IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION

2007: 184

BETWEEN:

BRIAN FUBLER

1st Plaintiff

-and-

ANGELA FUBLER

2nd Plaintiff

-v-

KATHERINE MELINDA THOMAS

Defendant

JUDGMENT

Date of Trial: September 14-15, 2009
Date of Judgment: September 25, 2009

Mr. Christopher E. Swan, Christopher E. Swan & Co.
for the Plaintiffs

Mr. Richard Horseman, Wakefield Quin
for the Defendant

Introductory

1. By their Specially Indorsed Writ of Summons issued on July 11, 2007, the Plaintiffs claim $73,425 by way of damages for fraudulent misrepresentation. They claim that in negotiations for the sale of the Rise and Shine Nursery School

("the School") between February 19, 2007 and March 6, 2007, the Defendant falsely represented (orally and by reference to financial statements) that the School had 22 registered students when in fact it only had 16. The representations induced the Plaintiffs to enter into an oral agreement to purchase the School for $215,000, which transaction was completed on April 26, 2007. Although the Defendant's former husband was initially a co-defendant, he was no longer involved in the proceedings at trial, a Notice of Discontinuance being filed against him dated January 15, 2008.

2. In the course of the trial, the Plaintiffs in the witness box further alleged that further oral and written misrepresentations where made in the course of the same negotiations by the Defendant falsely characterising the School as "thriving" when she well knew it was in poor financial condition. At my invitation, the Plaintiff's counsel at the end of his closing speech applied for leave to amend the Specially Indorsed Writ to add this additional misrepresentation averment so that all issues in controversy could be resolved. This application was vigorously opposed, and I indicated that I would give my decision as part of the present Judgment.

3. In her Defence, the Defendant alleges that at a meeting at the School before she made a formal offer to sell on February 16, 2007, she expressly told the Plaintiffs that there were currently seventeen students and one would be withdrawing. Her February 16, 2007 offer letter stated that there were 15 students. She denies ever stating there were 22 students.

The Plaintiff's case: the evidence

4. The Plaintiffs' witness statements were signed on the last working day before the trial, some 2 ½ years after the crucial negotiations took place. This suggests a need to treat with some caution their recollections of the precise details of oral discussions to the extent that such recollections are not supported to some extent at least by contemporaneous documentation.

5. Angela Fubler in her Witness Statement describes knowing the Defendant for 2-3 years before the Defendant offered to sell the School to her. They met at Elbow Beach on February 18, 2007 when the Defendant said the School was thriving with 22 out of a maximum permitted 25 students and offered to sell the School for $360,000. She refers to the February 19, 2007 offer letter. The Defendant was desperate to sell because of her marital problems so she arranged a second meeting. Prior to this, Mrs. Fubler met with her husband and based on the financial statement provided by the Defendant, they calculated that the School made $5,358 net profit per month based on 22 students. The second meeting took place on February 23, 2007 after hours at the School. The Plaintiffs promised to make an offer.

6. On February 26, 2007 the Plaintiffs made a written offer to purchase the business for $190,000. After further discussions they offered to pay $215,000 for the business in part out of compassion for the Defendant who had to meet a deadline for the purchase of a new home in Canada. The Plaintiffs requested confirmation of the price and a financial statement for presentation to their bank in support of their application for funding. The letter dated March 6, 2007 confirmed the previous representations about the business being a thriving one. The statement confirmed that there were 22 students. A March 7, 2007 letter confirmed that the business would be sold free of encumbrances. The purchase price was paid on April 26, 2007.

7. On June 4, 2007, the Plaintiffs attended a PTA meeting and were introduced to staff as the School's new owners. At this point they discovered that in March registration had only been 16 students and not 22 as stated in the financial statement obtained from the Defendant shortly after they received the March 6, 2007 letter. They met with the Defendant to discuss what could be done to increase enrolment levels, but seemingly made no accusations of misrepresentation at this time. On June 30, 2007 they received a list from a teacher revealing that only 10 students were enrolled for the summer and 8 for September. In July on a School computer she discovered an email from the Defendant to her husband describing the financial position of the School as being anything but thriving. If the true position had been known, they would not have purchased the business at the agreed price or at all.

