EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT NELSON

CIV-2014-042-000044
[2017] NZDC 21977

BETWEEN	ANTON WEBER AND SYLVIA KATHARINA WEBER First Plaintiffs
AND	MOUNTVIEW ENTERPRISES LIMITED Second Plaintiff
AND	RICHMOND LAW Defendant

Hearing:	18, 19, 20 and 25 September 2017
Appearances:	Mr G M Downing for the Plaintiffs Mr A Darroch for the Defendant
Judgment:	10 October 2017

RESERVED JUDGMENT OF JUDGE B DAVIDSON:
[Claims for breach of fiduciary duty and/or breach of the Fair Trading Act 1986]

The Claim

[1] Both plaintiffs ("the Webers" first plaintiffs; "Mountview" second plaintiff) claim damages for breach of fiduciary duty and/or misleading or deceptive conduct under s 9 Fair Trading Act 1986 against the defendant ("Richmond Law") who acted as their lawyers over an 11 year period from 2002 to mid-2013.

[2] The damages sought are:

(a) lost goodwill on a commercial motel lease - $90,000;

(b) lost chattels (less fair wear and tear) - $120,000;

(c) reimbursement of legal fees - $16,185.13;

(d) general damages - $50,000;

(e) interest from 21 February 2014;

(f) costs.

[3] Both the Webers and Mountview abandon any claim over the then applicable District Court jurisdictional cap of $200,000.

[4] The essence of the claim is that Richmond Law failed to properly advise and/or disclose to the Webers and Mountview that an agreement for the sale of a freehold property at [address deleted], Tahununui, Nelson on 9 November 2003[1] by the Webers, as trustees of their family trust, included chattels for a 10 unit motel complex to be built on the site ("the motel chattels"). These chattels, the Webers and Mountview claim, should have been retained by Mountview as the tenant under a registered lease from the purchaser (Mr Cant/Rocklea Family Trust); and without ownership of them its leasehold interest became valueless.

[5] Richmond Law says that the motel chattels were not sold along with the freehold to the landlord. Richmond Law's advice, or lack of advice, was neither incorrect or lacking; and if it was, it amounted to an isolated one-off act of negligence, now time-barred, and which could not form the basis of a claim for breach of fiduciary duty, or misleading conduct; and in any event, no loss has accrued to the Webers or Mountview.

[6] Much of the background evidence is undisputed; there are, however, 4 critical issues that require my resolution:

- were the motel chattels sold to the landlord?
- just what was Richmond Law's advice, or non-advice, to the Webers on the motel chattels?

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[1] The sale was settled nearly a year later on 23 September 2004

- have the Webers and/or Mountview proved, on the balance of probabilities, a breach by Richmond Law of its fiduciary obligations to them or misleading/deceptive conduct?

- what if any were Webers and/or Mountview's losses?

[7] Clearly these are a mixture of factual and legal issues.

[8] I will deal with the facts chronologically resolving where necessary these issues.

Events leading to the signing of the agreement

[9] The Webers immigrated to New Zealand from Germany in 1998. At the time, English was not their first language. By the time of the hearing before me in 2017, I found Mr Weber's command of English to be relatively good. However, it has to be said that his command of English at the time of the critical events in 2003 and 2004 may not have been as good. In the end, nothing turns on this.

[10] In 2001 they purchased a property at [address deleted], Tahununui, Nelson. Later that year, and in early 2002, Mr Ray Carter, who was then a partner in Richmond Law, acted for them when a mortgage was registered against the title. Later in 2002 he acted for them again when the Weber Family Trust was formed and the [address deleted] property transferred to the Trust.

[11] It is clear that the Webers planned a motel development on the site from early 2003, possibly earlier. More formal advice of the necessary legal structure for the development seems, however, not to have been taken by the Webers, initially from their accountants, until the end of 2003. The accountants, West Yates, in turn discussed the structure with Ray Carter in December 2003 and January 2004.

[12] In essence, the recommended legal structure was as follows:

12.1 a company, Mountview, to be formed to become the lessee of the motels under a registered lease from the Weber Family Trust;

12.2 the shares in Mountview to be owned by a new trust, Ansil Trust, whose beneficiaries were the Webers and their children;

12.3 the Weber Family Trust to develop the motel buildings and their fitout and to then sell the freehold, subject to the lease to Mountview.

[13] Ultimately the aim, it seems to me, was to sell the property for something in the region of $1.1m to $1.2m, having spent around $650,000 building the motels and $100,00 or thereabouts fitting them out. This would have the practical effect of releasing some capital to the Webers and allowing them an income by operating the motel as leaseholders.

[14] As I will come to shortly, in reality three key aspects had to occur for this structure to be put in place:

- a contract for the sale of land;
- a warranty to the purchaser of the land for the development of buildings on the freehold with accompanying assurances in respect of the nature and quality of those buildings as an income-generating asset;
- a lease of the motel business.

[15] What occurred, as I will come to next, however, was a contractual arrangement that blurred and confused these key aspects. I see this, as I will attempt to explain, as colouring much that later occurred.

[16] Between 28 October 2013 and 9 November 2013 an *"Agreement for Sale and Purchase of Real Estate"* was drafted, amended and concluded. This was on a standard form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society; a form in common use for the sale of land and buildings at the time. The Weber Family Trust was vendor; Mr P H Cant, as agent for the Rocklea Family Trust, was purchaser.

[17] However, read as a whole it was more than a mere agreement for sale and purchase of real estate. It was also a development-type contract for the motel units and their fitout and for the lease of the business.

[18] This agreement is at the heart of the case; the Webers and Mountview say it had the effect of selling the motel chattels to the purchaser, the Rocklea Family Trust,

which became the landlord. On the other hand, Richmond Law now says it did not, although prior to the hearing it had said that it may have.

The agreement itself

[19] The issue of the chattels first appears on page 1 of the agreement as:

> **CHATTELS**
>
> The following chattels **if now situated on the property** are included in the sale. [emphasis mine]
>
> *(strike out or add as applicable):*
>
> STOVE TV AERIALS FIXED FLOOR COVERINGS BLINDS CURTAINS DRAPES TELEPHONES LIGHT FITTINGS
>
> as per attached appendix

[20] None of the items listed in the preformatted contract were struck out. The words *"as per attached appendix"* were added.

