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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 9/97



BETWEEN TI LEAF PRODUCTIONS LIMITED

Plaintiff

A N D LESTER BAIKIE and
ROBIN BAIKIE

Second Defendants

Hearing: 3 – 7 July, 10 – 14 July and 24 – 27 July 2000

Counsel: J G Miles QC and P Dale for Plaintiff
R B Squire QC and T M Gresson for Second Defendants

Judgment: 3 October 2000

JUDGMENT OF PANCKHURST J

Solicitors:
Grove Darlow & Partners, Auckland, for Plaintiff
Gresson Dorman & Scott, Timaru, for Second Defendants

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Introduction:

[1] Ti Leaf Promotions Limited (Ti Leaf) is a company which was formed to produce a 35 millimetre feature film called "*The Lost Prince*". The aim was to film the movie in the Mackenzie Country - Mt Cook area. To that end Ti Leaf leased the homestead and out-buildings on a farm property, Pukaki Downs station, from Mr and Mrs Baikie.

[2] Arising from that tenancy relationship it is alleged that the Baikies both breached an agreement not to make "*negative comments*" about Ti Leaf and those associated with it, and variously defamed the company. As a consequence, it is said, investors withdrew their support for "*The Lost Prince*" and production of the movie was abandoned in mid-1996. In this proceeding Ti Leaf seeks to recover its pre-production costs of \$1,337,064 which were lost upon abandonment of the project.

[3] Mr and Mrs Baikie deny that they were in breach of contract or that they defamed the company. They further dispute that their actions caused the abandonment of the film project. Alternatively, they challenge the professionalism and commitment of Ti Leaf and maintain that the pre-production costs would never have been recouped in any event.

[4] Ti Leaf also took proceedings against Mr A G Neill, formerly the Member of Parliament for Waitaki, in which defamation was alleged. On 6 July, the commencement of the fourth day of the trial, it discontinued against him in light of a retraction and apology which was read in open court. Subsequently Mr Neill was called as a witness for Mr and Mrs Baikie.

Factual Background:

[5] Ti Leaf was incorporated in Hong Kong in late 1993. There were five shareholders. Sunil Khemaney, Richard Bellord (both resident in the United States of America), and David Muncie (also an American who died in December 1999) were the prime movers. They brought in Harry Goldstein, an American from an

accounting background, and Ramon Tamayo, a Philippine businessman. All shared a common religious belief in a branch of Hinduism called Vaishnavism.

[6] Members of the group knew Mr Chris Butler, who is a spiritual leader and teacher of Vaishnavism. He is also an American, but travels extensively throughout the world. He founded the Science of Identity Foundation a non-profit organisation based in the United States which is committed to promotion of Karma and Bhakti yoga and meditation. Mr Butler was the host of a television series "*Chris Butler Speaks*", while his wife Wai Lan Butler, taught exercise through yoga via the medium of a long-running television series. Mr Khemaney is an officer and shareholder in an American corporation which sells natural foods and produces a kitchen-based vegetarian television series. Generally, the shareholders in Ti Leaf and Mr and Mrs Butler subscribed to a similar life philosophy and, additionally, had interconnecting business interests.

[7] The idea for "*The Lost Prince*" began with the late David Muncie, who first introduced Messrs Khemaney and Bellord to the concept. Sometime later the story was described in these terms : "*An action/adventure/martial arts epic of heroism, revenge and the triumph of wisdom over ignorance ... good over evil*", set at a time "*several thousand years before recorded history*", and based in an "*idyllic, peaceful kingdom with an ancient, spiritual culture ... graced with an extremely varied environment from the snowy peaks of Mt Meru to the vast ocean with everything from deserts, rain forests and waterfalls in between*". The lead actors were to be the three teenage children of Mr Bellord, Richard junior aged 19 years, Satya 18 years, and Subhadra 17 years at the relevant time. The children's mother is Wai Lan Butler. All three are gifted martial artists and of attractive appearance.

[8] In December 1993 Ti Leaf entered into a series of contracts with persons to be involved in the film production. Mr Butler was to be the script writer, director, and, with his wife, a co- producer of the film. A schedule to his agreement with Ti Leaf provided that the script was to be available by 1 March 1994, filming was to be completed by 1 November 1994, and post-production by 31 December 1994. A clause of the agreement entitled Mr Butler to 10% of the profits received by Ti Leaf in its capacity as an investor in the film.

[9] There was a similar agreement with Mr David Moore intended to retain his services as a sound recording consultant. Mr Moore was an employee of Sunset Studios Limited, an Arizona-based company which had independently agreed to provide audio and video equipment to Ti Leaf. The lead actors also entered into service agreements, under which each was to be paid a set daily fee throughout the production of the film. Contracts were also concluded with an instructor in martial arts, script writers, and others.

[10] At the end of 1993, when Ti Leaf was formed and the service contracts were concluded, the intention was to film "*The Lost Prince*" in Australia. Certain steps were taken to that end. Ti Leaf was registered as a foreign company in Australia and about US\$300,000 was deposited in an Australian account in order to demonstrate Ti Leaf's solvency and satisfy the requirements of the Media, Entertainment and Arts Alliance (MEAA). This body regulates the working conditions for actors and others involved in film production in Australia. An approach was also made to the Australian School of Meditation which, on account of the religious and spiritual values of Ti Leaf's promoters, wished to take up a financial stake in the venture.

[11] However, by about mid-1994 problems with MEAA and the Australian Immigration Department resulted in a decision to relocate and film "*The Lost Prince*" in New Zealand. On 27 May 1994 Mr Khemaney wrote on behalf of Ti Leaf to the New Zealand Immigration Service seeking multiple-entry working visas for the cast and crew. The letter referred to "*The Lost Prince*" as a "*unique action adventure movie that will show-cast the exceptional fighting ability and charisma of the three young martial arts experts and some of the most exciting and cinemagraphically beautiful scenes available anywhere (especially if we are privileged to film in New Zealand).*" The letter also indicated that the film had the backing of the New Zealand School of Meditation, a non-profit incorporated society and sister organisation of the Science of Identity Foundation in the United States. The letter continued:

"The film's primary purpose is to promote yoga and yoga philosophy around the world in a way that is simultaneously entertaining, educational and commercially viable. Through the epic medium, we hope to provide yoga ideals, specific Bhakti yoga practices and philosophical teachings to as wide an audience as possible."

There were also comments to the effect that the film would not be shot “*in the traditional way*”, that is “*under strict time constraints*”, and it was anticipated a considerable time would be taken because “*the script is being written around the terrain*”.

[12] At about the same time an approach was made to Mr Allan Tibby, a New Zealander resident in the Philippines, to act as Ti Leaf’s location manager and liaison person in New Zealand. He retained Mr George Ormond of Whangamata to assist him and incorporated Kiwi Kcontacts Limited as a trading company. Both men were devotees of Vaishnavism and Mr Ormond was a long-time member of the New Zealand School of Meditation. According to Mr Ormond he first travelled to the South Island in search of shooting locations in July 1994 and set up a base in Twizel. He viewed a number of farms including Mr and Mrs Baikie’s property.

[13] Mrs Baikie’s evidence concerning the first contact with persons associated with Ti Leaf was to rather different effect. Pukaki Downs station, a 12,000 hectare run comprising freehold and leasehold land, was offered for sale by auction in late 1989. Ms Elaine Curran visited and inquired about the property. She spoke of people from the United States who suffered from severe allergy problems which may make the property attractive to them on account of the altitude and clean green environment. A sale at auction did not eventuate, and nor did Ms Curran pursue the prospective purchase on behalf of the unnamed Americans.

[14] However, in early 1994 Ms Curran again spoke to the Baikies and on this occasion indicated that people known to her wished to shoot a feature film for which Pukaki Downs may be a suitable location. Mr Ormond indeed acknowledged in cross-examination that he knew Ms Curran and that she played a limited role in introducing him to farmers who owned properties which were potentially suitable. In any event, he sent video footage of possible filming locations to the United States which served to confirm that the Mackenzie Country area was a suitable location for the film.

[15] Quite protracted negotiations ensued between Mr Ormond and the Baikies concerning the terms of a tenancy agreement. Mr Ormond explained that the

intended occupants of the farm homestead suffered from severe allergy problems which would necessitate alterations to the house and special terms in the lease governing fire-lighting and the use of pesticides and herbicides on the farm property. On 8 November 1994 a tenancy agreement was concluded between Mr and Mrs Butler and Ti Leaf as tenant and the Baikies as landlord. It was for a fixed term to 17 July 1995, with a right of extension to 21 August 1995 subject to a doubling of the rent. The ordinary rental figure was \$1200 per week.

[16] There were no less than thirty special conditions to the agreement which defined the rights of the tenant to alter the homestead on account of the Butlers' allergy and respiratory problems, prescribed certain limitations upon the landlord's farming activities, and confirmed Ti Leaf's entitlement to film on the farm. To that end there were clauses which guaranteed access to the film crew and permitted the building of a studio facility on the land.

[17] As soon as the lease was in place alterations to the homestead were commenced. Floor coverings were lifted and replaced with tiles. All other surfaces within the house were lined with a form of tin foil. The exterior deck was replaced using timber which had not been chemically treated. Sophisticated air-conditioning, heating, and filtration systems were installed to guarantee a pure air supply to the house and associated buildings. There were also major alterations to these buildings to establish a video-viewing room, a sound booth, and an audio control room.

[18] In November 1994 Ti Leaf was registered as an overseas company in New Zealand and in mid-January 1995 persons associated with the company arrived in New Zealand. Mr and Mrs Butler took up residence of the Pukaki Downs homestead. Members of the film crew and their families obtained rental accommodation at Twizel, 14 kilometres away. Pukaki Downs station is on the shores of Lake Pukaki on State Highway 80 the main access road to Mt Cook which is about 40 kilometres distant. Mr and Mrs Baikie moved to another three bedroom house situated on their property a short distance away from the homestead. Both houses are on the shores of Lake Pukaki and to the west of the highway. A common driveway from the main road bisects after a short distance to provide road access to the separate houses.

[19] Within a short time after the arrival of Mr and Mrs Butler difficulties surfaced between landlord and tenant. A common water supply serviced the two houses. The Butlers' water usage was high since the domestic water supply was used to dampen areas in the vicinity of the homestead which might occasion dust in the air. On a number of occasions there was insufficient water available for the Baikies' use. Mr Baikie responded by cutting off the water supply to the homestead. As early as 13 February 1995 the first of a number of letters written by solicitors acting for Ti Leaf was sent to the Baikies. It required immediate reinstatement of the water supply. The letter also demanded that the tenants be allowed quiet enjoyment of the property, that landlord inspections be conducted according to the letter of the agreement, and that the film crew be allowed to go about their work without interference and public criticism. Otherwise, the letter threatened, the tenancy would be terminated followed by a substantial claim for damages.

