggestion that the cost of ceiling with special sound insulation should be reallocated, the reference to the floor plan from the Heads of Agreement as the tenants original plan, when in fact it was prepared by Mr Donald and he had overlooked our floor plan requiring repositioning of the wastes and water supply. The Defendant's fax did not address the failure to pay stand-down costs for July and August 2006 and unrealistically sought an opening date of 1 September 2006.

[12] She said Dunes had no idea prior to Donald Design's 1 August letter that Rocks would not supply those items. At all meetings prior to that, Dr Donald said he would be getting on with them or asking Rocks' builder, Ian McCully Builders, ("McCullys") to do them.

[13] On 10 August, Rocks' solicitors faxed comments concerning proposed amendments to the agreement to lease which had been sent the previous day. The fax said Dunes "already has access" to the premises. The letter said Rocks was prepared to abide by the HoA fitout obligations but its position was "steadfast" as set out in its 1 August fax. The letter continued:

> Whilst your client has had the opportunity for more than one month to commence its fitout, it has failed to do so. This is seen as repudiatory behaviour.
>
> Our client expects your client to comply with its obligations and commence fitout immediately. Our client has proceeded in good faith to act responsibly under the terms of the Heads of Agreement, however its patience is now being tested.

> Accordingly, we are instructed to seek your client's execution of the Agreement to Lease with the modifications contained within this letter and to proceed immediately to commencing its fitout.
>
> Your clients are either in or out. Time is now of the essence. If your client fails to complete the Agreement to Lease by 18 August 2006 then our client will treat that behaviour as repudiation of the Heads of Terms, exercise its right to cancel and will mitigate its loss by reletting the premises.

[14] Dunes' reply to Rocks' 1 August fax was dated 11 August (annotated as having been prepared before receiving Rocks' solicitors' letter of 10 August). Over five pages it summarised Dunes' concerns relating to consents, fitout and stand-down costs, itemizing what Dunes saw as Rocks' attempts in the preceding correspondence to depart from the HoA. The major issues raised were:

> (a) Installation of the extraction system was Rocks' responsibility under its resource consent and to ensure a working replacement bar.
>
> (b) The parties' respective responsibilities for joinery were detailed. Rocks' responsibility was to provide the kitchen cabinetry to fit Dunes' equipment. The letter said McCullys were awaiting Rocks' authorization to commence work.
>
> (c) An agreement to re-route the plumbing and water supply at Rocks' cost was recorded, and the omission of any HoA reference to the grease trap noted.
>
> (d) The letter said it was Rocks' responsibility to "cover the cost of the reinstallation of all electrical services as was provided for in the previous premises".
>
> (e) The letter suggested it was Rocks' responsibility to instal the interior partitioning because it was shown on the Appendix 3 plan.
>
> (f) A demand was made for payment of the 1 July and 1 August stand-down costs and the storage costs which, the letter recorded, had been discontinued by Rocks on the grounds of claimed delay with the fitout.
>
> (g) The proposed opening date of 1 September 2006 was described as "unrealistic".

[15] In relation to the 11 August letter Mrs Hampson said:

> "We were doing everything possible to get in, without being able to actually work on the premises. We had innumerable contractors on stand-by ready to go. We were waiting for Mr Donald to move water and waste and to put in

> extraction. Nothing else could happen either by ourselves or McCullys until Mr Donald completed these things".

and she said they were also waiting for Donald Design to accept the cost of re-installing the electrical fittings and to decide on the ceiling.

[16] Mrs Hampson said this letter was a response to Donald Design's 1 August fax. They saw their solicitors immediately after its receipt. She did not know the reason for the delay in its being sent. There had been suggestions for a meeting with Dr Donald on either 3 or 4 August which, possibly due to misunderstandings on each side, did not occur.

[17] A response to Rocks' solicitors' letter of 10 August was sent on 14 August. Largely concerned with proposed lease amendments it said Dunes "did not accept that the premises were ready for access". It expressed hope that by the time the lease was signed access would be available. The letter expressly rejected that Dunes' attitude to fitout was repudiatory and asserted Rocks was in breach of the HoA. A meeting was suggested.

[18] Rocks' solicitors wrote on 15 August saying that:

> Our client views the continued attempt by your client to negotiate as a clear sign that your client is unprepared to follow its obligations under the heads of agreement

The letter set out Rocks' response to details in the correspondence and reiterated its position on the fitout was as in the 1 August fax: "Rocks is not prepared to haggle or negotiate further". As access for fitout had been available "from early June", Dunes must either accept the costs propositions in the letter, sign the lease and pay rent from 1 August or accept Rocks was "likely to cancel for repudiation".

[19] Dunes' solicitors' fax of 14 August was answered by a fax from Rocks' solicitors on 21 August which included a lease (as opposed to an agreement to lease). The letter suggested fitout "issues were settled some months ago". The letter concluded:

> Rocks … requires your client to:
>
> > accept the definition of fitout costs put to it as clarified in our client's facsimile of 1 August 2006; and
> >
> > sign and return the enclosed Lease (or a lease on substantially identical terms)
>
> by 5pm 25 August 2006 or our client will cancel on the basis that your client has repudiated the Heads of Agreement.

[20] Mrs Hampson said Dunes' response was to seek quotes from McCullys for the work required, contact Nelson City concerning fitout building consent, and sign the lease as the City advised no building consent could be granted until the tenancy was secure. She made the point that Rocks' solicitors' letter of 21 August revoked any chance of later contest on responsibility for the fitout costs, and left them only 10 days to do the work. No fitout was carried out on site during that period. Contractors had to be arranged and remaining quotes obtained.

[21] Alongside this exchange, emails passed between the respective solicitors largely concerning lease details. However, it is noted that on 23 August Rocks' solicitor advised Dunes' solicitor that the commencement date for the lease could be moved to 1 September "allowing for the fact that the premises has (*sic*.) been ready for fitting out from early June and allows for the fact that your client will have had two months within which to complete those works" but went on to repeat that "Friday 5pm is an absolute deadline by which time [Rocks] expects to have a full and final acknowledgement from your client that it has agreed to proceed with its fitout and will enter a lease on substantially identical terms to that which has been offered".

[22] McCullys' cost estimate dated 28 August recorded that, in a number of aspects, instructions were awaited from Donald Design, something that had not happened because of the lease issues which "came to a head a few weeks ago". The letter noted the distribution board was in place but "no power connected", the toilets could not be completed as sub-contractor work was required, placement of the water and plumbing was done in accordance with "plans provided by DD at the time" but that, at meetings, it was agreed that "these positions were incorrect based on the

plans you provided DD who did not forward to IMB [McCullys] at the time". Plans for the kitchen were completed but Donald Design approval was required.

[23] The letter also included fitout work costing $33,392.83 which "would be contracted direct" to Dunes. Mrs Hampson said the latter included the raised floors and excluded items such as the extraction system. She said the sum was a "contribution to fitout which the plaintiff was entitled to receive from the defendant under the terms of the agreement".

[24] After further correspondence over bar fitout and other matters, on 25 August Dunes' solicitors returned the signed lease but on a "Without Prejudice" basis.

[25] The letter sought confirmation that the work Rocks recognised as its responsibility had been completed, noted the water and plumbing had still to be re-routed and said Dunes was "now making arrangements for the completion for the entire balance fitout to ensure that their business can open for trade as soon as possible" though on a "without prejudice" basis that Rocks was responsible for some of the cost. Rights of further claim were reserved.

[26] It should be noted at this point that Mr and Mrs Hampson and Dr Donald all seemed to draw a distinction between execution of an agreement to lease and a lease. Mrs Hampson thought signing the latter would supersede the former and deprive Dunes of the benefit of the HoA. That distinction may partly have led Dr Donald to see the HoA as an "agreement to agree". That misunderstanding seems to have affected the instructions the parties gave their lawyers during July and August 2006 and affected negotiations over lease terms.

[27] On 28 August Rocks' solicitors responded that:

> Friday 5:00pm 25 August 2006 was our client's firm deadline for acceptance by your client of the allocation of fitout responsibility between the parties as outlined in the Heads of Agreement and the facsimile of 1 August 2006. With respect, the nominal acceptance with tags is neither one thing nor the other: our client needs greater certainty.
>
> Your client's attempt to continue discussions and negotiations concerning matters that our client views as settled substantially reduces the benefit of the original agreement between the parties to 623 Rocks Road Limited.

> Accordingly, you may take this letter as notifying cancellation of the existing contractual relationship pursuant to section 7 of the Contractual Remedies Act 1979.

[28] After unsuccessful negotiations, Dunes commenced these proceedings on 5 October. It sought a mandatory interlocutory injunction for orders restraining Rocks from entering into any further lease of the bar premises following its purported cancellation of the HoA and sought to restrain a company called Nelson Gourmet Ltd – to which Rocks had, following a form of tender, by then leased or was about to lease the premises – from taking any steps under that lease.

[29] Dunes' interlocutory application was dismissed by Gendall J in an oral judgment delivered on 6 November.

[30] On 5 December Dunes advised Rocks its failure to execute and return the lease, its denying Dunes entry to the new premises and its giving its 28 August notice of cancellation and entering into a lease with Nelson Gourmet was treated as repudiation. It gave notice of cancellation of the HoA under s 7 of the Contractual Remedies Act 1979 and advised it would be seeking damages under s 9 of that Act – but not entry to the premises.

[31] The essential liability question in this litigation is therefore the extent to which either party complied with, or breached, its obligations under the HoA and thus which was entitled to cancel.

Pleadings

[32] Dunes' claim is in breach of contract arising out of a large number of asserted breaches by Rocks of the HoA. Relevant details will be considered as this judgment proceeds, as will various claims for damages resulting from those alleged breaches. It is, however, pertinent to note that the major components of the claim were compensation for losses of goodwill ($450,000), value of retained plant and equipment ($165,063.72), a trade-tie advance ($119,138.69), gaming machine income ($114,075) and general damages for stress and anxiety ($50,000). In relation to that last, Dunes was advised during final submissions that, even if Mr and Mrs

Hampson might arguably have been entitled to general damages for stress and anxiety, as Dunes was the sole plaintiff that claim could not succeed.

[33] There was originally a second cause of action arising out of a first right of refusal of purchase of the premises included in the HoA. That was abandoned, if for no other reason than it could not be achieved since the premises were sold by mortgagee's sale on 29 August 2008.

[34] Rocks' defence was a detailed denial of the factual foundation for the claimed breaches. It also counterclaimed for misrepresentation as to the basis for the costs claimed by Dunes under the HoA and sought refund of at least the $242,122.25 which Dunes accepted it received from Rocks during its currency.

[35] A second counterclaim cause of action was based on breach and repudiation asserting failure on Dunes' part in particularized ways to comply with the HoA. It originally sought damages for floor plan costs, legal fees and lost revenue totalling approximate $20,000 and claimed for lost unit sales and diminution in the value of the development. That last counterclaim was abandoned by Rocks in the closing submissions of Mr England, its leading counsel, partly in light of the mortgagee's sale.

Procedural

[36] Before dealing with those issues, it should be noted the claim was originally set down for a 4-day hearing beginning on 21 April 2008. In pre-trial conferences, counsel were confident it would conclude well within that span. However, the 4 days proved significantly inadequate. The case had to be adjourned part-heard. That was unfortunate, doubly so since commitments of those involved meant the hearing could not be concluded until the October 2008 dates shown in the frontispiece.

[37] It needs also to be recorded that Dunes was represented by counsel at the April 2008 hearing but, in the run up to the October 2008 resumption, found itself unable to continue to retain Mr Praat. Presumably with assistance from counsel's preparation, the balance of the hearing was conducted – very competently as it

turned out – by Mrs Hampson. There was no objection to that course from Rocks or its counsel, despite the fact that Mrs Hampson had been one of the plaintiff's principal witnesses as to fact at the April 2008 hearing and despite decisions such as *Re G J Mannix Ltd* [1984] 1 NZLR 309 and the cases which have followed it – though Mrs Hampson has never been a director or shareholder in Dunes.

Negotiations Preceding the HoA

[38] Evidence made clear the parties' diametrically differing approaches in negotiating the HoA. In particular, Mr and Mrs Hampson had to accept the document was silent on a number of issues which they regarded as important.

