Teilact Pty Ltd v Tennant Creek Town Council [1998] NTSC 40

PARTIES:	**TEILACT PTY LTD** Plaintiff v **TENNANT CREEK TOWN COUNCIL** Defendant
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No.754 of 1989 (8924878)
DELIVERED:	20 April 1999
HEARING DATES:	15-18 and 21-23 December 1998
JUDGMENT OF:	Bailey J

REPRESENTATION:

Counsel:

Plaintiff:	J. Waters QC
Defendant:	S. Walsh

Solicitors:

Plaintiff	Waters James McCormack
Defendant:	Cridlands

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Teilact v Tennant Creek Town Council [1998] NTSC 40
No. 754 of 1989 (8924878)

BETWEEN:

TEILACT PTY LTD
Plaintiff

AND:

TENNANT CREEK TOWN COUNCIL
Defendant

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 20 April 1999)

Introduction

[1] In this action, the plaintiff sues the defendant to recover compensation or restitution said to be due for work done by the plaintiff for the defendant in connection with proposals for the development of tourist and other commercial facilities at Mary Ann Dam at Tennant Creek. The defendant decided not to proceed with the development proposed by the plaintiff. The defendant decided to proceed (in principle) with a development proposed by another party. The defendant eventually decided not to proceed with any development at the Mary Ann Dam.

[2] The plaintiff's claim is not founded in contract. The plaintiff relies upon principles of restitution. The defendant disputes the application of such

principles to the present facts; and in relation to the facts, the defendant disputes the plaintiff's version of events in relation to certain key issues.

Background

[3] While the parties dispute certain matters which are central to the plaintiff's claim, there is a good deal of common ground as to the chronology of events giving rise to the present action. It is convenient at the outset to summarise matters not in dispute to provide a framework in which to consider the plaintiff's claim.

[4] Mr Edwin Cross is a director of the plaintiff company. Mr Cross went to Tennant Creek in around 1982 and together with a partner (Mr Mark Selen) established an unincorporated building firm under the name "Tennant Creek Builders". The firm built residential flats for the Northern Territory Housing Commission and was awarded various building maintenance contracts with a government department. The firm prospered to the point where it had a staff of around 25 persons and an annual turnover of $1.25 – 1.50 million.

[5] In early 1986, Mr Cross approached the defendant with a proposal to build a combined restaurant and boatshed at the Mary Ann Dam on land owned by the Northern Territory Government but controlled by the defendant. On 9 April 1986, the defendant Council resolved (Exhibit P1-1) to reject this proposal. On 11 June 1986, Mr Cross made a further presentation of his proposals to the defendant Council (Exhibit P1-5). On 9 July 1986, the

defendant Council again resolved (Exhibit P1-6) to reject the proposals. Mr Cross was advised to this effect by letter dated 15 July 1986 (Exhibit P1-7). Meanwhile on 25 June 1986, the Council had resolved (Exhibit P1-4) that the defendant's town clerk investigate the legality of the defendant Council leasing out land at the Mary Ann Dam.

[6] In September 1986, the defendant Council by newspaper advertisement called for expressions of interest in developing the Mary Ann Dam site. Fifteen expressions of interest were received before the closing date and these were considered at a meeting of the defendant Council on 10 October 1986 (Exhibit P1-9/10). One of the expressions of interest received by the defendant was from Mr Cross on behalf of the plaintiff company. This undated and handwritten letter (Exhibit P1-8) under the letterhead of Tennant Creek Builders, signed by Mr Cross, refers to the interest of the plaintiff in the development of the Mary Ann Dam site in the following terms:

> "We, Teilact Pty Ltd, would formally like to express our interest in the above development, primarily being the restaurant-kiosk-yacht club. Our secondary interest would be the 40 motel units proposed".

[7] On 10 December 1986, Mr Cross attended a meeting of the defendant Council to explain his proposal to develop a "restaurant/yacht club" facility at the Mary Ann Dam. The defendant Council resolved (Exhibit P1-13) at that meeting:

"That Mr T. Cross be advised that the Tennant Creek Town Council approves 'in principle' to *(sic)* the establishment of the restaurant/yacht club at the Mary Ann Dam and that he be invited to submit further documentation in support of his development proposal for Council consideration."

[8] Mr Cross (whose name in the present context and all subsequent references in these reasons may be taken generally to be a reference to the plaintiff) was advised of the defendant Council's resolution. On 15 December 1986, the defendant's town clerk, Mr Ian Burfitt, wrote (Exhibit P1-15 to 17) to Mr Cross in the following terms:

"Dear Sir

RE: Proposed Development Application
- Mary Ann Dam

Further to our discussions and your meeting with the Tennant Creek Town Council on the 10th December, 1986 I am to raise the following issues in relation to your proposal to develop a Restaurant/Yacht Club at the Mary Ann Dam.

1. Council will require detailed plans and specifications detailing all aspects of the proposed development.
2. Council will require car-parking, stormwater dispersal, landscaping and sewerage disposal plans to accompany (1).
3 Proof of ability to finance the entire project will need to furnished to Council in writing.
4. The design of the total complex will be required to abide by the amenity of the surrounding locality and be aesthetically pleasing.
5. How the total development (including any landscaped area) is to be supplied with water, both for human consumption and for other purposes is requested.
6. How the facility is to be operated whether owner/operator or other method is to be identified.
7. What tenure will be extended to the Tennant Creek Yacht Squadron for storage of their boats and equipment is required to be outlined in detail.

8 How the facility is to be supplied with electricity and agreement with existing suppliers will need to accompany the detailed plans and specification.

9. Details of the operating hours of the facility need to be provided and any restrictions to the attendance of the general public.

10. Detailed cost estimates of each portion of the development so as to be able to verify the authenticity of the estimates provided.

11. Copies of approvals from Health, Building, Electricity, Conservation, Fire Control and any other government instrumentality which have jurisdiction over the Mary Ann Dam area to accompany plans and specifications.

12. Details of lease fee in which you would offer Council for a period lease of 50 years, with the right of renewal for an additional period, or other offer which will be extended to Council in lieu of a period lease.

13. Agreement to permit any officer of Council or person authorised by Council to inspect the site or construction area at all reasonable times prior and during construction of the facility.

14. Agreement that no occupation of the facility will be permitted until all facets of the project are totally completed to the satisfaction of the Council is received in writing.

15. Estimated commencement and completion timetable.

16. Guarantee that the Tennant Creek Town Council will be totally indemnified against all insurable risks in relation to all facets of the facility.

17. Supply of name and registered address of builder, financier and operator of facility and previous record of experience.

18. All structural details to be accompanied by certified engineering report verifying suitability of materials, design and wind load performance.

19. Cost of checking (18) by a certified structural figures of Council’s choice.

20. A soil report and design specification for footings to be provided in conjunction with plans and specifications for footings.

21. Details of occupation and lease arrangements that would be extended to the Tennant Creek Yacht Squadron need to be forwarded to the Tennant Creek Town Council.

The abovementioned details will need to be supplied to the Tennant Creek Town Council's satisfaction prior to final approval being granted for the commencement of the project.

Council further reserves the right to place additional requirements to be met at any time it so desires prior to commencement of construction.

This correspondence, in no way, is to be construed as an approval to commence the project as all requirements will need to be fulfilled prior to the Tennant Creek Town Council proceeding with the matter.

I look forward to a mutually rewarding venture should you wish to proceed.

Yours faithfully

Ian L. Burfitt

Town Clerk"

[9] On 11 February 1987, Mr Cross attended a meeting of the defendant Council in relation to the proposed development at Mary Ann Dam. Events preceeding this meeting are a matter of dispute between the parties, as is what occurred at the meeting. Such events are central to the plaintiff's action and I will return to them later in these reasons. The minutes of the defendant Council for the meeting of 11 February 1986 (Exhibit P1-20) in so far as they are relevant to the present action record the following:

"MR TED CROSS – RE: MARY ANN DEVELOPMENT

Mr Cross outlined further information in relation to his proposal to establish a yacht club/restaurant at Mary Ann Dam.

MARY ANN DAM – DEVELOPMENT

MOTION

The meeting proceed into committee to discuss the Mary Ann Dam development

MOVED: Alderman Boulter
SECONDED: Alderman Carmichael
CARRIED:
RES. NO: 31/87

The meeting then opened".

[10] The minutes of the defendant Council's meeting of 20 February 1987 (Exhibit D4) record that:

> "A registration of interest to develop the proposal at the Mary Ann Dam was received from P.M.T. Partners Pty Ltd".

[11] P.M.T. Partners Pty Ltd was not one of the fifteen respondents to the defendant's call for expressions of interest in developing Mary Ann Dam which had been considered at the meeting of the defendant Council on 10 October 1986 (see para [6] above).

