EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WELLINGTON

CIV-2015-085-000693
[2016] NZDC 17432

BETWEEN	LUCKY PLAZA LIMITED Plaintiff
AND	GEOFFREY MATHEW LAMBERT First Defendant
AND	AGEOLD LIMITED (IN LIQUIDATION) Second Defendant

Hearing: 28 July 2016

Appearances: A J Romanos for Applicant/First Defendant
R C Laurenson for Respondent/Plaintiff

Judgment: 12 September 2016

RESERVED JUDGMENT OF JUDGE S M HARROP
[As to Application to Set Aside Summary Judgment]

Introduction

[1] The plaintiff (LPL) operated a business, a beer bar called Tap Haus, in premises at the corner of Victoria and Dixon Streets, Wellington. It leased the premises from the owner of the building, Victoria Trustees Wellington Limited, for an initial term of six years commencing on 26 April 2011.

[2] By a written agreement dated 18 September 2014 LPL sold to the first defendant, Mr Lambert, or his nominee, the plant, equipment and stock- in-trade of the Tap Haus business for $100,000, comprising $90,000 for the tangible assets and $10,000 for the stock-in-trade. There was no payment of goodwill and no consideration paid for the assignment of the lease.

[3] It was a term of the agreement that the vendor would pay $60,000 on settlement with the balance of $40,000 being left in as a vendor loan secured by a first charge general security agreement (GSA). Initially that was over all the present and after acquired property of the purchaser with a priority of $100,000 over any subsequent GSAs. However that was changed to limit its application to present property only and to remove any priority. A term loan agreement was to be signed to this effect.

[4] On 13 January 2015 a term loan agreement was signed between LPL and the second defendant (Ageold), that company having been nominated by Mr Lambert both as purchaser and borrower under the vendor loan. Although Table C of the Annexure schedule to that agreement referred to after acquired property as well (and to a priority of $50,000), Mr Loveday, a director of LPL, says the true agreement was that LPL did not have security over Ageold's property acquired after purchase.

[5] Mr Lambert, a director of Ageold, guaranteed the performance of its obligations under the term loan agreement which was in standard form. By the time it had been signed, LPL had agreed to reduce the purchase price by $5,000, so the vendor term loan was for $35,000.

[6] When Ageold took possession of the premises it undertook, over a period of several weeks a new fitout of the premises for the purposes of its new business, an Italian restaurant called "Vatican".

[7] The restaurant business did not go well and Ageold paid only two months' rent before the premises were vacated. Formal eviction occurred on 17 September 2015 and Ageold went into liquidation on 30 September 2015. At the time the premises were vacated Ageold owed the landlord about $75,000 plus GST and any costs of recovery. LPL and its director and personal guarantor, Mr Loveday, are liable for what is currently owing to the landlord, as are both Ageold and Mr Lambert.

[8] On 30 September 2015, LPL filed this proceeding and sought summary judgment against the defendants for the $35,000 owing under the term loan

agreement in respect of which both defendants were in default following demand made on them. Mr Lambert was served with the proceeding on 13 October 2015.

[9] The matter came before Judge Tuohy on 17 December 2015. The claim against Ageold was not pursued because of its liquidation. On 15 December Mr Lambert filed a notice of opposition and a brief supporting affidavit sworn on 14 December 2015, so that was only two days before the hearing, not the three working days as required, and as he was informed was required by the notice of proceeding with which he was served over two months earlier.

[10] Mr Lambert did not appear at the hearing, but sent an email to the Registrar the day before saying that he would not be appearing because he had lived in Auckland since the company ceased trading. He said that he was seeking assistance to have the claim defended in Court once he had obtained the necessary information to brief solicitors.

[11] As Judge Tuohy noted, the notice of opposition and affidavit essentially asserted that Mr Lambert had what would be a counterclaim against LPL for misrepresentation, but the affidavit in support contained nothing more than a bald statement that he had been induced to enter the transaction through misrepresentations as to the turnover of LPL's business. There was also said to have been a misrepresentation that the premises were fit for the purposes of operating a restaurant.

[12] Judge Tuohy noted that those were matters which would support a counterclaim, but that LPL's claim was merely for an amount seemingly admittedly owing under a loan agreement.