[39] Dunes' approach is perhaps best typified by the following passage from Mr Hampson's evidence:

> I said to Mr Donald at one of the meetings … "We are sitting here in a fairly [*sic*. "fully"?] operational café and bar. Why would I walk out of this if it was going to cost me to come back in?" I had no reason to do that. I specifically asked him about the extraction unit because I can remember the Dunes was a single level building with extraction out of the ceiling. I asked Mr Donald how he proposed to get the extraction from The Dunes to outside, considering there were apartments above us. … We went through the extraction system and Mr Donald told me he would put the extraction system through the side walls, either front or back. It was then we talked about the kitchen work. We went through the bar and we went into the kitchen. I told him what we needed in the kitchen, what space we'd probably need in the kitchen, and it was only afterwards that with myself and Danielle together we thought we hadn't discussed with him the cabinetry and the shelves. And I think that was why Danielle put that in. He fully agreed at that time. If he took my bar he would put me in a new bar, fully operational. I mean, we would have been stupid to walk out if it was going to cost us hundreds of thousands to walk back in.
>
> Q. Well I put it to you that what you're talking about there is a discussion as to HOW an extraction system might be arranged?
>
> A. He told me he would put in an extraction system.
>
> Q. Are you also suggesting – as this is Mr Donald's evidence that this is not the case – that he would pay for that system?
>
> A. Yes.
>
> Q. And you understand Mr Donald says that is not the case?

A. I know he's saying that now. Yes. Yeah.

Q. There is NO mention whatsoever of that in the Heads of Agreement?

A. There is no mention whatsoever in the Heads of Agreement.

…

Q. The Heads of Agreement is characterised by several amendments and several requests in the last two days for specific items to be paid for by the developer. But it does NOT mention any of those three items, does it?

A. No it doesn't. Because – I mean, it's not there because he personally guaranteed that he'd put in an extraction system. He told us that he would re-do our kitchen. He told us he would do the internal structures for what we needed for the bar. I mean, he said he would get the consents. To get the consents he would have to have the bar to a certain standards. He told us that is what he was doing. We didn't even dream we'd have to go into a Heads of Agreement. To me, the Heads of Agreement was things that we thought about that may be contentious. To me, at that stage, it was not contentious, because he promised he would do them.

Q. Do you accept the Heads of Agreement specifically states the items which the developer would provide and goes on to state the tenant is responsible for all other items of fitout?

A. Yeah, that's what it says, yes.

[40] Mrs Hampson explained the omission from Appendix 2 of the HoA of any mention of an extractor fan, extraction system, hot water cylinder and the grease trap because –

> "We didn't include items that we had already discussed with Mr Donald. We had already been there as part of our resource consent … we were not going to leave fully-functioning premises to go into one that we had to fitout with the basics like hot water systems that were of the right size and extractor systems."

[41] Mrs Hampson accepted her fax of 16 June 2004 to Donald Design queried whether there would be, amongst other fittings, an "extractor fan". She had ticked some items but not that. She explained the fan was in the canopy in the kitchen but an extraction system was required in a commercial kitchen. She said the aluminium joinery would be "the same as we had in our alternative premises" including a suspended ceiling and electric power.

[42] She claimed Appendix 1 cl 2 required Rocks to re-connect all the plumbed equipment not just to wire up the distribution board**,** despite Appendix 2 cl 1.2 making the tenant liable for "electrical reticulation from DB" and that:

> Mr Donald agreed in there that he would reconnect all of our plumbed equipment – our dishwashers, our three phase power required for our ovens for our extractor fans. Mr Donald included in this that he would reconnect all of those. Now with the power only going to a distribution board, how was he gong to reconnect all of those?
>
> Q. It is Mr Donald's position that that refers to the disconnection of power and plumbing and the reconnection of same to the building … Now that is abundantly clear, is it not, that the plaintiff is responsible for electrical reticulation from the electric distribution board?
>
> A. I don't think it is abundantly clear at all. It states over there that Mr Donald is connecting existing plumbing and electrical connection from the previous building, items from that building were to be reconnected and reinstalled. So no. I don't think that is abundantly clear.
>
> Q. That item reads: "Electrician and plumber costs for disconnection and reconnection of same". Now, is it your contention that Mr Donald has agreed to reticulate power from the distribution board?
>
> A. For some items, yes. …
>
> Q. It is your contention, is it, that Mr Donald has agreed to electrical reconnections for some items, despite the wording in Appendix 2 that the tenant is responsible for electrical reticulation from the distribution board?
>
> A. Yes. From my understanding Mr Donald was to reinstall some items and those required electricity.
>
> Q. Now, nowhere in this agreement is an extractor system mentioned, is it?
>
> A. No.
>
> Q. Nowhere in this agreement is a grease-trap system mentioned?
>
> A. No.
>
> Q. And nowhere in this agreement is a h.w. cylinder mentioned?
>
> A. No. However, what *is* mentioned is "Resource Consent" and without those three items mentioned resource consent for our tenancy would not be obtained.

[43] Accepting the HoA did not refer to provision of power outlets, she said it was in their discussion with Dr Donald that:

> "We would not move out of the premises if it was going to cost us money to get the basics put back in. … The things that we had in existence in our old premises were going to be there when we moved back in."

[44] By contrast, Dr Donald said because of uncertainty as to Dunes' expenses when the HoA was entered into, it "was in some respects an 'in principle' agreement only and contained a number of clauses which required further agreement between the parties and which therefore were in the nature of an 'agreement to agree'".

[45] Negotiations over the terms of the HoA began about 6 May 2004. Dr Donald's notes of that day's meeting included his question "what are their ambitions?" and the response "given new premises".

[46] More particularly, the negotiations involved Dunes vacating on lengthy notice and being paid compensation towards its termination, holding and re-location expenses. It was initially envisaged that Dunes would be out of operation for only six months and Rocks would pay $1000 per week towards Mr and Mrs Hampson's living expenses and other costs with a concessional rent once the bar was back in business. Mrs Hampson's re-calculation of their costs, however, suggested they would require significantly greater compensation, particularly as they would be without income from both the bar and gaming machines. Their costs would also include such ongoing items as vehicle payments, servicing bank loans, meeting ACC levies and other insurance and staff redundancies.

[47] Mrs Hampson said a formula to cover their stand-down costs was critical to Dunes deciding whether to surrender its lease. It would not do so if it then suffered losses. She said the negotiations did not include linking entitlements to payment to precise application of the funds so that, for example, the allowance for redundancy might be used to meet unpaid wages or holiday pay or retain staff over the period of closure.

[48] The then position was set out in a Donald Design fax to Mr and Mrs Hampton of 25 May 2004 to which Dr Donald added changes agreed in a discussion

with Mr and Mrs Hampson the following day. Those annotations include "loans ($2200 p.m.)" and "fireplace for winter?".

[49] However – symptomatic of the way differences between the parties ultimately became contentious – when Dr Donald reported that discussion to his solicitor on 8 June 2004, the six month total of $13,200 for "loans" became "bank interest" - the formulation which was ultimately included in the HoA - and items such as the possible fireplace were omitted.

[50] By 4 June 2004 the position reached was reflected in a fax from Mrs Hampson to Dr Donald saying that as a "rough guess" based on Dunes' bank statements and a six month closure, the compensation costs were $60,500 plus storage costs, "electrician and plumber costs re installation and extallation [sic], installation and gravity system, new set-up costs" and other items.

[51] Dr Donald said he regarded those costs as high – particularly Mr and Mrs Hampson's living allowance of $40,000, the bank loans (by then $13,700) and staff retention costs of $20,000 – but was assured by Mrs Hampson on 8 June 2004 that:

> "all of the costs claimed were actual expenses which DCB [Dunes] would be forced to pay to third parties during the stand-down period … and were based on actual prior expenditure".

[52] He continued, relevant to the counterclaim, that:

> In particular Danielle told me that:
>
> (a) The Bank interest costs claimed were interest only payments on borrowings (not including any capital component); and
>
> (b) The staff redundancy payments would be paid to 8 staff at a rate of 4 weeks wages each; and
>
> (c) The staff retainer payments would be made to two staff (chef and bar manager) at the rate of $10,000.00 each to retain them for the anticipated 6 month stand down period; and
>
> (d) The vehicle lease payment was the payment required for one vehicle only; and
>
> (e) The amount of $40,000.00 claimed as a living allowance represented the actual amount that she and Mr Hampson were paid from the business which was $80,000.00 per annum; …

> ... During various discussions with Danielle regarding the stand down costs Danielle assured me that DCB would pay the costs claimed to the third parties mentioned in her claim so that DCB would be in a position to immediately reopen (with key staff on board and all required supply and finance contracts etc continuing in place) as soon as the premises were available.
>
> The maintaining of DCB as a "going concern" was in fact one of the key factors which persuaded me to agree to pay the costs as claimed because I could see the benefit to the Sands in having the restaurant premises operating as soon as possible.

[53] After receiving the first draft of the HoA, Mrs Hampson sent Dr Donald a fax recording Dunes then understanding of the proposal. After further discussion and amendment, the principal portions of that fax were attached to the HoA as Appendix 4 "Miscellaneous Items".

[54] There were, however, changes between the fax as annotated by Mrs Hampson of later discussions by comparison with the copy attached as Appendix 4. In particular, the note concerning "re-installation of fireplace either existing or new gas fireplace" became a commitment by Rocks to pay half the cost of a "new gas fire, light fittings and floor coverings" and the annotation for the developer to "provide timber bench cabinet" in the kitchen was replaced by "developer to provide timber cabinetry to receive s[tainless] s[teel] items to be re-used, also timber shelving over".

[55] Mrs Hampson said she regarded the attachment of Appendix 4 as a shorthand method of incorporating the terms of the fax as altered – but the differences between her annotations on the 16 June 2004 fax and Appendix 4 became contentious, not least because she said that immediately after the signing of the HoA Dr Donald demurred at the prospect of bottles for the gas fire being strapped to the building and offered to have his engineers set up a proposal for air-conditioning in lieu.

Heads of Agreement

[56] A number of the provisions of the HoA caused no concern between the parties even though several were not actioned precisely in terms of the agreement.

[57] As an example, cl 2 dealt with the vacation of the premises. Six months notice was required. It was not to expire prior to 30 March 2005. Notice was duly given. The Dunes closed on that date.

[58] A contrary example was that cl 2 also required that, prior to vacation, Rocks would confirm that all consents for the development were in place, including that for the new bar, and Dunes would sign a new lease in terms of cl 6. The consents were not timeously obtained and the new lease was not provided until well after due date. As earlier noted, this became an issue in relation to cancellation of the HoA.

[59] Another example was that cll 2.2(iii) and 3.2 and Appendix 1 required Rocks to pay stand-down costs totalling $96,700 to Dunes' solicitors for release to Dunes, with interest, on the first of each month after the premises were vacated. Clause 3.2 provided that should the bar's completion take longer than six months Rocks would continue to make those monthly payments to Dunes "together with compensation for loss of income from the gaming machines over this period".

[60] The $96,700 was not paid in one lump sum to Dunes' solicitors. That meant Mr and Mrs Hampson had to have recourse to their own funds to meet redundancies, contrary to the HoA. Monthly payments were made for a period thereafter – not always on time - though there was a dispute as to whether GST was required to be included despite Appendix 1 saying the fixed costs were GST inclusive.

[61] It is common ground the redevelopment was significantly delayed beyond the term originally envisaged by Dr Donald, Mr and Mrs Hampson and, no doubt, everybody else involved. In large measure, the delays were due to problems obtaining necessary consents under the Resource Management Act 1991 over objections from neighbours – finally resolved with Mrs Hampson giving evidence for Rocks - discovery of a midden on site with the necessity for that issue then to be appropriately dealt with, and significant re-drawing of the plans, particularly shifting parking from the underground site originally proposed to an alternative site, predominantly beside the building.

Position as at April/May 2006:

1. General

[62] What occurred between these parties during the nearly two years between the signing of the HoA on 17 June 2004 and the first meeting in about April 2006 between Mr and Mrs Hampson, Dr Donald and Ms Cadogan, Project Manager for McCullys, will require some later consideration but, for the present, it is convenient first to focus on what occurred at the early meetings involving all those participants.

[63] Ms Cadogan –a Dunes' witness – said at their initial meeting in about April 2006 she knew of the HoA and Dunes proposed new bar space only from the plans forming part of the contract between McCullys and Rocks. The only work McCullys expected to do in the Dunes' new space under that contract was instal shelving in the kitchen. Dr Donald then asked McCullys to assist him in liaising with Dunes over fitout. At about that time Dr Donald passed her a pile of sketch plans concerning the fitout which Mrs Hampson had sent Donald Design over the intervening period. Ms Cadogan had not seen them before.

