

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2012-404-001638
[2012] NZHC 3622**

BETWEEN	ESPLANADE PROPERTY HOLDINGS LIMITED First Appellant
AND	ANDREW VAN DER PEET Second Appellant
AND	TAMARA SPA LIMITED First Respondent
AND	NEELUFUR AMEEN Second Respondent
AND	WASIM AHMED Third Respondent

Hearing: 20 September 2012
Counsel: S Carey for Appellants
M Keal for Respondents
Judgment: 21 December 2012

JUDGMENT OF WOOLFORD J

*This judgment was delivered by me on Friday, 21 December 2012 at 4:15 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors/Counsel:

Heimsath Alexander, (A E Hansen), Auckland
S Carey, Auckland.
M Keall, Auckland

Introduction

[1] On 22 August 2008, Tamara Spa Limited (“Tamara”) entered into an agreement with Esplanade Property Holdings Limited (“Esplanade”) to lease a first floor room at the Esplanade Hotel in Devonport for the purposes of a spa business offering Ayurvedic massage and beauty treatments for the face and body. The term of the lease was two years from 1 November 2008. It was guaranteed by Mrs Neelufur Ameen and her husband, Mr Wasim Ahmed. The annual rental agreed was \$22,000 plus GST.

[2] The business was unsuccessful and Tamara vacated the room on 30 September 2009 having paid the rental to that date. Esplanade sought to recover 13 months unpaid rental from 1 October 2009 to 31 October 2010. Tamara cross-claimed under the Contractual Remedies Act 1979 and the Fair Trading Act 1986 on the basis that it had been induced to enter the agreement to lease on the basis of a misrepresentation by Mr Andrew Van der Peet, a director of Esplanade, that the hotel enjoyed a 50 per cent occupancy rate.

[3] The case was heard in the Auckland District Court before Judge Joyce QC on 16 November 2011. In a judgment dated 28 February 2012, Judge Joyce found as a matter of fact that a representation had been made by Mr Van der Peet that the hotel enjoyed a 50 per cent occupancy rate, that the representation was not true and that Tamara had been induced by the misrepresentation to enter into the agreement to lease. Judge Joyce therefore upheld Tamara’s cancellation of the lease. He also directed that Tamara should be compensated for what it had lost in terms of wasted expenditure. He awarded Tamara damages of \$41,219.57, being Tamara’s set up costs and outgoings (including rent), less earnings from hotel guests and from the sale of some equipment which was surplus to requirements. Judgment was given both against Esplanade and Mr Van der Peet jointly and severally.

[4] Esplanade and Mr Van der Peet (“the appellants”) appeal against the decision of Judge Joyce. Before the merits of the appeal can be considered however, it is necessary to determine an application made by the appellants for leave to adduce further evidence.

Application for leave to adduce further evidence

[5] The appellants seek leave to adduce further evidence, namely, new records as to the occupancy of the Esplanade Hotel for the financial year ending 31 March 2008 (“2008 financial year”) as well as corrected records relating to occupancy levels between March 2008 and September 2009, evidence of which was before the District Court. Prior to the hearing in the District Court, Esplanade had been directed to supply records of the hotel’s occupancy levels for the period 22 March 2008 through to 30 September 2009, following an application for discovery made by Tamara. Those records showed the following average monthly levels of room occupancy:

March 2008	51.1 percent
April 2008	51.89 percent
May 2008	20.34 percent
June 2008	16.63 percent
July 2008	13.17 percent
August 2008	20.73 percent
September 2008	15.98 percent
October 2008	23.35 percent
November 2008	31.5 percent
December 2008	26.52 percent
January 2009	35.68 percent
February 2009	46.25 percent
March 2009	32.97 percent
April 2009	38.62 percent
May 2009	16.77 percent
June 2009	18.08 percent
July 2009	27.92 percent
August 2009	30.97 percent
September 2009	29.82 percent

[6] In an affidavit sworn by Mr Van der Peet in support of the application for leave to adduce further evidence, he explains that at a pre-trial conference in July 2011, Tamara asked that Esplanade be directed to produce the hotel’s occupancy records from 22 March 2008 to 30 September 2009. Discovery orders in those terms were made on 6 July 2011, requiring production of the records by 29 July 2011.