[13] Judge Tuohy declined leave to Mr Lambert to file his notice of opposition late and considered it was just for LPL to have summary judgment on a claim to which there was no direct defence. His Honour noted that if Mr Lambert had a good counterclaim then he could still advance that if he wished to do so.

[14] Summary judgment was accordingly entered in the sum of $37,866.91 which included the principal sum owing under the term loan, interest to the date of judgment and disbursements. Costs were awarded to LPL on a 2B basis.

[15] On 18 March 2016, Mr Lambert applied for a *"retrial"* having engaged both solicitors and counsel. He filed a detailed affidavit sworn on 17 March 2016 in support. He also sought pre-commencement discovery in respect of his proposed defence and counterclaim and an alternative order that if the judgment were not set aside then execution on it should be stayed.

[16] On 5 April 2016, LPL filed a notice of opposition supported by a further affidavit from Mr Loveday of the same date (he had of course filed an affidavit in support of the summary judgment application, dated 16 September 2015). LPL also filed four further affidavits in support of its opposition. These were from Bryan Block, a commercial property broker involved in the transaction, Clayton Taylor and Gary Cao, directors of Red Mount Limited, the current lessee of the premises and Wendy Brown, a property manager for Oyster Management Limited who managed the transaction under which Ageold took over the premises from LPL.

[17] Mr Lambert filed a reply affidavit dated 14 July 2016 and later amended his application, on 22 July 2016.

The application to be determined

[18] Mr Lambert initially claimed that the judgment was irregularly obtained because the notice of proceeding with which he was served was defective. At the hearing Mr Romanos accepted this ground could not be pursued because the served document was in correct form. He submitted that the application should be considered under r 12.14 which provides that:

> A judgment given against a party who does not appear at the hearing of an application for judgment under r 12.2 or 12.3 may be set aside or varied by the Court on any terms it thinks just. If it appears to the Court that there has been, or may have been, a miscarriage of justice.

[19] Although Mr Laurenson made submissions, with reference to case authorities, to the effect that Mr Lambert had in a practical or constructive sense appeared, while not physically doing so, I intend to proceed on the basis that he did not appear; I therefore accept there is jurisdiction under r 12.14 to set aside the summary judgment. The key question is therefore whether in having had summary judgment entered against him by Judge Tuohy, Mr Lambert suffered, or may have suffered, a miscarriage of justice.

The grounds on which Mr Lambert claims there was a miscarriage of justice such that the judgment ought to be set aside.

[20] The amended notice of application is somewhat confusing as to the grounds of allegedly arguable defences on which this is advanced, but I take Mr Lambert's grounds to be as follows; I will address the respective contentions after stating each ground having quoted it from the application.

Ground 1 -

> The application proceeded on the basis of an unpaid vendor loan, but the plaintiff did not provide any evidence or advice to the Court in respect of the disposal and/or sale of the first defendant's property over which the plaintiff held a security – which property was in the plaintiff's possession and control – the value of which was substantially more than the amount owed under the vendor loan and sought in the application, nor did the plaintiff provide evidence or advice to the Court in respect of any set-off made in the disposal and/or sale of this property, as against the unpaid vendor loan.

[21] Mr Romanos submitted that the property left at the premises when Ageold vacated them was secured under the GSA to a value of approximately $87,245 plus GST. He submitted that LPL had an obligation to sell this property to recuperate its loss and that had that occurred there would not only have been no debt owing to LPL, but there would likely have been a significant surplus.

[22] Mr Laurenson however submitted, and I readily accept, that a creditor under a loan agreement of this kind has no obligation to resort to security, but is entitled to sue on the personal covenant. Clause 7 of the term loan agreement clearly provided that LPL had the right to exercise the power to call up the balance of the money owing following default regardless of any resort to security. It is also clear from

paragraph 13 that Mr Lambert, as covenantor, was not released from liability by the exercise or non-exercise of any of the lender's powers. In short, the term loan contract is both an agreement to pay the money back and an agreement to provide security for the debt. The security is simply added protection for the lender, but it has no obligation to enforce the security if it elects not to do so.