[21] Richmond Law say this whole portion needs to be read subject to the words *"if now situated on the property"*. Put simply, it says no chattels were situated on the property when the agreement was signed, so none are included. On the other hand, the Webers and Mountview say these words could only logically relate to the preformatted list of chattels and that the words *"as per attached appendix"* clearly added the chattels listed in the appendix into the sale of the freehold.

[22] The chattels list itself is clearly a mixture of chattels and fittings. It includes obvious fittings for a motel fitout such as bench tops, cupboards, stove, cook tops, splash back tiling, kitchen units, toilet bowls, carpets, vinyl and the like. These cannot be regarded at all as the kind of chattels that might normally be identified in a standard form agreement for sale and purchase of land and buildings. To my mind, the list carries the whole flavour of a list of chattels and fixtures that might be contained in a development contract.

[23] A number of special conditions are also relevant:

> 1.1 This contract is entered into on the basis that the Vendor is to construct on the property a Motel complex containing 10 motel units and a

Managers flat, all to be erected in accordance with the plans and specifications annexed hereto and marked "A" including full chattels fitout as per Chattels List as attached.

…

2.3 The Vendor covenants that all resource consents have been obtained and that they will, with all due diligence, preceded as quickly as if practicable to commence and complete the construction of the motel complex.

In particular, and without limiting the generality of the foregoing, the vendor shall use their best endeavours to ensure that the motel complex is complete and fitted out not later than the 1 September 2004, so that the whole of the motel complex is ready for occupancy and accommodation of guests and this agreement can be settled not later than 30 September 2004.

…

2.7 For the avoidance of doubt, it is recorded that the Vendor shall be required to complete not only the works authorised by the resource consent and building consents, but also such other ancillary works as may be required to finish the motel ready for occupancy, including:

- The finishing of fall paths and driveways
- Removal of building waste
- The landscaping of the site
- Installation of required fittings and fixtures and completion of appropriate signage
- Installation of telephone lines
- Interior decoration of all units including the laying of all floor coverings and including curtains and drapes
- Supply of all fittings, fixtures and chattels necessary for the usual operation of a motel business (but excluding furniture in the manager's accommodation area) and
- The installation and commissioning of all the above to the "top of the range" quality and standard referred to in the Chattels List.

…

2.10 The Vendor shall ensure that all contractors and sub-contractors are paid on due date to the end and intent that no lien or retention of title shall apply in respect of the work associated with the construction of the motel complex. The Vendor shall on or before the possession date provide an undertaking that all costs, expenses, charges, claims of any kind whatsoever relating to the construction and fitout of the "Motel

Complex" have been paid and satisfied in full and the vendor further fully and wholly indemnifies the Purchaser with respect to any such claims etc. whensover they might arise.

…

6.2 The Vendor shall retain and operate the Business and Lease as per the conditions of the Lease. [This was amended from the draft which read:

"6.2 The Business and Lease of 30 years is to be sold by the vendor together with all the chattels as per appendix ( ). Should the Business and Lease NOT be sold by the 1 September 2004, the Vendor shall operate the Business and Lease as per the conditions of the Lease."

…

6.5 The following terms are not included in the purchase price, and if required will be paid for by the Lessee.

(1) Sky TV and decoders for Sky TV

(2) Eftpos Terminal

(3) Bedspread

(4) Towel and Linen for beds

(5) The annual rent for gas bottle

[24] I have already said that this was a multi-purpose contract. It sold the land and buildings to be erected, so that a motel business could be up and running by settlement in 11 months time in September 2004. It ensured, by putting an obligation on the vendor as developer, that when the purchaser settled in full, the vendor, as tenant, could be assured that the motel business could generate sufficient income to meet its rental obligations ($101,000 per annum), which after all was a 10% investment return for the purchaser. In my view, such a conclusion is inescapable; this contract was designed to sell the land and buildings to be erected to ensure that the purchaser could be guaranteed that the vendor's cash flow (as tenants under the lease) from the motel would be sufficient to meet the rent. Critical to that, of course, would be an assurance, as is obvious from some of the contractual terms that I have mentioned, that the motels were fitted out ready for occupancy and income as at the date of settlement.

[25] That conclusion is reinforced by a consideration of what else the contract, as a whole, contained. It included:

- sale of land and buildings to be erected;
- title documents;
- motel plans and specifications;
- land information memorandum;
- utilities information;
- resource consent information;
- chattels list;
- lease to be registered against title.

[26] As well, 2 clauses of the lease, in my view, make it clear that the lessee owned the chattels:

> 37.1 The Lessee shall not without the prior consent in writing of the Lessor give or agree to give over all or any of the Lessee's stock-in-trade, furniture or other chattels ("The Lessee's chattels" in or upon the premises or execute any Bill of Sale, Mortgage, Lien, Declaration of Trust or any other document whatsoever that transfers or purports to transfer the ownership or right to the possession of all or any of the Lessee's chattels or that confers or purports to confer any right in equity to all or any of the Lessee's chattels but such consent is not to be arbitrarily or unreasonably withheld.
>
> …
>
> Lessor to Purchase Chattels
>
> 41.1 The Lessor will purchase from the Lessee the Lessee's chattels used in connection with the business conducted on the premises at the termination of the Lease for whatever cause and the purchase once thereof shall be the price agreed upon between the parties or if they are unable to agree at the price fixed by two Valuers (and in the case of their disagreement by their Umoire) one Valuer to be appointed by the Lessor and the other by the Lessee and such price shall be the value of the chattels in situ on the demised premises based upon replacement cost less fair wear and tear and the purchase price shall be paid to the Lessee by the Lessor immediately the purchase price is determined aforesaid.

[27] In my view, if the landlord owned the chattels, either or both of these clauses would simply be unnecessary and redundant.

4 November 2003

[28] Events of the 4th November 2003 are important. These events provide the foundation stone for the claim.

[29] Time records show that the Webers attended Mr Carter for some 51 minutes that day; the time record notation being *"go through agreement – change – ring to Darren Mark at West Yates"*.