8. Under cross-examination, Mrs. Fubler admitted that the financial statement was in fact first received after the March 6, 2007 letter and was not attached to it. She denied that the Defendant's initial offer letter stated 15 students, and said she understood this to refer to the number of musical instruments. She also admitted that the statement "I'll build up the numbers; I've done it before and I'll do it again", sounded like something she would say, although she could not remember saying this prior to the completion of the sale to the Defendant. She also disclosed that the School capacity had since been increased to 30 students and that enrolment was now at 28.

9. She insisted that a July 5, 2007 letter to Mrs. Thomas was in fact sent on that date, and explained that the financial losses to December 2007 were projected losses. She agreed that the letter incorrectly stated the financial statement was attached to both the February 19 and March 6 letters, when in fact it was obtained after both letters were received. She agreed that if the claim based on loss of revenue set out in the July 5, 2007 letter was valid, credit ought to be given to the Defendant for the $11,000 described as being received from her. She also explained that her husband did the financial calculations in respect of the purchase of the business and the compensation sought in the present action. In answer to the Court, Mrs. Fubler stated that the Financial Statement was furnished quite promptly by the Defendant on request, and that she normally responded quickly.

10. Brian Fubler's Witness Statement confirms his wife's Statement to be true as far as he is aware. He states that during negotiations they calculated the value of the School based on tuition fee rates and income less known expenses. He states that the Plaintiffs "*were provided with information from the Defendant set out in 'AF2', that the school had 22 students*" (paragraph 6). He explains that the loss calculations are based on the value of the business when it was purchased. This value was partly based on 22 students at $825 per month x 12 months ($18,150 per month) = $215,000. From July to December the School ran at a loss of close to $30,000 which the Plaintiffs had to fund.

11. Under cross-examination Mr. Fubler stated that he was present at more than one meeting with the Defendant before the purchase price was agreed when she orally represented that there were 22 students. He accepted, like his wife, that student contracts could be terminated on as little as one month's notice so that there was no guarantee that the same number of students who ended the year would be in school for the beginning of the next year. He stated, however, that the most significant representation to him for projecting future income was the assertion that there was a waiting list. This meant that if student numbers fell below what was projected for the new school year, the shortfall could potentially be made up.

The Defendant's case: the evidence

12. The Defendant denied ever representing that the School had 22 students prior to the sale being orally agreed for a price of $215,000 at a meeting at the Elbow Beach Hotel in late February 2009. Under cross-examination, she explained that in her February 19, 2009 offer letter she described the number of students as 15 because after previously believing the School (which then had 17 students) would be sold with 16 students, she had learned that another student might be withdrawing. She denied that the number 15 in that letter referred to the number of musical instruments, which she said numbered 30.

13. She stated that she felt Mrs. Fubler must have known that the School had only 17 students because the capacity was only 25 and she had cancelled the pre-school year in December 2006. This was because she was too emotionally traumatised by her divorce to manage this class herself. Prior to December 2006, the School had 22 students. She admitted that when she supplied Mrs. Fubler the same Financial Statement she had prepared for an earlier prospective purchaser in or about November 2006, she had made a mistake in not altering the document to specify that the 22 student figure and related income statements were projections only.

14. Mrs. Thomas became quite emotional when cross-examined about an email sent to her ex-husband on February 28, 2007 at the same time as she was negotiating a sale. This email stated that (a) she had lost $5000 as a result of the closure of the preschool class and $2475 through the departure of three other children, (b) insufficient money remained after paying salaries to pay other School expenses including rent and (c) as a result, asked the ex-husband to pay rent and related

house expenses as a matter of urgency. She explained that the way she had been left by her ex-husband had been extremely distressing and admitted that the email exaggerated to some extent the School's financial predicament. For instance, she was able to pay the School's rent. However she denied that her offer letter and letter prepared for the Bank deliberately misrepresented the truth by describing the School as thriving. She indicated that she had never run the School for profit and that to her "thriving" in relation to a School took into account non-monetary factors such as happy students and good teachers.