[23] In any event, while having no obligation to do so, Mr Loveday has explained why LPL did not attempt to enforce its security. Because the words *"and after acquired"* were crossed out in the agreement for sale and purchase, LPL only had security over items of plant and equipment in the premises as purchased by Ageold at settlement and not over any subsequently acquired plant and equipment. Because of the substantial change to the premises as a result of the fitout undertaken by Ageold, LPL made a deliberate decision not to seek to enforce the GSA security because of the uncertainty of ownership by that stage of the plant and equipment in the premises. That makes perfect practical sense. An attempt to enforce the security could well have led to claims against LPL, or at least to a dispute about what was and what was not covered by its security.

[24] I therefore reject Mr Lambert's first ground.

Ground 2 -

> A claim for breach of contract and/or unjust enrichment in respect of the plaintiff's failure to off-set the sale of the plaintiff's (sic) property – and, it would appear, a claim against the plaintiff in terms of s 110 of the Personal Property Securities Act 1999: that the plaintiff did not obtain the best price reasonably obtainable at the time of sale.

[25] This ground is misconceived and untenable because LPL is neither the landlord of the premises, nor a subsequent tenant. If any party has been enriched by obtaining, using or selling Ageold's assets left at the premises, it would appear to be the landlord. It certainly is not LPL. I understood Mr Romanos to accept this point in the course of the hearing. It is rejected accordingly.

Ground 3 -

> A claim for unjust enrichment in respect of the cost of substantial improvements the first defendant incurred during his tenure running a business at the premises of which the plaintiff was head-lessee, as well as property left at the premises upon the first defendant's vacation, and the plaintiff's failure to recompense the first defendant for this expenditure and/or offset its disposal and/or sale against the vendor loan.

[26] This ground is unsustainable for the reason just mentioned. Again I understood Mr Romanos to concede this at the hearing. It is rejected.

Ground 4 -

> Claims under s 9 of the Fair Trading Act 1986 in respect of representations the plaintiff made to the first defendant regarding the alleged:
>
> (a) turnover of the business, which was sold as a going concern;
>
> (b) condition of the building in which the premises was situated;
>
> (c) status of the building's tenants.
>
> being representations on which the first defendant placed reliance and, as a result, suffered consequential loss.

[27] As to the last two alleged misrepresentations, about the condition of the building and the status of the building's tenants, Mr Romanos conceded at the hearing that these were matters in respect of which Mr Lambert would need to look to the landlord because any claim against LPL would be too tenuous having regard to the obligation to prove reliance and causation of loss. I therefore put those two grounds to one side, given that they have been withdrawn as arguable grounds of defence by Mr Lambert.

[28] This leaves only one remaining alleged defence, namely misleading and deceptive conduct, founding a defence and a counterclaim under section 9 of the Fair Trading Act, by way of a representation as to the turnover of the business which Mr Lambert says was sold as a going concern.

[29] Before I discuss the evidence and submissions on this critical issue, I note that, albeit under the umbrella of establishing a miscarriage of justice or the possibility of one, the onus is on Mr Lambert to establish that this is a substantial

ground of defence. At the summary judgment stage the onus was on LPL to establish that the defendants had no defence to the application, but now the onus is on Mr Lambert to establish not only that he has a defence, but that it is a *"substantial"* ground of defence – see *Russell v Cox* [1983] NZLR 654. Although that case involved an application to set aside a default judgment, the principles have been applied to summary judgments – see also *Muollo v Hunt* (High Court Wellington, CP 252/00, 24 May 2001, Master Thomson).

The evidence and submissions bearing on the claim based on misrepresentation as to turnover

[30] It is necessary carefully to set out the evidence put forward by Mr Lambert in support of his contention that there was an actionable misrepresentation as to turnover. In his affidavit of 14 November 2015, Mr Lambert said that written representations had been made to him personally and to Ageold Limited on which he personally relied and that as a result he had suffered financial loss such that he was personally facing bankruptcy. He said that relying on the representations as to turnover of the pre-existing bar and restaurant operated by the plaintiff he entered into hire purchase agreements and loans totalling in excess of $200,000, not including the liability under the current claim. He says the representations made to him and on which he relied were misleading and false.

