WOLCOTT & ANOR v DAVIS & ANOR

Supreme Court of the Northern Territory of Australia

Rice J.

18, 20 to 26 March, 1 to 3 April, 2 to 10 September 1985 and 31 July 1987 at Darwin.

CONTRACT - rescission - fraudulent misrepresentations on sale of debt collecting business - whether plaintiffs properly rescinded contract - whether restitutio in integrum possible.

EQUITY - rescission - fraudulent misrepresentations on sale of debt collecting business - whether plaintiffs properly rescinded contract - whether restitutio in integrum possible.

EVIDENCE - failure of defendants to call witnesses whose evidence relevant to issue - adverse inference to be drawn therefrom.

Cases applied:

Alati v Kruger (1955) 94 CLR 216 at 222
Jacob v Commissioner for Taxation (Cwlth) (1971) 45 ALJ 568 at 570
Jones v Dunkel (1958-59) 101 CLR 298 at 320 and 321

Cases considered:

Clarke v Dickson (1858) E.B. & E148, (120) E.R.463 at 666
Derry v Peek (1889) 14 AC 337
Smarski v Barbarich (1969) W.A.R 46
S.Pearson & Son Ltd v Dublin Corp (1907) AC 351
Spence v Crawford (1939) 3 All E.R. 271 at 278, 281 and 282
Tailby v Official Receiver (1888) 13 AC 523 at 546

Commercial and Private Agents Licensing Act ss. 6(1), 18(1) and (4), 23(1)(5) and 40
Commercial & Private Agents Licensing Regulations Reg 7(1)
Supreme Court Act s.70

Counsel for the Plaintiffs:	D. Mildren Q.C. with K.M. Curnow
Solicitor for the Plaintiffs:	Mildren, Silvester & Partners
Counsel for the Defendants:	M. Carter
Solicitor for the Defendants:	Close & Carter

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IN THE SUPREME COURT

OF THE NORTHERN TERRITORY

OF AUSTRALIA

No. 306 of 1984

BETWEEN:

ROBERT LEE WOLCOTT and
CAROLEE CORBETT WOLCOTT

Plaintiffs

AND:

JOHN NOEL DAVIS and
COLLEEN LESLIE DAVIS

Defendants

CORAM: Rice J.

REASONS FOR JUDGMENT
(delivered 31 July, 1987)

In this action the plaintiffs claim (inter alia) a declaration that they had lawfully rescinded a written agreement made on the 5th day of March 1984 whereby they agreed to purchase from the defendants a business known as "Daytona Services". The basis of the plaintiffs' claim is that they were induced to enter into the contract upon certain fraudulent misrepresentations made by the defendants. Particulars of these allegations are contained in paragraph 5 of the amended Statement of Claim which, as pleaded, is as follows:-

"5. The Plaintiffs were induced to enter into the said agreement, inter alia, by the following representations made by the Defendants:-

(i) That the gross receipts of the aforesaid business for the three month period July to September 1983 were $84,983.00;

(ii) That the gross receipts of the aforesaid business for the six month period between June 1st 1983 and November 30th 1983 were approximately $165,500.00;

(iii) That one of the largest accounts held by the aforesaid business, namely the Northern Territory Department of Health, was reliable and growing and that under Medicare, accounts including inpatient accounts, would be re-issued to the business, having been culled and uncollectable or uneconomic accounts;

(iv) That the business was still actively engaged in pursuing the recovery of substantial debts due to the Northern Territory Department of Health;

(v) That the Defendants had no reason to suppose that the account with the Northern Territory Department of Health was in any way in jeopardy, and that, in fact, improvement from this source was expected;

(vi) That the Defendants held an existing licence under the provisions of the Commercial & Private Agents Licensing Act enabling them to run the business, and that, until the Plaintiffs obtained licences under that Act, the business could be continued under the Defendants' licence;

(vii) That the Defendants had lodged an application for the Plaintiffs to obtain an appropriate licence under the said Act.

(viii) That the gross receipts of the business as identified by the amounts banked by the business in December 1983 were $28,000.00 and in January 1984 $23,000.00.

(ix) That the Defendants had successfully tendered with the Darwin City Council to collect debts on its behalf and that no income whatsoever had as yet been received from this source as from prior to 29th September 1983.

(x) That the gross income of the business was approximately $30,000.00 per month."

The background to this case is that the plaintiffs are the owners of a property near Richmond, Queensland, known as Hilltop Station. Before acquiring Daytona Services, the plaintiffs were also owners of a home unit at Burleigh Heads, Queensland. While there, the plaintiffs were employed by Ray White Real Estate as real estate salespersons. Daphne Moran was also employed by the same firm but at a different office, namely Southport.

The defendants were the only two partners of a firm known as Daytona Services ("Daytona") which carried on business as debt collectors at premises located in Cavenagh Street, Darwin. At all relevant times this business had three major clients, namely, the Northern Territory Department of Health, the Darwin City Council, and Telecom. The firm also acted as agent for a number of interstate mercantile agencies. During the course of its business the firm had retained a solicitor, Mr. John Withnall, who did its legal work. The arrangement between Daytona and Mr. Withnall was not in accordance with usual professional engagements since Mr. Withnall had agreed with the firm that in consideration of an amount of $300 a week he would issue summonses which were prepared in Daytona's office and delivered to him. He would issue them in his name against the debtors named as defendants. Mr. Withnall occupied an office in the same building as that occupied by Daytona.

When the recovery was made from a debtor, Daytona kept any legal costs recovered and, as well, charged a commission based on a percentage of the amount of the debt recovered.

In about September 1983 the defendants had engaged Ray White Real Estate through its Southport office for the purchase of Daytona. Instructions were given to Daphne Moran by the defendant, John Davis, who provided her with documents included in Exhibit P43 referred to loosely as a Profit and Loss Projection of the business, Daytona Services.

In early February 1984, following certain telephone discussions between the parties, a meeting took place in Darwin lasting from either Monday 6th or Tuesday 7th February until Friday 10th February 1984. There was some dispute between the parties about when the plaintiffs had arrived in Darwin for what I will call "the February meeting". As a preliminary to that meeting, there was at least one telephone discussion between Mr. Wolcott and Mrs. Davis and at least two telephone discussions between Mr. Wolcott and Mr. Davis. Following the February meeting the plaintiffs returned to Burleigh Heads and later indicated through Mr. White that they wished to go ahead with the purchase. The plaintiffs engaged solicitors in Southport, Queensland, to act on their behalf and the defendants engaged Mr. Withnall to act for them. A written contract for the sale and purchase of the business dated 5 March 1984 was entered into. The contract provided for a

consideration of $160,000 which was to be satisfied partly by a transfer from the plaintiffs of their unencumbered interest in the Burleigh Heads unit (for which a nominal value of $90,000 was ascribed by the contract) with the balance of the purchase price of $70,000 to be notionally advanced by the defendants to the plaintiffs, the advance to be secured by a mortgage over Hilltop Station. Settlement of the contract took place on Friday, 23 March 1984. The plaintiffs took over the running of the business on Monday, 26 March, 1984.

After settlement, both defendants worked in the business and were employed by the plaintiffs for short periods, interrupted by a period of approximately one week in early April 1984 when the defendants went to Burleigh Heads.

It is common ground that neither one of the defendants worked in the office after 24 April 1984 although the defendants maintained that the last day either of them attended at the office was on 19 April 1984. The reason why the defendants were employed by the plaintiffs was that the plaintiffs had no familiarity with the type of business that they had purchased and desired to acquire some instruction in the procedure which was only too familiar to both of the defendants who had a ready knowledge of the business of debt collecting.

A short interval of time went by before the plaintiffs realised that the business was not up to expectations. They consulted solicitors who, in a letter to the defendants dated 16 May 1984, purported to rescind the contract, and on the very same day obtained an ex parte injunction against the defendants restraining them, inter alia, from in any way dealing with the mortgage they held over Hilltop Station. The letter (omitting formal parts) is as follows:-

> "We are instructed that you entered into a contract for sale of your former business known as 'Daytona Services' to our clients on or about 5th April (sic) 1984.
>
> We are further instructed that you represented to our clients during negotiations leading up to the formation of the contract the following allegations of facts:-
>
> (1) The gross receipts of the business for the three month period July, August and September 1983, were $84,983.00.
>
> (2) The gross receipts of the business for the six month period June 1, 1983 to November 30, 1983, were $165,000.00.
>
> (3) That one of the largest accounts held by the business, namely the Northern Department of Health, was reliable and growing and that under Medicare, accounts including in-patient accounts, would be re-issued to the business, having been culled of uncollectable or uneconomic accounts.
>
> (4) That the business was still actively engaged in pursuing the recovery of substantial debts due to the Northern Territory Department of Health.
>
> (5) That you had no reason to suppose that the account with the Northern Territory Department of Health was in any way in jeopardy, and that, in fact, improvement from this source was expected.
>
> (6) That you held an existing licence under the provisions of the Commercial and Private Agents Licensing Act enabling you to run the business, and that, until our clients obtained licences under that Act, the business could be continued under your licence.

(7) That you had lodged our clients' application for the appropriate licence under the Act.

On our instructions, the above allegations of fact are in fact false, and were false to your knowledge at the time you made them, or alternatively, that you were recklessly indifferent as to the truth or otherwise of any of these statements.

We are further instructed that when you made the above statements, you intended our clients to rely upon them and that our clients relied upon each and every one of the above statements as being true, the truth of each of which statements were material matters which induced our clients to enter into the said contract.

Accordingly, we have advised our clients that they may rescind the contract and sue you for damages.

The purpose of this letter is to advise you that our clients have elected to rescind the contract and sue you for damages. Consequently, our clients will no longer be operating the business which is returned to you as of now for you to do as you wish with it.

Unless you are prepared to forthwith accept the rescission of the contract, accept the return of the business, return to our clients their property in Queensland (being part of the purchase price), discharge our clients' mortgage to you over Hilltop Station, accept a retransfer of the lease from Australian Guarantee Corporation Limited of the "Apple" Computer, and otherwise do all things necessary to restore our clients, as well as yourselves, to your former positions as at the date of the contract, we are instructed to issue legal proceedings against you.

Furthermore, we are instructed that, shortly prior to settlement, you factored a substantial quality (sic) of the book debts owing to the business and took the proceeds thereof yourself. We have advised our clients that that was an act which quite separately from the above matters entitles them to rescind the contract and sue for damages. In so far as it is necessary for our clients to rely on this ground to support their decision to rescind the contract, please be advised that our clients rely on this ground as well."

The plaintiffs received no response from the defendants and did not attempt to run the business after this date. They paid off the staff, leaving the keys of

the business with an employee. They left the office intact including the furniture and unbanked cheques. I find that the defendants refused to take the business back. Ultimately the Department of Law obtained the unbanked cheques, moneys and postal orders still in the office, and these were paid into court where they were either placed in the court's bank account or held in specie pending resolution of this litigation. The defendants, who held a lease over the premises in their name, did nothing, but another mercantile agent subsequently entered into a new lease with the landlord and took over the premises and presumably a good deal of the clientele of the business which had operated there. A computer, the lease of which had been transferred to the plaintiffs on settlement, was paid out by the plaintiffs. For all intents and purposes the business, as a going concern, had virtually disappeared.

In April 1984 the defendants borrowed moneys from Finance Corporation of Australia which was secured by their granting a first mortgage over the Burleigh Heads unit. During the course of the trial before me the defendants defaulted under the terms of the mortgage and the mortgagee sold the property, but beyond this I have no evidence of the outcome.

On 30 August 1984 the injunction granted on 16 May 1984 was dissolved by order of this Court. On 3 September 1984 the defendants entered into a parol agreement with Mr. Withnall whereby the mortgage held by them over Hilltop

Station was assigned to Mr. Withnall. By a deed dated 23 January 1985, and before trial, this agreement was purportedly rescinded whereby Mr. Withnall acknowledged that he held his interest in the mortgage upon trust for both defendants.

The hearing of the action commenced before me on Monday, 18 March 1985. At that time Mr. Griffin appeared as counsel for Mrs. Davis and Mr. Davis appeared on his own behalf. Mr. Griffin sought an adjournment of the trial on the ground that he had only just been briefed that morning. I allowed an adjournment until Wednesday, 20 March 1985 when the hearing recommenced. At that time Mr. Griffin announced his appearance for both defendants, but with the consent of the plaintiffs, as Mr. Griffin said that his instructions were still not completed, the plaintiffs consented to cross-examination of their witnesses by both Mr. Davis personally and by Mr. Griffin on behalf of Mrs. Davis until Mr. Griffin had had sufficient opportunity to complete his instructions. This state of affairs continued until the plaintiffs closed their case on liability on 1 April 1985. Thereafter the defendants were represented by the same counsel in the normal way.

