PARTIES:	ELIZABETH MARTIN Plaintiff v MAGNETIC PTY LTD trading as HOOKER - ALICE SPRINGS Defendant
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Civil
FILE NO:	43/1995 (9515585)
DELIVERED:	5 December 1996
HEARING DATES:	11, 12 & 13 September 1996
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Property Law - unwritten lease over premises with an option to renew, original tenant sold the business operated within the premises and the landlords agent for collecting rents executed a new written lease and option in favour of the new tenant outside the scope of his authority. Breach of duty of care by the agent, damages to be assessed.

Cases

Thuman v Best (1907) 97 Law Times 239 followed
McCalman v Higgins [1960] NSWR 739 followed
Petersen v Moloney (1951) 84 CLR 91 followed
Pianta v National Finance and Trustees Ltd (1964) 180 CLR 146 followed

REPRESENTATION:

Counsel:

Plaintiff:	G. Hiley Q.C.
Defendant:	D. Stratford

Solicitors:

Plaintiff:	Morgan Buckley
Defendant:	McBride & Stirk

Judgment category classification:	C
Judgment ID Number:	MIL96027
Number of pages:	14

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 43 of 1995

(9515585)

BETWEEN:

ELIZABETH MARTIN
Plaintiff

AND:

MAGNETIC PTY LTD Trading as HOOKER – ALICE SPRINGS
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered the 5th December 1996)

This is an action for damages for breach of contract and/or negligence.

In about 1988, the plaintiff and her husband purchased a block of land situated at 267 North Stuart Highway, Alice Springs ("the land"). The land is a long narrow block roughly rectangular in shape measuring approximately 23.23 metres wide by 120 metres long, with the width fronting the highway. Subsequently the plaintiff and her husband erected on the land a shed at the front of the premises and behind it, a demountable. Both of these buildings occupied the front half of the land. The plaintiff and her husband operated three businesses from the land, including a company called Specialised Transport Services Pty Ltd.

The other two businesses were called Centre Truck Shop and Gungalla Mackay Pty Ltd. At some stage the plaintiff's husband borrowed money from a finance company on behalf of Gungalla Mackay Pty Ltd and a mortgage was granted over the land to secure the loan. According to the plaintiff, the mortgage was due to be repaid sometime in late 1994.

In 1991, the plaintiff and her husband separated. As part of the property settlement, the plaintiff was to become the sole owner of the land and took over sole control of some of the business enterprises. However, the plaintiff claims that the demountable was to remain the property of her husband.

In July 1991, the plaintiff erected a fence across the middle of the land, roughly dividing it into two, intending to operate her businesses from the rear half of the land, and to lease out the front half. The plaintiff did not get sole title to the land until 1992. The plaintiff could not sell the land until her husband discharged the Esanda mortgage. In the meantime, the demountable could not be removed by her husband, and the plaintiff had the use of it.

In about August or September 1991 the plaintiff, after placing some advertisements in a local newspaper, located a tenant for the front half of the land ("the premises"). The plaintiff entered into a parole agreement with the tenant, Marfix Pty Ltd, for a two year lease with an option to renew for a further twelve months at a rental of $1,300 per month. Thereafter, in August or September 1991, she spoke to Mr Doug Fraser, the Managing Director of the defendant company, and a licensed real estate agent. The defendant carried on the full range of a real estate agency practice under the style of L.J. Hooker – Alice Springs. The plaintiff told Mr Fraser about the terms of the lease which had been agreed with Marfix Pty Ltd, including the following matters; that the tenant was already in possession; that

the lease would commence on 1 December 1991; that she required the defendant to collect the rent; that the defendant was to bank the rental cheque into the account of Specialised Transport Services with Westpac Banking Corporation Limited, and the names and telephone numbers of the principals of Marfix Pty Ltd. It was agreed that the defendant would charge 7% commission. The plaintiff claims that she told Mr Fraser that no bond was required, that Mr Fraser undertook to prepare a 'standard commercial lease' over the premises, and that she signed a document, apparently prepared in the defendant's office, to state that she would forgo the requirement for a bond because that was not a standard item in the defendant's normal lease. The plaintiff said that this document was attached to the lease itself, that she did not sign the lease, and did not receive a copy of either the lease of the document attached to it.

