PARTIES:	
NO: 23 OF 1995	EIRE PTY LTD (ACN 009 651 281)
	AND:
	STAMEN INVESTMENTS PTY LTD (ACN 009 619 363)
	V:
	METAL ROOFING & CLADDING PTY LTD (ACN 010 035 266)
	AND
NO. 8 of 1993	MANNIN PTY LTD
	V:
	METAL ROOFING & CLADDING PTY LTD (ACN 010 035 266)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	23 of 1995; 8 of 1993
DELIVERED:	30 July 1998
HEARING DATES:	26 May-5 June; 6-8 July 1998
JUDGMENT OF:	Gray AJ

REPRESENTATION:

Counsel:

Plaintiff:	A. Wyvill
Defendant:	S. Southwood

Solicitors:

Plaintiff:	James Noonan
Defendant:	Morgan Buckley

Judgment category classification:
Judgment ID Number: gra98007
Number of pages: 32

gra98007

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

BETWEEN:

No.23 of 1995

EIRE PTY LTD (ACN 009 651 281)
Plaintiff

AND:

STAMEN INVESTMENTS PTY LTD (ACN 009 619 363)
Second Plaintiff

V:

METAL ROOFING & CLADDING PTY LTD (ACN 010 035 266)
Defendant

AND

No. 8 of 1993

MANNIN PTY LTD
Plaintiff

V:

METAL ROOFING & CLADDING PTY LTD (ACN 010 035 266)
Defendant

CORAM: GRAY AJ

REASONS FOR JUDGMENT

(Delivered 30 July 1998)

These are two proceedings which, by order of the Court, were heard together.

The first in point of time is a claim for damages for breach of contract by Mannin Pty Ltd ("Mannin") against Metal Roofing and Cladding Pty Ltd ("Metclad"). This proceeding was issued on 21 January 1993. At that time Mannin's claim included a claim for loss of profits arising from the delayed opening of a supermarket. Later in 1993, it was realized that Mannin was not the correct party to sue for the loss of profits. On 7 February 1994, the second proceeding was instituted in which the claim for loss of profits was made. The plaintiffs are Eire Pty Ltd ("Eire") and Stamen Investments Pty Ltd ("Stamen") and the defendant is Metclad. The second proceeding was issued outside the time stipulated in s12 of the *Limitation Act*. An order pursuant to s44 of the Act for an extension of time is sought.

Each proceeding arises from the business activities of Michael and Janet McElwee at Timber Creek in the Northern Territory. Timber Creek is roughly half way between Katherine and Kununurra. It is a four hour drive from Katherine. There is a substantial Aboriginal presence in and around Timber Creek. It can fairly be described as a remote community.

In March 1990, Mr and Mrs McElwee purchased the Wayside Inn at Timber Creek. It had a 24 hour liquor licence and also sold fuel. Mr and Mrs McElwee had been persuaded to conduct their affairs through a number of companies and trusts. The result was that the land and fixtures were purchased

by Stamen, a land holding company. The business of the Wayside Inn was acquired by Eire. Mr McElwee was a builder and that business was conducted by Mannin. In respect of each of these companies Mr and Mrs McElwee were the sole directors and shareholders. This proliferation of legal entities, however desirable in other ways, led to the failure to make the loss of profits claim in the name of the correct party.

To return to the narrative, it was appreciated by Mr and Mrs McElwee from an early stage that there was a potential profit to be made by building a supermarket at Timber Creek. They had been approached by Aboriginals and asked to build a supermarket so that a larger variety of goods would be available. The Wayside Inn sold only meals, cigarettes, soft drinks and fuel. There were also caravan sites, camping and some accommodation units.

So, Mr and Mrs McElwee resolved to build a supermarket and get it open as soon as possible. Their plan was to build the supermarket in about three months before the wet season and open for business by 1 November 1990. The building operation was to be conducted by Mannin. Plans were prepared and in June 1990 quotes were obtained for the different sections of the undertaking. A significant component of the work was the metal roof and cladding required for the building. Metclad was a well known national supplier of this class of material.

In June 1990, Metclad was supplied with the plans and Mr McElwee had a conversation with one John Michel who was then the manager of Metclad's

premises at Palmerston. Mr McElwee told Mr Michel that the material was for the building of a supermarket at Timber Creek and that he wanted the materials as soon as possible and that Metclad's ability to deliver the materials promptly would be an important factor in deciding whether to give them the job. Mr Michel said he would get back to Mr McElwee .

On 25 June 1990, Metclad provided a written quote for the supply of the required materials. Mr McElwee arranged to meet Mr Michel at Palmerston. The quote was discussed and Mr McElwee requested that one item, namely "RHS beams, posts and stumps" be deleted and an amended quote provided. Mr Michel agreed.