At the outset of the trial both parties agreed to have the issue of liability only determined, as a consequence of which no evidence as to damages was led by either side. Hence the whole of the contest between the parties has been limited to the issue of liability only.

The trial took place on the following dates:-

20, 21, 22, 25 and 26 March 1985;
1, 2, 3 April 1985;
2, 3, 4, 5, 6, 9 and 10 September 1985.

During the hearing in September 1985 the defendants were represented by Mr. Carter who replaced Mr. Griffin as their counsel. Mr. Griffin, in the meantime, had taken up an appointment elsewhere.

I turn now to the principal issues.

Paragraph 5(i) alleges that the plaintiffs were induced to enter into the agreement by a representation made by the defendants that the gross receipts of the business for the three month period July to September of 1983 were $84,983. In paragraph 5(ii) the plaintiffs allege that they were induced to enter into the agreement by the representations made by the defendants that the gross receipts of the business for the six month period between June 1st 1983 and November 30th 1983 were approximately $165,500.

The evidence of Mr. Wolcott is that in December 1983 he had a client interested in purchasing a cash-flow business. He received a telephone call from Mr. Davis in December 1983 who enquired about residential real estate in the Mermaid Beach area in Queensland. In the course of

that discussion Mr. Davis mentioned that he had a business called Daytona Credit Services which happened to be for sale in Darwin. He said that the business was grossing about $30,000 a month and that his expenses were running at approximately $15,000 a month. Mr. Davis said that the price of the business was $180,000 and that some of his business was secured by contractual arrangements. During the course of the next two or three weeks Mr. Wolcott said he again spoke to Mr. Davis over the telephone and told him that his client had lost interest in the idea of purchasing the business but that it had become of interest to him and for that reason he asked Mr. Davis if he would send him some written material concerning it. Shortly afterwards, Mr. Wolcott received in the mail what he described as some promotional material regarding the nature of the business and some financial figures. One of the documents was what came to be described as a Profit and Loss Projection (Exhibit D5). After that, Mr. Wolcott had further telephone discussions with Mr. Davis who repeated that the business was operating at a level of approximately $30,000 a month and his expenses at about $15,000 a month. At that stage Mr. Davis confirmed that the price of the business was $180,000. Mention was made again of the firm's same clients and the fact that there were some with whom contractual arrangements had been made. Mr. Davis suggested that Mr. Wolcott should come to Darwin. Before coming to Darwin, Mr. Wolcott also spoke to Mrs. Davis on one occasion which was probably 1 February 1984, but according to Mr. Wolcott, apart from being given a telephone

number of the defendants' accountant and being invited to speak to him, nothing much else material was discussed between them.

At the February meeting at Darwin Mr. Wolcott produced the Projection, Exhibit D5, on which he made notes during the discussions with the defendants at the premises of Daytona and afterwards in the afternoon whilst in his hotel room. Initially, discussions between the plaintiffs and the defendants centred around the clients of the business, how the business operated, and business overheads. Eventually there were discussions about the business income. In evidence, Mr. Wolcott said:-

> "At a later stage, and I would feel that this probably happened on the next day, we asked Mr. Davis if he could verify the figures that up to this point had simply either been told to us verbally or presented in the form of these projections, and he very willingly presented us his deposit books. Mr. Davis handed us the deposit books and a calculator then sat back and allowed my wife and I to have free rein to look at the deposits, add up the total over the period that extended from June to November of 1983, which we did. When we finished we arrived at a figure of $167,122. There were - at that point Mr. Davis came back into the discussion. I can't recall exactly what was said, but some relatively small matter regarding the figures resulted in our doubling - not that $167,122, a figure which is noted on another item that we have with us, but a slightly lower figure, the end result of which was that we arrived at a 6 month figure of $165,500 representing the returns of the business over the 6 month period we were looking at."

The defendants, on the other hand, say that the Projection, Exhibit D5, was not sent by Mr. Davis to the plaintiffs but that the plaintiffs obtained this document

from Daphne Moran, that the defendants each spoke to Mr. Wolcott on the telephone for the first time on 1 February 1984 and that on that occasion, and later during the course of the February meeting, the defendants told the plaintiffs that the figures contained in the Projection were unreliable and inaccurate.

As to this telephone conversation, Mr. Davis' evidence included the following:-

> "Can you remember what he said? --- Yes, he said that he had received from Daphne Moran at the Southport office of Ray White Real Estate some details that I had left with her some months previously." (p.599)
>
> "Was there anything else that you remember of the conversation at all? --- Mr. Wolcott referred to the figures that he had from Daphne Moran. I explained to him that we later discovered them to be accurate - inaccurate after we'd given them to Daphne, but if he'd like to take the matter any further at all, he should contact our accountants, or if he wished to examine the books, in fact even have them audited he would be free to do so." (p.600)

Mrs. Davis' evidence on this issue is at pages 923 to 925 of the transcript. She deposed to receiving a telephone call from Mr. Wolcott on 1 February 1984. She said that Mr. Wolcott said that he was interested in buying Daytona "and I have some figures here". She claimed that Mr. Wolcott had told her, upon her enquiry about where did he get the figures from, that Mr. Wolcott said, "I got them from our Southport office from Daphne Moran", whereupon Mrs. Davis said, "The figures you have got are inaccurate; they were wrong." (p.923)

Both defendants maintained at the February meeting they pointed out to the plaintiffs that the figures in Exhibit D5 were wrong.

The Projection, Exhibit D5, itself contains the following statement:-

> "The above projection turnover is based upon July to September trading figures for 1983 which totalled at 29/9/83 $84,983. It can be expected that turnover will fall below $30,000 per month only during December and January in the current financial year ..."

It is against this background that the allegations in paragraphs 5(i) and (ii) are made in respect of the amounts of $84,983 and $165,500, respectively.

The plaintiffs did not say that they separately added up the figures from July to September from the deposit books. What they did was to add the figures from the beginning of June to the end of November. Both plaintiffs said that they relied on the figure of $84,983 and the prediction of $30,000 per month (being understood to be approximate only) as the level of trading of the business by February 1984, given that that level would not be achieved within the months of December and January as repeated orally to Mr. Wolcott over the telephone.

In short, the plaintiffs claim that both before and during the February meeting the defendants made fraudulent

misrepresentations concerning the business in Exhibit D5 which they relied upon in entering into the agreement with the defendants. There is considerable disagreement between the parties about whether the representations alleged by the plaintiffs were ever made and, if made, whether they were false or fraudulently made.

While the resolution of these issues depend very largely on a question of the credibility of the witnesses called on each side, the Projection variously represented by Exhibits P1, D5 and P43, helps to throw some light on the matter. In particular, did the plaintiffs obtain Exhibit D5 from the defendants, as they alleged, or from Daphne Moran as alleged by the defendants? The answer to this question will throw considerable light on the issue for the following reasons. First, if Exhibit D5 was obtained by Mr. Wolcott from Daphne Moran, the plaintiffs would have obtained what they would fairly be expected to realise was a relatively out-of-date document which would tend to put them on enquiry about whether it still represented the current position. Hence the defendants' version of the telephone discussions prior to the February meeting might well be preferred to that of Mr. Wolcott and especially lead to a finding that Mr. Wolcott had been told that the figures referred to in that document were not reliable or accurate. This would have enabled the defendants to claim, as they did, that any representations made in that document had been withdrawn prior to the agreement being entered into.

On the other hand, if Exhibit D5 was obtained directly from Mr. Davis, as Mr. Wolcott asserted, then the following consequences are:-

1. that the document had been sent to the plaintiffs by Mr. Davis for the purpose of inducing them to enter into the agreement;

2. that the conversations alleged by both defendants that Mr. Wolcott acknowledged that he obtained the document from Daphne Moran were false;

3. that the document was, to the knowledge of both defendants, inaccurate in that it considerably overstated the trading figures for the period from the beginning of July to the end of September;

4. that the defendants' allegations that the plaintiffs were told that the document was "inaccurate, incorrect or wrong" are also false;

5. that the purpose of sending the document to the plaintiffs was deliberately to deceive the plaintiffs about the level of business trading from the beginning of July to the end of September;

6. that the defendants deliberately lied about this point;

7. that the defendants are not witnesses of truth.

I find, on the balance of probabilities, that the evidence of the plaintiffs is to be preferred to that of the defendants for the following reasons. First of all, the evidence of Daphne Moran, who was called by the plaintiffs, is that she did not receive a copy of Exhibit D5 from the defendants. The document she received was Exhibit P43 which was an identical document as to content but in upper case typescript. In evidence, she denied ever having provided Mr. Wolcott with a copy of Exhibit P43 at any time they were both employed by Ray White Real Estate and

maintained that the plaintiffs never had any opportunity of obtaining a copy of that document from her office. Following a request from Mr. Wolcott, she sent him her complete file relating to Daytona (including Exhibit P43) with a letter dated 3 December 1984 (Exhibit P47). She gave her evidence in a forthright manner and was not shaken in cross-examination, and there is nothing inherently improbable in her evidence. Although she worked for the same employer, she did not know the plaintiffs particularly well and had no reason to lie about this matter.

Mr. Davis conceded that he prepared Exhibit D5 on his computer which had the facility to print out on different typescripts as well as to store information. There is no doubt that Exhibits D5 and P43 came from his computer. Faced with this evidence, the defendants alleged that when the Projection was finished Mr. Davis ran off several copies in different typescripts and asked his wife which she preferred (pages 828 to 829). Mr. Davis said, "I just picked up several copies and took them with me." Subsequently, Mrs. Davis alleged that she picked several differently printed copies of the Projection for her husband to take with him to Surfers Paradise (page 1076). Earlier, Mr. Davis said in examination-in-chief (page 599), before he had been cross-examined about the differing printed versions of the Projection:

> "Had you in fact left any details with Daphne Moran of Ray White Real Estate? --- Yes, I had.

Can you remember the details that you left with her --- Yes, I left her a - copy of what is now called the projection and two pages of notes relating to the business.

Could the witness be shown P30?

Have you seen either of those documents before? --- Yes, P1 and P2 are documents I left with Daphne Moran. I left some promotional material which we had prepared earlier for general distribution to clients, and I believe there may have been three different sheets of promotional material."

Exhibits P1 and D5 are identical in content and typescript; but it was Exhibit P43 which Daphne Moran acknowledged as the document she had received and not Exhibit D5 or a document of the same content and typescript which Exhibit P1 was.

Moreover, the defendants' evidence is contradicted further by the evidence of Miss Moran who said she received only one copy of the Projection and that was Exhibit P43 (in upper case typescript) and had never seen Exhibit P1 or Exhibit D5. Furthermore, she asserted that Exhibit P43 was mailed to her and not given to her personally. I accept her evidence on this score.

I find, on the balance of probabilities, that Mr. Wolcott had with him Exhibit D5 at the February meeting and that as it contained damaging material, from the defendants' point of view, they therefore invented the story that the plaintiffs obtained Exhibit D5 from Daphne Moran. It is perhaps not without significance that neither counsel for

the defendants, nor Mr. Davis, put to Mr. Wolcott in the course of his cross-examination any of the conversations that the defendant later asserted had taken place with Mr. Wolcott relating to the figures in the Projection being inaccurate or incorrect despite their obvious importance and significance.

I find that the defendants invented their stories about Mr. Wolcott admitting to receiving the Projection from Daphne Moran in those initial telephone conversations, and that in an attempt to extricate themselves from their predicament they were forced to say that they had pointed out to Mr. Wolcott that Exhibit D5 was inaccurate, and they lied about the number of copies of the Projection given to Miss Moran. Although Mr. Davis claimed that he had told Miss Moran that the Projection was inaccurate, no attempt was made to establish this point when Miss Moran was being cross-examined. The defendants conceded that the figure of $84,983 was wrong and, in fact, was overstated by at least $20,000 to their knowledge (Mr. Davis - pages 798 to 802; and Mrs. Davis - page 1079). Mr. Davis attempted to exculpate himself from this by asserting that the business had supported a separate printing business which he conducted under the style of "Pink Panther" and consequently believed it fair to include the Pink Panther deposits as income to the Daytona business (page 801); but this explanation is untenable because the Pink Panther business had been sold off by the end of the year 1983 and the payment of $20,000 into the Daytona account was clearly as a

result of a sale of Mr. Davis' interest in the Pink Panther business to a new partner and had nothing to do with the income of Daytona. As far as I can ascertain, the true position with regard to the period July to September is set out in Exhibit P15 which demonstrates that the actual income to the business in that period, (based upon cash receipts,) is only $64,012, accepting for present purposes that transfers from the trust account to Daytona truly represent income to that business.