[31] In his affidavit of 17 March 2016, Mr Lambert says that Mr Loveday provided accounts suggesting the premises had made gross income of $712,139.54 in the financial year 2012/2013. He annexed a copy of the financial statement to that effect. He says that once he took over the business it was very clear that it was not generating income anywhere near that level. He says that in conversations with Mr Loveday's former business partner (who has provided no affidavit), it was confirmed that the premises did not generate such income. He also says he sent Mr Loveday a letter on 12 August 2015 setting out his concerns; he has annexed this letter. He noted that Mr Loveday had replied that he would have no issues with providing the documents substantiating the turnover for Lucky Plaza but that nevertheless these has still not been supplied.

[32] Albeit for the purpose of supporting his claim for misrepresentation based on the condition of the building, Mr Lambert also annexed a document dated 14 December 2013 which Mr Loveday had prepared and which Mr Lambert says he took into account in deciding whether to proceed with the purchase. I will refer to this later, as Mr Laurenson places reliance on aspects of it.

[33] In his affidavit of 5 April 2016, Mr Loveday says there is no issue or relevance as to the turnover of LPL's earlier business because Ageold Limited did not buy that business, but instead after a major fitout of the premises, it commenced a very different type of business. He confirms, however, that turnover was discussed between him and Mr Lambert; he says the turnover figures he gave for the Tap Haus business were accurate.

[34] In her affidavit Ms Brown says she is familiar with the premises and had inspected them a number of times in the course of the transactions, first from Mr Loveday to Mr Lambert and then when Red Mount took over the premises. She says that she was not surprised Mr Lambert's restaurant operation failed. She explained that once he took over the premises Mr Lambert closed the existing business down and stripped all the existing décor, which she regarded as *"a tasteful wooden fitout"* and *"whitewashed"* the entire area. She says he did not use a professional contractor for this and the paint job was of poor quality.

[35] Ms Brown said that Mr Lambert had spent nothing on the promotion of his restaurant apart from offering a *"Grab One"* deal which to her knowledge, while useful for brand awareness, is not a lucrative promotion. She says Mr Lambert "*did nothing else to attract custom and from my observations he spent a large amount of his time at the restaurant during the day, sitting on his computer rather than getting up and out and encouraging business"*. She adds that not long after opening the restaurant Mr Lambert closed for lunches, which in her view was a foolhardy decision when operating a restaurant in a central business district.

[36] In his reply affidavit of 14 July 2016, Mr Lambert says in response to Mr Loveday's affidavit:

5. In relation to my claims regarding Mr Loveday's representations to me of turnover generated from the premises, he has now argued that his turnover representations are *"irrelevant"* on the basis that the document entitled *"Agreement for Sale and Purchase of a Business"* was not in fact an agreement for the sale and purchase of a business. Mr Loveday suggests it was simply *"an assignment of that lease and a transfer of the plant and equipment and chattels then existing in the premises (tangible assets) and of stock and trade"*.

6. This articulation of the transaction is unrealistic, artificial and wrong in any event. I was heavily reliant on Mr Loveday's representations to me about the turnover generated by Tap Haus – which representations I note that Mr Loveday concedes he made.

7. It was a crucial component of my decision to enter the agreement that the location could generate the amount of turnover Mr Loveday represented. If Mr Loveday had not made those representations – and, moreover, had he not provided me with documents ostensibly recording this turnover – I would never have entered the agreement.

8. The short point is that I was induced to enter the agreement by Mr Loveday's representations of turnover. I consider his representations to have been false, and Mr Loveday has failed to open his records to prove the contrary.

[37] While Mr Lambert responds to various aspects of Ms Brown's affidavit he does not respond at all to what she says about the reasons why his restaurant business failed.

[38] Mr Romanos submitted that there is (at least) the basis for a legitimate claim under s 9 of the Fair Trading Act in respect of the alleged misrepresentation as to turnover. He contends that disputed facts as to whether there was a misrepresentation and losses which followed cannot satisfactorily be resolved on affidavit evidence at this early stage of the proceeding. Adding to what Mr Lambert himself says, Mr Romanos submits that there were many references in the relevant documents to the transaction being that of the sale and purchase of a *"business"* but that whatever label one puts on the deal which was ultimately struck there was reliance on the representations that Mr Loveday accepts that he made.