[12] Following a meeting of the defendant Council on 12 March 1987, P.M.T. Partners Pty Ltd was advised by letter of 18 March 1987 (Exhibit D7) that its proposals for development of the Mary Ann Dam were declined by the Council. Subsequently, on 10 April 1987, the defendant Council's town clerk wrote (Exhibit D8) to Barry Shannahan Consultancies, a firm of

architects engaged by P.M.T. Partners Pty Ltd., indicating that the defendant Council was prepared to consider a further (smaller) proposal to develop the Mary Ann Dam. Representatives from Barry Shannahan Consultancies and P.M.T. Partners Pty Ltd were invited to attend a meeting of the defendant Council on 22 April 1987 to discuss possible future development of the Mary Ann Dam.

[13] On 6 March 1987, the defendant Council's town clerk, Mr Burfitt, left his employment with the defendant. He was replaced as town clerk by Mr Daniel Anderson who took up his duties with the Council on around 10 April 1987. Shortly after his appointment, Mr Anderson wrote (Exhibit P1-25) to Mr Cross with reference to the defendant Council's letter of 15 December 1986 (Exhibit P1-15 to 17; para [8] above) and the plaintiff's proposal "to develop a restaurant/yacht club at the Mary Ann Dam". The letter continued:

> "Council to this date has not received detailed plans and specifications detailing all aspects of the proposed development for proof of ability to finance the project in writing.
>
> Failure to supply the above information by 22nd April 1987, Council may no longer consider your application."

[14] It is common ground between the parties that on 22 April 1987 as a result of this letter, it was agreed between Mr Anderson and Mr Cross that the plaintiff would make a detailed presentation of its development proposals for the Mary Ann Dam at a meeting of the defendant Council to be held on

13 May 1987. The evidence as to the precise nature of any discussions between Mr Anderson and Mr Cross in arriving at this arrangement is uncertain – a matter that I will return to later in these reasons.

[15] It is also common ground between the parties that on 22 April 1987 Mr David Keeler of Keeler & Associates Pty Ltd, a firm of architects, wrote a letter (Exhibit D1) to the defendant Council on behalf of the plaintiff in the following terms:

> "Dear Sir,
>
> RE: Mary Ann Dam
> Stages 3 and 4 Motel and Caravan Pack
>
> We have been approached by Mr Ted Cross and Teilact Pty Ltd to register an interest on their behalf with the Tennant Creek Town Council for the design/construction/operation of Stages 3 and 4, Motel and Caravan Park at the Mary Ann Dam.
>
> The financiers Partnership Pacific are currently preparing further information at the present time together with the company accountants.
>
> We trust that this expression of interest will be registered according *(sic)* at the meeting today and we await your further advice.
>
> Subject to mutual agreement between ourselves and Mr Cross/Teilact Pty Ltd we will be preparing a formal submission on the above matters.
>
> It is our understanding other architects have been engaged for stage 1 and 2.
>
> Yours faithfully
>
> David Keeler
> Director".

[16] On 13 May 1987, the plaintiff, represented by Mr Cross and Mr Harry Hamor (of Gibbon, Hamor & Associates, a Sydney firm of architects engaged by the plaintiff) made a formal presentation to a meeting of the defendant Council of its development proposals for the Mary Ann Dam. It is common ground that the presentation canvassed not only a proposed restaurant/yacht club but also included an outline of the plaintiff's proposals for a motel and caravan park at Mary Ann Dam.

[17] Mr Cross and Mr Hamor attended a further meeting of the defendant Council on 24 June 1987 and made a further presentation of the plaintiff's proposed development of the Mary Ann Dam. The presentation covered staged development of a restaurant/yacht club, motel and caravan park (Exhibit P3).

[18] At a meeting of the defendant Council on 2 July 1987, the Council resolved (Exhibit P1-34):

> " That the Tennant Creek Town Council accept the P.M.T. Partners proposal to develop Mary Ann Dam".

[19] The defendant Council also resolved at that meeting:

> "That Hamor and Gibbon be informed that their proposal to develop Mary Ann Dam was unsuccessful".

[20] The plaintiff and Gibbon, Hamor & Associates were subsequently informed by letters of 3 July 1987 (Exhibits P1-31 and 32) that the plaintiff's submission for development of the Mary Ann Dam was unsuccessful.

The Plaintiff's Statement of Claim

[21] In its amended statement of claim (dated 12 September 1990) the plaintiff refers to the defendant Council's calling for expressions of interest in developing the Mary Ann Dam (para. [6] Above), the resolution of the defendant Council to grant the plaintiff " in principle" approval of its proposal to establish a restaurant/yacht club (para. [7] above) and to the defendant Council's letter (Exhibit P1-15 to 17 : para. [8] above) setting out twenty one issues which the plaintiff needed to address to the defendant's satisfaction "prior to final approval being granted for the commencement of the project".

[22] The amended statement of claim then continues:

> "8. **By virtue of the letter and by virtue of discussions between Mr Cross, acting on behalf of the plaintiff, and the Mayor of the defendant Council,** the plaintiff by its servants or agents was given to understand that it had been successful and that of the fifteen expressions of interest received, **its proposal, originally lodged by Mr Cross**, was to be proceeded with.
>
> 9. **Relying upon the letter and the aforesaid conversations** the plaintiff proceeded upon detailed planning and preparation for the project, as contemplated by the letter which, inter alia, required from the plaintiff:
>
> (i) 'Detailed plans and specifications detailing all aspects of the proposed development.'
>
> (ii) 'Detailed cost estimates of each portion of the development.'

(iii) ‘copies of approvals of Health, Building, Electricity, Conservation, Fire Control and other Government Instrumentalities.’

(iv) ‘A soil report and design specification for footings, which was to be provided in conjunction with plans and specifications for footings.’

(v) ‘Specifications of all structural details of the project, to be accompanied by certified engineering reports verifying their suitability as to material design, wind and load performance.’

10. The plaintiff immediately and actively embarked upon compliance with the requirements of the defendant for the project and incurred considerable expense thereby.

11. Both the plaintiff and defendant proceeded with the project on the joint assumption that a contract would be entered into between them.

12. The preparation by the plaintiff of detailed plans and specifications and compliance with the defendant’s twenty one requirements, as detailed in the letter, was work beneficial to the project and in the interests of both parties.

13. Given the scope of the work required by the defendant of the plaintiff, as set out in the letter, and the intentions of both the plaintiff and defendant, the work undertaken by the plaintiff was not work which the plaintiff would be expected to do gratuitously and the plaintiff was induced by the defendant to incur expense, other than for a fair business risk.

14. **In pursuance of the terms of the letter the plaintiff provided further information to the defendant as to its proposal** and Mr Cross, on behalf of the plaintiff, made a detailed presentation to the defendant on 11 February 1987.” (emphasis added)

[23] It is unnecessary to set out the remainder of the amended statement of claim which deals with the meetings of the defendant Council held on 13 May 1987 (para. [16] above) and 24 June 1987 (para. [17] above) and the defendant's decision not to proceed with the plaintiff's proposals for the Mary Ann Dam. The amended statement of claim concludes with a claim to be entitled to "compensation or restitution" in the sum of $118,627 plus interest and costs. Particulars of the compensation or restitution sought are provided and comprise various fees and expenses said to have been incurred by the plaintiff in preparing various plans and models and pursuing various approvals in connection with the planning and design of the plaintiff's proposals for the Mary Ann Dam.

[24] In view of the way in which the plaintiff's case emerged in evidence, it is worth emphasising that:

(a) on the face of the pleadings (see paragraphs 8 and 9 of the amended statement of claim), the plaintiff relies upon the defendant's letter of 15 December 1986 (Exhibit P1-15 to 17 : granting "in principle" approval of the plaintiff's proposal to establish a restaurant/yacht club) and alleged conversations between Mr Cross and the Mayor of the defendant Council to justify its claim against the defendant;

(b) there is no reference in the amended statement of claim to the plaintiff having been granted approval (in principle or otherwise) to establish anything other than, or more than, a restaurant/yacht club; and

(c) in particular, there is no suggestion in the amended statement of claim (see paragraph 14) that at the meeting of the defendant Council held on 11 February 1987 the plaintiff received any form of approval to establish anything other than, or more than, a restaurant/yacht club at Mary Ann Dam.

[25] In this context, it is to be noted that while paragraph 8 of the amended statement of claim refers to "its (the plaintiff's) proposals originally lodged by Mr Cross" (and see also the reference in paragraph 14 to "its proposals"), the defendant Council's letter of 15 December 1986 refers only to in principle approval for a restaurant/yacht club and, makes no reference to any proposed motel or caravan park.

The Plaintiff's Case

[26] The principal witness for the plaintiff was Mr Cross. In addition, the plaintiff called evidence from Mr Lindsay Bond, (an architect), Mr Harry Hamor (the plaintiff's Sydney architect, to whom reference has already been made) and Mr Philip Camens (an accountant to the plaintiff at the relevant time).