I am satisfied that Mr. Davis attempted to confuse the issue (at pages 789 and 838) by claiming that the figure of $84,983 was arrived at by adding the monthly invoicing to the amount taken over from the trust account. There are several holes in this argument. The first is that if the figure of $84,983 was arrived at in this way, it would not contain any of the Pink Panther money or the moneys from Poveys (to which I will refer later), neither of which was invoiced nor transferred from the trust account.
Mrs. Davis acknowledged the latter point in her evidence at page 1161.8. Secondly, the defendants asserted themselves that the sum of $84,983 was wrong because it included the moneys from Poveys, and by implication, from the Pink Panther moneys as well. Indeed, no other explanation was advanced. Thirdly, Exhibit P15 shows the actual deposits taken from the bank statements amounted to $91,683. After deducting $1,700, due to a bank adjustment for a deposit which was made in error, the result is $89,983 which is precisely $5,000 more than the sum of $84,983. Although

the sum of $5,000 is unexplained, the fact is that it is precisely $5,000 more.

What emerges is that the July to September figure of $84,983 is inflated by an unknown figure for moneys taken from the trust account which were not the property of Daytona. During this period there was only one known doubtful cheque, namely one for $1,550 on 26 August 1983; but the evidence is that the trust account went into overdraft in July 1983. (Pages 777 to 778 and Exhibit P41) Mrs. Davis conceded that the trust account went into overdraft, and I find that it was more likely than not that the figure of $84,983 was inflated, due to a irregular transfer of moneys from the trust account of the business, but that in the absence of the trust account books I am unable to make an affirmative finding as to the precise amount involved. Nevertheless, I find that the defendants were aware that the trust account went into overdraft and were recklessly indifferent to the management of the trust account as evidenced by the simple fact that it was allowed to go into overdraft at all.

The defendants sought to answer these contentions by alleging that the plaintiffs knew the figure was wrong because the defendants had told them so on a number of occasions, that the plaintiffs had conducted an investigation of the figure by adding up the deposits for the period which "added up to a different figure" (page 162.9). Thus, it was argued, it is impossible to rely upon

a figure which was known to be wrong or untrue. Thirdly, the defendants claimed that they made all their books and accounts available to the plaintiffs and offered the plaintiffs the opportunity of having their books audited. Accordingly, it was argued, that as the plaintiffs had conducted an incompetent examination of the books, it was their look-out. The defendants placed reliance upon the case of Attwood v Small (1838) 6 Cl. & Fin. 232. At this stage, in passing, I merely note the observations of Sir George Jessel, M.R., in Redgrave v Hurd (1881) 20 Ch.D. 1 at p.17:-

> "In no way, as it appears to me, does the decision, or any of the grounds of decision, in Attwood v Small, support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract enquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud."

The defendants also argued that any defalcation of the trust account was done so innocently.

As to the defendants' first contention that the plaintiffs conducted an investigation of the figure of $84,983 which "added up to a different figure", I am of the opinion that that approach misconstrues the evidence. The evidence is that the plaintiffs totalled the deposits for a longer period than July to September. Even accepting that the total figure for this period was approximately $91,000, this figure exceeds the total figure of $84,983 thereby

giving the impression that that figure was, if anything, understated. I find that the defendants must have known that the plaintiffs would be misled by adding the deposits from the deposit books or from the bank statements because, to the knowledge of the defendants, those deposits contained both the Povey moneys and the Pink Panther moneys, neither of which had anything to do with the earnings of the business of Daytona.

The reference, (at page 162.9), to "adding up to a different figure", is not an accurate statement of the evidence and does not refer to a figure which is different from $84,983 for the three-month period July to September. The words used were:-

> "... we went quickly from that subject to a discussion of the bank deposits which resulted in a different figure."

What Mr. Wolcott was referring to was the result of multiplying $84,983 by four. (see page 162.3) This amounts to $339,932. As he pointed out before, (page 100), the projected annual income stated in Exhibit D5 is $339,752 against the item, professional fees, shown therein. He then says, "We did briefly discuss that result and figure when we were at our meeting in Darwin." Thus, when he said, "we went quite quickly from that subject to a discussion of the bank deposits which resulted in a different figure", the "different figure" he is referring to

is the figure of $331,000 which was arrived at by multiplying the six-month figure of $165,500 by two. (See page 103.7). Thus, it was not the case that the plaintiffs knew that the figure of $84,983 was "wrong", "inaccurate", or in any way overstated.

The submission based on Attwood v Small (supra) upon which Mr. Carter for the defendants relied, is distinguishable from the facts of the present case for the reason that in Attwood v Small the purchasers engaged a team of experts as well as three of the directors of the purchaser Company whom, the Court found as a fact, went to the vendor to examine for themselves the accuracy of the representations made to them and that the purchasers did not, as a matter of fact, rely upon the representations of the vendor. As I have already observed, Sir George Jessel M.R. in Redgrave v Hurd (supra) dealt specifically with the reasoning in Attwood v Small at some length and it is apparent from his analysis of the judgments of Their Lordships in Attwood v Small that that case is not authority for the proposition on which Mr. Carter relies.

It is clearly established by the Court of Appeal in Redgrave v Hurd that:-

> "(a) where one person induces another to enter into an agreement with him by material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made had the means of discovering, and might, with reasonable diligence, have discovered, that it was untrue;

(b) that the enquirer made a cursory and incomplete enquiry into the evidence, for that if a material representation is made to him he must be taken to have entered into the contract on the faith of it, and in order to take away his right to have the contract rescinded if it is untrue, it must be shown either that he had knowledge of the facts which showed it to be untrue, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation."

The submission by counsel for the defendants that the trust defalcations were done innocently is beside the point. The question is whether the defendants knew that the figure of $84,983 was inflated because moneys from the trust account had been improperly transferred or were recklessly indifferent to those transactions.

The defendants also relied upon their assertion that they had told the plaintiffs during the February meeting about the Pink Panther moneys, the Povey moneys and the Withnall moneys. The defendants went so far as to assert that Mr. Wolcott noticed these various deposits and specifically queried them, at which time he was told truthfully what they were. Furthermore, the defendants claimed that during the course of their giving these explanations, Mr. Davis referred to a cash book (Exhibit P30) and ringed in pencil the notations or the entries in that book which were being specifically queried. The plaintiffs deny that any of these matters were drawn to their attention or that they had any knowledge of them prior to settlement. Moreover, they deny ever having seen the

cash book (Exhibit P30) at all during the February meeting, or indeed, until trial.

The plaintiffs submit that the defendants' evidence on these issues is a continuation of the litany of lies told by the defendants, stemming from their denial of having sent the Projection to the plaintiffs. In support of this submission, the plaintiffs say that if the defendants sent the Projection to the plaintiffs knowing it contained false information, the purpose of doing so must have been to deceive the plaintiffs. It follows, it is argued, that the defendants, therefore, are hardly likely to make full disclosure of the falsity of their position when a close analysis is made of the figures on which the false information was based.

Mr. Wolcott said that on 24 April 1984 he had a conversation with Mr. Davis referring to the discoveries he had made regarding the Poveys, Withnall and Pink Panther deposits. (Pages 141-143) Mr. Wolcott said that he made notes of this conversation immediately after Mr. Davis left the room. (Page 144) When giving his evidence before me, Mr. Wolcott referred to these notes and refreshed his memory about other parts of this conversation not previously deposed to. (Pages 147 to 149) The notes were marked for identification Exhibit (MFI P10). There was no cross-examination of Mr. Wolcott as to whether or not this conversation took place and no cross-examination on the notes whether on the voir dire or otherwise. Later, when

giving evidence himself, Mr. Davis denied that that particular conversation ever took place and further denied that he had gone into the office on that day.

A contemporaneous record of payment to the defendants during the short time they were employed by the plaintiffs reveals, through a notation on cheque butt No. 291445 dated 26-4-84, that Mr. Davis was paid for two half days (Exhibit P27). According to Mrs. Davis, the plaintiffs had paid the defendants $500 by cheque No. 291406 (Exhibit P27) dated 5 April and that the defendants went to Burleigh Heads between Friday 6 April, and Tuesday 17 April, neither of them returning to the office until Wednesday 18 April. Mrs. Davis claimed she worked for half a day on 18 April and one day on 19 April. Mr. Davis claimed he worked only on 18 April. The plaintiffs' notation on cheque No. 291445, therefore, supports Mr. Wolcott's evidence that there was another day on which Mr. Davis worked half a day and I find that this was probably 24th April. Accepting as I do Mr. Wolcott's evidence of the day and, in particular, the discussion which took place between him and Mr. Davis as outlined by Mr. Wolcott, I have no difficulty in rejecting Mr. Davis' evidence on this topic. The Povey, Withnall and Pink Panther deposits were of such significance, both as to amounts and from whom they were derived respectively, that Mr. Davis could hardly have forgotten any of them.

If the defendants had made a full disclosure of the facts at the February meeting, this would have drawn

attention to serious errors in the projected income of the business. The Povey, Withnall and Pink Panther deposits totalled $35,192 (see Exhibit P16) over the period from June to November 1983. This reduces a potential 6-month income based on $84,983 multiplied by two, (which results in approximately $170,000,) to $135,000, per annum. This is so vastly different from the projected annual profit of $155,000 or, more accurately, $154,765, contained in Exhibit D5, that had the true state of affairs been revealed to them, I find that the plaintiffs would not have proceeded with the purchase of the business, bearing in mind that they were looking to service the repayment of a debt to the defendants for the balance of purchase moneys of $70,000 repayable at $2,411 per month (that is, $28,932 per annum) as well as employ a manager to run the business for them at $20,000 per annum (Wolcott page 106 and Davis page 617).

A most significant piece of evidence on which the credibility of the parties turns, is the cash book, (Exhibit P30). It will be recalled that Mr. Davis sought to gain support for his assertion that the Povey, Withnall and Pink Panther deposits had all been drawn to the plaintiffs' attention during the February meeting and that to reinforce his assertion he relied upon his claim that he had made pencil notations in the cash book in the course of drawing them to Mr. Wolcott's attention.

The issue of the cash book (Exhibit P30) was first raised in cross-examination at page 234. At that stage

Mr. Wolcott said that he was certain that he had not seen that book before. Mr. Davis, who was cross-examining him, did not signal the significance of the book at that stage. The next time the book was raised was at page 309 when Mr. Wolcott said that he "had seen it yesterday for the first time". It was raised next at page 351. Again the significance of the cash book was not signalled. Then it was raised again at page 355 when Mr. Wolcott said that the book "was made recently" and referred to the price tag with the date "84 JAN" on a price tag in the form of a sticker entitled "Darwin Newsagency Tel.818222" in red printing thereon, and the price $20-95 immediately above the red printing, and the figures "99" below it. At that point, counsel for the defendants said, "My learned friend asked for permission to remove - or my permission - I do not know if I have the right to give it, but to have a look at the cash book this morning, but I would make no issue of it,..." At that stage, the point of the price tag in the cash book was not revealed in cross-examination other than to suggest that the book was in existence at the February meeting, and if it had been consulted, what it might have revealed (pages 351-353). The topic was raised again at page 375. On this occasion Mr. Wolcott denied seeing the cash book, Exhibit P30; but whilst agreeing that he could not recall seeing a cash book, he did not deny the possibility of seeing a cash book at the February meeting. At no time during the cross-examination of the plaintiffs was it suggested that Mr. Davis had referred to the cash book Exhibit P30 to explain the Povey, Withnall or Pink Panther

deposits, or that he had made a pencilled notation alongside any of these references or had put a ring around these figures in the cash book, Exhibit P30. At this stage there was no suggestion of impropriety on the part of the plaintiffs or their legal advisers in connection with the price sticker. Mrs. Wolcott, who was not present in Court while her husband gave evidence, was asked in examination-in-chief if she had ever seen Exhibit P30 before. She answered quite emphatically, "no" - (page 413). In cross-examination it was not pursued with her. (The limit of her cross-examination on this topic is at page 442).

Mr. Snell, who was appointed as an inspecting officer pursuant to s.26 of the Commercial and Private Agents Licensing Act, and who took charge of the books of account after the business of Daytona had folded, was asked by me at page 470 whether he had ever seen the cash book, Exhibit P30, and he said that he had never seen it. Mr. Davis then announced, "We'll be calling a witness who was present in relation to that matter", but whether he meant present when the defendants' books were handed over to Snell or present at the February meeting, was not made clear. At all events, no independent witnesses were called to support the defendants' contentions that Exhibit P30 was given or shown to Mr. Snell, although Mr. Riley, who was acting for the defendants at the time of the hand-over of the books to Mr. Snell, could have been called on this issue. Two witnesses were later called by the defendants with a view to

establishing that Exhibit P30 was there at the February meeting.