15. The Defendant also explained why the Plaintiffs had only met with her at the School after hours. This was, she said, because the situation was somewhat volatile, implying that parents might consider leaving if they knew a change of ownership was in the offing.

Legal findings

16. The making of a statement of fact or opinion which the maker does not believe to be true may constitute a misrepresentation: '*Chitty On Contracts*', 29th edition, paragraphs 6-004-6-006. On the other hand:

> "*Mere praise by a person of his own goods, inventions, projects, undertakings, or other marketable commodities or rights, if confined to indiscriminate puffing and pushing and not related to particulars, is not representation.*" [1]

17. It is for the Plaintiffs to prove that a misrepresentation occurred and that it was material in the sense that it was one of the inducing causes of the contract being entered into. However, if this primary onus of proof is discharged, the burden of proving that the Plaintiffs had actual knowledge of the truth and were not deceived lies on the Defendant: *Chitty*, paragraphs 6-031-6-035.

18. It was common ground that proof of a fraudulent misrepresentation required proof that the Defendant made the relevant statements either knowing them to be false or reckless at to whether they were true or not: *Derry-v-Peek* (1889) 14 App.Cas. 337. It was also common ground that the "*normal measure of damages in such a case will be the purchase price paid less the actual value*": *Chitty*, paragraph 41.03; *Burville and Burville –v- Jones Waddington Ltd.* [2000] Bda LR 4 (per Clough JA, Judgment, page 33).

19. Although this principle is usually made redundant in contracts drawn by lawyers through the use of express covenants and/or warranties, Mr. Swan correctly submitted that the failure of the Plaintiffs to exercise reasonable care to discover the true student numbers would not constitute a defence to the Plaintiffs' misrepresentation claim: *Redgrave-v-Hurd* (1880) 20 Ch D 1.

[1] '*Halsbury's Laws*', 4th edition reissue, paragraph 715.

Factual findings-misrepresentation as to student numbers

20. The Plaintiffs' pleaded case from the commencement of the trial until closing speeches was that the Defendant deliberately misrepresented the numbers of students the School would have upon completion of the sale by representing that there would be 22 students when she knew there would only be 16. It is stated in paragraph 3 of the Statement of Claim that this was "*orally represented, supported by Financial Statements*".

21. In the course the Plaintiffs' own oral evidence at trial however, they creditably admitted that the Financial Statement in question was not furnished by the Defendant until after they had already consummated in late February 2007 an agreement to buy the School for a specific price of $215,000 subject to financing. In fact the Financial Statement was obtained to assist the Plaintiffs to obtain financing, not to inform their purchase decision. They nevertheless insisted that 22 students had been verbally stated to them during the course of negotiations. Having regard to all the evidence, in particular, documents more contemporaneous than this verbal testimony 30 months after the crucial events, I find that it is more likely than not the misrepresentation complained of was never made and that the Plaintiffs are honestly mistaken in this regard.

22. They first documented their claim one month after first discovering on June 4, 2007 that they had purchased the School with 16 instead of 22 students. They appear to have concentrated their initial efforts on boosting student numbers and the real spur to their legal complaint appears to have been the discovery on June 30, 2007 that only 8 students were registered for the next school year when they first received the waiting list. This prompted the July 5, 2007 letter which stated in material part as follows:

> "*5 July 2007*
>
> *Dear Ms. Thomas:*
>
> *On April 26, 2007, you received $215,000.00 representing the total amount for the sale of the Rise and Shine Preschool. You were provided the full amount against our better judgment as you were desperate to meet a deadline in Canada which related to the purchase of your home. We noted that you had not provided is with all of the information that we need to complete the sale and you assured us that everything we were supposed to get was included in the letter of sale and that it was accurate and that you would make sure that "everything was sorted" before you left the island in July 2007.*
>
> *Immediately following we provided you with a letter indicating our expectations. The first one was sent via email and the second was*

provided to you by hand. On both occasions you refused to follow through on your commitment to read and sign the document.

