SUPREME COURT OF QUEENSLAND

CITATION:	*WP Kidd P/L & Anor v Panwell P/L & Ors* [2007] QSC 373
PARTIES:	**W P KIDD PTY LTD** ACN 010 461 426 (first plaintiff) and **WILLIAM PETER KIDD** (second plaintiff) **v** **PANWELL PTY LTD** ACN 010 236 852 (first defendant) and **O'ROURKE HOSPITALITY PTY LTD** ACN 068 930 414 (second defendant) and **MICHAEL O'ROURKE** (third defendant) and **RAYMOND GRAHAM CLARK TRADING AS GRAHAM CLARK REALTY** ABN 8078 852 496 946 (fourth defendant) and **GRAHAM STANLEY** (fifth defendant) and **RHONDA KEATING** (sixth defendant) and **PETER KEATING** (seventh defendant) and **TELERN PTY LTD** ACN 010 730 006 (eighth defendant) and **CURETON PTY LTD** ACN 010 949 596 (ninth defendant)
FILE NO/S:	BS 5121 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 December 2007
DELIVERED AT:	Brisbane

HEARING DATE: 16, 17, 18, 19, 22, 23, 24, 25 and 26 October 2007

JUDGE: McMeekin J

ORDERS:

1. Judgment for the first plaintiff against the second and third defendants in the sum of $640,351 in respect of its claim and $182,745 for interest.

2. Judgment for the second plaintiff against the second and third defendants in the sum of $77,000 in respect of his claim and $32,000 for interest.

3. Judgment for the first, sixth and seventh defendants against the first and second plaintiffs on the plaintiffs' claim against them.

4. Judgment for the first defendant against the first plaintiff on its counterclaim in the sum of $218,733 together with $53,345 for interest.

5. Judgment for the first, sixth and seventh defendants:
- **(a) against the second and third defendants on the third party claims brought by the second and third defendants against them;**
- **(b) against the eighth and ninth defendants on the third party claims brought by the eighth and ninth defendants against them.**

6. Judgment for the second and third defendants:
- **(a) against the first, sixth and seventh defendants on the third party claims brought by the first, sixth and seventh defendants against them;**
- **(b) against the eighth and ninth defendants on the third party claims brought by the eighth and ninth defendants against them.**

7. Judgment for the fourth defendant:
- **(a) against the first, sixth and seventh defendants on the third party claims brought by the first, sixth and seventh defendants against him.**
- **(b) against the eighth and ninth defendants on the third party claims brought by the eighth and ninth defendants against him.**

8. Judgment for the eighth and ninth defendants:
- **(a) against the first, sixth and seventh defendants on the third party claims brought by the first, sixth and seventh defendants against the eighth and ninth defendants;**
- **(b) against the second and third defendants on the third party claims brought by the second and third defendants against the eighth and ninth defendants.**

CATCHWORDS: TRADE PRACTICES – MISLEADING & DECEPTIVE CONDUCT - NEGLIGENCE – ECONOMIC

LOSS – CARELESS ADVICE - CONTRACT – BREACH OF RETAINER – where misleading advice re suitability of hotel business – where purpose of advice known by second defendant – where reasonable care not exercised in giving the advice – where no proper basis for recommendation – whether reliance on advice

TRADE PRACTICES – MISLEADING &

DECEPTIVE CONDUCT – whether vendors of hotel business liable for representations re future profits and for statements made by salesman – whether actual or apparent authority of agent – whether reliance by plaintiff purchasers – whether causation when advice not known to plaintiffs and ignored by plaintiffs' agent

DAMAGES – causation – ineptitude of plaintiff in conducting hotel business – whether sufficient to break causal nexus

DAMAGES – assessment – allowance for wasted effort – allowance for lost profit in addition to capital loss – whether reduction for receipt of compensation for poker machine operating authorities during lease of the business

LEASE – breach by non-payment of rent – damages

Trade Practices Act 1974 (Cth), ss 51A, 52, 75B, 82
A New Tax System (Goods and Services Tax) Act 1999 (Cth), ss11-20
Gaming Machine Act 1991 (Qld), ss 55, 56, 58 and 68
Supreme Court Act 1995 (Qld)

Aceridge Pty Ltd v Chatswood Hills Tavern Pty Ltd & Anor [2004] CCT G 502-03, cited
Bevanere Pty Ltd v Lubidineuse [1985] 7 FCR 325, applied
BMD Major Projects Pty Ltd v Victorian Urban Development Authority [2007] VSC 409, considered
Burke v LFOT Pty Ltd (2002) 209 CLR 282, cited
Butcher v Lachlan Elder Realty (2004) 218 CLR 592, considered
Carlton v Pix Print Pty Ltd [2000] FCA 337, cited
Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-Operative Assurance Co of Australia Ltd (1931) 46 CLR 41, applied
Crystal Auburn Pty Ltd v IL Wollermann Pty Ltd [2004] FCA 821, cited
Cut Price Deli Pty Ltd v Jacques (1994) 49 FCR 397, cited
Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd (1987) 78 ALR 193, cited
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (1995-1997) 188 CLR 241, applied
General Newspapers Pty Ltd v Telstra Corp (1993) 117 ALR 629, cited
Henville v Walker (2001) 206 CLR 459, cited

I & L Securities v HTW Valuers (2002) 210 CLR 109, cited
Jaldiver Pty Ltd v Nelumbo Pty Ltd (unreported – Federal Court of Australia – V G51 of 1991 – Heerey J – 2 December 1992- BC 9203862), applied
Kizbeau Pty Ltd v WG & B Pty Ltd (1995) 184 CLR 281, cited
Manwelland Pty Ltd v Dames & Moore Pty Ltd [2001] QCA 436, distinguished
Meates v Attorney-General [1983] NZLR 308, applied
NEA Pty Ltd v Magenta Mining Pty Ltd [2007] WASCA 70, considered
Netaf Pty Ltd v Bikane Pty Ltd (1990) 92 ALR 490, cited
Totff v Antonis (1952) 87 CLR 647, cited
WP Kidd Pty Ltd v Panwell Pty Ltd [2004] CCT G 514-03, cited

COUNSEL: MD Martin with N Sadler for the plaintiffs and 8th and 9th defendants
RS Ashton for the 1st, 6th and 7th defendants
DW Marks for the 2nd and 3rd defendants
PJ Woods for the 4th defendant

SOLICITORS: McDonnells for the plaintiffs and 8th and 9th defendants
Baker O'Brien & Toll for the 1st, 6th and 7th defendants
Kerrin & Co Lawyers for the 2nd and 3rd defendants
HQF Lawyers for the 4th defendant

Introduction

[1] **McMEEKIN J:** Sometime in March or April of 2000 the second plaintiff, Mr William Peter Kidd, decided that he would investigate investing in a hotel business. Despite his years[1] he was a complete novice in that industry. He determined to retain an expert to help him make a wise decision. He duly retained the second defendant O'Rourke Hospitality Management Pty Ltd, which held itself out as having expertise in giving such advice. Mr Michael O'Rourke, the third defendant, was a director and the principal guiding mind of that company.

[2] On 25 July 2000 the company which Mr Kidd controlled, the first plaintiff, WP Kidd Pty Ltd, purchased[2] the leasehold of the business known as the Melbourne Hotel at Bundaberg from the first defendant Panwell Pty Ltd for a period of 5 years.[3] The directors and principal guiding minds of Panwell Pty Ltd were the sixth and seventh defendants, Mr and Mrs Keating. I will generally refer to these defendants collectively as "the vendors".

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1 Born 1939 – T 40/19

2 There is a written contract dated 25 July 2000 between the first plaintiff and the first defendant (see pp 1-24 of Ex 1).

3 A lease was entered into – see pp 25-48 of Ex 1- commencing 30 October 2000

[3] The business was not a success under Mr Kidd's stewardship. He lost money in every year of its operation.[4] The plaintiffs now seek damages. The plaintiffs allege:

(a) that the second defendant breached its retainer, was negligent and was misleading within the meaning of s 52 of the *Trade Practices Act 1974* ("the Act") in the advice Mr O'Rourke gave;

(b) that the vendors of the business supplied a misleading prediction of future profit to Mr O'Rourke and were in breach of s 52 of the Act; and

(c) that representations were made by the fifth defendant, the salesman involved in the transaction, that were misleading within the meaning of s 52 of the Act and for which the vendors are liable.

[4] To the extent that action is brought under the Act against individuals as opposed to corporations the plaintiffs rely upon s 75B of the Act and allege those individuals were knowingly concerned in the breach of s 52.

[5] To the extent that the statements made involved predictions as to the future the plaintiffs rely on s 51A of the Act and assert that there were no reasonable grounds for making the representations complained of.

The Remaining Proceedings

[6] The fourth, eighth and ninth defendants conduct real estate agencies. The salesman involved in the transaction was Mr Graham Stanley, the fifth defendant. Mr Stanley is an undischarged bankrupt and took no part in the proceedings. Up until 19 June 2000 he was employed by the eighth and ninth defendants. From 27 June 2000 he was employed by the fourth defendant.[5]

[7] A resolution of the issues between the plaintiffs and the fourth, eighth and ninth defendants took place prior to trial. The terms of settlement between the plaintiffs and the eighth and ninth defendants were tendered.[6] The effect of the settlement is that the plaintiffs have received $120,000 from those defendants (which must be brought into account in respect of any damages awarded) and the plaintiffs will indemnify the eighth and ninth defendants in respect of any claim brought against them in these proceedings.

[8] Mr Woods, who appeared for the fourth defendant, informed me in his written submission[7] that the plaintiffs did not advance a case against his client because, as at the date of the pleaded representations (16 June 2000), Mr Stanley was not his client's employee or agent.

[9] The first defendant counter-claims against the first plaintiff for rent owing under the lease.

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4 The losses are summarised at p 321 of Ex 1 but subject to the adjustment at p 590 of Ex 1. See paragraph 7.6 of Ex 25

5 See Ex 20

6 Ex 12

7 Ex 35 p1

[10] The vendors sought an indemnity from the fourth, eighth and ninth defendants in the event they were found liable for statements made by Mr Stanley. The vendors also claimed indemnity or contribution from the second and third defendants.

[11] The second and third defendants have brought proceedings against the vendors and the eighth and ninth defendants claiming an entitlement to equitable contribution.

[12] The eighth and ninth defendants have brought a claim for equitable contribution against the vendors, the second and third defendants, and against the fourth defendant.

The Case Against the Second and Third Defendants

[13] I will deal with the case against the second and third defendants first. The vendors maintain that an essential element in the case against them – reliance – cannot be established because the plaintiffs relied on Mr O'Rourke, not them, for advice and information, so that must first be determined.

The Issues

[14] The case against the second and third defendants involves the following issues:

(a) whether the advice given by the second or third defendants to the plaintiffs was conduct that was misleading and deceptive or likely to mislead and deceive within the meaning of s 52 of the Act, in breach the implied term of the contract of retainer to act with all reasonable care and skill, or negligent;

(b) whether Mr Kidd relied on the report and advice given by Mr O'Rourke;

(c) whether the damages claimed by the plaintiffs was caused by that advice – it being alleged that it was Mr Kidd's incompetence in managing the business that was the true cause;

(d) whether in any assessment of damages allowance should be made for:

(i) an amount for Mr Kidd's wasted effort in conducting the business over five years;

(ii) the amount of compensation that WP Kidd Pty Ltd received in respect of seven poker machine operating authorities.

The Common Ground

[15] It was not in issue that the second defendant held itself out as an expert in the hospitality industry including the giving of advice in relation to the profitability of licensed hotels.[8] Nor was it in dispute that as a result the second defendant was obliged to act with all reasonable care and skill expected of such an expert.[9]

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[8] See para 1(k) of the plaintiffs' third further amended statement of claim admitted at para 1(b) of the third amended defence of the second and third defendants.

[9] See para 3(d) of the plaintiffs' third further amended statement of claim admitted at para 3(d) of the third amended defence of the second and third defendants

[16] Nor is the fact of the retainer in issue or that consideration passed from the first plaintiff to the second defendant.[10] The retainer was entered into by Mr Kidd on behalf of the first plaintiff and Mr O'Rourke on behalf of the second defendant probably at meetings on 16 May and 30 May 2000.[11] It was oral. The terms are in dispute, at least on the pleadings. It is not in dispute that the second defendant's task was to find and advise the first plaintiff as to the suitability of purchase of a hotel business.[12]

[17] It was common ground that Mr Kidd was, at the time he retained the second defendant, totally inexperienced in the running of hotels.[13]

[18] On 15 June 2000 the second defendant provided a written report to the first plaintiff concerning the Melbourne Hotel.[14] That report contained the following information:

(a) wages at the hotel average $5,500 per month;

(b) the permanent employees were a cook being paid $480 gross per week and a bottle shop attendant being paid $600 gross per week;

(c) excess wages were being paid as the current operators of the hotel spent little time on the premises;

(d) the hotel offered great potential for a lessee operation;

(e) subject to negotiating an acceptable weekly rent the hotel could produce a good net profit.

[19] It is not in dispute that a meeting was held on 16 June 2000 between Mr O'Rourke and Mr Kidd. At that meeting Mr Kidd contends by his pleading that he was told by Mr O'Rourke:

(a) that a lease of the hotel was a good business;

(b) that such a lease should be purchased for the sum of $100,000 at a rental of $3,500 per week;

(c) that if the purchase price was increased to $125,000 the first defendant would reduce the rent to $3,100 and the GST would not be payable on such rental;

(d) that the weekly rental of $3,100 was "average for the industry" based on sales of approximately $50,000 per week;

(e) that there were no trading records for the hotel.