[30] Before reviewing the evidence from the 2 critical witnesses, Mr Weber and Mr Carter about this meeting, it is necessary for it to be put in some context. The meeting occurred on 4 November 2003, nearly 14 years ago. The meeting lasted around ¾ of an hour. It must be seen against what documents are now available and an obvious flurry of activity to conclude the agreement. Mr Carter's file has long since been destroyed. Some, but not all, contemporaneous documents are, however, still available. When both were first asked to recall events it was August 2012 over 9 years later. Initially neither had recourse to any documents, but committed themselves to positions about that meeting without consideration of such documents.

Weber's Evidence

[31] Mr Weber says that on 4 November 2003, he and his wife met with Mr Carter for advice on the offer. He says they went through the agreement and the handwritten amendments. The accountant was telephoned during the meeting. The sale price was amended to $1.2m. Mr Weber says that Mr Carter did not advise he and his wife to reject any of the handwritten amendments, simply to just initial them. After the meeting they took the countersigned agreement and delivered it to the agent. Soon after they received the agreement back, counter-offered at $1.15m and accepted this without further referral to Mr Carter as the amendment only affected sale price and rental.

[32] Significantly, Mr Weber says:

> 14. My understanding at the time was that the chattels list was added into the agreement to give an indication of the quality of the motel chattels that would be in the units once built. I certainly did not understand that the handwritten amendments transferred the motel chattels to the

owner of the freehold. That would not have made any commercial sense.

15. I note that Ray Carter has given evidence previously in this proceeding that while the sale agreement was still conditional he met with me and discussed the chattel issues and told me to sleep on it and come back the next day to discuss further. I don't recall him saying those words. I do not recall coming back the following day for a second meeting. But I do recall us having discussions about the handwritten amendments Mr Cant wanted in relation to the chattels. Mr Carter never advised us that the amendments meant the lessee of the motels would not own the chattels.[2]

[33] When cross-examined, Mr Weber accepted that the timesheets helped him settle the date of these events of 4 November 2003. In cross-examination he said:

Q. Well Mr Carter says that he discussed the fact the chattels list mixed up fitting and fixtures with the chattels. Do you recall that?

A. He never mentioned anything to us, he never mentioned anything.

Q. But you had a discussion with him about it?

A. We had discussion of the chattels in us saying listen the chattels list just included to show the finished product at the end of the construction that's it.

…

Q. Did he ever mention the fact that the chattels list included fixture and fittings?

A. No.[3]

…

Q. So what you just said in your evidence at this morning and repeated to me just now was that Mr Carter discussed with you the handwritten alterations. Do you remember that?

A. We just talked about, we virtually discussed, we just talked about this, the chattels is just included for to show the purchaser the quality of the finished products. He didn't discuss with us it could be this and it could be this and we could lose the chattels or whatever.

Further:

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2 Evidence statement 3 October 2016

3 Page 116 Notes of evidence

> A. I just know there was definitely no discussion on the amendments that discussion means they own the chattels. If you do this like this the chattels could be seen as belonging to the lease or it's a worry for me or whatever you can lose the chattels in the sale. There was no discussion like this.[4]

[34] So Mr Weber, in effect, says there was no advice from Mr Carter that the effect of the agreement was that the chattels had been sold. Ownership of motel chattels by the tenant, he said, would accord with commercial commonsense. Mr Weber says that thereafter he insured, depreciated, obtained valuations, raised finance, and reflected ownership of the chattels in annual accounts, all as if they were owned by him.

[35] Mr Weber's reaction when this was first raised in 2012 by Mr Whittle, who was then acting for them after Mr Carter had retired, is consistent with his evidence. When he saw the landlord's letter of 15 August 2012, in which the landlord first asserted ownership of the motel chattels, he told Mr Whittle that the chattels list was there only to show the purchaser the nature and quality of the fixtures included in the sale. He confirmed this in notes sent to Mr Whittle around the same time, after the landlord's letter of 15 August 2012 and before Mr Whittle's reply of 23 August 2012.

Evidence of Richmond Law

[36] Richmond Law's position shows a u-turn in explanation, as given before and at trial.

[37] In an email of 23 August 2012 from Mr Whittle to Mr Weber he said:

> I have spend some time going through the lease and the original sale and purchase agreement. Ray Carter was also in the office this week and we talked about it, **although his memory was only of the agreement and lease being somewhat rushed to get it done on time.**
>
> In any event there is some uncertainty as on the face of it the agreement for sale does seem to suggest that all the chattels were sold. That is probably not what was intended and is at odds with the lease. This is the basis of our argument (as you will see in my letter).

[38] A year later, on 19 September 2013, when first replying to notice of a potential claim by the Webers and Mountview, Richmond Law said:

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[4] Pages 118 – 119 Notes of evidence

We have consulted with the former partner, Ray Carter, of Richmond Law who dealt with this matter for the Webers in 2004. He certainly does not agree with your assertion that your client made it clear at all times that chattels were to be property of them.

Ray Carter's confirms that the transaction unfolded as follows:

- In 2003-4 Mr Weber was under pressure to pay for the build of the motel.
- Mr Weber had a conditional sale to Mr and Mrs Cant but that was withdrawn.
- Mr Weber was unable to get further funds from his bank and he had considerable bills owed to other trade creditors.
- When Mr Cant came back Mr Weber was desperate. There was some back and forth with some contractual matters including an alteration made to the contract by Mr Weber without authority or discussion with Ray Carter.
- Before the contract became unconditional Ray Carter realised that Mr Cant's alterations to special condition 1.1 and the inclusion of "as per attached appendix" in the chattels on page 1 **of the contract document meant the normal lease chattels were also to be sold.**
- Ray Carter fully discussed this with Mr Weber while the agreement was still conditional. Ray Carter explained to Mr Weber the potential loss of the sale, the depreciation issues on the chattels, the replacement of worn out chattels and that some time in the future the ownership may have to be resolved.
- Ray Carter advised that Mr Weber slept on the problem overnight and met the next day and decided not to raise the issue.

[39] In his evidence statement in preparation for trial, Mr Carter said as follows:

…

14. The discussion that I had with Mr Weber related to the issues I had with the agreement. **My concern was about the fact that the chattels had been included in the sale.** This was not usual in this situation. The letter from Berry & Co indicated there was an opportunity for Mr Weber to either re-negotiate or cancel the agreement.

