**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA130/2011**
**[2012] NZCA 163**

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|---|---|
| BETWEEN | GLENN KIPLING AND KAREN JANINE WHITE AND RODNEY THOMAS WHITE<br>Appellants |
| AND | HENDRIK VAN KAN AND WILHELMINA VAN KAN SEEGERS<br>Respondents |

Hearing: 22 March 2012

Court: Harrison, White and Asher JJ

Counsel: L Herzog for Appellants
A M Swan for Respondents

Judgment: 30 April 2012 at 2.30pm

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed in part.**

**B The summary judgment entered against the appellants in the High Court in the sum of $57,311.69 is set aside.**

**C The order for costs and disbursements made in the High Court is set aside.**

**D Summary judgment is entered against the appellants in the sum of $4,046.60.**

**E Subject to order D, the claim by the respondents is remitted to the District Court for a fixture to be allocated for a fully defended hearing.**

**F** **The respondents are ordered to pay the appellants costs for a standard appeal on a band A basis together with usual disbursements. Costs and disbursements in the High Court are to be fixed by that Court if the parties are unable to agree.**

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**REASONS OF THE COURT**

(Given by White J)

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## Introduction

[1] Glenn Kipling, Karen White and Rodney White (the guarantors) appeal against a High Court summary judgment entered against them jointly and severally in the sum of $57,311.69.[1]

[2] Hendrik Van Kan and Wilhelmina Van Kan Seegers (the Van Kans) satisfied the High Court that the guarantors had no arguable defence to the Van Kans' claim against them as guarantors of the obligations of a company called Brave Design Ltd

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1 *Van Kan v Kipling* HC Auckland CIV-2010-404-6799, 23 February 2011.

(Brave Design) under a lease of premises at 1/94 Henderson Valley Road, Henderson (the premises).

[3] The High Court Judge, Venning J, rejected the guarantors' argument that they had an arguable defence because Brave Design had been entitled to cancel the lease as a result of a misrepresentation by the Van Kans relating to the use of a right-of-way adjacent to an access way beside the premises. Adopting "a robust approach", Venning J was satisfied that no actionable misrepresentation was established on the evidence and that, even if there had been a misrepresentation, it could not have substantially reduced the benefit of the contract or have made the benefit substantially different from that represented. Venning J was also satisfied that Brave Design had affirmed the lease with knowledge of any breach and therefore lost the right to cancel.

[4] The application for the summary judgment was made and determined in the High Court rather than in the District Court because an application by Brave Design to set aside a statutory demand by the Van Kans for Brave Design's unpaid rent for the premises had already been dismissed by Associate Judge Bell in a judgment delivered on 9 August 2010.[2] Associate Judge Bell did not regard the allegations of misrepresentation as having been satisfactorily proved.[3] The Associate Judge also upheld the Van Kans' submission that the lease had been affirmed.[4]

[5] On this appeal from Venning J's decision, Mr Herzog, counsel for the guarantors, not only reiterated the submissions in the High Court relating to the allegation of misrepresentation in the context of s 7 of the Contractual Remedies Act 1979 but also relied on an allegation of misleading or deceptive conduct under s 9 of the Fair Trading Act 1986. Although the Fair Trading Act had been referred to in the guarantors' notice of opposition to the application for summary judgment in the High Court, Mr Herzog acknowledged that he had not emphasised this defence before Venning J.

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2 *Brave Design Ltd v Van Kan* HC Auckland CIV-2010-404-2623, 9 August 2010.
3 At [11].
4 At [16]–[17].

[6] The principal issue on appeal therefore is whether the guarantors have an arguable defence to the summary judgment application based on either misrepresentation or a claim of misleading or deceptive conduct under the Fair Trading Act.

