TSANGARIS & ORS. v GAYMARK INVESTMENTS PTY. LTD.

Supreme Court of the Northern Territory of Australia

Maurice J.

17, 18, 18, 20, 21, 24 February, 7 March 1986 at Darwin

Legal practitioners - Authority to compromise - Lessor's consent to proposed assignment withheld - Proceedings for declaratory relief compromised - Lessor to consent on terms - Authority later denied - Implied authority of counsel - Ostensible authority - No extraneous matter involved - Specific performance ordered.

Estoppel - Agency by - Ostensible authority of counsel - Compromise of action - Negotiations conducted through lawyers - Necessity for proving reliance on counsel's general authority - No direct evidence - Extent of reliance required - Specific performance ordered.

Landlord and tenant - Construction of covenants - Supermarket - Covenant not to use premises for other purposes - Covenant to conduct business in orderly and respectable manner - Whether amounting to covenant to keep business operating - Lessor consented to assignment knowing supermarket closed - Delay due to lessor's conduct - Possible application for relief against forfeiture - Relevance of lessor's conduct - Specific performance ordered.

Contract - Implied conditions - Lessor's consent to proposed assignment withheld - proceedings instituted by lessee - Lessor agreed to consent on terms - Subsequent breaches of lease covenants by lessee - Whether implied condition that lessee would observe and perform lease covenants - Not necessary for business efficacy of compromise - Specific performance ordered.

Specific performance - Impossibility and futility - Sale of supermarket business - Lessor's consent to assignment to purchaser withheld - Lessees applied for declaratory relief - Compromise entered into - Lessor to give consent - Further refusal - Lessees claim for specific performance - Purchaser no longer wishing to complete - Lessees' prospects of enforcing sale agreement not to be pre-empted - Lessee in

breach of lease covenants - Proceedings for possession - Possibility of relief against forfeiture - Relevance of lessor's conduct in delaying settlement of sale - Futility not clearly shown - Specific performance ordered.

Cases applied:

Crabtree-Vickers Pty. Ltd. v Australian Direct Mail Advertising & Addressing co. Pty. Ltd. (1975) 133 C.L.R. 72
Waugh v H.B. Clifford & Sons Ltd. (1982) 2 W.L.R. 679

Cases considered:

Codelfa Construction Pty. Ltd. v State Rail Authority of N.S.W. (1982) 149 C.L.R. 337
Eburn v Eburn (1974) 4 ALR 412
Harvey v Phillips (1956) 95 C.L.R. 235
Kempshall v Holland (1895) 14 Rep 336
Sydney Consumer Milk & Ice Co. Ltd. v Hawkesbury Dairy & Ice Society Ltd. (1931) 31 S.R. (N.S.W.) 458
Treloar v Bigge (1874) L.R. 9 Ex. 151

Cases distinguished:

Charlesworth v Watson (1906) A.C. 14
Perryman St. Clair Pty. Ltd. v The Commonwealth (1973) 21 F.L.R. 497

Cases referred to:

Alam v Preston 91938) 38 S.R. (N.S.W.) 475
Australian Safeway Stores Pty. Ltd. v Toorak Village Development Pty. Ltd. (1974) V.R. 288
Baird v Magripilis (1925) 37 C.L.R. 321
Canas Property Co. Ltd. v K.L. Television Services Ltd. (1970) 2 All E.R. 795
Ellender v Wood (1888) 32 Sol. Jo. 628
Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd. (1964) 2 Q.B. 480
Gordon v Gordon (1951) I.R. 301
Hargrave v Hargrave (1950) 12 Beavan 408
King v Poggioli (1923) 32 C.L.R. 222
Matthews v Munster (1887) 20 Q.B.D. 141
Mehmet v Benson (1965) 113 C.L.R. 295
Robinson v Tyson (1888) 9 N.S.W.R. 297
Shephard v Robinson (1919) 1 K.B. 474
Shiloh Spinners Ltd. v Harding (1973) A.C. 691
Strauss v Francis (1866) L.R. 1 Q.B. 379
Swinfen v Lord Chelmsford (1860) 5 H & N 890

Counsel for the Plaintiff:	G. Hiley
Solicitor for the Plaintiff:	P.M. Barr
Counsel for the Defendant:	D. Mildren Q.C. & T. Morris
Solicitors for the Defendant:	Morris, Fletcher & Cross.