The next witness to comment upon a cash book was Mr. Withnall who had been called on behalf of the plaintiffs. He said in the course of cross-examination that when he entered the room during the February meeting, he had an impression of account books being on Mr. Davis' desk (page 555). In re-examination, however, he said at pages 568-569:-

> "The accounts books that you've said your impression was were you able to see figures?--- No. No.
>
> Writing?--- Impression really is the accurate word. I didn't - no, I didn't take any notice of the particularity of it all.
>
> Could you tell us what it was that you actually saw on the table?--- Some documents spread over the table - yes. The impression is of a couple of open exercise book sized books - perhaps a bit bigger. I know they used Kalamazoo sheets and there weren't any Kalamazoo sheets there.
>
> Exercise?--- There may have been an analysis book.
>
> Sorry?--- There may have been an analysis book.
>
> There may have been an analysis book, did you say?--- Yes, I honestly cannot tell you what, in particular, they were. There was just documentation."

This evidence hardly proves the existence of a cash book in the office during the February meeting let alone Exhibit P30, the relevant cash book.

The first time the full significance of Exhibit P30 was mentioned was in the course of the opening address by counsel for the defendants (Page 585.8). As to the issue of the price sticker, this did not become significant until the cross-examination of Mr. Davis, after the hearing resumed in September 1985 (Pages 834 to 835).

If the defendants thought that the cash book Exhibit P30 was so vital, as they must have done if the account Mr. Davis gave of it is true, it is extraordinary that no effort was made to put to either plaintiff in cross-examination the allegations of the defendants in relation to it. Likewise, if the defendants really thought that Mr. Wolcott himself had affixed the sticker, why was no issue made of this at the time?

The defendants sought to establish the existence of Exhibit P30 during the the February meeting by calling two witnesses, Heather Podgorsky and Pamela Young. The effect of Mrs. Podgorsky's evidence was that the first time she took particular notice of Exhibit P30 was when Mrs. Davis explained to her how to keep such a book (Page 1135.9), but she said that she could not swear positively to having seen that book in 1983 (Page 1135.5 to.8), that she was waiting for the "business licence" to arrive before starting up the books (Page 1136.5), and she admitted that it was possible that she was not shown Exhibit P30 by Mrs. Davis until after the February meeting (Page 1138.1). Mrs. Podgorsky was about to go into a business partnership with her husband in

February 1984 and sought instruction from Mrs. Davis about how to write up a cash book. I pause to mention that instruction of this sort could have been derived equally from the cash book, Exhibit D20, which not only contained entries in completed form to 30 June 1983, but also contained the same lay-out and detail as Exhibit P30. Moreover, Exhibit P30 itself contains no entries beyond 29 December 1983.

The evidence of Pamela Young was that she worked for Daytona as a search clerk on a contract basis. She had been a near neighbour of the defendants and she had learned from Mrs. Davis of the prospective sale of Daytona. She claimed that when she had occasion to ask Mrs. Davis for a cheque for search fees, she went to the door of the defendants' office during the February meeting and said that she looked into the room and saw a cash analysis book on the desk. The book she saw, however, was not identified by her as Exhibit P30; and the defendants' case is that there was another cash book in the room as well, namely Exhibit D20. She said at page 1187.2 that the pages were "bluey-green". In fact, Exhibit D20 is ruled in both blue and green whereas Exhibit P30 is not ruled in blue and green but in blue only. I find that Miss Young, who had previously worked in an office equipment shop and had experience in selling office books of accounts and stationery, was more likely than not to have appreciated this fine distinction in colour, and that the book she saw was Exhibit D20.

It is perhaps not without significance that the defendants' accountant, Mr. Warner, who might well have been expected to have seen Exhibit P30 if it existed at the time of the February meeting, was not called by the defendants; and Mr. Jelly gave no evidence about it.

The defendants themselves both claimed that Exhibit P30 was given to Mr. Snell, but he denied this and claimed that he had not seen it before (Page 470). (Compare Mr. Davis, pages 841-842, and Mrs. Davis, page 1097.) I accept Mr. Snell's denial since, as a Government inspector, he would have had good cause to have remembered its existence because it represents so fundamentally one of the most important books of account of any business.

The defendants both asserted that Exhibit P30 had been entered up from time to time prior to the February meeting and, in particular, during the latter half of 1983.

I find that the cash book Exhibit P30 was bought by one or other of the defendants some time after January 1984, and specifically after the February meeting, and was written up by Mrs. Davis in expectation of the hearing, but was unaware of the existence of the price sticker until after it had been produced in Court and Mr. Wolcott and his solicitor were seen to be examining it critically. It then became necessary for the defendants to extricate themselves from the consequences of this revelation and they sought to do so by calling Heather Podgorsky and Pamela Young, neither of

whom in the end result was able to establish the existence of the cash book before the February meeting. To lend verisimilitude to his story, Mr. Davis made the pencilled notations to the figures in Exhibit P30 which related to Poveys, Withnall and Pink Panther. It follows, and I so find, that none of these pencilled notations was in existence at the time of the February meeting.

It was imputed to Mr. Wolcott and his solicitor, Mr. Curnow, that Mr. Wolcott had affixed the price sticker to Exhibit P30 while they were in possession of that cash book in the corridor of the court room. In giving his evidence Mr. Davis, at pages 835-836, said:-

> "How did it get there, Mr. Davis?--- Well, Mr. Wolcott, under our objection, removed the book from the court room - took the book upstairs. No note was made of that while he was giving evidence, and miraculously, 10 minutes after he returns from taking the book upstairs from the court, it's all of a sudden there.
>
> What is the suggestion you're making?--- Perhaps I could just clarify it. The book was purchased, I guess, sometime in the middle of 1983. We'll be producing witnesses at a later date that saw the book being filled out in the course of the year. Perhaps that could put the matter aside.
>
> What's the business about the witnesses?--- Well, we will be later producing a witness that will give evidence that Mrs. Davis was seen filling out this book prior to January 1984.
>
> As I recall, Mr. Curnow removed the book from the desk - the associate's desk; walked out the door behind me into the corridor; gave the book to Mr. Wolcott. He moved very quickly around the corner in the direction of the toilets, disappeared for several minutes, came back, gave the book to Mr. Curnow, and he put it back on the desk."

Mrs. Davis' account was at p.1034:

What did he (Curnow) do? Or what did you see?--- I saw him walk outside the courtroom, talk to Mr. Wolcott, they headed towards Courtroom 3, I saw Mr. Curnow give Mr. Wolcott the book, Mr. Wolcott continued on and Mr. Curnow came - walked back here.

Came back?--- Walked back to courtroom 2.

Did he enter courtroom 2?--- Well, he walked - well he walked into the courtroom.

Yes, and did you then observe anything else?--- Yes, several minutes later Mr. Wolcott came back, gave the book to Mr. Curnow and he replaced it on the desk.

Mr. Griffin said, at p.1038, that he saw Curnow go outside to the benches in the corridor.

"What did you see?--- I saw Mr. Curnow discussing or he appeared to be discussing something with Mr. Wolcott.

HIS HONOR: Where?---Out -- he was out in the corridor, Your Honour.

MR. CARTER: How was it that you were able to see him? Well, I could see through the door, where the window--- Pointing to a glass panel in the door, Your Honour.

HIS HONOUR: Thank you.

MR. CARTER: What did you see next?--- I saw - I saw him giving the book to Mr. Wolcott. I don't remember anything else after that at that point."

And at p.1039:

"When did you next see the book?--- I'd gone to the robing room, and I'd come back, and I'd seen Mr. Wolcott with the book in his hands.

You saw Mr. Wolcott - where were you standing at that time?--- I was walking down the corridor here from the robing room.

Where was Mr. Wolcott when you saw him?--- He was out in the area next to the public toilets, strolling - appeared to be strolling backwards and forwards with the book in his hand reading it."

In cross-examination the following exchanges took place:

At page 1040.2:

"When you first noticed him through the doors, talking to Mr. Wolcott, I suggest that the book was still physically in the possession of Mr. Curnow at that stage?---When I first looked through, yes."

At page 1042.2:

"You see, I suggest to you that Curnow never left the book - leave his personal possession that morning. What do you say about that?--- Well I know what I saw, and that was Mr. Wolcott with the book in his hand.

I suggest to you that at all times when that book, Exhibit P30 was outside of the Court that Curnow was in the immediate vicinity of the book. What do you say about that?--- I would be confident in saying that Mr. Curnow was not in the area near Mr. Wolcott at the time I came down the corridor.

Now you are certain that you are able to say it was that particular exhibit that you saw Mr. Wolcott looking at that particular morning"--- No, I definitely couldn't say that. I do know it was an account book of that shape and that colour.

Incidentally, was the book open?--- Yes. Mr. Wolcott had a rather intense sort of look on his face and was closing his eyes, and he appeared to be reading it."

The clear implication from this evidence is that Mr. Wolcott placed the sticker on Exhibit P30 during the period that he had the book in his possession. This evidence, however, contains obvious discrepancies. Mr. Davis' claim that Mr. Wolcott took the book upstairs is not substantiated by him or by anyone else. The only stairs in the vicinity lead to private access to the Judges' Chambers. Mr. Davis' evidence that Mr. Wolcott "moved very quickly around the corner in the direction of the toilets"

and "disappeared for several minutes" is not supported by Mrs. Davis.

There is no evidence that Mr. Wolcott placed the sticker on Exhibit P30. The evidence goes no further than that he had an opportunity of doing so. Nevertheless, the defendants through their counsel not only suggested to Mr. Wolcott and to Mr. Curnow when they were called in rebuttal that each of them, or that they together, had placed the sticker in the book; yet in his final submission counsel for the defendants suggested that Mr. Wolcott had obtained a sticker from the Darwin Newsagency, held the sticker on his finger by saliva and stuck the sticker on the book while Mr. Curnow was holding it. In the absence of evidence to the contrary, this is not only a fanciful suggestion but indicates how far the defendants were prepared to go to distort the truth. First of all, the suggested method was never suggested to either Mr. Wolcott or to Mr. Curnow in the course of cross-examination; secondly, it presupposes that Mr. Wolcott would foresee that Mr. Curnow would not leave him alone with the book; thirdly, it presupposes that Mr. Wolcott had sufficient manual dexterity to get away with such a sleight of hand virtually under Mr. Curnow's nose; fourthly, it is mere supposition of the most dangerous kind for it is not based upon any semblance of fact; and, fifthly, it imputes to a party such a positive conscious act of such a nature that it would constitute a preparedness on his part to pervert the course of justice in order to serve his own ends.

I agree with the submission made by counsel for the plaintiffs that the defendants were desperate in their attempts to go to any lengths to blacken Mr. Wolcott's character for their own ends. In the result, however, the imputations which they have made reflect not against the plaintiffs but against the defendants themselves.

On this issue, I find that the evidence of Mr. Wolcott, Mr. Curnow and Mr. Durant, the Court orderly, combine to establish that Exhibit P30 never left Mr. Curnow's hands, that Mr. Wolcott was never alone with the book, that Mr. Wolcott did not take the book "upstairs" or out of view in the direction of the toilets, or walked with it towards court room 3, or have possession of it for as long as ten minutes, but that the sticker was discovered by Mr. Wolcott and Mr. Curnow at the same time, when the book was taken out of the court room. In arriving at this conclusion, I accept that Mr. Durant, who was the only witness independent of the parties and their advisers, and whose evidence was not shaken in cross-examination, gave credence to and corroborated the testimony of both Mr. Wolcott and Mr. Curnow on this point.

As to Mr. Griffin, it is plain that he did not see Mr. Curnow part with possession of the book to Mr. Wolcott through the glass panels of the court room doors.

There is, on the face of Exhibit P30 (in contra-

distinction to the other cash book, Exhibit D20,) every indication that the entries were made by the same biro pen, both in the colour of the ink, and in the style of writing, to suggest that the same pen was used throughout and that it was written up to the end of December 1983 with a view to establishing the authenticity of the various books of prime entry and thus enabled the defendants to assert that the whole financial picture of Daytona was before the plaintiffs at the time of the February meeting. In view of my findings, it follows that the plaintiffs have established their allegations in paragraph 5(i) of the Amended Statement of Claim.

I turn now to paragraphs 5(ii) and 5(viii) of the Amended Statement of Claim.

The plaintiffs claim that during the February meeting they added up the bank deposits for June to November 1983 and arrived at a figure of $167,122. Having done so, the plaintiffs claim that there was some discussion between Mr. Wolcott and Mr. Davis which resulted in the figure being reduced to $165,500 for that period which, when doubled, resulted in a figure of $331,000 (Mr. Wolcott, page 103). Further, Mr. Wolcott said that Mr. Davis told him that the defendants were "currently operating at a figure of $320,000 per year (page 316). A note to this effect appears in Mr. Wolcott's handwriting on the top right hand corner of Exhibit D5. The defendants said in evidence that the plaintiffs added up, firstly, the bank statements and then,

because there were difficulties due to Daytona changing from the ANZ Bank to the Westpac Bank, the plaintiffs added the deposit books for the whole period, and that no figure of $165,500 was ever discussed. The plaintiffs further said that they were unable to check the deposits for December 1983 and January 1984 and that the figures for both these months were rung through by Mr. Davis to Mr. Wolcott after the February meeting as being $28,000 and $23,000 respectively. The defendants denied any such communication and pointed out that the deposit books covered the whole period from prior to June 1983 until after January 1984.