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10 T 41/55

11 T 573/15 and 577/30-50 for Mr O'Rourke's recollection refreshed by his diary entry

12 See para 3(a) of the plaintiffs' third further amended statement of claim admitted at para 3(a) of the third amended defence of the second and third defendants

13 T 156/30 for Mr Kidd's evidence and T 575/39 for Mr O'Rourke's evidence – the only experience he (Kidd) had was drinking in them

14 See pp 212-215 of Ex 1

[20] Of those various statements the only ones that Mr O'Rourke denies making[15] are that GST would not be payable and the last – that there were no trading records.

[21] Whilst Mr Kidd only spoke of the one meeting with Mr O'Rourke in which he received advice, that of 16 June, Mr O'Rourke said that there were "numerous telephone conversations" as well[16] in the context of him having received, by this stage, the vendors' trading figures from Mr Stanley. I am confident that in this respect Mr O'Rourke's recollection is the better one. I mention this as on Mr Kidd's account of the 16 June meeting Mr O'Rourke is virtually mute. I doubt that that is likely having observed Mr O'Rourke for some time in the witness box. He was articulate, very familiar with his facts and very ready with his answers. As well on his account[17] he discussed his report with Mr Kidd, as I would expect.

[22] Subject to what I have to say below I am satisfied that statements were made to Mr Kidd of the kind pleaded either at the meeting of 16 June 2000 or in the phone calls that Mr O'Rourke speaks of as occurring between late May and mid June 2000.

GST

[23] As to the GST point, Mr Marks, counsel for the second and third defendants, has pointed out that the GST payable would have been recovered as an input credit under the relevant legislation.[18] Thus it is not material to any assessment of the value of the business being purchased and so resolution of the issue irrelevant in any practical sense to the case. Mr O'Rourke says that in June 2000 he was conscious that the GST provisions were to shortly come into effect and made plain to Mr Kidd the effect of those provisions[19] – it may be that Mr Kidd has confused discussion as to his right to recover payments made as equivalent to there being no obligation to pay. I am not satisfied that Mr O'Rourke made any such representation as pleaded.

Trading Records

[24] It is plain that there were trading records and it is plain that Mr O'Rourke analysed them. His written report of 15 June 2000 makes express reference to trading figures which on the face of the report could only have come from the vendors. As well, Mr Kidd's own evidence suggests that he believed that Mr O'Rourke must have analysed trading figures.[20]

[25] I suspect that the confusion was more in the pleading than in Mr Kidd's mind as he seemed to assert in cross-examination that the statement concerning a lack of trading figures related only to an earlier meeting prior to 16 June[21] which is, to some extent, in accord with other accounts.[22]

[26] By the time of the operative advice I am satisfied that Mr Kidd was well aware there were trading records from the vendors' operation.

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15 T 590-592
16 T 582/40
17 T 592/55
18 ss 11-20 *A New Tax System (Goods and Services Tax) Act 1999*
19 See T 590/2
20 See T 46/35
21 See T 203/20; 204/20
22 See T 580/30

Credit

[27] Mr Ashton, counsel for the vendors, submitted that I should not accept Mr Kidd as a witness of credit. I reject that submission. I do so for a number of reasons.

[28] First, I thought that it was apparent that Mr Kidd was trying to do his best. He accepted propositions when they might well have been against his interest.[23] At times he was remarkably candid – to his potential detriment.[24] I detected no attempt by him to dissemble despite a long period in the witness box. I did not think he was inappropriately dogmatic.[25] That is not to say he was invariably accurate in his recollections but the same criticism can be levelled at other witnesses, including Mr O'Rourke.

[29] Secondly, the suggested bases for the attack on his credit were not persuasive. First, it was submitted that Mr Kidd had accepted that he had promoted false figures – a reference to trading figures put forward when Mr Kidd was himself trying to sell the lease of the hotel.[26] It seemed to me evident that when Mr Kidd adopted counsel's word "false" the meaning he intended to convey was "inaccurate" rather than "I have deliberately falsified figures". Counsel was not prepared to put the direct allegation to him. And this was against a background that Mr Kidd was criticised for employing for a significant period as his book-keeper, a person who had, allegedly, very limited knowledge[27] and who was eventually dismissed, apparently in May 2001.[28]

[30] Secondly, reliance was placed on Mr Kidd's denial of any knowledge of the footnote on a letter from his solicitor which became Exhibit 5. It was suggested that this footnote was against his interest and hence his denial. I very much doubt that Mr Kidd had the subtlety of mind to understand why Mr Ashton thought the footnote was adverse to his interest. Further his answers where hardly a categorical denial[29], and the information he did give was more fulsome than the note indicated.[30]

[31] The final ground of criticism related to mistaken evidence about the performance of the hotel. In my view this amounted to no more than an imperfect memory about matters that probably were never Mr Kidd's strong suit.[31]

What was a "Good Profit"?

[32] By the pleadings the plaintiffs contend and the second and third defendants deny that it was a term of the retainer that the second defendant would find for Mr O'Rourke a hotel earning a minimum net profit of $250,000 per annum. Mr Marks, who appeared for the second and third defendants, described this as the "key question on the retainer".[32]

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23 eg T 97/30
24 eg T 154/20
25 eg T 211/10
26 The relevant cross-examination is at T 78-81 and Ex 2
27 eg T 595/25 – 596/20
28 T 210/30
29 "I really can't say. I would be guessing to say yes or no": T 72/28 & 74/20
30 T 72/50 – 73/25
31 eg T 78/5; 121/15
32 See T 563/33

[33] However the pleading does not reflect Mr Kidd's case accurately. It became apparent from his evidence that what he asserted was not that Mr O'Rourke was obliged or promised to find him a hotel earning such a sum but rather that he made it plain to Mr O'Rourke in his first conversation with him that to be suitable to the first plaintiff the hotel would need to be one earning a minimum net profit of $250,000 per annum.[33] Thus it was not a matter of being any term of the retainer but rather an assertion as to the factual matrix within which the discussions and the giving of advice took place.[34]

[34] Whilst Mr O'Rourke said that he could not recall any such conversation[35] he does accept that he told Mr Kidd that he should be able to net eight percent to ten percent of a turnover of $2.5 million out of the hotel.[36] His evidence that "no-one ever asked me ... to find them a hotel netting so much"[37] does not sit well with this earlier statement to Mr Kidd.

[35] It is not in contention that Mr O'Rourke advised Mr Kidd that the business could earn him a "good net profit". So much is expressly stated in his report of 15 June. The issue is whether that statement was made in a vacuum or rather in a context that gives it some meaning.

[36] Given Mr O'Rourke's evidence concerning the return that he told Mr Kidd he could expect I am in no doubt that he intended Mr Kidd to read "good net profit" as indicating something in the order of $250,000.

[37] Whilst the resolution of the question of whether Mr Kidd had expectations and expressed them to Mr O'Rourke seems to me moot given Mr O'Rourke's evidence I would add the following. I am satisfied the witnesses generally were doing their best to accurately recall events of seven years ago however it was evident they had become entrenched in their views. I will say something of how I assess the probabilities.

[38] Firstly, I would expect that a novice investor in hotels, as Mr Kidd undoubtedly was, would make enquiry of an expert such as Mr O'Rourke as to what return he could expect – it would be surprising if he did not. My assessment of Mr Kidd is that he was the sort of person who would be very likely to identify what it was that he was getting into – he may have had no expertise in how to run a hotel but he had been an investor and run businesses for a significant time and at his age did not have the luxury of long periods of time to catch up if he made a bad investment. Mr Kidd was adamant that there was discussion about the level of profitability he was looking for. I believe him.

[39] Secondly, it seems not to be in contest that Mr Kidd's interest in a hotel business was first attracted by a hotel at Murgon advertising a return of $250,000 net. He claims that he mentioned the hotel to Mr O'Rourke.[38] It was put in

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33 See T 41/30 and 196/5, 197/35

34 I see no injustice to the defendants in receiving the evidence – the evidence was led at an early stage, no objection was taken, Mr O'Rourke gave evidence and was cross-examined on it and was very much alive to the issue as presented – the principles discussed in cases such as *Water Board v Moustakas* (1988) 180 CLR 491 at 497 are not engaged.

35 See T 573/25 & 629/25-35

36 T 581/1-10 ie $200,000 to $250,000

37 T 573/35

38 T 41/15-20

cross-examination that he did not[39] although there was no evidence denying the claim.[40] It would be odd if he did not talk about how realistic that return was.

[40] Thirdly, as I have said, it is evident that Mr O'Rourke thought that as a rule of thumb an investor should get a return of between eight percent and 10 percent on gross turnover[41] – the turnover here was said to be $2.5 million.[42]

[41] Fourthly, Mr O'Rourke was very enthusiastic about the hotel.[43]

[42] Fifthly, Mr O'Rourke's explanation that he would never give any such advice because there are too many variables involved[44] does not sit well with his evidence so readily given as to the return one should expect and his statement of what he told Mr Kidd.[45]

[43] In my view it is probable that there was discussion at an early stage along the lines that Mr Kidd's idea of a worthwhile investment would be a business returning him $250,000 per annum and that Mr O'Rourke not only well understood that Mr Kidd would read "good net profit" in that sense but led him to believe that this hotel met his criteria.[46] I accept that Mr Kidd did not intend to "buy on potential"[47] and that was obvious to Mr O'Rourke.

The Plaintiffs' Contentions

[44] On the strength of the advice given by Mr O'Rourke the plaintiffs say that the first plaintiff entered into the contract to purchase the hotel business for the sum of $125,000 at a rent of $3,100 per week.

[45] Whilst the plaintiffs' contentions are more fully particularised in the pleadings[48] the real gravamen of the plaintiffs' complaint is that no competent broker or consultant would have advised the plaintiffs to purchase the business for the sum of $125,000 at a weekly rental of $3,100. The Plaintiffs' contend that on a reasonable analysis the hotel business was operating marginally – well below a return of $250,000 – and this in the hands of the vendors who were highly experienced operators.[49] To return any significant profit it would require very substantial improvement in its profitability under Mr Kidd's ownership, that this should have been evident to Mr O'Rourke, and that this was not explained by Mr O'Rourke to Mr Kidd as it should have been.

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39 T 197/50

40 T 573/20 seems to be the only evidence from Mr O'Rourke about the early exchanges

41 T 581/5 and more emphasis on 10% at T 587/20-30

42 I appreciate that this fact was not known at their first meeting on 16th May but it was by the 30th May and so well prior to Mr O'Rourke forming his advice and Mr Kidd accepting it.

43 T 591/5 – "the return on his investment was going to be excellent, far better than I've ever seen anywhere"

44 See T 573/32

45 T 581/1-10

46 T 582/40: Mr O'Rourke advised Mr Kidd that the "hotel appears to be a good operation and may be a good investment for him"; and see T 587/60 and 590/50 – 591/10. See also T 321/1.

47 T 187/20

48 Para 8 of the third further amended statement of claim

49 The Keatings having some 26 years experience in the hotel industry and having been involved in this hotel since 1981. I note Mr Duthie's assessment of them: p 14 of his report Ex 28 paragraph 5.6

What was the Hotel's Profitability?

[46] An assessment of the true profitability of the hotel business is necessary to determine the issues. In support of their case the plaintiffs called Mr Alan Robert Butcher, a chartered accountant.

[47] Mr Butcher prepared a report dated 12 October 2007 for the purposes of the proceedings.[50] The relevant part for present purposes is section 3. He there calculates the EBITDA[51] figures for various periods from trading figures supplied by the vendors and to some extent available to Mr O'Rourke.

[48] The purpose of Mr Butcher's EBITDA calculations was to arrive at the historical non-interest operating profit on a commercial basis for the business operations – it shows what profit the business in fact earned shorn of items of expense that were personal to the vendors. These figures of course are those for the vendors' trading. They were limited to commencing 1 July 1999 because that best covered the period that Mr and Mrs Keating had the management of the hotel.[52]

[49] Based on the eight month trading figures to 29 February 2000 the annualised EBITDA calculated by Mr Butcher was $176,740. He also had available to him the trading figures to 30 June 2000[53] and calculated an EBITDA of $192,031. I note that Mr Duthie, an expert valuer retained by the vendors, arrived at virtually the same figure.[54]

[50] This should be contrasted with Mr O'Rourke's analysis.[55] The relevant information and trading figures that Mr O'Rourke had when providing his advice were:

(a) a facsimile from Mrs Keating;[56]

(b) trading figures for the eight month period to 29 February 2000 prepared by the vendor's accountants McLellan & Co[57] and supplied by Mr Stanley; and

(c) trading figures supplied by Mrs Keating at a meeting at the hotel on or about 13/14 June for the 12 week period from 1 March to 25 May 2000.[58]

[51] Mr O'Rourke claimed that in advising Mr Kidd he analysed the McLellan & Co figures[59] and the three month figures to 25 May 2000[60] and had regard to aspects of the facsimile message.[61]

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50 See pp 586 - 714 of Ex 1

51 Earnings Before Interest Tax Depreciation and Abnormal transactions

52 Tenants had operated the hotel from September 1992 for six years and then the Keatings' son and daughter-in-law for 12 months

53 Which Mr O'Rourke did not have but they are more favourable to his case

54 See T 508 and Ex 28 at p 18

55 I set out the analysis done in the witness box.

56 a copy of which is at p 239 of Ex 1

57 See p 240 of Ex 1

58 See p 233 of Ex 1 and T 584-585

59 See p 232 of Ex 1

60 See p 233 of Ex 1

61 See T 624/50-625/20

[52] The McLellan & Co figures indicated a net profit of $108,776 for an eight month period. Mr O'Rourke appreciated that expenses incurred by the Keatings in running the hotel reflected in the trading figures needed to be adjusted if one was to assume that Mr Kidd was to run the hotel on the same basis. The only item that Mr O'Rourke could identify as needing to be deducted from the expenses listed in the McLellan & Co figures were the leasing charges of $31,998.[62] Adjusting for those leasing charges the profit for the eight month period would have been about $140,000 and annualised it would have been $210,000 – about $18,000 more than the figure calculated by the experts retained by the parties.