[39] Mr Laurenson spent some during his submissions time going through the documents provided by Mr Loveday to Mr Lambert. He noted in the supplementary submission filed later on the day of the hearing that under s 9 of the Fair Trading Act there needs to be conduct in trade which was misleading, or deceptive or likely to

mislead or deceive. There is no need to prove an intention to mislead but before any remedy can be granted Mr Lambert would need to prove that he had suffered or would be likely to suffer loss or damage as a result of the misleading or deceptive conduct. He referred me to what Richardson J said in *Goldstone v Walker* [1993] 1 NZLR 394 (CA), at 401, namely that there must be a *"clear nexus between the conduct and the loss or damage suffered"*.

[40] Mr Laurenson submitted that there appears to be no suggestion of representations going beyond those implicit in the documents which Mr Loveday supplied. He noted that the profit and loss statement provided related to the period from April 2012 to March 2013. The end of that period was some 21 months before the agreement for the sale of the business was made unconditional. Accordingly, as Mr Laurenson notes, these figures did not relate to the latest financial year. A prudent purchaser would have sought information about the latest financial year, ending 31 March 2014, which in itself would already have been some 9 months old.

[41] More significantly, the profit and loss statement, while it shows gross income of $712,139.54, indicates an operating loss of $83,377.77. There is some handwriting on the copy of the document which was put in evidence tending to suggest that a somewhat smaller loss would be appropriate for Mr Lambert to consider, namely $70,874. However, on any view the Tap Haus business clearly made a substantial loss in the year ended 31 March 2013.

[42] Mr Laurenson then submitted, as is well known, that Wellington experienced two quite significant earthquakes in mid-2013. This is confirmed by Ms Brown in her affidavit. He submits that Mr Lambert ought to have realised they might have a substantial impact on the business one way or another. There was property damage of which Mr Lambert was aware before the purchase was agreed.

[43] Mr Loveday had prepared a document dated 14 December 2013 which set out his reasons for selling the business. Mr Lambert saw this document before he decided to purchase. This also referred to the effect of the earthquakes on the building and on the business which had faced closure over a two-month period because of them. This incidentally suggests that any more recent financial figures

would almost inevitably have presented a bleaker financial picture than the 2012/2013 figures did.

[44] At the conclusion of the three-page document Mr Loveday indicated he would be prepared to sell the bar for $250,000 plus stock at valuation and to leave in up to $150,000 if required. Ultimately of course LPL ended up selling to Ageold for considerably less, $95,000. I accept Mr Laurenson's submission that this document is an apparently frank statement of various difficulties Mr Loveday had had with the business.

[45] I do not accept Mr Lambert's point that this was in substance an agreement for the sale and purchase of a business as a going concern. Although the agreement is certainly described as an agreement for the sale and purchase of the business, in reality that was not the case. LPL was simply selling the assets and stock-in-trade and agreeing to assign the lease (for no consideration). There was no sale of goodwill.

[46] In any event there is no dispute that once Ageold took possession it closed the premises for a number of weeks, undertook a significant fitout and began its own very different business, namely an Italian restaurant. Instead of the 30 beer taps which Tap Haus had had (originally it had 52) and which provided the majority of its income, Ageold only had two or three after the renovations. In short, the focus of the business before the sale was as a beer bar but afterwards it was as a restaurant, though no doubt beer and wine were still sold.

[47] Mr Laurenson submits that whatever may have been represented – or misrepresented- about the Tap Haus turnover it related to a very different business and was at a time well before the sale and after a significant intervening event of the two earthquakes.

[48] Mr Laurenson points out that there is no, or no adequate, response from Mr Lambert in his reply affidavit as to these points clearly put forward by Mr Loveday and Ms Brown. He also notes that in the letter which Mr Lambert wrote following the closure of Ageold's business on 12 August 2015 he referred to having had the

accounts reviewed by an independent analyst. He has filed no affidavit from any such person.

Issue

[49] The essential question to be answered is whether Mr Lambert has satisfied me that he has a substantial defence/counterclaim based on misrepresentation as to turnover such that there would be a miscarriage of justice if I were not to set aside the summary judgment.