**Factual background**

[7] There is no dispute that the essential factual background is correctly summarised by Venning J as follows:

> [4] Brave Design commenced trading in 2002 from premises at 1/94 Henderson Valley Road owned by the plaintiffs. A written lease was not entered into until 9 November 2006. The lease was for a term of four years from 1 September 2006. The rent for the first two years was set out in the lease and provision was made for review on 1 September 2008. The premises leased were recorded as:
>
> > PREMISES: Commercial Unit at 1/94 Henderson Valley Road, Henderson
> >
> > CARPARKS: Eight (8) (to be allocated)
>
> The business use was recorded as signwriting.
>
> [5] The defendants executed a guarantee in standard form recording, inter alia, that they guaranteed payment of the rent and the performance by Brave Design of the covenants in the lease. The guarantee also stated that as between the guarantor and the plaintiffs, the guarantor was for all purposes to be treated as the tenant, Brave Design.
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> [6] The unit at 1/94 Henderson Valley Road was one of a number of units owned by the plaintiffs at 94 Henderson Valley Road. 1/94 was closest to the road. Access to the remaining units was by way of a driveway running beside the unit at 1/94. Immediately adjacent to that driveway was a separate right-of-way for the next-door property at 94A Henderson Valley Road. 94A was owned by Silverdale Estates Limited. The plaintiffs had formerly held a right-of-way over 94A and could access their property at 94 by using the right-of-way over 94A as well as directly from the road. Although there was a separate path and drain between the driveway running beside 94 and the right-of-way over 94A, the path was bordered with chamfered kerbstones. While the kerbstones were still a physical barrier, vehicles were able to drive up and over them. From the time it commenced its occupation in 2002 Brave Design also used that adjacent right-of-way to access its premises at 1/94 Henderson Valley Road.
>
> [7] It suited Brave Design to access its premises via 94A, because that enabled it to park additional vehicles on the driveway of 94. In that way it had parking space additional to the eight car parks provided for under the

> lease. It also carried out some of its signwriting work in the driveway area. Even though this blocked access to the units of other tenants at 94 they were still able to access their units by using the right-of-way over 94A.
>
> [8] However, in 2004 the plaintiffs surrendered the right-of-way easement over 94A. From that time neither the plaintiffs nor their tenants had the right to use the right-of-way over 94A. Despite this, Brave Design (and it seems from time to time others as well) continued to use 94A as an access way to the units at 94.
>
> [9] In November/December 2008 Silverdale erected a security fence along the boundary between the driveway of 94 and its right-of-way over 94A. This prevented the use of 94A as an access way to the units at 94. Further, Brave Design was no longer able to park vehicles on the driveway of 94 as it had been accustomed to do, because the driveway was required for access to the rear units at 94.
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> [10] Issues arose between Brave Design and the plaintiffs concerning the car parks at 1/94 and access to the rear units by the other tenants. Brave Design short-paid rental for the months March to December 2009. Correspondence was exchanged.
>
> [11] The issues remained unresolved and Brave Design had its solicitors write on 27 October 2009 purporting to cancel its lease effective as of 31 December 2009. Brave Design has not paid any rent since 31 December 2009.
>
> [12] The quantum of the plaintiffs' claim is made up of:
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> | | |
> |---|---|
> | • Shortfall in rental 1 March 2009 – 31 December 2009 | $ 4,046.60 |
> | • Rental 1 January 2010 – 31 August 2010 | $32,487.28 |
> | • Interest at the default rate | $ 2,509.26 |
> | • Legal costs | $18,268.55 |
> | Total: | $57,311.69 |

[8] The quantum is not in issue.

[9] There is also no dispute that, as Venning J held,[5] the shortfall in rental for the period 1 March 2009 to 31 December 2009 of $4,046.60, that is the period preceding the purported cancellation of the lease by Brave Design, is payable by the guarantors. Summary judgment for at least that amount should therefore be entered against the guarantors.

[10] In order to understand the submissions for the guarantors, it is necessary to refer to the factual background in some more detail.

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5 At [15].

[11] We start with the terms of the written lease dated 9 November 2006. It was for a term of four years expiring on 1 September 2010. It recorded the leased premises as the "commercial unit at 1/94 Henderson Valley Road, Henderson" and referred to the allocation of eight car parks. The lease then provided:

> Lease of Premises and Carparks Only
>
> 17.1 THE tenancy shall relate only to the premises and the car parks (if any) and the Landlord shall at all times be entitled to use occupy and deal with the remainder of the property without reference to the Tenant and the Tenant shall have no rights in relation thereto other than the rights of use herein provided.
>
> ...
>
> Car parks
>
> ...
>
> 37.3 THE Tenant shall comply with the Landlord's reasonable requirements relating to the use of the car parks and access thereto and in particular shall only use the car parks for the parking of one car per parking space.