[7] Mr Van der Peet explains that he did not have direct access to the occupancy records and asked the hotel manager to assist. Shortly before 29 July 2011, the hotel manager supplied Mr Van der Peet with a spread sheet of figures headed “Occupancy Statistics” covering the period sought by Tamara. Mr Van der Peet says that he had not seen those reports before as he had no day to day involvement in the hotel reservations system, which was primarily used by the hotel’s receptionists. Mr Van der Peet had no reason to question the records and did not carry out any additional analysis of the figures provided to him by the hotel manager.

[8] Following the District Court hearing on 16 November 2011, Mr Van der Peet noted that the District Court judgment referred to an assumption by Ms Ameen and Mr Ahmed that the representation as to 50 per cent occupancy related to the 2008 financial year. Given what Mr Van der Peet says was a shift in focus in the District Court hearing to occupancy over a financial year, for which no evidence had been before the Court, his lawyer suggested that he should check the occupancy records for the 2008 financial year.

[9] Mr Van der Peet says he then obtained the “Occupancy Statistics” reports for the 2008 financial year, which were produced by the same programme that produced the reports used at the District Court hearing. When Mr Van der Peet did so, he says that he discovered a large number of errors in the report. The principal errors were:

- (a) The number of rooms shown in the “Occupancy Statistics” reports was, on many occasions, higher than the actual number of rooms in the hotel.
- (b) On other occasions the “Occupancy Statistics” reports displayed fewer rooms than the hotel had.
- (c) Guest numbers were incorrectly recorded relative to the number of occupied rooms. All the hotel rooms, other than the penthouse, held a maximum of two persons, but on occasions the “Occupancy Statistics” reports showed fewer rooms occupied than could have been the case, given the number of guests.

[10] Having noticed the errors, Mr Van der Peet says he spoke with the hotel manager who advised him that the reservations system included in its statistics the hotel's non-accommodation rooms as being available for occupation. He subsequently learnt that the hotel's computer system had crashed in 2010 and that failure may have been the cause of the errors. Mr Van der Peet says he then checked the "Occupancy Statistics" reports for the period for which Tamara had requested occupancy figures, that is, 22 March 2008 to 30 September 2009, and found similar errors. Mr Van der Peet says that there is no doubt that the "Occupancy Statistics" reports produced by the hotel's reservations system were incorrect.

[11] In order to ascertain the true position and to obtain accurate occupancy information, Mr Van der Peet says he then used a different method of obtaining occupancy statistics. He began by obtaining the base "Individual Room Statistics" reports for every individual guest room for each month over the period. He then checked the accuracy of the "Individual Room Statistics" reports by comparing the figures listed on the reports for income generated per room with the hotel's income summary report. He says he further verified the monthly "Individual Room Statistics" reports by retrieving annual reports on each room from the hotel records.

[12] Mr Van der Peet says he then compiled the monthly room figures into an annual total for the hotel recording the number of occupied and vacant nights for the hotel as a whole over the 2008 financial year. The annual occupancy information was then divided by the total number of potential guest nights for the hotel to arrive at the true occupancy percentage for the hotel.

[13] Mr Van der Peet says that by running the report per actual hotel room he ensured that all accommodation rooms, and only those rooms, were included in the reports rather than having figures based on too many or too few rooms. There was also a column headed "locked" in the "Individual Room Statistics" reports which Mr Van der Peet says showed rooms that were not available for guests on a particular night because they were closed for cleaning, repair or renovation.

[14] On this basis, Mr Van der Peet calculated the average occupancy rate (including locked rooms) for the 2008 financial year to be 47.27 per cent. For every

month analysed from April 2007 to September 2009, the actual occupancy was higher than that shown in the previous reports. He also ran a separate report using the same format but removing locked rooms from the pool for the nights they were locked. It showed an occupancy rate for the 2008 financial year of 50.31 per cent.

[15] In addition, Esplanade has filed an affidavit by an IT consultant, Mr Simon Hobman, in support of its application for leave to adduce further evidence. Mr Hobman refers to repairs he made in 2010 to the computer system at the Esplanade Hotel, which had crashed. He says that it is entirely possible that the reservation system was corrupted as a result of a virus infection, the subsequent data restoration or the manual set up of the database connection to the software without his knowledge. It is also possible, he says, that the software was faulty to begin with or that the database server used was not robust enough for the hotel's purposes. He says that it is impossible to know for sure, but whatever the cause, he is not at all surprised to learn that the reservations system produced faulty results.

