IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA61/2023
[2023] NZCA 409

BETWEEN	ENA HOLDINGS LIMITED First Appellant	
	VINOD KUMAR SHARMA Second Appellant	
	ENA CHAUDHRY Third Appellant	
AND	ADMIRALTY LODGE MOTEL (2016) LIMITED Respondent	

Hearing:	17 July 2023
Court:	Gilbert, Lang and Woolford JJ
Counsel:	L T Meys for Appellants J D Savage and N G Scrivener for Respondent
Judgment:	31 August 2023 at 2 pm

JUDGMENT OF THE COURT

A The applications by the appellants and respondent to adduce new evidence are declined.

B The appeal is allowed.

C The summary judgment entered in the High Court is set aside.

D The cross-appeal is dismissed.

E The respondent must pay the appellants costs on a Band A basis for a standard appeal together with usual disbursements.

REASONS OF THE COURT

(Given by Lang J)

[1] This appeal and cross-appeal raise issues arising out of the sale by Admiralty Lodge Motel (2016) Ltd (Admiralty Lodge) of management and letting rights in relation to an accommodation complex situated in Whitianga. The first appellant, Ena Holdings Ltd (Ena), purchased the business in March 2020 for the sum of $950,000.

[2] Admiralty Lodge agreed to advance Ena the sum of $475,000 to enable it to complete the purchase of the complex. It entered into a term loan agreement with Ena under which the second and third appellants, Dr Sharma and Ms Chaudhry, guaranteed Ena's obligation to repay the loan.

[3] Ena subsequently defaulted in making payments under the term loan agreement. Admiralty Lodge then issued proceedings in the High Court seeking to recover the amount outstanding.

[4] On 15 December 2022, Associate Judge Gardiner entered summary judgment in favour of Admiralty Lodge in the sum of $488,129.49.[1] Ena and the guarantors appeal against the Judge's decision. Admiralty Lodge cross-appeals against the amount for which the Judge entered judgment in its favour.

Background

The Admiralty Lodge complex

[5] The owners of the 19 units in the Admiralty Lodge complex hold strata titles under the Unit Titles Act 2010 (UTA). As is customary in such situations, the administration of the complex is undertaken by a body corporate registered under the UTA.

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1 *Admiralty Lodge Motel (2016) Ltd v Ena Holdings Ltd* [2022] NZHC 3426.

[6] When the body corporate was created, existing resource and land use consents did not permit unit owners to reside in their units on a permanent basis. The body corporate rules also contained this restriction. This meant the units could only be used as travellers' accommodation or for short term stays by the owners. Notice of these restrictions was given in a consent notice registered against the title to each unit in the complex.

[7] The body corporate entered into a management agreement with Admiralty Lodge under which Admiralty Lodge was to manage the complex in return for an annual fee to be paid by the body corporate. It also had the right to rent out units within the complex. The management agreement was for a term of 10 years commencing on 20 December 2008. In 2019, Admiralty Lodge exercised its right to extend the term of the agreement for a further 10-year period commencing on 12 August 2019. The management agreement prohibited the body corporate from entering into a similar arrangement with any other person during this period.

[8] Admiralty Lodge also entered into individual letting agreements with the owners of the units under which the unit owners appointed Admiralty Lodge as their agent to rent their units out. Unit owners remained free to engage outside agencies to rent their units rather than using the services of Admiralty Lodge. Such agencies could not, however, operate from within the complex.

[9] Unit owners became frustrated at the prohibition against being able to reside in their units on a permanent basis. This caused practical inconvenience and resulted in the value of units within the complex being lower than would be the case if the prohibition was removed. During 2019 the body corporate applied for and obtained variations of the existing resource and land use consents to enable unit owners to live in the units on a permanent basis. The variation of the Consent Notice was subsequently registered against the titles to all units other than Unit 19 on 13 September 2019.

The sale of the business

[10] In November 2019, Dr Sharma was assisting Ms Chaudhry to buy a business. He saw an advertisement by Bayleys Real Estate Ltd (Bayleys) for the sale of the

management and letting rights in relation to the Admiralty Lodge complex. The purchaser would also acquire Unit 19, the manager's unit.

[11] On 21 December 2019, Admiralty Lodge and Dr Sharma entered into an agreement for the sale and purchase of the business. The purchaser was recorded as Dr Sharma and/or nominee. The agreement included the following essential terms:

(a) a purchase price of $950,000 plus GST if any;

(b) the purchase price included Unit 19, which contained the utility controls and hot water cylinders for all the units in the complex;

(c) the purchase price was apportioned as to property value ($570,000), chattels ($10,000) and goodwill ($370,000);

(d) the agreement was conditional on approval by the purchaser's solicitor of the content and form of the agreement by 4.00 pm on 23 December 2019;

(e) settlement was to take place on 20 January 2020;

(f) the purchaser acknowledged that the property was a functioning motel business;

(g) Admiralty Lodge warranted that the income statement it had given to the purchaser, a copy of which was annexed to the agreement, was true and correct; and

(h) on settlement the purchaser would take an assignment of Admiralty Lodge's interest in the agreements with both individual unit owners and the body corporate.