Both versions gain some support from the documents. Mr. Wolcott's handwritten notes on Exhibit D5, to which he made reference for the purpose of refreshing his memory, and which was put into evidence by the defendants, disclosed the following notations:-

(a) "@ rate of 400,000 by end of June. CURR. @ 320,000" (pages 315-316)

(b) There is a note of the telephone conversation referring to the turnover for December 1983 and January 1984 at the foot of Exhibit D5 in rather cryptic form (pages 331-333).

(c) There is a note under the 1983 figures for professional fees "? (82.4 plus 165.5)"; but Mr. Wolcott was unable to recall what this note meant. (335.5)

(d) There is also a note "$318,000 p.a. turn" which Mr. Wolcott said was an attempt (albeit a poor one) to average $28,000 and $23,000 and arrive at an annual figure. (page 335). (The actual result of such a calculation comes to $306,000.)

On the other hand, there is no doubt but that the bank deposit books (Exhibit D3), of which Exhibit P20 is a photostat copy, contains irrefutable evidence of bank deposits to the credit of Daytona Services No. 1 Account with the Westpac Bank from 4 November 1983 up to and including 29 March 1984 which necessarily covers the months of December 1983 and January 1984. On my calculations the sum total of deposits as revealed by this source are $22,534-17 and $12,065-02.

The plaintiffs say that the deposit figures for December and January were not in the office or available at the time the additions were made (page 104 and pages 391 to 392). Mr. Wolcott was unable to explain how it was that the deposit book Exhibit P20 contained deposits for October and November as well as for December and January. Clearly Exhibit D3 is an authentic document. What then is the explanation for Mr. Wolcott's assertion?

It is possible that the plaintiffs first asked to check the bank statements, but were given complete bank statements to the end of November only. This then led to the decision to use the period from the beginning of June to the end of November. When the plaintiffs arrived at the confusion in deposits brought about by the changeover in banks, the deposit books were checked, but only for the same period, this period having already been previously determined by the availability of bank statements. Later, the plaintiffs asked to have the figures for December and

January verified for them, probably because they had omitted or forgotten to do so themselves as their exercise was to check the six month period previously chosen. I find that this is the probable explanation for the following reasons:-

(a) It provides an explanation for the choice of the period from June to November.

(b) It explains how the deposits for December and January were not checked at the time.

(c) It explains also why, if the purpose of checking the deposit books was to verify the bank statements, little attention was given to the details recorded in the deposit book other than the total on each sheet.

(d) It accords with the defendants' assertions that both the bank statements and deposit book were checked.

(e) It accords with Mrs. Wolcott's evidence at page 392.8 that "I thought they went over from the top".

(f) Bank statements are easier to misplace than a book containing bank deposits such as Exhibit D3. (There would need to be only one misplaced, in December for example.)

I agree with the submission that the plaintiffs must be mistaken about not checking the additions from the bank statements. It does not necessarily follow that Mr. Wolcott's evidence about having the deposits for December and January telephoned to him by Mr. Davis must be false, or that there is no reasonable explanation for choosing the period June to November. Despite this lapse of memory as to detail on the part of the plaintiffs, I find them to be essentially truthful and reliable about the more material allegations, namely, that the deposits for June to

November were added up and the figure of $167,122 arrived at, and that after discussion with Mr. Davis this figure was reduced to $165,500 and that the figures for December and January were in fact telephoned by Mr. Davis to Mr. Wolcott after the February meeting.

The total deposits for June to November based on the deposit books, according to the plaintiff's solicitor, was $167,353-61. According to the plaintiffs' counsel, the total is $168,645-11. How the difference between these additions arises, I do not know, but for practical purposes there is not a material difference. More importantly, the actual deposits which truly represent income of Daytona Services from June to November is $125,640, an overstatement of $39,860, or almost 32%. The actual income for the months of December and January is set out in Exhibit P22 (namely, $18,840 and $12,065) a total overstatement for these two months of a little over $20,000.

Regardless of the precise circumstances surrounding the process by which the plaintiffs added up the deposits, it was agreed on both sides that the plaintiffs added up the deposits from the deposit books Exhibits P20 and P7.

I return to the issue of the cash book Exhibit P30. If this had been in existence at the time of the February meeting, containing as it does entries of both bank deposits and disbursements along with the entries in pencil of totals of deposits and totals of every column of disbursements

derived from cheque books of the business from 1 July 1983 to 29 December 1983, then the plaintiffs could have seen at a glance all the transactions both by way of deposit and disbursement throughout the six-month period of actual trading. Any verification of deposits could then have been made simply by referring to the deposit books for the respective deposits or to the cheque heels for any of the disbursements during the whole of that period. For the defendants to have produced a cash book to the plaintiffs, however, would have revealed that from time to time moneys were withdrawn from Daytona's trading account and debited against drawings for the defendants' copying business known as the Pink Panther. In fact, this practice seems to have commenced on 18 February 1983 as evidenced by disbursements in the earlier cash book, Exhibit D20, and was well established as the means of financing the Pink Panther business. The practice continued into the next financial year. Indeed, on 5 July 1983, $5,000 which represented private drawings from Daytona, was loaned to Pink Panther (cheque No. 016243, Exhibit D11, and cash book entry of the same date in Exhibit D20.) This amount was entered in the cash book under the column "Private Drawing" circled in pencil and has the pencilled notation "Loan to PP" alongside it. An entry in the cash book, Exhibit P30, for 23 December 1983 indicates a deposit of $5,437-26. This figure is circled in pencil and has the pencilled notation against it of "Return of PP money paid in July". The bank deposit book, Exhibit D3, records an entry of a deposit on the same date of a cheque for this amount drawn by one Stan

Chant (or Chan) on the Westpac Bank at Darwin. I am unable to account for the additional sum of $437-26 unless it represents interest, as I do not know the circumstances surrounding payment by Mr. Chant (or Chan) or of his connection with the Pink Panther business. At all events, the fact that a cheque for $5,000 from the Daytona account, coming from drawings, as it did, does not represent an ordinary business disbursement of Daytona Services, yet the "repayment" of that sum as a deposit would inflate the business income of Daytona by the amount deposited. Likewise, an earlier cheque from Daytona's account, cheque No. 234, drawn on 1 July 1983 for Wiggins Teape for $1,354-99 also is entered under the column "Private Drawing", is circled in pencil and has alongside it the pencilled notation "PP".

More importantly, however, on 8 July 1983 by cheque No. 279 entered in the cash book, Exhibit P30, as "private/deposit to 30.6" shows a deposit of $10,111-08. This amount has been entered under the column "Private Drawing", is circled in pencil and has the pencilled notation alongside it, "payment to trust of J.R.W's cheque deposit in trading by mistake". The cheque heel itself which provides the record for this payment simply has the entry "Daytona Trust". (Exhibit D11). In fact, J.R. Withnall's cheque, according to the pay-in slip, was for $12,416-93 drawn on the National Bank, Darwin, (Exhibit D10) and was included in a larger deposit of $16,688-67 which was deposited in Daytona's No. 1 Account with the ANZ Bank on 30

June 1983, thereby inflating that account by the sum of $12,416-93 while the purported rectification of this error was entered, not under business expenditure in the cash book, but under private drawings.

Earlier, there is an entry in the cash book, Exhibit D20, for 8 June 1983 against which no details are shown but a purported deposit of $3,000 in the banking column, yet there is no record of a deposit of $3,000 in Daytona's bank account.

More importantly, there is an entry in the cash book, Exhibit P30, for 5 July 1983 of a deposit shown in the banking column as $21,120-47 which included a cheque for $20,000 drawn by Poveys on the ANZ Bank, Darwin, which is verified by a deposit in the ANZ Bank deposit book of 5 July 1983 (Exhibit D10).

I find that the defendants, who must have been aware of the plaintiffs' purpose in adding up the deposits from the bank pay-in books (Exhibit D11 and earlier in Exhibit P7), deliberately sat back and said nothing knowing full well that the deposits included amounts which were not part of the ordinary income of the Daytona business. I find, therefore, that the defendants' actions in handing over the deposit books in these circumstances, without revealing to the plaintiffs the true state of affairs, amounted to a misrepresentation on their part that the deposit books contained only income of the Daytona business

when they knew this to be false. Deliberate concealment of evidence known by a person to be untrue is equally tantamount to fraud as an overt misrepresentation of fact known to be false.

I specifically find that no disclosure was made by the defendants to the plaintiffs about the Povey, Withnall or Pink Panther moneys and that the failure of the defendants to do so was a deliberate concealment on their part.

As to paragraph 5(x) of the Amended Statement of Claim, namely that the gross income of the business was approximately $30,000 per month, I have already dealt with this aspect of the claim to a large extent. In addition, page 2 of the Projection (Exhibit D5) contains the following words - "It can be expected that turnover will fall below $30,000 per month only during December and January in the current financial year due to successful tenders with Government and Local Government Departments which are yet to produce any income whatsoever."

The plaintiffs asserted that in December 1983 when Mr. Wolcott telephoned Mr. Davis, he was told that the business was grossing $30,000 per month (page 80) and that just before coming to Darwin, in another telephone call, Mr. Davis said to Mr. Wolcott "that the business was operating at a level of $30,000 approximately per month". The plaintiffs did not assert that the figure of $30,000 was

expected to be taken too literally. They understood that the figure was "$30,000 approximately". The plaintiffs said in evidence that at the February meeting Mr. Davis had said that he was currently operating at $320,000 per annum, (which amounted to $26,667 per month) and that the trading figures for June to November were $165,500 (which amounted to $27,583 per month.) I accept that these representations were made by Mr. Davis and were intended by him to create the impression of an approximate income of $30,000 per month and that the figure presented by him gave colour, as he intended it to do, to such an impression. The actual income of the business is set out in Exhibit P22 under the "Banked as Adjusted" column which I accept. The total income of the business, therefore, from 1 June 1983 to 31 January 1984 was in fact $157,553 or an average of $19,694 per month. (These figures do not take into account any reduction from it of any amount improperly taken over from the Daytona trust account.)

What Exhibit P22 also demonstrates is that except for June and July 1983, the actual deposits for the succeeding months never exceeded $26,957 which was the total for September 1983. The June and July deposits were both heavily inflated by the Withnall deposit and Povey and Pink Panther moneys. As well, Exhibit P22 demonstrates that the actual total deposits for the months of June 1983 to January 1984 amounted to $199,882 or an average of $24,985 per month.

I am satisfied that on this basis the defendants could not have held any honest belief that the business was operating on a level of approximately $30,000 per month.

I turn now to paragraphs 5(iii), 5(iv) and 5(v) of the Amended Statement of Claim. These allegations all relate to the Health Department account.

The plaintiffs' evidence concerning the discussions which took place at the February meeting concerning the Health Department are set out at pages 91-94, 388-390 and 396-397 of the transcript. In summary, the plaintiffs say that the Health Department account was discussed for at least two hours. Mr. Davis told the plaintiffs how the business was then doing, of collection work for the Northern Territory Department of Health, that the account was secured by contract, that the Department was entirely satisfied with Daytona's performance, that the account was "brilliant" because Daytona was able to charge legal costs and sometimes commission even though no debt was collected from the debtor, that "Medicare would have no effect on it (the account) at all, and that people who had in the past opted to use private practitioners would continue to do so." Mr. Wolcott said that in answer to his queries regarding the effects of Medicare, Mr. Davis took him into an area of the office where staff was working and he was shown a considerable amount of work that had been issued to the business by the Department since the inception of Medicare.

Mr. Davis did not really dispute these facts except to assert that during the February meeting a Mr. Bouffler from the Department of Health called at the office on 9 February 1984 (Mr. Davis, pages 750-751; Mrs. Davis, page 971.3) although Mrs. Davis at page 944 claims that her husband said on an earlier occasion he did not know what was going to happen following the introduction of Medicare. Mrs. Davis' version of Mr. Bouffler's call was that the plaintiffs and the defendants were in the computer room. There was a knock at the door and she answered it. The plaintiffs and the defendants walked out of the computer room. Mrs. Davis was introduced to Mr. Bouffler. There was a box of old records from the Department of Health in the vicinity. Mr. Bouffler said that he had come to collect the records. After Mr. Bouffler collected the records, Mr. Wolcott said, "What is that all about?" and Mr. Davis said, "I don't know what it means". It was Mrs. Davis' evidence that the plaintiffs were not introduced to Mr. Bouffler so that even if the plaintiffs were present and even if this had occurred during the February meeting, the whole episode was totally meaningless to the plaintiffs. Thus, it is unnecessary for me to resolve the issue of whether Mr. Bouffler collected the files on 9 February, as claimed by Mr. Davis, or in mid-March as Mr. Bouffler maintains, since the whole incident was meaningless and irrelevant so far as the plaintiffs were concerned.