[16] In his submissions in support of the application for leave to adduce further evidence, Mr Carey, counsel for Esplanade, acknowledges that leave to adduce new evidence may only be granted where there are special reasons. Within that overriding requirement, the relevant considerations are well known: the evidence should be cogent, it should be likely to be material and have an effect on the appeal and it should not have been reasonably able to be produced at trial. Counsel submits that the occupancy records used in the District Court are demonstrably incorrect and it is unsafe to allow a decision that was reliant on such evidence to stand.

[17] Mr Carey also submits that the materiality of the proposed evidence is clear inasmuch as evidence as to occupancy rates is of fundamental relevance to the claim of misrepresentation of those occupancy rates. Further, he submits that the corrected evidence is likely to have an effect on the result: the representation found to have been relied upon was that the hotel had a 50 per cent occupancy rate. The erroneous evidence that was before the District Court indicated an occupancy rate, in percentage terms, between the low and mid-30s. Whichever of the two periods said by Tamara to be relevant is considered (the 2008 financial year or the year ending 30 June 2008) the corrected figures show an occupancy rate of approximately 50 per

cent. On this new evidence, it is said that the hotel had an average occupancy rate of 47.27 per cent for the 2008 financial year and an average occupancy rate of 49.26 per cent for the year ending 30 June 2008.

[18] Mr Carey submits that a de novo assessment of the fresh evidence and its effect should be carried out on appeal. He submits that the average occupancy rates for both periods are at a level that shows the representation to be true and thus not a misrepresentation or a misleading or deceptive statement.

[19] Finally, Mr Carey accepts that the new evidence sought to be admitted was, at least, in a sense available at the time of trial but submits that that fact should not preclude its admission on appeal for several reasons.

- (a) The evidence that was produced at trial was that requested by the respondents;
- (b) This is not a case of evidence having been knowingly withheld at trial. Rather, fresh evidence is sought to correct errors that neither party nor the Court was aware of or picked up on at the trial;
- (c) The fact that evidence may have been available for trial thus does not exclude its admission on appeal; and
- (d) Availability “is only one matter to be taken into account”. If the evidence is cogent and material to the resolution of the appeal, it can be admitted even if it was available at trial.

Discussion

[20] The representation as to a 50 per cent occupancy rate was found by Judge Joyce to have been made by Mr Van der Peet on 24 July 2008. The only figures before the District Court which were of relevance were, therefore, those for the months of March, April, May and June 2008. These were:

March 2008	51.1 percent
April 2008	51.89 percent
May 2008	20.34 percent
June 2008	16.63 percent

These original figures show an average occupancy rate of 35 per cent for the four months immediately preceding the representation.

[21] Esplanade seeks leave to adduce fresh evidence in the form of revised figures for the same months as follows:

March 2008	70.02 percent
April 2008	66.27 percent
May 2008	34.54 percent
June 2008	27.06 percent

These revised figures show an average occupancy rate of 49.5 per cent for the four months immediately preceding the representation.

[22] While Mr Van der Peet says that the original figures are obviously incorrect, none of the “Occupancy Statistics” reports for March, April, May or June 2008 overstate the number of available rooms. In fact, it is quite the opposite. There were 17 rooms available for occupation in the hotel in total. On 24 days out of 31 days for March 2008, the number of rooms shown as available appears to be correct, that is, 17, but on 7 days, the number of rooms shown as available appears to be less than 17. The figures for April, May and June 2008 show a similar pattern. There is no day in the months of March, April, May or June 2008 when the number of available rooms are overstated.

[23] While I accept that overstating the number of available rooms (if true) would result in occupancy being understated, the understatement of the number of available rooms as disclosed in the “Occupancy Statistics” reports for March, April, May and June 2008 could only have the opposite effect – that is, to overstate occupancy.

[24] Mr Van der Peet also says that all the hotel’s rooms, other than the penthouse, hold a maximum of two people but on occasions the “Occupancy Statistics” reports

show fewer rooms occupied than could have been the case given the number of guests. He cites two examples and then says that this error indicates that the "Occupancy Statistics" reports do not properly record multiple nights stays, that is, where a guest stayed more than one night. The reports showed this as only one night's occupancy rather than reporting occupancy for all nights stayed.