[64] A further meeting took place between the same participants on 16 May. Ms Cadogan said:

> There was clearly a gap between what Mr & Mrs Hampson expected to happen with regard to the fitout for them and what work [Dr] Donald had instructed our company to complete verses [sic.] what [Dr] Donald intended to supply/pay for.
>
> McCully had no contract with Mr & Mrs Hampson so we generally looked to [Dr] Donald to provide instructions on behalf of Rocks … before we could do any work.
>
> We were instructed to provide services in preparing plans for the fitout which we did. One set for kitchen layout, which [Dr] Donald said he would pay for and one set for bar and restaurant layout, which [Dr] Donald expected the Hampsons to pay for. We provided the costing for the fitout Mr & Mrs Hampson intended. That costing we sent to [Dr] Donald. Some time went by before a response to this quote was received. A revised quote was sent to the Hampsons.
>
> The production of plans for a fitout are not completed overnight and the expectations from both parties was not realistic within the timeframes [Dr]

Donald had in mind for the Dunes opening. With the late decision on who was paying for what, achieving this was almost impossible.

I was aware that Rocks or [Dr] Donald and the Hampson's had very different expectations as to what their respective obligations were regarding completion of fitout but that was a matter in which McCully was not involved.

[65] More importantly, she said of the 16 May meeting, that:

> … the easiest way I can explain it is that from the discussions I had with the Hampsons is that they believed they had left a working restaurant and pub and that is what they, in theory, believed they would be returning to. Having read the Heads of Agreement document a number of times and talking with Robert Donald and Liz Prescott [Dr Donald's architectural assistant] about what their expectations were, as an outsider looking in, it was clear there were quite big gaps that were going to form about who was going to pay for what. We did try to keep out of that. We offered to help the owners of the shops with Robert Donald, he asked us to help and we said we would – that was part of being a good contractor. It went against our nature to do that. Usually you become the meat in the sandwich. We wanted the project to be successful and to get along. I was in Nelson and able to do that work and so it seemed that's why I did it. But from my personal opinion, listening to them talking … it was clear there were quite big gaps about what each party expected. It certainly wasn't up to me at that meeting to point that out.
>
> Q. You've just said that you'd read the Heads of Agreement a number of times and that was one of the factors leading to your opinion that there was a gap. As an outsider looking in, was it your opinion that the Heads of Agreement provided for a fully working restaurant?
>
> A. No, I think it provided for areas within it to be left out, there were certain areas that were mentioned that would be paid for by Rocks but it wasn't overly clear what exactly was going to be paid for and what wasn't. It was really quite ambiguous.
>
> Q. Certainly not, in your opinion, a finished restaurant?
>
> A. No. We stopped reading it because we thought it was easier to get directions from either party.
>
> THE COURT: By the end of the meeting on 16 May, were the parties any closer together as to who was going to do what?
>
> A. No. No.

[66] As the August 2006 correspondence demonstrated, the parties disagreed on just about every detail of their respective responsibilities concerning fitout of the

new bar. Some of that detail has already been recounted; some is not central to deciding the case. For present purposes, the parties' stances can best be exemplified by reviewing the detail on three aspects, namely, preparation of plans for fitout, availability of the premises for fitout and the associated question of watertightness of the premises.

2. Plans

[67] As to the plans, cl 4 of the HoA provided for Dunes to be given a shop of internal area approximately 225m^2 and an external area of approximately 45m^2, "generally in accordance with the preliminary draft floor plan" which formed Appendix 3. It continued by requiring the final floor plan lay-out to be agreed within one month of the HoA to enable Rocks to complete construction drawings.

[68] The Appendix 3 plan was drawn by Donald Design. It contained only modest detail. Whilst, for instance, it depicted the number and placement of tables and chairs in the external area, it contained no detail of booth seating within the restaurant or the casino area and although it showed a "raised bar" it appeared to include patron seating within the area.

[69] Nothing occurred between the parties to finalize the floor plans before due date, 17 July 2004, but at about that time Mr and Mrs Hampson approached DB Breweries' designers for assistance. They were unwilling to help. Mrs Hampson said she informed Dr Donald of their position.

[70] On 6 January 2005 Donald Design advised Mr and Mrs Hampson that at the end of that month they would be "lodging documentation with Council for building consent for the basement and ground floor shopping levels (as a 'first stage' to give McCullys six months work while we resolve any planning issues on the remaining floors)" and said the application would be for "all shops as 'shells' with toilets operational, walls lined and painted, false ceilings in place, power on to the distribution board, water on, and (in your case) plumbing wastes in place to the kitchen position" with tenants being "responsible for the subsequent fitout of their tenancies". The fax said Dunes would presumably work with their "brewery

designers to produce a separate fitout application to Council" and promised a plan from Rocks' "plumbing consultants showing what we have included in our 'shell' application". Dr Donald relied strongly on the references to only a "shell" being provided by Rocks.

[71] Mrs Hampson said that fax did not accord with Dunes' view of the HoA. No plans were received from the plumbing consultants, something Dr Donald accepted. Just before the closure on 30 March 2005 Dr Donald and Ms Prescott showed Mr and Mrs Hampson artist's sketches of the new complex and it was, she said, at that meeting they learned Dunes' architect was completing plans and layout. Contact was promised as to Dunes' specific requirements, particularly for air extraction in the kitchen and casino.

[72] Plans produced for the new bar by Donald Design in September 2005 included symbols for the extraction system. Thereafter, those symbols and the extraction system were omitted. She said she and her husband were under the impression the extraction system would be included and Rocks could not obtain a building consent without such for a commercial kitchen.

[73] Over ensuing months, alongside other preparatory work for the new premises such as settling on menus and costs, Mrs Hampson, though not skilled at drafting, prepared a floor plan and outline elevations on school graph paper and faxed them, in sections, to Donald Design in about August 2005. It was those plans Dr Donald gave Ms Cadogan in April 2006.

[74] The plans omitted placements for water and drainage, despite Appendix 2 to the HoA providing for water supply and plumbing waste in the floor "to positions nominated by the tenant" (cl.1.1(vii) (viii)).

[75] Mrs Hampson accepted Donald Design produced a plan for the restaurant dated September 2005 which showed the symbols she mentioned but was unsure whether they received that plan shortly after its date despite it being noted "latest plan (tenants have this)". She thought she and her husband first saw those plans in

April 2006. She acknowledged, however, that the layout in the Donald Design plans appeared to have taken account of detail included in her August 2005 version.

[76] The water and waste pipes to the proposed new bar were laid in the position shown in the Donald Design plan, McCullys having no other instructions. It was common ground they were in the wrong place for Dunes' new bar. However, because the bar floor was to be raised at Dunes' expense, it would have been possible to re-position the water supply and drainage pipes under the raised bar floor and obtain access from a neighbouring tenancy so as to enable the bar to function. Rocks' commitment to the cost became contentious.

[77] Dr Donald, however, asserted that completion of the final floor plan within the month allowed by the HoA was important to Rocks to complete its construction drawings and the only reason it did not occur was because Dunes did not obtain the services of an architect after Dominion Breweries declined to assist.

[78] He said Mr and Mrs Hampson failed to progress the plans, despite discussions on the topic, because their ideas for the new premises constantly changed. He acknowledged Dunes sent sketch plans in late 2005 but said these, too, varied as Mr and Mrs Hampson's restaurant ideas altered. The graph paper plan, he said, was "completely insufficient" for McCullys' use. It led to Donald Design's September 2005 plans which he said were sent to Mr and Mrs Hampson at the time. No response was received and as a result the pipes were laid in the slab in accordance with Donald Design's September 2005 version.

[79] On 26 January Mrs Hampson's fax to Dr Donald described where the raised floor areas were to be and also sought information concerning the heat pump system- about which Dr Donald had agreed to enquire - and likely access dates. He suggested in cross-examination this was the first he heard about a raised floor.

[80] Mrs Hampson followed that with a further fax the following month including painting and flooring quotes and followed that with a fax on 11 May, just before the 16 May meeting, reflecting Dunes' understanding of the parties' responsibilities. It attached quotes for air-conditioning, heat pumps, flooring and painting and set out

the cost to Rocks of its half share for the flooring and heat pumps and the entire cost of painting. She promised further quotes for the lighting and security systems. Another fax apparently also sent just before the 16 May meeting relevantly said:

> According to the heads of agreement you required the plans of The Dunes from us in order to be able to complete construction drawings. I did explain to you at one of our first meetings at The Dunes that the architects from DB and RM Mechanics were not prepared to take on a job that was being half completed by other architects. To this it was replied that you understood and that you would be able to take care of the drawings that we needed.
>
> …
>
> Hot water Cylinder. We were under the understanding that any equipment that was in The Dunes prior to demolition would be replaced ie the HWC. Simon (from McCullys) says he has sourced a cylinder that should meet our previous requirements and needs the ok on this to go ahead with it.
>
> The ceiling finish was agreed in the heads of agreement that this would be at our selection. We have been to Ceiling and Interior systems and chosen a suspended ceiling that will fit with our décor. We have emailed though to Simon about this and this will again need the ok from you.
>
> We are having a bit of confusion as to access dates. We were under the assumption that the access would begin limitedly [*sic.*] from now (May) based on a letter received from you previously so that we could begin measuring up etc for fit out, as our agreement runs until The Dunes is operational again, this would ensure that opening would be completed in the shortest possible time. However it seems that McCullys are under the impression that we will probably not gain any access until full hand over. Could you please clarify this for us as we have numerous tradesmen ready to measure up to begin work on different applications in relation to the bar. And certain aspects, as detailed in my letter to Liz [Cadogan]. Would need to begin prior to completion, ie heat pump / air con, beer systems, lighting, braces for vanities to be adhered to the bathroom walls, booth construction, alarm system etc.
>
> If it would be at all possible for your next visit into town to coincide with a combined meeting of McCully's / Yourself and Us we would find it extremely helpful in order to ascertain exactly where we are heading with regards to The Dunes whilst understanding that we are not top priority for you at present with your complete focus being on the apartment complex, which is completely understandable, you must understand that this is our entire lively hood [sic.] and we are getting slightly concerned about the lack of information being passed onto us by yourself, and that discussions that we have had with you do not appear to have been implemented.
>
> Just some small examples, no grease trap, no hot water, no extraction put in, plumbing laid in the wrong area, windows different to previously accepted, bathroom sinks and vanities different to requested. We feel that any further errors could be avoided with a great deal more communication. Therefore with hopefully a greater amount of

> communication in this latter stage of the development, we can forge ahead and look forward to an extremely successful and salubrious opening.

[81] Dr Donald said at the 16 May meeting Rocks agreed to pay half of the items listed in Appendix 4 (10) of the HoA and agreement was reached concerning amending the piping but Rocks declined to go beyond what he saw as the ambit of the HoA. It particularly refused to pay for the extraction system, hot water cylinder and grease trap. Mrs Hampson denied, despite the specific note, that extraction was agreed at the 16 May meeting not to be Rocks' cost. It had been left off the plans and Dr Donald was going to another firm to re-draw the system with those plans going to McCully's**.**

[82] It was not until 19 June that Mr and Mrs Hampson first saw those plans and, about that date, on Donald Design's instructions, McCullys prepared a detailed layout plan for the proposed new bar at a cost to Rocks of $1794.38 including GST. Even they, Mrs Hampson said, omitted the water and waste pipe repositioning and had to be amended for building consent.

3. Availability for Fitout

[83] Of importance, Dr Donald said that at the 16 May meeting Mr and Mrs Hampson were told the "premises were available for measuring up and pre-wiring etc although they remained a hard hat area". He said "all matters regarding fitout were then resolved". Dunes would commence its fitout in liason with McCullys "as soon as the premises were available". They were "made completely available" for Dunes to commence fitout in late May or early June 2006, something which, he said, was confirmed by a phone call on 1 June.

[84] Those arrangements, he said, were also confirmed in a fax he sent Mr and Mrs Hampson on 8 June confirming Rocks' agreement to payment of the items in Mrs Hampson's 11 May fax "towards the cost of the flooring, air-conditioning and painting" and commenting on the proposed ceiling system.

