Bleakley v Higgins & Anor [2006] NTSC 89

PARTIES:	BLEAKLEY, Noel John AND: BLEAKLEY, Lynette (Trading as WIMRAY SAFARIS) v HIGGINS, Bernard AND: NORTHERN LAND COUNCIL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SC 111 of 2003 (20313688)
DELIVERED:	24 November 2006
HEARING DATES:	14 and 15 July 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CONTRACT – construction of deed of release – privity of contract – circularity of causes of action – abuse of process

LIMITATION OF ACTIONS – facts material to the plaintiff's case – justice of the case – onus on applicant - strength of the plaintiff's case – prejudice suffered by defendants - amendment to Limitation Act – transitional provisions

DEFAMATION – Defamation Act 2006 – transitional provisions

Defamation Act 2006
Law Reform (Miscellaneous Provisions) Act
Limitation Act (NT)

Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251;
Bloss Holdings Pty Ltd v Brackley Industries Pty Ltd [2006] NSWSC 56;
BP Refinery (Westernport) Pty Ltd v Hastings SC (1977) 180 CLR 266;
Braedon v Hynes (1986) NTJ 885;
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541
Codelfa Constructions Pty Ltd v State rail Authority of NSW (1982) 149 CLR 337;
Fersch v Power and Water Authority (1990) 101 FLR 78;
Forbes v Davies and Anor (1994) Aust Torts Reports 81 – 279;
Haines v Australian Broadcasting Corporation (1995) 43 NSWLR 404;
London & South Western Railway Co v Blackmore (1870) LR 4 HL 610;
Lovett v Le Gall (1975) 10 SASR 479;
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451;
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 76 ALJR 436;
Sola Optical Australia Pty Ltd v Mills (1987) 163 CLR 628
Schenker & Co v Maplas Equipment & Services Pty Ltd (1990) VR 834;
Snelling v John G Snelling Ltd [1973] 1 QB 87
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, all applied

Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd [1999] FCA 131;
Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd [2000] 179 ALR 738;
Penfold & Anor v Higgins & Anor [2002] NTSC 65, referred to

Reichel v McGrath (1889) 14 App Cas 665, distinguished

REPRESENTATION:

Counsel:

Plaintiff:	P A Heywood-Smith QC
Defendant:	M Lynch

Solicitors:

Plaintiff:	A G James
Defendant:	R Levy
	Northern Land Council

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bleakley v Higgins & Anor [2006] NTSC 89
No. SC 111 of 2003 (20313688)

BETWEEN:

NOEL JOHN BLEAKLEY
Plaintiff

AND:

BERNARD HIGGINS
First Defendant

AND:

NORTHERN LAND COUNCIL
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 24 November 2006)

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Introduction

[1] By writ filed in this court on 18 July 2003 the plaintiff and his wife, Mrs Lynette Bleakley, claimed damages for various libels and slanders said to have been published by the first defendant on various dates in 1998. The writ was endorsed with a claim for an extension of time in accordance with s 44 of the Limitation Act (as in force at the relevant time).

[2] On 3 September 2003 the plaintiffs filed a statement of claim in the proceeding. The plaintiffs claimed damages for ten separate publications that are identified in paragraphs 3, 6, 8, 10, 12, 14, 17, 19, 23 and 26 of the statement of claim. The publications pleaded at paragraphs 12, 14 and 19 of the statement of claim are alleged slanders. The meanings pleaded in respect of the publications are as follows:

> "The plaintiff acted out of self interest and without concern for Aboriginal people" (paragraph 4).
>
> "…Noel Bleakley (and Wimray Safaris) is a person who associates with people of ill repute, with disreputable people" (paragraphs 5, 7, 9, 11, 13, 15, 18, 21, 25 and 27).

[3] The last imputation referred to above is the only imputation pleaded in respect of the publications pleaded in paragraphs 6, 8, 10, 12, 14, 17 and 26 of the statement of claim.

[4] The only other imputations alleged to arise are in respect of the publications pleaded in paragraphs 19 and 23 of the statement of claim. The meanings pleaded in respect of those publications are respectively as follows:

> "[T]he plaintiffs were disrespectful of Aboriginal persons and dealt with Aboriginal persons in an improper and criminal way using bent money."
>
> "[T]he Plaintiffs were: engaging or seeking to engage in criminal activity; seeking to exploit Aboriginal people; acting in an underhand (hidden) way; and using 'bent' (i.e. tainted) money."

[5] On 29 October 2003 the defendants filed a defence to the statement of claim. In their defence the defendants made various non-admissions and denials of liability and pleaded that the imputations pleaded in the statement of claim were incapable of being conveyed and were not in fact conveyed, the publications were not defamatory, and, in the alternative, the publications were made on an occasion of qualified privilege. In addition the defendants pleaded that the causes of action pleaded in the statement of claim were statute barred pursuant to s 12 Limitation Act (as in force at the relevant time) and by virtue of clause 2 of a deed of settlement dated 29 June 1998 ("the deed of settlement"), which was executed by the plaintiff, his wife, the second defendant and the Arnhem Land Aboriginal Land Trust (the "Land Trust") following the resolution of proceeding No 9812574 in the Local Court, the plaintiffs were estopped from maintaining the proceeding against the defendants. It was pleaded in the defence that clause 2 of the deed of settlement provided that the plaintiff shall "not (to) take any further proceedings against (the second defendant) in respect of the Licence or any

related matter" and that the proceeding in this court was a related legal action.

[6] On 19 January 2004 the plaintiffs filed a reply in which the plaintiffs joined issue with the defendants and specifically pleaded that the publications complained of in the statement of claim were not subject to qualified privilege as the matters complained of were published by the first defendant maliciously.

[7] On 18 March 2004 Master Coulehan ordered that there be a separate trial of two questions in the proceeding. First, did clause 2 of the deed of settlement operate as a bar to the proceeding being maintained by the plaintiffs? In other words, has the plaintiff released the defendants from this proceeding? Secondly, should the plaintiffs be granted an extension of time under s 44 of the Limitation Act (as in force at the relevant time)? The trial of the two separate questions took place on 14 and 15 July 2005.

[8] On 15 July 2005 Senior Counsel for the plaintiffs, Mr Heywood-Smith QC, stated that Mrs Bleakley wished to discontinue all of the claims that she was maintaining against the defendants in the proceeding. Mrs Bleakley was granted leave to do so. A notice of discontinuance was filed on 21 November 2006.

The issues

[9] The principal issues that arose during the trial of the first separate question were as follows. First, does the proceeding raise a matter related to a

dispute involving the Licence granted to the plaintiff by the Land Trust to conduct buffalo hunting safaris in the Gangan Area? Secondly, did the plaintiff have knowledge of the pleaded publications when he executed the deed of settlement? Thirdly, is the first defendant, who was not a party to the deed of settlement, released from this proceeding by the provisions of clause 2 of the deed of settlement?

[10] The principal issues that arose during the trial of the second separate question were as follows. First, did the plaintiff ascertain any facts material to his case within the 12 months before the writ was filed in the Court? Secondly, was the finding by Mildren J in *Penfold & Anor v Higgins & Anor* [2002] NTSC 65 that the first defendant was acting maliciously when he published the document headed, "Briefing Notes for Director Northern Land Council NT Tourist Commission Board Meeting 2 December 1994" to Mr Daryl Pearce a fact material to the plaintiff's case? Thirdly, was the strength of the plaintiff's case a factor to be taken into account in determining whether it was just to grant an extension of time and, if so, were the pleaded publications reasonably capable of bearing the meaning or meanings alleged by the plaintiff; and, of being defamatory of the plaintiff? Fourthly, in all the circumstances of the case was it just to grant the plaintiff an extension of time under s 44 Limitation Act (as in force at the relevant time)?

The plaintiff's case

[11] Mr Heywood-Smith QC argued that under s 44 of the Limitation Act (as in force at the relevant time) the plaintiff was entitled to an extension of time in which to bring the proceeding against the defendants for the following reasons. The plaintiff relied upon the affidavits of himself dated 16 May 2005 and 6 June 2005, and of his solicitor, Mr A G James dated 7 June 2005. The affidavits depose that the plaintiff did not become aware of nine of the ten publications pleaded in the statement of claim, including annexures "B" to "F" of the statement of claim and their contents, until November or December 2002. The circumstances of the plaintiff seeing annexure "A" prior to that time were disadvantageous to a reflective consideration by the plaintiff of that publication. Further, on or after 11 December 2002 the plaintiff learnt that in the matter of *Penfold & Anor v Higgins & Anor* (supra) Mildren J had found that the first defendant had defamed Mr Robert Penfold and Hunt Australia Pty Ltd and had done so with malice. All of these matters it was said were facts material to the plaintiff's claim against the defendants. The discovery of the latter material fact overcomes the threshold problem that the plaintiff may have otherwise had in relation to the cause of action based on the publication of annexure "A" to the statement of claim. The proceeding was commenced within 12 months of the plaintiff ascertaining these matters.

[12] Mr Heywood-Smith QC submitted that Mildren J's finding in *Penfold & Anor v Higgins & Anor* (supra) that the first defendant was actuated by

malice when he defamed Mr Penfold was relevant to this proceeding because his malice towards Mr Penfold tainted what he said and wrote about the plaintiff. The first defendant's statements about the plaintiff were interwoven with the deliberately false statements that he had made about Mr Penfold. The malice pleaded against the first defendant is that he was actuated by ill will towards the plaintiff because the plaintiff would not combine with him to stop Mr Penfold coming onto the areas of land that were under the control of the second defendant.

[13] As to the exercise of the court's discretion to grant an extension of time Mr Heywood-Smith argued that the plaintiff had established that he has a bona fide cause of action, the imputations pleaded in the statement of claim in relation to the 10 publications have caught the defamatory gist which arises from the natural and ordinary meaning of the words used by the first defendant, the delay in the commencement of the proceeding was caused by the late discovery by the plaintiff of the facts material to his case, within a short period of time after the discovery of the facts material to his case the plaintiff obtained legal advice from Mr James, the defendants will not suffer any prejudice if an extension of time is granted to the plaintiff and the facts that have been belatedly discovered by the plaintiff go to the heart of his claim against the defendants. The plaintiff's want of prosecuting the current proceeding is irrelevant to the court's discretion to grant an extension of time. Alternatively, there was no want of prosecution of the proceeding for reasons deposed to by Mr James in his affidavit.

[14] The deed of settlement which contains the resolution of the plaintiff's claim against the second defendant in Local Court proceeding No 9812574 did not release the defendants from the proceeding because the circumstances of the release were such that the plaintiff did not know and could not have known of the defamatory publications about which he now complains in the statement of claim. Further, the proceeding is not a matter that is related to the proceeding in the Local Court and the first defendant was not a party and is therefore not privy to the deed of settlement.

The background facts

[15] At all material times Mr Robert Penfold was a Director of Hunt Australia Pty Ltd, the corporate trustee of the R & K Penfold Family Trust: *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999] FCA 131 at par [2]. The company and trust constituted the structure that Mr Penfold used to organise and conduct safari hunting tours in the Top End of the Northern Territory and elsewhere between 1981 and the mid to late 1990s. Mr Penfold operated deer, banteng cattle, buffalo and goat safari hunting in the Top End of the Northern Territory. The game was available in three locations: Gurig National Park on the Coburg Peninsula, Aboriginal land in or near Arnhem Land and privately held pastoral leases: *Penfold & Anor v Higgins & Anor* (supra) at pars [1] and [3].

[16] During the period from 1981 to the mid to late 1990s, the safari hunting business conducted by Hunt Australia Pty Ltd grew from small beginnings

to a total of about 75 clients who attended hunts in the Northern Territory. Arrangements to enter land and conduct hunts varied considerably during the period. In some cases Hunt Australia Pty Ltd utilised other safari operators who held a licence to operate in the particular area. In other cases Hunt Australia Pty Ltd held a licence to hunt on Aboriginal land or obtained permission from the pastoral lease-holder: *Penfold & Anor v Higgins & Anor* (supra) at par [6].

[17] In 1986 the plaintiff and Mrs Lynette Bleakley purchased 25 per cent of the shares in Wimray Pty Ltd. The company had a number of registered business names including "Wimray Safaris" under which the company conducted hunting safaris on Aboriginal land in the Northern Territory.

[18] The first defendant was employed by the second defendant in 1988. In 1992 the first defendant became a Senior Project Officer employed by the second defendant. The second defendant is a body corporate established under s 21 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). Part of the second defendant's function is to assist traditional owners of Aboriginal land to negotiate with third parties who may wish to obtain rights to enter and to hunt wild animals on such land. Subject to the direction of the Chief Executive Officer and the Branch Manager employed by the second defendant, the first defendant was responsible for the conduct of the second defendant's business in relation to safari hunting. Under a Licence Agreement dated 5 April 1993 that was made between Wimray Safaris and the Land Trust the first defendant's duties included the approval of guides

who were to be employed by the plaintiff; the receipt and inspection of records that were required to be kept by the plaintiff about the number of the plaintiff's clients and motor vehicles entering the Licence Area and the number of buffalo shot; the approval of campsites; the approval of the construction of buildings and fittings; the suspension of operations under the Licence Agreement for reasons of Aboriginal tradition; and, the approval of advertisements relating to the exercise of the plaintiff's rights under the Licence Agreement.

[19] On 5 April 1993 the plaintiff signed the Licence Agreement that was made between the plaintiff and Mrs Bleakley and Diane Allwright and Raymond Allwright trading as "Wimray Safaris" and the Land Trust. The Land Trust is a body corporate that was established under the Aboriginal Land Rights (Northern Territory) Act (Cth*)*. The Licence Agreement gave "Wimray Safaris" a licence to hunt buffalo in the Gangan area which comprised land held by traditional Aboriginal owners.