[27] According to Mr Cross, immediately after the defendant Council had resolved on 10 December 1986 to approve the plaintiff's proposal for a restaurant/yacht club, he had engaged Mr Lindsay Bond's architectural firm (Isotech) and a Mr Barry Greensall (an engineer of McIntrye & Associates) to assist in developing the plaintiff's proposal. Mr Bond and Mr Grensall

travelled to Tennant Creek from Mount Isa, Queensland, and with the defendant's approval investigated the Mary Ann Dam site. Mr Grensall, using a backhoe owned by the defendant Council, undertook investigations of the site for a soil report and preparation of specifications for the footings for a restaurant/yacht club. During January 1987, Mr Bond drew up preliminary design drawings for the development. Mr Cross during that January sought to advance the project by investigating bank finance, electricity supply for the site and discussing aspects of the project with various government departments which would be required to grant approvals before the project could proceed.

[28] The evidence of Mr Cross was that by mid-January 1987 Mr Bond had completed preliminary design drawings for a restaurant/yacht club; McIntrye & Associates had completed footing calculations and a soil report; preliminary costings of $400,000 had been prepared for the restaurant/yacht club and the plaintiff's banker had given a written undertaking to finance that amount.

[29] Mr Cross said that he had been informed by the defendant Council's then town clerk, Mr Burfitt, that the defendant was seeking around $1.3 million from the Northern Territory Government for the provision of infrastructure at the Mary Ann Dam (principally a supply of water and sewerage facilities). Sometime before Mr Cross attended a meeting of the defendant Council on 11 February 1987, he was informed by Mr Burfitt that the Northern Territory Government had rejected the defendant's application for a grant of $1.3

million for infrastructure at the Mary Ann Dam. As a consequence of this development, according to Mr Cross, it was proposed that the plaintiff put forward a proposal to develop not just a restaurant/yacht club but also a motel and possibly a caravan park at the Mary Ann Dam site.

[30] The evidence of Mr Cross as to how this proposal eventuated is unclear. Mr Cross initially said that the proposal for the plaintiff to enlarge its development plans for the Mary Ann Dam came from Mr Burfitt. At another point in his evidence, Mr Cross referred to attending a meeting of the defendant Council in late January or early February 1987 at which a sub-committee of the defendant Council was established to oversee development of the Mary Ann Dam. Mr Cross suggested in evidence that the idea of a larger development at the Mary Ann Dam arose in the course of discussions between himself, members of the sub-committee and Mr Burfitt after it was learnt that the Northern Territory Government had rejected the defendant's application for an infrastructure grant. In relation to this version of events, Mr Cross said that he could not recall who had suggested expanding the plaintiff's development proposal to include a motel and caravan park. Later in his evidence, Mr Cross conceded that he may have been mistaken about the establishment of a sub-committee to oversee the development of the Mary Ann Dam (and I note that no minutes of a meeting of the defendant Council were produced with respect to late January or early February 1987, other than with respect to the meeting of 11 February 1987). At yet another point in his evidence, Mr Cross suggested that it was a "joint decision" of

the plaintiff and the defendant Council that the plaintiff enlarge its development proposals and that inclusion of "stage 3" (the proposed caravan park) was a "council request".

[31] It is common ground that Mr Cross attended a meeting of the defendant Council on 11 February 1987 (see para. [9] above). It is the evidence of Mr Cross that, some time shortly before this meeting, he had delivered a letter (Exhibit P2) to the defendant Council's town clerk, Mr Burfitt. The letter refers to various aspects of the proposed development at Mary Ann Dam (regarding lease arrangements and supply of electricity, water and sewerage) and continues:

> "(6) Finance
>
> Our costing of project and increasing size of Yacht Club took into consideration other developments taking place, Roads, Motel, Caravan Park. Talking to Minister before Christmas, told people in Tennant Creek did not want the development and Transport and Works would not be allocating any money at Mary Ann Dam.
>
> Our company now feels unless the motel goes ahead that the $1 million yacht club will be under used. **We would like to propose that Teilact obtains permission from Council to build motels after completing Yacht Club.**
>
> Company accountants, Pannell, Kerr and Forster (Phil Camens) has been in contact with stock brokers and stock exchange to set up public company. The aim of public company to finance stage II motels and other developments approved by Council.
>
> (7) Drawing
>
> **Due to lack of response from Government and Transport and Works.** ***(sic)*** **our company has advised our architect to stop work until advised. If Council give approval to stage II our original**

> **design will go ahead, if not our design first submitted to council i.e. small Yacht Club costing $300,000."(emphasis added)**

[32] It is the evidence of Mr Cross that this letter was prompted by the information from Mr Burfitt that the Northern Territory Government would not supply a grant for infrastructure and a suggestion by Mr Burfitt that the plaintiff put forward proposals for a larger development at the Mary Ann Dam encompassing a motel and a caravan park. Despite the letter's reference to the plaintiff proceeding only with a "small yacht club costing $300,000" if the defendant Council did not approve the plaintiff building a motel as part of the development, according to Mr Cross, if such approval was not forthcoming any development at the Mary Ann Dam by the plaintiff "couldn't go ahead, we couldn't afford to do it". In the absence of approval to expand the development proposal, Mr Cross said: "the project couldn't go ahead at all in any shape or form; the yacht club couldn't be built" (Transcript p.98) and "we'd just walk away from it" (Transcript p.97).

[33] In relation to what occurred at the meeting of 11 February 1997, Mr Cross gave evidence (Transcript p.38):

> "This letter (Exhibit P2) was taken to the next council meeting on 11 February, discussed it in front of the full council, explained that we couldn't go ahead unless we did the full development, and it was just discussed that if we still met the 21 points the full development could go ahead, with some reservations about the caravan park, because the council still wanted to get involved with the caravan park".

[34] The “21 points” referred to by Mr Cross in this passage were the 21 issues referred to in Mr Burfitt’s letter of 15 December 1986 (Exhibit P1-15 to 17; para. [8] above).

[35] The evidence of Mr Cross continued (Transcript p.38/39):

> “I read the points through to the council, what was happening, why we couldn’t go ahead, the costs involved with the extra work involved, and we got a go-ahead to do the yacht club, the motel and more details had to be supplied about the council involvement with the caravan park”.

[36] Later in his evidence (during cross-examination), Mr Cross claimed that the meeting of the defendant Council on 11 February 1987 had granted the plaintiff approval to proceed with “stage 1, stage 2 and stage 3” of the proposed development, namely, the restaurant/yacht club (stage 1) the motel (stage 2) **and** the caravan park (stage 3).

[37] Mr Cross gave evidence that he did not receive any letter from the defendant Council or its town clerk confirming that the plaintiff had approval in principle to proceed with all three “stages” of the proposed development, subject to the twenty one issues raised in the defendant Council’s letter of 15 December 1996. Mr Cross accepted that no resolution granting such approval is recorded in the defendant Council’s minutes for the meeting of 11 February 1987 (Exhibit P1-20 : para. [9] above). He also conceded that he was aware that the defendant Council could act only be resolution.

[38] In the summary of matters not in dispute, reference is made to a letter (Exhibit P1-25: see para. [13] above) from Mr Anderson, the defendant Council's town clerk (from around 10 April 1987) to Mr Cross, referring to the plaintiff's failure to provide detailed plans and specifications for the proposal to develop a restaurant/yacht club. It is common ground that the plaintiff was granted an extension of time (until 13 May 1987) in which to respond to the twenty one issues raised in the defendant Council's letter of 15 December 1986. Initially, Mr Cross gave evidence that he had met Mr Anderson, for the first time, on 22 April 1987 and (Transcript p.44/45):

> "…explained to him that … - because the size of the project had quadrupled in size, that we- we needed more time. I'd already done the – first development part of it. We just had to finalise the – second part of it; that's why he gave us the extension of time, to get it all together."

[39] When cross-examined about this meeting with Mr Anderson, Mr Cross gave evidence (Transcript p.119/120) that he could not recall what he had said to Mr Anderson, and in particular, could not recall if he told Mr Anderson that the plaintiff's proposals for the Mary Ann Dam were no longer restricted to a restaurant/yacht club, but now extended to the provision of a motel and caravan park.

[40] In relation to the letter dated 22 April 1987 (Exhibit D1) forwarded to the defendant Council by David Keeler of Keeler & Associates Pty Ltd, Mr Cross gave evidence that it was written and sent upon his instructions. Notwithstanding the terms of this letter (see para. [15] above), according to

Mr Cross, he did not consider that it was necessary for the plaintiff to submit an expression of interest to the defendant Council with respect to development of a motel and caravan park at Mary Ann Dam (because on his evidence the plaintiff had received approval in principle to proceed with these elements of the development at the meeting of the defendant Council on 11 February 1987). Mr Cross explained the involvement of Keeler & Associates Pty Ltd as necessary to provide a local contact point for the project's architect because of the difficulty of securing Mr Hamor to come from Sydney at short notice. According to Mr Cross the letter's reference to "expression of interest" was mere "terminology".