[85] In response to Dr Donald's comment about the May 2006 meeting, Mrs Hampson detailed eight items Dunes said were included in the HoA including

the plumbing. She said the hot water cylinder allowed was unsuitable for commercial premises and he had to get "resource consent for the tenant's proposed use of the tenancy", something that could not be achieved without a suitably sized hot water cylinder, without commercial extraction and ducting, and without appropriate removal of kitchen waste by way of a grease extractor. All fitout issues were therefore not agreed at the 16 May meeting, particularly as McCullys still required Donald Design's approval to meet the cost of shifting the piping.

[86] She denied Dr Donald ever telling them the premises were ready for fitout in early June or any other time in the sense of "full right to go in and fit out with furniture, fixtures, fittings and flooring etc." Fitout, for Mr Hampson, was putting in their choice of ceiling, "putting in our bar, getting the painters in, the carpet layers in, the guys doing the cameras, Lion Foundation putting the machines in". The premises were not ready for that. They knew they needed to work in with McCullys at that stage and everything was to be done for an intended roof "shout" around 11 August but delays occurred when one contractor declined to provide a mechanical quote. An alternative was sought. Until the mechanical work was done nothing else was realisable.

[87] The witnesses agreed that at the 16 May meeting Dunes was advised that it and its sub-contractors could access the new bar premises but, because it was still a hard hat/high visibility vest site, all visitors needed to be signed in and access was limited to pre-wiring and measuring. The limited access just described was given to Dunes, Ms Cadogan said, from about the end of May and some of their contractors took advantage of the opportunity to measure up. However, Dunes never had keys for the premises and Ms Cadogan said:

> McCullys … had work to finish for Rocks including completion of wall linings, ceiling, bathroom walls, partitions and painting, but by and large this work needed to follow the installation of other services including plumbing, air extraction, and cabling. There was no point in doing this work if it would be ripped out by the next tradesman.
>
> Throughout this period and particularly through June and July 2005 [sic.] Mr & Mrs Hampson were in constant communication with myself as well as others from … McCully …. They continued to take preparatory steps for fitting-out and re-entering. I know they purchased tapware and shifted a safe into the premises and acted at all times as though they were committed to re-entering and restarting their business.

4. Watertightness

[88] Mrs Hampson said that through June and into July they were anxious to get on with fitout and utilize the limited access permitted. During June they had technicians visit the premises to measure up and items were ordered but had to be stored off-site as their understanding was they could not bring them into the new premises. Their electrician was available to pre-wire the security system but could not act until Dr Donald decided about the ceiling.

[89] In particular, she said the premises still flooded and water would have ruined any equipment installed. She drew attention to photographs which showed water in the premises. At one stage she said the photographs were taken on 28 July but later accepted they were taken on 28 August. Photographs of the bar premises taken, dry, on 28 July by Donald Design confirmed that.

[90] Dr Donald was firm in his view that the premises were watertight by late July. He said the fact the complex then had no roof did not affect the ability to fitout because the roof was three floors above the restaurant and some distance back. The premises should have been weathertight by early June 2006 or, if they were not, it would have been a "relatively easy matter to rectify".

[91] He was cross-examined about the water and said he could not be sure when the building was roofed but the roof "shout" normally occurs when that is done. He accepted the plaintiffs' photos that on 28 August there was water in the premises - but claimed that was not uncommon from rain, stormwater, plumbing and other stacks and other causes. A lot of work can be done without premises being fully waterproof – such as sprinklers, plumbing, drainage, suspended ceiling grids. It was only when final wall linings and ceilings were to be installed that premises had to be dry.

[92] The best evidence on that topic came from Ms Cadogan. She said McCullys' contract with Rocks was for the shops to be available by June 2006. However, because of changes to the building to obtain necessary consents and altered placement of the parking, McCullys did not even have a roof design until July 2006.

The complex did not have a roof until late August at the earliest and the building was not waterproof before then. McCullys allowed site access to persons on the basis that they should be wary about installing fittings or materials susceptible to water damage. Though Dunes' bar was on the ground floor of a multi-level building, she said water can always gain ingress to such locations until a building is sealed and watertight. She explained the top carparking area was not waterproof until it was sealed and, because of the cost, Rocks only gave instructions to complete that part of the development as the "very last part of the job". That appears to have been in early September 2006 when the roof "shout" was held.

5. Chronology : June and July 2006

[93] Perhaps oddly, despite the parties' respective wishes to continue with readying the premises for opening, there seems to have been little personal contact between them over the couple of months following the 16 May meeting.

[94] Donald Design minutes of a site meeting on 14 June 2006 – not sent to Mr and Mrs Hampson –said Ms Cadogan had been working with the various shop owners and "noted The Dunes are proceeding, awaiting final plan for sign-off by the Hampsons", with Dr Donald confirming that a "fixed gib board ceiling to Dunes is to be throughout this tenancy" with duct work on the exterior of the building needing to be submitted for Donald Design's approval.

[95] Between 4 July - 7 August an exchange of emails occurred principally between Mr and Mrs Hampson and Ms Cadogan but, on 7 August, involving Dr Donald and his quantity surveyor. They dealt with installation of sandblasted front doors to the premises, air-conditioning and the separate extraction system plus alternative quotes for mechanical items and orders for toilets, tapware and joinery.

[96] Ms Cadogan made clear that, once Dunes and McCullys had agreed on a contract for construction of the fitout, the first task was installation of the extraction system. That needed at least part of the framing to be installed. Some other work such as mechanical services could be installed but much of the rest such as lining the walls would be wasted if done before the premises were watertight. In the email

exchanges just mentioned, Mrs Hampson said on 12 July that the "problems with the extraction are unfortunate especially in that they weren't addressed by Robert [Donald] when the initial plans were put in place as he was aware right from the start that this was a requirement for our kitchen and any commercial kitchen must have this".

[97] She and her husband accepted that by a 3 July meeting Dunes had completed no on-site fitout work. That remained the position at the end of July because she said they were still awaiting Dr Donald's go-ahead concerning the extraction, the ceiling and the pipe repositioning amongst other items. Mrs Hampson accepted they had no contractors for any onsite building but said this was because Rocks had contracted to do it. The bar was pre-made off-site, and would have been assembled in sections - but they still had to get approval from McCullys because it was "not our building site, it was Dr Donald's building site". Their contractors were therefore unable to work on site. She said Dr Donald did not tell them on 3 July he regarded it as Dunes' responsibility to instal the mechanical and extraction systems but instead instructed McCullys to prepare time-lines for that work.

[98] The difficulties Dunes, Rocks and McCullys had during this period were not assisted by Dr Donald's absence from New Zealand from about 4-24 July.

[99] During that period Mr and Mrs Hampson and Ms Cadogan corresponded by email on details of doors, extraction system, air conditioning, tapware, joinery and the like.

[100] Similar discussions continued with Dr Donald on his return. For instance, in an email to Donald Design of 18 July, Mrs Hampson said:

> Obviously the estimated date of 90% complete by 11 August has subsequently been pushed out again due to problems with extraction installation, we are doing all we can at our end with organising prewires etc and most other contractors are on standby, until the site is completed further. I know Liz is working as fast as she possibly can, so hopefully extraction will be resolved shortly and we can move on.

[101] Against that, however, Dr Donald said that when he visited the premises – probably on 28 July - on his return "it was clear that [Dunes] had taken absolutely

no steps whatsoever to commence fitout despite having access to the premises for well over a month". In support, he relied on a letter from McCullys to Donald Design's quantity surveyor of 20 July in which Ms Cadogan said that when Dr Donald was "last down I undertook to provide him with the price for the fitout as per the plans the Hampsons had put together". The letter attached quotations for ventilation and the extraction system, ducting, plumbing, kitchen furniture and joinery, electrical work including cabling and fitting a large number of lights and other electrical connections and upgrading the distribution board. The cost totalled $155,054.94 exclusive of GST. The letter concluded:

> It was hoped that work on the Dunes would be 90% competed by mid-August. The Hampsons would like to open at the beginning of September. With the delay for mechanical prices this will now be a stretch. The mechanicals are a key ingredient and needs to be completed before a number of other sub-trades can continue. We will, however, once approved, get this work completed with urgency.
>
> Please provide approval to proceed.

[102] The letter and quotes were not copied to Mr and Mrs Hampson but in evidence they said they regarded the work and the cost as Rocks' responsibility. Dr Donald took the opposite view.

[103] He said his view was confirmed by an email from Ms Cadogan to the quantity surveyor and Dr Donald of 31 July in which she summarized her understanding of the then position:

> Under [McCully's] contract with Rocks we were to hand over the Dunes, with toilets complete, suspended ceilings in place and as per the plans plumbing, electrical basics in place. There was mechanical noted (sum), however this was removed later … In other words we were handing over a shell. When the Head of Agreement was appended to the contract it was agreed the only work to be completed was the joinery shelving in the kitchen. …
>
> As you are aware we have read and re-read the Heads of Agreement between yourselves and the Hampsons, this so we could work out what work was required to fit the Dunes out. As discussed a few weeks back I would put a price together from the plans created. We have not done any further work as we are awaiting approval of price before we continue. The Hampsons have not seen my quote to you.
>
> We agreed to complete the kitchen drawings as discussed with you, for the Hampsons to progress the fit out and also continued to complete the bar drawings. …

> It is my understanding that the Hampsons believe you [Donald Design] are paying for this fit out. We have not commented as it is not our business. I just agreed to send one price and who paid what could be sorted between the two parties.
>
> From my discussions with [the QS] it seems that both parties are well apart on who is paying for what. If you believe it will help I can go over the quote with the Hampsons unofficially. From reading the Heads of Agreement I can see why there is some misunderstanding re who is paying for what and I could explain unofficially my understanding of it, but something tells me the Hampsons will not want to hear it. But I will help you any way I can so that we can progress. Your date of 1st September is going realistic if we start now and even then it will be close.
>
> Let me know what you want me to do.

[104] Ms Cadogan made clear that, for a 1 September opening, a contract had to be signed immediately. That required agreement on price for all items and sub-trades and who would pay.

[105] Mrs Hampson said that by the end of July:

> "We had done as much as we could under the allowance but we were still under the impression we only had access to pre-wire and measure up. The building still had no roof."

[106] By the date of the email, however, the situation between Dunes and Rocks had taken a turn decidedly for the worse.

[107] On 28 July Dr Donald telephoned Mrs Hampson. She said he demanded to know why the painting and flooring had not been completed. She replied that the premises had no internal walls or cladding because it still flooded. She said he told her it was Dunes' responsibility to give McCullys the go-ahead. She responded that Ms Cadogan required Donald Design's confirmation before work could begin. Mrs Hampson told Dr Donald it was Rocks' responsibility to instruct McCully's to put the walls in, do the extraction, do the partitions, alter the piping and remove the water. She could not instruct Rocks' builders to do that when Rocks was paying. The conversation then descended into recriminations including, she said, notification that Rocks would suspend all payments to Dunes.

[108] Dr Donald agreed suspension of the payments was threatened but, he said, it was because Dunes was not performing its responsibilities under the HoA by commencing fitout and that:

> Mrs Hampson responded by suggesting that [Rocks] had not completed the premises to the level required by the HOA and had not agreed as to the allocation of costs in respect of the fit out.
>
> Whilst the allegation regarding [Rocks'] completion of work on the subject premises is correct on its face, it is misleading as the completion of the final aspects of [Rocks'] work (gib fitting, WC fitting, painting etc) was dependent upon DCB commencing its fit out of the premises and liaising with [Rocks'] builders as to DCB's requirements to avoid unnecessary duplication and in particular removal of linings etc for DCB's subsequent requirements

[109] Donald Design's fax of 1 August, earlier recounted, followed that exchange.

Law

[110] There was no great disagreement between the parties as to the legal principles to be applied.

[111] This being a claim in contract, the approach to interpretation of the HoA is as appears in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74, 81-82 where the Court of Appeal held:

> … It is worth reiterating in full what Lord Hoffmann felt it necessary to spell out when delivering the judgment of the majority in the recent decision of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at pp 114 – 115. The learned Law Lord stated:
>
> > ``My Lords, . . . I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237 at 240 – 242, [1971] 1 WLR 1381 at 1384 – 1386 and *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of `legal'

interpretation has been discarded. The principles may be summarised as follows.

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the `matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945).
>
> (5) The `rule' that words should be given their `natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> `. . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

(Subsequent conduct may now aid in interpreting contracts: *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277).