On 29 June 1990, the amended quote was provided. Mr McElwee again spoke to Mr Michel. Mr McElwee said that the quote was acceptable and he required delivery by the end of July. He added that Mrs McElwee would be coming in to pre-pay the amount. Mr Michel did not demur in relation to the delivery date. At about this time Mr McElwee ordered other building materials for the supermarket to be delivered during July.

Following Mr McElwee's acceptance of Metclad's quote, Mrs McElwee attended at Metclad's office to pre-pay the account. She explained that there would be no invoice in existence because the goods were not to be delivered until July. An invoice was then prepared and produced. Mrs McElwee paid the amount due, namely $20,604 less a 2½% discount. On the printed form of invoice there is a section headed "Date required". On the copy of the invoice

handed to Mrs McElwee the date under this heading is “27.7.90”. The date is written in biro pen. The date appears to have been originally “1.6.90” and later “7.7.90”. The copies of the document retained by Metclad do not have the change to “27.7.90”. I am satisfied that Mrs McElwee did not make the alteration to “27.7.90”, but there remains something of a mystery about the invoice and the copies. I am not prepared to treat the document as evidencing an agreed delivery date of 27 July for two reasons.

First, it was accepted by Mrs McElwee that she was anxious to have the transaction treated by the taxation authorities as having occurred before 30 June 1990. Second, Mrs McElwee wrote on her copy of the invoice the expression “All on order, delivery July August”.

There was no evidence as to how the copies of the invoice retained by Metclad were treated, although there was evidence from Robert Newman, who was Metclad’s factory manager at the relevant time. There were 3 copies of the invoice produced from the custody of Metclad. The copies are coloured green, pink and yellow. Mr Newman said that the system was that the pink copy went to the factory and it was the factory’s job to see that the materials specified were produced by the date required as expressed in the copy invoice. Mr Newman gave no evidence concerning the pink copy invoice relating to this case. He said that Mr Michel left Metclad’s employ during 1991 and two other men left at the same time. Mr Newman said that this caused a bit of disorganization. He said that the material specified in the present invoice

could have been prepared in four to five weeks. He said that the yellow copy invoice is given to the transport driver or customer who picks up the goods.

He also said that it was usual for builders of structures in remote communities to arrange for the delivery of all the material required at one time. The evidence was that Mr Michel is now dead.

In determining what was the common intention of the parties concerning the delivery date of the material, I should say at the outset that I found the evidence of Mr and Mrs McElwee to be perfectly satisfactory. Each was criticised in some respects but not, in my opinion, with effect. I am satisfied there was nothing in the nature of wilful deception in either case.

I am satisfied that the understanding between Mr McElwee and Mr Michel was that the material be ready for transporting to Timber Creek by the end of July, or within a reasonable time from the order, which I would fix at five weeks in conformity with Mr Newman's evidence.

This finding is, I think, supported by a number of factors. First, the endorsement on the invoice made by Mrs McElwee. Second, the arrangements made by Mr McElwee with other suppliers. Third, the fact that when the allegation re the delivery date was made in a solicitor's letter in November, it was not denied in Metclad's formal reply. Fourth, the fact that complaints consistent with a July-August delivery date were made by Mannin from September onwards. Fifth, and most important, is the overwhelming

probability that Mr and Mrs McElwee wanted the supermarket built as rapidly as possible.

In determining that the delivery date fixed for the delivery of the material was not later than 5 weeks from the acceptance of the quote, I am also satisfied that time was of the essence. This inference arises from the mutual understanding of the parties that the building of the supermarket was an urgent matter. Furthermore, it is the general rule where a time is fixed for delivery in a contract for the sale of goods *Hartley v Hymans* [1920] 3 KB 475 at 484.

In discussing the nature of the contract which was made, I have got rather ahead of events.

Mr McElwee arranged with a subcontractor, George Riches, that Mr Riches would build the entire supermarket apart from the painting, electrical and plumbing work.

The first work was to clear the site and drill holes for the steel stumps upon which the bearers and joists are laid. The concreting was done by one Mario Candida. Mr Riches was to be remunerated at a rate of $70 per square metre. The job involved an area of 200 to 220 square metres, which meant that Mr Riches was likely to receive between $14,000-$16,000.

Mr Riches first attended the site in July 1990 to supervise the setting out of the building. The footings were poured in the second week of July. This

work was finished by the end of July. The RHS beams and stumps, which were ordered from Bluemax, did not arrive until September.