[12] On 24 December 2019, Dr Sharma informed Bayleys that the condition relating to solicitor's approval had been satisfied. He also nominated Ena as purchaser.

[13] Ena was incorporated on 6 January 2020, with Dr Sharma and Ms Chaudhry appointed as directors and shareholders. Ena began managing the complex and renting units out on 10 February 2020, at a time when it had not yet completed the purchase of the business. The parties agreed that a financial adjustment relating to income earned between 10 February and the date of settlement would be undertaken in a "wash up" following settlement. This did not occur, and the Judge held that the sum of $60,000 should be deducted from any amount payable by the appellants by way of a retention sum to meet any claim Ena may have to income earned between 10 February 2020 and the date of settlement.[2]

[14] On 19 February 2020, the solicitors acting for Admiralty Lodge on the sale confirmed that the body corporate had approved the assignment of the letting rights under the management agreement to Ena.

[15] During February 2020, Admiralty Lodge agreed to provide Ena with vendor finance to enable it to complete the purchase of the business. On 5 March 2020, Admiralty Lodge, Ena, Dr Sharma, and Ms Chaudhry entered into the term loan agreement. The loan was to be secured by way of a registered second mortgage against Unit 19.

[16] The sale of the business was completed on 13 March 2020. On that date, Ena paid the sum of $475,000 to Admiralty Lodge. The balance of the purchase price was funded using vendor finance in accordance with the term loan agreement.

[17] Ena made periodic payment of instalments under the loan agreement between 13 March 2020 and 10 September 2021. It made no further payments after that date.

[18] On 5 April 2022, Admiralty Lodge made demand on Ena in the sum of $605,510.22, being the amount then outstanding under the term loan agreement. On 5 May 2022, Admiralty Lodge made further demand for the sum of $619,121.99. Ena failed to comply with either demand. Admiralty Lodge then issued proceedings in the High Court seeking summary judgment for the balance owing under the term loan agreement.

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2 At [116].

Relevant principles

[19] There is no dispute regarding the principles to be applied in the present context. A plaintiff may obtain summary judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to the plaintiff's claim.[3]

[20] The Judge summarised the principles to be applied in an application for summary judgment by citing the following passage from *Krukziener v Hanover Finance Ltd*:[4]

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3. The court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as, for example, where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341. In the end the court's assessment of the evidence is a matter of judgment. The court may have a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[21] Mr Meys accepted on the appellants' behalf that the Judge correctly identified the principles to be applied in the present context. He contended, however, that she erred in applying those principles to the facts of the case.

[22] The notice of appeal contains detailed analysis of and challenges to the reasoning used by the Judge in reaching her conclusion that the appellants had no arguable defence to Admiralty Lodge's claim. The written submissions filed by Mr Meys in support of the appeal take a similar approach.

[23] We do not find this to be a particularly helpful way in which to address the essential issue the Court is required to determine on appeal. This is whether the

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3 High Court Rules 2016, r 12.2(1).

4 *Admiralty Lodge Motel (2016) Ltd v Ena Holdings Ltd*, above n 1, at [25] citing *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307.

appellants can establish that the Judge erred in concluding that they had no arguable defence to Admiralty Lodge's claim for judgment.

[24] The affirmative defences the appellants seek to advance are based on an assertion that Mr Brian Johnson, Admiralty Lodge's director, made false representations to Dr Sharma and Ms Chaudhry before and after Dr Sharma entered into the agreement to buy the business. The appellants contend that Mr Johnson misrepresented the nature and quality of the business, including its future profitability, and this influenced their decision to enter into both the agreement for sale and purchase and the term loan agreement. The appellants seek relief in relation to the misrepresentations under s 37 of the Contract and Commercial Law Act 2017 (CCLA). They also contend that the representations constituted misleading and deceptive conduct in breach of s 9 of the Fair Trading Act 1986 (FTA). In addition, the appellants say they were unsubstantiated representations in terms of s 12A of the FTA because Mr Johnson did not have reasonable grounds for making them.

[25] The essential question is therefore whether the proposed cross-claims under the CCLA and the FTA so affect Admiralty Lodge's claim that it would be unjust to enter summary judgment against the appellants without bringing the cross-claim to account.[5] We propose to approach the appeal from that perspective.

Applications to adduce new evidence

[26] Both Ena and Admiralty Lodge seek to adduce new evidence on the appeal. Each opposes the application by the other.