[12] There was no plan attached to the lease document showing the precise location of the premises or the car parks and no car parks were in fact allocated to Brave Design until June 2009 when the Van Kans sent Brave Design a car parking plan. Correspondence between the lawyers for the parties in August 2009 confirmed that even then there was disagreement as to the location of two of the eight car parks that were to be allocated.

[13] The absence of a plan attached to the lease and the non-allocation of the car parks meant that the lease itself was unusually informal and left open the possibility of at least some doubt or uncertainty as to the questions of Brave Design's ongoing use of the land adjacent to the right-of-way to 94A Henderson Valley Road (the right-of-way) and the Van Kans' representations as to use of the right-of-way.

[14] The next matter to refer to in more detail relates to Brave Design's actual use of the land adjacent to the right-of-way. There is no dispute that from the outset, as a result of the availability and use of the right-of-way by Brave Design and other tenants for access purposes, Brave Design had in fact used the land adjacent to the right-of-way not only for car parking but also as a workspace for sign writing on its

clients' vehicles. There is also no dispute that notwithstanding the surrender of the right-of-way by the Van Kans in 2004 Brave Design continued to use this land for these purposes until November/December 2008 when the security fence was erected.

[15] There is, however, a dispute between the parties as to when Brave Design first became aware of the surrender of the right-of-way by the Van Kans. Rodney White, a director of Brave Design, deposed that Brave Design did not know and was not advised by the Van Kans that the right-of-way had been surrendered when Brave Design entered into the lease in November 2006. He also deposed that Brave Design had been led to believe by the Van Kans that access to Brave Design's premises would be available through the right-of-way.

[16] In response to Mr White, Ms Seegers deposed that:

> 6 … We made all tenants at the time aware of the situation relating to the 94A right-of-way including Brave [Design]. In particular we advised the tenants that the right-of-way was not to be used any further, for access.
>
> 7 In 2006 when Brave [Design] entered into its formal lease it was well aware that access was not permitted over 94A's right-of-way. That is not only because Brave [Design] had been advised (as above) but also the temporary fence had been in place for some years which stopped access ...

[17] We note that Ms Seegers gave no particulars of the advice to Brave Design that the right-of-way was not to be used any further for access. She did not identify the person(s) to whom the advice had been given or when it was claimed to have been given.

[18] We also note that Ms Seegers' evidence that "the temporary fence" had been in place for "some years" and had "stopped access" was contradicted by the evidence of Jeremy Dillon, a Director of Silverdale Estates Ltd (Silverdale), the company that owned the property at 94A Henderson Valley Road. Mr Dillon deposed that:

> 5 ... From the date the property was purchased until SEL [Silverdale] erected the security fence in December 2008, no other "fence" was erected along the driveway boundary of 94 and 94a Henderson Valley Road by SEL or the Vankans [sic]. I do recall around 2004 following the [earlier] court proceedings a single rope was strung along part of

> the driveway boundary, presumably by the Vankans. This rope was initially supported on stools about a ½ metre off the ground for a few weeks. During the period the rope was on stools it was dropped to allow vehicle access from SEL's driveway to the Vankan property by Vankan's tenants and visitors. This process caused traffic blockages on SEL's driveway as the driver or some other person had to drop the rope to allow the vehicle in. After a couple of weeks the rope was just left on the ground and driven over. It eventually disappeared completely after another short period.
>
> 6 I recall that the rope was not laid along the full length of the driveway but only about 2/3rds of the rear part of the driveway away from the street frontage. Brave Design who occupied the premises closest to the street still accessed its unit from SEL's driveway over the chamfered kerbstones and was unaffected by the rope.
>
> 7 The reason SEL did not erect a security fence along the boundary until 2008 was that it was constructing a second 1,600 metre$^2$ building/development on the rear of its site at 94A and it was when this development was completed that the driveway was fenced to prevent congestion on the driveway as SEL now had additional tenants using the driveway.
>
> 8 After the security fence was erected in 2008 Mr Vankan approached SEL and indicated that as a result of the access from the driveway to his property from SELs [sic] driveway having been physically terminated his property was worth significantly less and SEL should purchase his property.