[20] Following receipt of the letter there was an incident on the access road which Ti Leaf characterised as a "*blockade*" by Mr Baikie. On 16 February Mr and Mrs Baikie and Mr Tibby, representing Ti Leaf, met in the company of their respective solicitors in an endeavour to negotiate a settlement of the differences. Various issues were discussed including provision of a larger capacity water pump by Ti Leaf, surrender of the tenancy bond of \$10,000, and, importantly, an extension of the lease to provide more time for filming "*The Lost Prince*".

[21] Over the ensuing months problems persisted. Mr Tibby was at the forefront of dealings between Ti Leaf and Mr and Mrs Baikie. He considered that Mr and Mrs Butler and the film crew did not have quiet enjoyment of the homestead and its surrounds. Specific concerns raised included rabbit shooting on the station which posed a risk to life and property, the threat to clean air arising from the use of fertiliser and herbicides and from burning-off, and the threat of physical violence on account of the ongoing differences of opinion.

[22] The perception of Mr and Mrs Baikie concerning the causes of the difficulties was rather different. They were increasingly sceptical concerning whether Ti Leaf was seriously engaged in the production of a film. The nature and extent of the modifications to the homestead they considered strange. The practice of a tanker

transporting water from Twizel to the homestead once or more daily was regarded with suspicion. The desire for privacy, characterised by the positioning of a guard caravan on the access road to the homestead, was regarded as abnormal in a high country farm setting. Mr Tibby's endeavour to schedule and control the timing and incidence of aspects of their normal farm activities was also foreign to their understanding. In these circumstances Mr and Mrs Baikie were reluctant to grant an extension of the lease, which was an issue of increasing concern to Ti Leaf as time marched on.

[23] Considerable evidence was led on both sides concerning differences and incidents which occurred during 1995 and into early 1996. As a result of these conversations and telephone calls were taped, letters were written (including a number through solicitors), and on occasions the police were called upon to mediate. In my view little purpose would be served by traversing these events and discussing the rights and wrongs of various situations. The fact is that the methods employed by Ti Leaf personnel were unusual and to a degree intrusive with reference to Mr Baikie's farm activities. From a straight-forward rural perspective much of the behaviour of persons associated with Ti Leaf was seen as inconsistent with that expected of a film crew. I am in no doubt that Mr and Mrs Baikie were affected by local gossip and speculation concerning people associated with Ti Leaf, since they felt a measure of responsibility for their presence in the area on account of the tenancy agreement. Mr Baikie in particular could not come to grips with the insistence made on behalf of Mr and Mrs Butler that their enjoyment of the homestead required restrictions upon normal farm activity: burning-off, application of fertiliser, and rabbit eradication for example. He and his wife considered the demands of their tenants excessive and Mr Tibby's approaches on their behalf aggressive. Matters reached the point where in the second half of 1995 Mr Baikie's health was significantly affected as a consequence of the differences.

[24] By August 1995 an impasse had developed in relation to renewal of the tenancy agreement. The Baikies were most reluctant to grant a renewal given the problems they had experienced and their understanding that the film would be completed within the term of the original agreement. This was despite their appreciation that the rental paid by Ti Leaf was greatly above the market rate. Mr

and Mrs Baikie remained genuinely sceptical concerning whether a film was under production. They had seen nothing which was consistent with film-making. To an extent their scepticism was understandable. Progress on "*The Lost Prince*" was still at the pre-production phase. Filming had not begun. Mr and Mrs Butler, with the assistance of others who went to the homestead each day, were still reworking the script while the lead actors continued their martial arts training in anticipation of filming.

[25] Negotiation of the terms of a new tenancy arrangement continued throughout the balance of 1995, with Ti Leaf becoming a monthly tenant in the meantime. In early September 1995 the Baikies communicated with their Member of Parliament, Mr Neill. They raised two matters of concern. First, whether persons associated with Ti Leaf were in compliance with the terms of their New Zealand work permits. An officer of the Immigration Service had visited the Baikies on two occasions, as a result of which they were advised the permit situation was in order. Nonetheless Mr and Mrs Baikie remained concerned that because permits had been granted to facilitate the filming of "*The Lost Prince*", their holders would be in breach if a film was not being shot.

[26] Their second concern related to renewal of the lease. Because of the history of differences they were reluctant to renew but on the other hand they feared the issue of proceedings were they not to do so. On 3 September thirty pages of material, including solicitors' letters about the lease renewal, were faxed to Mr Neill at Parliament. The covering letter also made reference to the rumours concerning "*our tenants e.g. drug-making, a cult-making nerve gas etc!*". After consideration of this material Mr Neill considered that the permit issue was one which he could legitimately pursue whereas renewal of the lease was a legal issue outside his domain.

[27] Mr Neill raised the immigration issue with his colleague Mr Maxwell, the Minister of Immigration. The Minister requested the Immigration Service to inquire into the matter. This took some time and in the meantime, during the balance of 1995 and into early 1996, contacts between Mr and Mrs Baikie and Mr Neill continued.

[28] Reverting to an aspect of Ti Leaf's affairs, during November 1995 arrangements were made with three major investors in "*The Lost Prince*". These were Mr Francis Martin of Honolulu, Mr Nilo Santos of the Philippines, and the previously-mentioned Mr Bellord. Each signed a letter of intent dated 14 November 1995 by which they agreed to subscribe US\$400,000, US\$300,000 and US\$500,000, respectively, in venture capital towards the production phase of the film. The letter indicated that Ti Leaf intended to arrange a total of US\$1.5m to shoot the film, over and above the pre-production investment. Investors who provided this US\$1.5m would share proportionately in 35% of the net profit, leaving 65% for Ti Leaf and pre-production investors. The letter also detailed the priority as between investors but continued "*although there is tremendous profit potential for small film companies producing low budget movies, the film business can also be a risky one*", hence Ti Leaf did not guarantee there would be a profit. The "*proposed investment*" was not payable until "*30 to 60 days prior to commencement of principle (sic) photography*". The letter concluded that Mr Khemaney's signature to the letter on behalf of Ti Leaf bound the company and the investor's signature constituted acceptance and bound the investors to the terms contained in it. Messrs Martin, Santos and Bellord, who each knew Mr Khemaney personally, signed and returned the letters. I shall return to the significance of these arrangements later in this judgment.

[29] In January 1996 Ms Dianne Oliver, the executive director of Film New Zealand, became aware that the bona fides of Ti Leaf was an issue under consideration by the Immigration Service and was of interest to Mr Neill. She had received an approach from Miriyana Alexander a reporter with the Timaru Herald who had already written articles concerning Ti Leaf's presence in the Twizel area. Ms Oliver made contact with Mr Tibby and arranged to visit the film base. She travelled to Twizel on 24 January, met the Butlers, various consultants, and the three lead actors. Ms Oliver concluded that Ti Leaf was a genuine film-making company and going about its business in a proper manner.

[30] Following her return to Wellington Ms Oliver wrote to the Minister of Immigration on 31 January 1996. Her letter included the comments:

"I left Twizel with the impression that this very courteous group were being maligned through a series of quite defamatory rumours ... My major concerns are:

- (i) If there is no substance to any of the rumours that are circulating then these people are being subjected to the worst type of bigotry for their philosophical and spiritual beliefs.*
- (ii) Investors in the film may well decide that the uncertainty of the situation is not conducive and pull the production out of New Zealand, doing irreparable harm to the public relations New Zealand is attempting to build with offshore film companies".*

In early February she also spoke to Mr Neill and explained her views.

[31] On 21 February the Minister, Mr Maxwell, advised Ti Leaf that he was in receipt of a report from which he was satisfied that there had been no breach of the Immigration Act 1987. However, he expressed concern at the *"apparent lack of progress with the production"* and advised that permits were not granted ad infinitum. The letter concluded on the note that *"no further permits will (be) entertained for Ti Leaf Productions until Film New Zealand provides an endorsed programme for the rest of the production"*. Mr Neill was also advised of this development.

[32] At the end of February Ms Oliver visited the United States and while there met Mr Khemaney. On 1 March 1996 she wrote to the Minister advising that she had seen the production schedule and other material, including the script, for *"The Lost Prince"*. Her letter concluded: *"Film New Zealand endorses the proposed production programme but does not provide any other guarantees"*. A draft of this letter had been provided to Mr Khemaney and was materially amended before the final version was sent.

[33] On 8 February 1996 written agreement was reached concerning an extension of the tenancy agreement. The document signed by Mr and Mrs Baikie and by Mr Tibby on behalf of the tenants provided:

"1) That the Tenants (Mr & Mrs Butler/Ti Leaf Productions Ltd.) will remain on the leased property at Pukaki Downs until May 10th 1996. During this time the original lease agreement will be in force.

- 2) *That the Tenants will be allowed the quiet enjoyment of the property until 10th of May 1996 and that the Landlords, their family members, and the tenants during this time and for two years after, will not make any negative comment about the other or their dealings with each other, to the media, representatives of government agencies, and any member of the public.*
- 3) *The Tenants agree to pay the Landlord \$8,000 as goodwill money. The Tenants will also leave behind for the Landlord the upgraded electrical facility, and a fuel metre for the petrol tank."*

Clause two became the cornerstone of the breach of contract claim in this proceeding.

[34] On the afternoon of 20 March 1996 Mr Neill made a speech in the House of Representatives concerning the activities of Ti Leaf. In the preceding months he had communicated with the Minister of Immigration on a number of occasions and maintained in contact with Mr and Mrs Baikie who briefed him concerning their ongoing problems. He had also sought out and had discussions with Detective Glending of the Timaru police and Ms Alexander the Timaru Herald reporter. The detective had accompanied immigration officials on a visit to Pukaki Downs in January 1996 and subsequently conducted some inquiries of his own. The speech in the House represented a direct attack upon Ti Leaf and persons associated with it.

[35] It was a wide-ranging attack. Mr Neill posed the question whether Ti Leaf was a genuine film company, or a sham; a vehicle to allow persons to circumvent immigration requirements and remain in New Zealand for other purposes. He referred to Mr Butler as an American, a guru or godfather, a leader of the Science of Identification (sic) Foundation, a man of dubious international connections, an eccentric, a recluse, and a person obsessed with the need for pure air. Returning to the purposes behind the presence of the group in New Zealand, Mr Neill questioned whether Ti Leaf was no more than a front for a religious cult or for an international drug ring operating out of Twizel. He ended on the note: "*The people of Twizel do not want a David Koresh and Waco, they do not want a Jim Jones and Guyana*".

[36] On the morning of 20 March Ti Leaf's solicitor from Timaru advised Mr Tibby that he suspected some publicity seriously adverse to the company was about to break. The warning was taken seriously. In an endeavour to pre-empt, or at least

temper, the situation a news conference was arranged at Pukaki Downs and members of the media were invited to attend. Despite this initiative Mr Neill's comments in the House excited considerable public interest throughout the country. Representatives of the print, radio and television media contacted, or endeavoured to contact, Mr Tibby and others associated with Ti Leaf for its response. What until then had been essentially a local issue in the Twizel area, became for some days a hot topic nationally.