…

16. **I explained my concerns about the possibility that the agreement could be viewed as saying that the landlord owned the chattels.** I mentioned issues such as depreciation and whether the landlord would have to replace any damaged or worn out chattels. I recall that I was nervous to some extent as to what possibilities might occur in the

> future. I told Mr Weber that he should think about it overnight and then we could talk again.
>
> …
>
> 18. The time records and the documents confirm my recollection of the sequence and my discussions with Mr Weber. **Again, I discussed the issue of the chattels with him** and suggested he take some time to consider his position. He had the option of raising and clarifying the issue or he could choose to confirm the agreement as it was.
>
> 19. When Mr Weber responded to me, he was clear that he did not want to negotiate further, he wanted me to confirm the contract and that was on the basis of just agreeing to the amendment to the painting clause in the lease.[5]
>
> …

[40] Mr Carter's u-turn emerged at the hearing. Under cross-examination he said it was clear to him when he saw the contract that the chattels had not been sold with the freehold. He says, however, he was concerned about the sloppy drafting of the contract and raised the possibility that this should be clarified. He said:

> Just go through that again, your belief? [question from me]
>
> A. Was that the chattels did not pass to the purchaser because the words *"the following chattels, if now situated on the property are included in the sale"*. And the chattels obviously were not included in the property, they were not on the property.

Further:

> I had no doubt that the chattels remained the property Mr and Mrs Weber. The confusion I think is my wording in the evidence statement. … when I say *"included in the sale"* I meant put on the front page of the document. I didn't mean that I was afraid that the chattels would pass to the purchaser.
>
> Q. So you mean what you meant by that sentence is my concern was about the fact that the chattels had been included in the sale document?
>
> A. Yes included in the front page of the document.[6]

[41] At the hearing Mr Carter went on to explain that when he was first asked by Mr Whittle to recall these events in August 2012, 3 years after his retirement, he had

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5 Evidence statement of 4 November 2016

6 Notes of evidence pages 164 - 165

little recollection. He further explained that his recollection as conveyed in Richmond Law's letter of September 2013 was incomplete and that the portions I have mentioned from his evidence statement were somewhat *"woolly"*.

[42] A few days after the agreement was concluded, two issues (GST provision and repainting clause) arose. As a result the purchaser contended there was technically no agreement. Mr Carter dealt with these issues over 12 and 13 November 2003 with Mr Weber by telephone. Both aspects were clarified. This occasion is of some significance to the plaintiff's case as Mr Downing contended that here lay the first opportunity for Mr Carter to tidy up aspects of his advice, and of the agreement itself.

Key Findings

Were the motel chattels sold and what was Richmond Law's advice?

[43] Before moving on with the balance of the chronology of events, it is necessary for me to make important findings about the terms of the agreement and of Mr Carter's advice, or non-advice, in November 2003.

Agreement

[44] I need to consider, if possible, the plain wording of the contract in the light of the background knowledge of the parties. A commonsense purposive approach is necessary to identify the business commonsense of the words in the contract. Subsequent mutual or shared conduct can assist in deciding that if there is some doubt about the words used.

[45] Here, in my view, the following points are critical -

45.1 this was a multi-purpose contract in the way I have described. Unfortunately it blurred and conflated an agreement for sale of land, an agreement providing assurances around the nature and quality of buildings to be erected, and an agreement around the operation of a motel lease. By wrapping these together the issue of the chattels became confused with the sale of the land and the buildings to be erected;

45.2 commercial reality is that a motel tenant would inevitably own and control its chattels and be responsible for insurance, repair and replacement. Ownership by a landlord would be cumbersome, highly unusual, and virtually unworkable;

45.3 much of the agreement itself makes it clear that the chattels list in reality was a list of fixtures, fittings and chattels proscribing both what the purchaser was buying (building and fixtures), and what the vendor/tenant was warranting would be in the motels by the time of settlement so trade could begin, cashflow could be achieved and the purchaser/landlord assured of a rental return on its investment;

45.4 the purchaser/landlord (Mr Cant) lived elsewhere in New Zealand. This was a $1m investment following the sale of a farm. Clearly he would have wanted a guaranteed return on a substantial investment. At a distance he would have really no workable and practical ability to own the motel chattels and be responsible for their insurance, repair, replacement and the like;

45.5 the Weber Family Trust sold the chattels to Mountview;

45.6 Mountview used the chattels thereafter for several years in a way entirely consistent with ownership; Mountview insured the chattels, depreciated them and reflected them in its annual accounts;

45.7 the landlord gave consent, as required under clause 37.1 of the lease, to the tenant raising finance against the security of the chattels. Again this is entirely consistent with the tenant owning the chattels;

45.8 the landlord never asserted ownership of the chattels until 15 August 2012, 8 years after settlement, when a rent dispute arose; and even then had not done so at the first occasion the dispute arose, some 2 months earlier in June 2012.

[46] In my view, the motel chattels were not sold under the contract. The contract was somewhat unclear and ambiguous, but commercial reality, business commonsense

and the mutual conduct of the parties subsequent made it clear that the plaintiffs had not sold the motel chattels.

What was Ray Carter's advice, or non-advice, about the position of the chattels under the agreement?

[47] In reality, both the Webers and Mr Carter ultimately say no advice was given about the position of the chattels under the agreement. The Webers say such advice should have been given; that it should have been pointed out to them that the effect of the agreement was that the chattels had been sold.

[48] Mr Carter initially said he raised the issue with Mr Weber, who waived any further legal action. He now says that it was not raised at all, other than an observation that the drafting of the contract was poor and sloppy, as it was clear that the chattels were not sold so there was no need for it to be raised.

[49] Unsurprisingly, I am somewhat cautious about the evidence of both Mr Weber and Mr Carter around events that occurred on 4 November 2003. Quite understandably, both have had to reconstruct aspects of their evidence. Even accounts given by both in 2012 and 2013, prior to the commencement of proceedings, are somewhat reconstructed, somewhat unwise and perhaps somewhat *"off the cuff"*.

[50] The best rationalisation I can see is that there was no clear advice from Mr Carter about the position of the chattels. Whether that was because, as Mr Carter says there was no need, or it was overlooked or not appreciated, is impossible for me to now say.