No copy of this lease, or of the document allegedly attached to it, was ever produced in evidence. Neither party called anyone from Marfix Pty Ltd to prove the existence or non-existence of this lease instrument. According to Mr Fraser, who was able to refresh his memory from notes he made of this meeting, no mention was made to him of any option. He was told that the landlord was Specialised Transport Services, there was to be a CPI increase in the rent after 12 months, and he did not agree to prepare a written lease. He agreed that his instructions were that the lease would commence on 1st December 1991. I am satisfied that no written lease was ever prepared. It is not necessary to resolve any of the other differences between the plaintiff's and Mr Fraser's evidence. It is common ground that the defendant thereafter collected the rent from Marfix Pty Ltd and accounted to the plaintiff for it.

Marfix Pty Ltd operated a business from the premises known as "Save a Dollar", and two of the principals lived in the demountable. Over the next two

years, the plaintiff continued to occupy the rear half of the land ("the rear premises") where she operated Specialised Transport Services, and she permitted others, including her ex husband, to store vehicles, trucks, tippers and trailers there, as well as one other person to keep camels and store camel wagons there.

In August 1993, Marfix Pty Ltd agreed to sell the business "Save A Dollar" to Mrs Gwendoline Ween. According to Mrs Ween, the agreement for sale and purchase was executed on 27 August 1993, and she took possession of the business and occupied the premises on 28 August 1993. The plaintiff said that she had been told about the sale beforehand, and she did an inspection of the premises after the business had been sold. The plaintiff was unsure of the exact date of the inspection, but by reference to records in her possession she thought the inspection occurred around the 24th or 25th of August. However, I prefer Mrs Ween's evidence that the inspection occurred the afternoon of 27th August. Whether or not the contract of sale had already been signed by then is not clear. No written lease had come into existence in the meantime, nor had the alleged option been exercised. The mortgage to Esanda had by then been discharged, but otherwise nothing else had significantly changed in relation to the land since Marfix had taken over the premises.

According to the plaintiff, she conducted the inspection with Mrs Rocard after which there was a discussion with Mrs Rocard and with Mrs Ween about the latter's future occupancy of the premises. The plaintiff said that the discussion she had with Mrs Ween was not on the same day of the inspection. She did not know who they were, but she said that Mrs Ween and her family members were not there that day. It was put to the plaintiff in cross-examination that on the afternoon of 27 August 1993, after the inspection had taken place, she spoke to Mrs Ween in an office area and told her she could have a 3 year lease with an option to renew for 3

years, or a 5 year lease with an option for 5 years if she wished, that she had no intention of "doing anything" with the land, and was "happy to have someone there". The plaintiff denied that any such meeting occurred, and further denied that she had ever indicated anything of the kind to Mrs Ween. Mrs Ween's evidence was that the conversation occurred in the office, in the presence of her daughter Mrs Matthews, Mrs Matthew's de facto Mr Caught, Mr Kidd, Ms Rocard and Mr Donaldson. Mrs Ween said she needed "verification" from Mrs Martin that she was agreeable to a lease for 3 years with a right of renewal for a further 3 years, and the plaintiff said: "Look, I'm just happy to have somebody on the premises. You can have the lease for 5 years with a 5 year right of renewal if you wish. I have no intention of doing anything with the property. I'm just happy to have somebody on it." Mrs Matthews and Mr Caught gave similar evidence. Mr Kidd, Ms Rocard and Mr Donaldson were not called by either party. It would seem extraordinary that the purchaser of a business, knowing that the premises were leased, in circumstances where no written lease capable of being assigned existed, would not wish to discuss the terms of a new lease with the landlord, particularly when there was an inspection taking place as part of a change in the ownership of the premises. It seems unlikely that a landlord, knowing that there was to be a change in occupancy, would not wish to meet with the new tenant, at or before the changeover. Yet, according to the plaintiff she met first with Mr Fraser either that afternoon, or the following morning, and then went on a trip to Darwin for several days, before she first discussed the question of a lease with Mrs Ween. As I understood the plaintiff her reason for this was that her understanding was that the existing lease would be transferred to Mrs Ween, and she had no objections to this, even though she had never met her. She said she told Mr Fraser she had no objection to Mrs Ween taking over until the end of the operation period, which she said was in September 1994. On the other hand, Mrs Ween said that about 7 or 8

days prior to 27th August she spoke to Mr Fraser about the premises. If this had occurred, it would seem extraordinary that Mr Fraser would apparently do nothing to follow this up with the plaintiff.

According to Mr Fraser, he did have a meeting with Mrs Ween and Mrs Rocard in or around the end of August 1993 about a proposed change in occupancy of the premises; that a sale of the business was pending to Mrs Ween, and he was asked by Mrs Ween to arrange for a for a fresh lease for 3 years with an option for a further 3 years; that he tried to contact the plaintiff several times about this, but was unable to do so until 3rd September 1993, when he contacted her in Darwin on her mobile telephone.