[53] For Mr Kidd's operation it would be necessary to factor in two things to the analysis of the EBITDA to determine the profit Mr Kidd would make assuming the same trading – increased management costs and rent.

[54] First, the agreed rent was $3,100 per week or an annual figure of $162,000 approximately (which Mr O'Rourke thought was appropriate).

[55] Secondly, the assumption on which Mr O'Rourke said he was operating at the time of the giving of the advice was that the hotel would be run by Mr Kidd's son-in-law and daughter, Mr and Mrs Donaghy. Mr O'Rourke maintained that he was told by Mr Kidd that they would be paid $800 per week gross between them[63] so that if there were no other adjustment to the wages bill (by reducing the number of staff or the hours worked by the staff) Mr Kidd would need to find an additional $40,000 over and above that which the Keatings had to find.[64]

[56] Thus, on this analysis – it assumes no change to the method of operation of the hotel and no change to the expenses (apart from rent and the manager's wage) likely to be incurred or the profit likely to be earned – the profit that Mr Kidd could expect for his outlay, on Mr O'Rourke's analysis was in the order of $10,000. Mr Butcher's analysis was less generous to Mr O'Rourke – a loss of about $26,000 on the eight month figures, or $10,000 on the full year figures. None of these analyses brings into account the $480 per week for the write-off of the premium paid of $125,000 over the period of the lease.[65]

[57] At one point, Mr O'Rourke seemed to be minded to suggest that a $10,000 per annum return was a "healthy bottom line"[66] and in accordance with his statement in his report to Mr Kidd that the hotel "could produce a good net profit".[67] I think it apparent, however, from the examination of whole of his evidence, particularly his responses to the cross-examination by Mr Martin, counsel for the plaintiffs, that that was not his contention.

Mr O'Rourke's Defence

[58] To the plaintiffs' argument that this was not a good business, could not achieve a $250,000 net profit and should not have been recommended, Mr O'Rourke's

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62 See Mr O'Rourke's evidence at T 626/1-35. This deduction is debateable given the recommendation to lease new gaming machines

63 See T 625/45

64 The Keatings were not paying themselves a wage or if they were it was not reflected in these figures – T 626/20-30

65 See the report of Mr Currey at p 720 of Ex 1 – para 5.2

66 See T 628/40-50

67 See p 215 of Ex 1

defence is effectively that, fairly read, his report was accurate and contained ample cautions.

[59] The written report of Mr O'Rourke concluded that the hotel offered "great potential for a lessee/operator" and that pending agreement on an acceptable weekly rental, the hotel and its two detached bottleshops "could produce a good net profit". Those statements were made with the following qualifications that can be found through the body of the report.[68]

- "Since the current operators have been running the hotel, they mention that they have not been too enthusiastic about running the hotel. The wages and the lack of promotion that has been done (sic)and the lack of atmosphere reflects (sic) this."
- "There appears to be excess wages being paid as the operators spend very little time actually operating the hotel."
- After discussing the gaming figures for three months to May 2000 Mr O'Rourke indicated that "about three of the machines should be traded in for newer machines to increase the turnover and profit".
- Relocation of gaming machines and promotion of them would "definitely increase turnover of the machines, bars and the food areas, thus increasing profits".
- If the lounge areas were "themed" it would "certainly give the patrons a reason to come to the hotel."
- Marketing for the hotel appears to be non-existent.
- "Currently there appears to be no reason why patrons would visit the hotel."
- "Competition in Bundaberg has been very strong over the past months" but Mr O'Rourke had been informed that "it has settled down."
- "If the drive-in could increase its gross profits to say, 22 percent from 19 percent, this would represent an increase in gross profit by some $400 per week."
- To produce "a good net profit" would require implementing tighter control of wages and general expenses, marketing and implementing a theme in a hotel lounge.

[60] As well Mr O'Rourke contends that his advice was subject to the following strictures:

(a) the increased cost of management should be offset by a decrease in the wages bill for other employees – ie the manager would be hands on and replace some, at least, of the labour being employed under the Keatings' management;[69]

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68 See pp 213 – 215 of Ex 1

69 T 626/15

(b) he intended that the "good net profit" could only be achieved if there were stricter control on costs and particularly wages costs which in his view had not been adequately controlled under the Keatings;[70] and

(c) inherent in Mr O'Rourke's approach, was that Mr Kidd would be putting in the "right management"[71] by employing his son-in-law and daughter, Mr and Mrs Donaghy.

Rejection of Mr O'Rourke's Defence[72]

[61] I reject Mr O'Rourke's defence essentially for four reasons:

(a) whilst he indicated that his opinion was qualified by the admonition that costs needed to be tightened he gave no indication of the extent that was necessary for his opinion to be remotely accurate. His admonition was little more than a platitude;

(b) he failed to advise Mr Kidd that if the business continued as in the hands of the Keatings, but with the rent and management expenses Mr Kidd would incur, it would not make a profit at all. That was essential information for Mr Kidd to make an informed decision;

(c) his advice gave no idea of the task that confronted Mr Kidd in achieving a profit of $250,000 or anything near that[73] – he had to increase profits by about 80 percent. The reference to marketing, the drive-in and lounge themes, if anything, had the effect of underplaying the difficulties;

(d) his opinion was given without any proper effort to analyse the business or its competition and this lack of analysis was not revealed.

[62] My reasoning for the foregoing conclusions I now set out:

(a) Mr O'Rourke's approach was to commence with the proposition that in order to have a "good bottom line" you had to put controls in place, that one of those was to run your wages at an average of 10 percent of your gross turnover,[74] and implicitly that any business could achieve this. None of the other experts called in the case expressed such a view and Mr Currey, an experienced hotel broker, disagreed – in his view the appropriate figure for this business was more like 14 percent of turnover;[75]

(b) further there was no examination by Mr O'Rourke of whether the 10 percent figure had ever been achieved in this particular hotel business even by experienced operators. Indeed, he accepted that the Keatings had not achieved such a wage level despite themselves being hands-on operators and very experienced hoteliers.[76] Mr Kidd's intention, at the time

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70 T 628/55 – 629/5
71 See T 629/22 and 635/49
72 This section deals with paragraphs 8 (g) (h) and (i) and 10(b) of the Third Further Amended Statement of Claim
73 T 636/20
74 See T 587/10
75 Para 5.4 at p 720 of Ex 1
76 T 631/20 - 30

he spoke to Mr O'Rourke and received his advice, was that he would not be a hands-on operator at all, at least in the longer term;[77]

(c) if Mr O'Rourke was to assume that the amount paid to the manager (which he claims he was told would be $40,000[78]) could be ignored in the analysis because the manager employed would replace labour that the Keatings were currently paying for then it seems to me essential that there be a very close analysis of what the Keatings were doing and what staff could be retrenched or have their hours reduced. The highest that Mr O'Rourke put his knowledge was that Mrs Keating had told him that she and her husband were not as active in the hotel in this last eight month to 12 month period and that they had used excess staff.[79] There was no close analysis of what staff members were doing, what hours they were being paid for and where the cost-cutting could be made. That hotel businesses could vary significantly in their staffing demands seems clear – see the opinion of Mr Currey.[80] The suggestion of Mr Butcher of Hanrick Curran – an accountant with special expertise in hospitality and gaming – that there needed to be a "fully costed wages roster by reference to duties; hours; licenced hours; off-site detailed bottleshop opening hours"[81] seems to me, with respect, to be obvious;

(d) that close analysis of what precisely the Keatings were doing needed to take into account the fact that they were to be replaced – so far as Mr O'Rourke knew – with Mr Kidd's son-in-law and daughter, Mr and Mrs Donaghy. It could hardly be supposed that Mr and Mrs Donaghy could possibly have had the same experience and knowledge of the Bundaberg market and of this particular hotel's operations as had Mr and Mrs Keating who had been in place since 1981 apart from the six years they leased the hotel. It is one thing to expect a very experienced hotel operator to reduce staff whilst maintaining service, stock levels, standards and profitability, but quite another for a new incoming manager to achieve that result;

(e) whilst Mr O'Rourke was very enthusiastic about Mr Donaghy's abilities, what particular expertise and ideas Mr Donaghy brought to the task was not explained by Mr O'Rourke.[82] Mr Donaghy had worked for breweries over a long period of time, but his actual experience in running a hotel was very limited. It was for a period of only 12 months[83] and with the assistance of another owner. He had a quarter interest in that hotel. The hotel was in Tasmania and was a very different type and size to the Melbourne hotel;[84]

(f) on Mr O'Rourke's analysis, the total wages bill should have been around $250,000 a year. If one adopts the figure of $5,500 per week which he told Mr Kidd in his report that the wages were averaging,[85] then the actual annual wages bill for the business as run by the Keatings was in the order of

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77 T 41/35

78 I note that Mr Kidd in fact paid $50,000

79 See T 586/40; 636/30. There was no evidence given at trial on the extent of their activity.

80 See para 2.3 of his report at p 718 of Ex 1

81 See p 606 of Ex 1

82 See T 597/30 – 598/10. Mr Kidd's opinion was less sanguine: T 154/50 -156/5

83 T 558/10

84 T 561/50

85 See p 214 of Ex 1

$286,000. To that had to be added something for the work that the Keatings were doing. The extent of that work was never identified either by Mr O'Rourke or at all in the trial. Without allowing for the Keatings work at all, the wages bill had to be reduced by over 12½ percent from its current levels assuming the $5,500 figure was accurate. If one allows for the Keatings' management and work activities, then it is very likely that the reduction in wages had to exceed 20 percent;

(g) this analysis is confirmed by Mr O'Rourke's evidence that his intention was that the hotel could have been run on a wages bill of $4,200, with $800 for the manager and his wife in addition,[86] a 23 percent reduction in the wage level of $5,500. That was not spelt out to Mr Kidd;

(h) assuming that the tighter control over wages that Mr O'Rourke envisaged could have been achieved, that improves the profit by only $25,000 a year.[87] In order to meet the profit that Mr O'Rourke told Mr Keating he could achieve from the hotel Mr Kidd had to find another $235,000 in profit. Nowhere was this explained to Mr Kidd;[88]

(i) further, and it may only be a relatively small matter, but the assumption of $5,500 as the average reflected by the McLellan & Co records, understates the true figure. Mr Martin was inclined to adopt the figure of $5,700 as the average shown by those figures[89] and I work out the average to be closer to $5,590. The fact is that there was another $4,000 to $5,000 per year that needed to be made either in cost cuttings or increased profits;

(j) the analysis to date ignores the fact that fundamental to Mr O'Rourke's approach was that Mr Kidd had to spend more money. Not only was he required to outlay $125,000 on the premium and some $200,000 on stock, but he had to make alterations to the hotel that would inevitably involve expenditure. Mr O'Rourke had advised that the lounge areas had to be "themed", that gaming machines had to be relocated, and that gaming machines had to be replaced. Nowhere does Mr O'Rourke analyse how much all this was to cost. Thus, whilst for the purposes of the discussion expenses (other than wages) have been assumed to remain the same as under the Keatings, it was inevitable that they would increase;

(k) Mr O'Rourke's true view was that in order to run this hotel successfully, it was necessary to run it "in a real, lean and mean way".[90] That was not conveyed to Mr Kidd by the written report;

(l) all this demonstrates that there would need to be a dramatically increased level of profitability from the business in order to be satisfied that it would make a "good profit". Mr O'Rourke agreed that that was so.[91] Given that was the true position, I would expect that Mr O'Rourke, before giving any advice of the sort that he did, would need to carry out a very close analysis

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86 See T 631/18
87 See T 629/10
88 Mr Kidd of course did not have the McLellan & Co trading figures: T 64/30
89 eg see T 631/1
90 See T 631/19
91 See T 635/25

of precisely how this dramatic increase in profit was to be achieved. The evidence given by Mr Butcher to the effect that there needed to be complete profit and loss centres for each division of the business, a business plan prepared, a SWOT analysis performed and a sensitivity report generally and for each division seems to me to be common sense.[92] Without such an approach I cannot see how one could reach a view as to where the profit was being made and where and how it might be improved. This is especially so when implicit in the advice was the optimistic view that profits could be so dramatically increased. I do not accept that any thorough analysis was carried out.[93] Mr O'Rourke did not look at the individual departments of the business[94] save for the analysis for the three month period to 25 May 2000.[95] What conclusion he drew from that analysis nowhere appears;

(m) not only was there no such analysis but this analysis had to be carried out bringing into account a new manager untried in the district and with only 12 months' experience behind him in a different hotel and environment, and with a price war being carried on in the Bundaberg area;[96]

(n) the McLellan & Co trading figures show just how dramatic that profit increase needed to be to achieve Mr O'Rourke's optimistic advice. The trading figures demonstrate, when adjusted, a weekly profit of about $4,650 under the Keatings operation. To achieve the net profit that Mr O'Rourke speaks of, and which he told Mr Kidd the hotel could achieve, there would need to have been an increase in the profitability of the hotel of over $4,000 per week. Effectively, the profit had to nearly double. That was not conveyed to Mr Kidd by the written report;

(o) no evidence was led to show that as at June 2000 this business was capable of earning anything like a profit of $250,000 per annum given the expenses that Mr Kidd was required to necessarily bear. Indeed I could not discern any factual basis, as at June 2000, on which to predicate an assumption of any increase in profits – all depended on attracting more custom from the competitors.[97] What those competitors were doing and spending, and what advantages or disadvantages they had was nowhere explored;

(p) the foregoing takes no account of the criticisms expressed by Mr Currey in his report that generally estimations of expenses and projections of profits made by Mr O'Rourke were too optimistic.[98] He was there referring to a projection prepared by Mr O'Rourke that came into existence sometime after Mr O'Rourke's advice to Mr Kidd and used to support an application for a gaming licence,[99] but which may give some insight into his thinking.