[20] So far as they are relevant, the recitals to the Licence Agreement stated as follows:

> C. The Licensee [Wimray Safaris] has applied for permission to conduct safari operations as hereinafter described on the Licence Area.
>
> D. The traditional Aboriginal owners of the Licence Area have been consulted by the Northern Land Council [the second defendant] and have consented to the proposed safari operations.

E. The Land Trust has received a direction from the Northern Land Council pursuant to the *Aboriginal Land Rights (Northern Territory) Act* to enter this Licence Agreement.

[21] The relevant clauses of the Licence Agreement provided as follows:

1. Subject to the terms of this Licence Agreement, the Land Trust grants to the Licensee [the plaintiff] a hunting safari licence for the Licence Area [The Licence Area was described in Schedule A of the Licence Agreement and was the area known generally as the Gangan Area of East Arnhem Land] for a term commencing on and expiring on the dates respectively specified in Item 5, both dates inclusive [The commencement date of the Licence Agreement was 1 May 1993. The expiry date was 30 April 1995.].

2.1 This Licence is granted only for the purposes of conducting safari operations as described and defined in item 6 [buffalo hunting].

3.6 This Licence only allows safaris to be operated when the Licensee or a guide approved under clause 3.7 is present on the Licence Area.

3.7 The Licensee shall only employ guides approved by the Authorised Officer.

3.8 The Licensee shall not enter into any agreement or understanding with any other safari operator that provides the other safari operator with access to the Licence Area with any of his clients.

3.9 The Licensee shall not act as an agent for or refer any of its clients to any safari operator that operates on Aboriginal land in the area of the Northern Land Council without a safari licence approved by the Northern Land Council.

3.10 The Licensee, if requested, will at all times give to the Land Trust a faithful and true account of any dealings it has with any other safari operator and in any proceedings in relation to this Licence the onus shall be upon the Licensee to prove that the Licence has been used in accordance with this covenant and not otherwise.

6.1 The Licensee shall keep in Darwin (or such other place that the parties agree) proper records for each calendar month of this Licence which, as a minimum, specify in respect of each safari operation conducted:

(a) the number of clients of the Licensee entering the Licence Area pursuant to this Licence and the names of such clients;

(b) the vehicle registration particulars of all vehicles entering the Licence Area pursuant to this licence;

(c) the number of buffalo shot during that operation and the location of the remains of the carcass of each buffalo shot.

6.2 The Licensee will produce the records required to be kept to the Authorised Officer at least once in each quarter and upon seven days verbal or written notice.

9.2 (a) Except as otherwise provided in this Licence Agreement, the Licensee shall be permitted access to the Licence Area at all times necessary to enable him to carry out the hunting safari operations in a satisfactory manner, so long as the Licensee and/or his employees are in possession of a current permit to enter upon the Aboriginal land the subject of the Licence Agreement;

(b) The Licensee may establish a camp site at such site as specified in item 10 of the agreement or at another site approved in writing by the Authorised Officer from time to time. Camp facilities only may be erected at such approved camp sites;

(c) No buildings or fixtures are to be constructed or installed without the prior written approval of the Authorised Officer provided that the Licensee may erect concrete pads at a camp site and further provided that the Licensee remove any such concrete pad prior to the completion of the term of the Licence Agreement or within two months of written notification to do so by the Land Trust;

(d) Notwithstanding paragraphs 9.2(b) and (c) the Licensee may at the camp site erect pit toilets the maintenance of which shall be the responsibility of the Licensee.

10.1 The Licensee shall not allow his clients to enter the Licence Area without a permit. For any permit application received by the Northern Land Council later than the period specified in item 11 before the commencement of a safari operation a charge of $20 per person named in the application will be paid by the Licensee to the Northern Land Council being a late fee to cover Northern Land Council administration expenses.

10.2 The Northern Land Council will provide the Licensee with permits for clients entering onto Aboriginal land.

12.2 If in the opinion of the Director of the Northern Land Council the Licensee has defaulted in the performance or observation of any covenant, condition, agreement, term, provision or stipulation of the Licence Agreement, the Director of the Northern Land Council may call upon the Licensee by notice in writing, to show cause within a period specified in the notice, being not less than five working days from the date of receipt of the notice by the Licensee why the power contained in clause 12 should not be exercised.

The notice in writing shall state that it is a notice under the provisions of this clause and shall specify the default on the part of the Licensee upon which it is based.

If the Licensee fails within the period specified in the notice in writing to show cause to the satisfaction of the Director of the Northern Land Council why the powers contained in the Licence Agreement should not be exercised, the Director of the Northern Land Council may without prejudice to any other rights that the Land Trust may have under the Licence Agreement against the Licensee, determine the Licence Agreement and in that case exclude from the Licence Area the Licensee and any other person concerned in the safari operations being carried out by or on behalf of the Licensee.

12.7 Notwithstanding any other provision in the Licence the Land Trust may terminate the Licence without cause by giving three months written notice to the Licensee of its intention to do so, upon the expiration of the period of notice.

13. The parties agree that they will at all times use their best efforts to carry out the provisions of the Licence Agreement to the end that the safari operations may be conducted efficiently and with adequate regard for the welfare of the Aboriginals entitled by Aboriginal tradition to the use or occupation of the Licence Area or land adjacent thereto whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission.

17. Except with the prior written approval of the Land Trust the Licensee shall not assign or charge in whole or in part its rights or obligations under the Licence Agreement.

21.1 In this Licence

"Authorised Officer" means any person authorised by the Director of the Northern Land Council from time to time to act on behalf of the Northern Land Council and the Arnhem Land Aboriginal Land Trust as the authorised officer. The Authorised Officer will be Bernard Higgins until further notice.

"Northern Land Council" includes the Northern Land Council, the Chairman of the Northern Land Council, the Director of the Northern Land Council or its or their nominees.

26. At the expiration of the term of the Licence Agreement should the Licence not be extended or in the event that no further Licence is granted to the Licensee and in the event that the Licensee shall with the Land Trust's consent express or implied continue to enjoy the privileges provided by this Licence the Licensee shall hold the Licence as a monthly Licensee of the Land Trust on the same terms and conditions (unless repugnant to a monthly licence) as are contained in the Licence Agreement. Provided that such monthly Licence may be determined by 30 days notice given by either party to the other on (sic) expiring on any day.

[22] During 1993 the plaintiff and Mrs Bleakley purchased the interests of Diane Allwright and Raymond Allwright in the safari business that was conducted under the name of "Wimray Safaris". They became 100 per cent owners of that business and the business name.

[23] At various times Hunt Australia Pty Ltd sought concessions to conduct safari hunting operations in Gurig National Park on the Cobourg Peninsula. The company was unsuccessful and in September 1994 Hunt Australia Pty Ltd began sending their clients to the Coburg Peninsula through Wimray Safaris: *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999] FCA 131 at par [74]; *Penfold & Anor v Higgins & Anor* (supra) at pars [99] and [100]

[24] On 2 December 1994 the first defendant defamed Mr Penfold when he published a document headed, "Briefing Notes for Director NLC NT Tourist Commission Board Meeting 2 December 1994" to Mr Darryl Pearce the then Director of the second defendant. He did so maliciously.

[25] On 30 April 1995 the term of the plaintiff's Licence Agreement dated 5 April 1993 expired and under clause 26 of the Licence Agreement the plaintiff held the Licence as a monthly Licensee on the same terms and conditions as those contained in the Licence.

[26] At the 67th Full Council Meeting of the second defendant which was held on 11 to 13 July 1995 it was resolved by the Full Council of the second defendant that the second defendant would not direct any Land Trust in its area to enter into any agreement for the grant of an estate or interest in (or any other right in respect of) land to Hunt Australia Pty Ltd or to any company or business that Mr Penfold, his family or Hunt Australia Pty Ltd

had any interest in. This resolution was put on the agenda by the first defendant: *Penfold & Anor v Higgins & Anor* (supra) at par [94].

[27] During 1995 Hunt Australia Pty Ltd commenced proceedings in the Federal Court of Australia against Davidsons' Arnhemland Safaris Pty Ltd and others: *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999] FCA 131. In the Federal Court proceeding Hunt Australia Pty Ltd claimed damages for defamation and for misleading and deceptive conduct. Judgment in the proceedings was handed down on 24 February 1999. The proceeding was subsequently appealed to the Full Court of the Federal Court of Australia and the decision of the trial judge was upheld: *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris* (2000) 179 ALR 738.

[28] At all relevant times the Gurig National Park was a jointly managed Park. It was managed by a Board of Management comprised of members of the Conservation Commission of the Northern Territory and traditional Aboriginal owners. On 19 December 1995 a member of the Board of the Gurig National park wrote to the plaintiff. In the letter it was stated that, "The Board would like to impress on those safari operators who have concessions in the Park that they would prefer Hunt Australia not to be used to source clients for hunts on Cobourg Peninsula." The plaintiff replied to the Board by letter dated 3 January 1996 to the effect that the suggestion contained in the Board's letter was prohibited by the Trade Practices Act. The Board replied by letter dated 18 January 1996. The Board requested that the plaintiff "disregard any reference to Hunt Australia".

[29] On 28 November 1997 Mr Penfold and Hunt Australia Pty Ltd commenced proceedings in the Supreme Court of the Northern Territory against the first defendant and the second defendant: *Penfold & Anor v Higgins & Anor* (supra). In the proceeding Mr Penfold and Hunt Australia Pty Ltd claimed damages for defamation against the first defendant and the second defendant. Liability was ultimately admitted and on 11 December 2002 Mildren J published his Reasons for Judgment and awarded damages to Mr Penfold and Hunt Australia Pty Ltd. In his Reasons for Decision Mildren J found that first defendant had been actuated by malice when he published the defamatory matter that was the subject of the proceeding before him. He based this finding in part on evidence that was given by the plaintiff in that proceeding.

[30] On 29 January 1998 the first defendant sent a facsimile to the plaintiff in which he informed the plaintiff that he had received information from a number of sources that the buffalo and banteng concessions held by Wimray Safaris had been sold to Mr Penfold. The first defendant stated that the reports he had received refer to Mr Penfold "mouthing off" that he had acquired the buffalo and banteng concessions previously held by Wimray Safaris. The first defendant advised the plaintiff that clause 17 of the Licence Agreement stated that "except with prior written approval of the Land Trust, the Licensee shall not assign or charge in whole or in part its rights or obligations under this Licence Agreement". The first defendant requested the plaintiff provide a faithful and true account of any dealings

that he had with Mr Penfold or any company associated with Mr Penfold in relation to his buffalo and banteng concessions.

[31] On 3 February 1998 the plaintiff sent a facsimile to the first defendant in which he stated that he knew he could not assign or sell his rights to buffalo and banteng concessions without prior written approval. He stated that he had not sold his concessions to Mr Penfold or anyone else for that matter. He stated that "as I explained in my conversation with you on the telephone on Friday 30th, [Mr Penfold] is for the first time specifically selling buffalo [hunting] safaris for me as a booking agent for my Gangan hunting area". The plaintiff stated that he would like to take on an equity partner who could help with sales not only for his benefit but also for Mr Gumana and the Gangan Community. He asked the first defendant what would be the response of the second defendant if he was able to interest Mr Penfold in a partnership to help him sell his product.

[32] In February 1998 the plaintiff gave evidence in the proceeding *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999] FCA 131 in the Federal Court of Australia. During his evidence the plaintiff stated that in about 1994, Hunt Australia Pty Ltd had entered into a contract with him whereby Wimray Safaris would provide hunting operations for Hunt Australia on the Cobourg Peninsula and in Arnhem Land. The first such hunt was conducted by the plaintiff in August 1994 and that arrangement had been ongoing until the time when the plaintiff gave his evidence in the Federal Court in February 1998: *Hunt Australia Pty Ltd v Davidsons'*

Arnhemland Safaris Pty Ltd [1999] FCA 131 at par [74]. The evidence of the plaintiff was presented by Hunt Australia Pty Ltd in the Federal Court for the purposes of establishing that Hunt Australia Pty Ltd was able to access the Cobourg Peninsula and Arnhem Land for hunting safaris.

[33] In March 1998 the Northern Territory Parks and Wildlife Commission, on behalf of the Board of the Gurig National Park, asked the plaintiff to advise them if the allegations that were reported in various hunting magazines that Hunt Australia Pty Ltd had taken over Wimray Safaris were true. The plaintiff replied by facsimile dated 13 March 1998 advising that Hunt Australia Pty Ltd merely acted as a booking agent and asserting that he had been asked this before and provided the same answer. What gave currency to the speculation were reports in overseas hunting magazines and evidence given by the plaintiff during the hearing of the proceeding in the Federal Court.

[34] On 25 March 1998 the first defendant wrote to the plaintiff. In the letter the first defendant acknowledged receipt of the plaintiff's letter dated 3 February 1998. He stated that since the receipt of this letter he had made further enquiries concerning the relationship between Wimray Safaris and Hunt Australia Pty Ltd and Mr Penfold. As a result of those enquiries he sought a detailed response from the plaintiff in relation to the following matters:

> 1. Confirmation of deposits that you have taken for buffalo hunts to be conducted on the Gangan area during 1998. This

confirmation is to include a copy of the receipt issued for the deposit taken, the name, contact address and phone number of each hunt and the date of the hunt;

2. An explanation as to why you did not attend the SCI 1998 Reno Convention and the date that cancellation for your booking was made. The Safari January/February 1998 issue had an advertisement for Wimray Safaris with the heading "See us at SCI 1998 booth 435";

3. A complete record of all dealings that you had with Bob Penfold and/or Hunt Australia Pty Ltd or anyone associated with Bob Penfold, his family or Hunt Australia Pty Ltd. It will be particularly useful for you to provide copies of all correspondence concerning the present relationship between yourself and Bob Penfold; and

4. A response to the article that appeared at page 9 of the March 1998 The Hunting Report which stated that "Bob Penfold of Hunt Australia Pty Ltd has headed up the unification under one roof of some 22 guides in Australia and New Zealand. The company has even gobbled up what used to be called Wimray Safaris". A copy of the article was attached.