According to Mr Fraser, (by reference to his diary) he was absent from Alice Springs and in Mt Isa from 25th August to 29th August, and returned to Alice Springs on 30th August. I accept his evidence. I think the plaintiff is wrong about having spoken to Mr Fraser on the afternoon of or the morning after the inspection. I consider the more probable course of events to be that Mrs Ween and Mrs Rocard met with Mr Fraser to seek a new lease from the plaintiff at some time prior to the 25th August. Mrs Ween, having heard nothing from Mr Fraser until the changeover on 27th August, raised the matter with the plaintiff who agreed to a three year lease with a 3 year option. It seems likely that the plaintiff would have been told then that Mr Fraser had already been spoken to and would be contacting her.

The plaintiff left Alice Springs shortly after 27th August to travel to Darwin. It is common ground that Mr Fraser did contact her in early September, and this accords with the fact that Mr Fraser was not in Alice Springs until 30th August. There was no reason why the property could not then have been sold, as by then the mortgage had been discharged. The plaintiff claims that the conversation she

had with Mr Fraser occurred on either 3 or 4 September, that Mr Fraser rang to ask 'where we were at with Ween', and that Mrs Ween wanted something longer than the end of the option period, perhaps 3 years. She claims she told Mr Fraser that she was not interested in leasing the property out for longer because she had to sell it by the end of the year.

Mr Fraser's evidence was that he said to the plaintiff that he had been approached by Mrs Rocard and Mrs Ween, that they had reached agreement for the sale of the business, that the plaintiff had indicated to Mrs Ween that she could have a lease for a term of 3 years and an option for 3 years, and was it in order for him to prepare the lease documentation? He said that the plaintiff indicated to him that that was completely in order, and that her main concern was to have a tenant on the property and that the rent for the property would continue. He then prepared, on his firm's standard lease document, a hand written draft which he gave to his secretary to type. On the following Monday 6th September, he personally delivered unsigned copies of the lease to Mrs Ween. Later that same day, Mrs Ween came to his office, and signed each copy of the leases, Mr Fraser signed one copy on behalf of the plaintiff, dated it 6 September 1993, and gave it to Mrs Ween. Mrs Ween's evidence was that Mr Fraser brought three copies of the lease to her office on 6th September, and she returned to Mr Fraser's office where the leases were signed later that day and she was given a copy.

Mr Fraser felt sure that a copy of the lease was sent to the plaintiff in accordance with the firm's normal practice. According to the defendant's records, a letter was dispatched to the plaintiff on 7 September 1993. According to the plaintiff, she never received a copy of the lease.

In December 1993, the plaintiff said that she advertised the land for sale, by erecting a sign on the front of the premises, and by listing it with other land agents (and not the defendant) in Alice Springs one of which put up a sign in March or April 1994. It is difficult to see how the property could then have been sold if the plaintiff expected to sell it with vacant possession if her expectation was that there was a valid lease, albeit an oral one, for 12 months.

In the meantime, until November 1994, the defendant continued to collect the rent from Mrs Ween and accounted for it for the plaintiff. The plaintiff said that when she returned to Alice Springs in late 1994, she expected to find the premises unoccupied. She found Mrs Wren still in possession and went to see Mr Fraser, who was not there. After discussing the matter with his secretary, she sent a letter to Mr Fraser dated 27 November 1994 (Ext P1 Document No. 2) which advised that she required vacant possession of the premises by 15 January 1995, as she wished to develop the land and had arranged for contractors to move onto the land on that date.

By letter dated 29th November 1994, the defendant wrote to Mrs Ween advising that the plaintiff required vacant possession by 15 January 1995. The letter said in part:

> "We note that the original term of your lease expired on the 1st September, 1994 and has not been renewed. Accordingly, you are occupying the premises as a monthly tenant only. Persuant (sic) to clause 5(e) of your lease you are required to deliver up and yield possession of the premises thoroughly clean ..." (Ext P1, document No. 3).