[27] The Court may grant leave for the admission of further evidence on appeal.[6] The principles relating to the admission of new evidence on appeal are well established. New evidence must be fresh in the sense that it could not have been obtained with reasonable diligence before the hearing in the court below. It must also be credible and cogent. Where evidence is not fresh, it should not be admitted unless

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5 *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA) at 12-13.
6 Court of Appeal (Civil) Rules 2005, r 45.

the circumstances are exceptional and the grounds compelling.[7] In the present context of summary judgment proceedings, particular weight is given to the public interest in ensuring finality in civil litigation.[8]

[28] Admiralty Lodge seeks to rely on an affidavit sworn by Ms Donna Holroyd, the owner of Unit 18B in the complex. Her affidavit explains the ownership changes that have taken place in relation to that unit, an issue we discuss briefly later in the judgment.[9] It also explains, from Ms Holroyd's perspective, the manner in which Ena has divided rental income from the complex between the unit owners. It also alleges that Ena has embarked on a strategy of renting out units in a manner that suits its own interests.

[29] Ms Holroyd's evidence does not constitute fresh evidence because it could have been obtained with reasonable diligence before the hearing in the High Court. The appellants challenge aspects of Ms Holroyd's evidence but we are in no position to make any finding on that issue. The credibility of the evidence therefore remains untested. However, we are satisfied the evidence is not cogent because it does not assist us to determine the issues raised by either the appeal or cross-appeal. We therefore decline Admiralty Lodge leave to adduce further evidence.

[30] The appellants seek leave to rely on an affirmation by Ms Chaudhry that responds to issues raised by Ms Holroyd. Given our decision in relation to Ms Holroyd's affidavit it is not necessary for us to consider the material contained in Ms Chaudhry's affirmation. We therefore also decline to grant the appellants leave to adduce new evidence.

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7 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192–193; aff'd *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

8 *Erceg v Balenia Ltd* [2008] NZCA 535 at [15] citing *Lawrence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

9 At [43]–[44].

The representations

[31] Dr Sharma approached Bayleys after he saw the advertisement in early November 2019. On 7 November 2019, Bayleys provided him with an Information Memorandum (IM) that contained the following appendices:

(a) a letter sent on behalf of the unit owners committee confirming the renewal of the management agreement for a further 10-year period from 12 August 2019;

(b) a certificate of title for unit 19 showing the consent notice; and

(c) a six-page pre-contract disclosure statement.

[32] On 8 November 2019, Dr Sharma requested and subsequently obtained copies of the financial statements for the business for the three previous financial years. He also received a copy of the 2018/2019 financial statements, a copy of the management agreement with the body corporate and an occupancy/profit statement. On 9 November 2019, Bayleys provided Dr Sharma with a sample letting agreement in the form of the agreement Admiralty Lodge had entered into with the owner of Unit 1A. The appellants do not take issue with the accuracy of any of this material.

[33] Dr Sharma and Ms Chaudhry say that Mr Johnson subsequently made several oral representations to them about the quality and viability of the business. Dr Sharma and Ms Chaudhry met Mr Brian Johnson and his brother, Mr Paul Johnson, at the complex on 21 December 2019. Mr Paul Johnson managed the business on a day-to-day basis. The agent from Bayleys was also present. Dr Sharma says that he also spoke to Mr Brian Johnson on his own later in the day. Dr Sharma says Mr Brian Johnson made the following representations during these meetings:

(a) he had unit letting agreements with every unit owner and these did not need to be looked at or varied;

(b) the business was very profitable, and he was sure it will continue to be a good business;

(c) the management agreement was "the best" and would guarantee exclusive rights for another 10 years; and

(d) in response to Dr Sharma asking Mr Johnson whether there was anything hidden in the business so that he would not have to worry about Ms Chaudhry, Mr Johnson said he would "look after" Ms Chaudhry, that he would sign the turnover figures and financial statements as showing the full picture and if there was anything wrong, they could cancel and walk away.

[34] The appellants did not seek legal advice until 23 December 2019, the date on which the condition relating to solicitors' approval needed to be satisfied. On that date Dr Sharma sent an email to Bayleys requesting that two separate agreements be prepared, one relating to the sale of Unit 19 and one relating to the sale of the management rights and letting business. Admiralty Lodge declined this request on the basis that one GST registration number related to both the unit and the business.

[35] In the email sent on 23 December 2019, Dr Sharma also sought an undertaking from Admiralty Lodge that the profit and loss statement for the period ended 31 March 2019 was true and correct. Bayleys responded by advising that Dr Sharma had access to the accounts and there was no need for the undertaking he sought. It said that Admiralty Lodge had been "open and honest with you".