[35] In his letter to the plaintiff dated 25 March 1998 the first defendant enclosed a copy of the letter that he sent to Mr Penfold dated 24 July 1995 and he reminded the plaintiff of a current resolution of the Full Council of the second defendant that it would not direct any Land Trust to enter into any agreement involving a grant of any interest or any other right to land to Mr Penfold, Hunt Australia Pty Ltd or any company or business that Mr Penfold, his family members or Hunt Australia Pty Ltd holds an interest. The first defendant stated he had not been provided with any information to suggest that the resolution of the Northern Land Council should be amended. He stated that if the plaintiff had any material to suggest otherwise he would appreciate receipt of it. These last comments suggest that the first and

second defendants were not in favour of the plaintiff going into any kind of partnership with Mr Penfold.

[36] On 25 March 1998 the first defendant wrote the following letter to Mr Gawirrin Gumana:

> Dear Gawirrin
>
> I have enclosed a letter that I sent today to Noel Bleakley asking him to provide information on two important issues:
>
> - Confirmation as to the number of clients that Bleakley has booked for buffalo hunts in the Gangan area this year; and
>
> - The arrangement between Wimray Safaris and Bob Penfold of Hunt Australia Pty Ltd.
>
> I am hearing a lot of stories from other safari operators that Noel Bleakley has sold Wimray Safaris to Bob Penfold of Hunt Australia Pty Ltd. Under the current contract that Noel Bleakley holds for the Gangan area he cannot transfer ownership of the contract without the consent of the Land Trust. This means that the NLC has to conduct consultations with the traditional land owners and obtain the instructions of the traditional land owners. It is also the NLC's job to provide information to the traditional land owners so that the traditional land owners can make an informed decision.
>
> I am therefore very concerned when I keep on hearing and reading about Noel Bleakley selling Wimray Safaris to Bob Penfold. I enclose a copy of an article from an American hunting magazine that talks about Bob Penfold buying Wimray Safaris.
>
> Due to past dealings that the NLC has had with Bob Penfold, as a result of his poor attitude towards Aboriginal people and their organisations, the NLC has passed a Full Council resolution that the NLC will not direct any Land Trust to enter any agreement with Bob Penfold. Some of the reasons for that resolution are as follows:
>
> - the non-payment of money by Penfold under a previous contract he signed with the Arnhem Land Aboriginal Land Trust;

- using Aboriginal people to get what he wants, including the direct payment of cash to only certain people. I have seen a letter that Bob Penfold sent to Robert Lee of the Jaywon Association in which Penfold states that he has paid $30,000 upfront money to the traditional owners in East Arnhem for buffalo that he will shoot this year; and

- lack of respect for Aboriginal people.

I am also very concerned that Noel Bleakley has been talking with Bob Penfold about your country, and business on your country, without letting the NLC know what is going on.

It is my view that Noel Bleakley is only interested in getting money for himself and is not worrying about what the consequences may be for Aboriginal people. From what I understand of where Bob Penfold has operated in the NT he has always caused trouble for people. This is both trouble for Aboriginal people and non-Aboriginal people.

As it seems that Noel Bleakley wants to finish up I contacted another safari operator to see if he was interested in working the Gangan area. As you can read in the letter Glen Giffin sent the NLC he is interested in working the Gangan area. He has offered a guaranteed payment of $5,500 per year and a trophy fee of $1,100 per buffalo. The trophy fee currently paid by Wimray Safaris is $1,000.

I have sent this story to the Nhulunbuy office of the NLC and explained that it is important that the NLC arranges a meeting of traditional land owners to talk about Wimray Safaris and the stories about selling to Bob Penfold. This meeting can also talk about the proposal received from Glen Giffin to conduct hunts in the Gangan area.

As a number of the comments I have made in this letter are of a personal nature I suggest you keep the information that I have provided confidential to yourself and other relevant traditional land owners.

Can you please contact me and let me know what you think about this matter.

Yours sincerely

Bernard Higgins

[37] The letter to Mr Gumana dated 25 March 1998 is the first publication complained of by the plaintiff in the statement of claim. It has not as yet been established whether the letter was published and, if so, to whom it was published.

[38] On 26 March 1998 the plaintiff responded by facsimile to the first defendant's letter dated 25 March 1998. The plaintiff denied that he had done anything wrong. He stated that he would answer the first defendant's letter if he was given a written guarantee that a copy of his letter and any information contained therein would not be given to anyone other than the staff of the second defendant. On 26 March 1998 the first defendant sent a facsimile to the plaintiff stating that the purpose of his letter dated 25 March 1998 and the requests contained therein was to assist the traditional Aboriginal owners make an informed decision concerning the conduct of commercial activity on their land and he undertook that any material provided would only be used for that purpose.

[39] On 31 March 1998 the plaintiff sent a facsimile to the first defendant which purported to be a response to the first defendant's letter of 25 March 1998. In the facsimile the plaintiff stated the following. The plaintiff had not sold nor subcontracted nor anything else Wimray Safari to Hunt Australia Pty Ltd. His tax and banking records showed that between 7 October 1997 and 20 February 1998 he had received $5884.23 for a hunt he conducted, a minor amount of $1297 and $12,000 in deposits for hunts for the 1998 season. He was unable to provide documentary confirmation of the deposits he had

received for buffalo hunts to be conducted in 1998 as he has never issued a receipt for a deposit. Nor was he going to provide the names, contact addresses and phone numbers of each hunter and the date of the hunt. He could not afford to go to the SCI Convention. He was represented at the Convention by numerous agents. He did not place the advert in *Safari* magazine. The advertisement was placed by a promotional man from the United States of America and he had no control over the content of the advertisement. He asked Mr Penfold to sell hunts for him and he cannot say why Mr Penfold told the Hunting Report that he owns Wimray Safaris. He asked Mr Penfold to help him obtain guides as the plaintiff did not know where to obtain experienced guides. There is a problem in the industry in obtaining experienced guides. He is trying to expand his business and plans on occasion to have hunts going in both of his camps. Although there would be times when some of Mr Penfold's clients would want him in the camp with them the plaintiff had no intention of employing Mr Penfold as a guide.

[40] On 11 May 1998 the first defendant wrote a facsimile to Richard Houlihan, an employee of the second defendant. The facsimile included the following words:

> Find attached a copy of a letter faxed to Wimray Safaris this afternoon. The crux of the letter is that the Northern Land Council will not issue any work permits for guides and employees of Wimray Safaris for the Gangan buffalo camp (save for Noel Bleakley) until Noel Bleakley has satisfied me that through the engagement of those people there is no financial benefit accrued to Bob Penfold or any affiliated interest.

[41] The words comprise the second matter complained of by the plaintiff in the statement of claim. It has not as yet been established if the facsimile was published and, if so, to whom it was published.

[42] On 11 May 1998 the first defendant wrote the following letter to Mr Gawirrin Gumana:

> Dear Gawirrin
>
> I refer to my telephone conversation with you this morning about the engagement of balanda guides by Noel Bleakley of Wimray Safaris for the Gangan buffalo safari camp.
>
> I have now written to Noel Bleakley and asked him to provide a list of the names of the balanda guides and workers that he wants permits issued to for the Gangan licence area. Noel Bleakley has said that he will be too busy to run the Gangan buffalo camp himself and therefore he has sought to engage balanda guides from down south. A copy of the letter I sent to Noel Bleakley is enclosed.
>
> Before the NLC will issue any permits for new balanda guides and workers I have asked Noel Bleakley to provide proof that with the engagement of those guides there will be no financial benefit gained by Bob Penfold or any associated business for him.
>
> The reason why I am concerned about the relationship between Wimray Safaris and Bob Penfold is that Noel has told me that he has sought the help of Bob Penfold to find guides for him, but the NLC has a Full Council resolution that says there can be no agreement with Bob Penfold that involves access to Land Trust land. I am still waiting for Noel to tell me a straight story.
>
> There may be a mining meeting at Gapuwiyak next month and because some of the same traditional owners for the Gangan buffalo safari area will be involved in that meeting, it may be possible to talk about the buffalo safari business after the mining meeting.
>
> If you have any questions give me a call.
>
> Yours sincerely
>
> Bernard Higgins

[43] The letter to Mr Gumana dated 11 May 1998 is the third defamatory matter that the plaintiff complains about in the statement of claim. It has not yet been established if the letter was published and, if so, to whom it was published.

[44] On 11 May 1998 the first defendant wrote to the plaintiff. In the letter he stated that the plaintiff could only employ guides approved by the first defendant and he requested that the plaintiff provide him with a list of all of the guides that the plaintiff intended engaging and proof that there would be no financial benefit accruing to Mr Penfold as a result of the engagement of any guides by the plaintiff. The first defendant stated that until he received such information no permits for the Gangan Licence Area would be issued for guides or camp workers other than the plaintiff. In any event no permit would be issued that granted access to the Gangan camp or any other area of Land Trust land to Mr Penfold or associated interests.

[45] On 15 May 1998 the plaintiff wrote to the first defendant. In the letter the plaintiff provided a list of those persons who he proposed to use as guides and stated, "As far as the safaris are concerned they will be Wimray Safari hunts, run by me and my responsibility. They are not Hunt Australia safaris nor are there any sub-contract arrangements. The only connection with Hunt Australia is that they are acting as a booking agent for me at my request which means they will receive an agent's fee for all hunts they book for me."

[46] On 21 May 1998 Mr Penfold swore an affidavit which was filed in the matter of *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999] FCA 131 which was being heard in the Federal Court of Australia. In the affidavit Mr Penfold deposed that Hunt Australia Pty Ltd had approximately 80 hunts booked across the whole of the company's packages. The value of the bookings was approximately US$628,760. The individual amounts that comprised the total figure were set out in annexure "T" to the affidavit. Annexure "T" listed the clients and the various amounts that each client was paying Hunt Australia Pty Ltd to go on a hunting safari.

[47] On 22 May 1998 the plaintiff telephoned the first defendant and asked if permits would be issued to those individuals who he has listed as proposed guides in his letter dated 15 May 1998. The first defendant advised the plaintiff that he had referred the question to more senior people employed by the second defendant.

[48] On 22 May 1998 the first defendant wrote the following memorandum to Mr Keith Taylor the Manager of Resource Management employed by the second defendant:

> TO: Keith Taylor – Manager Resources Management
>
> FROM: Bernard Higgins – PO Tourism (N06)
>
> DATE: 22 May 1998
>
> SUBJECT: Permits for Guides – Wimray Safaris – Gangan licence area

Noel Bleakley called this morning asking whether permits would be issued for those individuals as listed in his letter dated 15 May. I advised Noel that I would be referring the matter to more senior staff. He asked that I get back to him ASAP.

I make the following comments:

- the people listed (except for Anthony Hickson) are all listed as guides in an attachment to a Hunt Australia Pty Ltd document dated 1/1/98. In that document Penfold states that "Stan Peterson, a South Pacific Hunts & Guides member will be managing both the Cobourg Peninsula banteng camp and the new buffalo hunting area in eastern Arnhem Land". Penfold further states that "we now own and run all of the hunting areas in Northern Territory on our own and utilising our own guides and staff. South Pacific Hunters & Guides is a consortium of the best hunting guides who have drawn together to provide guides to outfitters who require professionally trained staff to conduct their hunts."

- A fax from Stan Peterson to Max & Philippa Davidson dated 12 January 1998 states that "a new company South Pacific Hunters & Guides have offered us both a long term contract promoting the South Pacific and management of the Territory hunt camps."

- Information obtained from the Consumer Affairs Office in NSW lists South Pacific Hunters & Guides as a business name owned by Hunt Australia Pty Ltd and was registered on 9 January 1998.

- In the March 1998 edition of the USA based *The Hunting Report* an article states that "… Bob Penfold of Hunt Australia Pty Ltd … has headed up the unification under one roof of some 22 guides in Australia and New Zealand … The company has even gobbled up what used to be called Wimray Safaris …"

- I sought confirmation of the truth of the article by contacting a New Zealand outfitter Mike Hodder. Hodder had spoken to Penfold in the USA and Hodder confirmed that "the content of the editorial substantiates all comments and statements that have been said by the parties concerned."

- I have written a number of letters to Bleakley requesting that he provides proof that there has been no transfer of the licence (letter dated 25/3/98), that Wimray still runs the licence and that Bleakley should be able to provide records of deposits taken for hunts to be conducted.

- The only proof provided by Bleakley is statements of denial (i.e. he has not provided the information requested to establish the reasonableness of his assertions of denial).

- I have kept the senior T/O, Gawirrin Gumana, informed through a face to face meeting at the NLC (in company with Chips McKinolty), by phone and by letters.

- It is crunch time for all players – Hunt Australia Pty Ltd (Bob Penfold), Wimray Safaris (Noel Bleakley), T/O's (Gawirrin Gumana) and the NLC.

- Penfold has been in recent regular contact with Jawoyn Association and by fax dated 16 March to Robert Lee stated:

> "Now we and the Northern Territory tourist industry are suffering a considerable loss of income because we made a mistake and Bernard Higgins will not allow me the opportunity to apologise for the mistake that I had made in entering into a direct contract with you and your family members.
>
> There seems to be no answer to the problem while ever Bernard Higgins controls the situation.
>
> If you can overcome this problem in the future I will be happy to enter into a $100,000 guarantee contract with you for hunting at Snowdrop."