Mr Fraser said that when he wrote this letter, he had been unable to locate the plaintiff's file, and relied upon information he got from a "computer screen". If this is so, the computerised records must have indicated that Mrs Ween's occupancy was due to terminate on 1st September 1994. There is no mention of the

date of termination in Ext P1 document 2. It is common ground between the parties that the original "lease" was to commence on 1 December. The plaintiff said she had told Mr Fraser at the meeting she had with him in August 1993 that Mrs Ween could occupy the premises until September 1994. This tends to support the plaintiff's evidence; but I think the more likely explanation is that the computer records incorrectly recorded the period of the lease, possibly because (1) the original computerised record indicated a lease to Marfix commencing in September when Marfix entered into possession; (2) when Mrs Ween took possession, the file containing details of the written lease was not acted upon by the defendant's staff to record the change in the term.

Mrs Ween consulted solicitors who responded to the defendant's letter of 29 November 1994, pointing out that Mrs Ween had a written lease dated 6 September 1993 for a term of 3 years with an option for a further term over the whole of the land and was not prepared to vacate. The letter also complained about third parties occupying the rear premises (Ext 1 Document No. 4). On Saturday 3rd December 1994 Mr Fraser sent a copy of Mrs Ween's solicitor's letter to the plaintiff asking for instructions. Over the weekend, events between Mrs Ween and the plaintiff escalated, and the police were called as Mrs Ween sought to occupy the whole of the land.

At some stage over the weekend, Mr Fraser claims he found the plaintiff's file, and found in it, he said, a copy of the lease. He does not appear to have done anything about this discovery until Monday morning, 5th December when the plaintiff called at his office, and he gave her a copy of the lease. Mr Fraser said he photocopied the copy on his file. The plaintiff said she gave the copy to her solicitor, Mr Morgan, later that morning.

Mr Morgan gave evidence that he saw the plaintiff on the 5th December. He had arranged this appointment with the plaintiff over the weekend. At some stage that day he also rang Mr Fraser. He made notes of this conversation (Ext D3) and had refreshed his memory from the notes. He said that Mr Fraser had told him that he had no recollection of any instruction in relation to a 3 year lease, but he did recall a 12 month lease being discussed. He also said that he understood that the lease was to be over only the front half of the land, and that there was a mistake brought about by the fact that the document had been created by a girl at the front desk of the office. Mr Fraser also told Mr Morgan he had no note of his instructions from the plaintiff.

Mr Fraser claims that there was no discussion with Mr Morgan about a 12 month lease. He had no notes of the conversation to refresh his memory.

Mr Morgan's note reads:

> " ... he recalls being asked to do the twelve months lease however, he doesn't recall the three year one."

I prefer the evidence of Mr Morgan to that of Mr Fraser. I am satisfied that Mr Fraser did recollect some discussion with the plaintiff about a 12 month lease when he spoke to her in September 1993. I also find that the plaintiff was unaware of the existence of the written lease granted to Mrs Ween and signed on the plaintiff's behalf by Mr Fraser until 5 December 1994. Whatever may have been the defendant's practice, I am satisfied on the balance of probabilities that no copy of that lease was posted to the plaintiff. The document posted on 7 September 1993 I find was, in all probability, a rental statement and cheque (Tr. P. 155). I do not accept Mr Fraser's evidence that he gave a photocopy of the lease to the plaintiff on the morning of 5 December. The copy given to the plaintiff is undated.

Mr Fraser's file copy is mysteriously dated 1 September 1993. Mr Fraser appeared to me to have a poor recollection of the events of 5 December 1994 when compared with that of the plaintiff and of Mr Morgan, and had no file notes to assist him. It is unlikely that he would photocopy the lease unless it was the only copy he had on his file at the time. I think it highly probable that Mr Fraser, believing that his staff, in the usual course, posted a copy of the lease to the plaintiff, has reconstructed in his mind that the copy he gave to the plaintiff must have been a photocopy. I am satisfied that at all times the plaintiff thought that Mrs Ween had an oral lease for a year ending in September 1994.

As to the differing versions of the telephone call between the plaintiff and Mr Fraser in early September 1993 concerning the lease to Mrs Ween, I prefer the substance of the plaintiff's evidence to the evidence of Mr Fraser. I am satisfied that Mr Fraser has no real recollection of that telephone call, and his evidence is reconstructed from what he thinks must have occurred. It was apparent at the beginning of the trial that Mr Fraser could not recall anything of this telephone call (See Tr. pps 8-10). He claimed his memory was in part revived during the trial after hearing the plaintiff's evidence (Tr. p. 130) and from documents available to him which assisted him in his "reflections of what did occur regarding this matter" (Tr. p. 122). He had no written instructions or file note of this telephone call. The plaintiff's evidence is consistent with what Mr Fraser told Mr Morgan on 5 December 1994, and Mr Fraser's letter (Ext. P1, Document No. 3). I accept the force of Mr Stratford's argument that the fact that Mr Fraser personally drafted a 3 year lease points to his having received instructions to do so; and this is consistent with the evidence of Mrs Ween that the plaintiff orally agreed to a 3 year lease. However, there are other possibilities.