[37] Mr Neill faced similar attention from the media. He agreed to participate in radio interviews with a number of talk-back hosts. As a result Mr Neill substantially repeated the comments he had made in the House under privilege but, of course, in a situation where he was answerable. It was these radio broadcasts which formed the basis of the defamation allegations in the separate proceeding brought by Ti Leaf against him. I need not set out the details of the claim, given the retraction, apology, and discontinuance referred to earlier.

[38] Persons associated with Ti Leaf were similarly active in the aftermath of the speech in the House. Messrs Butler, Tibby, and Ormond all variously participated in television interviews which were screened nationally. The evidence I heard concerning this aspect demonstrated to my mind that soon after the speech was delivered on 20 March public opinion and sympathy moved in favour of Ti Leaf. It became plain that there was no substance to the allegations of drug dealing, nerve gas manufacture, and, much less, of a cult organisation capable of mass murder or suicide, as had been suggested.

[39] Rather what emerged was that almost all of those associated with Ti Leaf were followers of Mr Butler and shared a religious belief in the Hindu teachings of Vaishnavism. Somewhat ironically, given the allegations, adherence to their faith involved abstinence from alcohol and stimulants. Mr Butler enjoyed a reputation as a teacher and writer against drug abuse. Nonetheless the group's different approach to living, coupled with the desire to be left alone and for privacy, proved a potent mix in a rural environment where conformity was the expectation of at least many in the community.

[40] In addition to the favourable media coverage, support also emerged for Ti Leaf within the Twizel community. A petition was circulated. It was addressed to Mr Neill and the New Zealand Government from Twizel and Mt Cook residents. The wording of the petition was:

"We the undersigned request Alec Neill and the New Zealand Government to stop hassling the film people ... end the bigotry!"

Presumably the reference to the Government related to the Immigration Service. Over 350 signatures were obtained and on 28 March 1996 Messrs Tibby and Ormond travelled to Wellington and presented the petition at Parliament. By this time a number of print articles appeared which were critical of the actions of the Member for Waitaki.

[41] On 1 April Mr Neill visited Twizel for a constituency meeting. His visit was the subject of articles in newspapers. These too were sympathetic to the position of persons associated with Ti Leaf, who were said to be at risk of losing their employment on account of the publicity which Mr Neill's actions had engendered.

[42] In early April the Immigration Service confirmed in principle that work permits would be issued to members of the Ti Leaf film crew, the duration of which would depend upon the shooting time-frame for *"The Lost Prince"*. After some communication on that issue, matters were resolved on 10 April by the grant of work permits current to 31 August 1996. In addition the letter of advice to Mr Khemaney confirmed that subject to evidence of attainment of certain production milestones further work permits and multiple travel visas would be issued without the need for formal applications. The Service required, however, that Ms Oliver of Film New Zealand provide verification of progress with the film..

[43] The production schedule and milestones indicated by Ti Leaf to the Immigration Service on 1 April 1996, were:

30 June 1996	Screenplay to be finalised
30 August 1996	Pre-production to end and winter filming to begin
30 November 1996	Minimum of 40% of New Zealand footage to be completed

28 February 1997	Minimum of 80% of New Zealand footage to be completed
30 April 1997	Completion of New Zealand post-production and filming, and crew to depart from New Zealand

These dates were expressed as "*maximum times*" which Ti Leaf would seek to better.

[44] Ti Leaf's tenancy of Pukaki Downs expired on 10 May 1996. Mr and Mrs Butler left New Zealand on 13 May and by about 20 May Ti Leaf's equipment was removed and the buildings on Pukaki Downs station were vacated. At the beginning of June Mr and Mrs Baikie resumed occupation of the homestead.

[45] On 6 June an article appeared in the Timaru Herald under the by-line "*Relieved to be back on their farm*". The article was written by Ms Miriyana Alexander, a staff reporter, based upon an interview with Mr and Mrs Baikie. It supplied as background that the Baikies had leased their home to Ti Leaf Productions, a Hong Kong film company, for a period of eighteen months and referred to the national attention the company attracted following Mr Neill's speech in Parliament. The article was broken into three parts which appeared on the front page and page two of the newspaper. A number of comments were attributed to Mr or Mrs Baikie which concerned Ti Leaf and the actions of persons associated with it. The article referred to Mr Baikie's serious health problems, which were attributed to the enormous stress caused by problems with Ti Leaf.

[46] The publication of this article assumed pivotal importance in relation to the claim against the Baikies. As noted earlier (para [27]) in November 1995 three businessmen agreed to provide venture capital of US\$1.2m towards the production costs of "*The Lost Prince*". The intending investors, Messrs Santos, Martin and Bellord, gave evidence about the impact of adverse publicity in March and, ultimately of their decision to withdraw support for the project following the Timaru Herald article of 6 June 1996. Correspondence between them and Mr Khemaney during the relevant period was produced. By early July all three had taken the decision to withdraw. I shall return to this important issue when I consider causation later in this judgment.

[47] Mr Khemaney gave evidence to the effect that with the withdrawal of support from these three major investors Ti Leaf was unable to proceed with production of *"The Lost Prince"*. Filming in New Zealand had to be abandoned. On 21 August 1996 he wrote to Mr Maxwell, the Minister of Immigration, and with regret advised him that on account of financial circumstances entirely beyond Ti Leaf's control it had been forced to abandon the film project. At the same time a news release headed *"Film Crew not returning to New Zealand"*, was made. In it Mr Khemaney indicated that serious consideration was being given to legal action against those considered to be responsible for Ti Leaf's woes.

The Claim:

[48] The statement of claim was in two parts. The first cause of action alleged a breach of contract, specifically of the 8 February 1996 agreement that Mr and Mrs Baikie would not make negative comments concerning Ti Leaf and persons associated with it for a period of two years. The alleged breach was based upon the Timaru Herald article of 6 June 1996, a conversation with Ti Leaf's Timaru solicitor Mr Shaw on 8 October 1996, two discussions with a private investigator Mr Scott on 3 September and 18 December 1996, comments made to the police, immigration authorities, Mr Neill, a Mr Brian Pollock, representatives of *"60 Minutes"* (a television programme) and to Twizel residents on unknown dates, and comments made to Mr Simon and Mrs Priscilla Cameron on an unknown date. Mr Pollock owned a property at Queenstown which Ti Leaf intended to lease, but in fact no evidence was led of comments made to him. The same applied in relation to the television programme representatives and to Twizel people.

[49] Despite the breadth of the pleading the real focus of Ti Leaf's case was upon the Timaru Herald article. In closing the case was put on the basis that it was the newspaper article on 6 June which caused the investors in *"The Lost Prince"* to withdraw their support, which in turn resulted in the loss which was claimed. As Mr Miles rightly acknowledged the discussions with Messrs Shaw and Scott for example post-dated abandonment of filming in New Zealand. Hence they were not causative of loss but, counsel submitted, such evidence was indicative of Mr and Mrs Baikie's attitude to the agreement prohibiting negative comments.

[50] Mr and Mrs Cameron were farming neighbours of the Baikies who in April 1996 leased a cottage on their property to Ti Leaf. Mrs Cameron gave evidence for the plaintiff on subpoena. It concerned a discussion which occurred between the Camerons and the Baikies about the suitability of Ti Leaf as tenants. The conversation was at the Cameron's home probably early in the winter of 1996. Even assuming it contained negative comments, again there was no evidence they were causative of harm to the company.

[51] The loss claimed was \$1,750,000, but in evidence Mr Khemaney reduced the figure to \$1,337,064. The break-down comprised the costs incurred by Ti Leaf in pre-production work in both Australia and New Zealand. The major components were salaries and fees, property rentals, travel, and general living expenses.

[52] The further dimension of the claim was in defamation. Here Ti Leaf alleged that words spoken by Mr and Mrs Baikie to Mr Shaw; to Mr Scott (on two occasions); to Mr and Mrs Cameron; and the repetition of similar statements to the police, immigration authorities, Mr Neill, Mr Pollock, representatives of "60 Minutes", and to Twizel people were defamatory. Significantly, the comments made by the Baikies to Ms Alexander which formed the basis of the Timaru Herald article on 6 June 1996, were not relied upon in the defamation context.

[53] Section 6 of the Defamation Act 1992 provides:

"6. Proceedings for defamation brought by body corporate – Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings –

- (a) Has caused pecuniary loss; or*
- (b) Is likely to cause pecuniary loss - to that body corporate."*

Although the likelihood of pecuniary loss by damage to its commercial reputation was alleged, Ti Leaf ultimately advanced its claim as one of actual pecuniary loss being the pre-production costs of \$1,337,064. There was also a claim for aggravated and punitive damages. The latter was abandoned by Mr Miles in the course of submissions made on the eleventh day of the hearing. In closing, he submitted that

in the event it was not necessary to seek aggravated damages. I did not understand that to be a formal abandonment of the claim.

[54] An important causation issue arose in relation to the wasted pre-production costs, since the evidence of the major investors was that the Timaru Herald article prompted their respective decisions to withdraw support for the film. As with the cause of action in contract, the discussions with Messrs Shaw and Scott occurred in late 1996 some time after the abandonment of filming. Similarly, on the evidence, anything said to Mr and Mrs Cameron was not causative of the loss which was claimed. In relation to the defamation claim most emphasis was placed upon the repetition of alleged defamatory remarks to Mr Neill, immigration authorities, and the police.

[55] The defamatory meanings said to have been conveyed by Mr and Mrs Baikie's statements were, that Ti Leaf was, or there were good grounds to believe that it was:

“(a) a manufacturer of LSD

(b) a religious cult engaged in the manufacture and distribution of illegal drugs

(c) a sham for some ulterior illegal or immoral purpose and

(d) engaged in illegal surveillance or bugging of the defendants.”

The defence pleaded was one of general denial coupled with positive defences of truth (but limited to the sham allegation), honest opinion, and qualified privilege.

[56] However, on 14 July, at the commencement of the tenth day of trial, the defences of truth and honest opinion were abandoned in light of concessions made by Mrs Baikie in evidence the previous day. Hence the remaining positive defence was one of qualified privilege. It was argued that to the extent Mr and Mrs Baikie were shown to have made statements to Mr Neill, the immigration authorities and the police, being in general terms the repetition of rumours which were circulating in the Twizel area, such was done *“pursuant to a social and/or moral duty ... to make such communication or communications to the said persons who by reason of their*

positions, duties and interests in the activity of (Ti Leaf) and its personnel, and dealings with them, had an interest or duty to receive them”.

[57] Because of the way in which the case developed and was closed, the contractual cause of action assumed greatest significance. In any event it is convenient to deal with it first and then to consider the defamation claim. Issues of causation and quantum which arise in that context are also relevant to the defamation claim.