In late July or early August, Mr McElwee telephoned Mr Michel and asked where the materials were because they were ready to proceed. Mr Michel said they were getting it together and it would be ready in a week. Mr McElwee accepted this. The materials still did not arrive. Mr McElwee telephoned again and was told by Mr Michel that the material was not ready and that there was a new manager and that he, Mr Michel, was leaving Metclad.

During August, Mr McElwee spoke to Mr Michel on three occasions and was told, in substance, that the material would be available shortly. The Timber Creek races were held in early September. Soon after Mr McElwee spoke to Mr Michel at Metclad's office in Palmerston. Mr Michel said he was leaving and did not want to get involved as it was the new manager's responsibility.

During the third week of September, some of the materials were delivered to the site. These were picked up by a carrier named Mr Austin, who was engaged by Mannin. It had been anticipated that Mr Austin would employ three trailers to bring all the material ordered. In fact, he arrived with part of the material on one trailer.

The materials which arrived were the steel wall frames, floor joists, bearers, verandah joists, cleats, purlin bolts, most of the steel roof trusses and about a third of the roof battens. The items which were not delivered were the whole of the roof, the flashings and fixings, the Z purlins and the fascia brackets and corners.

Mr Riches, who had been doing other work during August, returned to the site and went on with the work until he reached the roof stage where he could go no further.

After the incomplete delivery, Mr McElwee contacted Metclad immediately. He spoke to Mr Muir, who was the manager who had succeeded Mr Michel. Mr Muir said the balance of the material would be ready within a week.

Mr Riches had done all he could in about three days and then followed a series of phone calls from Mr and Mrs McElwee and three visits to Metclad's premises by Mr Riches. They were fobbed off by assurances that the materials would be coming soon. Some small items were delivered during this period, but nothing which would allow work to proceed.

Finally, in mid-November, Mr McElwee instructed his solicitor, Mr Winter, to act for Mannin. On 15 November Mr Winter faxed a letter to Metclad in the following terms.

"Dear Sir,

RE: SUPERMARKET BUILDING KIT FOR MANNIN PTY. LTD.

I am instructed by Mr. Michael McElwee as a director of Mannin Pty. Ltd. which company has ordered from you a prefabricated building kit to be used as a supermarket to be delivered by you to the Timber Creek Wayside Inn.

I am instructed that this building was ordered in June, 1990 and was paid for in full at that time, the purchase price being $20,605.00. It was agreed that the complete building kit would be available for collection by my client from your premises by 27th July, 1990.

I am advised that your company failed to make the building kit available to my client by the 27th July, 1990 and that it has been necessary for my client to make, to date, six trips to Darwin to collect parts for this building. On each occasion that parts were collected it was subsequently ascertained that necessary parts of the kit were missing.

I am advised that when my client arranged for parts of the kit to be collected recently from your premises a number of items were missing which has caused yet further delays in my client completing construction of the supermarket building.

As a result of your failure to make the building kit available to my client by 27th July, 1990 my client has suffered and continues to suffer substantial loss and damage for example;

A. costs incurred in travelling to and from Darwin to collect parts from Darwin;

B. my client having to pay workmen to stand idle as they could not continue construction of the supermarket due to missing materials and parts;

C. substantial loss of trade and profit as result of the substantial delay which has occurred in the finalisation of the construction of the supermarket building.

I understand that my client has endeavoured to discuss this matter with you on a number of occasions but has been met with a “don’t care” attitude.

My client has instructed me to advise you that he now makes time of the essence of the agreement between your company and Mannin Pty. Ltd. and requires:

A. That by 5pm on Saturday 17th November, 1990 you arrange to deliver to the construction site at Timber Creek the following items of equipment which form part of the contract:-

1. Holding down washers for substructure;
2. large number of bolts and holding plates for trusses;
3. four (4) hip trusses;
4. twenty-four (24) creeper trusses;
5. cleats and fittings
6. roof battons [sic battens] – steel
7. ceiling battons [sic battens] – steel
8. Z Purlins for verandah

B. That by 5pm on Saturday 24th November, 1990 you arrange to deliver to the construction site at Timber Creek the following items of equipment which form part of the contract:-

1. 1.6mm gal right angle metal to secure ridge capping to hips;
2. roof sheeting for complete job.

I am instructed to advise that provided the time table above is adhered to my client will not make a claim against your company for the loss and damages outlined above, however, if the above time table is not adhered to then you are hereby put on notice that a claim will be made against your company for all the losses and damages outlined above.

Yours faithfully,

DAVID de L. WINTER"

This resulted in a visit by Mr Muir to Timber Creek on 16 November, and a dispatch of further material on the same day. This further delivery was incomplete, as is evidenced by a letter dated 19 November to George Riches from Metclad in the following terms:

"Dear George,

Further to my visit of Friday 16th November, I confirm herewith the current material delivery status.