What is important, however, is that Mr. Davis, during the course of giving his evidence-in-chief, did not

say that he had told the plaintiffs that he did not know what was going to happen to the particular account after the introduction of Medicare. In fact, the only evidence he gave in chief approaching the subject was at pages 691-692 which related to the Bouffler visit. It was not until the trial had resumed in September 1985 that Mr. Davis raised the question for the first time during the course of cross-examination (page 869), yet neither plaintiff was cross-examined on this topic earlier. I reject Mr. Davis' evidence that he told the plaintiffs that he did not know what was going to happen to the account after the introduction of Medicare at any time during the course of the February meeting.

On the basis of the evidence of Mr. Brown (pages 488-503) and that of Mr. Clifford (pages 503 to 506), I accept that Mr. Davis was fully aware that the Department of Health did not intend to maintain work at the same level after 1 February 1984, that there would be a run-down of services after that date and that the Department intended to schedule in-patient accounts only until 1 February 1984. Indeed Mr. Davis did not dispute his knowledge of this, (pages 866, 872 to 875) and nor did Mrs. Davis (page 1071.8). In fact, Mr. Davis admitted that he was aware also that there was a proposal to spread the work with another debt collecting agency (pages 874 to 875). At page 875, he said:-

"You were aware, weren't you, that there was going

to be a substantial reduction in work in the future?--- Certainly, the restructuring and a reduction, yes, certainly."

Mr. Davis' credibility was put in issue on this point when he was faced with the statement in an affidavit sworn by him on 18 June 1984 where he stated:-

"I deny that I was orally advised in August 1983 that the services of the Department would be run down after 1 February 1984. I did not have any prior knowledge of any significant decrease in the work to be received by the Department of Health ..."

He later admitted that these statements were untrue (page 876). (See also Exhibit P46.)

I accept the plaintiffs' submission that the defendants have proven themselves to be unreliable on this issue. It has been amply demonstrated that Mr. Davis made untrue assertions in his affidavit of 18 June 1984 and that the defendants have shifted ground from, first of all, denying any knowledge of any significant decrease in work from the Department of Health, to later asserting that Mr. Wolcott became aware of the true state of affairs when Mr. Bouffler collected the files during the course of the February meeting, to then asserting that the plaintiffs were told by the defendants that they did not know what would happen to the account after Medicare. The defendants' own admissions establish that they were not only aware of what effect Medicare would have on the Daytona business, but that

they also knew that the account would be shared with another firm.

I therefore have no hesitation in accepting the plaintiffs' evidence and that of their witnesses on this issue in preference to that of the defendants wherever their evidence conflicts with that of the plaintiffs. In the result, I find that the defendants falsely represented to the plaintiffs that the Health Department account, which was one of their largest accounts, was reliable because it was secured by contract and because the business was still actively engaged in pursuing substantial debts due to the Department, and that there was no reason to suppose that the account was in jeopardy because Medicare would have no effect and because the Department was entirely satisfied with Daytona Services and because there was a large part of work waiting to be done in the staff work area sent in since the introduction of Medicare. Furthermore, I find that these representations were false in that the account was, to the defendants' knowledge, likely to become substantially reduced after 1 February 1984 and what work was to be expected was also likely to be shared with another debt collector.

I accept that these representations were all material and were relied upon by the plaintiffs as an inducement to enter into the contract. (Page 173 and page 411).

I am, therefore, satisfied that the plaintiffs have proved that the plaintiffs were induced to enter into the agreement, inter alia, by the fraudulent representations made by the defendants that one of the largest accounts held by the business, namely that of the Northern Territory Department of Health, was reliable. I find it unnecessary to resolve the remaining allegations in paragraph 5(iii) of the Amended Statement of Claim.

I am also satisfied that the plaintiffs have established that the plaintiffs were induced to enter into the agreement, inter alia, by the fraudulent representation that the defendants had no reason to suppose that the account of the N.T. Department of Health was in any way in jeopardy as alleged in paragraph 5(v) of the Amended Statement of Claim. I find it unnecessary to make a finding in respect of the remainder of the allegations in that paragraph.

Before disposing, finally, of this topic, Mr. Carter submitted on behalf of the defendants that the plaintiffs, having been told that "people who had opted in the past for private practitioners would still do so", were really being told that the account was in some sort of jeopardy and that there would be some sort of change. Mr. Wolcott must have known, therefore, so it was argued, that Medicare was a national system of health insurance and that Medicare would have a detrimental effect on the Daytona business. I reject this submission on the ground that

there is nothing inherently surprising in Mr. Wolcott's answer that he did not appreciate that Medicare was a national system of health insurance since he had taken little interest because his wife dealt with health cover, and the plain fact is that Australia has had various systems of health insurance for many years. After all, both he and his wife were American by birth and upbringing and there was no evidence as to what way Medicare was likely to bring about any change and, in particular, whether Medicare was to become a compulsory system whereas previous systems had not been, or whether the system covered hospital fees fully or only partly, or whether the system fully covered private as well as public patients in public hospitals. In fact, there was no evidence as to what changes Medicare was likely to bring.

Turning now to paragraphs 5(vi) and 5(vii) of the Amended Statement of Claim (the "licence issue"), there is no dispute that Mr. Davis claimed he was licensed under the Act when, in fact, because his bond had lapsed, he was not so licensed. (Section 18(1) and (4) of the Commercial and Private Agents Licensing Act.) The form of the bond prescribed by s.18(1) is contained in Form 6 of the Commercial and Private Agents Licensing Regulations, Reg.7(1). The bond has to be lodged with the Clerk of the Court (s.18(1)). The form indicates that the bond is issued for a finite period. I find that Mr. Davis must have been aware of this fact. He obviously had a copy of the Act in his office as he gave a copy of it to the

plaintiffs. Mrs. Davis admitted that she did not have a licence, yet under the provisions of the Act she was, as a partner in the business, also required to have a licence. I find that Mr. Davis' assertion that he was licensed carried the implication that his wife was also licensed and in broad terms that Daytona Services was licensed under the relevant Act.

The effect of neither defendant being licensed was that not only were they committing offences under s.6(1) of the Act, but that the plaintiffs, as purchasers of the assets of the business, could neither "sue for, recover or retain any commission, fee, gain or reward for any service performed" by the defendants - (s.40).

Moreover, the plaintiffs, as purchasers of the book debts of the business, were in the position of assignees. Accordingly, if these debts were not recoverable in the defendants' hands, they were not recoverable in the plaintiffs' hands either.

I find that the defendants' representations were not only untrue but that the defendants must have known them to be untrue, or at the very least the defendants were recklessly indifferent as to whether those representations were true or not. There is no evidence that either defendant had any reasonable grounds for believing that they were licensed. No evidence was given of any enquiries made by them which might lead them to a belief that they were licensed.

The Projection, (Exhibit D5), contains an item, "Licences & Permits". According to Mr. Wolcott, whose evidence I accept, is that whilst the figure of zero was shown against that item for the year 1984, he was told by Mr. Davis that it should be $300 (page 321.1). I was not told what this amount of $300 related to specifically; and the amount shown under this head for the year 1983, namely $227, could not have been in respect of the bond as that expired on 29 September 1982 (page 449).

Whatever the moral turpitude may be, which arises from this state of affairs, I agree with the submission by counsel for the defendants that insofar as Mr. Davis' assertions amount to misstatements of law, or statements as to future intentions, they cannot amount in law to fraudulent misrepresentations for which the plaintiffs are entitled to relief in equity. So much was conceded by counsel for the plaintiffs. Counsel for the plaintiffs also conceded that as to the allegation in paragraph 5(vii) that the defendants had lodged the plaintiffs' application for a licence with the Court. There was no evidence that such representation was made prior to settlement. If the plaintiffs are entitled to any relief at all, it would be in damages for breach of a collateral agreement which is not pleaded in the Amended Statement of Claim. Since the issue of damages has been expressly reserved between the parties, I need not proceed further with this matter at this stage.

Dealing now with paragraph 5(ix), (the Darwin City Council issue), the basis of the plaintiffs' claim is that the defendants, by their conduct and by virtue of certain statements in the Projection, led the plaintiffs to believe that the Darwin City Council was a relatively new client which, at the time the Projection was made, that is, at the end of September 1983, had not as yet produced any income.

The defendants claimed that it was made perfectly clear to the plaintiffs at the February meeting that the "Local Government Departments", which the Projection referred to, was the Alice Springs Council, and that, further, arrangements were specifically made between Mr. Wolcott and Mr. Davis to meet in Alice Springs before settlement to meet the Council staff.

The plaintiffs further claim that the defendants alleged that they had secured the Darwin City Council's contract by tender when, in fact, they had not.

The statement contained in the Projection upon which the plaintiffs claim to have relied, is as follows:-

> "It can be expected that turnover will fall below $30,000 per month until during December and January in the current financial year due to successfull (sic) tenders with Government and Local Government Departments which are yet to produce any income whatsoever. One contract alone is budgeted to produce a minimum of $38,000 by March 1984 with additional costs to only $3-4,000."

The plaintiffs also claim to have relied upon a statement contained in Exhibit P2 (a document which the plaintiffs say was also sent to them with Exhibit D5 through the mail from Mr. Davis) which is in the following terms:-

> "Work at Hand
>
> Current work at hand is estimated to exceed $100,000 not including a two year contract recently signed with one of Australias (sic) largest organizations which it has been calculated will increase turnover by a minimum of $30,000 per annum and a further local contract which will realize a minimum of $40,000 by March 1984 with minimal increase in costs. Daytona Credit Services acts on behalf of virtually every major business, Government, and semi-Government body in the Northern Territory that utilises a mercantile agency."

The plaintiffs, whose evidence I accept, say that the only Local Government body mentioned during the February meeting was the Darwin City Council and that it was never suggested to them that any other Council was a client of the business, and that the fact is that the only Local Government body at that time which was in Darwin was the Darwin City Council (Pages 94 to 95 and 388).

The cross-examination of Mr. Wolcott on this issue is at pages 369 to 370. The only issue raised in cross-examination of him is that the reason for going to Alice Springs was to meet Alice Springs Council personnel. Both plaintiffs gave evidence that the purpose of going to Alice Springs was to meet a person called John Lincoln from B&L Services, a mercantile agency, and that the plaintiffs did

not go to the Alice Springs Council or even attempt to do so (pages 382, 405 to 406 and 422). No cross-examination was directed to either plaintiff to suggest that there had been discussion at the February meeting that Daytona had secured a contract with the Alice Springs Council.

On the other hand, the defendants gave evidence that there was considerable discussion about the Alice Springs Council contract, why the work had not yet been forthcoming, and of the defendants' plans for this account (pages 651 to 654 and 948). Mrs. Davis said, as to the Alice Springs Council, "We didn't actually have a contract" (page 948), whilst Mr. Davis maintained "we were advised in writing that we were successful" (page 652). It is perhaps not without significance that no letter of appointment, contract, or other writing was ever produced to support this assertion. In short, I find that there was no discussion about the Alice Springs Council at the February meeting, and that the only purpose signified by Mr. Davis about the plaintiffs visiting Alice Springs was to meet the representative of B&L Services with a view to attracting business from that quarter.

Both defendants maintained that Daytona had acted for the Darwin City Council for twelve months and that that fact had been made known to the plaintiffs (Mr. Davis, page 704 to 706; Mrs. Davis, page 943). The defendants also maintained that the plaintiffs were told that Daytona had been "successful for the tender for the second time" (page

707) or "we were successful ... to win another contract from the Darwin City Council" (page 943).

The facts established by the evidence of Jennifer Ann Hughes were that the Council called for tenders which closed at 20 January 1984, that all tenders had been received, that the defendants' tender was referred to a finance and policy meeting of the Council on 21 February 1984, that the Council decided on 29 February 1984 that tenders were to be recalled, and that Daytona had been instructed to continue acting for the Council in the meantime (pages 510 to 513). Nevertheless, the defendants maintained that they were told that they had the contract prior to the February meeting by Mr. Shane Gratton, the Rates Officer (pages 888 to 889). No attempt was made by the defendants to call Mr. Gratton and his absence leads me to the conclusion that his evidence would not have helped the defendants had he been called (compare per Gibbs J. (as he then was) in Jacob v The Commissioner of Taxation of the Commonwealth (1971) 45 ALJR 568 at page 570; see also Jones v Dunkel (1958-59) 101 CLR 298 at pages 320 to 321). Moreover, the tender was to be for a period of five years. (Exhibit P33, Annexure B, Clause 3.01). If the defendants had believed that they had obtained such a valuable contract, one would have expected them to have shown the plaintiffs a copy of their tender at the February meeting and have invited them to verify the authenticity of it with the Council itself. No such evidence was forthcoming from the defendants. Having regard to the evidence before me on

this issue and the inferences to be drawn from it, I prefer the evidence of the plaintiffs to that of the defendants and draw the same conclusion as the plaintiffs did, namely, that the defendants intended the plaintiffs to think that the "Local Government Department" referred at page 2 of Exhibits, P1 and D5, was the Darwin City Council, and that "a further local contract which will realize a minimum of $40,000 by March 1984 with minimal increase in costs", referred to in Exhibit P2, was also the Darwin City Council.