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92 See paras 9.4 to 9.9 of his report at p 606 of Ex 1

93 See the cross examination at T 306-308

94 See T 635/35 although he seemed to plainly recognise the importance of examining each department: T 583/40-60

95 See p 233 of Ex 1 and T 584/1

96 As to the price war see T 54/40; Mr Currey's report at paragraph 5.7 p 722 of Ex 1

97 In this regard note Mr Currey's observation that Mr O'Rourke assumed a 40% reduction in advertising costs which would have a substantial effect upon sales: see his report at para 5.5 p 721 of Ex 1

98 See paragraph 5.4 of his report at p 720 of Ex 1

99 See pp 234-235 of Ex 1 & T 261/40; 630/30

> Mr Currey was plainly greatly experienced and independent. The point that I took from his evidence is that these projections were outside the modelling standards that he was familiar with[100] and would need to be justified to show that they were applicable to this business. In my view there was no such justification. Indeed his criticisms of the projections at paragraph 5.5 of his report seemed to me to be compelling.[101]

[63] In my view it is not possible to read Mr O'Rourke's written report that he provided on 15 June 2000 as giving Mr Kidd any real guidance as to what was in fact required in order to achieve a "good net profit", in the sense they had discussed. And once it is appreciated in what sense he used that expression there was no basis for so optimistic a view as he expressed. Nor is there any suggestion in the evidence that any other advice was given orally – quite to the contrary.

[64] The true effect of the report in the context of the advice given in telephone calls and at the meeting of 16 June was to indicate that despite there being no marketing and no reason for the hotel to attract customers, and with the adoption of relatively simple measures, improvement in wage costs, facilities and trading could be achieved. The implication was that this business was already earning a very substantial profit that could but improve.

[65] It is worth noting that both experts called by the vendors and relied on by Mr O'Rourke – Mr Duthie and Mr Kendall – expressed reservations about drawing any firm conclusions based on eight months of trading figures.[102] Mr O'Rourke based his advice primarily, although not exclusively, on that basis.[103]

[66] I am mindful of Mr Marks' submission that the advice had to be read in context and his reliance on *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd*.[104] The difficulty for Mr O'Rourke is that his advice must be read in the context that a certain level of profit was at the heart of the discussion.

Was the Rent of $3100 Per Week Appropriate?[105]

[67] The plaintiffs make two complaints concerning Mr O'Rourke's advice in respect of the rent – first that a rent at $3,100 per week could not be supported by this business and secondly, that it was not in accordance with industry standards. In reality both amount to the same thing – that the rent was well outside what was appropriate for the profit that the business was earning, and that Mr Kidd should have been so advised.

[68] The experts suggested various methods of determining a fair market rental. Mr Currey suggested[106] that 45 percent of net yield (Mr Butcher's EBITDA) was one method. Another, he asserted, was to add eight percent of in-house sales, five percent of retail and 20 percent of net gaming. Adopting either method would result

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100 See annexure 3 to his report

101 See p 721 of Ex 1

102 Mr Duthie at T 511/20; Mr Kendall - p 7 Ex 27

103 eg T 638/5; 606/45

104 (1987) 78 ALR 193, at p 242 per Gummow J

105 This section deals with paras 8(e) and (i) and 10 (c) and (d) of the Third Further Amended Statement of Claim

106 Ex 1 p 722

in a rent well below the $3,100 per week that Mr O'Rourke thought appropriate – in the order of $1,525 to $1,910 on the figures that Mr O'Rourke had available to him.

[69] Mr Kendall is an expert valuer called by the vendors to establish the market value of the business and the fair weekly rental for the lease. His opinion on those matters was of little assistance as he based his views on the assumption – without any evidence but on the instructions of the vendors – that the net profit of the business under the Keating's management was in the order of $250,000.[107] As I have found, the true net profit is reflected in the EBITDA calculated by Mr Butcher at $192,000.

[70] Of present interest is that Mr Kendall thought that a reasonable formula to adopt to determine a fair rent was to take 50 percent of net yield. He accepted that adoption of 45 percent would not be unusual.[108] He accepted that Mr Currey's alternative formula would be a "good sensitivity measure".[109] The 50 percent figure would result in a rental of about $1850 per week.

[71] The $3100 per week figure was 64 percent of an assumed net profit of $250,000. It could only be justified if one assumed not only that the true net profit was $250,000 but also that the business was in a growth phase and further that the premium paid of $125,000 was well below market value.[110] Whilst there was evidence to support the argument that turnover improved when the Keatings regained control of the hotel, the growth phase assumption ignores the fact that in other and less skilled hands (which of course was the premise with Mr Kidd assuming control) the hotel had not done as well. Neither of the remaining assumptions was established as valid.[111]

[72] Mr O'Rourke rejected the approaches of both Mr Currey and Mr Kendall. In his view all that mattered was turnover, almost regardless of profit.[112] I do not accept that such an approach can be justified.

[73] As Mr O'Rourke observed "wages, stock and rent are three of your biggest cost factors in a hotel".[113] Informed and accurate advice on this point was essential. Accurate advice to Mr Kidd would have been that he was paying well above the appropriate rental given the actual profits of the hotel. In my view Mr O'Rourke should have so advised him.

Wages and Staff Levels[114]

[74] There are two contentions. The first contention is that the true wage levels under the Keatings' management averaged $6,000 per week and not $5,500 as represented by Mr O'Rourke. As I have indicated I calculate the average wage levels based on the eight month figures to be about $5,590. Mr Marks contended for $5,565

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107 See p 33 of Ex 27; T 446/40-60

108 T 448/50-60

109 T 449/15

110 That was Mr Kendall's approach – see p 34 of Ex 27

111 Mr Kendall conceded that if one assumed an EBITDA as Mr Butcher calculated it the proper capital payment was under $100,000 – T 451/5. I am mindful of his qualification that he would look to the future maintainable EBITDA figure and so the past actual would not be conclusive - but in the absence of any proper analysis concerning the future it rather begs the question.

112 T 632/30 - 40

113 T 600/55

114 Refer paras 8(b) and (d) of the Third Further Amended Statement of Claim

adopting a 35 week period. I accept his submission that the true difference is of no consequence as indeed Mr Kidd conceded.[115]

[75] The second contention is that Mr O'Rourke wrongly asserted that wage levels under the Keatings were excessive. This claim is on firmer ground. Without an analysis of the sort I have previously discussed[116] I cannot see on what basis Mr O'Rourke could make such a claim. The sole support that Mr Marks could advance was Mr O'Rourke's own opinion concerning wages as a percentage of turnover that I have earlier discussed.[117] For the reasons mentioned earlier I consider there to be no valid basis for the representation.

[76] Accurate and informed advice on wages was crucial and in my view plainly not provided.

Reliance

[77] In deference to the submissions made by Mr Marks I will address the issue. Mr Marks argued that as Mr Kidd did not adopt suggestions contained in the report such as implementing a theme in the lounge, promoting the lounge, implementing tighter control over wages and marketing the hotel the conclusion followed that Mr Kidd did not rely on the report or advice he received concerning the suitability of the hotel as an investment.

[78] In my view the conclusion does not follow from the premise.

[79] There is no dispute that Mr O'Rourke was retained to provide advice on the suitability of the investment. This he did. The whole point of the initial retainer was for Mr Kidd to obtain guidance in a new field of investment.[118] He read the report of 15 June[119] and had a meeting the following day to discuss it. He sent Mr O'Rourke to Bundaberg to analyse the hotel for him.[120] As Mr Kidd said Mr O'Rourke was "in charge of recommending a hotel. That was his brief".[121]

[80] Accepting that Mr Kidd did not implement all suggestions made by Mr O'Rourke, the failure to do so is at a later time than that under consideration, in respect of different issues, and due to factors quite unrelated to Mr Kidd's acceptance of Mr O'Rourke's expertise. Indeed it is evident that Mr Kidd continued to rely on Mr O'Rourke well after the decision to enter into the contract and in relation to diverse aspects of the business, eg the details of setting up the investment in relation to the lease and licences,[122] assistance at the changeover,[123] organising the accounts in November 2000,[124] performance of the stocktake in December 2000,[125] and the dismissal of Ms Northey in May 2001.[126] Mr Kidd did not even visit the hotel until

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115 T 194/20
116 See [62] (c)
117 T 630/47 – 631/10 & see [62] (a) and (b)
118 T 156/30; 201/40
119 See T 46/30
120 T 146/40 & 201/49
121 T 202/1
122 T 73/1-5, 182/40, 185/35
123 T 207/20-30
124 T 208/45
125 T 209/50
126 T 210/30

October 2000, well after he had signed the contract and after the lease had been entered into.[127]

[81] A further submission was made to the effect that as late as 11 July 2000 Mr Kidd had not satisfied himself as to the takings – the inference being I take it that he therefore did not rely on Mr O'Rourke's report and advice given in June. This submission was based on the footnote to a letter sent by Mr Kidd's then solicitor Mr Bradley that I have referred to earlier[128] advising Mr Kidd to satisfy himself as to the takings and Mr Bradley's evidence concerning the footnote.[129]

[82] Whilst there was no question about Mr Bradley's honesty I was far from satisfied that he had any real recall of the transaction. He was shown the letter from his file (Ex 5) and asked to explain the footnote on it seven years after he sent the letter, with no apparent opportunity to refresh his memory of the file,[130] and without any contemporaneous note of any discussion with Mr Kidd to support the inference sought to be drawn. In my view Mr Bradley's note indicates nothing more than him providing a standard caution to a client. There is no hint in any other evidence of Mr Kidd not being satisfied, at that time, with the advice Mr O'Rourke had given him about takings. His later reliance on Mr O'Rourke suggests he put implicit faith in him.

[83] In my view reliance is plainly established.

Breach

[84] The advice concerning the profitability of the business and the ability to reduce wages costs each involved predictions and was subject to s 51A of the *Trade Practices Act 1974*. There was no proper basis for making those predictions. The qualifications contained in the report of 15 June 2000 in no way alerted Mr Kidd to the difficulties that he faced.

[85] The statements concerning the profitability of the business, whether it was suitable for the first plaintiff, the appropriateness of the rental and the ability to reduce the wages cost were each misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the Act. Those statements were made in the context of an expert advising a client in relation to the suitability of a business knowing that the client intended to use the advice as a basis for a decision whether or not to buy the business and fully aware of the sensitivity of the issues to that decision.

[86] The elements of the tort relevant to the giving of negligent advice were identified by Brennan CJ in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*.[131]

> "In every case, it is necessary for the plaintiff to allege and prove that the defendant knew or ought reasonably to have known that the information or advice would be communicated to the plaintiff, either individually or as a member of an identified class, that the

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127 T 146/35. Mr Keating's recollection was different: T 406/10. Mr Kidd said he had a broken leg at the time. That is a circumstance that he would be unlikely to mistake and tends to confirm his recollection as probably more accurate

128 See Ex 5 and [30] above

129 T529/55

130 T 532/40

131 (1995-1997) 188 CLR 241 at 252

> information or advice would be so communicated for a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind that the plaintiff does enter into and that it would be very likely that the plaintiff would enter into such a transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice should be unsound."

[87] It is not relevant that the advice relates to future matters: *Meates v Attorney-General*.[132]

[88] Each of the elements necessary to found liability in negligence is made out here.

[89] It follows as well that the second defendant was in breach of the implied contractual term to exercise proper care and skill in the furnishing of the advice.

[90] Plainly Mr O'Rourke was knowingly concerned in the breach within the meaning of s 75B of the Act.

The Plaintiffs' Claim against the Vendors

[91] The issues relevant to the plaintiffs' claims against the vendors are:

(a) whether the vendors were involved in trade or commerce within the meaning of s 52 of the Act;

(b) whether the facsimile sent by Mrs Keating of 4 April 2000[133] to Mr Stanley contained information that was misleading or deceptive or likely to mislead or deceive within the meaning of the Act;

(c) whether the vendors are liable under s 52 of the Act for four statements that the plaintiffs allege were made by the fifth defendant Mr Stanley on 16 June 2000; and

(d) whether there was any reliance by Mr Kidd on the conduct complained of rather than misconception resulting from other circumstances for which they are not responsible – such as Mr O'Rourke's advice.

Trade or Commerce?

[92] It has long been established that statements made in the course of negotiation concerning the sale of a business is conduct in "trade or commerce" within the meaning of the Act: *Bevanere Pty Ltd v Lubidineuse*.[134]

The Facsimile of 4 April

[93] The facsimile, so far as is relevant, attached the eight month trading figures to February 2000, asserted that the wages had been reduced to $4,850 per week gross and predicted an "estimate" of net profit for 12 months of $240,000. From this the plaintiffs assert that there was an implied representation that the wages would

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132 [1983] NZLR 308 at pp 335-336 per Woodhouse P

133 See p 239 of Ex 1 – various copies were sent on various dates to agents but it is not disputed that Mr Stanley received a copy of the facsimile – see Exs 16 & 17

134 [1985] 7 FCR 325

continue at that level for the balance of the financial year[135] which was misleading and deceptive.

[94] There is no allegation that the eight month trading figures were not accurate, nor is it alleged that the wages were not in fact about $4,850 as at the time of the fax. In fact the wages were approximately $4,665 per week for March.[136]

[95] Whilst it is true that the estimate of future profit must have involved an assumption of wages at much the same level as asserted, and that the profit was not as predicted, it by no means follows that there was no reasonable basis for the prediction at the time it was made. The wages for April as well as March had been low – on my calculation about $4,825. Thus two months of trading supported the estimate. The average for the year to February 29 is greater but Mrs Keating asserted in the facsimile that the Keatings had changed the way the business was operating – by reducing hours at a bottle shop and replacing a chef with a cook. There was no suggestion that was not an accurate statement.