Discussion

[50] I accept the submission of Mr Romanos that in principle this kind of defence/counterclaim is a proper basis for declining summary judgment, or by inference for setting aside one obtained where the defendant did not appear. He referred me to the judgments in *Garry Denning Limited v Wright* [1989] 1 NZLR 45 and *ML Paynter Limited v Ben Candy Investments Limited* [1987] 1 NZLR 257. I accept and of course am bound by the principles stated in those cases. I therefore accept, in principle, that a claim for the balance of the purchase price in respect of the sale of a business may properly be defended by way of equitable set-off based on a material misrepresentation relating to the purchase of that business. The two issues are clearly closely related and, in principle, it would be quite wrong to allow summary judgment on this kind of claim to be entered, or retained, where there is a tenable basis for a misrepresentation defence/counterclaim under the Fair Trading Act.

[51] The question is whether on the information put before me Mr Lambert has established a sufficient basis for such a defence. I accept Mr Laurenson's submission that in considering this question I am entitled to apply by analogy the approach typically applied in summary judgment applications. He referred to four statements of principle, three of them very well-known. These were:

18.1 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA), Somers J at page 3:

> Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident – that is to say, satisfied – that the defendant's statements as to matters of fact are baseless.

18.2 *Eng Mee Young v Letchumanan* [1980] AC 331 (PC) at 341; the Court held a Judge will not be bound:

> … [t]o accept uncritically as raising a dispute of fact which calls for further investigation, every statement of an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

18.3 *Bilbie Dymock Corporation v Patel* [1987] 1 PRNZ 84 (CA):

> … the need for judicial caution has to be balanced, when considering a summary judgment application, with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. In the end it can only be a matter of judgment on the particular facts.

18.4 *S H Lock (New Zealand Ltd v Oremland* (HC AK CP 641/86, 19 August 1986 (Wylie J) at page 11:

> Clearly the onus of showing there is defence lies with the plaintiff, but the discharge of that onus is not in my view, to be frustrated by a defendant raising hypothetical possibilities in vague terms unsupported by any positive assertions or corroborative documentation.

[52] I accept those statements of principle and proceed on the basis of them. Having reflected on all of the evidence and submissions, I am not satisfied that Mr Lambert has a substantial ground of defence of equitable set-off based on misleading or deceptive conduct by Mr Loveday on behalf of LPL in relation to turnover causing loss to Ageold and to him as guarantor of its liabilities.

[53] The first point, without reference to anything else about this case, is that turnover figures may not reasonably be considered in isolation by any prospective purchaser of a business; they must always be considered in the context of the "bottom line" by way of net profit or loss. Here, even before the earthquakes, the Tap Haus business was making a significant loss. A reasonable prospective purchaser would have looked beyond the bare turnover and been very cautious about

purchasing a business when the costs of obtaining the turnover and running the business were such that a substantial loss nevertheless results.

[54] Further, once the earthquakes occurred, the business was in an even worse position as Mr Loveday made very clear in his statement of 14 December 2013. As he put it, he was prepared to sell the assets and goodwill at a significant discount to what it had cost him to set up, let alone to cover the losses to date. By then the effects of the earthquakes had made the position worse than the 2012/2013 profit and loss statement indicated. A reasonable person considering purchasing on the basis of the combination of the profit and loss statement and Mr Loveday's statement must have known that if the beer business was to be continued dramatic improvements would need to be made somehow in order to turn a profit, or even to avoid quite a significant loss.

[55] The provision to Mr Lambert by Mr Loveday of evidence of a significant loss and his apparently frank statements of his difficulties with the business, statements clearly against LPL's interests, ought to have given him an impression of candour and indeed of warning. They strongly suggested that a purchaser intending to carry on the Tap Haus business would need to consider that very carefully. In terms of reliance, it is odd for Mr Lambert to claim he relied on the turnover figures when he was in effect told he should be cautious given the poor state of the business.

[56] That message ought to have been reinforced by the substantial drop in the price at which Mr Loveday had said in December 2013 he would sell.