“Negative Comments”:

[58] To recap clause 2 of the 8 February 1996 agreement by which the tenancy was extended to 10 May 1996 provided *“That the landlords, their family members, and the tenants during this time (the extension period) and for two years thereafter, will not make any negative comments about the other or their dealings with each other to the media, representatives of Government agencies, and any member of the public”.* The breach ultimately relied upon was comments made to Ms Alexander which in turn prompted the Timaru Herald article of 6 June 1996.

[59] Specifically Ti Leaf pleaded the following comments derived from the newspaper article:

- “(i) The 18 month tenancy by Ti Leaf had been a nightmare for the Defendants;*
- (ii) The Defendants were in touch with people interested in making a movie about the strange circumstances of a man from the U.S. living in a house full of tin foil with security guards manning the entrance.*
- (iii) There was constant aggravation between the defendants and the film company.*
- (iv) Litigation was threatened by the plaintiff because the defendants had apparently broken their contract with the company by not providing Mr Butler with a clean and peaceful environment.*
- (v) Continuous legal threats by the plaintiff.*

- (vi) *During the 18 months which the Baikie's lived in a nearby cottage there were many odd goings on by the plaintiff*
- (vii) *Cars were coming and going 24 hours a day and the defendants did not know who were coming onto their property.*
- (viii) *A water tanker used to come in at 4am – now why would a film company cart water at that hour of day.*
- (ix) *If the defendants had been told who Mr Butler was, what he was doing in New Zealand and what his religious connections were that would have been different. The plaintiff was never upfront with us."*

There was also a separate pleading that Mr and Mrs Baikie told Ms Alexander that:

"During the 18 months that Ti Leaf Productions occupied Robyn and Lester Baikies' Pukaki Downs farm home, the pair were prevented from returning home or meeting American spiritual leader Chris Butler, despite many requests to do both."

These particulars were drawn from the newspaper article and in the main reflected comments attributed to Mr or Mrs Baikie by the use of quotation marks.

[60] Ms Alexander appeared as a witness for Ti Leaf on subpoena. Generally she had little recollection of the visit to Pukaki Downs station and the interview with the Baikies upon which the article was based. She said her practice was to take a shorthand note of matters which might subsequently form the basis of an article. However she had not retained the notes on which this article was based. Challenged concerning certain of the comments attributed to Mr and Mrs Baikie, Ms Alexander responded she was a competent reporter and was not in the habit of making mistakes, in particular of misquoting persons.

[61] Mrs Baikie gave evidence that she and her husband only agreed to be interviewed by Ms Alexander on 5 June because of her persistence and on condition that she would not report matters which would involve them in a breach of the February agreement. She requested that a copy of the article be provided by facsimile, before it was published. This arrangement was not honoured. She said both she and her husband were appalled at the content of the article when they read it the following day. In cross-examination Mrs Baikie challenged three points from the

article as inaccurate. She said they did not say the eighteen months of the tenancy was “*a nightmare*”, or that they were prevented from returning to the homestead and meeting Mr Butler throughout the eighteen month term despite requests to do so, nor that they were paid about \$100,000 by Ti Leaf.

[62] I accept Mrs Baikie’s evidence concerning these points. On two occasions during the tenancy there were visits made to the homestead. It is not likely that Mr and Mrs Baikie would tell the reporter otherwise. I also consider it most unlikely they disclosed what they had received from Ti Leaf, even assuming the amount of \$100,000 mentioned in the article is a correct figure. Ordinarily these findings might call in question the accuracy of the article generally but it is significant that Mrs Baikie challenged none of the comments alleged to be negative, save for the “*nightmare*” remark. As to that, again I accept Mrs Baikie’s evidence that she and her husband made no such comment.

[63] Against this background Mr Squire argued that the comments relied upon were not negative and hence there was no breach of the agreement. He submitted that the term “*negative*” was not capable of precise definition, that the line between acceptable and negative comment was not easily drawn, and since there was room for uncertainty or ambiguity the subsequent conduct of the parties should be resorted to as an aid to interpretation : *Attorney General v Dreux Holdings Limited* (1996) 7 TCLR 617. see the dissenting judgment of Thomas J in particular.

[64] To my mind the meaning of “*negative comments*”, as that phrase was used in the 8 February agreement, is not ambiguous. It is necessary to have regard to the surrounding circumstances, the factual background known to the parties in February 1996, including the objective they had in mind at that time. The background was of a tenancy relationship which had subsisted for sixteen months, but during which there were marked difficulties between landlord and tenant. Adverse remarks and assessments were made, on both sides, and communicated to persons in the Twizel area and beyond.

[65] The phrase “*negative comments*” then, in the context of this agreement, required that the parties not communicate anything adverse about the other, or their

tenancy relationship, to any third party. Favourable, indeed neutral, comments could be made but it was agreed there would be an embargo on comment which was critical of the other party.

[66] Applying this test I am satisfied that a number of the pleaded comments were negative in nature. They conveyed that those associated with it, and Ti Leaf as a company, were strange, secretive, non-communicative, threatening, and demanding. It is significant that Mrs Baikie said in evidence that she and her husband were appalled when they read the Timaru Herald article. She was at pains to explain that it was not their intention for an article in such terms to be published, hence the request to see a draft before publication occurred. In my view she conceded through her evidence that negative comments were made, and in clear breach of the agreement, albeit she felt the reporter had abused their confidence in writing in the terms she did.

Abandonment of “*The Lost Prince*”:

[67] Messrs Bellord, Martin and Santos agreed in November 1995 to invest US\$1.2 million in “*The Lost Prince*” (see para 28). In July 1996, in the aftermath of the Timaru Herald article of 6 June, each investor withdrew from their commitment to provide production capital. The letters of intent which each had signed were silent concerning the right of the investors to withdraw. Ti Leaf did not challenge the investors’ actions, nor was any endeavour made to raise finance elsewhere. The case was presented on the footing that the adverse publicity in New Zealand was fatal to the project and thereafter all was lost.

[68] Messrs Bellord and Santos gave evidence in person concerning their decision to invest and the reasons for their withdrawal of support for the film. A witness statement was received from Mr Martin, he being permanently confined to a wheelchair, by consent. He was not cross-examined.

[69] Mr Bellord explained that he had known Mr Khemaney and the late David Muncie for almost thirty years. He and Mr Muncie went into business together in Hong Kong in the 1970s and in the United States in the 1990s. He was also

associated in business with Mr Khemaney in relation to the international distribution of television programmes.

[70] As to his decision to invest US\$500,000 he said this:

"I was satisfied that the project was viable simply on the assurances given to me by David Muncie. I made no independent inquiries. This was an investment that was motivated principally by my desire to assist the careers of my three children. I had been in business with David Muncie before and I had faith in his judgment. He told me that with a \$1.5 million budget, we would certainly be able to break even and get our investment back. He went through the typical revenue streams, from international distribution, domestic distribution, video rights, etc. and assured me that any investment I made would not be at risk. Whether or not there was any profit to be made would entirely depend on how well the movie was publicised and how well it was received from the viewing public."

In cross-examination he confirmed there was no written budget or financial projections for *"The Lost Prince"* which he saw before taking the investment decision. Indeed, the only document produced relevant to the investment itself, was the letter of intent dated 14 November 1995, which was signed by all three investors. Mr Bellord expressed the opinion that even if the movie was poorly made the investors would have got their money back *"very easily indeed, just with theatrical release"*, that is from the box office, before video, television, and other forms of distribution.

[71] With reference to his withdrawal decision, Mr Bellord said that the publicity which followed Mr Neill's speech was a matter of serious concern but that Mr Muncie persuaded him to *"weather the storm"*. However, when he learnt of the Timaru Herald article in June *"this put the nail in the coffin ..."*. In a letter dated 20 June 1996 to Mr Khemaney Mr Bellord wrote that the *"barrage of negative publicity in New Zealand"*, and the fact of two of the other major financial backers pulling out, caused his withdrawal as well.

[72] On 28 June Mr Khemaney replied by indicating that Ti Leaf was prepared to increase the investors' share of the profits from 35% to 51%. However, when Messrs Santos and Martin were not persuaded Mr Bellord wrote to Mr Khemaney on 19 July that his decision was final. He said the determining factor was the bad press in New Zealand, and even if *"eleventh hour money"* was obtained he and his wife

would not come back in. In cross-examination he conceded that there had been no negative publicity in the United States, but countered that via the internet any adverse material could plague a film at the time of its release and beyond. In fact there was no evidence adduced concerning the extent to which in 1996 newspaper or other media material from New Zealand, was available on the internet.

[73] Mr Santos gave evidence to similar effect concerning his commitment to invest US\$300,000. He described himself as a member of an affluent family engaged in commercial real estate development in the Philippines. He was approached by Mr Khemaney, whom he had known for almost twenty years, concerning investment in *"The Lost Prince"*. Nothing in the way of financial projections was provided. His interest sprang from his passion for the arts and his confidence in the project from a reading of the film story-line, which satisfied Mr Santos the film had *"great potential"*. He was also influenced on account of Mr Butler's involvement, since he regarded him as *"probably one of the great philosophers of the world"*.

[74] Mr Santos' decision to withdraw from the project emerged from letters between himself and Mr Khemaney. On 18 April 1996 Mr Santos wrote that having reviewed media material which had been provided he was *"more concerned than ever"*, the attack mounted by Mr Neill being of particular concern. The letter indicated *"unless all these problems are resolved, we (Mr Santos and his then fiancée) may have to regrettably cancel our investment commitment"*.

[75] Mr Khemaney replied in a letter dated 25 April. He said:

"Mr Neill has been very tight-lipped recently and we don't expect any further outbursts from him. Clearly, this matter has backfired on him politically. No doubt he was expecting to win some votes for his revelations, but instead, he became an object of ridicule by many media sources for his ridiculous allegations which have no basis whatsoever."

Mr Khemaney, with reference to Mr Baikie, ventured the opinion that he was *"no longer a matter of great concern"* given the clause in the February agreement which prevented the making of negative comments. The letter concluded on the note: *"We sincerely believe the project is back on track"*. On 6 May Mr Santos replied:

"... you can count on our continued support for the movie. However, this is based on your assurance that there will not be any more problems and that everything is back on track".

[76] Then on 12 June with specific reference to the Timaru Herald article published six days earlier, Mr Santos advised: *"... the bad publicity still continues to plague and add injury to the movie. Therefore, I must regrettably inform you that we will be cancelling our investment commitment".* By letter dated 28 June Mr Khemaney responded:

"Admittedly it is an uphill battle with all the negative publicity our project has been subjected to to date. However the story is so great we feel there is still a place for 'The Lost Prince' in todays market. To address your concern this is no longer an attractive investment (Ti Leaf) is willing to sweeten the stakes. ... "

The letter proposed that equity investors would receive 51% of profits, rather than 35%, and requested that Mr Santos reconsider his position. However on 5 July Mr Santos replied stating:

"Looking back on all that has happened, we simply cannot take the chance that the movie could survive all the bad publicity, or that there would not be any more still to come".