[51] Both, however, just assumed the chattels had not been sold as this would be highly unusual and abnormal. The Webers acted consistently afterwards as if they owned the chattels; and so did Mr Carter, in his lack of advice to the contrary at the time, his preparation of the lease and other documentation, attending to settlement of the transaction and acting on the giving of security by Mountview, with the landlord's consent, over the chattels.

What advice should Mr Carter have given? Was it sloppy, or negligent, or the beginning of a breach of fiduciary duty by concealment?

[52] Mr Carter says he was concerned about the wording of the agreement and conveyed this to Mr Weber. I tend to accept this explanation as it is consistent with the rather sloppy nature of the contract itself in the way that I have described. In my view, any cautious or prudent lawyer should have clarified this aspect of the agreement.

[53] But I am not at all confident this amounted to negligence. In the absence of any expert evidence about the point from an experienced and professional commercial conveyancer, and because whether Mr Carter was negligent or not is not really the focus of the case as presented to me, I refrain from any concluded view.

[54] As well, in fact, it is unnecessary. It is sufficient for me to proceed on the basis that Mr Carter's advice, or non-advice, was sloppy and given what was at stake, should have been much clearer.

Events after signing of the agreement

[55] In late November 2003 the Webers signed contracts to build the motel units and demolish and remove the existing house on the property. This is of some significance as it does show, despite their language difficulty, they were well capable of understanding contracts. This reinforces an impression I gained during Mr Weber's evidence, that he has a good degree of commercial savviness.

[56] On 28 January 2004, Ray Carter formed the Ansil Trust which was to take the shares in Mountview. Both the Webers and Mr Carter were trustees. The Webers were income beneficiaries; their children capital beneficiaries. A few days later Mountview was incorporated.

[57] On 1 September 2004, the Weber Family Trust sold the chattels to Mountview for $117,014 inclusive GST. This amount was largely supported by a bundle of receipts and invoices.

[58] On 23 September 2004 a lease was prepared and registered against the title. Ultimately the sale of the freehold settled in September 2004.

[59] In May 2006 the Webers arranged for the leasehold to be valued for asset security purposes. The leasehold interest, as a going concern, was then valued at $420,000 comprising chattels $100,000 and goodwill $320,000.

[60] It is worthy of note, however, that this valuation was affected by a discounted rent agreement. Under the lease, rent had been fixed at $101,000 per annum, but an agreement on 2 October 2005, reduced the rent to $80,000 for a 2 year period ending 30 August 2006. This agreement was signed by Mr Weber as a director of Mountview (the tenant) and as a trustee of the Weber Family Trust (the landlord). In my view, this was an artificial rental discount agreement. It seems on its face to have been done in an effort to drive up the valuation which was undertaken the following year. Nevertheless subject to that qualification, Mr Hayward, a valuer called by Richmond Law, was fairly comfortable with the then leasehold valuation of $420,000.

[61] Based on that valuation, in August and September 2006, Mr Carter sought the landlord's consent to the securing of finance against the chattels. In his letter of 22 August 2006 to the landlord's lawyer, Mr Carter said:

> Our client is arranging some financing secured against the motel lease and chattels and requires … the landlord's consent.

[62] I note, as an aside (although this did not emerge at the hearing), that Mr Carter presumably would have had to undertake that Mountview was in a position, ie. owned, both the lease and the chattels over which security was being given.

[63] Significantly, however, at no stage during this transaction did the landlord assert ownership of the chattels, or that the tenant could not give security against ownership of the chattels.

The events of 2012 – 2013 leading to the landlord's re-entry and cancellation of the lease

[64] Following the establishment of the motel business in September 2004, it traded without notice of any difficulty with the motel chattels, or without any apparent concern, for the next 8 years or so until mid-2012. For the earlier part of this 8 year period net profits were relatively good (eg. nearly $100,000 in 2008), but in the latter period turnover and profit diminished.

[65] In May 2012 the Webers approached Richmond Law about the motels' financial difficulties. By this stage Mr Ray Carter had retired and they consulted with Mr Robert Whittle. It is clear enough from Mr Whittle's file notes, his letter of advice to the Webers of 18 May 2012 and his letter of 14 June 2012 to the landlord, which the Webers had authorised, that they were seeking a rent reduction from $101,000 to around $80,000 per annum. This was seen as the only realistic option for the economic survival of the motels.

[66] Much was made by Mr Downing at the hearing in suggesting that Richmond Law essentially encouraged the Webers to take an aggressive and confrontational stance, ultimately to their detriment, with the landlord. In my view, whilst an aggressive approach was part of Mr Whittle's advice, nevertheless the Webers accepted it and authorised the sending of Mr Whittle's letter of 14 June 2012 to the landlord.

[67] This first salvo is important. Mr Cant, on behalf of the landlord, replied by email a few days later. He made it clear the landlord would not consider any negotiation about the rent until the arrears had been addressed by the tenant. Significantly, he did not assert in any way at all ownership of the motel chattels. Mr Cant's email position was confirmed by letter from his lawyer about a month later on 24 July 2012. Again chattels ownership was not asserted by the landlord.

[68] At around this time Mr Hayward valued the motel chattels at around $60,000.

[69] On 15 August 2012 the landlord, through its lawyer, asserted for the first time ownership of the motel chattels. This assertion must be seen in the context of an attempt to negotiate a resolution of an emerging rent dispute. In its letter the landlord's lawyer said:

> It needs to be acknowledged by the Lessee that the chattels are not the Lessee's to dispose of but are the Lessor's – notwithstanding clause 41.1 of the lease. Everything else points to the clear and unequivocal conclusion that the chattels belong to the Lessor. The original agreement for sale and purchase quite specifically referred to the chattels *"as per attached appendix"* (chattels list appendix attached hereto) and Special Conditions of Sale 6.5 detailed those chattels **not** included in the purchase price (*"and if required will be paid for by the Lessee"*).

[70] This letter was referred by Mr Whittle to the Webers. Their response was immediate; they owned the chattels, had not sold or intended to sell them, the list was only attached to the agreement so that the purchaser knew what would be complete by settlement.

[71] Soon after Mr Whittle went through the agreement, the lease and other material he could locate. By this stage Richmond Law's file had been destroyed. He spoke to Mr Carter and emailed the Webers on 23 August in the way described in paragraph [37]. Significantly at this stage, all Mr Carter could meaningfully say was that the agreement and lease were somewhat rushed so that they could be done on time.