[57] I accept that Mr Loveday has, despite a promise to do so, not provided any substantiation of the 2012/13 turnover figures, nor an explanation of why he has not done so. The onus is of course on Mr Lambert to establish there was a misrepresentation, but, understandably, he says he cannot detail that claim without discovery. Mr Loveday does however depose that the turnover figures were correct.

[58] Purely looking at the undisputed facts, it seems unlikely there was any misrepresentation as to turnover, given that the result disclosed was still a substantial loss. If there was a misrepresentation through overstatement of the turnover, the true

result would have been a still greater loss. There is also a serious question about the materiality of any misrepresentation and of reliance by Mr Lambert. If, as he says is the position, Mr Lambert critically relied on the figures he was given, that really means he was happy to proceed when told of an $80,000 loss but that he would not have been if it were in truth a much greater one.

[59] Significantly though, this is not a case of any misrepresentation being relevant to the business ultimately undertaken by Ageold. Perhaps because of the difficulties with the bar business, Ageold did something of a quite different kind. Turnover figures for 2012/2013 in respect of a bar, of which beer provided the vast proportion of the income, can have had little if any relevance to the performance in 2015 of a business of a very different kind. They had the premises in common but little else.

[60] Significantly in my view, Mr Lambert has made no attempt in his affidavit in reply to respond to the assertions by both Mr Loveday and Ms Brown that in effect the reasons why his business failed have nothing to do with the way the Tap Haus business had performed. He has simply not provided an answer to the assertions they made in the paragraphs I have quoted. He says he was *"heavily reliant on Mr Loveday's representations to me about the turnover generated by Tap Haus"*, but he does not explain *how* they have caused the losses Ageold incurred.

[61] He needed to explain how a misrepresentation about the turnover achieved by a bar – in a year where there was a substantial loss – had any relevance to the losses Ageold's business ultimately suffered, especially with earthquakes intervening between the making of the representation and the losses being suffered. He has not established a tenable basis for the necessary causative link between any misrepresentation there may have been about turnover and the loss or damage which Ageold undoubtedly suffered as a result of the failure of its business.

[62] It was directly asserted by both Mr Loveday and Ms Brown that the turnover of the beer business could have had no relevance to what ultimately happened to Ageold's business, yet Mr Lambert simply does not address this fundamental point.

[63] In summary, even if there were some misrepresentation about turnover, the reality is that Mr Lambert was made well aware that the business was in financial difficulty and losing money in 2012/2013, a situation exacerbated by the earthquakes. There is a serious doubt about the reasonableness of Mr Lambert's claimed reliance. In any event, Ageold carried out a different business. Accordingly, for several reasons, the necessary nexus between any misrepresentation about Tap Haus turnover in 2012 and the losses Ageold suffered in 2015 is simply not given any basis in the evidence before me. Mr Loveday has had an opportunity to explain why he sees a causative link but he has not provided any basis for one.

[64] In these circumstances, I am not satisfied that there is a substantial defence of equitable set-off based on misrepresentation as to turnover of the Tap Haus business leading to a possible claim under s 9 of the Fair Trading Act and a remedy under s 43 of that Act.

Conclusion

[65] Whether or not there is any arguable defence is not the only issue to be considered on an application under r 12.14. There are also issues as to whether the applicant's failure to appear was excusable, and whether the respondent would suffer irreparable injury if judgment were set aside. For present purposes I will assume in favour of Mr Lambert (despite some argument to the contrary from Mr Laurenson) that his failure to appear was excusable and that no irreparable injury would be suffered by LPL if the judgment were set aside. Overall, the key question is always focussed on the interests of justice: if I decline to set aside the summary judgment would there be or might there be a miscarriage of justice?

[66] In all the circumstances, I am not satisfied there has been or would be a miscarriage of justice if I decline Mr Lambert's application. I do not consider it appropriate to overturn the judgment for what is in isolation an undisputed and liquidated sum because of the assertion of what I consider to be an untenable claim to equitable set-off. That conclusion is reinforced by the point that if Mr Lambert wishes to pursue a counterclaim based on the proposed Fair Trading Act cause of action, he is entirely free to do so.