[112] One of the major issues between these parties is which has repudiated its obligations under the HoA. That position is governed by s 7 of the Contractual Remedies Act 1979 which reads:

> **Cancellation of contract:**
>
> (1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.
>
> (2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.
>
> (3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—
>
> (a) He has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or
>
> (b) A term in the contract is broken by another party to that contract; or
>
> (c) It is clear that a term in the contract will be broken by another party to that contract.
>
> (4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) of this section applies, a party may exercise the right to cancel if, and only if,—
>
> (a) The parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to him; or
>
> (b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—
>
> (i) Substantially to reduce the benefit of the contract to the cancelling party; or

(ii) Substantially to increase the burden of the cancelling party under the contract; or

` (iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

(5) A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

[113] As to proof of breach, as Burrows Finn & Todd *Law of Contract in New Zealand* (3rd ed (2007) p 567 para 18.2.1(a)) puts it:

> What has to be established is that the defaulting party has made clear beyond reasonable doubt the intention no longer to perform his or her side of the bargain. Proof of such an intention requires an investigation inter alia of the nature of the conduct, the attendant circumstances and the motives which prompted the conduct.

[114] In *Starlight Enterprises Ltd v Lapco Enterprises Ltd* [1979] 2 NZLR 744 the test was put as:

> "Whether one party has demonstrated quite as distinctly an absolute refusal to perform his obligations according to the contract" (at 745 per Woodhouse J)
>
> or:
>
> "Whether the party said to be repudiating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract" (at 748 per McMullin J)

but with the caveat that (at 747 per Richardson J):

> "An announcement by one party of its determination to perform in a manner which is inconsistent with its obligations under the contract evinces an intention not to perform the contract according to its terms, whether the conduct relies or goes that far must be determined objectively and having regard to all the circumstances of the particular case."

Discussion re Liability

[115] Mr and Mrs Hampson both said that, in essence, the price of Dunes agreeing to surrender its existing lease and enter into the HoA was that they would walk out of a functioning restaurant, bar and casino and walk back into another such

functioning facility. The first question is accordingly whether interpreting the HoA required that.

[116] In considering the parties' respective negotiating positions, matters that need to be borne in mind include, first, that neither party chose to involve solicitors, business brokers experienced in the area or other expert advisers to assist in negotiating the terms of the HoA and, secondly, that although Mr and Mrs Hampson were knowledgeable in the running of a café, bar and casino, they were tyros as far as property development was concerned. Dr Donald was experienced in that area and thus may be taken to have been more aware than Mr and Mrs Hampson of, for example, the different detail required in plans produced for construction, consents and other purposes or the differing varieties of consents required at different stages of the process. Even though Mr and Mrs Hampson were not experienced in property development, they knew they were entering into an agreement with an experienced property developer to safeguard their future livelihood and, if the provision of costly items by Rocks was important to them to "achieve new premises" as Dr Donald's note said, it was for them to ensure that responsibility for the provision of - and the payment for - such items was expressly included. Despite having the opportunity, they did not do so in many instances.

[117] In those circumstances, both during negotiations leading up to the execution of the HoA and in the period to mid-2006 before goodwill between the parties evaporated, negotiations and discussions – even explanation by those more experienced in such matters than Mr and Mrs Hampson - may have overcome their problems. But, as the cited passages from Ms Cadogan's evidence concerning the April/May meetings makes clear, the parties had been, and continued, talking past each other and thus did not resolve the outstanding issues between them.

[118] Some preliminary observations as to the incompleteness of the HoA appear elsewhere. Further examples include that even Mr and Mrs Hampson accepted that significant aspects of the construction of their bar, restaurant and casino in the new premises would be at Dunes' cost. They also accepted the HoA was silent on a number of significant aspects of the fitout of the new premises such as the extraction

system, hot water cylinder and grease trap and the cost of their supply and installation.

[119] Then, of importance, there are no claims based on implied terms or rectification: the parties and their advisers must therefore accept that the HoA had business efficacy without the implying of a term reflecting Mr and Mrs Hampson's view of what underlay the agreement and that there was no basis for saying the terms of the HoA did not reflect the parties' common understanding of the agreement between them.

[120] Finally on this aspect of the matter, the straightforward answer is that, had Mr and Mrs Hampson only been prepared to have Dunes enter into the HoA on the basis they would close one functioning restaurant, bar and casino and receive another in due course, they could have insisted on the HoA saying as much. It does not. The HoA's recitals speak of Dunes operating a "restaurant" in the existing premises, but only obliged Rocks to give it a "new tenancy" or a "shop", not another "restaurant".

[121] In all those circumstances, the conclusion must be that the parties were content to be governed by what appears in the HoA, not what was omitted from it or what they thought may have underlain it. Thus, Dunes' suggestion it would receive, as Dr Donald put it, a "turnkey" operation fails for lack of proof.

[122] In light of that, on the issue of liability the question therefore comes down to the parties' respective obligations under the HoA and whether they had complied with them by the time each cancelled the contract.

[123] A general comment already made about the HoA is that in some areas, such as the plans, the parties did not timeously comply with the strict terms of their agreement, though it must be said Mr and Mrs Hampson did all they reasonably could to make their requirements known to Dr Donald. As an example, his failure to hand their plans to McCullys until 16 May constrained Dunes' ability to complete the fitout and have the premises operating in a timely way.

[124] Then, some of the terms of the HoA at first sight may appear contradictory. Appendix 1 cl 2 required Rocks to meet the "electrician and plumber costs for disconnection and reconnection of same (including alarm system)" but the interpretation of that requirement must be tempered by Appendix 2 cl 1.1(v) which obligated Rocks to meet the cost of "electric power to a distribution board (DB)" but for Dunes to be responsible, according to cl 1.2((iii) for "electrical reticulation from DB" but with both those provisions being expressly subject to Appendix 4 (10) which required Rocks to pay "50% of the cost of a new gas fire, light fittings, and floor coverings". That distinction makes untenable Mr and Mrs Hampson's contention that because their previous premises included reticulation from a distribution board to the light fittings, Rocks was contractually obliged to replicate that arrangement at its cost.

[125] It is important to note that under Appendix 2 cl 1.1 Rocks was obliged to meet half the cost of the floor coverings, stop and paint gib board wall linings, provide aluminium window joinery, complete a suspended ceiling of removable tiles, provide electric power to the distribution board, instal toilets and hand basins in fully operating order and provide water supply and plumbing wastes in the floor to Dunes' nominated positions. Further, Appendix 4 required Rocks to "provide timber cabinetry to receive SS items to be re-used, also timber shelving over".

[126] When that series of obligations is compared with Donald Design's 1 August fax, it is immediately apparent – as Dr Donald had to accept – that the fax did not correctly set out Rocks' express obligations under the HoA and it had not completed those obligations either at the date of the fax or at 28 August, the date of its purported cancellation. In particular, the suggestion that Rocks was only responsible for "perimeter walls lined with gib board and painted" did not accord with the obligation to "complete the tenancy … [with] … stopped and painted gib board wall linings". Similarly, the 1 August description of the ceiling obligations was not identical with what the HoA required. Further, neither the toilets nor the hand basins were installed let alone operating and, importantly, though Dunes' nomination of the positions of the water and waste pipes had been known to Rocks since McCullys' 19 June plan at the latest – and probably much earlier - no authority or commitment

to the cost of repositioning had been given by Donald Design on Rocks' behalf at that date.

[127] On that basis, therefore, Rocks' enumeration of its responsibility for work and cost in its 1 August fax did not fully and accurately reflect its obligations under the HoA.

[128] A further factor which must be borne in mind is that as at 1 August Dunes' new premises were not watertight. Ms Cadogan's evidence made clear that did not finally occur until late August-early September. Whilst there is some force in Dr Donald's observations that at least partial fitout can occur in premises that are not watertight, Ms Cadogan was correct in saying it would be foolhardy for tenants to instal fittings and equipment which can be damaged by water in premises where rain and other water can find access.

[129] It was clearly Rocks' obligation to provide Dunes with premises in which it could complete its fitout, that is to say premises which were watertight so water could not damage furniture and fittings, yet that had not occurred either at 1 August, or the date of its cancellation, 28 August.

[130] Even leaving aside watertightness, Dr Donald took the view the premises were fully available for Dunes' fitout from late May-early June. But it is clear the premises were still a hard hat and high visibility-vest area until well after that date. Access to Dunes and its sub-contractors was therefore significantly restricted. Accordingly, even had the premises been watertight, it would have been difficult for all Dunes' sub-contractors to gain access to the site and to complete their work when the site's availability was limited. It is noteworthy that at no time did Dunes have keys to the premises.

[131] A further factor is that the lease between the parties was still in fairly preliminary stages of negotiation at 1 August. By 28 August, negotiations over the lease terms were largely complete but Rocks refused to execute the lease following its return on 25 August.

[132] Turning to Dunes' position during the period up to 1 August, though effectively nothing had been done on site, much had been done off site. McCullys knew that, and if Dr Donald was unaware of the situation – something it is difficult to accept given the detail of the emails he received - had he inquired of McCullys or Mr and Mrs Hampson he would doubtless have been advised of the position. The limited access to the premises available to Dunes and the lack of watertightness, of both of which Dr Donald must have been aware, also contributed to the lack of activity on site.

[133] The view must accordingly be that Rocks was not entitled, as a matter of law and as a matter of interpreting the HoA, to send its 1 August fax in the terms in which it was couched at that date, nor maintain its unvarying attitude to the correctness of its stance after that date. Its letter did not correctly represent its obligations. It now accepts it had not fully complied with its obligations under the HoA at that date. Throughout August it took the stance that its interpretation of its obligations was unassailably correct and, as its solicitor's 15 August letter made clear, was not prepared to "haggle or negotiate further": Dunes must accept Rocks' view of the cost and work distribution or Rocks would regard Dunes' lack of preparedness to agree as evidence of repudiatory conduct and would cancel the HoA. More generally, it had not provided full access to Dunes to fit out its premises in a building capable of being completely fitted out at that date and it did not execute a lease granting its tenant occupancy of the premises at any time during August.

[134] The further conclusion must be that Dunes, up to 28 August, had not made clear that it was no longer prepared to perform its side of the HoA nor that it was insisting on its interpretation of the parties' respective obligations before being prepared to proceed.

[135] In all those circumstances, the conclusion must be that Rocks had not correctly outlined or completed its obligations under the HoA either as at 1 August or 28 August, and accordingly its purported cancellation on the latter date of the HoA for Dunes' suggested repudiation was unjustified at law.

[136] Was Dunes entitled to cancel the HoA on 5 December?

[137] By that date, it was clear Rocks did not intend to perform its obligations under the HoA: it had said as much and purported to cancel. It had not executed the lease. It had let the premises to Nelson Gourmet and thus could not have performed its obligations under the HoA even had it wished.

[138] In those circumstances, Dunes must be held to have been entitled to treat Rocks' stance over the period since at least 1 August as repudiatory conduct thus giving Dunes the right to cancel the HoA for repudiation as it did on 5 December.

[139] The plaintiff accordingly succeeds on the breach of contract claim against the defendant on liability.

Quantum

1. General

[140] As often occurs in cases where liability and quantum are in issue, though each party called an expert accountant on quantum issues the main thrust of the evidence and, more so, of submissions focused on liability. And, while Mrs Hampson handled the October hearing competently, unsurprisingly she was not fully able to assist with submissions on quantum.

[141] Issues of quantum are by no means without complexity in this case and, as will be seen, have proved problematic in a number of areas. Not only have those issues significantly delayed delivery of the judgment, they may necessitate further determination and a second judgment if the parties are unable to compromise their views.

[142] The parties are directed to confer within one month of delivery of this judgment to endeavour to agree on matters of quantum within the parameters of this section of the judgment. At the conclusion of that process, a memorandum is to be filed setting out the agreed amounts for which judgment is to be entered for the plaintiff against the defendant and the items listed. Mr England is to take prime responsibility for the preparation of that memorandum. If there remain items on

which the parties are unable to agree, the memorandum is to list the same and the parties are then to have one further month to file and serve memoranda setting out their views on those items and listing the passages in the evidence on which they rely in support. A further judgment will then be issued.