I have already found in a number of instances that the defendants are not witnesses of truth. Their evidence contradicts that of other witnesses whose evidence I have preferred. They have at times contradicted each other and in some instances they have contradicted themselves. There are further comments relating to matters of credit affecting the plaintiffs to which reference should be made.

In an affidavit Mr. Davis swore falsely concerning the status of the mortgage taken over Hilltop Station to secure the balance of purchase moneys during the course of interlocutory proceedings in February 1985 (pages 857 to 863 and Exhibits P44 and P45). I pause to mention that the relationship of solicitor and client existed between Mr. Davis and Mr. Withnall in relation to the factoring of the Hilltop mortgage and accordingly Mr. Davis first of all waived privilege over the discussions he had had with Mr. Withnall concerning that matter (page 551). Mr. Davis, as was his entitlement, later claimed privilege (pages 849

to 850), and about that I propose saying nothing further. What emerges, however, which will become of significance later on in these reasons, is that there is enough evidence before me to indicate that Mr. Withnall under no stretch of imagination could maintain a claim that he was a bona fide purchaser for value in relation to that transaction, or indeed could validly accept a trusteeship for or on behalf of the defendants having knowledge, as he did, both of the original contract of sale and purchase of Daytona and of the course of these proceedings.

I am also critical of the conduct of the defendants who, in the course of defending a suit in equity for a declaration of recission, factored the mortgage over Hilltop Station by an oral agreement with their friend and then partner in Travellers' World, Mr. John Withnall, who had been associated with them in an arrangement about the issuing of summonses which, in my opinion, was somewhat questionable on both legal and ethical grounds.

While it is not unusual for business partners to freely discuss matters between them, and especially so when the close relationship of husband and wife also exists, the evidence of Mr. and Mrs. Davis tended to go in harness, to such an extent that I drew the conclusion that they had discussed their evidence frequently during the course of the trial, a fact which, in fairness to both of them, they freely admitted. (Pages 1069 to 1071)

The defendants allowed their trust account to be operated in such a way that it went into overdraft on several occasions in 1983; and, after settlement, remain in overdraft to the extent of a considerable sum for an extended period. Not only was this the case, but no clients' ledgers were maintained by the defendants except where there were payments by way of instalment. In view of these facts, I have no hesitation in finding that the defendants plainly disregarded s.23(1) of the Commercial and Private Agents Licensing Act. As to s.23(5), the defendants breached the Act in two ways:-

First, by allowing the account to go into overdraft. More importantly, the defendants used their clients' moneys for their own purposes.

Secondly, moneys were drawn out of the trust account to pay for the defendants' personal debts, notably rent and for repairs to their house.

The defendants claim that a book was kept which showed the commissions and fees due to them out of the trust account, that a running total of this was maintained, and that withdrawals of sums in round figures were able to be met, these sums being less than the amount due. It is interesting to note, however, that between 25 October 1983 and 1 March 1984 the following amounts were transferred from

the trust account to the trading account of Daytona (pages 768 to 771):-

25.10.83	$3,000
10.11.83	$2,000
21.11.83	$1,000
30.11.83	$1,000
5.12.83	$2,000
15.12.83	$2,000
12. 1.84	$1,800
25. 1.84	$1,000
31. 1.84	$2,500
9. 2.84	$2,000
14. 2.84	$1,000
22. 2.84	$1,350
1. 3.84	$1,400
	$22,050

Extracting from these figures the transfers from Daytona trust account for the months of November, December 1983 and January 1984, total $17,650. Comparing this with Exhibit P32 which represents the Daytona monthly income as per bank statement, the total bankings for those three months (excluding the sum of $5,437 received from Standard Chartered Finance per Stan Chant (or Chan), (Exhibit D3), Westpac deposit of 23-12-83) amounted to $48,414. In addition to these transfers there were other transfers from Daytona trust account to Daytona trading account. An example of this is referred to at page 770 for $1,152-17. If one adds to the sum of $22,050 (being the total of the figures referred to above), the sum of $1,265-63 paid to D. Chin (page 784) and $1,270 paid in respect of the house (page 785), the total amount used by the defendants from the trust account is $24,585-63.

At the end of September 1983 the state of the ANZ trading account was $6,251-71 overdrawn (Exhibit P9 ANZ Bank statement for that month). By the end of January 1984, the trading account had a credit balance of $268-20, despite a credit transfer of $19,974-50 on 17 October 1983 which represented the "balance of account" with the ANZ Bank, (Exhibit P19). This would appear to represent the proceeds of the fully drawn advance Mr. Davis refers to at page 774 of the transcript (compare Mrs. Davis, pages 1103-1105). The result of this exercise is that the cash position of Daytona, leaving aside the fully drawn advance, had deteriorated from approximately $6,250 overdrawn at the end of September 1983 to about $19,500 overdrawn by the end of January 1984, despite the transfer or the use of trust moneys totalling approximately $24,500 not properly accounted for. As was submitted by counsel for the plaintiffs, this gives rise to more than a mere suspicion that this sum of approximately $24,500 was not moneys belonging to the defendants.

The defendants claimed that the trust records which were needed by them to show what happened to this money had been left at Daytona's office after settlement and that that is the last they saw of them. The implication from these claims is that the plaintiffs have destroyed or disposed of the trust account records. There is, in my opinion, no earthly reason why the plaintiffs would be motivated to destroy, hide or dispose of these records. On the other hand, there is every reason to suspect that the defendants

had very good reasons to remove them. The records were obviously not in Daytona's office when Mr. Snell came looking for them. The plaintiffs for their part had nothing to hide and in fact their own trust account was audited. On the other hand, the defendants had a good deal to hide and the discrepancies shown in the records which are available reveal a very good reason for the defendants' desire to suppress the true state of affairs.

On another matter going to credit, I reject the evidence of Mr. Davis that the plaintiffs "showed him the door" in the process of sacking him. Having seen and heard the parties give evidence, it is impossible for me to believe how a woman like Mrs. Davis would continue to work for the plaintiffs, if indeed Mr. Wolcott was so rude to her husband for whom she gave her loyalty and affection.

On yet another score which goes to credit, Mr. Davis claimed that he had lodged Mr. Wolcott's application for a licence at the Court; yet the Court had no record of it. I simply disbelieve Mr. Davis on this topic.

Overall, I found the evidence of both defendants unconvincing on many of the major aspects and to the extent that their evidence was in conflict with that given by the plaintiffs I prefer that of the plaintiffs unreservedly.

It is important, I feel, to deal with the defendants' attack on the plaintiffs' credit, in an attempt

to do justice to it. Counsel for the defendants, in referring to page 104 of the transcript relating to the plaintiffs not being shown any other books of account, and comparing this to page 232 where Mr. Wolcott was shown books involving the daily running of the business, sought to demonstrate an inconsistency in his evidence. The "books of account" referred to at page 104, however, were not necessarily the same as the books used in the daily running of the business. As I pointed out earlier, the cash books of any business are not necessarily written up regularly by anyone engaged in business but are of particular significance when it comes to presenting the final figures to an accountant for the preparation of income tax returns.

Counsel for the defendants also submitted that Mr. Wolcott on 6 September 1985 admitted that he may have seen "the cash book", that is, Exhibit P30. This so-called admission is at page 1293.1 where Mr. Wolcott conceded that "there is a possibility that I looked at a cash book." This concession, albeit of a possibility, is the same one as he had previously made at page 375.

Counsel for the defendants referred to the figure of $165,500 and asserted on his calculations that the deposit books in fact add up to $168,645-11 for the period June to November. This contention ignores entirely Mr. Wolcott's evidence at page 103 as to how the figure of $165,500 was arrived at.

On a question of credit, counsel for the defendants pointed to Mr. Wolcott's evidence relating to the different number of mortgages given by the plaintiffs over Hilltop Station and, more particularly, that a fourth mortgage was given instead of a second mortgage. Mr. Wolcott explained his inability to remember whether there were two or three separate mortgage instruments; and the defendants never took issue before settlement that a fourth mortgage was granted instead of a second mortgage, although this had been specifically drawn to their attention by their own solicitor, Mr. Withnall, who was acting for them. (Pages 543 to 544).

Counsel for the defendants drew attention to an admitted error by Mr. Wolcott in an affidavit he swore on 16 May 1984 (page 253). I simply observe that the mistake was one of timing but not of the events themselves.

As to the alleged differences between the evidence given by Mr. and Mrs. Wolcott as to who it was who posted the application for a licence back to Mr. Davis, Mrs. Wolcott said that she had posted it. Mr. Wolcott said (at page 111) - "I returned it to Mr. Davis", but he did not say how this was done. It is equally open on the evidence to conclude, as I do, that he got his wife to post it for him.

Counsel for the defendants pointed out that Miss Moran said in evidence that she told Mr. Wolcott that

Mr. Davis claimed to be collecting debts for the Alice Springs Council. There is some support for the fact that Mr. Davis had told Miss Moran that the Alice Springs Council was one of Daytona's clients based on the appointment card of Ray White Real Estate (Exhibit P30) but for the reasons I have stated, if Mr. Davis told Miss Moran this, it was, to his knowledge, untrue.

Counsel for the defendants submitted there was an inconsistency between Mr. Wolcott's evidence at page 282 when he said that he was unaware of factoring with Arafura Finance until 12 April 1984 and what Mr. Wolcott said in giving evidence on 6 September 1985, namely, that factoring of the Health Department account was discussed in the first week after the handover. The point at page 282 was that Mr. Wolcott was unaware that the defendants had factored the Health Department account until 12 April 1984. The suggestion was made in the first week after settlement with the plaintiffs to factor the account. Again, these are two different ideas.

The reference to "books" at page 306.4 where Mr. Wolcott said that he had checked the figures was obviously referable to the deposit books and bank statements. Moreover, the reference to "expenses" at page 394.1 of $20,000 was to the plaintiffs' anticipated expenses if they ran the business, taking into account that they would need to employ a manager. The reference to this figure appears in Mr. Wolcott's handwriting on the back of page 2 of Exhibit D5.

I find that the plaintiffs were unaware that the defendants had been factoring their accounts to the Department of Health prior to the agreement for sale and purchase between the plaintiffs and the defendants being executed. Clause 13 of this agreement provides as follows:-

> "13. The vendors shall be liable for all debts incurred by the business up to and including the day of settlement, and shall remain entitled to receive profits in respect of the conduct of the business to that time. After settlement all debtors of the business shall become the property of the purchasers and all income receivable in their hands and to and for their benefit. The vendor shall indemnify the purchaser against all claims demands, actions suits and proceedings in respect of all debts incurred by the business prior to settlement."

Although this clause is poorly drafted, the clear intention of the parties was that the book debts outstanding to the business were assets of the business which were intended to pass to the plaintiffs "after settlement". Book debts are clearly choses in action (Halsbury 4th Ed. Vol. 6 Paragraph 8). As such, they are capable of assignment either in law or in equity. For the assignment to be valid in law, the provisions of s.70 of the Supreme Court Act had to be complied with. S.70 provides as follows:-

> "70.(1) Any absolute assignment, whether made before or after the commencement of this Act, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in

action is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of that notice -

(a) the legal right to that debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor.

(2) If the debtor, trustee or other person liable in respect of such a debt or thing in action has notice -

(a) that the assignment is disputed by the assignor or any person claiming under him; or

(b) of any other opposing or conflicting claims to that debt or thing in action

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under and in conformity with the provisions of the law relating to relief of trustees."

Clearly these provision were not complied with but that would not prevent the assignment being valid in equity. (See generally Cheshire & Fifoot, Law of Contract, 3rd Australian Edition at pages 618 ff.) The book debts were obviously assets of the business and if the purchasers bought "the business" (it being not otherwise defined than as "the business known as 'Daytona Services'") then they purchased the book debts of the business as well. This is not inconsistent with Clause 13 which provides in effect that property in the debts passes after "settlement" which I interpret as meaning immediately after settlement or upon settlement. It is well established that a contract to assign amounts to an assignment in equity (Snell's Principles of Equity 25th Ed. Page 75; Halsbury 4th Ed. Vol. 6 para 27).

In Tailby v The Official Receiver (1888) 13 A.C. 523 at 546, Lord Macnaghten said:-

> "Long before Holroyd v Marshall 10 H.L.C. 191 was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, 'that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust:' Legard v Hodges 1 Ves.Junr.478."