[41] Mr Cross gave evidence that after the meeting of the defendant Council on 13 May 1987, Mr Hamor, Mr Chittock (the Mayor) and Mr Anderson (the town clerk) and himself met to discuss further the plaintiff's development proposals for the Mary Ann Dam. According to Mr Cross, he learnt at this meeting that the defendant Council was considering an expression of interest in relation to development of the Mary Ann Dam from P.M.T. Partners Pty Ltd. Mr Cross said that he was outraged to learn that the defendant Council was considering an expression of interest from a competitor. He denied being aware of the interest of P.M.T. Partners Pty Ltd before this meeting. He did not seek to raise his concern about this matter either in subsequent correspondence with the defendant Council or at the meeting of the defendant Council held on 24 June 1987.

[42] Mr Cross was cross-examined about the terms of a written report (Exhibit P3) provided to the defendant Council as part of the plaintiff's presentation of its development plans at the Council meeting held on 24 June 1987.

[43] The report (page 1 of Exhibit P3) opens with the words:

> "Further to Council's invitation for Expressions of Interest in the development of a Tourist Facility at the Mary Ann Dam, Teilact Pty Ltd has expressed this interest, and **this submission is presented to Council as confirmation of this interest."** (emphasis added)

[44] The report (page 29 of Exhibit P3) concludes with a summary in which:

> "Teilact invites Council to take up this submission and **respond to the above points with a 'Letter of Intent and Commitment'** to the project, confirming this submission and allowing Teilact to proceed with its development programme….".

[45] According to Mr Cross, the plaintiff did not in fact require a letter of intent because, on his account, the defendant Council (at its meeting of 11 February 1987) had given approval in principle to the plaintiff undertaking development of not only a restaurant/yacht club but also a motel and caravan park. In relation to the invitation for the defendant Council to provide the plaintiff with a "letter of intent" (page 29 in Exhibit P3), Mr Cross gave evidence (Transcript p.124/125) that:

> "If I'd wrote that I'd have put a contract. Just the different name. A letter of intent to me is a contract…"
>
> "A letter of intent in this context means a contract….".

[46] Later in cross-examination, Mr Walsh for the defendant Council returned to this topic (Transcript p.132):

> "*Mr Walsh:* I'll put it to you again. You were hoping to get a letter of intent from the Council in June 1987 so that you could then proceed with the project. Yes or no?
>
> *Mr Cross:* Yes. Yes."

[47] In addition to Mr Cross, the plaintiff called evidence from Mr Lindsay Bond (an architect), Mr Philip Carmens (an accountant) and Mr Harry Hamor (the plaintiff's Sydney based architect). It is sufficient to refer to the evidence of these three witnesses in brief terms. None of these witnesses was present at the defendant Council's meeting of 11 February 1987 at which Mr Cross maintains that the plaintiff received approval in principle to proceed with development of a motel and caravan park in addition to a restaurant/yacht club. None of these three witnesses gave evidence that they had been told by anyone with the authority to speak on behalf of the defendant Council that the plaintiff had received approval (in principle or otherwise) to develop a motel and caravan park at Mary Ann Dam.

[48] Mr Bond and Mr Carmens in their evidence each referred to visiting Tennant Creek and meeting with Mr Cross and employees of the defendant Council. Neither witness could recall to whom they spoke at the Council's offices and in Mr Bond's case any such conversations were well before the defendant Council's meeting of 11 February 1987.

[49] Mr Hamor gave evidence that he was engaged by the plaintiff in early 1987 to develop a proposal for a restaurant/yacht club, motel and caravan park at Mary Ann Dam. He recalled a meeting with Mr Burfitt, the town clerk, in late January or early February 1987. His evidence was that he sought and received assurances at that meeting that the defendant Council was "serious about proceeding" with the development at the Mary Ann Dam.

[50] Mr Hamor attended the defendant Council's meeting of 13 May 1987 with Mr Cross. According to his evidence, he put forward preliminary proposals, on behalf of the plaintiff, for the development of a restaurant/yacht club, motel and caravan park. With the aid of notes made at the time, Mr Hamor gave evidence of the discussions at the Council's meeting. In particular, his notes record that the following matters were referred to at the meeting (albeit he could not now recall the content of the discussions):-

(a) the letter dated 22 April 1987 (Exhibit D1) from Keeler & Associates Pty Ltd to the defendant Council (registering the plaintiff's interest in developing a motel and caravan park at Mary Ann Dam); and

(b) the expressed interest of P.M.T. Partners Pty Ltd in the development of Mary Ann Dam.

[51] In relation to the interest of P.M.T. Partners Pty Ltd., Mr Hamor could not now recall if he first learnt of such interest at the meeting of 13 May 1987 or at some earlier date. He could also not recall the nature of such interest,

namely, whether that company was interested in undertaking the development itself or participating as a sub-contractor.

[52] Mr Hamor also gave evidence that at some stage he was informed that the defendant Council wished to compare the plaintiff's development proposals for the Mary Ann Dam with competing proposals that the defendant was expecting to receive from another party. Mr Hamor was not able to say whether this information came to him before or at the meeting of the defendant Council on 13 May 1987. His evidence was that during that meeting Mr Cross was angry that the defendant Council was prepared to consider other expressions of interest for the development of the Mary Ann Dam.

[53] Mr Hamor's evidence also confirmed that neither at the meeting of 13 May 1987 nor at the meeting of 24 June 1987 (when he made a more detailed presentation of the plaintiff's development proposals) did the defendant Council pass any resolutions approving the plaintiff's plans for the Mary Ann Dam.

The Defendant's Case

[54] On behalf of the defendant Council, Mr Walsh called evidence from Mr Ian Burfitt and Mr Daniel Anderson (former town clerks of the defendant Council), Mr Alfred Chittock (the Mayor) and Mr Lindsay Carmichael (an Alderman).

[55] Mr Burfitt gave evidence that he was the town clerk of the defendant Council from around the middle of June 1986 until 6 March 1987. Before taking up the post, he had around ten years experience of local government employment.

[56] Mr Burfitt confirmed that he had written to Mr Cross on 15 December 1986 (Exhibit P1 – 15 to 17) advising him of the defendant Council's approval in principle of the plaintiff's proposal to establish a restaurant/yacht club at Mary Ann Dam. He does not recall any discussions with Mr Cross during January 1987 as to the possibility of the plaintiff expanding its proposals to include a motel and caravan park. According to his evidence, Mr Cross raised such a possibility in early February 1987 shortly after Mr Burfitt had received a letter from Mr Cross (Exhibit P2 – see paras. [31] and [32] above). Mr Burfitt recalled attending the meeting of the defendant Council on 11 February 1987. Prior to that meeting, he had prepared a document (Exhibit D2) headed "Notes to Mayor" setting out recommendations in the following terms:

> "1.00pm **MR TED CROSS**
>
> Wishes to discuss with Council the possibility of being awarded the Motel development at the Mary Ann Dam in addition to that of the yacht club/restaurant.
>
> **RECOMMENDATION**
>
> Council give Mr Cross the opportunity to present his case but Council give NO indication in relation to the matter to Mr Cross.

1.30pm	Mr Barry Shannahan	Shannahan Keeler & Faeshe	
	Mr Terry Burns	P.M.T. Partners	Interested parties in
	Mr Terry Dowling	Parap Hotelier	M.A.D.Development

P.M.T. Partners are interested in being involved within the Mary Ann Development.

Mr Dowling is interested in being involved within the Mary Ann Development.

RECOMMENDATION

Council again give the interested parties the opportunity to present their case. Council to further discuss the matter at a later part of the meeting."

[57] Mr Burfitt said a copy of this document had been given to Mr Chittock, the Mayor, before the meeting.

[58] It was the evidence of Mr Burfitt that neither at its meeting of 11 February 1987 nor at any other time during his tenure as town clerk did the defendant Council give approval to the plaintiff proceeding with the development of a motel and caravan park at Mary Ann Dam on the basis of the twenty one points set out in Mr Burfitt's letter of 15 December 1986 (Exhibit P1-15 to 17) or otherwise. With the lapse of time, Mr Burfitt was not now able to recall the details of discussions at the meeting. He relies principally on the lack of any resolution by the defendant Council giving approval to the plaintiff to proceed with a motel and caravan park development. In evidence he said (transcript p306):

> "….if that approval was issued by Council, it would have been issued by resolution, of which I would've been advised and then I would've notified Mr Cross in writing of that decision…"

[59] According to Mr Burfitt between 11 February 1987 and his departure from the position of town clerk (6 March 1987), he did not receive any further documents from the plaintiff with respect to any proposal by the plaintiff to develop Mary Ann Dam generally, nor, in particular, any documents in response to the twenty one points set out in his letter of 15 December 1996.