[25] However, the "Occupancy Statistics" report for May 2008 does not show any day upon which the number of total guests recorded is more than twice the number of occupied rooms. In respect of the months of March, April and June 2008, there are some days where the number of total guests recorded is more than twice the number of occupied rooms. For example, on 17 March 2008, four rooms are shown as occupied with the number of total guests shown as 9, being 8 adults and one child. While Mr Van der Peet says all the hotel rooms, other than the penthouse, hold a maximum of two people, he does not refer to children and what would happen if, for instance, a husband and wife requested a foldaway bed for their child.

[26] Furthermore, Mr Van der Peet does not disclose how many guests are able to stay in the penthouse. Nor does he give an explanation why the "Occupancy Statistics" reports do not properly record multiple night stays. Moreover, if there is a discrepancy between the number of occupied rooms and the number of total guests, he assumes the number of occupied rooms is understated but ignores the other obvious alternative, that the number of guests is overstated.

[27] I am therefore unable to accept that the original figures for March, April, May and June 2008 are demonstrably incorrect as alleged by Mr Van der Peet.

[28] I also not convinced that the revised figures are more accurate. They contain obvious errors themselves. For example, the "Individual Room Statistics" report for Room 107 for the month of May 2008 shows 26 occupied nights, negative one vacant night and six locked nights. Another example is the "Individual Room Statistics" report for Room 222 for the month of June 2008. It shows zero occupied nights, 30 vacant nights and zero locked nights, yet the number of total guests is shown as two.

[29] Mr Van der Peet also says that he checked the accuracy of the revised figures by comparing them with the hotel's income summary report and that the figures reconciled. He annexes the hotel's income summary report but does not explain how the reconciliation was done.

[30] Mr Van der Peet then says that he further verified the "Individual Room Statistics" reports by retrieving reports on each room for the 2008 financial year from the hotel records, which he says were printed in May 2008. He says the annual reports show the same occupancy figures per individual room as the combined monthly reports for the same room. There are, however, some obvious errors and omissions. For example, Mr Van der Peet has included, in error, an "Individual Room Statistics" report for Room 220 for the date range "1/2/208 to 29/1/208" (which I take to be intended to be the month of February 2008) which shows two occupied nights and negative three vacant nights. In addition, he has omitted an "Individual Room Statistics" report for Room 111 for the month of April 2007. In addition, when I sought to verify Mr Van der Peet's statement about the matching of the annual reports with the combined monthly reports, I found, for example, that although the annual report for Room 223 showed the number of total guests to be 86, when I added up the number of total guests on each of the 12 monthly reports for the same room, I arrived at total guest figure for the year of 96, a difference of 10.

[31] Not only does Esplanade seek leave to adduce revised figures for the months of March, April, May and June 2008, but leave is also sought to adduce completely new figures for the months of April 2007 to February 2008 on the basis of evidence given at trial by Ms Ameen and Mr Ahmed, that although Mr Van der Peet did not specify the period over which the hotel enjoyed a 50 per cent occupancy rate, they assumed it was either a year or a financial year. For the reasons explained above, I am not satisfied that the new figures, which are also based on "Individual Room Statistics" reports, are sufficiently cogent to be relied upon as accurate in respect of the 2008 financial year or the year ending 30 June 2008.

[32] Overall, I am therefore not satisfied that the new evidence sought to be adduced is cogent. Esplanade has not sought to have its claim about the obvious inaccuracy of the original figures or the reliability of the revised and new figures

verified by an independent forensic analyst. I also agree with counsel for the respondents that the IT consultant, Mr Hobman, does no more than speculate about the consequences of the computer crash, which he was called in to remedy. He did not investigate whether in fact any data had been corrupted by the crash or the subsequent remedial steps that he undertook.

[33] I am also not satisfied that the proposed new evidence could not have reasonably been produced in the District Court. In its response to the notice of claim for unpaid rent filed by Esplanade and in its notice of counterclaim filed on 8 June 2011, Tamara made it clear at an early stage of the proceedings that it asserted that Mr Van der Peet had represented to Ms Ameen and Mr Ahmed that the hotel enjoyed a 50 per cent occupancy rate.