[143] In very broad terms the conventional approach to damages in a case such as this is to place the plaintiff in the same position, so far as money can do so, as it would have been in had Rocks not wrongfully purported to cancel the HoA on 28 August (Burrows Finn & Todd *op.cit* para 21.2.1 p 669), but with the important rider that Dunes cancelled the HoA on 5 December. In essence, therefore, a correct assessment of compensation is, in effect, to treat Dunes as being entitled to compensation as at the date of its cancellation. What Dunes lost as a result of Rocks' wrongful purported cancellation was the ability to have a fully functioning restaurant, bar and casino as at the date Dunes cancelled.

[144] In assessing the correct approach to quantum it is important to bear in mind that in its 5 December letter, Dunes abandoned any attempt to gain entry to the premises. In the circumstances, that must be seen, not as a limitation or waiver of its right to damages but as a realistic assessment that, in the circumstances, it would have been highly improbable that any application for the equitable remedy of specific performance would have been granted. Had Dunes endeavoured to continue efforts to obtain possession of the premises, it would have been most unlikely to succeed and would have been left to its claim for damages, a commonplace alternative weighing significantly in the exercise of discretion as to whether a decree of specific performance should be granted. However, Dunes' abandonment of any claim to gain entry to the new premises significantly impacts on its claims for judgment for funds which would have been required to be spent by both parties to make the new premises operational but in the event were not required.

[145] More specifically, it is helpful to bear in mind the observations in *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68, 86 where the following appears:

> There was considerable argument over the extent to which losses … are recoverable under s 90 of the Contractual Remedies Act. To appreciate the

> argument one must understand the nature of the alleged losses. Here I think it useful to adopt the terminology used by Fuller and Perdue in their well-known article "*The Reliance Interest in Contract Damages*" (1936) 46 Yale LJ 52, 53-54. Following a breach of contract the innocent party may have:
>
> > (i) a *restitution interest*, namely the right to restoration of a valuable benefit conferred on the other party, the object being to prevent unjust enrichment;
> >
> > (ii) a *reliance interest,* namely the right to compensation for loss due to steps taken by the innocent party in reliance upon the existence of the contract, the object being to restore the innocent party to the position which he or she would have occupied had the contract not been made; and/or
> >
> > (iii) an *expectation interest*, namely the right to compensation for loss of the bargain, the object being to financially restore the innocent party to the position which he or she would have occupied had the contract been performed.
>
> In the present context I think that one must then go on to subdivide Fuller and Perdue's reliance interest into *reliance performance losses* being expenditure and other losses incurred in or for the purpose of performing the contract itself and *extraneous reliance losses* being those losses which had nothing to do with the innocent party's performance of the terms of the contract, but which were incurred by the innocent party in the ultimately vain expectation that the defaulting party would perform his or her side of the bargain.

[146] Though the labels adopted in *Newman's Tours* do not precisely fit the categories of claims in this matter, they are helpful in focusing on the recoverability of some items, particularly those claims for amounts which would have been expended had Dunes continued to seek entry to the bar but which were, in the event, not required to be met.

[147] It is convenient to consider Dunes' claims in the order pleaded.

2. Monthly Payments of $14,950.00: Appendix 1 of the "Stand Down" costs

[148] Under the HoA, Rocks was to pay Dunes the fixed sum in Appendix 1 totalling $96,700.00 for six months. It was meant to be paid to Dunes' solicitors for monthly release but was paid direct on furnishing of GST invoices at $14,950.00 monthly.

[149] Mrs Hampson said that the stand-down payments were suspended by Rocks on 28 July the defendant was 27 days in arrears. Dunes' claims $59,800.00 for July (balance), August, September and October only.

[150] Given that Dunes has now been held entitled to have cancelled the HoA on 5 December, were it not for the time limitation pleaded in the amount claimed Dunes would have been entitled to payment of the monthly costs to that date.

[151] Rocks' response was to challenge the use for which Dr Donald inferred some of the funds paid by Rocks to Dunes had been utilized. Its stance in relation to this and other aspects of Dunes' quantum claim formed part of the basis of Rocks' counterclaim for misrepresentation. It asserted that, for this claim to succeed, the stand down costs in Appendix 1 must have been the exact payments actually incurred by Dunes for precisely the stated purposes during the stand down period, together with the retainer for key staff and an allowance for drawings. It said Appendix 1 provided for payment of interest, not principal, on mortgages. It challenged whether Mr and Mrs Hampson drew $80,000.00 per annum. It claimed Mrs Hampson represented that Dunes would apply all payments to the costs in the Appendix and such did not always occur. Some or all of those were pleaded to be representations; some false, though not particularized.

[152] The first item listed in Appendix 1 – storage costs being a separate claim – was cartage costs. There appears to be no evidence on those. If correct, the parties are to confirm that.

[153] The second item in Appendix 1 is electrician and plumber costs for disconnection and reconnection. If this remains a claim, it is not quantified and the parties are directed to endeavour to agree on this item.

[154] The same applies to item 3, the DTR and Sky television and music rental costs. These appear to have been deferred, according to Mrs Hampson, but she also mentioned that website and cellphone contracts could not be suspended. There is no claim for the latter.

[155] Item 4 is for Council rates. Again, the parties are to endeavour to agree if there is any claim in that regard.

[156] Item 5.1 is $900 for bank fees. The parties are to endeavour to agree if there is a remaining claim in that respect.

[157] Item 5.2 claims $13,700 for Bank interest on mortgages. Mrs Hampson said Dunes paid $34,249.99 for bank loans, but that total may not tally with the interest entries appearing in the plaintiff's accounts (2006 $13,995, 2007 $14,736, but in a financial year in which Rocks is only liable for part). How "bank loans" became "bank interest" in the HoA has been noted. If it is not accepted by Rocks that the sums paid or payable but unpaid under this item were only interest and not principal, the parties are to endeavour to agree on the amount which is interest and is therefore properly payable by Rocks under this heading.

[158] Item 5.3 claims $5,800 for personal and business insurances. That sum, too, needs to be the subject of discussion.

[159] Item 5.4 claims $2,200 for ACC levy but there was some evidence that ACC was deferred during the relevant period and the payment that may have totalled $2945.44. The accounts produced showed ACC levies for 2006 and 2007 of $1,686 and $83.00. Again, the parties are to endeavour to agree.

[160] Item 5.5 claimed $7,100 for vehicle lease payments. This, too, needs to be the subject of discussion.

[161] Items 5.6 and 5.7 claimed $7,000 and $20,000 respectively for staff redundancy and retainers.

[162] As to these, Mrs Hampson said she paid what she understood from inquiries of the Hospitality Association amounted to "redundancy" even though it may not, strictly, have fallen within that rubric as recognised in employment law. The payments were holiday pay and pay in lieu. She said "redundancy" equated to "final" payments. She actually miscalculated the redundancy including PAYE

at $7660. The only retainer payments paid during the stand-down were paid to one staff member in March-October 2006. Again the parties are to endeavour to agree on the correct sum for the total payments to staff – irrespective of whether the payments were, strictly, redundancies. The Court accepts that term should be interpreted as payments required to be made by Dunes on closure even if not within the formal definition of the employment law use of the term.

[163] Finally, item 5.8 claimed $40,000 for Mr and Mrs Hampson's living allowance. That may not have been fully supported by the sums paid in salaries and drawings over all the years the pair had been involved in the Dunes'. The defendant's documents showed drawings by Mr Hampson of $28,000 in 2005 and $26,000 in 2006 and shareholders' salaries were $79,000 in 2005 and $72,000 the following year. The $40,000 sum in the HoA was the maximum Mr and Mrs Hampson ever received on a semi-annual basis. But the fact remains it was a sum which was contracted for and accordingly such amount as the parties agree was unpaid at the date of the purported cancellation is to be included in the amount for which judgment will ultimately be given.

3. Gaming Machines : $114,075

[164] Clause 3.2 of the HoA provided that should completion of the shops take longer than six months Rocks would continue to make monthly payments "together with compensation for loss of income from the gaming machines over this period".

[165] Mrs Hampson said gaming machines can only operate in association with licensed premises and although when the HoA was negotiated they had a licence for 18 gaming machines they were only operating 14. They expected only to be operating nine machines after the closure (and potential re-opening) because in February 2007 Nelson City capped the maximum number of gaming machines in one location at that figure.

[166] Mrs Hampson produced figures from the Lion Foundation (which owned the machines) for Dunes' last 12 months trading to April 2005. The average monthly return was $8775.00. However, when payment was sought on 29 September 2005 and on 28 March, Dr Donald endorsed Mrs Hampson's second letter saying the sum

"will be paid on handover of shops as agreed" because, she said, he told her Rocks could not meet the payment. She agreed to the variation. Allowing for a realistic date to complete the fitout of 1 November at $8775.00 per month, Rocks has a liability, according to her calculations, for 13 months of casino income to that date of $114,875.00.

[167] Dr Donald put a different interpretation on the HoA as far as gaming income was concerned. He said that operation of casinos is normally only suspended for three months - though Dunes managed to arrange a six month suspension. Failure to operate for longer than the permitted period could lead to forfeiture of the gaming machine licences and the need to apply for a new licence on re-opening. Further, in Dunes' case, because in February 2007 Nelson City limited the number of gaming machines on any site to nine, that would have been the maximum Dunes could operate. Dr Donald said cl 3.2 of the HoA was only to operate if the gaming machine licence was lost because of more than six months closure and there was therefore a loss of income to Dunes once the premises re-opened either through an inability to obtain a licence or to obtain a licence only for nine machines. Only in those circumstances was Rocks to compensate Dunes for any resultant loss of income. He claimed Dunes' interpretation of cl 3.2 was accordingly incorrect and his handwritten addition to Mrs Hampson's fax of 28 March 2006 should have read "to be calculated and paid (if any) on handover of shops as agreed" because he thought the gaming machine licences would be cancelled before the premises opened. He also claimed the loss of income referred to net rather than gross income. He claimed because Dunes' gaming machine licences were never in fact cancelled, no compensation was payable as no loss was suffered.

[168] Mrs Hampson disputed Rocks' interpretation of the HoA that the gaming machine provision was to provide compensation to be paid only after six months because it was expected they would maintain their licence for that period. She acknowledged that the HoA spoke of compensation for lost income but the claim was payment of gross site rental from the machines.

[169] Dr Donald's interpretation of the HoA cannot be accepted. It contradicts the actual terms the parties used in cl 3.2. It is artificial in the sense of being predicated

on a future possibility that may never have occurred. It goes against the reason for Rocks compensating Dunes, namely to replace all the latter's expected income during closure.

[170] The HoA was intended to ensure Dunes and, through it, Mr and Mrs Hampson, continued to receive much the same income during closure of the premises as they would have enjoyed had the premises been open. Income from the gaming machines was one revenue stream. Just as Dunes was entitled to be paid its other outgoings and enjoy from them much the same income as previously, it was entitled to compensation for the funds it would have received from the gaming machines during the whole period of closure beyond six months. That accords with cl 3.2 of the HoA obliging Rocks to "continue" to make the Appendix 1 payments to Dunes "together with compensation for loss of income from the gaming machines over this period", that is to say to continue to make the payments beyond the expected six month closure.

[171] There appears to have been no challenge to Mrs Hampson's calculations – though it needs to be confirmed that it was assessed on a nine machine basis - so Dunes would appear to be entitled to judgment against Rocks for the $114,075 claimed but this, too, needs to be the subject of discussion and coverage in the directed memorandum.

4. Storage : $7,533.18

[172] Mrs Hampson calculated this claim for the monthly storage costs from 10 June 2006-2 October 2007 and produced invoices covering the sum due. She justified claiming beyond 5 December because of the need to continue to store items to dispose of what Dunes could. Not all items from the former premises were sold but there was no claim for ongoing storage costs after 2 October 2007.

[173] Rocks did not appear to challenge the quantum of the claim.

[174] Dunes would appear to be entitled to judgment against Rocks for the sum claimed, $7533.18 but that matter is also to be covered in discussions and in the directed memorandum.

5. Goodwill : $450,000.00

[175] Dunes claimed $450,000.00 for the loss what it said was the value of the goodwill its bar/restaurant/casino would have had on re-opening had Rocks not acted as it did.

[176] This was the subject of factual and significant expert evidence.

[177] Factually, at a 3 July meeting between the parties and Ms Cadogan, Mrs Hampson said Dr Donald enquired why Dunes had not signed the agreement to sell its lease which Mr Lawrence, Dunes' real estate agent – though Dr Donald said Mr Lawrence was acting independently in this matter - was meant to have presented to them. Mr and Mrs Hampson had seen nothing. Dr Donald said he would follow up the matter.