During a meeting with the parents on Monday 4 June 2007 it was revealed that student enrolment was low. My husband and I investigated this statement to discover that indeed enrolment had been at 16 students since March 2007 only a few short weeks after our negotiations began. **Your written statement as indicated in the Sale of Business letter dated February 19, 2007, which included a Financial Statement, indicated 22 Students enrolled with a capacity for 25 and a waitlist which we have never seen.**

On February 26 2007 we made a counter offer at $190,000.00. You stated that with the purchase of your house in Canada at approximately &164,000.00, Rise and Shine Nursery bills and back pay to cover, you wanted to ensure that you had a bit of funds left to care for your children as you were not certain at the time that you would receive support from your husband. We were understanding this scenario and agreed to the sale price of $215,000.00 we approached the bank with the financial statement you had prepared regarding the Nursery and received our loan to purchase based on the 22 student scenario stated therein.

On June 30 2007 we were provided with a list of names from one of the teachers identifying the children enrolled for the summer and the September 2007 school year. There are 10 children enrolled for the summer and only 8 children enrolled for September 2007 would be full. Clearly this is not the case. Having 8 children enrolled does not generate the required revenue to support the expenses of the Nursery and pay into our loan.

We have consistently made you aware of our concern regarding the enrolment. We have asked you place and ad in the Royal Gazette announcing there is space at the Nursery – you have refused to accommodate our wishes as you indicated on Monday 2 July 2007, "…because you can't afford it". You indicated that it would be placed in the Bermuda Sun and on Emoo [sic]. *We are still uncertain about whether or not this was done. This is not an acceptable response.*" [Emphasis added]

23. Just over 4 months after agreeing to buy the School for a negotiated price, the Plaintiffs unequivocally asserted that (a) the Financial Statement had been attached to the Defendant's initial offer letter dated February 19, 2007, and (b) that the said letter had also referred to a wait list which they had never seen. This would clearly have potentially supported their claim, because the Financial Statement would have falsely represented what the Defendant knew was materially false, namely that there were 22 students when in fact she well knew

that there were only 16. The Plaintiffs were clearly seeking to reconstruct the negotiations some four months later while under the undoubted pressure of assuming initial responsibility for a new business. They doubtless merged the accurate recollection that the undated Financial Statement had been provided for the purposes of assisting them to obtain financing for the purchase with an inaccurate recollection that the same document had been furnished to them for the purposes of initially deciding upon the purchase price.

24. As the Plaintiffs were forced to concede at trial, the undated Financial Statements were attached to neither the Defendant's February 19, 2007 letter nor her March 6, 2007 letter written to assist the Plaintiffs to obtain financing. In my judgment, the Defendant's February 19, 2007 letter clearly stated that there were 15 students, with the Defendant actually understating by one the number of students the School ended up with after the sale:

> "*The School has been very successful over the last five years.* **It is a thriving business with the potential to add**. **Rise & Shine has one of the best reputations on the Island.**
>
> **I am asking $350 thousand for the School, this price is for what I have put into Rise & Shine and for 'Good Will**...*The sell includes everything that is in the Nursery School and the photo copier, computer, handmade wooden computer desk, brand new T.V, brand new DVD player which are in my home. Inside the School most of the equipment table, chairs, shelves, toy area, drama center will never have to be replaced, as I have purchased excellent quality wooden equipment. The toys will have to be replenished as some of them do find other homes.* **The sell includes** *cots, toys, books, resource books, teaching materials, flannel boards, musical instruments* **for each child (15)**, *art supplies, photo machine, wooden book shelves, wooden lockers, wooden cabinet, plastic art storage cabinet, videos, teachers desk, brand new fridge, microwave, outside jungle gym that was just purchased in the summer, a never been used Bermuda Pay Manager software bought for $600,* **client list** *etc*..." [Emphasis added]

25. I do not think that this letter can be fairly read as stating that 15 musical instruments were being sold and giving no indication whatsoever of how many children were expected to be at the School. I accept the Defendant's evidence that that at this point in time there were 17 students and she was expecting two to leave by the time the sale completed, hence the reference to 15 children. What is noteworthy about the offer letter is that the asking price of $350,000 is described as being based on what the Defendant has invested as well as the goodwill. The reference to "*potential to add*" is consistent with a student capacity of 25 and a student body of 15. There is only a passing reference to the number of children and to a "*client list*", with no reference to a "waiting" list at all. There is no reference whatsoever to how much income the School is generating or what its

expenses are. There is no representation made as to how many students will remain in the School for the summer or the following September.