[36] Dr Sharma also says he telephoned Mr Brian Johnson on 24 December 2019. During the ensuing conversation Mr Johnson allegedly advised him that:

(a) the business was a great investment that will make good money for at least 10 years;

(b) Dr Sharma would have no problems if he and Ms Chaudhry kept everything the same. This would include retaining Mr Brian Johnson's niece to assist with the management of the business; and

(c) Dr Sharma should trust him, and they could worry about the lawyer's paperwork later.

[37] Dr Sharma and Ms Chaudhry met again with Mr Brian Johnson on 30 December 2019. During this meeting they say he told them that the business was very profitable, it was a good management agreement and the letting agreements did not need to be updated.

The claims

[38] In order to be actionable under the CCLA any misrepresentation by Mr Johnson must have induced Dr Sharma to enter into the agreement.[10] As we have already noted, the parties entered into the agreement for the sale of the business on 21 December 2019. The discussions that occurred on 24 and 30 December 2019 could not give rise to any actionable misrepresentation under the CCLA because by that stage Dr Sharma had already entered into the agreement to buy the business. However, any subsequent misrepresentation that induced the appellants to enter into the loan agreement would potentially be actionable under the CCLA

[39] This is to be contrasted with the position so far as claims under the FTA are concerned. Misleading or deceptive conduct may be actionable under the FTA even if it did not induce the appellants to enter into any contract. In order to obtain relief under the FTA, however, misleading or deceptive must have caused the appellants loss.

[40] In his written submissions, Mr Meys did not deal separately with the proposed cross-claim under the FTA. It is likely that he also adopted the same approach in the High Court because the Judge did not give separate consideration to that issue in her judgment. This is a case that may ultimately require careful analysis of whether statements made by Mr Johnson provide grounds for relief under the CCLA and/or the FTA. For present purposes, however, we propose to deal with them together because the appellants rely largely on the same statements made by Mr Johnson as giving rise to liability under both the CCLA and the FTA.

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[10] Contract and Commercial Law Act 2017, s 35(1).

Analysis of alleged misrepresentations

[41] The statements upon which the appellants rely can be divided into six broad categories. The first comprises broad statements of opinion such as the statement to the effect that the management agreement was "the best". We do not propose to discuss these further because, like the Judge, we are satisfied no reasonable purchaser in the position of Dr Sharma and Ms Chaudhry could rely upon them.[11]

[42] The second category comprises statements that cannot give rise to liability on the evidence as it currently stands. The third category comprises the statement made by Mr Johnson on 21 December 2023 to the effect that the management agreement gave Admiralty Lodge the exclusive right to manage the complex for the next 10 years.

[43] The fourth category comprises the alleged omission by Mr Johnson to advise Dr Sharma of issues the body corporate had raised with Mr Johnson regarding Admiralty Lodge's performance of its obligations under the management agreement. This becomes relevant because Dr Sharma asked Mr Johnson on 21 December 2019 whether there was anything hidden in the business he needed to know so that Ms Chaudhry could be protected.

[44] The fifth category comprises Mr Johnson's statement that he held letting agreements for all units. The sixth category comprises statements he made about the past and future profitability of the business.

Statements that cannot give rise to liability on the evidence as it currently stands

[45] An example that falls within this category is the statement that Dr Sharma should keep everything the same and this would include retaining Mr Brian Johnson's niece to assist with the management of the business. The appellants have never suggested that they subsequently discovered they needed to change the operation of the business or that retention of Mr Brian Johnson's niece as an employee caused issues. Another example is the suggestion that the appellants should trust him and

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[11] *Admiralty Lodge Motel (2016) Ltd v Ena Holdings Ltd,* above n 1, at [64] citing *Western Park Village Ltd v Baho* [2014] NZHC 198 at [67].

they could worry about the lawyer's paperwork later. The appellants have not adduced any evidence to suggest this statement caused them any problems subsequently.

[46] A further example is the statement that Dr Sharma did not need to look at the letting agreements and they did not need to be varied. Bayleys had provided Dr Sharma with a sample letting agreement on 9 November 2019 and he had not raised any issue about it. The statements could therefore be taken as a representation that the remaining agreements were in the same or similar form. If this was incorrect it could amount to an actionable misrepresentation and/or misleading and deceptive conduct. However, the appellants have never suggested that the other agreements differed in any material way from the sample Dr Sharma was given. It follows that there is currently no basis for a claim under either the CCLA or the FTA under this head.

The management agreement gave Admiralty Lodge exclusive letting rights for 10 years

[47] The management agreement prohibited the body corporate from granting letting rights to any other person for the duration of the agreement. As we have already noted, Admiralty Lodge had exercised its right under the management agreement in August 2019 to extend the term of the agreement for a further 10-year period from 12 August 2019. Admiralty Lodge also had the right to extend the agreement for a further 10-year period thereafter. In that sense, the statement made by Mr Johnson was correct. The body corporate had given Admiralty Lodge the exclusive right to manage and rent out units in the complex until August 2029 and beyond.