[72] In my view, the Webers have read too much into this email. On its plain face it advises of a problem with the motel chattels ownership. However, it is not conclusive. It is a piece of advice about a potential problem only. Nevertheless it is clear from Mr Whittle's letter of the same day to the landlord's lawyer that he was prepared to go into bat forcefully for his clients advocating that the chattels had in fact not been sold.

[73] The landlord's reply of 11 September 2012 left the door open for negotiation without conceding on the issue of the chattels. The Webers rejected the proposed terms of settlement.

[74] By this stage rent was in arrears. Although this was rectified from time-to-time the landlord was forced to take cancellation and re-entry action by Property Law Act notices in October 2012, December 2012 and May 2013; eventually, being forced to commence action in the High Court in June 2013 for cancellation of the lease and re-entry.

[75] The Webers ultimately did not oppose cancellation and re-entry. Some of Mr Weber's responses to the landlord's steps were unsavoury. These included deliberately forward-booking, electronically, the motels for a year in order to frustrate any attempt by the landlord to run the business following cancellation of the lease and re-entry. The Webers also removed some chattels, only returning them after legal advice.

[76] Eventually the landlord regained possession of the premises on 13 August 2013. The lease was cancelled by court order. At that stage the rent was in arrears;

aggregated rent arrears and costs were then fixed at $63,465.35. Interest at 13.7% began, and continues, to accrue.

[77] Around this time the Webers took independent legal advice from Nigel McFadden at the Nelson firm of McFadden, McMeeken & Phillips. His advice was that the agreement had the effect of selling the chattels. Richmond Law was put on notice, by letter of 22 August 2013, of a potential claim.

[78] Richmond Law responded on 19 September 2013. I have already covered their response at paragraph [38] of this decision.

The valuation evidence

[79] In January 2014 Mr Simon Charles, a commercial property valuer with experience in the accommodation industry, undertook a special purposes valuation (as at August 2017) of the leasehold of the motels.

[80] The first scenario he was asked to consider was the value if the tenant owned the chattels; his valuation was $210,000 comprising goodwill $90,000 and chattels $120,000. This is significant, because it shows the devaluation of the business from the time of the giving of bank security in May 2006, of $420,000; in other words over that 7 year period the value of the business had halved.

[81] In his second scenario, he was asked to consider the value of the leasehold if the tenant did not own the chattels, but if they were owned by the landlord. His conclusion was that the lease was valueless.

[82] His reasons for concluding this in essence were that without ownership of the chattels by the tenant there is a significant risk of chattels rental by the landlord, chattels removal by the landlord, sale of the freehold with uncertainties around replacement, repair and insurance of chattels.

[83] He put it this way in his report:

> VALUATION APPROACH - SCENARIO 2
>
> We have been instructed to provide a valuation under this scenario on the basis that the chattels at the property are in the ownership of the lessor. It should be noted that all of the sales detailed above include the chattels. Furthermore, we

are unaware of any recent sales of lessee's interests which do not include chattels. Therefore, we consider there would be a significant deduction on this basis from our assessed valuation under scenario 1.

We have contacted agents active in the tourism market in order to assess an appropriate deduction from our assessed valuation under scenario 1 however; we were informed that it is very uncommon for the lessee not to own the chattels. Furthermore, it is our understanding that it would be very hard to obtain any funding to purchase a leasehold interest without chattels. We were informed by lenders (banks) active in the market that they require the business chattels as security. Therefore, under this scenario any purchaser would effectively have to pay cash.

Another significant issue caused by the lessee not owning the chattels is it effectively takes away their right to run and operate the motels as they wish due to the fact if the wanted to redesign the internal layout or upgrade the rooms at any stage they do not have this option due to not owning the chattels.

With regard to the above, we consider the following points have a significant effect on the saleability and therefore value of the leasehold interest under this scenario:

- The lessee does not have any control on the chattels provided in the rooms. This could become an issue overtime if the lessee wanted to upgrade the rooms. This effectively takes away the lessee ability to move with the market.

- With no chattels the lessee has no fixed security at the property and under current market conditions we have been informed that bank finance would be very hard to obtain with no ability to offer the chattels as fixed security.

- The current lease document is silent on a rental (if any) that could be charged for the chattels. Therefore, at some point in the future the lessor could demand a rent for the use of their chattels.

- Currently, there is no guarantee the lessor will keep the chattels in place. This creates a significant on-going risk as effectively they could be removed at any stage.

- At the end of the lease the lessee is left with nothing.

Having regard to the above, we believe that the key issue is that the lease is silent on chattels. Therefore, at any stage the lessor could demand a rent for the chattels or remove them from the property. This along with the on-going risk and uncertainty around being able to obtain finance leads us to the conclusion that the leasehold interest under this scenario is unsellable under current market conditions. Therefore we consider it to have nil value.[7]

[84] In summary his conclusion is that without chattels ownership a lease would become valueless.

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[7] Pages 18 – 19 report of 31 January 2014

[85] On the other hand, Mr Hayward, equally an experienced commercial valuer considered that the lease would nevertheless still have value. He concluded that if the lessee owned the chattels that the leasehold interest would be worth $162,500 comprising goodwill $99,000 and chattels $63,500. As to the second scenario, if the landlord owned the chattels, he considered that the lease would still have a value, which he described as site goodwill of $99,000.

[86] I have to say that I find it difficult to accept that a lease for 30 years from 1 September 2004 with a renewal right for a further 30 years would be valueless. Equally I have no doubt that the value of a leasehold would be significantly enhanced with chattels ownership by the tenant. It clearly removes the kind of uncertainties identified by Mr Charles. But, in truth, motel chattels would only have a fairly limited shelf life before replacement in any event. Although no evidence was placed before me on this issue, it is hard to see that motel chattels, with all the wear and tear associated with occupancy and use, would have a life much beyond 10 years. Commonsense would suggest that as chattels become worn and outdated, customers would take their business elsewhere and occupancy rates would decline.

[87] Assuming the figure placed before me about the capital cost of chattels acquisition in this case is broadly correct (around $10,000 - $12,000 per motel unit), then it is clear that at some stage a significant capital cost for replacement would be likely. So, for example, selling a motel lease with chattels in the 10th trading year where there had been average occupancy, it might be expected that any incoming purchaser would be faced with a fairly significant replacement cost in any event.