[19] The Van Kans did adduce affidavit evidence from other tenants in support of Ms Seegers's claim that the tenants had been informed that access via the right-of-way was not available and that there was a temporary rope fence erected at one stage, but this evidence was brief and generalised and, as already noted, specific evidence relating to the circumstances surrounding the temporary rope fence was subsequently given by Mr Dillon. At the very least there was a conflict on the evidence as to the circumstances relating to the rope fence.

[20] There was also a dispute between the parties as to the Van Kans' knowledge of Brave Design's use of the land adjacent to the right-of-way for work purposes, that is sign writing on its clients' vehicles. For Brave Design, Mr White deposed that:

> 2 ... We discussed our workspace requirements with Mr Van Kan prior to agreeing to lease the premises and in particular our need for large outdoor yard space.
>
> ...

> 7 In November 2008 the owners of 94a Henderson Valley Road ... without any notice erected a security fence along the common boundary between Lots 1 and 2 DP92654 [i.e 94 and 94A Henderson Valley Road]. We were shocked by this unexpected event as this action resulted in the bulk of our car parks/workspace and access being removed and the quiet enjoyment of our property was detrimentally affected. The access that was essential to be able to properly conduct our business from the premises was immediately removed. It also created an unworkable situation regarding vehicle access for the rear 4 units ...
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> ...
>
> 11 To reiterate our position, at no time were we advised by the Van Kans that the use of the ROW was not available to Brave and in fact we were encouraged by them to use the ROW. The use of the ROW allowed us to operate our business and we would never have entered in to the verbal lease in 2002 and the written lease in 2006 if we were made aware that there was a potential for losing our right of access over the ROW. We were induced to enter into the lease in 2006 by the failure by the Van Kans to advise us that the ROW was not available for access.

[21] In disputing [7] of Mr White's affidavit, Ms Seegers referred to the provisions of the lease and deposed:

> 9 For the sake of completeness we dispute the comments made in para 7 of Mr White's affidavit in particular that the unexpected erection of the security fence along the common boundary in 2008 resulted in the bulk of their car parks, workspace and access being removed. The lease provided for the workspace to be confined to the premises. There was no provision in the lease for Brave [Design] to carry out any works outside its premises. The only outdoor area that Brave [Design] agreed to lease were eight spaces for car parking only. We did not remove any car park space. Brave [Design] had eight car parks and still had eight car parks when it vacated. Again as previously stated the access to Brave [Design's] unit hadn't changed with the fence being in place. The main entrance to their premises was from Henderson Valley Road which was right in front of their premises. That is how they always accessed their premises.
>
> 10 In the circumstances we cannot see how Brave [Design] could lose any business due to access issues. Brave [Design] leased premises within which it carried out its business. It had direct access to those premises and neither used nor required access from any other place on the property.

Significantly, however, this evidence is largely a summary of the terms of the lease which is not in issue and Ms Seegers did not respond specifically to Mr White's evidence in [2] and [11] of his affidavit that the Van Kans knew about Brave Design's need for an outdoor workspace and encouraged Brave Design to use the

right-of-way.

[22] Finally, as far as the factual background is concerned, it is necessary to refer to the correspondence between the lawyers for the parties that occurred following the erection of the security fence in November/December 2008:

(a) On 7 January 2009 the solicitors for the Van Kans wrote to Brave Design and advised that:

> For many years we have used the driveway, although we knew it was not ours to use. Unfortunately this now has to change, and as you are well aware it is effective immediately.

(b) On 7 April 2009 Brave Design's lawyers responded that under the circumstances:

> the most appropriate course of action may now be for your client and our client to mutually agree to terminate the lease.

Brave Design's position was recorded as:

> that it may well have been known to you that the driveway was not "ours to use" but that was not our client's knowledge or understanding, and our client entered into its lease of the premises strictly upon the basis that such access would be available to it …
>
> …
>
> … As you well know, the nature of our client's business requires that such access to the side entrance of our client's business is an absolute requirement.