[48] Bayleys gave Dr Sharma a copy of the management agreement on 8 November 2019. He received the sample letting agreement the following day. Dr Sharma therefore had the ability to compare any statements Mr Johnson made about the nature and duration of the management agreement against the terms that those documents contained.

[49] The management agreement expressly provided that unit owners were free to use the letting services of any other person provided such persons did not operate within the complex. The individual letting agreements also gave unit owners the right to withdraw their units from the rental pool by giving Admiralty Lodge six months'

notice of their intention to do so. These provisions created an obvious risk for any purchaser of the business. Further, the management agreement gave the body corporate the right to terminate the agreement on the basis of non-performance by the manager.

[50] Dr Sharma received a copy of the management agreement and sample letting agreement approximately six weeks before his discussion with Mr Johnson. He therefore had ample opportunity to assess the nature and duration of both documents, as well as the potential risks they posed. Dr Sharma confirms in his affidavit that he received the documents but does not say whether he read them. Given his previous business experience, however, we assume that he would have done. In the absence of evidence by Dr Sharma to the contrary, we proceed on the basis that he was aware that both the management agreement and the letting agreements could be terminated in prescribed circumstances.

[51] On the evidence as it currently stands, we are therefore satisfied that no actionable misrepresentation could arise under either the CCLA or the FTA as a result of Mr Johnson's statements about the exclusive nature of the management agreement and its duration.

Omission to advise Dr Sharma of issues the body corporate had raised about Admiralty Lodge's performance of its obligations under the management agreement

[52] Mr Johnson had received an email sent on behalf of the body corporate committee on 15 September 2019 stating that a report from Qualmark, an agency that provides ratings for short-term accommodation, had returned a weighted rating of 2.2 stars out of 5 for visitor experience. The email went on to request Mr Brian Johnson to remove his brother Mr Paul Johnson as manager within 60 days. It said that if this request was not met the body corporate would have no choice but to cancel the agreement based on poor performance.

[53] The appellants also contend that Mr Johnson failed to tell them that the unit owners had several discussions with Mr Johnson during 2018 and 2019 in which they

expressed their dissatisfaction with the manner in which Mr Paul Johnson was managing the business.

[54] We accept it is arguable that Mr Johnson should have disclosed these issues to Dr Sharma when Dr Sharma asked him on 21 December 2019 whether there were any hidden issues about the business that he had not disclosed. The fact that the body corporate and unit owners were not happy with the current performance of the manager was a material fact that any potential purchaser would be interested to learn. It meant that any purchaser of the business would be required to deal with a body corporate and unit owners who were currently concerned about the manager's performance. This meant it was likely to be less tolerant in the future about shortcomings in the manager's performance.

[55] However, the body corporate had acknowledged in August 2019 that Admiralty Lodge was entitled to extend the term of the management agreement for another 10 years. It was therefore not sufficiently concerned at that stage about identified shortcomings in Admiralty Lodge's performance to terminate the management agreement. Further, Ena had the ability to rectify the shortcomings the body corporate had identified once it took over the business. We therefore do not consider the evidence discloses that the appellants suffered any loss because Mr Johnson failed to advise them of the performance issues the body corporate and unit owners had raised with Admiralty Lodge.

The statement that Mr Johnson held letting agreements for all units in the complex

[56] The argument in relation to this issue focusses on two units, Unit 102 and Unit 18B.

Unit 102

[57] The statement by Mr Johnson on 21 December 2019 that Admiralty Lodge had letting agreements with every unit owner was a statement of fact. It was therefore capable of giving rise to liability under both the CCLA and the FTA if shown to be incorrect. It transpired that the owner of Unit 102 had given Mr Paul Johnson notice

cancelling the letting agreement for that unit on 2 November 2019. This meant the assurances Mr Johnson gave Dr Sharma on 21 December 2019 were incorrect because Admiralty Lodge did not hold letting agreements with all 18 unit owners as at that date.

[58] The Judge did not consider this misrepresentation entitled Ena to cancel the agreement. However, she gave the appellants a credit in the sum of $19,230.50 to reflect the diminution in goodwill created by the withdrawal of Unit 102 from the letting pool.[12] This amounted to one eighteenth of the goodwill paid by Ena for the business ($346,149).

[59] The appellants dispute the approach taken by the Judge, although they have never suggested an alternative basis or methodology for calculating how compensation should be assessed. We consider the Judge erred in her approach to this issue because she effectively quantified the damages to be awarded to the appellants for the misrepresentation, when that would ordinarily be an issue to be determined at trial. At most, we consider the Judge should have reduced the amount for which judgment was entered by a generous sum and directed that the quantum of damages for this misrepresentation be assessed at trial.

[60] However, this point becomes academic for reasons we shall now outline in relation to Unit 18B.