[60] Mr Burfitt categorically denied encouraging Mr Cross to pursue a motel and caravan park development at the Mary Ann Dam. His attitude was that the plaintiff had received in principle approval for development of a restaurant/yacht club, subject to meeting the twenty one points referred to in his letter of 15 December 1986; the plaintiff had not provided the information referred to in that letter and it was a matter for the defendant Council whether the plaintiff should receive any further in principle approval to develop a motel and caravan park. On his evidence, no such approval was given by the Council before he left his position as town clerk on 6 March 1987.

[61] Evidence was called from Mr Chittock, the Mayor of the defendant Council between May 1978 and 1988. Mr Chittock's evidence was to the effect that he now has very little independent recollection of the relevant Council meetings and events concerning the plaintiff's involvement with proposals to develop the Mary Ann Dam. Mr Chittock accepted the accuracy of what

was recorded in the defendant Council's minutes of meetings and correspondence regarding the defendant Council's grant of in principle approval for the plaintiff to develop a restaurant/yacht club.

[62] Mr Chittock was not able to throw any light on what occurred at the defendant Council's meeting of 11 February 1987 beyond confirming that Mr Burfitt had provided him with the note (Exhibit D2) recommending that Council give Mr Cross the opportunity to present his case (in favour of the plaintiff being awarded the motel development) but Council "give no indication in relation to the matter to Mr Cross".

[63] The essence of Mr Chittock's evidence can be summarised by the following answer (in cross-examination) regarding the defendant Council's meeting of 15 May 1987 (transcript p.356):

> "And at that meeting there was talk about giving them a letter, you know, that we would grant them the right to build the (inaudible) on – on two occasions I mentioned that if they did submit these plans, or drafts, or whatever they wished to call them, that there would be no additional costs to Council. That was definitely referred to at that particular time. And there was – there was no talk – or there was talk, but as far as Council was concerned, there was no – we never gave them any authority whatsoever, or led (them to believe) that they would be the fortunate ones to be able to build this structure."

[64] Evidence was called from Mr Carmichael, a former Alderman of the defendant Council. Mr Carmichael recalled that he attended the defendant Council's meeting of 11 February 1987. According to his evidence, Mr Cross outlined his proposals for a motel and caravan park at Mary Ann Dam

and was asked a number of questions – particularly regarding finance for such a project.

[65] Mr Carmichael recalls the town clerk (Mr Burfitt) had mentioned to him and other Aldermen "…to ask any questions (of Mr Cross) we had and leave it at that" (transcript p.403). This was because the plaintiff had not then provided the information sought by the defendant Council's letter of 15 December 1986. In evidence, Mr Carmichael said that he did not recall that there was any discussion at the meeting to the effect that if the plaintiff met the twenty one points referred to in that letter, the plaintiff could proceed with a motel and caravan park upon the same basis. He was then further cross-examined about this matter (transcript at p.406):

"Mr Waters:	Of course what I really put to you, I suppose, was the proposition that somebody, or some members on the council side, assented to the proposition that if the – if all those other requirements were met then the project as he now envisaged it could proceed. I am not saying that you'd get final council approval or enter into contracts, but that it could proceed?
Mr Carmichael:	More than likely, yes.
Mr Waters:	Well, was that the impression that you were left with that the council's attitude was that if the – if all those issues in that letter were dealt with the matter could progress?
Mr Carmichael:	Probably to the next stage, yes, yes.
Mr Waters:	That was the impression that you were left with?
Mr Carmichael:	The letter was the thing that needed to be answered.

Mr Waters: Yes, I understand that. And that was the situation whether we were talking about the smaller project or the bigger project?

Mr Carmichael: Regardless, yes.

Mr Waters: Yes. And that was the thrust, I suggest, of the interchange between council and Mr Cross at that time?

Mr Carmichael; To have the letter answered, that's right."

[66] In re-examination, Mr Carmichael was asked the following question and gave the following answer (transcript at p.411):

"Mr Walsh: Mr Carmichael, at that meeting of 11 February of 1987 was Mr Cross told that he had approval for anything to do with the motel/hotel or the caravan park?

Mr Carmichael: No."

[67] Mr Anderson took up the position of town clerk with the defendant Council on 10 April 1987 following Mr Burfitt's departure. His evidence, to the extent that it is relevant, is canvassed in the summary of common ground as to the chronology of events giving rise to the present action (see paras. [13] to [15] above). He was subjected to lengthy cross-examination on behalf of the plaintiff, but given the fact that he did not take up his appointment as town clerk to the defendant Council until after the plaintiff says that he received in principle approval to develop a motel and caravan park, it is not necessary to refer to his evidence in any detail.

The Law

[68] At the outset of these reasons, I noted that the plaintiff's claim is not founded upon contract, but relies upon principles of restitution. I also noted that Mr Walsh on behalf of the defendant disputes not only the plaintiff's version of events regarding key issues, but also the application of the law of restitution in the present action.

[69] Both Mr Walsh and Mr Waters QC made extensive submissions, oral and written, regarding the applicable law. In the light of my findings of fact, which I will come to shortly, I do not consider that it is necessary to resolve all the complex and difficult questions of law to which counsel referred me.

[70] It is clear that the plaintiff's statement of claim and the submissions of Mr Waters QC were constructed with very close regard to the judgment of Sheppard J in *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880. The facts of that case are complex, but in very broad terms relate to a municipal council making a public invitation for redevelopment of 6.8 acres of land. The council proposed to grant a lease of the land in consideration of the council being provided at no cost with 68,000 square feet of administration space. The redevelopment was to be wholly financed by the developer. The plaintiff ("Sabemo") was successful in tendering to redevelop the land. It was agreed that the acceptance of the tender did no more than bring the parties together so that they could plan the project until

a point was reached where they would enter a contractual relationship, namely, a proposed building lease.

[71] At very considerable expense, Sabemo prepared three redevelopment schemes, each of which was discarded in turn. Much of the detailed work in relation to these three schemes had been carried out at the express request of the council. Eventually, after it had been agreed that additional costs would be shared equally between the council and Sabemo, a fourth scheme was prepared which was acceptable to all parties and for which development approval was granted by the council. Discussions continued between the parties on various outstanding issues. However, while negotiations were continuing, a new proposal was raised by a councillor for a far less ambitious redevelopment scheme, involving no commercial development. Seven months after granting development approval for Sabemo's scheme, the council resolved to "drop the present scheme and enter into negotiations for its termination and then confer with Sabemo Pty Ltd in regard to a further altered scheme". Sabemo sued the council for $426,000 alleging it to be for work done by the plaintiff for the defendant in connection with the proposed redevelopment.

[72] Sheppard J made an extensive review of the authorities dealing with the law of restitution which His Honour observed at that time (1977) was "not settled". In reaching his conclusions, Shepherd J referred extensively to two cases which received a good deal of prominence in the submissions of Mr Waters QC in the present action: *Brewer Street Investments Ltd v Barclays*

Woollen Co Ltd [1954] 1QB 428 and *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932. Sheppard J, in finding for the plaintiff (but leaving the question of quantum to be decided) concluded (at p.902):

> "In my opinion, the better view of the correct application of the principle in question is that, where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party."

[73] Mr Waters QC submits that the application of the law of restitution adopted by Sheppard J is applicable to the present case. He submits that the plaintiff undertook work for the redevelopment of Mary Ann Dam upon the assumption shared by the plaintiff and the defendant Council that a contract would be entered into between them. He submits that such work was beneficial to the project and was work which in other circumstances the plaintiff would not be expected to do gratuitously. Mr Waters submits that the defendant Council for reasons entirely of its own unilaterally decided not to proceed with the plaintiff's development proposals and accordingly is liable to pay compensation or restitution to the plaintiff.

[74] Mr Walsh for the defendant Council submits that the law of restitution has been clarified since the judgment of Sheppard J in *Sabemo*, supra. Mr Walsh notes that in arriving at his judgment in favour of the plaintiff,

Sheppard J relied upon a line of authorities which suggested a basis of recovery grounded in an imputed or implied promise. Thus (at p.898) Sheppard J held:

> "….it is now recognised that there are cases where on obligation to pay will be imposed (**a promise to pay implied**) notwithstanding that the parties to a transaction, actual or proposed, did not intend, expressly or impliedly, that such an obligation should arise. The obligation is imposed by the law in the light of all the circumstances of the case." (emphasis added)

[75] Mr Walsh submits that later High Court authorities have discarded the concept of an imputed or implied promise as a basis of recovery in favour of a duty imposed by law to make restitution for unjust enrichment; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp.* (1988) 164 CLR 662 and *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

[76] In *Pavey & Matthews*, supra at p.256-257, in a judgment with which Mason CJ and Wilson J substantially agreed, Deane J said unjust enrichment is:

> "….a unifying concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution **for a benefit derived at the expense of a plaintiff** and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case". (emphasis added)

[77] At p. 263, Deane J also observed:

> "The tendency in some past cases to see the rationale of the right to recover remuneration for a benefit provided and accepted under an unenforceable contract as contract or promise rather than restitution has tended to distract attention from the importance of identifying the basis upon which the quantum of the amount recoverable should be ascertained. What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or 'enrichment' actually or constructively accepted."