[34] The response to the notice of claim filed in the District Court stated in part:

Our experience and subsequent enquiries revealed that it is extremely unlikely that immediately prior to our discussions, the Esplanade Hotel enjoyed anything resembling 50 per cent occupancy. Such misrepresentation on hotel occupancy at the relevant time amounts to misleading and deceptive conduct in terms of the Fair Trading Act 1986.

[35] In his affidavit, Mr Van der Peet states that as far as he was aware it was only at trial for the first time that Ms Ameen and Mr Ahmed each stated that they had taken the alleged representation as to 50 per cent occupancy to relate to a financial year. He notes that occupancy records for the most recent financial year, that is, the year ending 31 March 2008 were not in evidence at the hearing because they had not been requested by Tamara. He says that if he had known that occupancy for the 2008 financial year was, in fact, relied upon by the respondents, Esplanade would have provided those records but that period was never mentioned by Tamara prior to trial.

[36] I am however of the view that it would have been obvious to Esplanade that if there were records justifying the representation of 50 per cent occupancy then they should be produced or if the existing records showed substantially less than 50 per cent occupancy they should at least be checked for accuracy before being disclosed

pursuant to Court order. In my view, Esplanade had ample opportunity to analyse its own records in order to substantiate the representation of 50 per cent occupancy.

[37] As noted by Judge Joyce in his judgment:

[71] Presumably because his stance was that there had never been any discussion about occupancy rate levels at all, Mr Van der Peet had nothing to say on the subject of percentage figures in his brief of evidence.

[72] He did not, for example, go back – as one can reasonably infer he could have – beyond March 2008 to produce figures for the first part of that year and back into 2007: he did not go back to any figures as might be justified (as accurate even in broad terms) the representation that I have found he made.

[38] In conclusion, I decline leave to adduce the fresh evidence. Not only is it not cogent but it was also reasonably available in the District Court.

Appeal

[39] The appellants appeal on two grounds. They allege that Judge Joyce erred in that:

- (a) He wrongly determined that there had been a misrepresentation and/or misleading/deceptive statement of occupancy rates for the Esplanade Hotel; and
- (b) He wrongly determined that, and/or failed to address whether, it was reasonable of the respondents to have relied upon the representation (as found to have been made) as the basis for entering the lease.

Misrepresentation

[40] The first ground of appeal relies upon occupancy records which were the subject of Esplanade's application for leave to adduce further evidence. Leave having been refused, the first ground of appeal falls away. The only figures before the District Court of relevance were those for the months of March, April, May and June 2008. Ms Ameen and Mr Ahmed made it abundantly clear that they would not

have agreed to lease a room in the hotel had they known the actual level of occupancy for the March to June 2008 period, which was disclosed to them pursuant to Court order. This showed an average occupancy rate of 35 per cent. After hearing from them, Judge Joyce accepted their evidence. Although Ms Ameen and Mr Ahmed, in response to specific questions, referred to an assumption that the 50 per cent representation related to the average occupancy over the period of a year, that cannot detract from the evidence that they would not have proceeded at all had they been told of the actual occupancy figures for March to June 2008.

[41] Furthermore, Judge Joyce did not find that the representation related to the previous year. Instead, he described a disinterested but reasonably informed bystander taking it to refer to “a truly meaningful period of time”, not necessarily an entire year. When Mr Van der Peet gave evidence, he agreed that a comment that the hotel was enjoying 50 per cent occupancy would have been inaccurate for the three months preceding July or the six months preceding July but maintained that he did not make such a comment. Judge Joyce disbelieved him when he said he did not make such a comment, preferring the evidence of Ms Ameen and Mr Ahmed. No grounds are advanced to overturn this finding of credibility.

Unreasonable reliance

[42] As to the second ground of appeal, Mr Carey submits that Judge Joyce failed to fully address the issue of reasonable reliance. Counsel does not claim that Ms Ameen and Mr Ahmed ought not to have believed the representation as to 50 per cent occupancy. Rather, he submits that, based on business related information that was known to Tamara but not to Esplanade, it was not reasonable for Tamara to have relied on the representation of 50 per cent occupancy as the basis for agreeing to lease a hotel room and commencing a spa business.