[96] In assessing the estimate of future profit it needs to be borne in mind that the Keatings are not accountants. Just as Mr Kidd was, in my view, inappropriately criticised for the inaccuracies in his understanding of the books of account, so should a more circumspect view be taken of the alleged inaccuracy in this prediction. Mr Butcher assessed the EBITDA at $192,000 when annualised.[137] As Mrs Keating explained in the facsimile some adjustment had to be made to the profits for the leasing charges. The figure known at 4 April was about $39,000. Her estimate as to her profit then ($192,000 + $39,000) was about $10,000 out - not so far off for a lay person trying to predict the future profit three months out. I am not satisfied that the statements in the facsimile were misleading or likely to mislead.

[97] However a fatal problem for Mr Kidd's argument is the issue of causation – Mr Kidd did not see the facsimile or know of its contents. Mr O'Rourke did, but the matters complained of, he says, did not influence him.[138] Given that the average that he put into his report of 15 June 2000 was $5,500 per week there is good reason to accept his statement. Thus the information did not influence the decision that Mr Kidd made.

The Meeting of 16 June

[98] There is a preliminary factual issue. It was submitted that Mr Stanley was not at the meeting. Mr Kidd asserts that Mr Stanley was present at the meeting.[139] Mr O'Rourke said that he could not recall.[140] I am satisfied that Mr Stanley probably was present for five reasons:

(a) Mr Kidd asserts it and has a positive recollection of a conversation;

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135 See paragraph 13A(c) of the Third Further Amended Statement of Claim
136 See Ex 21 – a useful summary of Ex 21 is at paragraph 6.8 of Ex 25
137 See his calculations at Annexure 6 to his report at p 643 and 662 of Ex 1
138 T612/1-10; 625/10
139 46/60
140 See 613/40

(b) the facsimile cover sheet for Mr O'Rourke's report of the day before that he sent to Mr Kidd records: "Graham [ie Stanley] and I would like to see you at 9am (tomorrow) Friday 16 June".[141] Plainly the arrangement was made;

(c) Mr Stanley was keen to sell the hotel. He had been in communication with Mr O'Rourke;

(d) I am unimpressed with Mr O'Rourke's evidence that he would wish to discuss things privately with his client hence it was unlikely Mr Stanley was present.[142] When this belated realisation of a need for privacy came to him was not explained. It clearly was not a concern when he made the arrangement to meet Mr Kidd;

(e) the vendors were not prepared to call Mr Stanley to deny the claim.

[99] There are four statements complained of in the pleading[143]:

(a) that the contents of the report prepared by Mr O'Rourke of 15 June were true and correct;

(b) the hotel was a good business and should be purchased by the first plaintiff;

(c) that at a purchase price of $100,000 for the lease a weekly rental of $3,500 was fair; and

(d) the weekly rental of $3,500 at a purchase price of $100,000 was average for the industry.

[100] Mr Kidd's account of what was said at the meeting[144] differs from Mr O'Rourke's account[145]. I have mentioned earlier that I am not satisfied that Mr Kidd's recollection was accurate.[146] Mr O'Rourke could not recall Mr Stanley being present. I find that he is wrong in that recollection, but the very absence of a recall of Mr Stanley's presence says something about his contribution.

[101] I am not satisfied that I should accept Mr Kidd's evidence in its totality. I am not prepared to accept the assertion that what Mr Stanley said "was very, very important" to Mr Kidd.[147] Mr Stanley was not advising Mr Kidd. No doubt if Mr Stanley had asserted that the hotel was not a good one that would have carried considerable weight. But it strains credulity to believe that an experienced investor, as Mr Kidd was, would place any great weight on endorsements by the selling agent whose commission depended on the sale being effected, especially when he had on hand a well qualified expert advising him.

[102] Mr Kidd's evidence, if accepted, would support a finding that the statements in paragraphs (b) and (d) were in fact said by Mr Stanley but not (c), about which there

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141 See p 212 of Ex 1
142 T 611/40
143 See paragraph 10 of the Third Further Amended Statement of Claim
144 See T47-49
145 T590-592
146 See [21] above
147 T49/50 – the transcript should read "…because I was already retaining Mr O'Rourke and whatever Mr Stanley had to say to me was very, very important"

was no evidence at all. His evidence does not support the statement in (a) as pleaded.

General Principles

[103] Determination of whether such statements by Mr Stanley constituted conduct that was misleading or deceptive requires a consideration of the respective position of the parties, their knowledge and experience, and the surrounding circumstances: *Butcher v Lachlan Elder Realty*[148]; *NEA Pty Ltd v Magenta Mining Pty Ltd.*[149]; *BMD Major Projects Pty Ltd v Victorian Urban Development Authority.*[150]

[104] Applying those principles I note that there is a fundamental difference between Mr Stanley's position and Mr O'Rourke's position. I am critical of Mr O'Rourke because he was required to analyse the business and he should have realised that the business and rent were not appropriate for Mr Kidd. However the same cannot be said of Mr Stanley. Mr Stanley has not purported to attempt any analysis of the hotel business. He was a conduit for the trading figures prepared by McLellan & Co and aware that Mrs Keating asserted an expected profit of $240,000. Mr O'Rourke, he knew, had the same information and had performed an analysis.

[105] It is no part of the plaintiffs' case that the trading figures supplied were wrong – rather that an analysis of them that Mr O'Rourke should have done would have made plain that this was not a good business for Mr Kidd, especially given his stated expectations, plans and his background. There is no evidence at all that Mr Stanley purported to have any expertise in assessing businesses of this type.

[106] Finally, in assessing Mr Stanley's position it needs to be borne in mind that he is not privy to the conversation concerning Mr Kidd's expectation of a $250,000 net profit. Absent that background Mr O'Rourke's report does not carry the same connotation. It speaks of an opportunity for a lessee but with several cautions. There is no mention of any particular profit.

Contents of the Report were True and a "Good Hotel"

[107] As to the statement set out in (a) above: The totality of the evidence is in two short answers given by Mr Kidd. Mr Stanley was "enthusiastic about the report", commented on all aspects of it and "didn't disagree and say anything was wrong".[151] That is not the same as asserting that the report was true and correct as pleaded. There is no evidence that the statement as pleaded was made.

[108] Without any duty to analyse, or expectation that Mr Stanley would, I cannot accept that a salesman being enthusiastic about a business he is trying to sell and not disagreeing with a report which fundamentally depended on an analysis of the business carried out by an apparently well qualified expert is misleading or deceptive conduct or likely to mislead or deceive.

[109] As to the statement in (b) above: I am satisfied that Mr Stanley probably did say that it was a good hotel qualified however, as Mr Kidd said, by the statement that the

148 (2004) 218 CLR 592 at [37]
149 [2007] WASCA 70 [125]-[126]
150 [2007] VSC 409 per Pagone J at [139]
151 T 48/30-40

figures in Mr O'Rourke's report "should bear it out".[152] That qualification tends to confirm that Mr Stanley was not purporting to have analysed the figures himself. In the right hands the business might well have been a good one – apparently the Keatings maintain they are doing well out of it.

[110] Mr Stanley of course is not privy to any information about Mr Kidd's background or plans. He is merely a salesman employed by the agency that the vendors commissioned to sell the hotel. Statements that the business is a good one and should be purchased cannot, in this context, be given any great weight by any reasonable person. I do not accept that they were by Mr Kidd.

[111] Further, as Mr Ashton submitted, general statements about how good a business might be, made by the agent of the vendors, are typically regarded as the usual puffery that "is part of the ordinary stuff of commerce".[153]

[112] I am not satisfied that the statements set out in paragraphs (a) and (b) above were misleading or deceptive or likely to mislead or deceive. As well, in my view, reliance on the statements is not made out.

Rent "Average for the Industry?"

[113] The remaining statement complained of is that the rent that the vendors wanted ($3500) was "average for the industry". Mr Kidd's evidence was that Mr Stanley asserted that "it is turning over $50,000 a week and its average for the industry"[154] Mr O'Rourke agrees that he, Mr O'Rourke, said that[155] and I have no doubt that Mr Stanley would have agreed with him.

[114] There are then three issues:

(a) was the statement authorised by the Keatings;

(b) did the statement mislead or deceive or was it likely to;

(c) did Mr Kidd rely on it?

Stanley's Authority

[115] The vendors cannot be made liable for all that Mr Stanley said. The plaintiffs must show that the statements complained of were within the authority or apparent authority of the agent.[156]

[116] There is no evidence that the vendors expressly authorised Mr Stanley, or the agencies for which he worked, to make any representation that the rent they desired was "average for the industry". Mr Keating accepted that he had armed Mr Stanley "with all the relevant information about the hotel so that he could present it in the best possible light".[157] It was not put to him that his instructions went further.

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152 T 47/10

153 *General Newspapers Pty Ltd v Telstra Corp.* (1993) 117 ALR 629, 642 per Wilcox J

154 T 47/25

155 T591/40

156 Section 84 of the Act.

157 T 411/40

[117] Mr Martin submitted that both Mr and Mrs Keating "conceded that the amount of rent agreed to by the first plaintiff was fair and in accordance with industry standards" and that it followed that a representation in accordance with that belief would be authorised and not in breach of a retainer.[158] I am not at all sure that the conclusion follows however I cannot find any such reference in the transcript. Mrs Keating expressly refused to accept that she held a belief one way or the other that the rent was fair.[159] She accepted that the previous tenants had paid a fair rent.[160] Mr Keating's answer to Mr Martin's suggestion that the rent was "reasonable" is at best equivocal.[161] There was no other evidence. Thus the submission of actual authority to make such a statement fails at the threshold.

[118] However it is not necessary that the statement complained of be authorised. I apprehend that the relevant principle applicable to a principal's liability for statements made by an agent in these circumstances is that explained in *Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-Operative Assurance Co of Australia Ltd*[162]*("CML").* Provided that the agent represents the vendors in marketing the property and in soliciting offers for the hotel business – which Mr Stanley plainly was – then, as Dixon J held in *CML*, "it follows that the [vendors] in confiding to his judgement, within the limits of relevance and reasonableness, the choice of inducements and arguments, authorised him on [their] behalf, to address to prospective proponents such observations as appeared to him appropriate."[163]

[119] I am satisfied that the statements alleged here fall within the principle and that the vendors may be held liable for them.

Misleading or Deceptive?

[120] In my view the statement regarding rent is in a potentially different category to the earlier statements I have discussed. Mr Kidd had some basis to think that Mr Stanley would have familiarity with the industry in general and be in a position to know what rent was "average" if he so asserted an average. I have found that hotel businesses vary in their staffing demands[164]and it follows that statements about industry averages have the potential to mislead. Much depends on the profit of the individual business.

[121] Assuming that the profit was as predicted by Mrs Keating then the expert evidence in the case is consistent – the proposed rent was fair.[165] Whilst intent to mislead is not an element of the cause of action[166] the fact that the statement is accurate, on the profit assumed by the salesman, which assumption was known to the plaintiffs and their advisor, is a relevant circumstance.

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158 Paragraph 32 of Ex 36

159 T380/25

160 T380/40

161 T411/45

162 (1931) 46 CLR 41 at 46 per Gavan Duffy CJ and Starke J, 49-50 per Dixon J. See also *Scott v Davis* (2000) 204 CLR 333; [19] per Gleeson CJ, [110] per McHugh J; *Hollis v Vabu* (2001) 207 CLR 21 at [74] per McHugh J. For an extensive discussion of the principle see *NMFM Property Pty Ltd v Citibank Ltd* [2000] FCA 1558 at [520] and [563] –[595] per Lindgren J

163 At p 50

164 See [62](c) and footnote 80

165 Mr Currey agreed: T 255/40

166 *Brown v Jam Factory Pty Ltd* (1981) 53 ALR 340 at 348 per Fox J

[122] Given the factors that I have earlier referred to[167] and particularly Mr Stanley's expected knowledge as a salesman, his position vis-à-vis Mr Kidd, that his communications were in the company of Mr O'Rourke, an independent consultant retained to advise Mr Kidd and greatly experienced in the industry, and that those communications included a later statement to that designated consultant that the Keatings were attempting to sell on potential[168] I cannot regard his conduct – in its totality[169] – as misleading or deceptive or likely to be so.

[123] Nor am I satisfied that Mr Kidd relied on any statement made by Mr Stanley. The fact there was only the one meeting, the continued dependence on Mr O'Rourke, and the dominant position of Mr O'Rourke all suggest that any ready agreement by the agent with a statement by Mr O'Rourke would have meant relatively little to Mr Kidd.

[124] The plaintiffs' case against the vendors fails.

Counter-Claim by the First Defendant

[125] The only aspect of the first defendant's counterclaim against the first plaintiff that was pressed was the claim for outstanding rent. The first plaintiff ceased to pay the whole of the rent due under the lease in December 2003. In my view the first plaintiff had no right to unilaterally alter the rent due under the lease – either the first plaintiff rescinded the contract or affirmed it. Plainly the contract was affirmed in which case the first plaintiff's obligations continued. The outstanding amount of rent was calculated at $218,733.[170] The claim must succeed.

Claims by the Vendors

[126] The vendors' claims against the eighth and ninth defendants need not be considered – they only arose if the vendors were held liable to the plaintiffs.