[78] In Mr Walsh's submission a central feature of the modern law of restitution is that an action for unjust enrichment does not arise unless a benefit has been accepted (see *Pavey & Matthews*, supra at p.227, per Mason and Wilson JJ and at p.256, per Deane J). Accordingly, it would not be sufficient for a plaintiff merely to prove that he had done work; rather an action for restitution involves payment of an amount which constitutes reasonable compensation for the benefit or enrichment **accepted** by the defendant.

[79] In *Sabemo*, supra, Sheppard J found that the work carried out by the plaintiff was "beneficial for the project" (at p.903) and was "work done in the course of the parties putting themselves in a position to contract" (at p.902). However, His Honour expressly rejected the defendant's submission "that there could not in any event be recovery unless a benefit accrued to the defendant in respect of the work which was done and for which payment was claimed" (at p.902).

[80] In Mr Walsh's submission, the reasoning of Sheppard J in *Sabemo*, supra, cannot be relied upon now having regard to the later decisions of the High

Court, in particular *Pavey and Matthews*, supra, as to the proper basis for recovery in restitution for unjust enrichment. Further, Mr Walsh submits that quite aside from the later High Court authorities, the facts in *Sabemo*, supra, are far removed from the present case. In *Sabemo*, it was common ground that the parties intended to enter into a contract. The plaintiff had carried out work over a period of three years, much of which was at the specific request of the defendant. Development approval had been granted for the fourth scheme prepared by the plaintiff. It was only at that stage that the defendant decided to abandon the project for reasons unconnected with the terms of the proposed contract. Sheppard J observed (at p.901):

> "It seems to me to be unthinkable that the plaintiff would have been prepared to do what he did, if he had thought the defendant might change its mind about proceeding with the proposal".

[81] In contrast, Mr Walsh submits, the present plaintiff had, at best, in principle approval to develop a restaurant/yacht club (subject to a list of twenty one issues which were never met to the satisfaction of the defendant) and was hoping to obtain similar approval for a motel and caravan park. In the defendant's submission there was no joint assumption in the present case that a contract would be entered into between the plaintiff and defendant, the defendant derived no benefit from the plaintiff's work and none of such work was performed at the request of the defendant. In Mr Walsh's submission, such work as was performed by the plaintiff was carried out in the hope that the defendant Council would accept the plaintiff's proposals. In short, the defendant submits that the work undertaken by the plaintiff was

simply part of the normal work which a builder or developer performs gratuitously when seeking to secure a tender or development approval.

[82] Mr Waters QC submits that the defendant's approach in confining the law of restitution to recovery on the basis of unjust enrichment is not justified by reference to authorities such as *Pavey & Matthews*, supra. The plaintiff stresses that the High Court in that case did not overrule or distinguish *Sabemo*, supra. Mr Waters QC submits that *Sabemo* is illustrative of a line of authority concerning "collapsed negotiation cases" involving provision of "pure" services where unjust enrichment (or acceptance of a benefit by a defendant) is not an essential element of a valid cause of action. In support of this proposition, Mr Waters QC referred to the judgment of Matheson J in *Independent Grocers Co-operative Ltd v Noble Lowndes Superannuation Consultants Ltd* (1993) 60 SASR 525. In commenting upon the judgments of Mason CJ, Wilson and Deane JJ in *Pavey & Matthews*, supra, Matheson J observed at p.556:

> "Their Honours did not need to consider the situation where restitution is sought for services which are not clearly a benefit for the defendant. Benefit in *Pavey & Matthews v Paul* was clear and posed no problem. The most useful discussion of the relevant situation is to be found in Carter and Harland, *Contract Law in Australia* (2nd Ed., 1991), pp791 – 800. At p.791, the learned authors state:
>
> > 'Unlike the receipt of money, the receipt of services is not necessarily a benefit: services are not necessarily realisable, even where there is, in an objective sense, an increase in the defendants' wealth and a decrease in the plaintiff's wealth.'

They then referred to the *Sabemo* case, which they describe as "a case involving 'pure' services", and where they state:

> 'it is clear that the council got what it asked for and the argument that it therefore obtained a benefit is quite sensible. After all, it cannot be said that the work of professional people is not a benefit for the purposes of unjust enrichment' (pp 795-796)."

[83] Mr Waters QC also referred to an article of Ms Sharon Christensen:

"Recovery for Work Performed in Anticipation of Contract : Is Reliance an Element of Benefit?" 1993-95 11 Australian Bar Review 144 which suggests at p.159:

The following must exist before a plaintiff will be entitled to recover:

(1) There is a joint relationship or endeavour and the plaintiff has an expectation of acquiring an interest.
(2) The plaintiff does work or contributes money for the purposes of the relationship.
(3) There is no positive or express intention that the defendant enjoy the benefit of the work without compensating the plaintiff.
(4) It is unconscionable in the circumstances for the defendant to retain the work without paying for it.`

[84] However, as Ms Christensen notes at p.161:

> "If cases such as *Sabemo Pty Ltd v North Sydney Municipal Council, Brewer Street Investments Ltd v Barclays Woollen Co Ltd and William Lacey (Hounslow) Ltd v Davis* are to be explained on the basis of unjust enrichment the concept of benefit must be widened to include not only positive accretions but also depletions of the plaintiff's assets and income forgone."

[85] Mr Waters QC submits that Ms Christensen is correct in emphasising (at p.161) that the:

> "… common thread throughout all the cases is the court's willingness to found a remedy based on the injurious reliance of the plaintiff in circumstances where it would be *unconscionable* for the defendant to withdraw from the transaction."

[86] Notwithstanding the comprehensive submissions by Mr Walsh and Mr Waters QC as to the applicable law, I do not consider that it is necessary in the present case to reach a concluded view as to the extent to which, if any, the law permits recovery for the provision of "pure services" in cases of "collapsed negotiations". This is so because, in my view, having regard to the facts, the plaintiff's case must fail irrespective of whether the law of restitution is limited in the manner submitted by Mr Walsh or whether there is a right to compensation in the circumstances suggested by Mr Waters QC.

The Facts

[87] The fundamental basis of the plaintiff's case, as it emerged in the evidence of Mr Cross, is that at the defendant Council's meeting of 11 February 1987, the plaintiff received approval to expand its development proposals for the Mary Ann Dam to include not just a restaurant/yacht club, but also construction of a motel and caravan park. The evidence of Mr Cross is that such approval in principle was granted subject to satisfactory compliance with the twenty-one points set out in the letter dated 15 December 1986 from town clerk, Mr Burfitt (Exhibit P1-15 to 17).

[88] The first observation that needs to be made is the stark contract between the evidence of Mr Cross and the plaintiff's statement of claim. The plaintiff's

statement of claim (see para. [22] above) identifies the critical issue as the combined effect of the letter dated 15 December 1986 and discussions between Mr Cross and the Mayor on behalf of the defendant Council. The statement of claim makes reference to the defendant Council's meeting of 11 February 1987 only in terms of Mr Cross having made "a detailed presentation" of the plaintiff's development proposal. There is no claim that the plaintiff was granted any form of approval for an expanded development at that meeting.

[89] On the basis of all the evidence, I am satisfied that Mr Cross did not receive any form of approval to develop a motel and caravan park at Mary Ann Dam at the defendant Council's meeting of 11 February 1987. I have reached this conclusion in the light of a number of considerations to which reference is made below.

[90] Firstly, I am not persuaded that the evidence of Mr Cross can be relied upon to provide an accurate account of the plaintiff's dealings with the defendant Council concerning proposed development of the Mary Ann Dam generally and, in particular, regarding the meeting of 11 February1987. I hasten to add that I do not wish to be taken as doubting the honesty of Mr Cross. I accept that he is sincere in his present belief that the plaintiff had approval " in principle" to develop a restaurant/yacht club, motel and caravan park at Mary Ann Dam. However, I am also satisfied that the belief of Mr Cross cannot be attributed to any action (or lack of action) by or on behalf of the defendant Council.

[91] The numerous inconsistencies and uncertainties in the evidence of Mr Cross (as to which see below) suggest that, with the passage of time, there has been an element of subjective reconstruction of events to justify his belief in having had the approval of the defendant Council to prepare detailed proposals for a three stage development at Mary Ann Dam.

[92] In summarising the evidence of Mr Cross, I have noted previously the uncertain nature of his evidence as to how the idea of the plaintiff expanding its proposal for a restaurant/yacht club to include a motel and caravan park came about. Mr Cross first suggested that the idea came from the town clerk, Mr Burfitt. Later in his evidence, Mr Cross suggested that the idea emerged in the course of discussions between himself and a sub-committee of the defendant Council. Eventually, Mr Cross conceded that he may have been mistaken as to the establishment of any sub-committee. At another point in his evidence, Mr Cross suggested that the idea of a larger development was a joint decision of the plaintiff and the defendant Council.