(c) On 27 October 2009 Brave Design instructed its lawyers to write to the Van Kans' lawyers purporting to cancel the lease effective as of 31 December 2009. The lease was cancelled on the basis that Brave Design had been induced to enter into the lease by the Van Kans' representation that access to the premises would be available by way of mutual right-of-way, shared by the property of which the premises formed part, and the immediately adjoining property.

[23] There was evidence for the guarantors explaining that Brave Design did not abandon the premises immediately when the permanent fence was erected because their business would have been destroyed. They attempted through their lawyer to negotiate a resolution to the sudden loss of access, but no resolution was reached which resulted in the cancellation.

[24] Notwithstanding this, Brave Design continued to pay rent until 31 December 2009, the date from which it purported to cancel the lease.

**High Court judgment**

[25] As already noted, Venning J rejected the arguments for the guarantors and held that there was no misrepresentation by the Van Kans to justify the cancellation of the lease by Brave Design. Venning J also held that, in any event, Brave Design, by continuing to pay rent until 31 December 2009, had affirmed the term of the lease.

[26] On the misrepresentation issue, Venning J summarised the relevant evidence and concluded:

> [29] However, it is inherently improbable that the plaintiffs would have made such a positive representation to Brave Design and its principals in 2006 when the written lease was entered into, given that by then the plaintiffs had surrendered any right-of-way they had over it (in 2004). The plaintiffs knew that neither they (nor their tenants through them) had any legal access over 94A. Further, on the evidence of the independent witnesses, the plaintiffs had erected at least a temporary fence between 94 and 94A prior to 2006 and made the legal position clear to their tenants. Even Mr Dillon, the defendants' witness confirms the existence of such a fence, although he questioned its efficacy. Given the rope fence (which Mr White says nothing about in his evidence) the defendants cannot rely on the alleged misrepresentation by silence or conduct. The plaintiffs' conduct in erecting the rope fence was entirely inconsistent with any suggestion the defendants were entitled to continue to use the right-of-way over 94A. There is little in the chamfered kerbstones point. Whatever "encouragement" to use the right of way over 94A they might have offered was met by the clear impact of the rope fence.
>
> [30] I am satisfied a robust approach is appropriate to this application. The evidence satisfies the Court that Brave Design was not induced to enter into the lease in 2006 by an actionable misrepresentation – whether positive, by conduct or by silence – that it was entitled to use the right-of-way over 94A. The evidence, notably that of the independent witnesses, satisfies me

that the plaintiffs made it clear at that time (2006) there was no such legal entitlement.

[31] It may well be that from time to time the parties, including Brave Design, continued to access premises at 94 by using 94A but they did so in the knowledge that there was no formal right to do so

[32] Further, even if there was a misrepresentation that 94A could be used to access unit 1 the representation could not have substantially reduced the benefit of the contract or have made the benefit substantially different from that represented because Brave Design always had alternative access to its property from the road frontage on Henderson Valley Road. Brave Design did not require the access from 94A to access its premises under the lease. There is nothing in the access point.

…

[34] The car parks that Brave Design had allocated to it under the lease were allocated to allow the other tenants to use the driveway of 94 past unit 1 to access their units. Brave Design's use of access from 94A by it (and by other tenants at 94 when Brave Design blocked the driveway of 94) was a matter of convenience. By using that access, Brave Design may have been able to park vehicles on the driveway of 94 and thereby enjoy more than the eight car parks bargained for under the lease, but when the legal position was asserted by Silverdale it can hardly be said that affected the benefit or burden of the lease.

[27] On the affirmation issue, Venning J said:

[35] Finally, Brave Design affirmed the lease with knowledge of any breach. On the defendants' case, when Silverdale erected the security fence in November 2008 that came as an absolute shock to them, and was contrary to their understanding of the arrangements. The result was, on Mr White's evidence, "chaotic" as they could not carry out their business:

> The access that was essential to be able to properly conduct our business from the premises was immediately removed. It also created an unworkable situation regarding vehicle access for the 4 rear units.