26. The Defendant in my judgment did not herself consider that the number of students was significant to the value of the business or perhaps felt that in light of the comparatively modest registration numbers, other aspects of what was on offer needed greater emphasis. Her sales pitch was simply not cast in income-generating. The offer letter having explicitly referred to 15 students, it is not believable that the Defendant would in subsequent oral negotiations have stated that there were 22 students, especially bearing in mind that she and Mrs. Fubler knew each other and Mrs. Fubler had the means to verify (through a parent whom she knew-if not by insisting on seeing client lists before completing any sale) how many students were actually at the School.

27. I find that the Plaintiffs in any event were clearly content to engage in horse-trading with a seller who they knew was somewhat desperate to sell without any verification of what the financial position of the School was. In the final analysis, they agreed to buy at a 45% discount of the initial asking price on the assumption that the School on completion would have 15 students. Their initial counter-offer was $190,000, set out in their letter of February 26, 2008 does not suggest that their valuation was based on an analysis of student numbers and projected income, but rather on far broader valuation criteria:

> "Dear Melinda,
>
> *We are in receipt of your letter dated 19 February 2007 and are honoured that you would consider us for the purchase of The Rise and Shine Nursery.*
>
> *Thank you for agreeing to meet with us on Friday 23 February 2007 and familiarize us with the contents and history of the school.*
>
> *After much discussion and research, we would like for you to consider our offer to purchase the business, all going concerns, the software, current clients and current client lists, the goodwill associated with it and free and clear of all encumbrances.*
>
> *The amount of our offer to purchase is $190,000….This offer reflects a combination of research into other recent nursery sales agreements, our ability to meet the financial requirements attached to this purchase and to ensure that we maintain 'quality of life' for our family…*"

28. The Plaintiffs' counter-offer refers to the February 19, 2007 letter which mentions 15 children without seeking to clarify the number of children in the light of contrary representations made at the subsequent February 23, 2007 meeting. Indeed, by the Plaintiffs' own account, the Defendant's offer letter made no reference to student numbers at all. If their counter-offer was based on what they

first learned in terms of student numbers at the subsequent meeting, it seems implausible that this supposedly significant fact was not memorialised by the Plaintiffs at the earliest opportunity. Reference is simply made by the Plaintiffs in their February 26, 2007 counter-offer to "*current clients*". The purpose of the February 23, 2007 meeting is said to have been to "*familiarize us with the contents and history of the school*", not to discuss the number of students and the operating costs. The $190,000 counter-offer ($25,000 short of the price eventually agreed) is said to have been based on (a) "*research into other recent nursery sales agreements*", and (b) considerations as to what they could afford to pay. This suggests that the Plaintiffs, like the Defendant, were negotiating on the basis of a valuation which looked at the School, its students and its physical contents in broad-brush market value terms. Rather than researching the income generated or likely to be generated by the School, the Plaintiffs appear to have researched the market value of similar businesses.

29. This approach would be entirely logical, because what was being sold was not a client list alone, but the goodwill in an established entity and its operating equipment as well. Moreover a small School under the control of an owner operator could be expected to have a somewhat fluid student body, by way of contrast with a local shop or service station with a comparatively stable clientele. No explicit mention was made by either party, at this juncture, of existing staff and the benefit of an existing lease for the School's premises. It may be coincidental that the $215,000 agreed price approximates to the income 22 students would generate over one year, just as it may also be coincidental that the agreed price is 55% of the original offer price and the number of students identified in the Defendant's offer letter (15) represents some 60% of the School's authorised capacity.