[93] I accept the evidence of Mr Burfitt that at no stage did he encourage Mr Cross to expand the plaintiff's development proposal. I also find that the defendant Council did not establish a sub-committee for the purpose of overseeing development at the Mary Ann Dam.

[94] Mr Cross gave evidence that shortly before the meeting of 11 February 1987, he delivered a letter (Exhibit P2) to the town clerk, Mr Burfitt. The essence of this letter (see para. [31] above) is that, having regard to the

rejection of the defendant Council's application to the Northern Territory Government for an infrastructure grant, the **plaintiff** considered that its proposal for a restaurant/yacht club development was not financially viable. In that letter, the **plaintiff** writes:

> "We would like to propose that Teilact obtains permission from Council to build motels after completing Yacht Club."

[95] It was also the evidence of Mr Cross that in the absence of Council approval for an expanded project, the plaintiff would abandon the initial proposal to develop a restaurant/yacht club.

[96] I am satisfied that the plaintiff's proposal for a three stage development at Mary Ann Dam (restaurant/yacht club; motel; caravan park) was solely an initiative of the plaintiff and not something suggested or encouraged by or on behalf of the defendant Council. This is not to say that the defendant Council was uninterested in seeing a motel and caravan development at Mary Ann Dam – my finding is simply that the plaintiff, having concluded that its initial proposal for a yacht club/restaurant was not financially viable, decided to pursue a development of a larger scale.

[97] The key issue in the present context is, of course, not the origin of the proposal for a three stage development, but rather whether any form of approval for such a development was granted to the plaintiff at the defendant Council's meeting of 11 February 1987. Here again, the evidence of Mr Cross is both uncertain and, I find, unreliable.

[98] The initial evidence of Mr Cross was that the plaintiff received approval in principle to develop a motel in addition to the restaurant/yacht club "with some reservations about the caravan park". Later in his evidence, Mr Cross was quite firm that the defendant Council had granted approval for all three stages of the plaintiff's development, including the proposed caravan park. This uncertainty in the evidence of Mr Cross as to precisely what the defendant Council had approved is compounded by the claimed terms of such approval. The evidence of Mr Cross is that the defendant Council granted approval on the same basis as its earlier approval regarding the development of a restaurant/yacht club, namely the twenty one points set out in the town clerk's letter of 15 December 1986. Point number 14 of that letter states:

> "14. Agreement that no occupation of the facility will be permitted until all facets of the project are totally completed to the satisfaction of the Council is received in writing."

[99] There was no suggestion by Mr Cross that this requirement had been removed or amended at the meeting of 11 February 1987. Such a requirement would, however, be quite inconsistent with the evidence of Mr Cross (and Mr Hamor) that the plaintiff's proposal was for a three stage development. At page 4 of the plaintiff's written presentation (Exhibit P3) to the defendant Council at its meeting of 24 June 1987, it was said:

> "The three stages of this programme will be developed consecutively with each overlapping the past in the construction programme. It is estimated that the whole of the development and construction

> programme will take about two years, with progressive opening of the amenities at the dam as they are completed."

[100] In the submission of Mr Waters QC, any uncertainty in the evidence of Mr Cross as to what was approved at the meeting of 11 February 1987 should be dispelled by the actions of Mr Cross (and Mr Hamor) subsequent to the meeting. In short, Mr Waters QC poses the question that if the plaintiff did not receive approval for all three stages of its proposed development at the meeting, why did the plaintiff, a relatively small building company, engage Sydney architects and spend thousands of dollars if there was any uncertainty about the Council's intentions to proceed with the plaintiff's proposals at the Mary Ann Dam. As I have indicated, I accept the Mr Cross has a sincere belief that he had the defendant Council's in principle approval, but the real issue is whether the defendant Council was in any sense responsible for that belief.

[101] In this context, it is common ground that, shortly after his appointment as town clerk, Mr Anderson wrote to Mr Cross concerning the plaintiff's proposal "to develop a restaurant/yacht club" and noting that the defendant Council had yet to receive detailed plans and specifications. It is also common ground that at a meeting between Mr Cross and Mr Anderson on 22 April 1987, it was agreed that the plaintiff would make a detailed presentation of its development proposals at a meeting of the defendant Council on 13 May 1987.

[102] Mr Cross initially gave evidence that he had explained to Mr Anderson that the plaintiff needed more time to present its proposals "because the size of the project had quadrupled in size "(see para. [38] above). Later in his evidence, Mr Cross said that he could not recall if he had told Mr Anderson that the plaintiff's proposals were no longer restricted to a restaurant/yacht club, but extended to a motel and caravan park. Mr Anderson gave evidence that he could not now recall details of what was discussed between himself and Mr Cross beyond the fact that an extension to 13 May 1987 was granted for submission of the plaintiff's proposals. Whatever the content of the discussions between Mr Cross and Mr Anderson, I consider it is a matter of very real significance that, on the instructions of Mr Cross, a letter dated the day of their meeting (22 April 1987) was forwarded to the defendant Council by David Keeler of Keeler & Associates Pty Ltd. I have set out the text of this letter at para. [15] above. The letter cannot be interpreted as anything other than an expression of interest by the plaintiff to construct a motel and caravan park at Mary Ann Dam. This letter is entirely at odds with the evidence of Mr Cross that the plaintiff had received approval in principle to proceed with a motel and caravan park development in February 1987. The evidence of Mr Cross that the letter's reference to an "expression of interest" is mere terminology is, in my view, wholly unconvincing.

[103] Similarly, the references in the plaintiff's written report of its proposals (Exh. P3 – see paras. [42] to [46] above) to the plaintiff's confirmation of its interest in developing Mary Ann Dam and its invitation to the defendant

Council to provide the plaintiff with a letter of intent are inconsistent with the plaintiff having any existing approval for development of a motel and caravan park. The evidence of Mr Cross that a letter of intent is synonymous with a contract in the context of Exhibit P3 is, again, wholly unconvincing.

[104] The evidence of Mr Hamor, Mr Bond and Mr Carmens does not assist the plaintiff as to what occurred at the meeting of the defendant Council held on 11 February 1987. At its highest, the evidence of Mr Hamor suggests that the defendant Council was "serious about proceeding" with the development of Mary Ann Dam. Such evidence does not support the existence of any approval in principle that the plaintiff was or would be the chosen developer. Further, correspondence sent by Mr Hamor to the defendant Council in May and June 1987 does not indicate that the plaintiff had any approval (in principle or otherwise) to proceed with development of a motel and caravan park at Mary Ann Dam.

[105] In a letter dated 21 may 1987 (Exhibit P1-28) Mr Hamor referred to the defendant Council's meeting of 13 May 1987 and continued:

> "…we will prepare for Council a formal submission of the various aspects of **our proposal**…" (emphasis added)

[106] In a facsimile dated 23 June 1987 (Exhibit P1-28) Mr Hamor referred to the meeting of the defendant Council to be held on the next day and his

intention to provide a written report (Exh. P3) of the plaintiff's proposals. Mr Hamor's facsimile continued:

> "This submission …. We hope will assist Council to favourably consider our proposal…".

[107] One would expect that if the plaintiff already held the approval claimed by Mr Cross, the plaintiff's architect would be seeking approval of its plans rather than favourable consideration of its proposals.

[108] Nothing in the evidence of the former town clerks Mr Burfitt and Mr Anderson nor Mr Chittock, the then Mayor, lends support to the claim by Mr Cross to having received approval for a three stage development of the Mary Ann Dam at the Council's meeting of 11 February 1987. These witnesses claim not to recall precise details of conversations in the relevant period: a claim which I accept, having regard to the passing of twelve years since relevant events. However, their evidence that the plaintiff received no expanded development approval (for a motel and caravan park, in addition to the earlier in principle approval for a restaurant/yacht club) is consistent with the documentary evidence. In addition to the plaintiff's "expression of interest" (made through Keeler & Associates Pty Ltd in April 1987) and the passages to which I have referred in Exhibit P3 and Mr Hamor's correspondence, there is the absence of any record of a Council resolution approving the plaintiff's expanded development proposals. Mr Cross accepts that the Council could act only by resolution.

[109] The briefing note (Exhibit D2) prepared by Mr Burfitt and given to Mr Chittock before the meeting of 11 February 1987 is also consistent with the absence of any resolution by the defendant Council granting the approval claimed by Mr Cross. Mr Waters QC submits that this briefing note should be viewed as part of some sinister plot to disguise the Council's wish to have the plaintiff work up development proposals at its own expense that could then be compared with anything put forward by P.M.T. Partners Pty Ltd.