[36] Despite that serious and immediate effect, Brave Design remained in the premises and paid rental at an unabated (indeed increased) rate until February 2009. Brave Design then did reduce the rental paid, paying it at an abated figure from March 2009 until 31 December 2009. But it only sought to cancel by letter of 27 October 2009. In the circumstances s 7(5) of the Act and cl 41.1 of the lease apply:

> Affirmation
>
> 41.1 A party to this lease shall not be entitled to cancel this lease if, with full knowledge of any repudiation or misrepresentation or breach of covenant, that party affirmed this lease.

> [37] Apart from reducing the rental paid from March 2009 (which seems to have been in response to an issue concerning the car parks) the earliest complaint in terms of formal correspondence appears to be a letter from the defendants' solicitors of 7 April 2009. By remaining in possession and paying rental during 2009 Brave Design affirmed the lease and lost the right to cancel.

[28] As already noted, Venning J did not address the question of misleading or deceptive conduct under the Fair Trading Act because it was not raised in the High Court.

**The issues on appeal**

[29] There is no dispute that the relevant summary judgment principles were correctly stated by Venning J[6] by reference to the judgment of this Court in *Krukziener v Hanover Finance Ltd*:[7]

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

[30] There was also no dispute that the question whether the guarantors have any defence to the Van Kans' claim against them under their guarantee depends on whether the evidence before the Court raises any factual issues that require resolution at trial. It is accepted that each of the defences relied on by the guarantors involves issues of fact.

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6 At [13].

7 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162.

[31] Under s 7(4)(b) of the Contractual Remedies Act, cancellation is permitted when the misrepresentation or breach substantially reduces the benefit of the contract to the cancelling party or makes the benefit or burden of the contract substantially different from that represented or contracted for. As the relevant case law confirms,[8] the existence of a representation inducing a contract with the requisite impugned consequences is essentially a question of fact in the circumstances of the particular case.

[32] Under s 43(2)(a) of the Fair Trading Act, the Court may make an order declaring a contract void from the outset when a person's misleading or deceptive conduct in contravention of s 9 of that Act has caused loss to another person. Again, as the relevant case law confirms,[9] the existence of such conduct is essentially a question of fact in the circumstances of the particular case.

[33] Finally, under s 7(5) of the Contractual Remedies Act a party is not entitled to cancel a contract if, with the full knowledge of the repudiation or misrepresentation or breach, the party has affirmed the contract. As the relevant case law confirms,[10] affirmation or election requires an unequivocal choice between two inconsistent causes of action. Whether there has been an election is determined by an objective assessment of the party's actions, and may be imputed irrespective of actual intention or subsequent rationalisation. Again, a question of fact is involved which is to be determined in the circumstances of the particular case.

[34] As recognised by the summary of the authorities referred to in the judgment of this Court in *Krukziener*, the question whether a defendant to a summary judgment application, who raises defences involving factual issues, has a defence to the claim will depend on an assessment of the affidavit and documentary evidence adduced by the parties. A trial will normally be required when there are material

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8 *Progeni Systems Ltd v Hampton Studios Ltd* HC Christchurch CP105/86, 11 August 1987 at 36–40; *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA) at 284–285; *Jolly v Palmer* [1985] 1 NZLR 658 (CA) at 663; *Westpac Merchant Finance Ltd v Winstone Industries Ltd* [1993] 2 NZLR 247 (HC) at 255; and *Sharplin v Henderson* [1990] 2 NZLR 134 (CA) at 137.

9 *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1 (CA) at 39; *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [26]–[28].

10 *Jansen v Whangamata Homes Ltd* [2006] 2 NZLR 300 (CA) at [13]–[18]; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] AC 788 (HL); *Oxborough v North Harbour Builders Ltd* [2002] 1 NZLR 145 (CA) at [8]; and *Jolly v Palmer* at 663.

conflicts in the evidence or an assessment of credibility of deponents is required. Not all conflicts in the evidence or differences between deponents will, however, be material or require resolution. The Court is entitled to take a robust and realistic approach, recognising that the assessment of evidence is a matter of judgment. The evidence of a deponent might be rejected as inherently lacking credibility where it is inconsistent with undisputed contemporary documents or other statements by the same deponents or is inherently improbable. At the same time in some cases the nature of the defences raised and the scope of the factual issues requiring resolution will mean that the real and material evidentiary conflicts will be sufficiently significant to require a trial. Summary judgment should not be entered if the Court is left with any real doubt or uncertainty.