Despatched Friday 16th November.
185mm Mist Green Fascia and accessories
50x50x1.6mm Angle Tie 18/2.400.

Roof Battens	44/8.100
Ceiling Battens	300 Lm
Jack and Hip trusses	21off
200x100 Cleats	55off
M12 Purlin Bolts	400off

The above were despatched via Gascoynes Transport Con note: Z130967.

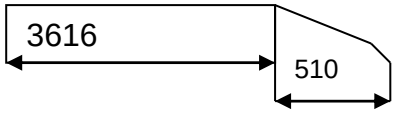
Further to my visit of 16th November, the following will be despatched by first available transport, upon despatch we will advise con note details.

Mist Green Interdek	34 @ 5.350
Mist Green Ridge	3 @ 4,500
Teks	1,200
Ridge Screws	100
100 LC 16 Purlin	4 @ 12.000
Bolts 12.20 Flathead	50 off

As I indicated to you the crimp curving may still be a week or so from this date due to commissioning of new curving equipment.

The verandah curving consists of

54 @ 4.120
Teks 14x50 1550 off



We have raised a work order for the 100 Z 16 verandah purlins and would expect availability within 14 days from todays date.

Upon delivery of the above materials, I believe all components would have been delivered.

We thank you for your understanding and assistance in this matter.

Yours sincerely,

D.H.Muir.
manager”

As a result of receiving the above letters, Mr McElwee decided to persist in seeking completion of the contract by Metclad. On 29 November the sheeting for the main roof was delivered less eight sheets, together with ridge capping.

Mr Winter faxed Metclad again on 4 December as follows:

"Dear Sir

RE: TIMBER CREEK SUPERMARKET

I refer to my letter dated 15th November, 1990. I understand that some further items have been delivered to Timber Creek however my client advises me that some of the items are still missing, as follows:

Z purlins for verandah
roof iron for verandah
roof iron missing from main roof
flashing for roof

As indicated in my previous letter your continued failure to deliver the required items and equipment to my client has caused and is continuing to cause my client substantial loss and damage, my client cannot allow these delays and unsatisfactory state of affairs to continue any longer. I am instructed to advise that unless the above items of equipment are delivered to Timber Creek by this Thursday the 6th December, 1990 my client will arrange for other suppliers to supply the above items and thereafter will look to you to reimburse the costs of these items in addition to the other claims my client will be making against your company for compensation for all other loss and damage sustained by it as a result of your failure to comply with the contract entered into in June, 1990.

Yours faithfully,

DAVID de L. WINTER"

On 5 November, Mr Muir spoke to Mr McElwee by telephone. Mr McElwee said that they were desperate to get the remaining material. Mr Muir said, in substance, that Metclad could not delivery the material required by

Mr Winter's letter dated 4 December, and that Mannin should get the materials elsewhere.

On 7 December Mr De Winter faxed a letter to Metclad as follows:

"Dear Sir,

Re: TIMBER CREEK SUPERMARKET

I refer to my letter dated 4th December, 19990. I understand that you telephoned Mr. McElwee direct on 5th December, 1990 and advised him that your company would not be able to supply the equipment requested in my letter of 4th December, 1990 until the end of January, 1991 and further advised that my client should order the equipment required from another source and should then sue your company.

My client has now ordered the balance of the equipment from another source and you may be assured that my client will be instructing me to commence proceedings against your company in the Supreme Court for all loss, damage, inconvenience, interest and costs incurred by it in connection with your company's failure to supply the building kit ordered in June, 1990 for collection by my client on 27th July, 1990.

Yours faithfully,

DAVID de L. WINTER"

On 6 December, Mr McElwee contacted Stramit Pty Ltd and ordered the crimp curving roofing. He was told that because of the approach of Christmas and the January break Stramit would not be able to provide the curved sheeting before the end of January. Mr McElwee gave Stramit the relevant measurements and ordered the roofing. It was delivered to Timber Creek on 30 January 1991 but did not arrive for some weeks because Timber Creek was cut off from traffic at the Victoria River, and to the west as well.

On 10 December Metclad delivered the missing eight sheets of flat roofing and on 18 December the Z purlins for the verandah. There was an argument over whether Metclad was obliged to provide all the flashings. In the result these were never provided and were ordered from and supplied by Stramit in March 1991.