Comments

I do not accept Bleakley's version of the distance between Hunt Australia and Wimray. Bleakley wants out of the safari business and Penfold wants access to Land Trust land. I would not be recommending permits be issued to those people listed. I consider a reasonable interpretation of the material available suggests that those people for whom Bleakley seeks permits are affiliated with South Pacific Hunters & Guides which is an entity owned by Hunt Australia

Pty Ltd. The current Full Council resolution with respect to Hunt Australia states:

"that the Northern Land Council will not direct any Land Trust in the area of its responsibility to enter into any agreement for the grant of any interest (or any other right in respect of) land to Bob Penfold, Hunt Australia Pty Ltd or any company or business that Bob Penfold, his family of Hunt Australia Pty Ltd holds an interest."

I am also confident that Penfold will use financial inducement as a means to secure his objective. This may be as direct as visiting Gangan Outstation and offering a sum of money to Gawirrin. Or it could be more indirect and based on the hundred's of thousands of dollars potentially available to the T/O's.

Required Action

A decision on whether permits will be issued to those people identified by Bleakley.

Bernard Higgins

[49] The above memorandum contains the fourth defamatory matter about which the plaintiff complains in the statement of claim. It has not as yet been established if the memorandum was published and, if so, to whom it was published.

[50] On 26 May 1998 Mr Penfold gave evidence in the Federal Court of Australia in the matter of *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999] FCA 131. During his testimony Mr Penfold gave the following evidence. He had stated in his affidavit dated 21 May 1998 that he had five fully equipped camps in the Northern Territory. One of those camps was the Wimray Safari camp at Cobourg. Another of those camps was the Wimray Safari camp in Arnhem Land. He had stated in his affidavit

dated 21 May 1998 that Hunt Australia Pty Ltd owned those camps. Hunt Australia Pty Ltd had bought out part of Wimray Safaris operations. Hunt Australia Pty Ltd and Wimray Safaris had entered into a joint venture agreement whereby he had provided the capital finance to expand Wimray safaris operations. The plaintiff retained all of his ownership of the "Wimray Safari" business name and the ownership of the Wimray Safari hunting contracts with the Northern Land Council and Cobourg Peninsula. He did significant marketing on behalf of Wimray Safaris and he provided the professional staff that Wimray Safaris needed to run the expanded operation. The Northern Land Council had been advised of these arrangements. The plaintiff had advised the Northern Land Council of the position by a letter which he had sent to them in the last few weeks prior to Mr Penfold giving evidence in the Federal Court of Australia. He was aware that the second defendant would not sanction him having access to or use of rights in either Cobourg or Arnhem Land. The joint venture agreement was not in writing. A large proportion of his liability to the hunters who had booked hunts arose from Wimray Safaris' ability to operate the hunts. He had been selling the hunts as Hunt Australia Pty Ltd hunts and the hunters had been told that when they came to the Northern Territory they would be operating under Hunt Australia Pty Ltd. Hunt Australia Pty Ltd owned some of the assets comprising the camps at Cobourg and at Arnhem Land. Wimray Safaris had already been paid the deposits for the hunts that they

would be conducting and Wimray Safaris will conduct those hunts under their Licence Agreements.

[51] On 26 and 27 May 1998 Mr Gumana visited the offices of the second defendant and he spoke with the first defendant. The first defendant made a file note of his discussions with Mr Gumana. The file note is dated 28 May 1998. The file note states as follows:

> FILE: 96/312
>
> DATE: 28 May 1998
>
> SUBJECT: **Meetings with Gawirrin Gumana – NLC – 26 & 27/5/98**
>
> Gawirrin Gumana visited the NLC on the morning of 26 May. I spoke to Gawirrin for a considerable period of time. I explained that the NLC had received a letter from Noel Bleakley requesting permits for 9 guides. I said that 8 of these guides were listed on a document that Bob Penfold had written which suggested that they were engaged through a business called South Pacific Hunters and Guides. South Pacific Hunters and Guides was a business name owned by Hunt Australia Pty Ltd. I explained to Gawirrin that the licence held by Wimray Safaris was a non-exclusive licence and that other safari operators could conduct hunts on the Gangan licence area with the consent of the T/O's. Gawirrin was keen for a safari operation to continue on the Gangan area as this was the only source of royalty money that the Gangan Homeland A/C currently received. Gawirrin also had interest in the relocation of the Balma safari camp and considered that a number of Banyiala T/O's should be consulted about the location. Gawirrin indicated that this was a site of some significance. One of those people Gawirrin mentioned was Terry.
>
> After Gawirrin left I received a phone message from Philippa Davidson. I called DAS and was informed that in court that morning under cross examination by DAS's lawyer Penfold has admitted that he was the effective controller of Wimray Safaris. I called Davidson's that night and spoke to the lawyer who had conducted the cross examination and he was of the view that Penfold did admit to owning Wimray Safaris. This was not a direct statement but was a

conclusion that would be reasonable arrived at after reading all the transcripts.

On the 27 May Gawirrin again visited the NLC. I informed Gawirrin about the conversation I had with the lawyer but advised that I was awaiting a copy of the transcript before forming my own opinion. I said I would also forward the transcript to a NLC lawyer for their comment as well. Another lengthy conversation took place with Gawirrin and he was keen for Glen Giffin to operate in the area. I said that the NLC was aware that the Gangan T/O's wanted the safari operation to continue and would pursue strongly professional operators to ensure that the T/O's received a return. Gawirrin said that Noel Bleakley was coming back to see him and I suggested to Gawirrin that he could say to Bleakley that he was awaiting the transcripts an would give a more definite answer concerning Bleakley's continuing activities in the Gangan area once the transcripts had been obtained. I said to Gawirrin that if the transcripts clearly indicated that Penfold owned Wimray Safaris the licence was effectively terminated due to the Full Council resolution. I said that I was aware that Bleakley did have 3 genuine clients an that Gawirrin could give permission for permits to be issued to cover those clients. I then drove Gawirrin to the hospital to see his wife.

Noel Bleakley called me this afternoon and wanted to know who had told me that Penfold had admitted in court that he owned Wimray Safaris and why was I then telling that to Gawirrin. I said to Noel that I was awaiting a copy of court transcripts and that I would talk further with him once these were obtained. I then hung up.

Bernard Higgins

[52] The oral statements made by the first defendant on 26 and 27 May 1998 and recorded by him in the file note comprise the fifth and sixth matters complained of by the plaintiff in the statement of claim. The file note itself is relied on as the seventh publication complained of by the plaintiff in the statement of claim. The contents of the file note are said by the plaintiff to have been published to all people who had access to the file. It is yet to be established if the file note was published to anyone and, if so, to whom.

[53] On 1 June 1998 the first defendant had a further conversation with Mr Gumana. The details of the conversation are contained in the following email dated 2 June 1998:

> From: Bernard Higgins
>
> To: Jitendra Kumarage
>
> Cc: Richard Houlihan – Nhulunbuy; Yikaki Maymuru – Nhulunbuy; Keith Taylor; Alison Worsnop
>
> Subject: Meeting with Gawirrin Gumana
>
> Dated: Tuesday, 2 June 1998 4.39PM
>
> Further to my e-mail on 1 June I provide the following. I have also attached a draft letter to Noel Bleakley. This letter is currently with Alison for comment before sending.
>
> Gawirrin visited me at the NLC on 1 June. I read through the transcript of the cross examination of Bob Penfold. I made reference to particular statements Penfold had made i.e. Part ownership of Wimray Gangan safari camp by Hunt Australia; the safari hunts are Hunt Australia hunts; and there was a joint venture agreement between Hunt Australia and Wimray Safaris (this was verbal and not a written agreement). I did say that the name Wimray Safaris was still owned by Noel Bleakley. I then made a comparison to a motor car and it was possible for a person to own the car but if they didn't have any money for fuel the car was fairly useless – it could not do what it was supposed to do – drive you somewhere. This was how Wimray Safaris seemed to be. The name was owned by Noel Bleakley and possibly some tents and maybe a car but the clients were owned by someone else. I had previously sent Gawirrin a copy of a letter received from Glen Giffin of Muckadilla Safaris who had expressed an interest in conducting safaris in the Gangan area. He was willing to pay an up-front fee of $5,500. Gawirrin said he had spoken to family and they were keen to try Muckadilla. I said that it was possible to look at safaris differently and not give sole rights to one operator but to market the potential of the area. There were safari operators down south who were professional and had maybe a few clients per year who wanted buffalo. Previously those operators had referred their clients on to those who held a licence or to a

pastoral property. It would be possible for the operators to escort their own clients under a varied management arrangement. I said that the Wimray/Penfold issue indicated to me that non-Aboriginal people had forgotten that this was Aboriginal land for which T/O's were the boss and any commercial proposals for use required informed T/O consent. Bleakley and Penfold had purposely avoided that and had sought to make deals themselves independent of the T/O's. It seemed that they wanted to present T/O's with a fait accompli where the amount of dollars required would be sufficient to convince T/O's of the beneficial nature of the co-operative venture. I said to Gawirrin that there was straight money and bent money. Straight money was that received through proper agreements under the Land Rights Act and bent money was that done in a hidden way. The conversation with Gawirrin went for some time and the points made revisited to ensure that Gawirrin understood the issue was not an easy position for Gawirrin i.e. been asked to say no to money. Gawirrin was also keen for Noel Bleakley to leave him alone and if Bleakley had a problem with termination to talk to the NLC. I referred to the meeting happening at Gapuwiyak on the 11 and 12 June and how this would be a good opportunity to talk about the safari operations for the Balma and Gangan area. Gawirrin agreed. I had previously said that this would be a chance to hear from the safari operators but now that Gawirrin had given instructions on behalf of the group to terminate the licence held by Wimray there was now no point for Bleakley in attending the meeting. It was probably better that no safari operator attended and was just a meeting between T/O's and NLC. Gawirrin agreed.

The instructions Gawirrin gave on behalf of the Gangan licence area T/O's was to terminate the licence under the provision of the one month's notice. I said that the T/O's could still issue permits for Wimray clients as I was aware that Bleakley had 3 genuine clients. If he could prove that they were genuine clients it was reasonable for permits to be issued. Gawirrin said OK and agreed that the NLC would talk to and gain approval of T/O's before issuing a permit. Gawirrin also instructed that I pursue Glen Giffin as family were keen to try him out. I asked Gawirrin a number of times that his instructions, for the NLC to act upon them, would have to be given on behalf of the group for the Gangan licence area. Gawirrin understood and provided those instructions < < File Attachment: LNB2-6.DOC > > ons.

Noel Bleakley called today and I advised him that the instructions I had received from the T/O's were to terminate the licence under the provisions of the holding over clause. I said that T/O's agreed that genuine clients of Wimray could be issued permits and that I was

> aware of 3 genuine clients. Bleakley asked about permits for 2 clients this week with guides as given in the letter from Bleakley dated 15 May. I said that permits would not be issued to those guides. I said that I could not say more and that a letter would be forthcoming and I hoped by this afternoon. That has not proved possible.
>
> As a follow-up I spoke to Glen Giffin and he agreed to deposit $2,200 into the NLC royalty trust account before the meeting on 11-12 June. I said I would advise the T/O's at the meeting of that deposit and saw it as a matter of good faith on his behalf. The money would be released to T/O's on confirmation of permits been issued for 2 hunts.
>
> Jitendra, I spoke to you yesterday to confirm that Gawirrin had the authority to provide instructions on behalf of the Gangan licence area T/O's to terminate the licence. Your verbal advice was agreeance. Can you confirm this in writing as the termination letter is to be sent tomorrow?

[54] The plaintiff alleges that both the statements made by the first defendant to Mr Gumana, which are recorded in the email, and the email, which was allegedly sent to the various recipients, are defamatory publications. These matters comprise the eighth and ninth publications complained of by the plaintiff in the statement of claim. It is as yet to be established if the email was published to anyone and, if so, to whom.

[55] On 2 June 1998 the first defendant had a telephone discussion with the plaintiff. During that telephone discussion the first defendant told the plaintiff that it was the intention of the traditional Aboriginal owners of the Gangan Area to terminate the Licence Agreement dated 5 April 1993. On 3 June 1998 the first defendant, as the Authorised Officer, wrote a letter to the plaintiff in which he confirmed that it was the intention of the traditional Aboriginal owners of the Gangan Area to terminate the Licence Agreement

in respect of the Gangan Area. In the letter the first defendant stated that to enable a full explanation to be provided to traditional Aboriginal owners formal written notice of termination would be sent by 15 June 1998. The letter further stated that the first defendant had been instructed that if Wimray Safaris had any outstanding hunts to be conducted after the termination date of the Licence Agreement then the plaintiff could apply to the second defendant for permits which would be issued on a case by case basis. For permits to be issued it was anticipated that the traditional Aboriginal owners would want to be certain that the hunting clients were genuine clients of Wimray Safaris. The first defendant acknowledged that there were three such clients. In response to the plaintiff's letter of 15 May seeking work permits for Matthew Ray, Anthony Hickson, Stan Petersen, Ron Spanton, Alicia Condon, Mark Sergeant, Tom Condon, Gary Harvey and Grant Robinson the first defendant stated that he was instructed that permits would not be issued.