[127] The vendors' claim against the fourth defendant also depends on liability being found against the vendors and so it is not necessary to consider it. However, it may be useful to say something further as to the position of the fourth defendant as there is inherent in the vendors' case a number of propositions that are unattractive. First there is the proposition that the fourth defendant was under an obligation to correct any misconception arising from Mr Stanley's alleged misleading conduct whilst an employee of the eighth and ninth defendants, of which he had no notice. No authority was cited for that proposition.[171]

[128] Secondly, assuming such an obligation, it could only arise once the employment relationship between the fourth defendant and Mr Stanley was established. It is common ground that occurred on 27 June 2000. Mrs Keating accepted that agreement was reached on premium and rent on about 23 June – before the relevant relationship came into being.[172] She accepted that she would not have authorised

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167 See [103]-[106] above

168 Ex 1 p 246 – a facsimile of 20 June - and see the related message from Mrs Keating at p 243

169 *Butcher v Lachlan Elder Realty* (2004) 218 CLR 592 at [109] per McHugh J; *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 242 per Gummow J

170 Ex 1 at p 704

171 See paragraphs 43-44 of Ex 33

172 T 369/20

any reduction in position after that agreement was reached.[173] The contract was executed on 25 July 2000. The vendors' case must then require a finding that the vendors would have authorised the fourth defendant (if he had learnt of the supposed misconception) to inform Mr Kidd that the rent was in excess of industry standards or unfair after agreement had been reached and whilst the formalities of drawing the contract were being attended to. There was no evidence to support such a finding and it is inherently improbable.

[129] Thirdly, and alternatively, there could be a finding that the fourth defendant was under an obligation to his client to act contrary to his clients' wishes and perhaps instructions and if he failed to do so was liable to contribute to or indemnify the client. No authority was cited for such a duty.

[130] Fourthly, to the extent that the action was based on a breach of the Act the fourth defendant was not a corporation and so not amenable to such a cause of action. It was pleaded that he was knowingly concerned in the breach of the Act. There was no evidence of actual knowledge of Mr Stanley's conduct. Constructive notice of conduct prior to the employment relationship would not suffice to satisfy s. 75B of the Act.

[131] "Reason, justice and law" seem against these propositions.[174]

Claims by the Second and Third Defendants

[132] The second and third defendants have brought third party proceedings against the vendors claiming an entitlement to indemnity or contribution on the "basis of equitable contribution". Mr Marks relies on the principles explained in *Burke v LFOT Pty Ltd*[175]. It is fundamental to such a claim that there is a "common obligation" to "make good the one loss".[176]

[133] The claim relies on the allegations made by the plaintiffs against the vendors and principally the alleged misleading conduct constituted by the representations pleaded at paragraph 10 of the plaintiffs' statement of claim.[177] Given my findings concerning those representations[178] there is not the common obligation required.

[134] The second and third defendants have counter-claimed against the eighth and ninth defendants. Again fundamental to their claim is the assertion that the representations pleaded at paragraph 10 of the plaintiffs' statement of claim involved conduct that was deceptive or misleading within the meaning of s 52 of the Act.[179] I have found against that contention. The claim therefore fails.

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173 T 369/40

174 *Marsack v Webber* (1860) 6 H & N 1 at 6 [158 ER 1 at p3] per Martin B quoted by Kitto J in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at p 351

175 (2002) 209 CLR 282

176 *Burke* at p 293 [15] per Gaudron A-CJ and Hayne J, p 298-299 [38] per McHugh J, p318-319 [94]-[96] per Kirby J, p332 [138] per Callinan J

177 Paragraph 3 of the second and third defendants' statement of claim against the first, sixth and seventh defendants

178 See [99]-[123] above

179 Paragraph 12(d) of the second and third defendants' counterclaim

Claims by the Eighth and Ninth Defendants

[135] The eighth and ninth defendants have brought claims for equitable contribution against the vendors, the second and third defendants, and the fourth defendant relying on *Burke v LFOT Pty Ltd.* All claims depended on a finding that the eighth and ninth defendants were liable to the plaintiffs. As the action between them and the plaintiffs was resolved there is no such finding.[180] If it be relevant there was no admission of liability in the terms of settlement.[181]

[136] In any case the only possible basis for a finding against the eighth and ninth defendants was a breach by their employee, Mr Stanley, of some duty owed to the plaintiffs. The conduct of Mr Stanley, to the extent it was explored at the trial, is analysed above. In my view he has not breached any duty owed.

[137] Effectively the claim against the fourth defendant is that he misled the plaintiffs by failing to correct the misleading information provided by Mr Stanley when he was the employee of the eighth and ninth defendants. As I have found that Mr Stanley did not mislead the plaintiffs in the relevant sense the claim cannot succeed. As well it is an unattractive proposition that fairness and justice requires that the fourth defendant indemnify the eighth and ninth defendants for failing to detect and remedy misleading statements for which the eighth and ninth defendants are responsible, even if vicariously.[182]

Damages

[138] The losses claimed by the plaintiffs fall into three quite distinct categories – the operating losses, the capital amounts lost, and damages to compensate for unrewarded labour.

[139] No submission was made that it made any difference whether the damages were assessed in contract, in negligence, or under the statutory right of action conferred by the Act. McPherson JA has observed that damages under the statutory right of action conferred by the Act cannot be less than the damages at common law for actions in contract or negligence: *Manwelland Pty Ltd v Dames & Moore Pty Ltd*.[183] I will concentrate then on the loss or damage applicable under the Act.

[140] The loss or damage that the plaintiffs are entitled to is that loss or damage suffered "by conduct" done in contravention of the Act. So long as the contravening conduct is *a* cause of the loss (in the sense that it "materially contributes") that is sufficient: *Henville v Walker*,[184] *I & L Securities v HTW Valuers*.[185]

[141] Damages are assessed not on the basis that the defendant must make good the representations or advice complained of but rather on the basis of making good the loss caused by the conduct in contravention of the Act. In most cases the appropriate guide is the measure of damages in tort: *Kizbeau Pty Ltd v WG & B*

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180 I sought clarification from Mr Martin that these claims were maintained in light of the settlement and was advised that they were.

181 Ex 12 at cl 7

182 Cf *Burke* at p 264 [19]-[22] per Gaudron A-CJ and Hayne J

183 [2001] QCA 436 at [10].

184 (2001) 206 CLR 459 per Gaudron J at [61]; per Mc Hugh J at [106]

185 (2002) 210 CLR 109 at p 128 [57]

Pty Ltd[186] but damages claimable under s. 82 of the Act are not limited by such an analogy: *Marks v GIO Australia Holdings.*[187]

[142] The prima facie measure of damages recoverable under s 82 of the Act in a case where it is said that a business has been acquired in reliance on representations or advice that amount to contraventions of s 52 of the Act is the difference between the price paid and the real value of the business at acquisition date: *Radferry Pty Ltd v Starborne Holdings Pty Ltd.*[188], *Netaf Pty Ltd v Bikane Pty Ltd*[189]. In my view that is reflected here by the capital loss claimed.

[143] That consequential losses of the type that the plaintiffs' claim here can be recovered is clear from comments in cases such as *Gould v Vaggelas*[190], *Marks v GIO Australia Holdings Ltd.*[191], and *Netaf.* Where the difference in value does not take into account the trading losses suffered it may be proper to make some allowance for those consequential losses.

[144] The difficulty facing the plaintiffs once the lease was executed and business purchased was what to do in a loss making situation. The effect of the contravening conduct was to lead the first plaintiff into dealings with the vendors which Mr Kidd had guaranteed.[192] Assuming no right to rescind as against the vendors then the choices facing Mr Kidd were stark – trade-on and try to recover ground, sell the leasehold which he tried to do and failed, or close the business and be sued on the lease contract and the guarantee.

[145] In these circumstances it seems to me that restricting the first plaintiff to capital losses alone would in no sense compensate for the losses in fact sustained by the contravening conduct.

[146] But for Mr O'Rourke's endorsement of the hotel business I am satisfied that Mr Kidd would not have entertained the business and not committed the first plaintiff to the lease. I am satisfied that a significant loss flowed from the decision to purchase the Melbourne Hotel. The defendants' breach has materially contributed to that loss. Quite apart from the decision to enter into the purchase the advice expressly endorsed the rent to be paid for the entire period of the contract. Given that the rent was the primary cost that converted the business from one earning a substantial profit to one that was marginal – without significant change to its trading results – the losses are sufficiently direct in my view whatever test be adopted.[193]

[147] There were three principal arguments relating to the damages claim:

(a) causation was not made out;

(b) whether any and what amount should be allowed for Mr Kidd's effort in conducting the business over five years;

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186 (1995) 184 CLR 281 at 290
187 (1998) 196 CLR 494 at 501 per Gaudron J; at 510 per McHugh, Hayne and Callinan JJ
188 [1998] FCA 1689
189 (1990) 92 ALR 490 at p 493
190 (1985) 157 CLR 215 at 221-222 per Gibbs CJ
191 (1998) 196 CLR 494 at [48]
192 The guarantee is at p 47 of Ex 1
193 See *I & L Securities* per Gleeson CJ at p121 [31]

(c) whether the damages should be reduced by the amount of compensation that WP Kidd Pty Ltd received in respect of seven poker machine operating authorities.

Causation

[148] The defendants' submission is that any loss that the plaintiffs may have suffered derives not from any fault of the defendants but from the ineptitude of Mr Kidd as a publican.

[149] It is first necessary to identify the relevant principles.

[150] It is clear that Mr Kidd was not a particularly skilful publican. That does not mean that he cannot recover – the Act does not merely protect "the careful or the astute".[194] Once the causal link between injury and contravention be established then the claimant's carelessness is irrelevant: *Henville v Walker;*[195] *I & L Securities*.[196]

[151] There is authority for the proposition that losses referrable to the plaintiff's ineptitude in the conduct of the business are not recoverable: *Gould v Vaggelas*;[197] *Henville v Walker*;[198] *Tefbao Pty Ltd v Stannic Securities Pty Ltd*.[199] Various expressions have been used to describe the applicable test to adopt in to deciding what conduct on the part of the plaintiffs would be sufficient to displace the reliance on the contravening conduct: a loss caused by the "intentional conduct" of the applicant;[200] the plaintiffs' "own conduct may be 'so dominant' in the causal chain as to constitute a *novus actus interveniens"*;[201] it may be necessary to characterise the conduct as an "abnormal event"[202] or "grossly unreasonable… a supervening cause".[203]

[152] What seems plain is that cases where it is appropriate "to divide up the loss … and attribute parts of the loss to particular causative events are likely to be rare".[204] The crucial distinction is between conduct contributing to "*part* of the loss, in the sense of a discrete and separate portion of the whole loss, and playing *a part* in the sustaining of the entire loss".[205] It is only the former that cannot be recovered. For the defendants to succeed it is incumbent on them to disentangle any competing causes and demonstrate that the contravention did not materially contribute to some part of the loss claimed: *Henville v Walker*.[206]

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194 per Gleeson CJ in *Henville v Walker* at [13]

195 (2001) 206 CLR 459 at 482 [66] per Gaudron J, at 505 [140] per McHugh J, at 507 [153] per Gummow J, at 510 [166] per Hayne J

196 Per Gaudron, Gummow and Hayne JJ at p 126 [50]; per McHugh J at p 138 [92]

197 (1985) 157 CLR 215 at p 267 per Gibbs CJ at p 222; Dawson J at p 267 – a case of deceit

198 per Gleeson CJ at [31];

199 (1993) 118 ALR 565 at 575 per Hodgson J

200 *I & L Securities* per McHugh J at p 141 [104]; *Henville* per Gaudron J at 483 [72];

201 *I & L Securities* per McHugh J at p 136 [85]

202 *Henville* per McHugh J at 493 [106]

203 *I & L Securities per* Gleeson CJ at 119 [27]

204 *I & L Securities* at p130 [62] per Gaudron, Gummow and Hayne JJ

205 *I & L Securities* per McHugh J at p137 [89] and see Gaudron, Gummow and Hayne JJ at p130 [62]

206 per Gleeson CJ at [41], per Gaudron J at [70], per McHugh J at [148]; Hayne J not deciding: [166]

[153] In their defence the second and third defendants particularise the plaintiffs' mismanagement[207] in various ways, but principally:

(a) failing to adopt Mr O'Rourke's recommendations as set out in the report of 15 June;

(b) failing to use the available expertise in hotel management of the second plaintiff's daughter and son-in-law;

(c) failing to adopt proper stock and accounting controls;

(d) running down the stock in the bottleshops so that customers are not attracted;

(e) failing to maintain stocks of higher margin items;

(f) closing bottleshops and thereby "giving up first mover advantage";

(g) by the second plaintiff being gruff to customers and staff and not being a good publican;

(h) closing the Westaway Plaza off-site bottleshop at a time when patrons of nearby restaurants were about to commence dining;

(i) persisting with incompetent staff, failing to keep books in order and maintaining no control over accounts in cash.

[154] The defendants sought to support this argument by relying on the testimony of four former employees who supported these particulars in varying degrees; a customer and supplier, Mr Bridge, who observed a drop-off in patronage, felt that there were not the wines available that he liked, and noticed, on a couple of occasions, that Mr Kidd was either not available to serve him or was slow; and the report of Mr Duthie who concluded that the losses were occasioned by the second plaintiff's mismanagement of the hotel.

[155] In my view, there are several answers to the defendants' arguments. Firstly, in no sense did the defendants demonstrate that any discrete part of the operating loss was due to the factors about which they complain. Rather the defendants sought to demonstrate that the total loss was due to the alleged mismanagement. In other words, they sought to establish that from the outset the business was a profitable one that Mr Kidd destroyed by his inappropriate practices. Given my earlier finding that the business that Mr Kidd purchased was at best marginal from its first day and that the only way in which it could ever make a profit was for him to dramatically improve its trading and cut its costs, the submission fails at the threshold.