When the curved sheeting arrived in February 1991 Mr Riches completed the roof. The next step was the completion of the floor. The floor should have been completed at an early stage of the construction to enable the walls to be supported. Because the roof could not be completed, the walls had to be supported by pieces of ply which had to be removed later when the flooring was able to be completed. The flooring was not able to be laid at the normal time because it would become rain damaged in the absence of a complete roof. This dislocation of the normal building sequence added approximately four days time to the building of the supermarket.

After the roof was completed, the next step was for the electrician to do the wiring. Mannin's usual electrician, Andrew Newell, was unavailable. he was working on other jobs in remote areas. His difficulties in returning to Timber Creek were exacerbated by the wet season. Mr Newell had done the sub-mains at an early stage of the construction, and had been paid for that work. Mr McElwee considered it was impossible to obtain another electrician to come to Timber Creek during the wet season.

Mr Newell was not able to attend at Timber Creek until June 1991 when he completed the electrical work. Between February and June 1991, Stramit had delivered some flashings and ceiling battens on 26 March and the balance of the flashings on 29 April. These items were installed in the building by Mr Riches as they arrived.

The building was inspected by the Building Inspector on 21 April 1991. After this inspection, the plumbing and electrical work could proceed. This was to be followed by the lining of the walls and ceilings. Then followed the painter and the sheet vinyl layer to complete the building operation.

Difficulties wee experienced in getting each of these trades, all of whom would have been available in the second half of 1990.

Mannin's usual painter was unavailable and another painter was tried without success. Mr McElwee ended up doing the painting himself, with the help of his brother-in-law and another man who was passing by. The sheet vinyl layer was working on Groote Eylandt and did not attend for a considerable time.

In the result, the building was not ready for final inspection until September 1991. The premises were inspected on 13 September 1991 and a

final certificate given. The supermarket was then stocked and opened for business on 1 October 1991.

The foregoing narrative represents the course of events about which I am substantially satisfied. I leave aside, for the moment, the questions of the reasonableness of the conduct of the participants and the contractual implications.

What I am about to say is concerned only with the first proceeding in point of time.

Mr Wyvill, of counsel, appeared for Mannin and Mr Southwood, of counsel, appeared for Metclad.

I have already indicated that I am satisfied that it was Metclad's obligation to have all the items listed in the invoice available for delivery to Timber Creek by mid-August 1990 at the latest. Metclad's failure to do so represented a breach of the contract under which Mannin had already performed its obligation by making payment. Mr Southwood submitted that the proper inference was that Metclad's duty was to make deliveries in stages, as and when the materials were required. There was no admissible evidence in support of this inference. I also regard such an arrangement as improbable.

On the findings I have made, it is clear that Mannin did not repudiate the contract when it was breached in mid-August. It treated the contract as being on foot and sought to bring about the belated performance by Metclad of its obligations.

However, after the piecemeal and incomplete steps taken by Metclad between September and early December 1990, the contract was clearly repudiated by Mr Winter's letter dated 7 December.

This, in my view, enables Mannin to recover

> "Such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach"

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, at 539-540.

First, the evidence satisfies me that there was a non-delivery of the crimp curved roofing, ceiling battens and most of the flashings required to be delivered under the contract. These items had to be purchased by Mannin. I allow the claim made under par7(i) of the Statement of Claim in the sum of $4662.87.

As to the losses flowing from delayed delivery, it is clear that such losses were foreseeable by Metclad. Nor did the evidence reveal any reasonable

explanation for the delays. So far as the crimp curving is concerned, it was said that the crimping machine was defective and that difficulties were experienced in fixing it. The evidence of Mr Newman suggests that Metclad put up with the vagaries of this machine throughout most of 1990. It cannot, in my view, be called in aid to render an unreasonable delay reasonable. Otherwise, the delays in delivery were quite unexplained. It remains a mystery how the copies of the original invoice were handled in the Metclad system. The difficulties experienced by Metclad in performing this contract are probably explained by a dislocation of Metclad procedures by reason of a change over of staff at the relevant time.

The largest item claimed relates to alleged additional payments to Mr Riches by reason of delay, down time, wasted work caused by the disruption to the sequence of work, trips to Darwin to secure deliveries and extra work in replacing damaged ply. The evidence under this head was far from precise. I am satisfied that extra cost was incurred under this heading but I do not feel justified in allowing the claim made, namely $8,370. This was arrived at by attributing 90% of the additional money paid to Mr Riches as being attributable to Metclad's delays. It was said that Mr Riches' original rough "quote" for the whole job was between $13,000 and $16,000, whereas he was paid $26,300. The invoices rendered by Mr Riches give no particulars of the work to which they refer. It is clear that he was doing other work for Mannin from time to time. Furthermore, as Mr Southwood pointed out, the

only extra work done on the building by Mr Riches was in doing work on the floor over three to four days at $20 per hour. I am satisfied that extra payments to Mr Riches were occasioned by Metclad's delay, but I am not disposed to allow more than $3000 under this head.