[43] Mr Carey notes the evidence at trial as to the financial requirements for the business. Ms Ameen and Mr Ahmed were aware, prior to the representation having been made, that the spa needed to make \$1,400 per week. Ms Ameen says that this equated to one customer per day from the hotel at \$200 per visit. Mr Carey submits that this ignores the acknowledged fact that Tamara issued 200 vouchers for hotel

guests at a rate of \$50 per visit. On that evidence, Mr Carey submits that the business in fact required four customers per day during the period that the \$50 vouchers were available. While it might be reasonable to take the view that a customer per day or even four customers per day can be achieved from 50 per cent occupancy of a large hotel such as the Stamford Plaza, Mr Carey submits that the same cannot be said of a 16 room hotel, such as the Esplanade. He submits that four spa visits per day from a pool of eight occupied rooms is not a business assumption that a reasonable person in Tamara's position would have made. Nor is it reasonable to assume that even one guest from a pool of eight rooms would on average visit the spa every day of every week throughout the lease term.

[44] That lack of reasonableness is put in stark relief when the actual performance of the spa is considered, according to Mr Carey. During the 11 month period during which the spa operated out of the hotel it in fact received only 14 hotel guests, being 4 per cent of the required number using the one guest per day calculation. While the figures cited are from the period following the representation, Mr Carey submits that the extraordinary gulf between what was required and what was attained clearly illustrates the lack of justification for Tamara's business decision. The hotel could have been fully occupied every day of the lease and the spa would not have come close to meeting its requirements. Mr Carey therefore submits that reliance by Ms Ameen and Mr Ahmed on the representation as the basis for entering the lease was not reasonable. Tamara was therefore not entitled to cancel the lease and judgment should be entered for Esplanade.

[45] It does not appear to me, however, that there was any focus in the District Court hearing about the reasonableness of any reliance on the misrepresentation. There was no evidence led by either party about the normal proportion of hotel guests who visited a spa located within a hotel (described as the capture rate). It seems to me that the capture rate may vary considerably from one hotel to another and will depend on a range of factors, including the training of hotel employees and the establishment of a successful marketing relationship between the spa and the hotel. It seems to me that simple strategies such as asking a guest who is making a hotel reservation if they would also like to make a spa booking, so as not to risk disappointment on arrival, could make a considerable difference. The other roles

which a hotel fulfils such as providing venues for events such as weddings may also be important. However, there was little or no evidence led of any of these matters.

[46] What is of significance is that the representation as to a 50 per cent occupancy was clearly of primary or indeed paramount importance to Ms Ameen and Mr Ahmed. When he gave evidence, Mr Van der Peet acknowledged that room occupancy was important, saying it would be a question that he would personally ask if he were looking to establish a spa business at the hotel. Mr Van der Peet also told Ms Ameen and Mr Ahmed that they would get a lot of business from hotel guests, catering as the hotel did for weddings and conferences; that guests had requested spa services and there would be good support from hotel reception.

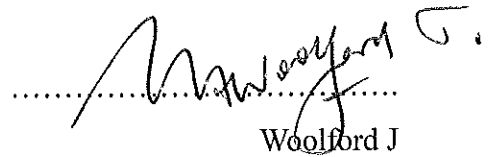
[47] Mr Carey's submission that it was not reasonable for Tamara to rely upon the representation does not, in my view, have sufficient substance to overturn the District Court findings. Apart from inferences that might be drawn from the actual income generated from hotel guests, no significant factors have been identified which demonstrate that the respondents acted unreasonably. The issue of reasonable reliance was not, for the most part, explored with Ms Ameen and Mr Ahmed in cross-examination.

[48] Furthermore, it is well established that a misrepresentation must be an effective cause but need not be the sole cause of the loss that was suffered. It is my view that the reasonableness of the decision to proceed with the lease should not be measured exclusively by what happened afterwards, given the other representations made by Mr Van der Peet about support for the spa. There was considerable evidence at trial about the lack of promised support which may well have been another cause of the loss that was suffered.

[49] The second ground of appeal also fails.

Result

[50] The appeal is dismissed. Costs should follow the event. If counsel are unable to agree I will receive memoranda.

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Woolford J