[156] Secondly, whilst Mr Kidd did not implement all of Mr O'Rourke's recommendations – and I note that he did in fact relocate the poker machines and acquire others[208] as recommended – he had a reasonably good reason not to. The business that he thought he was buying was one which should have generated him a profit, and a substantial profit, from its first week of operation. In fact, he had

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207 See paras 7 and 8(j) of the Second Amended Defence

208 T 57/30; 59/30. And see Ex 13 at p5 for costs of relocation at $23,956. The status of the facts related in Ex 13 was not explored.

a business that was operating at a loss. Mr Butcher's analysis[209] demonstrates that in the eight month period to 30 June 2001 the operating loss was in excess of $70,000 – over $2,000 per week. The stark decision facing Mr Kidd was whether he expended more moneys to endeavour to halt the drain on his resources or not. Effectively, he is being criticised for failing to take steps to mitigate his loss. It seems to me to follow from the decisions in *Henville* and *I & L Securities* that a failure to mitigate is irrelevant to the computation of the damages.[210]

[157] Thirdly, I am not at all satisfied that the particulars of the mismanagement could be characterised as intentional or abnormal or grossly unreasonable or so dominant as to constitute a *novus actus interveniens*. Mr O'Rourke's advice led an inexperienced person into taking on the conduct of the hotel business. He can hardly be then heard to complain about Mr Kidd's inexperience. It is no answer to say that he failed to find a suitable manager. That amounts to a plea that he failed to mitigate his loss. Further there was no evidence as to the availability of such managers. Nor is it an answer to say that Mr O'Rourke expected Mr and Mrs Donaghy to manage the hotel. As I have explained[211] there was no evidence to establish that Mr Kidd's son-in-law and daughter had the necessary expertise to convert a loss-making venture into a profitable one. No evidence was led to demonstrate that Mr Kidd's assessment of his daughter and son-in-law[212] was wrong. They may or may not have been better publicans than Mr Kidd, but the defendants came nowhere near discharging the onus that lay on them.

[158] Fourthly, I was not persuaded that anything that Mr Kidd could reasonably have done would have made a significant difference. The defendants point to the alleged success of the Keatings so soon after their return, as supporting their argument.[213] But that is hardly persuasive. There was no close analysis of what the Keatings did or spent to earn any profit. Their alleged success in so short a time serves to highlight what is probably a significant factor in conducting a business such as this – the personal following of a particular publican, especially with a 26 year history in the area behind them.

[159] Turning to the particular complaints as to what Mr Kidd ought to have done I observe that the evidence was not comprehensive or compelling. For example the evidence relating to stock levels was quite restricted.[214] What different stock or accounting control ought to have been adopted and when and how that would have made a significant difference to the overall profitability of the hotel was not demonstrated. The onus throughout lay on the defendants to show what loss could be attributed to the alleged mismanagement that they complain of. This onus was not discharged.

[160] Nor do complaints that Mr Kidd was gruff to customers[215] and staff or lacked people skills fall within the category of conduct that would disentitle the plaintiffs

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209 See p 321 of Ex 1

210 See [150] above. Whilst those cases were concerned with carelessness and apportionment they emphasised the primacy of the causation principle (per French J in *Pavich v Bobra Nominees Pty Ltd* [1988] ATPR (Digest) 46-039 referred to by McHugh J in *I &L Securities* at p 136 [85])

211 [62](e) above

212 See T 216/60

213 See the opinions of Mr Kendall - Ex 26

214 T 394-395; 459/10

215 The evidence came principally from his son-in-law who was hardly unbiased: T 551/30. For Mr Kidd's account see T 175/25-40

to recover the losses suffered. I am by no means persuaded that Mr Kidd was not appropriately courteous to his customers. He certainly did not impress as a person who would deliberately set out to sabotage his own business. The fact is he is deaf. That certainly affected him in the witness box and could easily have given an impression to an observer of gruffness, and perhaps even rudeness. But that cannot be held against him in this assessment.

[161] Mr Kidd was criticised for his distribution of the "Review of Hotel" document[216]. This was said to demonstrate his lack of management skills. Mr Kidd was there attempting to deal with significant problems he perceived in the workplace. He was not shown to have misjudged the fact that there were such problems. In the context of employees behaving as he believed they were – giving away free drinks to friends, his daughter undermining his authority and being disrespectful to him, and the hotel business and poker machines being closed down at inappropriate times – he faced very significant problems. Quite how an employer can best deal with such problems is very much an individual matter. No evidence was led to show that there were any reasonable measures open to him that he failed to adopt that would have solved the problems in any better fashion. Indeed it was not established that, generally, Mr Kidd did not enjoy reasonably cordial relations with his staff.[217]

[162] Indeed, the very variety of the complaints made about Mr Kidd demonstrates the difficulty. For example Mr Duthie, who had expertise in hotel management, was of the view that Mr Kidd's problems would have potentially been solved "if he'd focused on machine gaming only".[218] Simultaneously, Mr Kidd is criticised for not providing better service behind the bar, for not "theming" the lounge, and for failing to keep stock levels at appropriate quantities and type. Should he have focused more on one problem or the other? He is criticised for not controlling wages but at the same time for restricting hours that the hotel was open in an effort to control wages.[219] As Mr Kidd observed, Mr O'Rourke did not suggest to him anything in particular that he ought to have done to provide a theme for the lounge[220]. What effect any such theme might have had – let alone probably would have had – was nowhere demonstrated in the evidence. Whilst Mr Kidd is criticised for closing down a bottle shop, Mr Currey thought that was the appropriate course that he should take.[221] The decision to continue to operate a loss-making section of the business[222], or to close it and minimise the losses, is one that can easily be criticised in hindsight but is very much one for the person who is losing the money and facing unknowable imponderables to decide.

[163] Nor can it be right, in my view, to say, as was said, that Mr Kidd has failed because he did not reach the district average in the gaming returns[223]. The fact that statistics display an average return does not necessarily indicate that an averagely competent person could achieve those returns – and I do not mean to say either that Mr Kidd is not such a person or that such a person is the only person entitled to claim damages.

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216 Ex 8

217 For Mr Kidd's views see T 164/35; 167/20 – note too that only 4 out of 45 staff were called

218 T 500/25. One witness in fact thought that was his main focus: T 457/45 (Devney)

219 eg T 159-160

220 T 320/50

221 See p 721 of Ex 1 para 5.7

222 And the losses were formidable – see p 692 of Ex 1. As to the factors impacting on his decision see T 56/1-20

223 See Ex 28 p15-16 and annexure 12. I do not accept the opinion at para 6.10 as necessarily accurate.

What the competition was doing[224], what profit was made by them from those returns and how that competition could best be countered were not explained.

[164] He is criticised for falling out with his daughter and son-in-law but I am by no means persuaded that the fault was all on one side. Mrs Donaghy did not give evidence to refute the allegations of discourtesy and disrespect. Even if fault were on one side that does not assist the defendants – it can scarcely be claimed that a family falling out is not foreseeable in a general sense.

[165] Perhaps Mr Kidd may have done better had he been prepared to spend more money to upgrade and market the hotel. But if Mr O'Rourke had one message in his evidence that was that costs had to be cut – e.g. in the budget that Mr O'Rourke himself prepared for the purposes of obtaining a gaming licence he reduced the advertising budget by 40 percent. From Mr Kidd's perspective he had to decide whether he poured more money into this loss-making venture. The fact that he decided not to do so does not convert this case into one of the rare ones where some part of the loss should not be allowed.

[166] It is a reasonable proposition to state that Mr Kidd did not have the skill or expertise to convert what was, at best, a marginal operation into a profitable one. And it might well be that in more skilled hands the losses would not have been so great or may have been avoided. However, no conduct of his, in my view, can be said to have been so unreasonable so as to break the chain of causation between his reliance on Mr O'Rourke's advice and the losses that flowed from the purchase of the hotel.

[167] In my view the defendants' arguments on causation are not made out.

Additional Capital Contributions

[168] The first category of loss relates to capital expenditure of the first plaintiff - the acquisition of the lease ($125,000), other acquisition costs ($14,737) and subsequent capital purchases including gaming machines ($100,115) less the depreciation item included in the operating loss ($100,383) and the value of a van that was retained ($3,391).[225] Both accountants agree that the total is $136,088.

[169] Where a business has no value in the hands of the plaintiffs, lost capital contributions will be compensable. No submission was made to the contrary or that any particular item was not properly claimable.

[170] I am conscious of the valuation evidence led by the vendors – effectively that the value of the hotel business as at the date of acquisition (25 July 2000) was $200,000.[226] As I have mentioned previously[227], the difficulty with the analysis is that it assumes that the vendors were achieving a net profit in the order of $250,000 in the period leading up to the acquisition of the hotel business by the first plaintiff. This assumption is fundamental and wrong. It also ignores entirely the fact that in the hands of the first plaintiff, additional expenses were to be incurred which would have reduced the net profit to a loss situation.

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224 See Mr Kidd's brief summary at T 90/40 to show that the competition was indeed active

225 Full particulars of the capital expenditure claimed is set out in Appendix 2 to the Hanrick Curren report – see pp395-399 of Ex 1

226 See Ex 26 and particularly pp 33-35

227 See [69] above

[171] There being no submission to the effect that the capital contributions are not properly claimable and agreement between the accountants as to the calculation of the loss, I will allow the amount claimed in the sum of $136,088.

The Operating Loss

[172] The claim is for the losses sustained each year in conducting the hotel business. The accountants called on each side of the case agree on the calculation of the loss in the sum of $405,530.[228]

[173] However that calculation assumes an obligation to pay only a reduced rental. The vendors claim the amount of rent unpaid and due at $218,733. It follows from my earlier findings[229] that this is must be brought into account.

[174] No submission was made that the plaintiffs' approach fell into the error referred to by Sheppard and Pincus JJ in *Netaf Pty Ltd v Bikane Pty Ltd*[230] to the effect that such an approach rendered the contravener "the insurer of the other's success and prima facie liable to indemnify him against the consequences of the purchase".[231] Presumably that was so because on the plaintiffs' case the business that the first plaintiff purchased had no value to it and so the plaintiffs were properly entitled to both the capital costs expended as well as the consequential losses incurred.[232]

[175] I will allow the damages claimed but adjusted to include the omitted expense of the rent yet unpaid – a total of $624,263.

Unrewarded Labour

[176] Mr Kidd claims that he worked without reward for five years and that that is a compensable loss. Reliance was placed by the plaintiffs on *Crystal Auburn Pty Ltd v IL Wollermann Pty Ltd*[233]; *Jaldiver Pty Ltd v Nelumbo Pty Ltd*[234]. In that latter case Heerey J said at p 34:

> "Where the misleadingly or deceptively induced transaction is a lease between contravener and victim of premises for business purposes, there seems to be ample justification for including as an item of loss and damage suffered by the victim the value of unpaid labour, at least in the case of proprietor-operated small businesses like those of the applicant's. The purchase of such a transaction from the contravener's point of view is to bring about a continuing obligation on the victim to provide the contravener with income in the form of rent. The parties contemplate that rent be generated from the introduction by the victim into the business of his own capital and labour. In the event of the failure of the business (being a business on which the victim would not have embarked had it not been for the contravener's conduct) I do not see the logic in saying

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228 Eg see p 321 of Ex 1 as adjusted at p 590 of Ex 1

229 See [125] above

230 (1990) 92 ALR 490 at 494

231 Quaere where the principle has survived *Henville* and *I & L Securities*

232 cf *Carlton v Pix Print Pty Ltd* [2000] FCA 337 at [82] – [103]

233 [2004] FCA 821 at [151] per Goldberg J

234 Unreported – Federal Court of Australia – V G51 of 1991 - Heerey J – 2 December 1992 – BC 9203862

> that the victim can recover, as part of loss and damage, capital which he has wasted but not the value of his wasted labour."

[177] Those remarks seem to me to be apposite to the present case. No submission was made to the effect that as a matter of principle such a claim could not be advanced. The objective value of the work done would be the appropriate measure of the loss: *Jaldiver* at p34.

[178] The accountants were asked to come up with a measure for the loss claimed. Mr Haley of Vincents considered that the appropriate salary to apply was that of a duty or venue manager at $909 per week. He calculated a figure of $210,307. Mr Butcher initially adopted an annual salary as at October 2000 of $60,000 with CPI adjustments to arrive at a total of $321,733. Assuming a duty manager salary, as Mr Haley suggested, he arrived at a figure of $288,280. The distinction between the two approaches is that Mr Butcher considered that Mr Kidd's duties were over and above those of a duty or venue manager and that was best brought into account by allowing an extra 15 hours per week – because that is the time that Mr Kidd says that he worked - but at the same average hourly rate as such a manager. Mr Haley considered that the salary of $909 per week was not necessarily restricted to a 40 hour week.

[179] Mr Kidd's evidence was that he worked full-time in the hotel for at least 55 hours per week when averaged over the five year period of the lease.[235] Mr Ashton, counsel for the vendors, was critical of this evidence as being vague and contrary to that of the employees called[236]. In my view, the evidence was as precise as one is entitled to expect given the time that has elapsed since the events and the lack of contemporaneous records. The employees were not in a position to comment on the accuracy of the claim. No one employee could claim to have been present for the five year period or in a position to know what it was that Mr Kidd was doing throughout the day. That is not to say that some of the time Mr Kidd allocates as working in the business was not as productive as he now recalls. There was no reason to disbelieve the observations of the witnesses, so far as they went.

[180] Nonetheless, it seems to me that it was inherently probable that Mr Kidd would have spent a deal of his time attending to the business of the hotel. It is relevant to note that the original intention was that the tasks that Mr Kidd attended to were to be carried out by his daughter and son-in-law and that they were to be paid $50,000 annually which gives some indication of the value of the work. However, it follows that when Mr and Mrs Donaghy were present at the hotel it is probable that Mr Kidd's involvement was at a lesser level. After all, that was one of the reasons they were there.