As to the claim for the cost of replacing 8 sheets of ply, this seems a foreseeable consequence of failing to deliver roofing material until the wet season arrived. This claim is allowed at $640.

I accept the evidence concerning additional freight and the claim is allowed at $304.76. There were other items of loss claimed in the Statement of Claim, but these were not pressed by Mr Wyvill. According to my calculations, Mannin is entitled to recover $8607.63 in the first action.

I now turn to a consideration of the second action. The first matter to be dealt with is the plaintiff's application for an extension of time within which to bring the action.

The first action, with which I have just dealt, was commenced on 21 January 1993. Mannin was the sole plaintiff and the claim included a claim for loss of profits by the supermarket. This came about because Mr Winter, who issued the proceeding, believed that Mannin was the proper party to make such a claim.

There is a conflict of evidence between Mr and Mrs McElwee and Mr Winter on this point. Mr Winter swore that he was instructed to sue in the name of Mannin by Mr and Mrs McElwee. They say that they left it to Mr Winter because he had organised the company arrangements and might be expected to know that Eire was the proprietor of the supermarket business.

Mr Winter discovered in November 1993 that Eire was the owner of the supermarket business. The present proceeding was instituted on 7 February 1995.

The claim for loss of profits is based upon an allegation that the supermarket would have opened in November 1990 had it not been for Metclad's negligence. This means that the cause of action accrued to Eire in November 1990. The limitation period thus expired in November 1993. Section 44 of the *Limitation Act* gives the Court jurisdiction to extend time if a fact material to the plaintiff's case was not ascertained by the plaintiff until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action is instituted within 12 months of the ascertainment of that fact. Thus, the commencement of the period under s44 for the ascertainment of a material fact is, in this case, 7 February 1994.

On 23 July 1996, an application was made to add Eire as a plaintiff in the first action. This application was refused by Angel J on 4 October 1996. An application for leave to appeal was refused by the Court of Appeal on 6 March 1997.

The material fact relied upon by the plaintiffs in this case is the furnishing of a report by Mr Chilman of KPMG to the plaintiffs' solicitors in May 1998 which provided a calculation of the loss of profit suffered by the supermarket. Although the report was based on materials provided by Mrs McElwee it is said that the revelation of the extent of the loss of profits was the ascertainment of a material fact within the prescribed period such as to authorise the Court to extend time.

Until being referred by counsel to the relevant authorities, I did not think there was any basis for the grant of relief sought.

The only fact which had any causal connection to the proceeding being out of time was Mr Winter's mistake as to the identity of the proper plaintiff. This has been held not to be a material fact for the purpose of s44. In a case in which the facts, in this regard, are indistinguishable from the present, Mildren J, in *Berno Bros v Green's Steel Constructions Pty Ltd* 84 NTR 1 held that the fact that the plaintiff though it had an action on foot against the defendant when, in fact, it did not, was not a material fact. Mr Wyvill,

although reserving his position, did not invite me to consider the correctness of Mildren J's opinion, and I do not.

However, it has been held by the High Court in *Sola Optical Australia Pty Ltd v Mills* [1987] 163 CLR 628 that, in relation to the South Australian *Limitation of Actions Act* (which is indistinguishable from the NT Act):

(i) that there is no requirement that there should be some interaction between the ascertainment of the material facts and the plaintiffs' decision to sue;

(ii) that a fact is material to a plaintiff's case if it is relevant to the issue and is likely to have a bearing on the case.

In *Sola Optical* (supra) the material fact was a medical report in which a surgeon expressed the view that the plaintiff was suffering an 80% loss of function in the arm. The plaintiff ascertained this fact years after she had instructed her solicitors to bring proceedings.

At p638, the Court said:

> "It was submitted that the dissenting view of Johnston J was correct; the Court should have held that the fact found to have been ascertained by the respondent on 20 March 1985 was not a fact material to her case for the reason that Mr. Morgan in his second report was only putting a percentage on the disabilities which she had described and demonstrated to him and of which she must necessarily have been aware at the time of his second examination. But the second report was doing more than that. It was expressing a specialist medical opinion as to the effect of the disabilities upon the functional capacity of the respondent's arm. The respondent certainly had a knowledge of the physical disabilities that she

> suffered, but it was material to her case to learn that a medical assessment of the effect of those disabilities upon her capacity to function was expressed in terms of 80 per cent loss of function. Such a fact was material to the issue of damages."