[77] Mr Martin, a Canadian citizen but resident in Haiwai, is likewise a long-time friend of the late Mr Muncie and Mr Khemaney. He was introduced to *"The Lost Prince"* by Mr Muncie, which culminated in his agreement to provide US\$400,000 in November 1995. Mr Martin described himself as a businessman with interests in the storage industry in Haiwai and in stock and futures trading.

[78] He also wrote two letters to Mr Khemaney concerning his decision to withdraw from the project. The first dated 14 June 1996 indicated that Mr Muncie had kept him informed concerning negative press that Ti Leaf had received in New Zealand. The letter referred to *"more bad publicity"* a few days ago, and concluded:

"To me, the situation has gone from bad to worse and I have lost all confidence in the project and have decided to withdraw my pledge of \$400,000. Although I am a student of Chris Butler and know the news reports to be incorrect, I still must make this decision to completely pull out strictly from a business point of view. I am sorry this had to happen."

Following receipt of Mr Khemaney's letter offering an increased share of the profits, Mr Martin wrote again on 3 July 1996. Although tempted to continue with the investment he concluded that "*the reputation of Ti Leaf and your whole film venture is shot. I agree the story of 'The Lost Prince' is a good one but I feel its financial feasibility is doomed.*"

[79] Against the background of this evidence Mr Miles submitted that the causal connection between the Timaru Herald article and the decision of each of the three investors to withdraw was very clear. He stressed that it was the fact of further and renewed adverse publicity which was pivotal in their minds. Even if, viewed objectively, an article in the Timaru Herald may not reverberate on a world-wide stage, the subjective assessment of Messrs Bellord, Santos and Martin at the time was different. They genuinely lost confidence in the film and that in turn spelt disaster for Ti Leaf.

[80] Mr Squire approached this aspect from the perspective of foreseeability. He argued that as at February 1996, when the agreement to refrain from negative comments was made, Mr and Mrs Baikie could not possibly have appreciated that a breach would cause abandonment of the film project. The argument was, I think, predicated upon the judgment of Cooke P in *McIlroy Milne v Commercial Electronics* [1993] 1 NZLR 39, at 43:

"It is clear at least that reasonable foresight or contemplation, which appear to be interchangeable terms, are always an important consideration. I doubt whether they are the only consideration. Factors include directness, 'naturalness' as distinct from freak combinations of foreseeable circumstances, even perhaps the magnitude of the claim and the degree of the defendant's culpability, are not necessarily to be ignored in seeking to establish a just balance between the parties."

And, a little later:

"In the end it may be best, and may achieve more practical certainty in the New Zealand jurisdiction, to accept that remoteness is a question of fact to be answered after taking into account the range of relevant considerations, among which the degree of foreseeability is usually the most important."

[81] Counsel pointed out that the Baikies could not in February have contemplated the speech which Mr Neill made the following month and, by comparison, he

described the negative comments in the Timaru Herald article as relatively benign. Thus, it was said, in terms of relative culpability it was unjust that Mr and Mrs Baikie should carry responsibility for abandonment of the film, when Mr Neill's speech and the publicity it generated was so potent a factor.

[82] Mr Squire also strongly challenged the evidence of the investors that their decisions to withdraw were prompted by the Timaru Herald article. He submitted there was a rather contrived quality to the focus upon it as the precipitating factor. He relied upon a range of factors : Mr Khemaney's evidence that the film was to be distributed world-wide (in the United States, the United Kingdom, Scandanavia, and Asia for example), that the article appeared in the Timaru Herald alone, that there was no evidence of any adverse publicity concerning Ti Leaf beyond New Zealand whether in June or earlier, and that the withdrawal of financial support followed by abandonment of the project was in marked contrast to the professed great optimism that "*The Lost Prince*" was bound to succeed in the market place. It was notable as well, he suggested, that Mr Butler acquired the rights to the film script and no alternative production had since eventuated. Likewise, the young intended stars of the film had not subsequently furthered their acting careers by involvement in some other production.

[83] I think it helpful to adopt a two-stage approach : the first question being whether the conduct of the defendant caused the loss in question, and the second being whether such loss was too remote. Causation is essentially a question of logic, while remoteness involves the application of policy, although the two also overlap. In this case the loss which is claimed was not a direct loss. Rather it flowed from the decisions of third parties, the investors. The first question is whether the negative comments in the Timaru Herald article did in fact cause the investors to withdraw. The second is whether that response and the wastage of all expenditure to that point was reasonably foreseeable.

[84] I have found the issue of assessment of the evidence of the investors most troubling. In the first place the situation is not one of arms-length investors who made a conventional commercial assessment of the venture before making the commitment to invest considerable sums. No hard information was provided to

them, since it did not exist. Rather the investment decisions impressed me as acts of faith borne of the investors' belief and confidence in Mr Butler and others involved in the project.

[85] The decisions to withdraw also presented problems. I agree with counsel's submission that there was a contrived quality to the focus upon the 6 June article as the precipitating and pivotal factor. It is hard to credit that an article of this type published in a provincial newspaper, and at a time when production of the film was in a temporary recess caused abandonment of the entire project. The publicity in March 1996 was far worse yet the project survived that and, significantly, public opinion moved in favour of Ti Leaf as a result of it. The correspondence between Mr Khemaney and the investors which culminated in their withdrawal decisions also left me with a sense of unease. The letters must be read as a whole but the extracts set out earlier demonstrate their flavour. Their suitability for production as exhibits to establish the necessary causal connection was striking.

[86] At one point in the cross-examination of Mr Santos it appeared that the genuineness of the correspondence was under question. Mr Squire asked this witness about the absence of facsimile transmission data on the letters to and from Mr Khemaney produced as exhibits. Mr Santos said that the letters were both faxed and mailed, and that the exhibits were the originals which were sent by mail. Matters rested there. In final submissions the credibility of the investors' evidence was not directly challenged. Counsel questioned the evidence on account of its focus and for elements of suggested inconsistency. That was all. In these circumstances I think the rule in *Browne v Dunn* (Rule 441K of the High Court Rules) applies. It would not be competent of me to make an adverse finding concerning the credibility of the investors and conclude that it was not the article of 6 June 1996 which caused them to withdraw financial support for "*The Lost Prince*".

[87] Turning to remoteness it is important, I think, to distinguish between foresight of the kind of loss which is claimed, as opposed to foresight of its extent. The genesis of the negative comments clause in the February agreement is obvious enough. By then Ti Leaf had been in the Twizel area for over twelve months. Relations between at least some persons associated with Ti Leaf and Mr and Mrs

Baikie were considerably strained. The Immigration Service was in the process of deciding whether Ti Leaf was a committed film production company and whether its personnel should be granted further visas and work permits. Ms Oliver of Film New Zealand had visited Pukaki Downs a few days earlier in order to advise concerning progress with the film. All the while rumours were rife in the local community concerning persons associated with Ti Leaf, their activities, their religious beliefs, and their quest for privacy.

[88] In these circumstances clause 2 was plainly drafted to secure an embargo on negative comments and was intended, from Ti Leaf's perspective, to promote an atmosphere conducive to production of the film. Put another way, the mischief at which the clause was aimed was negative publicity harmful to the film-maker and to the film itself. I am in no doubt that Mr and Mrs Baikie well understood this.

[89] But must they have been able to contemplate that a breach of their obligation may lead to abandonment of the project and the consequent wastage of expenditure to that point? As to that, I consider a further passage in *McIlroy Milne*, from the judgment of Hardie Boys J at 45, is in point:

"The appellant's case is really that though the consequences of delay may have been foreseeable the extent of those consequences was not. In my opinion the distinction is not tenable. If the kind of loss sustained was foreseeable, the defendant must accept responsibility for the extent of it ... Here, the purpose of the guarantee was to avoid the very kind of loss that occurred. The respondent must be entitled to recover that loss."

Here, the purpose of the negative comment clause was to avoid harm to Ti Leaf and to the film. It may well be that, while Mr and Mrs Baikie could foresee loss occasioned by disruption to the schedule, they could not foresee abandonment of production. But, to my mind, that distinction is untenable in that the kind of loss, and the extent of it, are blurred.

Was There a Loss?:

[90] Extensive evidence was led by Ti Leaf from persons associated with the production of *"The Lost Prince"*. Most of these persons were from the United States and were experienced in film-making, or in many cases in the production of

television programmes. Hence I heard evidence from a script consultant, a sound engineer, a film-lighting expert, and a set designer. This evidence was presented in response to the defence of truth raised with regard to the claim that Ti Leaf was not involved in making a film, rather the film was a sham or cover for some other activity.

[91] As noted earlier the defence of truth was abandoned after Mrs Baikie gave evidence. Nonetheless a closely-related issue remained alive, namely whether Ti Leaf was a committed and professional film-maker, or whether its crew were as one defence witness put it, "*naive dabblers*". I am in no doubt that Ti Leaf was a film-making company and such was the primary purpose for its presence in New Zealand. However, whether it is probable "*The Lost Prince*" would have been completed, and if so, whether it would have been a marketable film, are more difficult questions. They assumed increasing significance as the case developed.

[92] Two witnesses called for the defence were Mr Mladen Ivancic and Mr David Gibson, an executive with the New Zealand Film Commission and a film-maker, respectively. One of the functions of the New Zealand Film Commission is investment in local films. Mr Ivancic is involved in this area and he appeared on subpoena to provide information concerning investment returns.

[93] In particular he produced a schedule of the Commission's investment in feature films from June 1987 to May 2000, which showed the return expressed both in dollar terms and as a percentage. The total sum invested in fifty films was \$65.2million while the total return to date was \$17.4million. Expressed as a percentage the return varied from 173% in one case to nothing in the case of thirteen films. Only three films out of the fifty had achieved a 100% return of the Commission's investment.

[94] The interpretation of these statistics, however, was not straight-forward. In the first place the Commission is bound by the New Zealand Film Commission Act 1978, s18 which requires that financial assistance may only be provided to films which have "*a significant New Zealand content*". Regardless of this requirement Mr

Ivancic considered that the Commission's approach was a commercial one and that its statutory obligations did not result in investment in less marketable films.

[95] The statistical information suffered from the deficiency that the individual films were not named. This was because the income information was regarded by the Commission as sensitive and confidential. However Mr Ivancic indicated that twenty-four of the films were low budget productions, that is had a budget of \$2million or less. Many of the films were produced by first-time film-makers. These two factors were common to "*The Lost Prince*" which, although a low budget film, had a projected cost of over US\$2.0million.

[96] Mr Ivancic accepted that the genre of a film was an important factor in assessing its likely profitability. Given the anonymity of the information in the schedule it was not of course possible to compare genres and commercial success. A further complication was that the Commission usually stands last in line amongst investors in relation to a return on its investment. It follows that the circumstance the Commission has received no, or a limited, return does not necessarily mean the film has not recouped a good part of its production costs.