Unit 18B

[61] Prior to the settlement of the purchase, there was a misunderstanding between the parties regarding the status of Unit 18B. At that time all parties believed there was no letting agreement in place for this unit because attempts to contact the person believed to be the current owner had been unsuccessful. However, in late February 2020, Dr Sharma formally waived any right to make a claim against Admiralty Lodge for the absence of a letting agreement in relation to Unit 18B. He did so on the basis that Admiralty Lodge agreed to take a second ranking mortgage over Unit 19 rather than a first ranking mortgage as had previously been offered.

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12 At [90].

[62] By the time of the hearing in the High Court it was common ground that Unit 18B still remained in the letting pool as at 13 March 2020. The confusion had been caused by the fact that it was now owned by an entity associated with Ms Holroyd. That entity had acquired the unit in October 2019 and was registered as the owner on 19 November 2019. It did not withdraw the unit from the rental pool until well after settlement had taken place.

[63] When the appellants agreed to waive their right to compensation for the fact that Unit 18B was not in the letting pool they effectively fixed the level of compensation payable to reflect the fact that Admiralty Lodge did not hold a letting agreement in relation to one unit in the complex. That unit now turns out to be Unit 102 rather than Unit 18B. However, the fact remains that 17 of the 18 units remained in the letting pool at the date of settlement and the parties had agreed to the compensation to be paid to reflect the loss of one unit. We consider this means the appellants suffered no loss as a result of Mr Johnson's erroneous representation that Admiralty Lodge held letting agreements for all 18 units.

The statements Mr Johnson made about the past and future profitability of the business

[64] For present purposes we proceed on the basis that the appellants will be able to establish that Mr Johnson made the statements upon which they rely. We note, however, that Mr Johnson acknowledges in the affidavit he filed in support of the application for summary judgment that he did make some statements about the future profitability of the business:

> (a) I made comments at various times that the business was profitable and that I thought it would be a good purchase. These comments were very general in nature and were true.

[65] The appellants contend Mr Johnson made statements about the profitability of the business on 21 and 24 December 2019. These related both to the accuracy of the financial statements he had given to Dr Sharma and the future profitability of the business.

[66] A statement that a business is profitable may be actionable if the statement is incorrect because the profitability of a business is a matter of fact. However, as the Judge pointed out, a representation will not be actionable if the recipient tests the accuracy of the statement and relies on their own assessment.[13] In the present case, Bayleys had given Dr Sharma copies of the financial statements for the business. These related to the previous three years as well as the 2018/2019 year.

[67] Dr Sharma was an experienced businessman and had been approached by Ms Chaudhry for that reason. We therefore accept he had the necessary business experience to be able to make his own assessment of the profitability of the business in the past from the financial statements Bayleys provided to him.

[68] Ms Chaudhry also deposed that she reviewed the previous year's profit and loss statements as well as the occupancy figures. She calculated that the margin "was good but not great". The profitability of the business depended mainly on the letting fees and a high level of occupancy.

[69] As the Judge noted, the appellants have never claimed that the information they were given about the profitability of the business in the past was incorrect.[14] On the evidence as it currently stands, we do not consider the appellants can advance an arguable cause of action under either the CCLA or the FTA based on any statements Mr Johnson may have made about the profitability of the business in the past.

[70] The appellants go further, however, and say that in providing the financial statements Admiralty Lodge represented that nothing had changed in the business since the financial statements were prepared. They also rely on Mr Johnson's statement on 24 December 2019 that the business was a great investment that would make good money for at least 10 years. In addition, they rely upon his statement that he would "look after" Ms Chaudhry when Dr Sharma asked on 21 December 2019 whether there was anything he had not disclosed about the business.

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13 At [65] citing *Attwood v Small* [1838] 6 Cl & Fin 232 (HL).
14 At [63].

[71] Mr Meys' argument for the appellants on this issue was based largely on the fact that by the time Dr Sharma considered the financial statements they were out of date because Units 18B and 102 were no longer part of the letting pool. However, that was not the case with Unit 18B and, as we have found, the appellants and Mr Johnson reached agreement as to the compensation to be paid to reflect the fact that Mr Johnson only held letting agreements for 17 of the 18 units.

[72] We nevertheless have a concern as to whether Mr Johnson ought to have told Dr Sharma about the likely implications for the business once the prohibition on unit owners being able to occupy their units permanently was removed. This obviously had the potential to reduce the extent to which units in the complex would be rented out in the future because some owners were likely to take the opportunity to reside in their units on a permanent basis. This would diminish the income derived by Admiralty Lodge's business.

[73] Mr Johnson was clearly alive to this issue. At an annual general meeting of the body corporate on 10 October 2018, he told the unit owners present that he was concerned the proposed variation of the resource consent had the potential to adversely affect Admiralty Lodge's business. The minutes of the meeting record that he said he had no wish to impede any process that would produce the best financial outcome for unit owners but considered further clarification was required. He also said he would seek legal advice about the issue.