[67] I do not accept that Mr Lambert is unable to advance such a claim without pre-commencement discovery. The test in r 8.20 is a difficult one to attain. It must be *"impossible or impracticable"* for the intending plaintiff to formulate his claim without discovery. Here, Mr Lambert appears to have some information from an independent analyst and from a former partner of Mr Loveday to the effect that the turnover was not as represented. That information can be pleaded as particulars in support of the essential allegation of misrepresentation and post-proceeding discovery may then follow with further particulars being included at that stage.

[68] I therefore consider that no miscarriage of justice will follow from LPL retaining its summary judgment for the unpaid term loan together with interest and costs. More accurately, in terms of rule 12.14, I do not accept that the entry of summary judgment by Judge Tuohy involved an actual or possible miscarriage of justice.

Should execution of the judgment be stayed?

[69] In the alternative, Mr Lambert seeks a stay of execution of the judgment. Little attention has been given to this issue in evidence and submissions, the focus having been on the threshold question of whether the judgment should be set aside.

[70] Mr Lambert has apparently been threatened with bankruptcy action by LPL. He says the task of pursuing his proposed counterclaim would be more difficult if he is declared bankrupt by the High Court. I accept that is literally correct because it would then be no longer Mr Lambert's decision whether such a claim was mounted or pursued, but rather than of the Official Assignee.

[71] If it appears to the court on an application for summary judgment that the defendant has a counterclaim that ought to be tried, there is jurisdiction under Rule 12.12(2)(a) to grant judgment "on any terms it thinks just". No doubt this wide jurisdiction includes the ability to direct a stay of execution of the judgment on such terms as the Court thinks fit, including relating to the filing and pursuit of the proposed counterclaim.

[72] LPL opposes a stay. Mr Laurenson notes that both LPL and Mr Loveday, while not yet sued, are at risk of an undefendable claim being made by the landlord for the outstanding rental and interest and are therefore potentially prejudiced by delay in receipt of the proceeds of judgment. I accept that weighs against a stay. So does the fact that the judgment is not especially large, that it relates to a liquidated sum not in itself disputed and that the judgment creditor could equally have been a bank rather than the vendor.

[73] The question of whether or not there should be a stay of execution is primarily informed by my conclusion about the prospects of success of the proposed counterclaim, effectively reached in the course of discussing the same claim as a possible equitable set-off. Indeed, it is a threshold to imposing a stay or any other terms attaching to the judgment that the court considers the defendant "has a counterclaim that ought to be tried".

[74] On the information before me, which includes three affidavits from Mr Lambert in which he has had the opportunity to substantiate his defence/counterclaim, I have, in effect, concluded that his proposed counterclaim based on the Fair Trading Act is not tenable. If it was, he would equally have had a substantial defence based on equitable set-off. There is currently no such counterclaim filed, though Mr Lambert has explained, wrongly in my view, that it cannot be launched without pre-commencement discovery. It is not, in my current view, a counterclaim which "ought to be tried".

[75] It may be that Mr Lambert is ultimately able to provide more evidence than I currently have substantiating the prospects of success of his proposed counterclaim, and evidence which might, by reference to his personal financial position, support a stay, but I currently see no justification for ordering a stay of execution of the judgment and I decline to do so.

[76] Incidentally, had the threshold of a claim that ought to be tried been met, and I had been inclined to grant the application for stay, I would only have done so on the condition that the full amount of the judgment was paid into Court. That would have tested whether Mr Lambert's raising of the proposed counterclaim is genuine or

merely an attempt to avoid paying LPL the amount it is undoubtedly owed for the default on the term loan.

Costs

[77] LPL is entitled to costs against Mr Lambert. My preliminary view is these should be awarded on a 2B basis, as adopted by Judge Tuohy, but I reserve costs in case either party takes a different view.

[78] If LPL wishes to pursue its claim for 2C costs, or if Mr Lambert wishes to oppose costs on a 2B basis, brief submissions are to be filed and served within 14 days of the date of this judgment i.e by 5pm on Monday 26 September 2016. Any submissions in reply are to be filed and served within a further 14 days. Any such submissions are to be referred to me for consideration and decision.

[79] Otherwise, in the absence of submissions, I direct the Registrar to fix costs on or after Tuesday 27 September 2016, on a 2B basis.

S M Harrop
District Court Judge