[97] Further, the revenue life of a feature film may be substantial. Ordinarily a film is first released for public screening, which may gain it a profile, and thereafter video release and other forms of distribution may follow. If the film-maker has not entered into an all-rights deal but rather markets the film in the different mediums, income from the film may accrue to investors over an extended time-frame. Indeed the schedule produced by Mr Ivancic is therefore updated regularly to show income received throughout the shelf life of each film before it is included in the Board papers of the Commission from time to time.

[98] I accept that all of the above matters restricted the conclusions to be drawn from the statistical information. Nonetheless, I think Mr Ivancic's evidence at least established by way of background that film investment is hazardous and that only a minority of films generate a return sufficient to cover production costs. Beyond that, the evidence was too general in nature to enable firm conclusions to be drawn with reference to "*The Lost Prince*".

[99] Extensive evidence was given on both sides relevant to the professionalism of Ti Leaf as a film-maker. The evidence of the plaintiff's witnesses Messrs Olsen, Moore, Lowther, Holt and Ms Pamela Smith was given prior to abandonment of the defence of truth in relation to the allegation of sham. Hence their evidence was directed to proof that Ti Leaf was a genuine film-maker, as well as to the issue of competence and professionalism.

[100] Mr Olsen is an experienced producer of television shows, much of his experience being with Sunset Studios which produced yoga, vegetarian cooking, and philosophical discussion shows in which Chris and Wai Lan Butler were involved. He spent an extended time at Pukaki Downs working on "*The Lost Prince*" during the pre-production phase. Mr Lowther, likewise an employee of Sunset Studios, is an experienced television crewman with special expertise in lighting and photography. Mr Holt is an Australian whose expertise lies in set design. He spent about six weeks at Pukaki Downs to mid-May 1996, when the crew departed from New Zealand.

[101] Mr Moore was another employee of Sunset Studios. He spent a considerable time in New Zealand working as a sound engineer. He did extensive work on the sound track for "*The Lost Prince*" for which two compact discs were produced. Finally, Pamela Smith an independent script consultant spent about three weeks in New Zealand in late 1995. She advised and assisted in relation to the film script which underwent many iterations throughout the pre-production process. Unlike the others, her experience in the United States included extensive work in relation to 35 mm feature films. Her witness statement ended in these terms:

"I am not sure, but from the little I have heard, the goal of Ti Leaf was to make the most commercially viable yet deeply meaningful, beautiful and entertaining film, knowing full well that if they were in possession of such a film, distributors would be lining up to make a deal with them."

She considered that the television backgrounds of the other experts retained by Ti Leaf were not a significant disadvantage in a feature film context, and that the Mackenzie Country was the optimal place to shoot "*The Lost Prince*".

[102] The Baikies called Mr David Gibson who operates the Gibson Group Limited, a New Zealand television and film production company. A subsidiary of the group, First Sun Limited, produces only feature films. Mr Gibson has 25 years in the industry. He has produced a wide range of television programmes, including a number of drama series, and two feature films, one in 1984 and one recently. As it happened the current film, "*The Irrefutable Truth About Demons*" was part financed by the Film Commission and subsequent to the preparation of the schedule produced by Mr Ivancic had been sold for a sum greater than its production cost.

[103] Mr Gibson expressed opinions concerning a range of production issues. In many respects his views were markedly different to those of witnesses called by Ti Leaf. He detailed the normal process of film production:

- (a) the evolution of the script, ordinarily through a process of numerous drafts,
- (b) scheduling, being a break-down of the personnel and equipment requirements for the film, including time-frames for all phases,
- (c) preparation of a budget including market projections (this may result in reworking the script and/or the schedule to reduce cost),
- (d) soliciting investment finance for the production phases,
- (e) pre-production, including set design and building, costuming, and rehearsals,
- (f) the shoot of the film itself,
- (g) post-production : editing, special effects and sound track, and
- (h) distribution of the film to the market place.

Against this outline of the process, Mr Gibson proceeded to analyse how Ti Leaf went about producing "*The Lost Prince*".

[104] He drew a number of conclusions. First, the evolution of the script was, Mr Gibson considered, most unusual. Many months were spent on location in Australia and New Zealand, with a significant group of people gathered, as successive versions of the script and screen-play were written. This cost much of the sum of \$1.3m, the

amount claimed in this proceeding, whereas in Mr Gibson's experience the cost of a script for a low-budget film was typically less than \$100,000.

[105] Mr Gibson also considered that there was an absence of activities which he would have expected to run in parallel with final development of the script. These included preparation of : a production schedule, a budget, a shooting schedule, and of marketing materials. Whereas the Ti Leaf witness considered that the script of "*The Lost Prince*" was suitable for the production of a low budget film, say US\$2 - \$2.5m, Mr Gibson was of the opinion that the script indicated it was "*an extremely ambitious project, requiring a substantial budget and considerable professional resources*". He considered that filming at a number of different locations, and the indicated requirements with reference to costuming, sets, special effects and stunts would all be costly. He concluded that the script simply did not fit the normal concept for a low-budget film, where the use of limited locations, minimal sets, and adherence to a well-defined budget were first requirements. This, Mr Gibson considered, was not surprising since the fantasy/action genre tended to fall at the upper end of the film budget spectrum.

[106] With reference to personnel Mr Gibson was doubtful whether the Ti Leaf crew possessed the experience and abilities required to complete a feature film. as opposed to a television show. He noted that in terms of television experience involvement in the production of a serious drama series, for example, was of greatest value, whereas experience in the production of cooking, activity and discussion shows was less relevant.

[107] The Ti Leaf perspective was quite different. While it was acknowledged that Chris and Wai Lan Butler were novices in relation to the direction and production of a feature film, there was nonetheless total confidence in their creative ability. Considerable store was placed upon the potential of the Bellord children as the young stars of "*The Lost Prince*". There was evidence that a world-renown director of action feature films considered the three to have exceptional martial arts talent and star potential as well.

[108] With reference to the cost of making the film evidence was given of supporting actors, stuntmen, choreographers and others who were prepared to work on low or deferred salaries. Likewise persons from Sunset Studios considered that special effects and music, for example, would be provided at low cost because of the commitment of those involved to the ideals behind the film. Those witnesses experienced in various aspects of production were confident of Ti Leaf's ability to complete and successfully market the film. To the extent it proved necessary to engage outside help, that would have been done as required.

[109] Extensive work had been undertaken to evaluate the work of New Zealand directors of photography, so that someone with experience of New Zealand conditions could be engaged for the shooting of the film itself. Several persons of experience and high calibre had provided examples of their work, which enabled a judgment to be made concerning their suitability.

[110] Confronted with this evidence Mr Gibson remained of the view that it was unlikely "*The Lost Prince*" would have got into production. He considered it was not uncommon for intended films to proceed no further than the script development phase. Moreover he thought it was premature for anyone to express an opinion concerning the prospects of the film recouping its production costs, let alone making a profit.

[111] Extracts from his oral evidence indicate the extent of the division between his views and those of other witnesses. With reference to Mr Bellord's evidence that "*The Lost Prince*" even if poorly made would get its money back very easily indeed just with theatrical release, Mr Gibson said:

"I think as I described to you there (is) this pyramid of films trying to get theatrical distribution. So many can't get it. This man says even if made poorly this film will get theatrical distribution, that is just so naive."

Asked whether he agreed with the view of Ms Pamela Smith that, although it could not be guaranteed, it was likely investors would have been attracted to the film because it had all the elements for success including attractive stars, gorgeous scenery and sets, and a story that combined action, love and spiritual depth, he responded:

“No. It’s an extraordinary statement. I think it touches on a lot of the things I said, you can’t on the basis of a script with an unknown cast, inexperienced people say that you will end up with a film which will be highly commercial and will sell internationally ...”

At another point:

“I suppose the thing I find in a lot of this, there is this assumption that this film is going to make money that runs through all of this, you can’t say that and can’t have any certainty about that, the numbers don’t stack up that way. I wish they did.”

[112] In relation to the assessment of whether *“The Lost Prince”* was a low-budget film, was likely to be completed, and if so whether it would have enjoyed commercial success I much prefer the evidence of Mr Gibson. I bear in mind that the evidence from Ti Leaf’s witnesses was given in a context where the bona fides of the film project was in issue. Understandably persons who had generally travelled a great distance and had devoted considerable energy to the project over a period of weeks or months, were indignant at the suggestion of sham. The strength of their commitment to *“The Lost Prince”* and their collective enthusiasm for the success of the project was no doubt in part a reaction to the cynicism they encountered in New Zealand, in particular the scurrilous allegations which were advanced by Mr Neill.

[113] But on all the evidence I am in no doubt that to successfully make and market a feature film is a difficult exercise. A hard-nosed professional approach is required, and even then commercial success in a fickle market place is not assured. Even absent Mr Gibson’s evidence, I was left in real doubt whether in fact *“The Lost Prince”* would have been shot regardless of publication of the Timaru Herald article in June 1996. Three aspects of the evidence suggested this.

[114] By late May 1996 when the last of the Ti Leaf crew left New Zealand, work on the film had been underway for about two years. Steps were taken in the first half of 1994 to establish a presence in Australia to enable the script to be developed on location in that country. From November 1994 to May 1996 a significant group of people were on location in the Mackenzie Country to complete the script and work on certain of the pre-production aspects. In excess of NZ\$1.3m was expended.

[115] By May 1996 the script and screenplay were close to completion. A number of spectacular locations suitable for shooting "*The Lost Prince*" had been identified. A number of short video clips had been shot, in particular of a fight scene which involved the young stars. These were shot to demonstrate the suitability of the locations and the considerable martial arts ability of the intended stars. Mr Moore, working from the sound facilities he had established at Pukaki Downs, had produced two compact discs towards the sound track for the film. Some costume work had also been undertaken, and one fine example of a period costume was produced in evidence. Likewise, Mr Holt had undertaken some work in relation to planning set designs, which extended to the creation of a mud hut village. But actual production of sets had not begun. Throughout the Bellord children, coached by martial arts experts, continued training in anticipation of the film being shot.

[116] It must, I think, be asked whether the sum total of progress after eighteen months in New Zealand suggests it was probable "*The Lost Prince*" would ever have been completed? When the company in late 1993 engaged Mr Butler as the script writer, director and a co-producer of the film a schedule to his agreement provided that post-production work was to be completed by the end of 1994. In fact by then the script was still in its formative stages. When, in April 1996, the New Zealand Immigration Service granted extended work permits to members of the cast and crew it did so upon the assurance that the screenplay was to be finalised by the end of June 1996 and filming, including post-production, by the end of April 1997. On the basis of progress achieved to May 1996 I doubt that these milestones were achievable.