[56] On 3 June 1998 the first defendant sent the following email to Mr Jitendra Kumarage and others:

> From: Bernard Higgins
>
> To: Jitendra Kumarage
>
> Cc: Richard Houlihan – Nhulunbuy; Yikaki Maymuru – Nhulunbuy; Keith Taylor; Alison Worsnop; Bobby Nungmajbarr – Ngukurr
>
> Subject: RE: Meeting with Gawirrin Gumana
>
> Date: Wednesday, 3 June 1998 1.41PM

After discussion with Jitendra I visited Gawirrin and again had extensive conversation with him. He said that Noel Bleakley had been waiting for him at ARDS last night when he returned from the hospital. Bleakley wanted to know whether it was true that the T/O's were terminating his licence. He wanted to know whether that was the story from Gawirrin or just from Bernard Higgins. Gawirrin said it was his story – the Wimray licence is finished. I said to Gawirrin that I had prepared a letter of termination for Wimray but if Gawirrin preferred this letter could wait for sending until the meeting next week at Gapuwiyak. I read through the letter. Gawirrin said that the formal letter of written notification should wait until after the meeting next week. He was happy though for a letter to go to Wimray confirming the verbal advise already given by both myself and Gawirrin and that reference should be made to forthcoming written advice. Discussion also took place about money and that the trophy fee could be raised to $1,500. This money could then be split into 3 parts: royalty money to T/O's; camping fee money to T/O's for where the camp was situated; and ceremony money to be used to assist with the costs of ceremony. I also said that it would be good if Rex from Walker River agreed for proper contracts under the Land Rights Act. This would tie the whole Blue Mud Bay area up for buffalo safaris under proper Land Rights Act contract. Gawurrin said he would try and talk with Rex. I ran through again the story about managing the Gangan area for not just one operator and the intention to build the name of the country for buffalo safari and not the name of the operator. By this it was hoped that more money would go to T/O's. I also said the Glen Giffin was willing to pay $2,200 up-front money as a sign of good will. I said that instructions for release of the money could be obtained at the Gapuwiyak meeting but would required consent from T/O's for 2 hunts.

[57] On 9 June 1998 the first defendant wrote the following memorandum to Mr Keith Taylor:

TO: Keith Taylor – Manager Resource Management (N01) Alison Worsnop – Legal Advisor (L03) Richard Houlihan – SPO Nhulunbuy (R04) Yikaki Maymuru – PO Nhulunbuy (R26)

FROM: Bernard Higgins – PO Tourism (N06)

FILE: 96/312

DATE: 9 June 1998

SUBJECT: Follow-up memo – Permits for Guides/Termination of Licence Wimray Safaris, Gangan area

I refer to my earlier memo dated 22 May concerning the application by Noel Bleakley of Wimray Safaris for work permits to be issued to a number of guides (nine). It was my recommendation that work permits not be issued to those people due to what I considered from the available information was their close affiliation with an organisation owned by Hunt Australia Pty Ltd called South Pacific Hunters and Guides and the 1995 Full Council resolution concerning Hunt Australia Pty Ltd.

Subsequent to that memo a number of long meetings took place with Gawirrin Gumana who was in Darwin with his wife who required medical attention. The content of these discussions is contained in a number of e-mails. Gawirrin provided instructions on behalf of the T/O's for the area held under licence by Wimray Safaris that the licence was to be terminated. Verbal advice to this effect was given to Noel Bleakley on the 2 June by both myself and Gawirrin. Formal written advice of termination will be given after the Gapuwiyak meeting on 11-12 June. This was to allow the opportunity for both the NLC and Gawirrin to explain to a full complement of T/O's the background story and the action taken to date.

Two reasons were given by Gawirrin for the termination: i) there was an argument between the NLC, Bob Penfold of Hunt Australia Pty Ltd and Wimray Safaris; and ii) Wimray crossed an important ceremony ground which Gawirrin had only became aware of recently. Gawirrin though was not precluding forever the activities of Wimray in the Gangan area but it was deemed appropriate that the current licence be terminated. I believe a significant reason for Gawirrin providing the instructions was the material provided in the affidavit and court transcripts from Bob Penfold and how Penfold's story under oath differed to that provided in the letter dated 15 May from Noel Bleakley. Relevant portions of these documents are provided below.

The Gapuwiyak meeting – 11 & 12 June

I became aware some time ago that a mining meeting was to be held at Gapuwiyak and that a significant number of the T/O's involved were T/O's for the Gangan and Balma area. As both these licences had outstanding issues it seemed appropriate that the Gapuwiyak meeting be used to try and address these matters. In my recent discussion with Gawirrin I have referred to that meeting as providing an opportunity to discuss buffalo safari operations in the Gangan and Balma areas. Gawirrin has now indicated that the meeting would be

the appropriate venue to confirm the verbal instructions that he has given for the termination of the Wimray licence.

The Future

In my lengthy discussions with Gawirrin I spoke about how buffalo safaris in the Gangan and Balma areas could be conducted in a different way. Instead of the focus been on individual safari operators it should be on the area and the premium product available. If T/O's supported the professional management of the area they should be able to receive additional payments. It may be that a number of camps could be set up in the area and these camps managed by one operator. These camps would be available to other safari operators to access who would then not have the expense of setting up their own camps for a limited number of hunts.

I said that at Walker River the safari operation was conducted without an agreement under the Land Rights Act. This was mainly due to the past desire of Simon Kyle-Little for that to be how he wanted it and that now Rex enjoyed received the dollars direct. It made sense for all of the Blue Mud Bay area to be under Land Rights Act agreements and then the whole region could be promoted for the safari operations.

Gawirrin mentioned money for the camp site areas and for ceremony. He said that from the Gangan trophy fees he had sought to share them but this was very difficult when there was not that much money available. I said the one way to make the sharing easier was to increase the trophy fee payable and then split it into three parts: trophy fee; camping fee; and a ceremonial fund fee. The total fee suggested was $1,500. Currently the trophy fee is either $1,000 or $1,100. I said that if T/O's could demonstrate that they were very serious in maintaining a professional product then I could possibly convince the current safari operators that the trophy fee should be increased. These were matters that could be discussion at the forthcoming Gapuwiyak meeting.

Primary Source Material

On the 26 May Bob Penfold was cross examined in the Federal Court as part of the long running Hunt Australia Pty Ltd v Davidson's Arnhemland Safaris Pty Ltd libel and damages case. Transcripts of these proceedings have been obtained. A copy of an affidavit by Bob Penfold dated 21 May 1998 has also been secured. Sections from both these documents relevant to the Wimray operations at Gangan are provided below.

1. Affidavit of Bob Penfold dated 21 May 1998

"15. The Applicant [Hunt Australia Pty Ltd] currently own and run five major hunting camps across the Northern Territory and all these camps are fully equipped and operational.

The Applicant has approximately 80 hunts booked for 1998 across my whole range of hunt packages. The value of these bookings is approximately US$628,760.00 (converts to AU$1,002,807.01 at the rate of 0.6270). The individual amounts that comprise the total figure are attached herewith and marked with the letter "T"."

Court Transcript 26 May – Cross examination of Bob Penfold by Mr G Kennedy

[The first defendant then reproduced the transcript of Mr Penfold's evidence in the Federal Court of Australia. A summary of the evidence contained in the transcript is set out in par [50] above].

Extract from Noel Bleakley letter dated 15 May

"As far as the safaris are concerned they will be Wimray Safari hunts, run by me and my responsibility. They are not Hunt Australia safaris nor are there any sub-contract arrangements. The only connection with Hunt Australia is that they are acting as a booking agent for me at my request which means they will receive an agent's fee for all hunts they book for me."

[58] The memorandum of the first defendant to Mr Taylor dated 9 June 1998 is the tenth publication complained of by the plaintiff in the statement of claim. It is as yet to be established if the memorandum was published and, if so, to whom it was published.

[59] On 10 June 1998 the plaintiff sent a facsimile to Mr Robert Lee, Chairman of the Northern Land Council. In the facsimile the plaintiff stated that he had been conducting hunting safaris in Arnhem Land for nine years and that he had always paid moneys due and had a good working relationship with the traditional owners both at Balma and Gangan. In December 1997 he

advised his booking agents, including Hunt Australia Pty Ltd, of his prices for the 1998 season and he had asked them to arrange bookings for him. The agents did so. They did so on a commission basis. Safari hunts were sold for the 1998, 1999 and 2000 hunting seasons. The plaintiff had been advised by the first defendant that he would not be given permits for any clients booked by Hunt Australia Pty Ltd, nor would he be given entry permits for his guides and workers because they would also be working for Hunt Australia Pty Ltd at some time. Hunt Australia Pty Ltd had sent him deposit cheques for clients for the 1998 season in the amount of $56,000. The plaintiff had paid $26,000 of this amount to the Cobourg Sanctuary Board for trophy fees. The plaintiff was currently holding $30,000 for buffalo hunts at Gangan during the 1998 hunting season. The first defendant had poisoned the traditional Aboriginal owners' mind at Gangan with over zealous claims and accusations against Hunt Australia Pty Ltd and had now advised the plaintiff that his Licence Agreement was to be terminated by 15 June 1998. The plaintiff had guides from New Zealand and other places in Darwin ready to work for him. If the plaintiff was forced to cancel any of the hunts he would be sued for breach of contract. The plaintiff was presently holding bookings for the next three years which represented $300,000 in trophy fees for the traditional Aboriginal owners.

[60] On 11 June 1998 the solicitors for the plaintiff, Ward Keller, sent a facsimile to the second defendant's chief legal officer. In the facsimile Ward Keller stated that they were of the view that the Licence Agreement

did not contain a term which had been breached by the plaintiff. Further, that the booking and commission arrangements that had been described by the plaintiff in his letter to the Northern Land Council dated 10 June 1998 did not breach any clause of the Licence Agreement. Ward Keller further advised that they were instructed to apply for an injunction to prevent the second defendant from unlawfully terminating the plaintiff's Licence Agreement. They also were instructed to bring a claim for any loss that the plaintiff incurred as a result of being prevented from conducting hunts in the Gangan Area.

[61] On 15 June 1998 the first defendant caused a letter to be sent to the plaintiffs' solicitors terminating the Licence Agreement. In the letter the first defendant stated as follows:

> The expiry date of the licence was 30 April 1995 and since that date the licence has continued to operate on a monthly basis as per clause 26. Pursuant to that clause and acting on the instructions received from the traditional Aboriginal owners I now give 30 days notice that the Licence is to be terminated as of 16 July 1998. I am further instructed that after 16 July 1998 no further permits to enter the Gangan Area will be issued to yourself. Any safaris you have booked to be conducted on the Gangan Area will have to be referred to another safari operator. One operator you could approach is Brenton Hurt of Territory Buffalo Safaris.
>
> All material brought onto the licence area by Wimray Safaris is to be removed by 16 July 1998.
>
> I am advised that there would be an alternative basis for termination of this licence pursuant to clause 12.2 on grounds that you have entered an agreement, arrangement or agency with another safari operator (namely Bob Penfold of Hunt Australia Pty Ltd) contrary to clauses 3.8 and 3.9. This is based on statements made by yourself,

statements made in a signed affidavit by Mr Bob Penfold presented to the Federal Court and statements made under oath by Mr Bob Penfold in recent Federal Court proceedings. Further, there is a July 1995 resolution from a Northern Land Council Full Council meeting which specifically precludes the Northern Land Council from directing any Land Trust in the area of its responsibility to enter into any agreement for the grant of an interest in (or any other right in respect of) land to Bob Penfold, Hunt Australia Pty Ltd or any other company or business that Bob Penfold, his family members or Hunt Australia Pty Ltd holds an interest. Furthermore, you have refused to give a true and faithful account of the dealings of Wimray Safaris' business with Bob Penfold of Hunt Australia Pty Ltd contrary to clause 3.10.

[62] On 15 June 1998 Ward Keller filed a statement of claim in Local Court proceeding No 9812574. The statement of claim named the plaintiff and Mrs Lynette Bleakley trading as Wimray Safaris as the plaintiffs, the second defendant as the first defendant and the Land Trust as the second defendant. The statement of claim contained the following particulars of claim:

PARTICULARS OF CLAIM

1. Wimray Safaris is the registered business name of Noel Bleakley and Lynette Bleakley. The firm trades as a safari tour operator in the Northern Territory.

2. The First and Second Defendants are bodies corporate established pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* ("the Land Rights Act") and are each capable of being sued.

3. On 5 April 1993 the Plaintiff and the First Defendant entered into an agreement under the Land Rights Act, namely a Licence to Conduct Hunting Safaris on Gangan Area ("the Licence Agreement"). The Plaintiff pleads the Licence Agreement and the Summary of Licence Particulars annexed thereto ("the Summary") and relies upon their contents for their full effect and meaning.

4. At all material times the Second Defendant has acted as the First Defendant's agent in relation to the Licence Agreement.

5. Pursuant to clause 1 of the Licence Agreement and item 5 of the summary, the initial term of the agreement expired on 30 April 1995. Pursuant to clause 26 of the Licence Agreement, the agreement continued and continues on a monthly basis on the same terms and conditions as during the initial term.

6. During June 1998 the Plaintiff applied for permits to enter the Licence Area for clients and guides pursuant to clause 10 of the Licence Agreement. The Second Defendant has without lawful excuse refused and continues to refuse to issue the said permits, thereby breaching clause 10.

PARTICULARS

(a) Clients [List of clients]

(b) Guides [List of guides]

7. Further, the Second Defendant has refused and continues to refuse to issue permits pursuant to clause 10 of the Licence Agreement.

8. In purporting to terminate the agreement in the manner described, the First and Second Defendants have breached the following terms and conditions of the Licence Agreement:

(a) subclause 12.2;

(b) clause 26; and

(c) clause 30.

9. As a result of the First and Second Defendant's breaches of the Licence Agreement, the Plaintiff has suffered and continues to suffer loss.

PARTICULARS

(a) The Plaintiff is unable to conduct hunting safari tours for overseas clients who have arrived in Darwin on the basis of bookings made prior to the First and Second

Defendants' unlawful actions as described, and the Plaintiff will be liable to compensate those clients for any loss.