[178] Two days later, Mr Lawrence contacted Mr and Mrs Hampson saying he had a potential buyer for Dunes' business who would offer up to $500,000 if they were interested. They were. Mrs Hampson sent Mr Lawrence a document on 6 July setting out Dunes' position in generally laudatory terms. At this hearing, Rocks focused on the comment that

> "we have had increased amounts of interest from potential purchasers whom we have forestalled due to the awkwardness of selling whilst in the midst of setting up, and had been looking at the potential scenario of putting the business on the open market after a short trading history, due to the amount of interest shown".

[179] Mr Hampson denied that passage indicated Dunes had been actively canvassing possible buyers. He said he had never considered selling, though agents had contacted him. He said Dunes never put the bar on the market and never approached a real estate agent.

[180] In the event, the offer, when it arrived, was from Nelson Gourmet and was for $350,000 equally divided between tangible and intangible assets with $500.00 for stock. Dunes was uninterested at that price. The matter lapsed.

[181] Dr Donald inferred from that evidence that Dunes was actively involved in trying to sell its business prior to Rocks' 1 August fax and that the episode showed both that any award to Dunes in this litigation should take into account the suggested active attempts to sell the property and was evidence Dunes would have been incapable of financing fitout.

[182] The Court is unprepared to draw the latter inference, there being evidence to the contrary though borrowing would have been required. As far as the former is concerned, the approach by Mr Lawrence had an opportunistic air about it, as did Mr and Mrs Hampson's response. Neither has any impact on quantum,

[183] For Dunes, Mr Underwood, an expert accountant, reviewed the history of the business and noted that when it closed in March 2005 the net equity was negative $50,713.00 but said this did not properly represent the true market position because of significant writing down of the fitout and plant and equipment costs. He opined the Nelson Gourmet offer of $175,000.00 for goodwill was below market value.

[184] Assessing the value of Dunes' goodwill on both a future maintainable profit and discretionary cash flow basis, - based largely on information provided by Mrs Hampson, including a significant patronage increase - Mr Underwood calculated the likely future trading result. A cash flow forecast, inclusive of GST, for the 12 months from October 2005 showed a cash surplus of $152,646.00 - after starting with a nil figure excluding GST - and a net profit before tax of $189,280.00. His calculations included the standard 33% and 27% respectively for food and beverage and wages costs and $78,000 salaries and wages for Mr and Mrs Hampson. After allowing for the concessional rental for the first six months and factoring in the trade-tie arrangement, Mr Underwood calculated pre-tax profit for the business in the first year of the new operation at $223,518.00 to which he added the proprietor's salary, giving a discretionary cash flow of, in round terms, $300,000.

[185] Mr Underwood calculated the cost of the physical assets on re-opening the business would have been about $400,000 including items initially retained but later sold ($43,591.00), items retained as per Mrs Hampson's list ($132,172.00), fitout costs ($100,509.00) and contractors' quotes ($114,159.00) to give a round figure of $400,000.00. After depreciation, the discretionary cash flow showed a return of about $300,000 per annum. Bars want to recover that cost in 2-3 years. That gave a value between $600,000-$900,000.00 plus GST with an EBIT of income after proprietors' salary with no allowance for interest or tax - but allowing for depreciation of $173,518.00. A return of 20% pre-tax would be appropriate for such a business – perhaps, he thought, low but reasonable when gaming income was taken into account – giving a capital value of $867,590.00 plus GST at 20% return on $173,518.00.

[186] Mr Underwood's calculation of goodwill gave him gross values varying between $600,000-$900,000.00 which, after deducting $400,000.00 for the assets, gave a goodwill value of between $200,000-$500,000.00. Mr Underwood settled on a figure of $450,000.00 for goodwill which, when the $400,000.00 was added for plant, equipment and fitout value, gave a total value of the business of the order of $850,000 plus GST.

[187] Mr Carran, also an expert accountant, gave evidence for Rocks. He was critical of Mr Underwood's approach as:

a) Not based on a valuation of fixed assets.

b) Not adopting a cautious approach to the calculation of goodwill: none appeared in Dunes' accounts.

c) Overlooking the increase in the debits in the shareholders' current accounts in the year to closure.

d) Largely accepting Dunes' own projections, including significant increases in historical earnings in both revenue and gross profit, the latter by 40% when historically it had been in the 35-36% range.

> Such an increase required significant increase in revenue through significantly larger patronage or higher prices, neither, he thought, likely.

[188] Mr Carran was also critical of Mr Underwood reversing the shareholders' and employees' salaries thus increasing discretionary cash flow; taking account of the concessional rental which was unlikely to be of great importance to buyers; and assuming the trade-tie would be written off through satisfaction of volume requirements. He was especially critical of Mr Underwood's acceptance of Mrs Hampson's valuation of the fixed assets. He noted Mr Underwood's $400,000 figure included contractors' and fitout quotes for expenditure which had not been incurred.

[189] Mr Carran disputed Mr Underwood's adoption of a 20% pre-tax capitalization rate and its resultant calculation of an enterprise value of $867,590.00 for Dunes' business divided between fixed assets and goodwill. His view was that no purchaser would have paid anything approaching $450,000 for goodwill of the plaintiff's business.

[190] Mr Carran's approach was to look at trading results prior to closure. Sales from the bar and restaurant never exceeded $600,000.00 p.a. though he accepted new premises would generate some increased patronage. He was critical of the forecast operating and administration costs being at a lower percentage than had historically been achieved – 17.88% and 4.85% respectively forecast to diminish to 11.03% and 1.21% - which led to the proprietor's discretionary cash flow being doubled.

[191] Mr Carran assessed the historical seller's discretionary cash flow in the range of $110,000-$120,000.00 p.a. plus 25-35% for increased patronage in the new restaurant. That gave him cash flow in the range of $145,000-$155,000.00. By reference to market data for bar and café businesses – though that data may not have dealt with cafés and bars with gaming machines - Mr Carran said that on average a multiple of between 2.7-3.0 of seller's discretionary cash flow is paid for a business like Dunes split between intangible (or goodwill) and tangible assets. To reach Mr Underwood's $850,000.00 figure the market data would require a seller's

discretionary cash flow of between $285,000-$315,000.00. Mr Carran regarded that as unachievable on Dunes' forecasts as the revenue and gross profit precluded the business generating cash flow at that level.

[192] Mr Carran's analysis of the market data was that the best possible market price for Dunes' business would not have exceeded $450,000.00. This he thought was high. Adopting the historical seller's discretionary cash flow, and applying his industry multiple of 2.7-3.0 against the historic range of $110,000-$120,000.00 gave a total value for the business of between $300,000-$360,000.00. He thought Nelson Gourmet's $350,000.00 offer very attractive.

[193] As was accepted in evidence, prospective purchasers usually offer a round figure divided between intangibles – principally goodwill - on the one hand and tangibles – mainly fixtures, fittings and other assets - on the other divided in proportions negotiated by the parties, not entirely arbitrarily but reflecting maximum advantage to both.

[194] In that light, Nelson Gourmet's offer of $350,000.00, essentially equally divided between the two components of goodwill and tangibles, should be seen as an opening bid by a willing but not anxious prospective buyer – Nelson Gourmet did, after all, ultimately lease both the Dunes' premises and the shop next door – but one by a prospective buyer which had not seen Dunes' books and which, as most buyers do, might have been willing to increase its offer in the course of negotiations, but not to the $500,000.00 Mr and Mrs Hampson were seeking. Nelson Gourmet's offer should therefore be seen as an opening gambit, books unseen, by a knowledgeable prospective buyer which may have been prepared to increase the sum offered.

[195] What increase might have been justifiable?

[196] Though Mr Underwood was disparaging of calculating a new business' worth from historical earnings, Mr Carran's top of the range figures would appear to make a certain allowance for that factor. He noted that, historically, the seller's discretionary cash flow had been a maximum of $120,000.00 which, after adjustment for increased patronage, gave him a top figure of $155,000.00. If his market data

multiplier range of up to three is then applied, the total value for Dunes' business would be of the order of $465,000.00. Subdivision of that figure, as noted, would be a matter for negotiation, but too great an allowance for fitout costs, plant and equipment, could be detrimental for Dunes.

[197] Accepting that what might have occurred cannot be exactly calculated and the result may be thought a best estimate, the Court's view is that the whole of Dunes' business in late 2006, assuming fitout had been completed and it was a going concern, would have been worth towards the top of Mr Carran's range, say in the region of $450,000.00, with between half to a maximum of two-thirds of that, $225,000-$300,000.00, likely to be apportioned to goodwill. That assessment is not too far away from the mid-point of Mr Underwood's range of goodwill values and, as mentioned, seems to accord roughly with the mid to higher end of Mr Carran's assessment based on historical values.

[198] There is imprecision in the figures but that necessarily arises from the fact it is a hypothetical assessment of a future event which never occurred and, despite there having been a bar on the premises for nearly a decade up to March 2005, there had been a gap of about 21 months since during which local competition had increased. In those circumstances a cautious approach to this aspect of the claim is mandated. The Court takes the view that it would be appropriate to allow the mid-point of the range discussed, $262,500, as damages for lost goodwill.

[199] If the parties are unable to accept that as the amount to be allowed in the judgment for loss of goodwill, the issue is to be covered in the directed memoranda.

6. Diminution in value of retained plant and equipment : $165,063.72

[200] Mr and Mrs Hampson took as much as possible from their former premises with the intention of storing it and re-using it in their new premises. They claim that when they were denied the right to enter the premises the plant and equipment lost any value it had. Since that time, Mrs Hampson has made substantial attempts to sell the equipment through advertising, locally and in hospitality trade magazines, listing items on "Trade Me" and emailing breweries and others in the business, all without

much success. At the date of the hearing, Dunes had realised $11,505.87 from sales, as against $43,591.76 being the estimated cost of buying new items as established from trade suppliers' price lists. The net loss claimed was accordingly $32,891.30.

[201] Mrs Hampson estimated the replacement costs of other necessary plant and equipment items at $132,172.42 (before deducting $915.00 for a Halloween coffin) in accordance with a detailed list. The two calculations produced the $165,063.72 claimed for items Dunes still retained but which now have no value and the cost of replacing the remainder of the furniture and fittings required.

[202] Mr Carran challenged Mrs Hampson's approach, drawing the distinction between the cost of the items claimed and their value to a willing but not anxious purchaser. He again drew attention to the absence of a chattel valuation and suggested the correct value of the plant and equipment should be determined by estimated sale prices or book values. He also again made the point it was "misleading to assess the value of a business by adding plant and equipment to a separately assessed goodwill value as the two values are inter-dependent within an overall valuation". Mr Underwood described Mr Carran's views as "misplaced" as the total price would still need to fit within the discretionary cash flow calculation.

[203] In the Court's view, placing Dunes in the position it would have been in had it not been for Rocks' wrongful cancellation of the HoA, means not only would it have had a business with the goodwill value earlier assessed but it would have been achieving that business with the use of both recycled and new chattels.

[204] However, its abandonment of any attempts to obtain entry to the premises means not just that its remaining chattels lost value but that it was freed from the financial cost it would otherwise have incurred in fitting out the new premises.

[205] This is an aspect of the quantum claim which is not, however, easy to calculate for at least the following reasons:

a) The book value of the chattels was apparently only $2073.00 but the sale price of such of the chattels as Dunes has been able to quit

$11,505.87 (against replacement costs estimated at $43,591.76 but plus commission and listing fees of $805.41).

b) The replacement costs of the balance of the chattels required in the business was estimated by Mrs Hampson from trade magazines and similar sources to have cost $132,172.42 (presumably less the $915.00). There seemed to be no challenge to the necessity for all the chattels listed to be in the new business (though some, such as the bar top, still required further expenditure to complete).

[206] As regards the chattels from the former bar, the amount realised from sales significantly exceeded the book value and the difference should perhaps be deducted from the amount which Rocks would otherwise have to pay Dunes for the loss in value of the retained chattels. However, apart from that, if Rocks accepts the remaining chattels have no value, it could be liable to Dunes for the value lost through its wrongful purported cancellation of the HoA. There is the additional complication that on payment by Rocks to Dunes of the correct amount, Rocks would then presumably be entitled to take over the balance of the chattels. Mr Carran's criticisms of this claim also had weight and there would be a need to ensure there was no double counting with the trade tie advance next discussed. This, plainly, is an area requiring negotiation in an attempt to reach a sensible accommodation. It will need to be covered in the directed memoranda.