[88] I therefore conclude that a lease without chattels is not valueless. Whether in this case it is as much as $99,000 as Mr Hayward concludes I cannot truly say.

Who is the correct plaintiff?

[89] The claims by the Webers and Mountview are pleaded both conjunctively and disjunctively.

[90] I assume this was done to meet a prospective, or anticipated, defence by Richmond Law that as the Webers, as trustees of the Weber Family Trust, had sold the motel chattels to Mountview on 1 September 2004, shortly before settlement, they had been paid in full and no longer had any valid claim.

[91] Although some concern around this issue arose at the hearing before me in the end it faded away. In my view, both the Webers and Mountview have standing as plaintiffs.

[92] The Webers sought advice from Richmond Law during 2002 to 2003 initially in their personal capacities, then as trustees of the Weber Family Trust when it purchased the freehold and then sold it to the Rocklea Family Trust and granted a lease to Mountview. Further, they took advice about the establishment of the Ansil Trust which acquired the shares in Mountview. They, at least, were income beneficiaries under that trust.

[93] The whole structure was organised ultimately for their personal benefit; firstly by the provision of income during the time of their motel management and secondly (hopefully) by capital upon any ultimate sale of the business.

[94] As a result, in my view, both the Webers and Mountview are the correct plaintiffs. Both have standing; Mountview as a lessee and the Webers as beneficial owners of its shares.

Limitation issues

[95] In my view, neither of the claims are time-barred.

[96] It is clear enough that the landlord's letter of 15 August 2012 and Richmond Law's email advice to the Webers of 23 August 2012 was the first time either they or, through them Mountview, discovered or could reasonably have discovered a potential claim for breach of fiduciary duty and/or breach of the Fair Trading Act. Until then the Webers, and through them Mountview, assumed they owned the chattels and that they were operating a business under a lease of real value generating income and which could ultimately be sold.

[97] That being the case, the effect of s 28 Limitation Act 1950 is that the limitation period for the fiduciary duty claim would not begin to run until August 2012; likewise by virtue of s 43A Fair Trading Act 1986 that claim would not begin to run until the same time.

Just what is the breach of fiduciary duty alleged and has a breach been made out to the requisite standard by the plaintiffs?

[98] Mr Downing made it clear that the plaintiffs' case did not rest on a one-off isolated act of negligence by the defendant in its advice, or non-advice, as to the terms of the November 2003 agreement. In any event, as he rightly conceded, such would now be time-barred.

[99] Rather the plaintiffs' case is that Richmond Law (in particular Mr Carter) breached its duty as a fiduciary by failing to provide full disclosure and ensure the Webers understood the effect, or likely effect, of the agreement that the motel chattels had been sold. And further, that Richmond Law became disloyal to its clients, not acting in their interest, indeed acting against their interest and not remedying the situation when opportunities arose.

[100] In closing submissions Mr Downing put it this way:

> 4.1 Returning to the legal summary from Tipping J in the *Guardian Trust* Decision, our case is in the second category. It involves an element of disloyalty by the fiduciary. Mr Carter's evidence that he was aware of the error with the motel chattels prior to the Sale Agreement being unconditional supports that. It became his duty at that time to ensure that the Webers fully understood what that would mean. Yet he didn't do so. Further, the subsequent actions of Mr Carter and Richmond Law are all in conflict with a position of the Lessor being the owner of the motel chattels. It is difficult to see this as anything but continuing ongoing failures of the fiduciary to keep the Plaintiffs fully informed; to provide ongoing disclosure of all material matters. At the most extreme, the question is whether the conduct of the Defendant after the Sale Agreement was concluded involved an element of concealment of the previous breach by the fiduciary in allowing the sale of the freehold to proceed with the motel chattels not being retained by the Lessee. Silence is the opposite of full disclosure. The fiduciary duty required ongoing full disclosure of all material matters. And the Defendant should have sent the Webers away for independent advice early on, when the Webers sought work from the Defendant which was inconsistent with the Lessee owning the motel chattels. The first such occasion was in September 2004 when Mr Carter drafted the Lease which recorded the motel chattels as belonging to the Lessee

> 4.2 In this second category of case, questions of foreseeability or remoteness do not arise. Once the Plaintiff has shown the loss arising the Plaintiff is entitled to recover against the fiduciary, unless the fiduciary (who has the onus of proof) can show that the loss or damage would have occurred in any event (i.e. without any breach on the fiduciary's part). Importantly the policy dictates here that fiduciaries only be allowed a narrow escape route from liability; based on proof that the loss or damage would have occurred even if there had been no breach. Patently in this case, the loss of the motel chattels would not have occurred in any event. That is because it was clearly the intention of this whole family business enterprise established by Richmond Law that the Lessee would retain the motel chattels and the Plaintiffs would operate the Lease of the motels.
>
> 4.3 Our case is also within the first category. This was a breach of fiduciary duty (failure to provide full disclosure and ensure the Plaintiffs understood what this unusual provision meant) by the fiduciary which directly caused loss. No foreseeability or remoteness issues therefore arise. The fiduciary is liable for the losses resulting.
>
> …

[101] On the other hand Richmond Law says the plaintiffs' case, at its highest, is one of negligent advice or non-advice only, but is not and cannot be a case of breach of fiduciary duty or misleading or deceptive conduct under the Fair Trading Act.

[102] Mr Darroch submitted that Mr Carter's ultimate evidence, as given at trial, should be preferred by me as it reflected the correct legal position under the contract; that the chattels had not been sold. In other words, although Richmond Law's response to the allegation had changed and morphed somewhat between 2012 to 2017, their most recent position was correct. That being so, Mr Darroch submitted that Mr Carter's non-advice was adequate and correct. At worst, he submitted, it might be sloppy, or perhaps even negligent, but in order for either claim to succeed the plaintiffs would need to demonstrate more; that deliberately over a period of time Richmond Law withheld and did not disclose the true position to the Webers, presumably to divert or avoid any claim in negligence.

[103] Mr Darroch went on to submit that after signing the November 2003 agreement, Mr Carter acted as if the Webers retained ownership of the chattels in drafting the lease and in seeking the landlord's consent for the giving of security over those chattels. There was nothing, Mr Darroch submitted, to alert Mr Carter to the contrary. In other words, Mr Carter's subsequent conduct was consistent with his

belief that the true position was that the chattels had not been sold; that his conduct was not some kind of cover up.