(b) The Plaintiff's business reputation has been and will continue to be damaged if ti is unable to carry out its obligations pursuant to those bookings made prior to the First and Second Defendant's unlawful actions as described.

10. Full particulars of the Plaintiff's damages will be provided prior to trial.

[63] On 17 June 1998 the first defendant swore an affidavit that was filed in Local Court proceeding No 9812574. In the affidavit the first defendant deposed that the second defendant had a difficult job to do in relation to safari hunting, receiving many complaints about and encountering many difficulties with safari hunt operators, who are not subject to any regulations specific to their industry, operating without a licence or permission on remote tracts of Aboriginal land. To combat these problems the second defendant had pursued a strategy of cooperation with the Northern Territory Tourist Commission to promote professional safari hunting operations and to maintain control of the safari hunting business to a degree which enabled the second defendant to fulfil its statutory responsibilities by requiring, where the relevant traditional Aboriginal owners consented, that safari hunt operators who wish to conduct their business on Aboriginal land must enter into a Licence Agreement with the relevant Aboriginal land trust. The first defendant deposed that because of the difficulties involved in regulating safari hunt operations on remote areas of Aboriginal land, and because of the typical independent mindedness of safari hunt operators and guides,

terms are included in the Licence Agreement stipulating such things as who may act as a guide on the hunting trips and placing restrictions on the arrangements which the operator may enter into with other safari hunt operators. He said that these provisions are included to prevent a licensed operator from using their licence as a front for another (unlicensed) safari hunting operator. Since October 1994 he had continued to receive reports concerning unlicensed safari hunting activities by Mr Penfold on Aboriginal land. The first defendant deposed that as a result of the disputes and difficulties which the second defendant has had with Mr Penfold and Hunt Australia Pty Ltd a resolution of the Full Council of the Northern Land Council had been passed to the effect that the second defendant would not direct any Land Trust in the area of its responsibility to enter into any agreement for the grant of an interest in (or any other right in respect of) Aboriginal land to Mr Penfold or Hunt Australia Pty Ltd. All of the persons listed in the plaintiff's application in Local Court Proceeding No 9812574 were also listed as clients of Hunt Australia Pty Ltd in Annexure "T" to an affidavit that Robert Penfold had sworn on 21 May 1998 in the proceeding between *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999] FCA 131 in the Federal Court of Australia.

[64] On 17 June 1998 Ms Alison Worsnop, a legal officer employed by the second defendant, sent the following letter to Ward Keller:

Dear Sir

NOEL & LYNETTE BLEAKLEY –v- NORTHERN LAND COUNCIL & ANOR

I refer to the above proceedings which are listed for hearing of an interlocutory application at 3.00pm today.

I wish to make the Land Council's position regarding this matter clear and also to make an offer of settlement.

I also wish to bring to your attention a letter (a copy of which is enclosed) which was sent by facsimile transmission by Noel Bleakley to Bernard Higgins of this office yesterday. This letter followed a telephone conversation which was initiated by Noel Bleakley on 15 July.

The Land Council takes the position that clause 26 of the Licence Agreement is absolutely clear in allowing that the agreement may be terminated on 30 days notice by either party without qualification. Such notice was served on you on 15 June 1998 (following your telephone advice to me that morning that you had instructions to accept service of same) and on your client on 15 June 1998. Accordingly, I do not believe that there can be any serious argument against the proposition that the Licence Agreement is terminated as from 16 July 1998.

I note in passing that from the enclosed letter it would not appear as though Noel Bleakley disputes the right of the Arnhem Land Aboriginal Land trust to terminate the agreement. It follows from the termination of the Licence Agreement that there can be no basis for an order requiring the issue of permits for clients for trips made after 16 July 1998.

Our position in relation to clients booked for trips occurring prior to 16 July 1998, is and has always been, that so long as such people are demonstrably Wimray clients, the Land Council will issue them with permits. In the light of recent sworn evidence given by Bob Penfold, which we note you are familiar with, it is not at all unreasonable for us to require from your client some evidence that the people in question are Wimray clients. Production of such information is not an onerous task. Your client has produced such evidence recently for client Bynum who was issued with a Permit as a result.

You will note also that in accordance with the terms of the Licence Agreement, permits will not be issued for trips of longer than 5 days duration. The Application and the Statement of Claim filed seek orders for the issue of permits for trips of more than 5 days for some of the persons listed.

In relation to guides, it follows from what I have said above that no guides would be issued with permits for a period extending beyond 16 July 1998. Further, it is clear that the Licence Agreement requires all guides to be approved by the "Authorised Officer" which approval has not been given in relation to any of the persons mentioned in the Application or the Statement of Claim.

Notwithstanding the above, we are prepared without admission and without prejudice to make an offer of settlement on the following basis:

1. The Land Council will grant permits for Gale and Suzie Sup, the clients mentioned in your client's letter to us of 16 June 1998;

2. The Land Council will grant permits for any other persons for hunting trips up to 16 July 1998 who are proven to the satisfaction of the Land Council's authorised officer to be clients of Noel and Lynette Bleakley;

3. The Land Council will grant permits for the purpose and duration of that trip for all necessary ancillary staff, including guides (but only approved guide and those persons for whom permission has already been refused);

4. Your client will discontinue the proceedings forthwith;

5. Your client will agree to a stay of further proceedings arising out of the licence agreement and this agreement may be pleaded as an absolute bar to all such proceedings; and

6. Your clients will indemnify the Land Council and the Land Trust against any proceedings, claims, actions whatsoever arising out of the subject matter of these proceedings, the above mentioned licence and permit issues arising therefrom, made by third parties including but not limited to Bob Penfold/Hunt Australia and clients of same.

7. Each party to bear their own costs of these proceedings.

In addition to this offer of settlement we reiterate previous advice to Noel Bleakley that we will seek instructions from the relevant traditional Aboriginal owners on an ad hoc basis for trips which are planned to take place after 16 July 1998.

If you are not agreeable to the offer of settlement then we intend to defend the proceedings, including the interlocutory application, and will seek our costs of doings so. I await your response.

Yours faithfully

[65] Ultimately proceeding No 9812574 in the Local Court was settled by way of the deed of settlement. The operative parts of the deed of settlement provide as follows:

> THE PARTIES HERETO HAVE AGREED that in full and final settlement of all Wimray's claims in the Proceedings:
>
> 1. Wimray shall forthwith lodge Notice of Discontinuance of the Proceedings in the prescribed or other appropriate form.
>
> 2. Wimray shall not take any further proceedings against either the Land Trust, the Land Council or any traditional Aboriginal owner of the Land, nor shall they join the Land Trust, the Land Council or any traditional Aboriginal owner as a party in any proceedings, in respect of the Licence or any related matter including but not limited to the issue or refusal of permits to enter the Land pursuant to the Licence and this Deed may be pleaded as an absolute bar to all such proceedings or applications for joinder undertaken by Wimray.
>
> 3. Notwithstanding the termination of the Licence, the Land Council agrees to grant permits to enter the Land for the following named persons only and for the following periods only and subject always to: execution of this Deed by Wimray; filing of the Notice of Discontinuance; payment of the sum set out in clause 6; and in accordance with the terms and conditions of the Licence *Mutatis mutandis:*

Hunter to whom Permit will be issued	**Inclusive Term of Permit**
Mr & Mrs Rudd	18 - 22 June 1998
Mr & Mrs Kirk Courson	20 – 24 June 1998
Mr & Mrs Hans Wandmaker	23 – 27 June 1998
Mr & Mrs Gale Sup	28 June – 2 July 1998
Mr Arthur Dubs	18 – 22 July 1998

provided that if any one of these hunts is cancelled, then Wimray may apply for and subject to this Clause the Land Council shall issue permits in relation to another hunt in substitution.

4. The Land Council shall grant in respect of the dates set out in the preceding clause a permit for Mr Ron Spanton as an approved guide, to enter the Land for the purpose of acting as a hunting guide subject always to the terms and conditions of the Licence and to his good conduct and demonstration of respect to traditional Aboriginal owners, provided that if in exceptional circumstances, such as death, illness or incapacity, Mr Spanton is not able to attend on any of the hunts referred to in clause 3 hereof and Wimray require the assistance of a guide for that trip, Wimray may apply for, and subject to the instructions of the relevant traditional Aboriginal owners the Land Council shall grant, a permit for another guide to attend on the relevant hunt in substitution for Mr Spanton.

5. Wimray shall not seek from the Land Council any permit other than the permits listed in the preceding paragraphs nor will Wimray solicit or accept any permit in respect of the Land from any traditional Aboriginal owner. Wimray will not seek or have access to the Wimray Camp on the Land for any reason other than the hunts referred to in Clause 3 hereof and the removal of the equipment and rehabilitation of the Camp referred to in Clause 8 hereof.

6. Wimray will not later than 1600 hours 19 June make an advance payment of six thousand dollars ($6,000) to the Land Council on behalf of the Land Trust in respect of the Persons named in this Deed and for a previous client of Wimray, Mr Bynum.

7. Wimray will pay in full any further sums which may be due to the Land Trust under the terms and conditions of the Licence on or before 25 July 1998.

8. Wimray shall remove from Aboriginal land all equipment at the Wimray Camp on the Land on or before 15 August 1998 and will have made good all damage caused by such removal. Any equipment which is not removed by 15 August 1998 shall become the property of the Second Plaintiff absolutely.

9. Wimray acknowledge that as from 22 July 1998 the Licence is terminated but without prejudice to any rights or claims which may have accrued to the Land Trust arising from the Licence including but not limited to the recovery of unpaid moneys and claims for damage to land or property.

10. Each party shall bear their own costs of the Proceedings.

[66] The plaintiff was given until 15 August 1998 to completely vacate the Gangan Area. After the termination of the Licence Agreement the plaintiff was invited by the respective traditional Aboriginal owners to conduct hunting safaris at Djurubitbi which is 20 kilometres away from Gangan. The plaintiff continued to conduct hunting safaris in that area until 2001. In 2001 the plaintiff returned to the Gangan Area without a contract that was approved by the second defendant. He was invited back by the traditional Aboriginal owners of the Gangan Area.

[67] In December 1998 the first defendant gave evidence in the proceeding of *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999]

FCA 131 in the Federal Court. During his evidence the first defendant stated that the second defendant had refused to renew a Licence in favour of the plaintiff because the second defendant had formed the opinion that the plaintiff had become a shell for Hunt Australia Pty Ltd.

[68] In June 2002 the matter of *Penfold & Anor v Higgins & Anor* (supra) came on for hearing in the Supreme Court of the Northern Territory. On 3 June 2002 the defendants in that proceeding admitted liability and apologised to the plaintiffs in that proceeding in open court.

[69] At sometime prior to 6 June 2002 the plaintiff received a telephone call from Mr Charles Yuen, a solicitor employed by Ward Keller, who were the solicitors for Mr Penfold in the manner of *Penfold & Anor v Higgins & Anor* (supra). Mr Yuen requested the plaintiff to agree to an interview to provide a witness statement. An appointment was made for 6 June 2002. On that date the plaintiff met Mr Yuen and was introduced to Mr Heywood-Smith QC who interviewed the plaintiff. During the course of the interview a number of documents were shown to the plaintiff including the letter dated 25 March 1998 from the first defendant to Mr Gumana being Annexure "A" to the statement of claim. After the interview a witness statement was prepared which was signed by the plaintiff. In par 9 of his statement the plaintiff stated:

> At some time in 1995, Bernard Higgins spoke to me in his office at the NLC. He said: "You are to stop providing product for Penfold". He was quite forceful. He added: "Along with everybody else, we can put Penfold out of business and send him bankrupt." I said: "I

> am in business and I need all the business I can get". I also said: "He can go and operate on private properties anyway." Higgins said: "We have the better areas. If we combine together and stop him coming onto those areas, we'll finish him off", or words to that effect. That was how it was left. I continued to take bookings from Bob Penfold.

[70] The plaintiff gave evidence in the proceeding of *Penfold and Anor v Higgins & Anor* (supra) on 19 and 20 June 2002. During his evidence in chief each of the documents being annexures "A" to "F" to the statement of claim was tendered in evidence. The majority of the documents were tendered as business records. During his cross examination the plaintiff gave the following evidence. During 1997 he was not getting enough hunting safari work. The partnership's financial returns for that year actually show a loss of $7000. It was at about this time that the plaintiff received an approach from Mr Penfold. They discussed the possibility of the plaintiff selling Mr Penfold his assets so that he could get some money to pay his debts. He did sell Mr Penfold his assets. He sold him most of his equipment. He did not sell the camp sites. He could not sell Mr Penfold the actual operating area. He just sold Mr Penfold most of the equipment. In return for Mr Penfold purchasing most of the plaintiff's equipment the plaintiff provided Mr Penfold's business with cheaper hunts. The price of Hunt Australia Pty Ltd's hunts was cheaper or lower than what would have been the case if the plaintiff owned all of the equipment. The plaintiff was dependent on Mr Penfold for access to nearly all of the equipment used in the camps from 1998 onwards. On average for a $5000 hunting safari Wimray Safaris would receive $3500 and Hunt Australia Pty Ltd would

receive $1500. Mr Penfold introduced additional equipment to the camps. This was done in order to provide greater comfort to the clients. The plaintiff only paid the hunting staff when they were working for Wimray Safaris. When the hunts were booked by Hunt Australia Pty Ltd the hunting staff were paid by Mr Penfold. In an operation for clients introduced by Mr Penfold those clients were escorted or guided by staff employed by Hunt Australia Pty Ltd or contracted by Hunt Australia Pty Ltd. However, the plaintiff did not ever use staff that did not have permits to enter. The plaintiff supervised all staff. It was his responsibility. The camps were his responsibility. Mr Penfold was never in the camps. By June 1998 the first defendant had been corresponding with the plaintiff and had been asking him to provide information about the nature and relationship he had with Hunt Australia Pty Ltd at the Gangan Camp. There was a suspicion held by the Northern Land Council that the camp was not operated merely by the plaintiff but in conjunction with Mr Penfold's business in some way. The plaintiff's concession for the Cobourg Peninsula expired in November 1999.