30. Be that as it may, there is nothing in the contemporaneous documentation relating to the period in February 2007 leading up to the oral agreement reached in late February, 2007 for the Plaintiffs to purchase the School and its goodwill and equipment for $215,000 which even hints at the fact that the Defendant told the Plaintiffs that the School would on completion have 22 students, having in her written offer stated that there would be only 15 students.

31. Accordingly, I find that the Plaintiffs have not proved that the Defendant orally and/or in writing falsely stated in negotiations for the purchase of the School that it had 22 students in February, 2007 when the negotiations took place.

32. The parties essentially agreed that a binding agreement was reached subject to financing in late February. It is unclear what consideration passed for such agreement to be legally binding and it might be more technically accurate to characterise it an agreement in principle subject to contract. The contract was seemingly completed when on April 26, 2007 the purchase price was paid. Irrespective of how the oral understanding is legally characterised, any false representations about student numbers contained in the Financial Statement

provided for the purposes of obtaining financing were clearly immaterial to the Plaintiffs' decision to purchase for the agreed price. The price was determined before any such misrepresentation occurred, and the Defendant has easily satisfied me that this document did not operate on the minds of the Plaintiffs as an inducement to contract because they had already decided to enter into the sale agreement over a week before any subsequent misrepresentations were made.

33. The Financial Statement was, in professional financial terms, an extremely unsophisticated document. It was not dated and seems quite clearly to have been prepared for the Defendant's late 2006 sale offer as she testified. In assisting the Plaintiffs to obtain financing, the parties shared a common interest in presenting the School in the most favourable light, a fact which would be self-evident to any lending institution. Moreover, in seeking financing to purchase a business, it would probably not be unusual to seek to borrow funds to pay a purchase price which was not based on purely on the current income flow of the business, but on the value of the enterprise as a whole. Against this background it seems somewhat bizarre to suggest that the Defendant was at the financing stage seeking to deceive the Plaintiffs by inflating the number of students and/or the potential income flow above the level she had stated in order to "seal the deal".

34. Three months later when the Plaintiffs took over the School in early June, the precise details of the negotiations may well have been forgotten. At this stage, have acquired the business, their attention would likely have focused more sharply on student numbers and income. And reconstructing when they received the undated Financial Statement and precisely how they calculated the financing required to fund the School's acquisition would be influenced by a reluctance to accept that they had assumed a business risk that entailed downside as well as upside outcomes.

35. Their July 5, 2007 letter makes it plain that the present claim was advanced on the wholly mistaken basis that they agreed to purchase the School in reliance on the Financial Statement which they did not in fact receive until after the relevant agreement had been concluded. Even in the witness box at trial, Mr. Fubler said that the reference in the March 6, 2007 letter and the financial statement to a waiting list he regarded as highly important. Yet the waiting list was not mentioned at all either in the Defendant's initial offer letter or in the Plaintiffs' own counter-offer letter. There is accordingly no reliable evidence that supports a conclusion that the purchase decision was influenced by any pre-March 6, 2007 reference to a waiting list at all.

36. Although the claim as pleaded was advanced in good faith and I found the Plaintiffs to be generally credible witnesses, their claim must having regard to the evidence as a whole be dismissed.

Findings-misrepresentation as to the existence of a "thriving business"

37. At the conclusion of the trial in the course of the Plaintiffs' counsel closing speech, I invited him to apply to amend his clients claim so that a second limb of their primary claim, which only emerged in the course of their evidence at trial, could be considered by the Court. I indicated that I would consider this application, which Mr. Horseman opposed, and decide it when delivering the present judgment.