[181] Further, I think it a legitimate criticism that Mr Kidd was completely unqualified as a manager of a hotel.[237] The premise underlying Mr Haley's selection of the appropriate wage rate to apply was of a competent manager.[238] Mr Ashton was minded to submit that the better measure would be the remuneration that Mr Kidd actually drew[239] but that is a totally artificial measure.

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235 T 314/15-35

236 Note particularly Ms Devney at T 461/30 but see p 511 Ex 1 and T 464-465 for hours worked

237 T 605/50 for Mr O'Rourke's assessment

238 See para 7.12 of Ex 25

239 See p 321 of Ex 1

[182] Mr Marks' submitted that there ought to be brought into account any drawings or wages received and the value of food and board received. I think that must be right. Mr Butcher analysed the trading records of the first plaintiff's business. He advised that a total of $133,244 was paid in wages to Mr Kidd over the period of the lease.[240] There is no evidence of the benefits, let alone the value of the benefits, that Mr Kidd received. Whilst the onus is plainly on the plaintiff to establish the loss there is at least an evidential onus on the defendants to introduce the evidence they contend should be taken in reduction of the losses alleged. To the extent that Mr Kidd lived at the hotel the accommodation was hardly a benefit to him – he had a home at Woody Point. In the absence of evidence as to the benefits received I will make no deduction.

[183] Whilst the assessment of this component of the loss is somewhat speculative, it seems to me that Mr Haley has come up with as good a measure as can be found. From his figure of $210,307 I will deduct the $133,224 in wages and round the figure to $77,000. In my view this approach takes into account the competing arguments as best can be done.

[184] There is authority for the proposition that claims of this type should be restricted to that which might be considered to be effort additional to what the plaintiff may have expected to have put into the business in any case – that it is only the additional effort that is compensable: *Cut Price Deli Pty Ltd v Jacques*.[241] That principle was applied in *Carlton v Pix Print Pty Ltd*.[242] No submission was made to that effect here. Mr Kidd's intention was that he would not be a hands-on operator at all.[243] He intended to hand over the management of the hotel to his daughter and son-in-law when he was satisfied that it was profitable – which he expected at the outset. This situation never came to pass. I therefore see no reason to discount the amount awarded under this principle.

Gaming Machine Operating Authorities

[185] On 1 July 2003 the *Gaming Machine Act 1991* was amended to introduce the concept of gaming machine authorities. The holder of every category 1 gaming machine licence was assigned an operating authority. The first plaintiff was assigned 20 such authorities. There was a dispute between the first plaintiff and the first defendant concerning the ownership of these operating authorities. That dispute was resolved in a hearing before the Commercial and Consumer Tribunal.[244]

[186] The Tribunal determined that all 20 operating authorities would be transferred to the first defendant at the end of the lease but that the first plaintiff was entitled to compensation equivalent to the value of seven of those operating authorities. The basis of the Tribunal's determination was that the first defendant had contributed to

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240 See p 321 of Ex 1. Mr Marks submitted that there was no evidence that this was in fact paid and so it followed that damages could not be awarded. In my view the submission was wrong legally and factually. An evidential onus lay on the defendants to introduce the evidence. There was extensive evidence of the payroll summaries and cross examination of Mr Kidd about wages (eg T 108/35) with no suggestion to him that he had falsified his records.

241 (1994) 49 FCR 397 at 404

242 [2000] FCA 337 at [106] – [107]

243 T 41/35

244 *WP Kidd Pty Ltd v Panwell Pty Ltd* [2004] CCT G 514-03, 15 December 2004 – see Ex 13 for the reasons

the business of gaming conducted at the Melbourne Hotel to the extent of 64.28 percent and was thus entitled by reason of that contribution to 13 operating authorities. Similarly the first plaintiff was entitled by reason of its contribution to the gaming business of the hotel to the value of seven such authorities.[245]

[187] By the Tribunal's order the first defendant paid to the first plaintiff a total sum of $581,707. That amount included the goods and services tax of $52,882. The issue is whether that sum should be applied in reduction of the damages. The defendants contend that the damages ought to be reduced by $528,825 being the net compensation after deduction of the GST component. The plaintiffs contend that there should be no reduction but if there is to be such a reduction it should also take into account the professional fees that were incurred by the first plaintiff in the disputed hearing which reduced the amount that the first plaintiff received to $432,009.[246]

[188] The defendants base their submission on the principles explained in *Manwelland Pty Ltd v Dames & Moore Pty Ltd*.[247] There the plaintiff acted on a misleading statement by a third party about the suitability of contaminated land for commercial use which it intended to clean up and use for development and re-sale. The plaintiff did in fact develop and re-sell the land but only part of it because of the extent of the contamination. The issue between the parties was whether the plaintiff was required to bring into account the whole of the profits obtained on that development and re-sale. That case had the peculiarity that the valuation evidence led by the plaintiff was uncontradicted and arguably deficient. As McPherson JA observed, the valuer made no allowance in his valuation for the fact that the land was, as to at least one-third of its area, plainly capable of being developed in the manner and with the results achieved by the plaintiff – a sale for $3.7 million.[248]

[189] The general principle is that a plaintiff is to be put, so far as possible, in the position he would have been in if he had not acted on the misleading statement or advice: *Totff v Antonis;*[249] *Wardley Australia Ltd v Western Australia*;[250] *Potts v Miller*;[251] *Kenny & Good Pty Ltd v NGICA (1992) Ltd.*[252]

[190] The ratio of the judgment of McPherson JA in *Manwelland* is to be found, in my view, in the following passage where, after referring to *Henville v Walker*[253] and the judgment of Hayne J in that case at [160] his Honour said:

> "What is required in ascertaining loss for the purpose of s 82(1) is [as Hayne J said at [162]] a comparison between the position in which the appellants there found themselves after the project was finished and the position in which they would have been if, instead of relying on what they were told by the respondents, they had not undertaken the project at all.

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245 See [85] of Ex 13 at p 34
246 See p 592 of Ex 1 – para 2.19 of the Hanrick Curran report
247 [2001] QCA 436
248 Per McPherson JA at [12]
249 (1952) 87 CLR 647 at 650
250 (1992) 175 CLR 514 at 539 (per Brennan J)
251 (1940) 64 CLR 282 at 297 (per Dixon J)
252 (1999) 199 CLR 413, 424, 454-455
253 (2001) 206 CLR 459

> In my respectful view, the same method of ascertaining the loss or damage is appropriate in the present case. The plaintiffs' losses resulting from their having acquired the subject land in reliance on the advice of the defendant concerning its "remediability" are to be set against the receipts or gains accruing from that acquisition. It is the acquisition of the land that is the cause of both the ensuing losses and gains, or which materially contributed to them." (my emphasis)[254]

[191] The distinction, if there is one, between *Manwelland* and this case is that in *Manwelland* the very property acquired was the cause of the gains that had to be brought into account. Here the acquisition of the hotel business was not the cause of the gains that the defendants seek to bring into account. In my view, the acquisition of the hotel business was merely the circumstance which put the plaintiff in a position to acquire the operating authorities. By the purchase of the business the first plaintiff did not acquire the operating authorities.

[192] In a series of decisions the Commercial and Consumer Tribunal, which has jurisdiction in relation to gaming machine allocation disputes, has held that operating authorities are to be regarded as a new asset created by statute: *Aceridge Pty Ltd v Chatswood Hills Tavern Pty Ltd & Anor*;[255] *Australian Leisure and Hospitality Group Ltd v Cellcom Pty Ltd*[256]. That view was reiterated in the dispute between the first plaintiff and the first defendant: *WP Kidd Pty Ltd v Panwell Pty Ltd*.[257] A similar view has been taken in New South Wales in respect of the legislation introduced into that State which is similar in its effect: *Wonall Pty Ltd v Clarence Property Corporation Ltd*.[258] In my view I should take the same attitude not least because the matter has been litigated between the parties and determined by the appropriate tribunal.

[193] The approach of the Commercial and Consumer Tribunal to the determination of the issue of the amount that the first defendant ought to pay to the first plaintiff for transfer to it of the operating authorities was to determine what amount each of the parties had contributed to the business of gaming at the premises. The expert evidence before the Tribunal was to the effect that the first plaintiff had contributed $94,402 to the business of gaming and the first defendant $169,882 for a total capital contribution of $264,284. The first plaintiff's contribution was made up of the following:

(a) five extra machines that it installed;

(b) replacement of eight of the original 15 machines at its cost;

(c) the making of significant renovations to improve the business of gaming.[259]

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254 [2001] QCA 436 at [14]-[15]

255 [2004] CCT G 502-03, 16 January 2004

256 [2004] CCT G 504-03, 4 March 2004

257 [2004] CCT G 514-03, 15 December 2004

258 [2003] NSWSC 497 at [31]

259 See the analysis in the first plaintiff's submission at p 15 of Ex 13 and the determination of the Tribunal at [84] at p 33 of Ex 13

[194] Specific findings were made that the premium of $125,000 that the first plaintiff paid to the first defendant to acquire the hotel business for a period of five years was not to be brought into account as it did not enhance the value of the gaming business and was not invested in the gaming business.[260] The Tribunal then simply applied the respective percentage contributions to determine that the value of seven of the 20 operating authorities should be the amount that the first defendant had to pay to the first plaintiff to obtain a transfer of the operating authorities.

[195] Thus it was not the acquisition of the business that resulted in the first plaintiff receiving the benefit of the order of the Tribunal but rather the expenditure by the first plaintiff of its own funds in acquiring and improving the gaming business. It is plain from the Tribunal's reasons that if there had been no such expenditure there would have been no "compensation" paid at all for the transfer of the operating authorities at the end of the lease.[261]

[196] In my view the defendants' argument produces this anomaly: it strikes me as perverse that if the second defendant's advice had been accurate, so that the first plaintiff had in fact acquired a profitable business, then the first plaintiff would, by reason of the decision of the Commercial and Consumer Tribunal, have enjoyed not only those profits but the sum awarded to it by the Tribunal; but the effect of failing in its duty is said to be that the first plaintiff not only does not enjoy those profits but loses the benefit to which it was otherwise entitled.

[197] I have with some hesitation come to the view that the amount of "compensation" that the first defendant paid to the first plaintiff should not be brought into account in reduction of the damages. It seems to me that the amount awarded is an asset which reflects the first plaintiff's own expenditure and effort and it is no more to be brought into account than any other asset that the first plaintiff might have acquired during the currency of the lease. It seems to me that the distinction that I referred to earlier is a valid one.

[198] I should mention that if I had been of the contrary view, I would have brought into account the net compensation amount as determined by Mr Butcher, that is, $432,009. If it was appropriate to apply the principle in *Manwelland* then it is appropriate to bring into account the costs incurred in obtaining the compensation amount as the net amount represents the true position of the first plaintiff.

Interest

[199] Interest is claimed under the provisions of the *Supreme Court Act 1995.*

[200] In respect of the first plaintiff's claims the interest allowed must take account of the payment of $120,000 by the eighth and ninth defendants on or about 12 April 2007. The table in Mr Butcher's first report[262] gives some indication of the timing of the losses and excludes the unpaid rent. I will apply the receipt of the settlement amount to the earliest loss and assume the legal expenses[263] were incurred in the 2004 year

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260 Ex 13 at p 33 [82]

261 The operating authorities are attached to a gaming machine licence which can only be held by the holder of the liquor license: see s 55, s 56, s 58 and s 68 of the *Gaming Machine Act 1991*

262 P321 of Ex 1

263 Of $28,191 that must be taken out of these figures

– the action having been instituted in the 2005 year.[264] I will allow interest at 10 per cent. I assess the interest at $182,745.

[201] I will allow the second plaintiff's claim for interest at 5 per cent during the period that he worked (from the commencement of the lease to 30 October 2005) and 10 per cent thereafter. I assess the interest at $32,000.

[202] I will allow interest in favour of the first defendant on its counter-claim for rent at 10 per cent. I assess the interest at $53,345.[265]

Summary and Orders

[203] I give judgment for the first plaintiff against the second and third defendants in the sum of $640,351[266] in respect of its claim and $182,745 for interest.

[204] I give judgment for the second plaintiff against the second and third defendants in the sum of $77,000 in respect of his claim and $32,000 for interest.

[205] I give judgment for the first, sixth and seventh defendants against the first and second plaintiffs on the plaintiffs' claim against them.

[206] I give judgment for the first defendant against the first plaintiff on its counterclaim in the sum of $218,733 together with $53,345 for interest.

[207] I give judgment for the first, sixth and seventh defendants:

(a) against the second and third defendants on the third party claims brought by the second and third defendants against them;

(b) against the eighth and ninth defendants on the third party claims brought by the eighth and ninth defendants against them.

[208] I give judgment for the second and third defendants:

(a) against the first, sixth and seventh defendants on the third party claims brought by the first, sixth and seventh defendants against them;

(b) against the eighth and ninth defendants on the third party claims brought by the eighth and ninth defendants against them.

[209] I give judgment for the fourth defendant:

(a) against the first, sixth and seventh defendants on the third party claims brought by the first, sixth and seventh defendants against him;

(b) against the eighth and ninth defendants on the third party claims brought by the eighth and ninth defendants against him.

[210] I give judgment for the eighth and ninth defendants:

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264 Both assumptions favour the defendants

265 ($95,660 x 10% x 3yrs) + ($123,235 x 10% x 2 yrs)

266 The total loss of $760,351 ($624,263 + $136,088) less the sum received from the eighth and ninth defendants of $120,000

(a) against the first, sixth and seventh defendants on the third party claims brought by the first, sixth and seventh defendants against the eighth and ninth defendants;

(b) against the second and third defendants on the third party claims brought by the second and third defendants against the eighth and ninth defendants.

[211] I will hear counsel as to the appropriate orders as to costs.