[71] In or about the middle of October 2002 Mr Penfold contacted the plaintiff and asked him if he would store a quantity of papers for him. The plaintiff agreed to store the papers at his home at Wanguri and in late October 2002 he collected some cardboard cartons of papers from Ms Caroline Bicheno, a solicitor employed by Ward Keller, and took them to his residence. Over the course of November and December 2002 the plaintiff perused the papers.

The papers included copies of the documents that are annexures "A" to "F" of the statement of claim.

[72] On 11 December 2002 Mildren J delivered the Reasons for Decision in *Penfold & Anor v Higgins & Anor* (supra). Mildren J found that the first defendant had maliciously defamed Robert Penfold when he published the document entitled "Briefing Notes for Director Northern Land Council NT Tourist Commission Board Meeting 2 December 1994".

[73] On 18 July 2003 the plaintiff filed the writ commencing the current proceeding. On 2 June 2004 Mr Moharich received a facsimile from Mr James, the solicitor for the plaintiff. The facsimile was followed by a proposed amended reply. Paragraph 5 of the proposed amended reply stated as follows:

> 5. In response to paragraph 7 of the Defence the Plaintiffs say that facts material to their case were not ascertained by them until within 12 months of the institution of the within proceedings.
>
> Particulars of Facts Material
>
> 5.1 The fact that the First Defendant was instrumental in damaging the reputation of Penfold and Hunt Australia Pty Ltd and did so with malice, which fact was learnt by the Plaintiffs on the publication of the judgment of

Justice Mildren on 11 December 2002 in the matter of *Penfold & Anor v Higgins & Anor* [2002] NTSC 65.

5.2 The fact that the documents being Annexures "A" to "F" to the Statement of Claim herein did not come to the full attention of the male Plaintiff until after 11 December 2002 being the date of publication of the judgment in the *Penfold* proceedings and did not come to the attention of the female Plaintiff until after 11 December 2002.

Particulars

The Annexures "A" to "F" were shown to the male Plaintiff whilst giving evidence in the *Penfold* proceedings and he was questioned concerning them. However, the male Plaintiff was not provided with copies of the documents at that time and was not in a position to comprehend their full force and effect until he obtained a copy of them after judgment in the *Penfold* proceedings.

[74] On 14 and 15 July 2005 Mr Bleakley was cross examined in relation to his affidavits filed in this proceeding. He gave the following evidence. During cross examination on 14 July 2005 the plaintiff stated that there were a whole lot of letters shown to him one after the other at the trial in the matter of *Penfold & Anor v Higgins & Anor* (supra). He saw the letter dated 25 March 1998 from the first defendant to Mr Gumana during the course of

the trial while he was in the witness box. He was shown a bundle of documents during the course of his evidence at the trial. Off the top of his head he could not tell what documents he had seen prior to going into the witness box. The plaintiff agreed that he was shown more than one document but there was nothing in the documents that concerned him at the time he first saw them. In relation to Annexure "B" to the statement of claim the plaintiff stated that he could not say whether or not that was one of the letters that was shown to him on 6 June 2002. He could not say whether or not Annexure "C" to the statement of claim was a document that he saw on 6 June 2002. To the best of his recollection he did not see Annexure "D" at the meeting which took place on 6 June 2002. There were a lot of documents he saw after the trial. He was concerned about the things that had happened in the trial. That is why he went looking to see what else was there. There was nothing in Annexure "D" to the statement of claim that troubled him. There was nothing in Annexure "D" which enabled him to be able to remember whether or not he had seen the document on 6 June 2002 in the meeting with Mr Heywood-Smith QC or before that date. There was nothing in the statements of the first defendant contained in Annexure "F" to the statement of claim that concerned the plaintiff. There was nothing in Annexure "F" that suggests the first defendant was saying anything unfavourable about the plaintiff. The plaintiff agreed that the amended reply was served on the defendants under letter of 1 June 2004 by his solicitor, Mr James. The plaintiff's solicitor was not acting off his own

bat when he prepared the amended reply. The plaintiff gave his solicitor the information to enable him to prepare the amended reply. He gave Mr James instructions as to when Annexures "A" to "F" of the statement of claim first came to his attention. The plaintiff said that he was confused about when he received some of the documents or when they first came to his attention. He was not confused about all of them. Whether he saw the documents then or now or whenever it was the judgment in the Penfold case that made him realise that all of this had been done with malice against him and Mr Penfold and the plaintiff needed to do something about it. He did not come to that realisation until December 2002.

[75] The plaintiff further gave evidence that from about February or March 1998 the first defendant was suggesting to the plaintiff that he was in some venture with Mr Penfold. One of the sources of the first defendant's belief which he communicated to the plaintiff was the evidence that Mr Penfold gave in the Federal Court proceeding of *Hunt Australia Pty Ltd v Davidsons' Arnhemland Safaris Pty Ltd* [1999] FCA 131. In 1998 the plaintiff knew that the first defendant was alleging that Mr Penfold was the effective controller of Wimray Safaris. The plaintiff knew in 1998 that one of the concerns of the first defendant in 1998 was that the plaintiff was involved in some secret way with Mr Penfold in the conduct of safaris under the plaintiff's Licence. He knew prior to the termination of his Licence Agreement that the first defendant was informing the traditional owners that he had a relationship with Mr Penfold of Hunt Australia Pty Ltd that was

contrary to the terms of his Licence. He did not know if the first defendant was telling the traditional owners other things as well. He knew that the first defendant was telling Mr Gumana that in the first defendant's opinion he had an agreement with Mr Penfold that contravened the Licence. He knew that one of the reasons for the first defendant's allegations was Mr Penfold's evidence in the case of *Hunt Australia Pty Ltd v Davidsons' Arnhem Land Safaris Pty Ltd* [1999] FCA 131. The plaintiff also knew that Mr Penfold had published an assertion in a hunting magazine that Mr Penfold had swallowed up Wimray Safaris and he knew that in 1998. He knew that the first defendant was saying bad things to traditional owners about Mr Penfold and Hunt Australia Pty Ltd. He knew that the first defendant was telling the traditional owners that the reason for the termination of his Licence was because of the plaintiff's association with Mr Penfold and Hunt Australia Pty Ltd. He did not know that the first defendant was telling Mr Gumana that his Licence was in jeopardy because the first defendant believed that the plaintiff was associating in business with Mr Penfold, a person who the first defendant believed was disreputable.

Clause 2 of the Deed of Settlement

[76] Against the above factual background counsel for the defendants, Mr Lynch, submitted that the release granted by clause 2 of the deed of settlement is wide and was intended to bar any further proceeding against the second defendant in respect of the Licence or "related matter" including but not limited to the issue or refusal of permits to enter the land pursuant to the

Licence. The deed of settlement may be pleaded as an absolute bar to all such proceedings or applications for joinder undertaken by Wimray. The current proceeding is a "related matter". The relationship is clear and extends to include communications between officers of the second defendant as well as communications between the first defendant and Mr Gumana about the Licence.

[77] It was also submitted that an implied term of the deed of settlement was that the release granted by clause 2 of the deed of settlement extended to cover "related matters" against the second defendant and its employees and authorised officers. Accordingly the deed of settlement operated as a bar to a continuation of the current proceeding against both the first defendant and the second defendant. I accept the submissions of counsel for the defendants.

[78] Clause 2 of the deed of settlement is set out in par [65] above. As the text of the clause is drafted in wide and general terms there are a number of possible interpretations that may be given to clause 2. In order to interpret clause 2 it is necessary to consider what the words convey to the reasonable person circumstanced as the parties to the deed of settlement were. The normal rules of interpretation relating to contracts apply to releases. The language will be interpreted having regard to the surrounding circumstances against which it came into existence and with special reference to the ambit of the dispute that was the occasion of its creation: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; *Bank of Credit and Commerce*

International SA v Ali [2002] 1 AC 251 at [26]; *Bloss Holdings Pty Ltd v Brackley Industries Pty Ltd* [2006] NSWSC 56 at [36] to [39]; *London & South Western Railway Co v Blackmore* (1870) LR 4 HL 610, Lord Westbury at 623 – 624. It is necessary to consider the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (supra) at [40]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461 – 462 [22].

[79] An appreciation of the purpose of contract presupposes knowledge of the genesis of the transaction, the background and the context in which the parties are operating: *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at par [10]; *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337. As Brennan J stated in his judgment in *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (supra) at 401: "The meaning of a written contract may be illuminated by evidence of facts to which the writing refers, for the symbols of language convey meaning according to the circumstances in which they are used."

[80] However, it is important to start with the meaning conveyed by the text of the clause 2 of the deed of settlement. When clause 2 is read in the context of the whole of the deed of settlement the following broad meaning is conveyed – the hunting safari operator shall not bring any further legal proceedings against the owners of the land or their agent about the buffalo hunting licence concerning its meaning, interpretation, effect, enforcement or termination nor shall the hunting safari operator bring any further legal

proceeding against the owners of the land or their agent about anything else that is amiss which is connected to the operation or administration of the provisions of the buffalo hunting licence.

[81] The above construction of clause 2 of the deed of settlement is supported by the relevant surrounding circumstances which are as follows. The second defendant administered the operation of the Licence Agreement on behalf of the traditional Aboriginal owners and the Land Trust. The second defendant had an obligation to do so under the provisions of the Aboriginal Land Rights (Northern Territory) Act. The provisions of the Licence Agreement also provided that the second defendant would do so and would attend to many of the duties that you would expect an agent to attend to in such circumstances. The reasons for giving the second defendant such administrative responsibilities under the Licence Agreement are set out in the affidavit of the first defendant which is referred to in par [63] above. The second defendant's man on the ground and the person who was responsible for the day to day administration of the Licence Agreement was the first defendant. The term of the Licence Agreement expired and no new licence agreement was entered into by the parties. However, the plaintiff continued to enjoy month to month access to the land to conduct and operate buffalo hunting safaris under the holding over provisions of the Licence Agreement which provided for termination of the Licence upon 30 days written notice. The relationship between the second defendant and Mr Penfold and Hunt Australia Pty Ltd became acrimonious and the first

defendant and the second defendant decided that all ties should be severed between the traditional Aboriginal owners and Mr Penfold and his associates. The first defendant and through him the second defendant received a variety of information to the effect that the plaintiff was very closely associated with Mr Penfold and may be a front for Mr Penfold's business. The first defendant wrote to the plaintiff seeking clarification from the plaintiff about his relationship with Mr Penfold. The first defendant was not happy with the answers that he received from the plaintiff about the nature of his relationship with Mr Penfold and he obtained instructions from the traditional Aboriginal owners and directions from his superiors about refusing to grant permits to the plaintiff's guides and clients and about terminating the Licence Agreement. The second defendant and the traditional Aboriginal owners resolved to terminate the Licence Agreement and on 15 June 1998 30 days notice was given to the plaintiff. It is apparent from the correspondence between the parties and the internal memoranda that the objective of the first defendant and through him the second defendant was strict compliance with the resolution of the 67th Full Council Meeting excluding Mr Penfold from the area. As a result of their suspicions about the plaintiff they wanted the plaintiff gone from the Gangan Area and the arrangements concerning the Licence Agreement completely finalised without the risk of any ongoing litigation. The plaintiff's objective was to complete the hunting safaris that his clients had pre-booked and to avoid any loss that he may incur if he did not comply

with his contractual obligations to his clients and thereby keep his business reputation intact because he had other concessions on which he intended to operate hunting safaris. At all times prior to the execution of the deed of settlement the plaintiff knew that the first defendant was communicating with the traditional Aboriginal owners and his superiors and other appropriate personnel about these matters.

[82] The primary causes of action pleaded in Local Court proceeding No 9812574 relate to the second defendant's refusal to issue permits to enter the Licence Area to the plaintiff's clients and guides which prevented the plaintiff from completing his existing contractual obligations to his clients. The plaintiff claimed compensation for damage to his business reputation which would result if he could not carry out his contractual obligations in respect of existing bookings. The plaintiff knew prior to the termination of the Licence Agreement that the first defendant was informing the traditional Aboriginal owners that he had a relationship with Mr Penfold of Hunt Australia Pty Ltd that was contrary to the terms of the Licence and that the first defendant told Mr Gumana that in the first defendant's opinion the plaintiff had an agreement with Mr Penfold that contravened the Licence Agreement. He knew that one of the reasons for the first defendant's allegations was Mr Penfold's evidence in the case of *Hunt Australia Pty Ltd v Davidsons' Arnhem Land Safaris Pty Ltd* [1999] FCA 131. He knew that the first defendant was saying bad things to traditional Aboriginal owners about Mr Penfold and Hunt Australia Pty Ltd. He knew that the first

defendant told the traditional Aboriginal owners that the reason for the termination of his Licence was because of the plaintiff's association with Mr Penfold and Hunt Australia Pty Ltd.