[35] Adopting this approach in the present case, the essential issues on appeal therefore are:

(a) whether, as Venning J found,[11] it was, on the evidence before the Court, "inherently improbable" that the Van Kans would have made the alleged misrepresentation;

(b) whether, as Venning J found,[12] if there was a misrepresentation it could not have substantially reduced the benefit of the contract or have made the benefit substantially different from that represented;

(c) whether, on the evidence, an arguable defence of misleading or deceptive conduct was available; and

(e) whether, as Venning J found,[13] Brave Design affirmed the lease with knowledge of any breach.

[36] It is convenient to address the issues and the submissions for the parties separately.

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11 At [29].
12 At [32].
13 At [35]–[37].

**Misrepresentation?**

[37] In our view the evidence before the Court gave rise to real doubts or uncertainty between the parties as to Brave Design's ongoing use of the land adjacent to the right-of-way to 94A Henderson Valley Road for both parking and workspace purposes. In these circumstances, and bearing in mind that there was no dispute that Brave Design in fact continued to use the land adjacent to the right-of-way for these purposes until November/December 2008 when the security fence was erected, there is a real possibility that Brave Design's use of the land was as a result of a misrepresentation.

[38] Against this background, when it comes to the assessment of the conflict in the evidence between Mr White for the guarantors and Ms Seegers, we consider that real and material evidentiary conflicts are involved requiring resolution at trial. We do not agree with Venning J that it was necessarily "inherently improbable" that the Van Kans would have represented that Brave Design could continue to use the right-of-way for access purposes and the land adjacent to the right-of-way for parking and workspace purposes in 2006 when:

(a) Brave Design in fact continued to do so.

(b) It was reasonably likely that the Van Kans would have been aware of Brave Design's continued use of the land in that way or at least this is an issue that requires determination at trial.

(c) There was no specific evidence from Ms Seegers that she told any particular representative of Brave Design that the Van Kans had surrendered the right-of-way.

(d) The evidence of Mr Dillon indicated that the rope fence was temporary and ineffective. As Mr Herzog submitted, the evidence showed that the position, duration, composition and efficacy of the rope fence was at least conflicting and did not necessarily support the view that it made the position clear to the Van Kans' tenants and

particularly to Brave Design when it appears that the rope fence did not even reach that part of the right-of-way adjacent to their premises.

(e) The evidence of the four tenants that they had been informed by the Van Kans, prior to 2006, that access via the right-of-way was not available does not sit comfortably with the statement by the Van Kan's lawyers in their letter of 7 January 2009 that:[14]

> For many years we have used the driveway, although we knew it was not ours to use. Unfortunately this *now* has to change, and you are well aware it is *effective immediately!*

(f) Mr Dillon's evidence that after the security fence was erected in 2008 Mr Van Kan told him that the loss of access to his property from the right-of-way had reduced the value of his property also tends to confirm that, contrary to the evidence of the independent witnesses and Ms Seegers, the right-of-way had been used for access to the Van Kan's property until that time.

[39] There is therefore no basis for rejecting, without the opportunity for cross-examination and an assessment of credibility, the evidence of Mr White who said that he was unaware until the fence was erected in November/December 2008 that the right-of-way was not available.

[40] The issue whether there was a misrepresentation therefore needs to go to trial. In particular we are not satisfied that there is no arguable defence that the Van Kans induced Brave Design to believe that they could use the right-of-way for access and the land adjacent to the right-of-way for parking workspace.

**Substantial reduction of benefit of contract or benefits substantially different?**

[41] In our view if the guarantors were able to establish that the Van Kans had induced Brave Design to enter into the lease on the basis of either a statement or their silence as to the use of the land adjacent to the right-of-way for both parking

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[14] Emphasis added.

and work purposes then this misrepresentation could well have substantially reduced the benefit of the contract or have made the benefits substantially different from that represented. This is because once the security fence was erected and the right-of-way was no longer available Brave Design was unable to use the land adjacent to the right-of-way in the manner in which it had previously been able to do so for the apparent benefit of its business.