[110] I consider that there is nothing sinister in the briefing note of Mr Burfitt. In this regard I accept his evidence that the rationale of his recommendation (to allow Mr Cross to present his case but for Council to give "no indication") was that the defendant Council should make no further commitments to Mr Cross at a time when he had not addressed the twenty one issues referred to in the letter of 15 December 1986.

[111] I also keep in mind that the briefing note (Exhibit D2) prepared by Mr Burfitt refers to the attendance of representatives on behalf of P.M.T. Partners Pty Ltd after the time fixed for Mr Cross to meet with defendant Council on 11 February 1987. Mr Burfitt's note refers to P.M.T. Partners being "interested in being involved with the Mary Ann Dam" (see para. [56] above) and, as with Mr Cross, the note recommends that the interested parties by given only an "opportunity to present their case" with further discussion of the matter to be pursued by the defendant Council at a later time.

[112] The evidence as to whether the defendant Council met with representatives of P.M.T. Partners Pty Ltd on 11 February 1987 after hearing from Mr Cross is unclear. Mr Chittock was not asked about such a meeting. Alderman Carmichael gave evidence that he could not recall such a meeting. Mr Burfitt's evidence was that he believed such a meeting took place and that he specifically recalled the attendance of Mr Barry Shannahan (an architect of the firm Shannahan, Keeler and Faesche which, at the time, acted for P.M.T. Partners Pty Ltd). I accept the evidence of Mr Burfitt that at least Mr Shannahan met with the defendant Council on 11 February 1987 to discuss the Mary Ann Dam on behalf of P.M.T. Partners Pty Ltd. The fact that such a meeting was held is inconsistent with the defendant Council having granted any approval to the plaintiff to proceed with its three stage development of the Mary Ann Dam.

[113] Events subsequent to 11 February 1987 involving P.M.T. Partners Pty Ltd and the defendant Council are similarly inconsistent with Mr Cross having received any approval for the plaintiff's enlarged proposals at the meeting of 11 February 1987.

[114] The records of the defendant Council indicate that on 20 February 1987 (Exhibit D4) P.M.T. Partners Pty Ltd registered its interest in developing the Mary Ann Dam. Following a meeting of the defendant Council on 12 March 1987 P.M.T. Partners Pty Ltd. was advised by letter (Exhibit D7) of the rejection of its proposals. On 10 April 1987, the defendant Council wrote (Exhibit D8) to Barry Shannahan Consultancies inviting P.M.T. Partners Pty

Ltd. to put forward further proposals and attend a meeting of the defendant Council on 22 April 1987 for that purpose.

[115] Mr Waters QC lays particular emphasis on the evidence of Mr Carmichael, an Alderman of the defendant Council, who attended the defendant Council's meeting of 11 February 1987. I have referred to certain passages of Mr Carmichael's evidence at paras [65] and [66] above. Mr Carmichael denied that any form of approval development of a motel or caravan park was given to Mr Cross at the meeting. However, Mr Waters QC submits that the effect of Mr Carmichael's evidence is such to support a submission that Mr Cross left the meeting with the impression that he had approval to proceed with a motel and caravan park development subject to satisfactory resolution of the twenty one issues referred to in Mr Burfitt's letter of 15 December 1986 (re the initial proposal for a restaurant/yacht club).

[116] I consider that such an interpretation of Mr Carmichael's evidence is misconceived. While Mr Carmichael appeared to concede that a three stage development by the plaintiff could "proceed" if the twenty one issues were met, he immediately clarified this answer by adding that the project could proceed to "the next stage" and that "the letter was the thing that needed to be answered". Mr Carmichael was not asked to define what he meant by "the next stage". However, I consider that upon a fair reading of the whole of Mr Carmichael's evidence, what he intended to convey was that until Mr Cross had addressed satisfactorily the twenty one issues raised in relation to the proposed restaurant/yacht club, there would be no

consideration of, or commitment to, proposals by Mr Cross for an expanded development encompassing the "next stage", namely, a motel and/or caravan park.

[117] At no stage did Mr Cross seek any written confirmation of the alleged approval granted at the defendant Council's meeting of 11 February 1987. Mr Cross concedes that at that meeting he did not present any concept plan, feasibility study or financial estimates. He put forward "an idea" (transcript p.103) for a project likely to cost five or six million dollars. It is difficult to conceive that the defendant Council would give any approval, in principle or otherwise, to a project of such a scale based simply on presentation of an "idea". In light of the matters to which I have referred, I am satisfied that no such approval was given by the defendant Council. I am also satisfied that the defendant Council's "silence" (by not expressly rejecting the proposals put forward by Mr Cross) could not have left Mr Cross with the impression that the defendant supported the plaintiff's proposals for an enlarged development subject to mutual resolution of the twenty one points raised in the Council's letter of 15 December 1986.

[118] The totality of the evidence is such as to satisfy me that while Mr Cross did not receive approval for the plaintiff's enlarged development proposals on 11 February 1987, he may well have been given the impression that the defendant Council was prepared to **consider** any **new proposals** that he wished to put forward for a larger development at the Mary Ann Dam, subject to the plaintiff satisfactorily resolving the twenty one issues raised

in relation to the **initial proposal** for a restaurant/yacht club development. The defendant Council might be criticised for not drawing the attention of Mr Cross to the interest of P.M.T. Partners Pty Ltd in developing the Mary Ann Dam, but the available evidence falls a long way short of establishing that the defendant Council made any form of commitment to Mr Cross on 11 February 1987 as to staged development of a restaurant/yacht club, motel and caravan park. Indeed, on the available evidence, I am not satisfied that the defendant Council encouraged the plaintiff to submit proposals for development of a motel and caravan park.

Conclusions

[119] In all the circumstances, I am satisfied that the defendant Council did not receive any benefit or "enrichment" from the work of the plaintiff in preparing its proposals for a "three stage" development of the Mary Ann Dam. Such work as the plaintiff did undertake was not for the defendant Council's benefit, but rather for the plaintiff's own purposes in seeking to persuade the defendant Council to award the plaintiff the right to develop the site coupled with a lease on terms to be agreed.

[120] Even on the assumption that the law of restitution is sufficiently broad to encompass recovery for provision of "pure" services, the plaintiff's case must inevitably fail in the absence of "a joint assumption that a contract will be entered into between (the plaintiff and the defendant" (*Sabemo,* supra, at p.902). I have found that the defendant Council granted no approval (in

principal or otherwise) to the plaintiff for development of a motel and caravan park at the Mary Ann Dam. Accordingly, there was no joint assumption that the parties would enter a contract for these elements of the plaintiff's proposals for development.

[121] In relation to the plaintiff's initial proposal for a restaurant/yacht club, the plaintiff had received "approval in principle" for such a development (subject to the twenty-one issues set out in the defendant Council's letter of 15 December 1986). In the light of the onerous nature of the twenty one issues required to be resolved to the defendant Council's satisfaction, it is open to doubt that the parties ever shared a joint assumption that a contract would be entered into for development of a restaurant/yacht club. However, if such a joint assumption ever existed, there can be no doubt that it ceased at the meeting of the defendant Council held on 11 February 1987.

[122] Whatever other uncertainties exist in the evidence of Mr Cross, his evidence was unequivocal that, consequent upon the refusal of the Northern Territory Government to provide an infrastructure grant for the Mary Ann Dam, the plaintiff would not be proceeding with its initial proposals (approved in principle by the defendant Council in December 1986) for a restaurant/yacht club. In such circumstances, no question can arise of the plaintiff being entitled to "fair and just compensation" for its work in relation to the initial proposals for a restaurant/yacht club. It was the plaintiff's unilateral decision to abandon its original proposal (albeit for valid reasons) and regardless of however benevolently the question of "benefit" is approached,

there is no basis for the defendant Council to be held liable for work of the plaintiff (performed during December 1986 and January 1987) in developing proposals which were never presented to the defendant Council for consideration and approval.

[123] The plaintiff's revised plans for a (larger) restaurant/yacht club, combined with a motel and caravan park, were presented in outline form at meetings of the defendant Council held in May and June 1987. In the absence of a joint assumption by the parties that a contract would be entered into on the basis of proposals for a "three stage" development of the Mary Ann Dam, the work undertaken by the plaintiff cannot be said to have been beneficial to the project or in the interests of the parties. I am satisfied that the defendant Council derived no benefit at the expense of the plaintiff. Accordingly, I am further satisfied that there is no basis for the defendant Council to pay anything to the plaintiff by way of fair and just compensation.

Result

[124] I dismiss the plaintiff's claim and in the action I give judgment for the defendant Council against the plaintiff.

[125] In the ordinary course of events, the plaintiff would be ordered to pay the defendant's entire costs. However, one full hearing day was lost upon the defendant's application to adjourn (to secure the attendance of a witness) and as a consequence it was necessary for Mr Waters QC to reduce much of his closing submissions to writing. In the circumstances, the plaintiff is

ordered to pay the defendant's costs save with respect to the final two days of the seven day hearing.