[83] Looked at in light of the above circumstances a reasonable person in the position of the parties would conclude that the text of clause 2 is wide enough to bar the current proceeding. Reasonable people in the position of the parties would have regarded "related matters" as including the matters which are the subject of the proceeding in this court: *Schenker & Co v Maplas Equipment & Services Pty Ltd* (1990) VR 834 at 840. As Mr Lynch has submitted, the subject matter of each of the publications complained of in the statement of claim is restricted to the Licence issue. The publications deal directly with the ground of termination of the Licence which was the association between the plaintiff and Mr Penfold, a person who had been excluded from Aboriginal land by a resolution of the Full Council of the second defendant. Each of the publications preceded the date of the deed of settlement. The parties cannot have reasonably contemplated that there would be future litigation about matters that involved the obtaining of instructions by the first defendant or internal communications about the termination of the Licence Agreement.

[84] While it is likely that as at 19 June 1998 the plaintiff did not know about the 10 publications complained of in the statement of claim, the principle of construction that a release will not be construed as applying to facts of which the party making the release had no knowledge at the time of its

execution does not prevent the application of clause 2 of the deed of settlement to this proceeding. The plaintiff knew that the first defendant was saying bad things to traditional Aboriginal owners about Mr Penfold and Hunt Australia Pty Ltd and that the first defendant told the traditional Aboriginal owners that the reason for the termination of the Licence was the plaintiff's association with Mr Penfold and Hunt Australia Pty Ltd. The plaintiff must have reasonably contemplated that in the course of obtaining instructions from the traditional Aboriginal owners to terminate the Licence Agreement the first defendant would have communicated with the traditional Aboriginal owners about the reasons for terminating the Licence and also with the relevant officers employed by the second defendant.

[85] In order to justify the implication of a term in a contract which the parties have not thought fit to express, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express terms of the contract: *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266.

[86] The implied term contended by the defendants meets these conditions. It is a necessary implication of clause 2 of the deed of settlement that the plaintiff will not sue an employee or authorised officer of the second

defendant: *Snelling v John G Snelling Ltd* [1973] 1 QB 87 at 98 C - D. The release granted by clause 2 of the deed of settlement could not be adequately enforced without the implication of a term extending the provisions of the clause 2 to the employees and authorised officers of the second defendant. A statutory corporation can only act through its servants and agents and it was not intended that the provisions of the release could be avoided by suing an employee or authorised officer of the second defendant for actions they had taken in relation to the termination of the Licence.

[87] The effect of s 22A (1) of the Law Reform (Miscellaneous Provisions) Act, which provides that an employer who is vicariously liable to indemnify an employee in relation to the liability incurred by the employee, and the implied term of the deed of settlement is that there is a circularity of causes of action or rights. The plaintiff sues the employee who is entitled to indemnity from the employer who, in turn, may seek a remedy for breach of the implied term of the deed of settlement from the plaintiff. While there is no privity of contract between the plaintiff and the first defendant in relation to the deed of settlement, the effect of the circularity of the causes of action or rights is to defeat the plaintiff's claim against the first defendant and the plaintiff's claim should be dismissed: *Snelling v John G Snelling Ltd* (supra) at 99 E – G. Alternatively, the interests of justice require that the plaintiff not be permitted to succeed against the first defendant and a stay of the proceeding should be granted: *Snelling v John G Snelling Ltd* (supra) at 98

D – E. Clause 2 of the deed of settlement is a bar to the plaintiff's claims against both the first defendant and the second defendant.

Section 44 Limitation Act

[88] Section 12 of the Limitation Act (as in force at the relevant time) provided that an action founded on tort was not maintainable after a period of three years from the date on which the cause of action first accrues to the plaintiff. This meant that subject to obtaining an extension of time under s 44(3) of the Limitation Act (as in force at the relevant time) the plaintiff's causes of action for the 10 publications complained of in the statement of claim became statute barred within three years from the date of publication.

[89] Section 44 of the Limitation Act provided as follows:

> **44. Extension of periods**
>
> (1) Subject to this section, where this or any other Act, or an instrument of a legislative or administrative character prescribes or limits the time for –
>
> (a) instituting an action;
>
> (b) doing an act, or taking a step in an action; or
>
> (c) doing an act or taking a step with a view to instituting an action,
>
> a court may extend the time so prescribed or limited to such an extent, and upon such terms, if any, as it thinks fit.

(2) A court may exercise the powers conferred by this section in respect of an action that it –

(a) has jurisdiction to entertain; or

(b) would, if the action were not out of time, have jurisdiction to entertain.

(3) This section does not –

(a) apply to criminal proceedings; or

(aa) apply to an action on a cause of action for defamation; or

(b) empower a court to extend a limitation period prescribed by this Act unless it is satisfied that –

(i) facts material to the plaintiff's case were not ascertained by him 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 was instituted within 12 months after the ascertainment of those facts by the plaintiff; or

(ii) the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or

a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances,

and that in all the circumstances of the case, it is just to grant the extension of time.

(4) Where an extension of time is sought under this section in respect of the commencement of an action, the action may be instituted in the normal manner, but the process by which it is instituted must be endorsed with a statement to the effect that the plaintiff seeks an extension of time pursuant to this section.

(5) Proceedings under this section may be determined by the court at any time before or after the close of pleadings.

(6) This section does not –

(a) derogate from any other provision under which a court may extend or abridge time prescribed or limited by an Act or an instrument of a legislative or administrative character; or

(b) affect a rule of law or equity under which a limitation period affecting a right to bring an action may be extended

or within which an action may be brought notwithstanding the expiration of the limitation period.

(7) This section extends to an action in which the damages claimed consist of or include damages in respect of personal injuries to any person or to an action which arises under the *Compensation (Fatal Injuries) Act* notwithstanding that the limitation period for that action has expired before –

(a) the commencement of this Act; or

(b) an application is made under this section in respect of the action.

[90] A fact is a fact material to a plaintiff's case if it is both relevant to the issues to be proved in the case and is of sufficient importance to be likely to have a bearing on the case: *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 at 636. The words "facts material to the plaintiff's case" comprehend not merely the facts essential to formulating the cause of action in the form of a statement of claim but the whole complex of evidence, law and argument to be relied on in court by the party concerned: *Forbes v Davies and Anor* (supra); *Fersch v Power and Water Authority* (1990) 101 FLR 78 at 82 to 87; *Braedon v Hynes* (supra) NTJ 885; *Lovett v Le Gall* (supra) at 482, 486. The facts material to the plaintiff's case must be ascertained by the plaintiff personally: *Sola Optical Australia Pty Ltd v Mills* (supra) at 637 – 638.

[91] The court has consistently taken a broad view of what is a fact material to a plaintiff's case. What appears to be contemplated by the various authorities is the receipt of any information that is of sufficient forensic importance to have a bearing on the case.

[92] The discretion that the court exercises when considering whether it is just to grant the extension of time is an unfettered discretion. However, there is no presumptive right to an extension of time once the precedent conditions to the exercise of the discretion have been established. An applicant for an extension of time bears the legal onus of showing that the justice of the case requires the discretion to be exercised favourably, and to do so must prove that an extension beyond the limitation period would not result in significant prejudice to the defendants: *Brisbane South Regional Health Authority v Taylor* (supra) 186 CLR 541.

[93] The following guidelines are of assistance in the exercise of the discretion: the length of the delay in filing the writ; the plaintiff's explanation for the delay in filing the writ; the hardship to the plaintiff if the proceeding is dismissed and the cause of action is left statute barred; the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay; the conduct of the defendant in the litigation; the conduct of the plaintiff; and the nature, importance and circumstances surrounding the ascertainment of the new facts that are material to the plaintiff's case: *Forbes v Davies and Anor* (supra).

[94] For all of the publications pleaded in the statement of claim the plaintiff relies on Mildren J's finding in *Penfold & Anor v Higgins & Anor* supra) that the first defendant was actuated by malice against Mr Penfold when he published the "Briefing Notes for Director NLC NT Tourist Commission Board Meeting 2 December 1994" on 2 December 1994 as a fact material to each of the plaintiff's causes of action. For the publications pleaded in paragraphs 6, 8, 10, 12, 14, 17, 19, 23 and 26 of the statement of claim the plaintiff relies on the discovery of the documents being annexures "B" to "F" of the statement of claim and their contents as facts material to the plaintiff's respective causes of action.

[95] Annexures "A" to "F" of the statement of claim are clearly capable of being facts material to the plaintiff's case for the purposes of s 44(3)(b)(i) of the Limitation Act (as in force at the relevant time). However, on the whole of the plaintiff's evidence, I am not satisfied that the first time that plaintiff became aware of annexures "B" to "F" of the statement of claim was within the 12 months before the writ was filed in the current proceeding. During his cross examination the plaintiff conceded that he may have seen annexures "A" to "D" inclusive on or before 6 June 2002. The following short passages of cross examination are also telling:

> Q: Can you remember whether you were shown only one document or more than one document at that meeting with Mr Heywood-Smith QC?
>
> A: Well, I am sure I would have been shown other documents but there was nothing there that concerned me at that time.

Q: You cannot remember what the other documents were now? Is that correct?

A: No, not at this point in time I cannot.

And later –

Q: Is not the truth this, Mr Bleakley that you are confused through the passage of time as to when these documents first came to your attention?

A: Not all of them but whether I saw it then or now or whatever, it was the judgment in the Penfold case that drove me to – that made me realise that all this had been done with malice against me and Bob Penfold and I needed to do something about it and that was not until December 2002.

[96] The plaintiff's discovery of annexures "A" to "F" of the statement of claim cannot be relied upon for the purposes of s 44(3)(b)(i) of the Limitation Act.

[97] In my opinion the finding of Mildren J in his Reasons for Decision in *Penfold & Anor v Higgins & Anor* (supra) is a fact material to the plaintiff's case. It is information that is of sufficient forensic importance to have a bearing on the case. The information could be used to cross examine the first defendant should he give evidence if an extension of time were granted or to tailor the evidence that is to be presented in the plaintiff's case. It is potentially useful information given the manner in which the plaintiff puts his case on malice (see paragraph [12] above). I accept Mr Heywood-Smith QC's submission that Mr Lynch's argument about the application of *Haines v Australian Broadcasting Corporation* (supra) at 414 is largely

irrelevant to the question of whether the relevant finding of Mildren J is a fact material to the plaintiff's case.

[98] As to the justice of the case, it is my opinion that the court's discretion should be exercised in favour of the defendant's and that the application for an extension of time should be refused. There has been a long delay. The plaintiff's explanation for the delay in bringing the proceeding is unsatisfactory. So too is the circumstance in which the new material fact was discovered and was sought to be relied upon by the plaintiff. Finally, because of the lack of particularity in the pleading of the statement of claim I am not satisfied that the defendants will not suffer prejudice in the course of the proceeding if the action is allowed to proceed.

[99] I think a fair construction of what occurred is that at all material times the plaintiff was aware of the nature of allegations that were being made about him and Mr Penfold (see pars [34], [35], [38], [39], [44], [45], [46], [55], [59] and [75] above), he read annexures "A" to "F" on or about 6 June 2002, it would be most unusual if he was not shown them to read before a statement was taken from him and he did not think a great deal about the contents of those documents or pay a great deal of attention to them because they were broadly consistent with what he already knew. Then following the publication of Mildren J's Reasons for Decision in *Penfold & Anor v Higgins & Anor* (supra) the plaintiff has belatedly reassessed his position. That is not a satisfactory basis for seeking an extension of time given the nature of a defamation proceeding and the very important matters of policy

that are identified in the judgment of McHugh J in *Brisbane South Regional Health Authority v Taylor* (supra) at 550 to 556.

[100] The application for an extension of time is refused. Given the above reasons it was unnecessary to consider whether the pleaded imputations were capable of being conveyed and whether the publications are capable of being defamatory.

The Defamation Act 2006

[101] On 26 April 2006 the Defamation Act 2006 came into force. The Defamation Act 2006 repealed the old Act and amended s 12 and s 44 of the Limitation Act. The objects of the Act include the promotion of uniform laws of defamation in Australia.

[102] Section 12(1A) of the Limitation Act provides as follows:

> An option on a course of action for defamation is not maintainable if brought after the end of a limitation period of one year from the date of the publication of the matter complained of.

[103] Section 44A of the Limitation Act provides:

> (1) A person claiming to have a cause of action for defamation may apply to a court for an order extending the limitation period for the cause of action.
>
> (2) If the court is satisfied it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of the publication, the court must extend the limitation period mentioned in s 12(1A) to a period of up to three years from the date of publication.

(3) A court may not order the extension of a limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).

[104] The Defamation Act 2006 contained various transitional provisions. In particular s 45 of the Defamation Act 2006 provided as follows:

(1) This Act applies to the publication of defamatory matter after the commencement date, unless subsection (2) applies.

(2) …

(3) The existing law of defamation continues to apply to any cause of action that accrued before the commencement date.

[105] "Commencement date" was defined in s 43 to mean the date on which Part 6 of the Defamation Act 2006 came into operation.

[106] The Defamation Act 2006 also contained transitional provisions in relation to the amendments to the Limitation Act. Section 52(2) of the Limitation Act provided that:

> The existing limitation law continued to apply to any cause of action to which the existing law of defamation continues to apply under s 45 of the Defamation Act.

[107] As a result of the enactment of the Defamation Act 2006 I caused the matter to be further mentioned in court to take submissions from the parties as to whether the provisions of the Defamation Act 2006 and the amendments to the Limitation Act applied to the current proceeding. The defendants declined to make any submissions. The plaintiff submitted that neither the

new Defamation Act nor the amendments to the Limitation Act applied to the current proceeding.

[108] I agree with the submissions made on behalf of the plaintiff. It is apparent from the provisions set out above that this proceeding still continues to be governed by both the old Defamation Act and the unamended provisions of s 12 and s 44 of the Limitation Act.

Orders

[109] I make the following orders:

(1) The plaintiff's application for an extension of time pursuant to s 44 of the Limitation Act is dismissed.

(2) Judgment for the defendants.

[110] I will hear the parties as to costs.