[104] In my view, greater care should have been taken by all those involved in the negotiation and completion of the 2003 agreement. As I have stressed, this was an agreement designed for more than one purpose; the sale of land, the development of purpose-built motels on the land (a development contract) and a contract for the operation of a business. This had the effect of conflating different requirements of each contract and in particular confusing the interface between the motel chattels under the business and development aspects of the agreement and the sale of the land. Greater care was undoubtedly called for; if only because at the time of the agreement there were no buildings, there was no fitout, there was no completed lease.

[105] Looking back in 2017, with hindsight, I accept that such comments are easily made. The realities of commercial and business pressure on the Webers in particular, and on Mr Cant as well, might well have been otherwise. However, care was needed by all involved in the transaction, including the Webers, Mr Cant, the agent concerned and the lawyers involved.

[106] In the end Mr Carter should have taken greater care when he was consulted about the agreement on 4 November 2003. But without the benefit of expert conveying evidence I would not be prepared to conclude that he was negligent. I am prepared to say, however, that his work at the time was sloppy and wanting.

[107] I accept his evidence that he believed that the agreement as a whole meant that the chattels were not sold. This would accord with commercial commonsense and usual practice. It accords with my consideration of the agreement as a whole. But, because of the way it was a multi-faceted agreement it should have been tidied up in the way he says he raised at the time, by clarifying the somewhat careless and sloppy drafting of the contract.

[108] In reaching that conclusion, I have not ignored Mr Carter's other out-of-court statements, particularly Richmond Law's letter of 19 September 2013 and the portions of his brief of evidence to which I have referred. However, I do not for one moment consider that Mr Carter has deliberately lied or misled me. The best explanation that I can see is that he had retired in 2009, some 3 to 4 years before the first issue arose.

His first response in August 2012 indicated little real recollection of the events other than they were hurried and pressured. His recollection, as conveyed in Richmond Law's letter of 19 September 2013, a year later was without full recourse to documents. Also this really was Mr Whittle's response; Mr Carter was not a partner at the time having retired several years earlier so a degree of caution is warranted in sheeting its full effect against Mr Carter. The portions in his brief of evidence that I have referred to were ill-considered.

[109] I see his trial evidence as more reliable and considered than his brief of evidence and Richmond Law's letter of 19 September 2013.

[110] However, when I stand back and view all the evidence in the round, I find that I am left in this position. The agreement was sloppy and carelessly drafted, attempting to serve a number of different purposes in one contract. The Webers were not told the chattels were sold under the contract because they were not in fact sold. Mr Carter did not tell the Webers that the chattels had been sold as he did not need to, but did point out to them that in his view the contract wording was problematic and sloppy. Mr Carter and the Webers acted thereafter as if the Webers owned the chattels and so did the landlord. For several years until 2012 the key parties continued their arrangement as if the Webers owned the chattels. The landlord only asserted ownership when a rent dispute arose in 2012. When that dispute arose, the poor drafting of the original agreement, with its uncertainty and ambiguity in respect of chattels ownership, emerged. Thereafter Mr Whittle, on behalf of the Webers, continued to forcefully argue that they owned the chattels.

[111] Accordingly I make the crucial following findings:

1. the motel chattels were not sold under the 2003 agreement;

2. Mr Carter's 2003 advice, or non-advice, to the Webers was sloppy and careless;

3. the plaintiffs' at best have proved sloppy and careless work, but have failed to prove, on the balance of probabilities, breach of a fiduciary duty and/or misleading, or deceptive, conduct;

4. Mr Carter and Richmond Law never embarked on any cover up and were never deceitful or disloyal to their clients' interests, in such a way that a claim might lie.

[112] These findings are necessarily sufficient to dismiss both the claims for breach of fiduciary duty and breach of the Fair Trading Act.

Loss

[113] Strictly speaking, it is not necessary for me to go on and consider the question of loss, but for the sake of completeness, and in case I am wrong on my liability conclusions, I do so.

[114] By 2012, even before the chattels issue had arisen, it is clear that the motel was trading at a loss. Put bluntly the rent was too high and unsustainable. Between 2006 and 2013 the value of the leasehold halved.

[115] During 2012 to 2013 the Webers defaulted consistently on their rental obligations. Whether this was because they simply could not afford the rent, or because they wanted to pre-empt some resolution with the landlord, or a combination of both, I cannot say. In my view they were not encouraged to do so by Richmond Law; they were simply given advice as to available options.

[116] The Webers jeopardised the commercial viability of their own business by doing so. A business which was already devaluing was devalued even more by their own conduct. Put bluntly, the Webers placed the commercial viability of their own business at peril.

[117] Whether they owned the chattels, or not, considerable loss was inevitable.

[118] If they did own the chattels, as I have concluded, with a broad value of $60,000 in mid-2012, this equated with their rent and costs arrears at the time of re-entry a year later. So loss, would have occurred in any event, with the landlord entitled to set-off rent arrears against the chattels.

[119] If they did not own the chattels and the landlord did, they were still facing significant rental losses and imperilling the value of their business.

[120] As well, I cannot conclude, as the plaintiffs contend, that their lease had become valueless. As at August 2013, it still had 21 years to run, with a right of renewal for 30 years. By August 2013 the time must have been reached, or was soon to be reached, when a significant capital outlay by way of chattels replacement was necessary in any event.

[121] So returning to the damages claimed:

121.1 even without ownership of chattels, the lease would still have a site goodwill value;

121.2 either the Webers or Mountview would have lost the motel chattels in any event as set-off against rent arrears;

121.3 the Weber's conduct particularly at the time of the rent dispute in 2012/2013 would have contributed significantly to their loss.

[122] Put another way, even if a breach of fiduciary duty, or deceptive/misleading conduct had been made out, Richmond Law would have shown that any loss would have occurred in any event, without any liability on its part.

Outcome

[123] Accordingly both plaintiffs' claims are dismissed. There will be judgment against each in favour of the defendant accordingly.

[124] Costs are reserved.

[125] Counsel are to file and exchange appropriate memoranda.

B Davidson
District Court Judge