Clause 13 contemplates that the defendants, as vendors, were entitled to run the business until settlement and "to receive profits" to the day of settlement. Unfortunately no accounting seems to have been done by way of adjustments between the parties upon settlement. What the defendants did, however, was to assign the two substantial debts to Arafura Finance, the last assignment being on the very day of settlement. In my opinion, there should have been a proper accounting between the parties to determine the profits of the business. The actions of the defendants had the result of giving them more than their entitlement.

Clause 12 of the agreement for sale and purchase provides as follows:-

> "12. The purchasers and each of them acknowledge that they enter this agreement after making all such

enquiries whatsoever as they have deemed relevant to the purchase and acknowledge that they have inspected all such books and have satisfied themselves on all such matters as they have deemed pertinent to their decision to execute this agreement, and are not relying on any warranty or representation by the vendors (none being given) as to turn-over, profitability, or possibility of future development or capital gain. The purchasers acknowledge that they have not been induced to enter this agreement by any provision or representation of or made in any other or collateral agreement. However the vendor warrants the reasonable accuracy of the statements of account produced to the purchaser."

This clause provides no answer to a claim based on fraudulent misrepresentations. (S. Pearson & Son Ltd. v Dublin Corporation (1907) A.C. 351; Snarski v Barbarich (1969) W.A.R. 46.)

I find that the plaintiffs were induced by the defendants to enter into the agreement for sale and purchase by the material misrepresentations to which I have referred specifically, which were untrue in fact; and which the defendants both knew to be untrue; and were intended or calculated to induce the plaintiffs to act upon them; and which the plaintiffs acted upon and suffered damage. Accordingly, the plaintiffs have proved that the misrepresentations were fraudulent. (Derry v Peek (1889) 14 A.C. 337.

When the plaintiffs discovered the fraud, they had two choices open to them. They might have sued to recover as damages for fraud the difference between the price they had paid and the fair value of the property at the time of

the contract, or, provided that they were in a position to restore to the defendants substantially that which they had received under the contract, they might avoid the purchase and sue to recover their purchase money back from the defendants with interest, and also with damages for any loss which they may have suffered through carrying on the business in the meantime. (Alati v Kruger (1955) 94 CLR 216 at page 222.)

The plaintiffs elected to rescind. The validity of the plaintiffs' election to rescind depended upon the question whether restitutio in integrum was possible in the circumstances as they existed at the commencement of the action. The proceedings in the present case were instituted by writ of summons dated 16 May 1984, being the same date as the plaintiffs gave the defendants notice in writing that they had elected to rescind the agreement for the sale and purchase of Daytona which was then offered to be returned to the defendants for them to do as they wished with it and demanding that the defendants restore the applicants to their position to the date of that agreement, namely, as at 5 March 1984.

As was pointed out in Alati v Kruger by Dixon C.J. and Webb, Kitto and Taylor JJ. at pages 223 to 224:-

> "If the case had to be decided according to the principles of the common law, it might have been argued that at the date when the respondent issued his writ he was not entitled to rescind the purchase, because he was not then in a position to return to the appellant in specie that which he had received under the contract, in

the same plight as that in which he had received it: Clarke v Dickson (1858) E.B. & E. 148 [120 E.R. 463]. But it is necessary here to apply the doctrines of equity, and equity has always regarded as valid the disaffirmance of a contract induced by fraud even though precise restitutio in integrum is not possible, if the situation is such that, by the exercise of its powers, including the power to take accounts of profits and to direct inquiries as to allowances proper to be made for deterioration, it can do what is practically just between the parties, and by so doing restore them substantially to the status quo : Erlanger v New Sombrero Phosphate Co. (1878) 3 App.Cas. 1218, at pp.1278,1279; Brown v Smitt (1924) 34 C.L.R. 160, at pp.165, 169; Spence v Crawford (1939) 3 All E.R. 271, at pp.279, 280. It is not that equity asserts a power by its decree to avoid a contract which the defrauded party himself has no right to disaffirm, and to revest property the title to which the party cannot affect. Rescission for misrepresentation is always the act of the party himself : Reese River Silver Mining Co. v Smith (1869) L.R. 4 H.L. 64, at p.73. The function of a court in which proceedings for rescission are taken is to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction ab initio, and, if it is valid, to give effect to it and make appropriate consequential orders: see Abram Steamship Co. Ltd. v Westville Shipping Co. Ltd. (1923) A.C. 773. The difference between the legal and the equitable rules on the subject simply was that equity, having means which the common law lacked to ascertain and provide for the adjustments necessary to be made between the parties in cases where a simple handing back of property or repayment of money would not put them in as good a position as before they entered into their transaction, was able to see the possibility of restitutio in integrum, and therefore to concede the right of a defrauded party to rescind, in a much wider variety of cases than those which the common law could recognize as admitting of rescission. Of course, a rescission which the common law courts would not accept as valid cannot of its own force revest the legal title to property which had passed, but if a court of equity would treat it as effectual the equitable title to such property revests upon the rescission."

As Fullagar J. said at page 228:-

"I do not think that the purchaser is bound to remain in possession. On the other hand, I think that he would commit a breach of his duty if he simply abandoned the property without notice to the vendor. If he gave reasonable notice to the vendor offering to restore

possession of the property to him, I think that the vendor would act at his own risk if he declined to take the opportunity offered to him, and that he could make no claim for compensation if the purchaser then left the property and it were subsequently held that he was entitled to rescind: cf. Maturin v Tredennick (1864) 10 L.T. 331 which is cited by Townley J. in his judgment. There the property sold consisted of contributing shares in a company, and, after the purchaser had given notice of rescission, a call was made, of which the vendor had notice. He did not pay the call, and the shares were forfeited. It was held that he had acted at his own risk, and there was a decree for rescission.

It is, of course, in many cases open to either party to apply for an order appointing a receiver or a receiver and manager, but often the expense incurred in and by such an appointment would be out of proportion to the amount involved."

In order to do justice, I am of the opinion that the equitable remedy has to be determined as at the time that the defendants first became acquainted with the plaintiffs' claim; for that was the time when a receiver and or manager could have been appointed to carry on the business until the rights of the parties had been ascertained. At that time, there was nothing to stop the defendants from resuming their debt-collecting business. Hence, in my opinion, if the capability of doing so existed at that time, there should be no reason in good conscience why a Court should not grant the relief sought; otherwise a fraudulent vendor of any business could simply sit back and force the purchaser of it to seek his remedy in damages which, in many circumstances, would be a poor substitute for repayment of the purchase price. As I see it, this approach is not inconsistent with the spirit of what Lord Wright said over a hundred years ago in Erlanger v New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218 at 1278:-

"And I think the practice has always been for a Court of Equity to give this relief wherever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

Lord Wright re-echoed the statement of Lord Blackburn in Spence v Crawford (supra) at p.288 where he said:-

"In that case, Lord Blackburn is careful not to seek to tie the hands of the Court by attempting to form any rigid rules. The Court must fix its eyes on the goal of doing 'what is practially just'. How that goal may be reached must depend on the circumstances of the case, but the Court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation. This is clearly recognised by Lindley MR in Lagunas' case. There is no doubt good reason for the distinction. A case of innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud. The Court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the Court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff. Restoration, however, is essential to the idea of restitution. To take the simplest case, if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return. The purpose of the relief is not punishment, but compensation ... Certainly in a case of fraud the Court will do its best to unravel the complexities of any particular case, which may in some cases involve adjustments on both sides."

Turning then to the facts of the present case, the plaintiffs had possession of the premises but the defendants still had a lease of them and this did not expire until 18

July 1984 and, as well, the defendants had a right to renew the lease for a further two years (Exhibit P29). The lease, too, was not transferred by any instrument to the plaintiffs and could have been resumed by the defendants. Although under Clause 8 of the agreement for sale and purchase it was contemplated that the defendants would assign the lease of the premises to the plaintiffs, no assignment seems to have been effected and at the date of rescission it would appear that the defendants were still the lessees.

There was no stock-in-trade and there is no evidence that the work in progress had any value. In view of s.40 of the Commercial and Private Agents Licensing Act, it is doubtful whether "work in progress" had any value at all. In any event whatever work in progress there was, could be compensated for in money upon accounts being taken as of 16 May 1984. There is no evidence that the business had "deteriorated" within the concept of that term in Alati v Kruger. In fact, the evidence of Mr. Cooney suggested the contrary. Even if the business had deteriorated, then it would be possible to assess the amount of any deterioration; but in my view no claim for compensation arises since the defendants had every opportunity following receipt of the letter to them of 16 May 1984 to resume the conduct of the business which they had been assisting to run as recently as the latter part of April 1984.

The lease over the computer was capable of being retransferred to the defendants (page 580).

The plaintiffs did not act unconscientiously in returning the business to the defendants and taking no steps to keep the business on foot. As I have said, the plaintiffs immediately advised the defendants by letter of rescission and all business records were left in the premises. There is no suggestion that the letter of 16 May 1984 failed to reach the defendants at the address shown, namely 27 Sandalwood Street, Nightcliff, a suburb of Darwin, on that day or the following day. Indeed, the writ followed swiftly in its wake and an appearance was entered on the 25th May 1984. The defendants could have taken steps to have protected their position by immediately re-occupying the premises. The defendants chose to ignore the plaintiffs' invitation to take back the business and no application was made by them for an order appointing a Receiver or a Receiver and Manager to preserve the property pending the determination of the case.

The plaintiffs were in no position to carry on the business themselves as they had no licence which, in my opinion, was largely the fault of the defendants in failing to lodge the plaintiffs' application with the Court, and by their telling the plaintiffs that they could carry on under Mr. Davis' licence which was non-existent anyway.

The chattels which were sold with the business were still on the premises at the date of rescission. (See Statement of Agreed Facts.) The best way of dealing with these items is for an order to be made that they be returned to the defendants or that their value be assessed and allowance be made for them.

There are no difficulties associated with changing the particulars associated with the registered business name.

The book debts of the business as of the date of settlement are ascertainable from Exhibit P18. Appropriate adjustments could be made to allow for any of these debts which may have been recovered by the plaintiffs.

The plaintiffs seek the cancellation of the mortgage over Hilltop Station as part of the restitutio due to them. There is no doubt that a Court of Equity can in rescission cases order a deed, such as a mortgage, to be delivered up and cancelled (Kerr on Fraud and Mistake 6th Ed. page 473; Meagher, Gummow and Lehane: Equity, Doctrines & Remedies, 2nd Ed. paragraph 2418).

This leaves only the unit in Burleigh Heads which cannot be returned in specie as it was sold by a mortgagee during the course of the hearing. Nevertheless, the Court is entitled to make allowance for its value in money. The agreement for sale and purchase of Daytona itself makes

provision for the value of $90,000 to be ascribed to it and hence I would be disposed to order payment of this amount to the plaintiffs in lieu of the property. The defendants, who, as vendors, have been guilty of fraudulent misrepresentation, cannot complain that the plaintiffs are entitled to such compensation ex debito justitiae. (cf. Spence v Crawford (1939) 3 All E.R. 271, per Lord Thankerton at pp.279, 281 and 282.) As Lord Wright pointed out in the same case on page 289:-

> "The rule is stated as requiring the restoration of both parties to the status quo ante, but it is generally the defendant who complains that restitution is impossible. The plaintiff who seeks to set aside the contract will generally be reasonable in the standard of restitution which he requires. However, the court can go a long way in ordering restitution if the substantial identity of the subject-matter of the contract remains. Thus, in the Lagunas case, though the mine had been largely worked under the contract, the court held that, at least if the case had been one of fraud, it could have ordered an account of profits or compensation to make good the change in the position. In Adam v Newbigging, where the transaction related to the sale of a share in a partnership, which had become insolvent since the contract, the court ordered the rescission and mutual restitution, though the misrepresentation was not fraudulent, and gave ancillary directions so as to work out the equities. These are merely instances. Certainly in a case of fraud the court will do its best to unravel the complexities of any particular case, which may in some cases involve adjustments on both sides."

I have borne in mind throughout my assessment of the evidence that in a civil action where fraud is alleged against a party to the action, the standard of proof is that applicable to civil actions generally, namely, proof on the balance of probability, and not the higher standard of proof

beyond reasonable doubt which is required in criminal cases; but there is no absolute standard of proof and no great gulf between proof in criminal and civil cases. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding upon the balance of probabilities. (Hornal v Neuberger Products Limited (1957) 1 Q.B. 247, but more importantly, Rejfek v McElroy (1965) 112 C.L.R. 517 at page 521.)

The orders made by the High Court in Alita v Kruger (supra) are set out in condensed form in Equity Doctrines and Remedies 2nd Edition (supra) paragraph 2411, and I shall hear counsel on the form that an order for rescission, which I propose making, should take. In view of my conclusion, the counter-claim is dismissed.