38. Order 20 rule 5(1) provides as follows:

> "*Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*"

39. Having regard to the well-recognised principles relating to applications for leave to amend, I grant leave to amend so that the Statement of Claim reads in material part as follows:

> "*3. During the said negotiations…the Defendant orally represented to the Plaintiff, supported by Financial Statements that the business had 22 Children enrolled and made a gross income of $18,500 per month based on fees of $850.00 per child with net income of $5,358.00 per month and that the business was a successful thriving business.*"

40. Was this additional representation materially false? Again, it is necessary to analyse the representation that was undoubtedly made by the Defendant in her February 19, 2007 offer letter in the context of the offer as a whole. The crucial part of the offer letter stated as follows:

> "*The School has been very successful over the last five years.* **It is a thriving business with the potential to add**. Rise & Shine has one of the best reputations on the Island." [Emphasis added]

41. The crucial part of the offer letter states that the School "*has been very successful over the last five years*" and "*is a thriving business*". Looked at in isolation and having regard to the financial challenges the Defendant was clearly facing (as reflected in her email to her ex-husband, literally read), these words do potentially support the misrepresentation complained of at trial. If the Plaintiffs had entered the purchase agreement in reliance on the March 7, 2007 letter and the Financial Statement, a case of fraudulent and/or negligent misrepresentation would have been made out. However these documents were, ultimately, admitted not to have been relied upon by the Plaintiffs when deciding to enter into the contract.

42. As noted above, however, the Defendant's offer letter also (a) understated by one the number of students the School was eventually sold with, and (b) expressly disclosed that the School was operating at only 60% of its licensed capacity. No mention was made of a waiting list and no Financial Statement suggesting income based on 22 students accompanied the Defendant's written offer. The phrase "*potential to add*" combined with the reference to 15 students made it clear that the School was operating beneath its full financial capacity. Moreover, subsequent events have only borne out this assertion. Under the Plaintiffs' able management, the School now has 28 students and a legal capacity of 30. After a difficult initial transition period, the business now appears to be both successful and striving.

43. The Plaintiffs have not satisfied me on a balance of probabilities that the assertion that the School was a successful thriving business in the context of the February 19, 2007 letter and the related negotiations was a representation in the requisite legal sense. The phrase used was in my judgment no more than sales patter, not a factual assertion which contributed to the Plaintiffs' decision to purchase the School. In any event, the Defendant has satisfied me that if false representations were made in this regard, they did not operate in any material sense on the minds of the Plaintiffs at any material time. There is nothing in the contemporaneous documentation which credibly supports the view that the current cash-flow position of the School was a material consideration underlying the Plaintiffs' purchase decision.

44. This alternative limb of the Plaintiffs' misrepresentation claim also fails.

45. If I had found in favour of the Plaintiffs, however, I would have awarded the costs up to the conclusion of the trial to the Defendant in any event and ordered an inquiry into damages as the parties did not address the quantification of damages in relation to this alternative claim in their evidence or submissions.

Findings: damages (in case primary findings dismissing the pleaded claim are held to be wrong)

46. If I had found in favour of the Plaintiffs in respect of their pleaded misrepresentation claim (on the basis of verbal misrepresentations made in the course of negotiations), I would have awarded damages as follows. In the absence of direct evidence as to what values the parties attributed to existing students, equipment and goodwill, I would have estimated the diminution in value attributable to the difference between 22 and 15 students as follows.

47. A key consideration is that every existing student when the School was purchased in late April 2007 could have left by the end of June on one months notice. In the absence of a pre-school year (as things stood when the purchase occurred), it was likely that 6-7 might move elsewhere at the end of the school year (as seems to have occurred). Other students might leave because of loyalty to the departed owner/manager of the School. The price was agreed without reference to any

waiting list, even if 22 students were verbally mentioned during the February negotiations.

48. In these circumstances and doing my best in the absence of expert accounting evidence, I would assess the value of the 22 assumed students at no more than 25% of the purchase price agreed: $53,750. The difference in percentage terms between the number of students as represented (22) and the number of students actually acquired (16) would be approximately 75% of what was paid. I would award 75% of $53,750 or $40,312.50 gross but give the Defendant credit for the $11,000 received by the Plaintiffs. The net award would accordingly have been $29,312.50, had the Plaintiffs' claim succeeded. In the event it has not.

Conclusion

49. The Plaintiffs' claims for misrepresentation are dismissed. I will hear counsel as to costs.

Dated this 25th day of September, 2009 _____
KAWALEY J