[117] A second aspect or feature of the evidence, to my mind, was the vagueness of the evidence concerning the return of Ti Leaf personnel to New Zealand for the resumption of the project. As noted earlier the Immigration Service had been told the screenplay would be finished by the end of June, winter filming would begin at the end of August and 40% of the New Zealand footage would be shot by 30 November 1996. Yet when the Butlers and members of the crew and cast left New Zealand during May 1996, the planned arrangements for their return were sketchy. The lease of Pukaki Downs homestead had expired on 10 May. It was not to be renewed. There was evidence of payment made to lease other accommodation in the

Queenstown area, but nothing concrete was adduced in evidence concerning the future of this arrangement. In the result I was left with the clear impression that adequate forward planning did not exist in relation to the establishment of a new film base and for the accommodation of cast and crew.

[118] Thirdly, the circumstances and way in which the film was abandoned in July 1996 have already been mentioned. A comparatively low key article in the Timaru Herald brought about the end. Little or nothing was done in an endeavour to obtain alternative sources of finance. Production of the film has not resumed since then.

[119] When one views objectively the modest pace of progress, the amount expended on pre-production alone, the absence of adequate forward planning for a resumption of production in New Zealand, and the circumstances of the abandonment, I am satisfied that Ti Leaf had lost its way, had lost direction, by about May 1996 when the crew and cast disbanded. From that point the probability was that "*The Lost Prince*" would never be completed. The various indicators, viewed in combination, all point in that one direction.

Damages – Onus of Proof:

[120] Ti Leaf's case was advanced as one of reliance losses. That is it claimed damages for the wasted expenditure it had incurred in reliance on the agreement with the Baikies. It did not claim expectation damages, being profits from marketing "*The Lost Prince*", because proof of such loss was speculative. *Anglia Television v Reed* [1971] 3 All ER 690 a decision of the English Court of Appeal was relied upon in support of the proposition that expenditure incurred before the relevant contract was concluded was nonetheless recoverable. Lord Denning at p 692 said:

*"If the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred **after** the contract was concluded. He can claim also the expenditure incurred **before** the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken. Applying that principle here, it is plain that, when Mr Reed entered into this contract, he must have known perfectly well that much expenditure had already been incurred on director's fees and the like."*

The case concerned a television play in which the defendant was to play the leading role. He repudiated the contract and Anglia successfully sued for wasted expenses rather than loss of profits.

[121] With reference to the onus of proof the decision of the High Court of Australia in *The Commonwealth v Amann Aviation Pty Ltd* (1991) 66 ALJR 123 was cited. Amann successfully tendered for a contract to conduct aerial coastal surveillance for the government. It committed a large sum to establishment of the infrastructure, including the acquisition of aircraft, required to perform its side of the bargain. The Commonwealth wrongfully cancelled the contract. Amann sued to recover its set-up costs. The evidence indicated that the surveillance contract would not have been profitable in the short-term because of the high initial capital outlay, but with renewals of the contract profits would have resulted. In these circumstances modest damages were awarded at first instance but on appeal a substantial award was substituted. The High Court upheld the later decision. In doing so it accepted that an onus rested on the contract-breaker to demonstrate that reliance expenditure at least would not have been recouped.

[122] The six judgments in the case express the matter in different ways. The joint judgment of Mason CJ and Dawson J at p 131 contains this:

*“The placing of the onus of proof on a defendant in the manner described amounts to the erection of a presumption that a party would not enter into a contract in which its costs were not recoverable. ... such a presumption is not irrebuttable but, until that presumption is rebutted, a plaintiff may rely on it to recover his or her reasonable expenses both in the case of a contract which would not have been profitable and in the case of a contract where the outcome of the contract, if it had been fully performed, cannot be demonstrated, whether at all or with any certainty. This last type of contract, of which *McRae* and *Anglia Television* have been cited as examples, is to be distinguished from a purely aleatory contract where, almost by definition, it would not be appropriate to apply the presumption we have described for the reason that inherent in the entry into such a contract is the contingency that not even the slightest expenditure will be recovered, let alone the securing of any net profit. In the case of aleatory contracts, damages are awarded for loss of a chance and the burden of establishing the existence and loss of this chance as a result of the defendant’s breach lies on a plaintiff although, as has already been observed, mere difficulty of estimation does not relieve a court or jury, in appropriate cases, of the task and responsibility of placing a value on the chance lost.”*

Adopting this approach counsel for Ti Leaf argued it was for the Baikies to establish that Ti Leaf would not have recouped its expenditure in whole or in part.

[123] The approach indicated in *Amann* has been adopted in New Zealand in a number of decisions of this Court. It has not been considered by the Court of Appeal, but *Amann* is cited with approval in **Burrows, Finn & Todd Law of Contract in New Zealand**. The rationale for imposition of a reverse onus is that where, through the default of the defendant, the plaintiff is denied the opportunity to demonstrate whether and to what extent the contract would have been profitable it is appropriate that the defendant should carry the burden of demonstrating that reliance costs would not have been recouped.

[124] There are comparatively few cases which demonstrate circumstances in which a defendant has met the onus by proving that the plaintiff had entered into a bad bargain and was not entitled to recover even reliance damages. Two such cases are *Bowlay Logging Ltd v Domtar Ltd* (1978) 87 DLR (3d) 326 and *C & P Haulage v Middleton* [1983] 3 All ER 94. The former concerned a contract to cut and supply logs. After it had run for a time the defendant purchaser of the logs repudiated the contract. However, it demonstrated by reference to actual figures that Bowlay's operation was unprofitable. The cost to supply logs exceeded the contract price payable by the defendant. Berger J was satisfied that the losses incurred flowed from entering into the contract, not from the defendant's breach, and at p 335 continued:

"If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise. Moreover, the amount of the damages would increase not in relation to the gravity or consequences of the breach but in relation to the inefficiency with which the plaintiff carried out the contract. The greater his expenses owing to inefficiency, the greater the damages."

Bowlay was awarded only nominal damages on account of the breach itself.

[125] In *C & P Haulage* the plaintiff was forced to relocate its engineering business when the defendant wrongly cancelled a contractual licence to occupy its premises. The plaintiff relocated its business to a house which was rent-free and

therefore gave rise to a saving, but nonetheless sued for wasted set-up costs incurred in modifying the defendant's premises. Under the licence the plaintiff could not remove any fixtures installed at the commencement of its occupation. In these circumstances, given the rent-free alternative and the non-removal clause, the defendant established there was no loss. Again the plaintiff was awarded only nominal damages.

[126] The present situation is unlike that in these Canadian and English cases. Unless, and until, "*The Lost Prince*" was marketed relevant financial information does not exist. It is not a case of an interrupted business activity where the cost implications can be assessed from available financial information. In such circumstances can the defendants surmount the onus which confronts them?

[127] Before I turn to that question there is a foreseeability aspect which requires consideration. Pre-contractual expenditure is recoverable provided it was reasonably "*in the contemplation of the parties as likely to be wasted if the contract was broken*" : *Anglia Television*. Here the expenditure incurred by Ti Leaf prior to 8 February 1996 comprised a mix of expenses incurred in Australia and in the Mackenzie Country while Ti Leaf was based at Pukaki Downs station. I am satisfied that the latter expenditure was within the contemplation of Mr and Mrs Baikie when the negative comments clause was included in the tenancy renewal agreement. Effectively these costs were incurred under their noses, being the outlay required to establish a presence at Pukaki Downs and Twizel, and the production and living costs which followed. However, there is no, or insufficient, evidence to establish that Mr and Mrs Baikie knew anything of the expenditure incurred in Australia before Ti Leaf's relocation to New Zealand.

[128] Mr Khemaney gave the only evidence relevant to expenditure incurred by the company. The total figure claimed, \$1,367,204, represented \$975,382 incurred in New Zealand as appeared in Ti Leaf's financial statements prepared by Timaru-based accountants. In addition there was identified expenditure in Australia of NZ\$67,627. This amount was clearly pre-contractual expenditure incurred during the Australian phase before Ti Leaf relocated to New Zealand. Its wastage was not reasonably foreseeable by the Baikies.

[129] The balance of the claim, NZ\$299,257, represents expenditure met from a Hong Kong account of Ti Leaf down to mid 1996. The major categories of expenditure from this account were salaries \$192,768, rentals \$37,053, legal and accounting \$34,652 and travel \$27,653. Mr Khemaney's evidence did not distinguish between expenses incurred in Australia as opposed to New Zealand, and met from the Hong Kong account. Mr Lazelle, an accountant called for the Baikies, was unable to verify payments made from the Hong Kong account, much less establish by reference to country where the expenses were incurred. In these circumstances I consider the appropriate course is to treat one-third of the \$299,257 as referable to the period Ti Leaf was located in Australia. If anything, this is favourable to the defendants. The expenses incurred with reference to the New Zealand phase therefore become \$1,199,825.

[130] Returning to the question of proof, I consider that on all of the evidence it was most probable "*The Lost Prince*" would not have been completed anyway. In other words that assuming Mr and Mrs Baikie had not breached their contractual obligation and the Timaru Herald article had not been published as a result, the film would still not have been completed and marketed by Ti Leaf. It follows that wastage of expenses to date was the likely outcome, even absent the defendant's breach of contract.

[131] I have already reviewed features of the evidence and set out reasons in support of my conclusion that by May 1996 Ti Leaf no longer had the direction and commitment necessary to ensure completion of the film. Failure in Australia had been followed by limited progress in New Zealand, despite significant expenditure over a prolonged period.

[132] I am fortified in this conclusion by the testimony of Mr Gibson. His evidence established that it is a hard fact of life in the industry that a considerable number of films do not progress beyond the pre-production phase. I think "*The Lost Prince*" was one of them, on account of the inexperience of Ti Leaf in feature film-making and the approach which it adopted. Developing a film script around a location and gathering a considerable number of people under the guidance of Mr Butler, a first

time film-maker, for the purpose, was I think an unwieldy approach to the production of a low-budget film.

[133] I do not overlook that the philosophical approach of the film-maker was by its own admission unconventional. Mr Khemaney in May 1994 openly told the Immigration Service that the approach would not be traditional, that there would not be strict time constraints, and that the script was to be written on location. While I do not doubt Ti Leaf's good intentions and enthusiasm, its professionalism and performance are another matter. On account of the unusual approach it adopted I fear there was always the risk that focus and direction would be lost and the project would founder. Such proved to be the case.

[134] To summarise I am satisfied that Mr and Mrs Baikie breached the negative comments clause of the February 1996 agreement. However, I am also satisfied that the New Zealand expenditure, which foreseeably was at risk in the event of a breach, was not in fact lost for that reason. Rather it is established that Ti Leaf lost its way and the probability was the film would never have been completed, even absent the breach. Nonetheless proof of the breach justifies an award of nominal damages in the sum of \$500.00.