In my view, there is a close analogy between the medical a report there discussed and the accountant's report in this case.

In *Fersch v Power and Water Authority* (1990) 101 FLR 78, the Northern Territory Court of Appeal applied *Sola Optical* (supra) to a case in which the plaintiff had discovered the material fact long after he had given instructions to sue. The principal judgment was delivered by Asche CJ who, although accepting the binding authority of the High Court, expressed reservations about the state of affairs which had been reached.

The authorities to which I have referred satisfy me that I have jurisdiction to extend the time. Furthermore, there seems no reason why the Court's discretion should not be exercised in favour of the plaintiffs. To my mind, the dominating consideration is the fact that an action for loss of profits had been brought within time by a party who, for all Metclad knew, was the correct party. The mistake was purely technical, because Metclad was given notice of the claim within the limitation period. There being no significant contrary indications, I will extend the time within which the present plaintiffs may bring the action to 7 February 1995.

The next question is whether Metclad owed Eire a duty of care. I will hereafter ignore Stamen because its joinder was made to accommodate a contingency which has not arisen.

Assuming that Metclad was guilty of a negligent delay in the delivery of materials, the question is whether its duty of care extended to Eire.

In the circumstances of this case, I consider that guidance is given by the leading case of *Caltex Oil v The Willemstad* (1976) 136 CLR 529. In that case a dredge negligently broke an underwater pipe owned by AOR which carried petroleum across Botany Bay from its refinery to a Caltex terminal. Not only did AOR recover for the damage to its pipe and contents, but so did Caltex for the cost of alternative arrangements until the pipe was repaired. The Court emphasised that the defendant knew of the risk to Caltex as a specific individual rather than as a general class. It is true, as Mr Southwood pointed out, that Caltex's claim was not for loss of profits, but for expenditure incurred. Nevertheless, the Court emphasised that AOR and Caltex were engaged in a common venture and since the same loss would clearly have been recoverable by AOR, it was not really increasing the defendant's burden to allow the Caltex claim.

In this case, had the builder, owner and operator been the same person (as in reality they were), loss of profits would have been recoverable; *Victoria Laundry* (supra), at 539-40.

Furthermore, the evidence satisfies me that Metclad was informed by Mr McElwee that the material was required for building a supermarket. In that context, it could be readily foreseen that economic loss to the proprietor would be the consequence of delayed delivery. In short, I am satisfied that a sufficient degree of proximity has been established to support this aspect of the claim. Mr Southwood strenuously contended to the contrary. He submitted, inter alia, that *Caltex Oil* (supra) gives no support to a claim for loss of profits and that, in any event, the loss of profits, and certainly the extent of it as claimed, was quite unforeseeable by Metclad. I accept this submission to the extent that it is only loss of profits over a period of foreseeable duration that are recoverable. Mr Southwood also put it that Metclad had no knowledge of the existence of Eire, and did not owe it any duty. But, in my view, the evidence supports the finding that Metclad knew that the supermarket, when built, would be conducted by a particular person in the McElwee interest, as distinct from a mere member of a class.

The subject is undoubtedly difficult. See *Fleming* The Law of Torts, Ninth Edition pp193-202. But with some hesitation I am satisfied that Eire's claim for loss of profits is maintainable.

I do not have any difficulty in characterising Metclad's purported performance of this contract as negligent. The deliveries were delayed and piecemeal, and there was a failure to inform Mr McElwee of the true position when complaints were made. Nor do I feel any difficulty in finding a causal connection between the non-compliance with the contract and the late opening of the supermarket. I put aside the question of the extent of the lateness for the moment,.

In relation to the duration of the delay, I accept Mr Riches' evidence that the building of the supermarket to completion would have occupied no more than three months if the materials were all available at the outset.

I am satisfied that the lateness of deliveries of material caused substantial delay in the opening of the supermarket. Eire claims that a delay of 11 months was brought about by Metclad's defaults. It is said that the supermarket would have been completed by 1 November 1990 if Metclad had delivered the materials in late July or early August 1990. It is then said that by reason of the late deliveries and non-deliveries of material the supermarket could not be completed until late September 1991. In my opinion, the claimed 11 month period of delay is overstated at each end.

First, I am not satisfied that the supermarket would have been completed by 1 November 1990, even if Metclad had complied strictly with its contract. Apart from the foundations, the building could not commence until mid-September 1990 when the RHS beams, poles and stumps arrived on the site. If work had then proceeded smoothly, it could hardly have been completed much before Christmas, by which time the wet season was likely to have caused difficulties.