[207] As far as the claim for chattels that were required to be bought to outfit the new premises is concerned, given Dunes' abandonment of any attempt to gain entry to the new bar and the fact it has thereby been freed from meeting any part of the cost - which was no more than an estimate at the end of 2006 – the appropriate view would appear to be that this aspect of Dunes' claim should be disallowed. This, too, will however need to be addressed in the directed memorandum.

7. Trade-tie advance : $79,138.69 and $40,000.00

[208] Dunes entered into a trade-tie arrangement with Dominion Breweries providing for advances in three tranches of up to $120,000.00 from 1 April 2006.

[209] When Dunes could not enter the new premises, on 15 November 2006 Dominion Breweries sought repayment. Dunes had used $43,090.30 from the initial drawdown of $80,000.00 towards fitout expenses. Making up the difference themselves, Mr and Mrs Hampson paid $40,000.00 and then negotiated a settlement of $35,000.00 against the balance of $40,000.00.

[210] In this claim they seek reimbursement of the $35,000.00 settlement, $4,138.69 legal costs concerning the litigation with Dominion Breweries and $40,000.00 as the balance of the first drawdown and the inability to access the balance of the advance.

[211] Mr Hampson said Dunes was entitled to recover as it could not take advantage of the forgiveness of debt over time. He said they had always previously managed to achieve the required volume for forgiveness to accrue.

[212] Mr Carran suggested these claims were double-counting because on any sale of Dunes' business the outstanding loan would have been required to be repaid from the proceeds. He took the view Dunes could not claim diminution of goodwill and then ask for repayment from the Dominion Breweries advance.

[213] The Court's view is that, provided there is no double counting, Dunes is entitled to recover the sums paid to Dominion Breweries by way of repayment of the funds advanced and later repaid at the date of cancellation. As it had always achieved the quantity prerequisite to forgiveness of part of the Breweries' debt previously, there is no basis to assume such would not occur again, particularly with increased patronage. The sum advanced may be a surrogate for wasted expenditure, at least to the extent to which it was not used to purchase assets nor used for other recoverable items such as Mr and Mrs Hampson's living expenses for which allowance is elsewhere made. The maximum sum is $75,000.00 but again this aspect of the claim will need to be the subject of negotiation between the parties on the same terms as elsewhere directed.

[214] However, there does not seem to be any basis on which Rocks can be liable for Dunes' legal costs in defending the claim. It was Dunes' choice to retain counsel

in relation to that claim. The sums paid by it under its contract of retainer with its lawyers, absent some provision in the HoA which might have made Rocks liable under its contract with Dunes, does not make the fees paid under the contract of retainer recoverable from the defendant for its breach of contract.

[215] Similarly, recovery of sums that probably would have been advanced by the Breweries but were not, and might have been forgiven in the future cannot be claimed. A potential debt and forgiveness programme which never eventuated is irrecoverable.

[216] It would appear that the plaintiff is entitled under this head to judgment against the defendant for $75,000 but this matter needs also to be the subject of negotiation and be dealt with in the directed memoranda.

8. Unpaid Legal Costs on Deed of Lease : $562.50

[217] The HoA says Dunes is entitled to payment of its legal costs concerning the lease from Rocks (Appendix 4(9)). There appears to have been no dispute on this item.

[218] The plaintiff seems to be entitled to judgment against the defendant under this head for $562.50. That matter is, however, left to be dealt with in the memoranda.

9. Unpaid Portion of Rocks' Contribution to Building Costs ($33,392.83) and for heat pumps, floor coverings and painting ($22,532.16)

[219] This is another area where Mr Carran disagreed with the claim because the benefit of the expenditure was included in the earnings and the goodwill valuation. Thus, to him, there was double counting of the same items.

[220] There is force in Mr Carran's approach to this item but, again, this aspect of quantum is not straightforward because, as with the claim for the cost of chattels which might have been required to be purchased for the new bar, these are claims for expenditure by Dunes and Rocks which would have been required of them to create

a fully functioning bar, café and casino. Once installed with the premises operating, their value would have been subsumed into the plaintiff's fixed assets, chattels and, to a lesser extent, goodwill and recoverable as such, in the event of a sale, in the overall sale price. A further problem faced by Dunes is that, it having abandoned any claim for entry to the premises, it is difficult, conceptually, to give judgment against Rocks for expenditure which both Dunes and Rocks, in the event, were not called upon to make. There is also the difficulty of division between the parties though the claim for the unpaid portion of Rocks' contribution to Dunes' building costs on fitout ($33,392.83) is derived from McCullys' estimate of 28 August including building the raised floor, painting and fire protection but excluding electrical, plumbing and extraction system. The sums were only partially payable by Rocks to Dunes under the HoA (Appendix 2 cl 1.1 and Appendix 4).

[221] For all those reasons, the Court is currently unpersuaded of Dunes' right to recover these sums but, as with all the other items, that matter should be addressed by the parties in negotiations and the directed memoranda.

Counterclaims

1. Misrepresentation

[222] The basis of the claimed misrepresentation was earlier recounted. It was clearly founded on s 9(3)(a) of the Contractual Remedies Act 1979.

[223] A "representation relates to some existing fact or some past event, and contains no element of futurity" (Burrows Finn and Todd (*op.cit.*) para 11.2.1(a) p304) though "a statement which is ostensibly about the future may sometimes imply an statement about a present fact and may thus be a misrepresentation" (*ibid.* p305). So, in *Ware v Johnson* [1984] 2 NZLR 518, a statement about future productivity of an orchard was a misrepresentation as wrongly implying that the present state of the orchard justified such a prediction and in *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 a budget forecast was held to be a misrepresentation in that it wrongly conveyed an implication as to the company's present state.

[224] This counterclaim cause of action faces considerable hurdles. In the first place, Rocks must prove that the pleaded representations were false and were thus innocent or fraudulent misrepresentations. It must also prove Rocks relied on the misrepresentations in entering into the HoA and that as a result Dunes received money to which it was not entitled.

[225] Though calculated as carefully as possible at the time, it is clear at least some of the items listed in Appendix 1 of the HoA could only be estimates of the future cost of replacing Dunes' various prospective income streams during the period its premises were closed. As the evidence showed, estimates could be increased or decreased by later events – eg a variation in mortgage interest rates, insurance premiums or the ACC levy – and accordingly it is very difficult to see any statements made by Dunes or on its behalf as being other than estimates of future costs. That is to say, they could not have been representations in terms of the authorities in that, though based on existing categories of expenditure, they could not have been precise forecasts of future costs. They were representations about existing facts only in the sense that those categories of cost would be incurred but implied almost nothing about the quantum of those existing costs either at the date of the HoA or based on historical cost.

[226] Further, even if the estimates in Appendix 1 were representations defined, it is difficult to see them as misrepresentations when some – e.g. the change from "bank loans" to "bank interest" on mortgages – arose as a result of Rocks' amendments to the draft HoA and other figures contracted for Mr and Mrs Hampson's living allowance could easily have been checked by Dr Donald had Rocks wished to assure itself of the correctness of the figure.

[227] This aspect of the matter also raises questions of credibility and reliability of the witnesses.

[228] In that regard, it must be said that Mr and Mrs Hampson - though perhaps somewhat naïve, trusting and, on some issues, even muddle-headed - nonetheless impressed as honest witnesses doing their best to give a detailed and truthful account of matters as they saw them. Mrs Hampson, in particular, whilst on occasions

declining to accept what the HoA said against her views – reticulation to the light fittings from the distribution board is an example – nonetheless had by far the best grasp of all the witnesses on detail and, apart from the occasional well-meant fixity of view, was a reliable and credible witness.

[229] The same can be said of Mr Hampson and Ms Cadogan.

[230] However, it must be said Dr Donald's evidence did not carry the same persuasiveness. As with Rocks' correspondence during August 2006, he seemed only able to see Rocks' viewpoint, and was almost never prepared to change his initial view. As an example, he could not have believed that all issues over the fitout were resolved at the 16 May meeting. If he was listening to Mr and Mrs Hampson, he must by then have realised how widely varying were the parties' understanding of their respective obligations. Such correspondence between the parties as ensued before that meeting and up to the beginning of August must have shown him substantial issues as to fitout and the availability of the premises still remained for resolution. His correspondence with McCullys and his quantity surveyor also confirm that situation. He also must have known that McCullys and Dunes required Donald Design's approval to undertake aspects of the fitout – especially the repositioning of the piping - approval they never or never timeously received. It appears Rocks was incurious or failed to grapple with the reasons for what it saw as lack of progress with the fitout, and on his return from overseas Dr Donald simply resolved to bring the matters to a head by stating Rocks' position and refusing to alter it. Yet, despite all that, Dr Donald continued to insist throughout the hearing that no matters of fitout, either work to be done or cost, remained outstanding throughout the period up to both 1 and 25 August.

[231] The reliability and thus acceptability of Dr Donald's evidence was also undermined by the adverse inferences he persistently took from aspects of what occurred. Rather than attribute what he saw as Dunes' slow progress to inaction on Rocks' part, he attributed it to Dunes' inability to finance the fitout. Ms Cadogan, though manager of Rocks' builder, was a very helpful witness who gave evidence from a relatively independent standpoint, yet Dr Donald regarded her as having an ulterior motive and being "economical with the truth".

[232] The reliability of Dr Donald's evidence was not assisted by his habit of writing what he doubtless regarded as model answers to likely questions during breaks in the hearing and reading them verbatim into the transcript.

[233] Finally, it must be observed that the counterclaims have a "makeweight" air about them. They seemed calculated and propounded more in the hope of reducing the amount Rocks would be ordered to pay Dunes than with belief in their genuineness and legal soundness.

[234] When all those facets are combined, the view must be that the statements on which Rocks relied for its misrepresentation claims were not representations at law for the reasons given – especially that they were no more than estimates of future expenditure - were not innocently or fraudulently false, and did not induce Rocks to enter into the HoA. It was, after all, Rocks which was the prime mover in negotiating the HoA as, without it, it had no chance of undertaking the development of both Rocks Road sites. It was determined to proceed if at all possible with the development and the Court accordingly concludes that it was not whatever Dunes may have said to it about its future payments which induced Rocks to enter into the HoA.

[235] Dunes did not therefore receive money to which it was not entitled and the defendant's counterclaim for misrepresentation is accordingly dismissed.

2. Breach and Repudiation

[236] The second counterclaim was based on the facts earlier discussed concerning the provision in the HoA concerning plans and Donald Design getting McCullys to prepare the same, plus assertions relating to the legal costs of the lease ($3721.50) and lost rent between 1 July-6 October of $13,832.00.

[237] As to those counterclaims:

a) The HoA is silent as to who would prepare the final floor plan or at whose cost. Donald Design opted to ask McCullys to do the work. It

had no obligation so to do but, having made that choice, the sum paid is irrecoverable as being outside the HoA.

b) As it has now been held that Rocks was not in a position legally to issue its 1 August fax or cancel on 28 October and was engaging in repudiatory conduct in so doing, the claim for lost rent must also fail.

c) Appendix 4 obligated Rocks to pay Dunes' legal costs in connection with the lease. There was no provision concerning Rocks' legal costs in that respect. That claim is similarly irrecoverable.

[238] The second counterclaim cause of action based on breach and repudiation is accordingly also dismissed.

Result

[239] In the result:

(a) The plaintiff is entitled to judgment against the defendant on liability.

(b) The plaintiff will be entitled to judgment against the defendant for the total of the sums allowed after discussion between the parties as directed, and either agreement on those sums or a decision on quantum following receipt of the directed memoranda.

(c) The plaintiff is entitled to judgment against the defendant for interest on the total sum for which judgment is entered payable at the rate under the Judicature Act 1908 from 5 December 2006 to the date of delivery of this judgment and from the date of delivery of this judgment to the date of payment.

(d) The plaintiff is entitled to judgment for costs against the defendant but, given that it was not represented at the October 2008 hearing, the parties are to endeavour to agree on the sum for which judgment for costs is to be entered. The scale is 2B. The sum for costs is also to

include disbursements, Court fees and witnesses' expenses (including expert witnesses' expenses, disbursements and travelling expenses).

(e) All other claims by the plaintiff are dismissed.

(f) The counterclaims by the defendant are dismissed and the plaintiff is entitled to judgment for costs on the counterclaim in the same terms as in (d) above.

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HUGH WILLIAMS J

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