[74] Admiralty Lodge relies on the fact that Bayleys provided Dr Sharma with the IM on 7 November 2019. A copy of the Certificate of Title for Unit 19 was annexed to the IM. This showed the Consent Notice giving notice of the prohibition on the units in the complex being used for any purpose other than travellers' accommodation. The IM also contained two other pieces of information that are relevant for present purposes. These were as follows:

> ***The Body Corporate is currently undergoing a review of its Operational Rules following the recent change to the Building Consent and variations to the Land/Property Use.***
>
> …

> ***The Body Corporate has submitted and received approval from Council for a Variation to the Resource Consent. This specifically relates to the use of the Property to include Visitor Accommodation and/or Permanent Accommodation.***

[75] Admiralty Lodge points out that this information was highlighted in bold and stood out from the surrounding text. Any person reading the IM would therefore be aware that there had been a recent variation of the resource and use consents that applied to the complex. These related specifically to the use of the property so as to include not only visitor accommodation but also permanent accommodation.

[76] Counsel for Admiralty Lodge contended that a lay person who read the IM would appreciate that there had been recent changes to the use to which the units could be put. They also argued that Dr Sharma cannot be regarded as a lay person. Their written submissions describe him in the following terms:[15]

> Dr Sharma, the second appellant, is highly educated and an experienced investor, with specific industry experience in the subject matter of this dispute. He is a director and shareholder of a substantial number of businesses that provide serviced accommodation. He is chairman of the board of hotel operators VR Group and Kiwi Hospitality LLC.

[77] Admiralty Lodge relies in this context on the following observations made by the Supreme Court in *Red Eagle Corporation Ltd v Ellis* in relation to the principles that apply to a claim for an alleged breach of s 9 of the FTA:[16]

> [28] It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. *Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer or, to take an extreme case, towards an individual known by the defendant to h*ave *intellectual difficulties.* Richardson J in *Goldsbro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been

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15 Footnotes omitted.

16 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 493 (emphasis added and footnotes omitted).

> established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

[78] Admiralty Lodge submits that Dr Sharma is a sophisticated businessman and that he would immediately recognise the significance of the information contained in the IM. He would appreciate that recent changes to the resource and use consents meant that units in the complex could now be used for permanent accommodation. It therefore says Dr Sharma had been placed on notice of this change in circumstances well before he spoke to Mr Johnson on 21 December 2019. This meant Mr Johnson was not obliged to raise the issue when Dr Sharma asked him whether there was any other issue about the business that had not been disclosed.

[79] The difficulty with this submission is that an application for summary judgment is not an appropriate forum in which to explore and assess the extent to which Dr Sharma's previous business experience ought to have alerted him to the significance of an issue such as the change of use. He was not aware of the circumstances that had led to the unit owners promulgating the change of use. He did not know that unit owners had become frustrated because they could not live in the units themselves or sell them to others as permanent accommodation. They had decided to rectify the problem by changing the use to which their units could be put. The change of use therefore meant there was a real possibility that many of the units would be removed from the letting pool and this would decrease the profitability of Admiralty Lodge's business.

[80] By December 2019, matters had also moved on significantly since the annual general meeting in October 2018. The proposal to change the use to which units could be put was on the verge of being implemented. The variation of the resource and land use consents had been approved and the body corporate rules were being amended to reflect the change in use. Unit owners were therefore on the cusp of being able to reside in their units on a permanent basis. Mr Johnson was fully aware of these issues and had obviously been concerned about them since at least October 2018.

[81] This meant Mr Johnson had to be very circumspect in making any representations regarding the future profitability of the business. Any statement to the effect that the business would continue to be profitable in the future needed to be tempered by the fact that he knew of the change in use that was about to occur.

[82] At this stage we are reliant on the evidence given by Dr Sharma and Ms Chaudhry as to what Mr Johnson told them on 21 and 24 December 2019 regarding the future profitability of the business. However, assuming their evidence to be correct we consider the statements arguably amounted to breaches of ss 9 and 12A of the FTA. Applying the test enunciated by the Supreme Court in the passage cited above from *Red Eagle,* we cannot be sure that a reasonable person in Dr Sharma's position could (or should) have been expected to appreciate the extent to which this issue was likely to adversely affect the future profitability of Admiralty Lodge's business. Rather, we consider such a person could have been misled or deceived by Mr Johnson's statements. The same may be said about any statement Mr Johnson made about the future profitability of the business during the telephone conversation with Dr Sharma on 30 December 2019.