[42] If Venning J meant that because the use of the car parks and land adjacent to the right-of-way was not referred to in the lease, its loss could not substantially reduce the benefit of the lease, then we would disagree. Such an approach seems to limit a claim that a misrepresentation has caused a contract to be substantially less beneficial to a loss of benefits that are included in the contract. But misrepresentation, by definition, is about loss caused by pre-contractual statements that are not terms of the contract.[15] And s 6(1)(a) of the Contractual Remedies Act provides that a person is entitled to damages for misrepresentation as if the misrepresentation was a term of the contract that had been broken. In other words, given that the appellant's claim is that the lease was represented to them to give *more* benefits than those actually included in its terms, the claim cannot be rebutted by pointing to the terms of the lease.

[43] We also disagree with the formulation of the representation advanced by Mr Swan on appeal. The representation allegedly relied on by Brave Design was not limited solely to the question of access to its unit. The focus was on the use of the land adjacent to the right-of-way for parking and workspace purposes, which arose from the informal and uncertain nature of the lease coupled with the fact that Brave Design had used that land for those purposes.

**Misleading or deceptive conduct?**

[44] Given that it is arguable that there was a misrepresentation which arguably caused a substantial reduction in benefit, it is also arguable that the requirements of

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[15] See Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [11.1].

the Fair Trading Act for a successful claim of misleading or deceptive conduct causing loss may be made out.

**Affirmation?**

[45] Following the erection of the security fence in November/December 2008 and the receipt by Brave Design of the letter of 7 January 2009 from the lawyers for the Van Kans, the lawyers for Brave Design made Brave Design's position that it had been wrongly induced to enter into the lease clear in their letter of 7 April 2009. Brave Design immediately proposed termination of the lease and its position did not change until notice of cancellation was given on 27 October 2009.

[46] The fact that Brave Design paid rent from April 2009 until it was able to vacate the premises after it cancelled the lease on 31 December 2009 does not necessarily mean that Brave Design had affirmed the lease with knowledge of the Van Kans' breach. The explanation given by the guarantors for Brave Design's delay in vacating the premises, if upheld at trial, might enable them to answer the affirmative defence of affirmation which the Van Kans have raised.

[47] In particular, on the evidence currently before the Court, it could not be said that Brave Design took unequivocal steps to affirm the lease. Mr White deposed that an attempt was made to negotiate a solution after the erection of the security fence. No details of the negotiations were given, but the fact that there were negotiations does not suggest an unequivocal commitment on the part of Brave Design to continue with the lease. As Ms Seegers does not refer to the issue of affirmation in her affidavit, it is at least open to argument that, despite continuing to pay the rent, Brave Design did not affirm the lease.

[48] This is not a case where the tenants have simply remained in occupation without complaint or any attempt to negotiate. Here the tenants remained in occupation, after the negotiations, only until they were able to arrange alternative premises.

**Summary**

[49] We accept that Venning J's "robust" approach may well be vindicated at trial, but in our view there are sufficient doubts and uncertainties in the evidence at this stage to require a trial. We are not satisfied that the guarantors have no arguable defence to the case against them.

[50] In view of the amount involved in this summary judgment application, however, the case should now be heard in the District Court. We propose that the case should be remitted to that Court for a fixture to be allocated for a fully defended hearing.

**Result**

[51] For the reasons we have given the appeal is allowed and the summary judgment entered against the guarantors in the High Court in the sum of $57,311.69 is set aside. Summary judgment will be entered against them in the undisputed sum of $4,046.60. Subject to that order, the claim by the Van Kans is remitted to the District Court for a fixture to be allocated for a fully defended hearing.

[52] The Van Kans are ordered to pay the costs of the guarantors in this Court for a standard appeal on a band A basis, together with the usual disbursements. Costs and disbursements in the High Court are to be fixed by that Court if the parties are unable to agree.

Solicitors:
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