Was Ti Leaf Defamed?:

[135] The allegations of defamation advanced in the statement of claim were wide-ranging (see para 52). However, in the end result the focus was upon things said by Mr and Mrs Baikie to the police, immigration authorities, and to Mr Neill. That is upon discussions and correspondence concerning Ti Leaf with these persons in late 1995 and during the first half of 1996. By contrast, the allegations concerning what was said to Mr Shaw, Mr Scott and others related to the period after abandonment of the film.

[136] I heard lengthy evidence from Mrs Baikie and from Mr Neill. In addition a former police officer, Mr Glendingin, and an immigration officer, Mr Hastilow, were called as defence witnesses. The gist of the evidence which emerged was that from about September 1995 Mr and Mrs Baikie were in regular contact with Mr Neill to

express concerns about aspects of their dealings with Ti Leaf. Also, that on two occasions they visited Mr Glendining at the Timaru Police Station and raised similar issues. There was no direct contact between the Baikies and Mr Hastilow, but as early as about March 1995 another immigration officer had spoken to them concerning persons associated with Ti Leaf.

[137] Broadly there were two aspects of concern to the Baikies. Rumours were abroad in the Twizel area to the effect that persons working for Ti Leaf were involved in drug manufacture and distribution, and that film-making was no more than a front for these activities. There were also rumours that the group was a religious cult. On a personal front, Mr and Mrs Baikie also believed that their telephone was bugged by Ti Leaf. The rumours were repeated and the concern about bugging was conveyed to Messrs Neill and Glendining at least, if not to immigration officials.

[138] The second aspect was interrelated and concerned the immigration status of Ti Leaf personnel, in particular whether they held valid visas and work permits entitling them to remain in New Zealand. This issue became the subject of dealings between the Baikies and Mr Neill, when the latter seized upon it as a matter of legitimate concern to himself as a member of parliament. The serious rumours were of course the very background to the immigration question.

[139] Mrs Baikie in giving evidence acknowledged that she and her husband had repeated the rumours to Mr Neill in the course of their discussions with him. He also made his own inquiries in the area and obtained similar information from other persons. On 20 September 1995 Mr Neill wrote to the Minister of Immigration advising that he wished to discuss with his colleague a file he had concerning the immigration status of Mr and Mrs Butler. The letter referred to an alleged film production and included the comment that "*there are allegations within the community that the group, while fronting as a film unit, may be little more than a 'religious cult'.*" The Minister, Mr Maxwell, instructed immigration officials to investigate the matter and advised Mr Neill of this.

[140] On 13 December 1995 Mr Neill again wrote to the Minister commenting that he understood an immigration official had endeavoured to visit Pukaki Downs station, was refused access and that this tended to substantiate his concerns. The following day the Minister issued an instruction for a visit to be made to Pukaki Downs with police support so that he may have a report as soon as possible in the New Year. On 11 January 1996 Mr Hastilow and Detective Glendining did visit Pukaki Downs and conducted further inquiries in the area.

[141] By about this time Ti Leaf was well aware of the immigration investigation. The involvement of Ms Oliver of Film New Zealand towards the end of January was in response to the official scrutiny to which Ti Leaf was then subject. At about the same time Mr Khemaney, Mr Tibby and others were involved in writing to the Prime Minister complaining of the bigotry and suspicion which was affecting Ti Leaf. They asked that the government intervene to address matters.

[142] On 21 February 1996 Mr Maxwell wrote to Mr Tibby advising that he was satisfied there was "*no apparent breach of the Immigration Act 1987*". However the Ministry expressed concern at the lack of progress with production of the film and required the provision of an endorsed programme to completion. On 28 February the Minister advised Mr Neill in writing that he was satisfied there had been no breach of the Immigration Act and pointed out that the "*religious beliefs and the practising of those beliefs by individuals (did) not in itself constitute a breach ...*".

[143] Despite the Minister's position, Mr Neill continued to maintain contact with the Baikies and pursued other inquiries as well. On 8 March the police searched premises occupied by Ti Leaf personnel in Twizel with negative result. Then on 20 March Mr Neill made his speech in the House and in large measure repeated its content in the course of media interviews in the following few days. I have already described what occurred in the aftermath of the speech.

[144] Mr Squire did not contest that the allegations made against Ti Leaf of involvement with drugs, using film production as a front, and involvement in illegal surveillance by bugging were defamatory. Nor was it suggested the circumstance that the defendants repeated rumours which were already at large in the community

excused or mitigated the defamation : see, for example, *Associated Newspapers v Dingle* (1964) AC 371 (HL) and *Ware v John Fairfax & Sons* (1973) 1 NSWLR 43. And, after Mrs Baikie gave evidence, the defence of truth with reference to the aspect of sham was abandoned. Accordingly in the final result the only positive defence raised was qualified privilege.

Did Qualified Privilege Apply?:

[145] Mr Squire contended that the relevant communications between Mr and Mrs Baikie and Messrs Neill and Glendining were protected by qualified privilege. He cited *Beach v Freeson* (1972) 1 QB 14 as an example of qualified privilege accorded to a member of parliament who, at the request of a constituent, reported allegations against a professional person to appropriate authorities. Arguing by analogy, he submitted constituents (Mr and Mrs Baikie) were equally protected while reporting their concerns to a member of parliament. There was, he said, sufficient concurrence of duty or interest to attract qualified privilege. Further, that it was well-established that genuine complaints to a police officer were privileged : *Bowles v Armstrong* (1912) 32 NZLR 409 (CA).

[146] Mr Miles did not dispute that in principle communications between a constituent and a member of parliament (as with a citizen and a police officer) could be protected by qualified privilege, in appropriate cases. However he argued this was not one of them. I agree. Two factors in particular influence me.

[147] In the first place the nature, extent, and number of the communications between the Baikies and Mr Neill was not consistent with the discharge of an interest or duty to speak, nor of a corresponding interest or duty to receive such information. The dialogue was not confined to concrete information which required investigation. The flavour of the exchanges was rather that they were part of an ongoing campaign to denigrate Ti Leaf, regardless that the matter was under investigation and, eventually, was resolved to the satisfaction of the Minister of Immigration.

[148] I accept that Mr and Mrs Baikie did have genuine concerns on account of their perception that a segment of the community viewed them as responsible for the

presence of Ti Leaf in the area. Such persons subscribed to the rumours and reasoned that but for the lease of Pukaki Downs station, there would not be this local problem. By way of response Mr and Mrs Baikie colluded with Mr Neill and in the process repeated the defamatory rumours, giving them added currency. But the very flavour of the contacts was not such as to attract qualified privilege.

[149] With reference to Mr Glendining, I see no sufficient basis of duty or interest for the further publication of the rumours to him. By then Mr Neill was already seized of the matter and the Baikies knew that an immigration investigation was underway. Their approach to Mr Glendining in early 1996 was not that of citizens making a complaint to a police officer, but rather the action of busybodies.

[150] Secondly, Mrs Baikie conceded in cross-examination that there was no evidence to support the very serious allegations against Ti Leaf and that she did not believe the rumours to be true when approaches were made to Messrs Neill and Glendining. It follows, even assuming for the moment there was a duty to speak out, the protection of qualified privilege does not apply on account of the absence of belief in the truth of what was said : *Horrocks v Lowe* [1974] 1 All ER 662 (HL). On this basis as well, the plea of qualified privilege must fail.

Was There Pecuniary Loss?:

[151] Section 6 of the Defamation Act 1992 requires that a company must prove that the defamatory publication “*caused pecuniary loss*” or was “*likely*” to do so. Ti Leaf of course claimed that it was caused actual pecuniary loss, being the wasted pre-production expenses of \$1.3m.

[152] I do not accept that the publication of the defamatory matters by Mr and Mrs Baikie to Mr Neill, and others, caused the loss of the \$1.3m which is claimed. I have already made a finding concerning what caused the loss although in the context of the first cause of action. In essence the methods and approach employed by Ti Leaf were ill-advised and the reality was that by about May 1996 the project was doomed. But was the defamation which Ti Leaf suffered at the hands of the defendants also a material and substantial cause of the failure?

[153] I do not consider that to be so. Even viewing the defamatory publications at their broadest, that is including what Mr Neill said in March 1996, Ti Leaf worked through the difficulties quite quickly, with the result that public opinion moved in its favour within a period of days. And so, in early April the Immigration Service completed its investigation and granted extended work permits. I consider that the fundamental underlying problems of an absence of relevant experience and an ill-advised approach, caused the loss. The destructive process by which direction was lost, occurred gradually over an extended period and reflected a lack of adequate progress with the film.

[154] However, a subsidiary question remains : whether the defamation caused, or was likely to have caused, Ti Leaf pecuniary loss in the sense that it expended resources to meet the defamatory publications. Mr Miles in closing characterised this as expense which arose because Ti Leaf was deflected from its real purpose, which gave rise to actual costs in retrieving the situation. I consider there is substance in this argument. In *Mount Cook Group v Johnstone Motors* [1990] 2 NZLR 488 Tipping J was required to assess what damage flowed from publication of a risque business poster, which was commercially harmful to the plaintiff and defamatory of it. The headnote to the case (p 489) accurately summarises the judgment in these terms:

"Where a company is the plaintiff, damages, although not limited to special damages, must be assessed on a commercial basis. They must reflect injury to the pocket rather than injury to feelings. A company need not prove actual loss, but loss must be shown to have been probable. Here, it was extraordinarily difficult to make an assessment of what harm there might have been to the plaintiff's pocket, both directly and as a result of diminished goodwill, and there was no proof of exact loss. The probabilities were, however, that the plaintiff had suffered more than nominal damages, but under the circumstances a conservative approach should be taken."

In the event damages of \$1000 were awarded.

[155] I consider that a similar, if difficult, exercise is required here. I do not doubt that Ti Leaf incurred expenses which at least in part flowed from the actions of the defendants. Resources were committed to countering the highly damaging publicity in March 1996. Travel and communication costs must have been incurred. The problem is in putting a figure on such cost and in assessing to what extent the part

played by Mr and Mrs Baikie caused such expenses to be incurred. Unlike *Mount Cook* there was no scope for economic loss as a result of diminished goodwill, since Ti Leaf was not in business in the conventional sense.

[156] Adopting as I must a conservative approach I consider that an award of \$5,000 is warranted. Aggravated damages were also claimed, although in final submissions Mr Miles did not pursue them. To my mind there is no basis for an increased award on account of aggravating features. Where a plaintiff company has a reputation in commerce or trade which has been harmed so as to cause actual or likely pecuniary loss, there may arguably be scope for an aggravated award. But that is not this case.

Conclusion:

[157] There shall be judgment for the plaintiff in the nominal sum of \$500 for breach of contract and in the sum of \$5,000 for defamation.

[158] The issue of costs is reserved for further consideration. The plaintiff is allowed 21 days within which to file a memorandum, and the defendants a further 14 days in which to reply.

A handwritten signature in black ink, appearing to be 'G. Miles', written in a cursive style.

Signed at 9-00 am on 3 October 2000