One is that Mr Fraser deliberately drafted a 3 year lease contrary to his express instructions from the plaintiff. That would be a very serious allegation, and in my view, it was not proved. To be fair to Mr Fraser, this was never suggested to him by counsel for the plaintiff, and no such submission was made to me. Another is that the lease was drafted before his telephone call with the plaintiff in early September in accordance with what Mr Fraser understood from Mrs Ween the plaintiff had accepted; the draft was left in the file; the typist prepared the lease from the draft thinking that this was required; and the lease was executed by Mr Fraser without his checking it. Mr Fraser said he was under pressure from Mrs Ween to get a lease (Tr. 149 and 154). It seems therefore he could well be expected to have prepared a draft pending the plaintiff's confirmation. It seems likely that Mr Fraser did not check the lease. Had he done so he would have realised that the lease covered the whole of the land and not just the premises. If one serious error admittedly occurred, why not two? The fact that the plaintiff told Mrs Ween that she could have a three year lease does not mean that she did not change her mind by the time she had spoken to Mr Fraser. The plaintiff wanted to sell the property. She seems to have thought it might be better sold without a tenant. She also wanted a tenant in the meantime. She might well have told Mrs Ween one thing and Mr Fraser another. I think this is what she did, and that she has decided to conveniently forget all about her discussion with Mrs Ween.

I find that the plaintiff told Mr Fraser in effect that she was not prepared to grant a lease for longer than the existing lease to Marfix. I find that the plaintiff gave no instructions to Mr Fraser to prepare a written lease, whether for a year or for 3 years. Mr Fraser conceded that he could not recall the plaintiff asking him to prepare a written lease (Tr. p 149). Further, he could not recall being authorised to

sign a lease on the plaintiff's behalf (Tr. p 149). Mr Fraser conceded that he had no recall of ever executing a lease on behalf of a landlord without also having a written management agreement in place with the landlord (Tr. 151), and that no management agreement existed in this case. He conceded that he had no authority to grant any kind of lease over the whole of the land (Tr. 154). He conceded that he never sent a copy of the lease to the plaintiff for her approval before he signed it, that there was nothing to have prevented him from having sent her a copy by fax (p 154), and he could offer no explanation as to why this was not done (p 154). Mr Fraser accepted that he did not act in the plaintiff's best interests in preparing this lease, that he acted outside the scope of his authority in preparing a lease over the whole land (Tr. 166-67) and that the market rental for the whole land exceeded $1,300 per month.

I find that the defendant owed a duty of care to the plaintiff arising out of the relationship of landlord and real estage agent, and that the defendant breached that duty by:

(a) failing to ascertain the plaintiff's instructions before purporting to enter into the lease as agent for the plaintiff;

(b) failing to obtain the proper market rental for the land by entering into the lease at a rental of $1,300 per month;

(c) entering into a lease on the plaintiff's behalf over the whole land; and

(d) entering into a further lease over the land.

I find that the defendant had no authority, actual or implied to enter into the lease on behalf of the plaintiff with Mrs Ween. Even if the plaintiff had indicated to Mr Fraser that she was prepared to grant a new lease to Mrs Ween, this did not authorise Mr

Fraser to prepare such a lease, let alone execute it on behalf of the plaintiff. Mr Fraser had no express authority. A land agent does not have implied authority to prepare or execute leases on behalf of a landlord merely on the basis of an agency agreement to collect rents: *Thuman v Best* (1907) 97 Law Times 239; *McCalman v Higgins* [1960] NSWR 739 at 744; *Petersen v Moloney* (1951) 84 CLR 91 at 94-5; *Pianta v National Finance and Trustees Ltd* (1964) 180 CLR 146 at 151-2.

In view of my findings in relation to the defendant's negligence, I do not consider that it is necessary to imply terms into the contract between the plaintiff and the defendant: *Hawkins v Claytons and others* (1988) 164 CLR 539 esp. at 583-587. Consequently I make no finding that the defendant breached its contract of engagement with the plaintiff.

There will be interlocutory judgement for the plaintiff against the defendant for damages to be assessed.

I adjourn the further hearing of the action to a date to be fixed by the Master or the Registrar.