Looking at matters as they in fact developed, it is clear enough that the roof was on the building by 14 February 1991. This fact is proved by the building inspector's report (Exhibit 7), and the invoice rendered by Mr Riches at that time. The building inspector's report of 14 February 1991 gave the go ahead for the lining of the building.

From that point onwards, I accept Mr Southwood's submission that the delay in completion is far from adequately explained, even after making all reasonable allowances for the difficulties in obtaining tradesmen, the weather and the remoteness of Timber Creek. Mannin had other projects on foot during this period, and it no doubt suited Mr McElwee and Mr Riches to proceed in the way I have earlier outlined. But to attribute the full extent of the delay to the defendant is quite another matter. The evidence of Mr Cooper persuades me that the relevant tradesmen could have been obtained within a week or so of being approached.

Once the supermarket roof was on in mid-February 1991, I consider that the building could have been completed by mid-April 1991 without going to any unreasonable lengths. Mr Wyvill submitted that self interest would have driven Mr McElwee to complete the building as soon as practicable and, accordingly, it is safe to infer that earlier completion was not practicable. But Mr McElwee had other money making ventures on foot; he was not necessarily giving top priority to the completion of the supermarket.

Mr Wyvill submitted that it has not been shown that Mr McElwee acted unreasonably, and that the onus is on Metclad to prove a failure to mitigate the loss. Nevertheless, it must first be proved by Eire that the whole period of the delay is referable to Metclad's default. In that regard, Eire has been only partially successful. For the reasons given, I am satisfied that the period of delay caused by Metclad's negligence is from mid-December 1990 to mid-April 1991, namely four months.

The question of the loss of profits by the supermarket occupied several days of a very long hearing. The problem was much complicated by the fact that no separate accounts for the supermarket were kept. This was surprising because a claim for loss of profits was contemplated before the supermarket commenced trading. The difficulty arises from the fact that Eire conducted the Wayside Inn and the accommodation business concurrently with the

supermarket and no separate accounts were kept. Further, the primary record of the supermarket sales, namely till tapes, were not retained. The cash takings of the two businesses were combined and banked together.

In the result, Mrs McElwee was forced to go through the supplier's invoices and attempt to allocate the invoices to either the hotel or the supermarket. This was done in order to ascertain the level of purchases by the supermarket business and the volume of the items which were sold.

After this exercise, Mrs McElwee prepared summaries of the cost price of the goods sold through the supermarket and the profit mark up on the different type of goods. The summaries were referable to different trading periods from October 1991 to June 1993. From this material and other records dealing with business expenses, the accountants KPMG prepared a report dealing with estimates of nett profits for different periods. Mr Finch of KPMG gave evidence explaining his report. Mr Cowling from Ernst and Young produced a report and gave evidence for Metclad. He criticized aspects of Mr Finch's report.

I am satisfied that Mrs McElwee did her best to present an accurate picture, but the method employed undoubtedly lacks precision.
Mrs McElwee's evidence was strenuously attacked by Mr Southwood over a long period. He submitted that Mrs McElwee was seriously discredited, and

that the basic material is entirely unreliable. I do not accept this submission, but it is clear that the basic material must be treated guardedly.

It was accepted that, in assessing loss of profits, a period of normal trading must be considered rather than the early months of operation.

After making elaborate calculations in a lengthy report, Mr Finch concluded that the rate of lost profits to be considered is approximately $10,500 per month. Mr Cowling, who conceded that he had erroneously taken the early period of trading as a measure, arrived at a figure, when related to a normal period of trading, of approximately $4,500 per month.

There is in evidence a file note made by Mr Winter which records that on 29 September 1992, Mr and Mrs McElwee told Mr Winter that the gross takings of the supermarket were $30,000 per month, and a conservative estimate of the nett profit was $2000 per week. In her evidence, Mrs McElwee said that the foregoing statement was pretty accurate. As this estimate falls roughly mid-way between the estimates of the rival accountants, I am strongly tempted to adopt it as being a relatively reliable guide as to the true position. At the time the estimate was made, Mrs McElwee would have been in a good position to make it. Furthermore, the circumstances were such that there was no motive to over or underestimate the figure. In the circumstances, I propose to adopt it.

Accordingly, I assess the loss of profits which were occasioned by Metclad's negligence, as being $8000 per month for a period of four months.

In the second proceeding there will be an order extending the time in which the proceeding may be instituted until 7 February 1995. There will be judgment for the plaintiff, Eire, for $32,000 plus interest on that sum at 10% per annum from 14 February 1991 until judgment ($23,863).

In the first proceeding there will be judgment for the plaintiff, Mannin, for $8697.63, plus interest on that sum at 10% per annum from 7 August 1990 until judgment ($6,880).

———————————————