[83] The next issue is whether the appellants relied on the representations in deciding to enter into the agreement to purchase the business and the loan agreement. They say that they did, and it is not possible to decide otherwise on an application for summary judgment. However, we observe that it would be surprising if they did not rely to some extent on Mr Johnson's assurances as to the future profitability of the business given the amount they agreed to pay for it.

[84] The final issue is whether the misleading or deceptive conduct arguably caused the appellants loss. In this context the Supreme Court observed in *Red Eagle*:[17]

> [29] Then, with breach proved and moving to s 43, the court must look to see whether it is proved that the claimant has suffered loss or damage "by" the conduct of the defendant. The language of s 43 has been said to require a "common law practical or common-sense concept of causation". The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct. It does not follow from the fact that a reasonable person would have been misled or deceived (the capacity of the conduct) that the particular claimant was actually misled or deceived. If the

[17] Footnotes omitted.

> court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach *the* effective cause or *an* effective cause? Richardson J in *Goldsboro* spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage. The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage. The claimant may, for instance, have been materially influenced exclusively by some other matter, such as advice from a third party.

[85] It appears to be common ground that most of the unit owners withdrew their units from the letting pool after Ena purchased the business from Admiralty Lodge. This occurred gradually over a period of approximately 18 months as unit owners began living in the units on a permanent basis or rented them out using another letting agency. By November 2021, the only units that remained in the pool were the three units that Ena owned itself. In addition, the body corporate terminated the management agreement in July 2022 due to shortcomings in Ena's performance under the agreement.

[86] Any loss caused by the termination of the management agreement is obviously unlikely to have been caused by any statements made by Mr Johnson in December 2019. However, the fact that many of the unit owners began living in their units after Ena took over the business was precisely the consequence that Mr Johnson appears to have foreseen in October 2018.

[87] The appellants have not specified in their draft statement of defence and counterclaim what they would have done if Mr Johnson had made them aware of the likely effect of the change of use on the future profitability of the business. However, they say the business is now valueless and seek a declaration that the misrepresentations entitled them to cancel the agreement to buy it.

[88] We consider there is sufficient connection between the representations as to the future profitability of the business and the likely reason for the subsequent reduction in value of the business to conclude that Mr Johnson's representations have arguably contributed to the appellants sustaining loss. As matters currently stand, they are also still obliged to repay the loan from Admiralty Lodge even though the management

agreement has now been terminated. The quantum of any loss will obviously need to be established at trial.

[89] For the sake of completeness, we accept that the appellants' solicitors were expressly advised of the current position in relation to the change of use shortly before settlement. The Judge observed that the appellants could at that stage have exercised their right under the agreement for sale and purchase to make Admiralty Lodge aware of their claim and requiring funds to be withheld on settlement to provide for it. She considered the appellants waived their claim when they elected to settle the purchase without raising their claim at that stage.[18] We respectfully disagree. There was nothing to prevent the appellants from completing the purchase of the business and advancing their cross-claim following settlement.

Waiver of interest

[90] This issue arises because of events that occurred after the onset of the COVID-19 pandemic in March 2020. Not surprisingly, the travel restrictions imposed by the New Zealand Government at that time had a significant effect for all tourist accommodation complexes. This lasted for many months.

[91] The term loan agreement required Ena to pay Admiralty Lodge the sum of $1,600 on the tenth day of each month. The appellants contend that Mr Johnson advised them they could stop making payments under the term loan agreement until their cashflow permitted them to resume doing so. They say he is now estopped from resiling from that agreement. In effect, Ena says Admiralty Lodge waived its entitlement to require Ena to make the payments due under the term loan agreement.

[92] Ena also contends that, because there was an agreement to defer the obligation to make payments under the term loan agreement, those payments never became overdue. Admiralty Lodge was therefore not entitled to charge penalty interest on outstanding amounts.

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[18] *Admiralty Lodge Motel (2016) ltd v Ena Holdings Ltd,* above n 1, at [52].

[93] Admiralty Lodge denies having waived its rights under the term loan agreement. Mr Johnson says he did not pursue Ena for payment between March and June 2020 because he was aware of the financial issues it would be facing. Thereafter, however, he regularly sent text messages to Ms Chaudhry asking her to make the required monthly payments.

[94] Given that the matter will need to proceed to trial in any event we consider this issue should be determined having regard to the evidence given at trial.

The cross-appeal

[95] The fact that that the judgment is to be set aside means we are not required to determine the issue raised by the cross-appeal.

Result

[96] The applications by the appellants and respondent to adduce new evidence are declined.

[97] The appeal is allowed.

[98] The summary judgment entered against the appellants in the High Court is set aside.

[99] The cross-appeal is dismissed.

[100] The respondent must pay the appellants costs on a Band A basis for a standard appeal together with usual disbursements.

Solicitors:
Neilsons Lawyers, Auckland for Appellants
Norris Ward McKinnon, Hamilton for Respondent