IN THE SUPREME COURT

OF THE NORTHERN TERRITORY

OF AUSTRALIA

No. 734 of 1985

BETWEEN:

NICOLAOS TSANGARIS, SEVASTI TSANGARIS, EMMANUEL GERAKIOS and GARYFALIA GERAKIOS

Plaintiffs

AND:

GAYMARK INVESTMENTS PTY. LIMITED

Defendant

CORAM: MAURICE J.

REASONS FOR JUDGMENT
(delivered 7 March 1986)

The plaintiffs are the proprietors of the business known as the Fannie Bay Supermarket. In February 1985 they took up a lease on new premises next door to those in which the business was being carried on. The intention was that the supermarket would shift into the new shop when the necessary fitting out work was completed. The lease is for a fixed term expiring in 1988 with an option for renewal.

The rent reserved is $3,958 per month. The defendant is a private company incorporated in the Northern Territory. It owns both the old and the new shop premises. They were let directly by it to the plaintiffs. In September 1985 the plaintiffs entered into an agreement to sell the business to Detapan Pty. Ltd. This litigation arises out of the defendant's refusal to consent to the assignment of the lease over the new shop premises to Detapan.

An important part of the background to the present dispute is the fact that the plaintiffs suspended retail trading on or before 16 September 1985. No attempt to explain how this came about was made in the course of these proceedings.

The terms upon which the new shop was let to the plaintiffs are contained in a Memorandum of Lease executed by them on 15 February 195 and by the defendant six days later. It contains a covenant to pay rent and a number of other covenants which it will be necessary to refer to in the course of these reasons. It also contains a proviso for re-entry in the event of the lessee making default in the payment of rent or in respect of any of their other obligations under the lease. In clause 1(g) the lessee covenanted with the lessor that -

> "... the lessee will not transfer assign sublet or part with the possession of the demised premises or any part thereof without the consent in writing of the lessor first had and obtained which consent however shall not be capriciously or unreasonably withheld in the case of a proposed transfer assignment or subletting to a respectable and solvent person or persons proof thereof shall rest upon the lessee BUT the lessor may require as a condition of the giving of such consent that the proposed assignee or subtenant shall enter into such direct covenants with the lessor as the lessor's solicitors shall reasonably require and as between the lessor and the lessee the lessor's legal cost of and incidental to such consent and any necessary investigation and the preparation of any such direct covenants shall be borne by the lessee."

The agreement for the sale of the business to Detapan is in writing dated 30 September 1985. Two directors of that company, Haute and Jeany Jongue are also parties to the agreement being described in it as "the Guarantors". The consideration for the sale is $200,000 plus the value of stock. The purchase price is apportioned: $75,000 for goodwill; $120,000 for plant, fixtures, fittings and chattels; and $5,000 for the transfer of the lease. Completion of the agreement is expressed to be conditional upon and interdependent with the transfer or assignment to Detapan by the plaintiffs of their right title and interest as lessees of the shop premises under the lease, "such transfer or assignment to be with the consent of the said lessor Gaymark Investments Pty. Limited".

The agreement for sale also contains a provision whereby the Guarantors agree to give such personal guarantees and enter into such other personal covenants as the lessor may require as a pre-condition to the giving of consent to the transfer of the lease.

Completion of the agreement for sale, that is the date on which the giving of possession and payment of the balance of the purchase price is to take place (in the events which have occurred) is to be within seven days of notification of consent by the lessor to the transfer of the lease. One of the issues raised in this action is whether this agreement is still on foot. The plaintiffs were interrogated on the point by the defendant, their answers being tendered as part of the latter's case. They disclose that on two occasions in 1986 Detapan's solicitor has said over the telephone that his client "did not wish to proceed with the purchase". Of course, taken by themselves and with no knowledge of the context in which these words were spoken it is not possible to say that they reveal an intention to repudiate the agreement. However, the plaintiffs' answers also disclose that they do not regard Detapan as having communicated to them any intention to rescind or terminate the agreement or not to be bound by it. More importantly, perhaps, there is nothing in the evidence before me to suggest that Detapan has any grounds for repudiation or that

the plaintiffs have elected to treat Detapan's solicitor's words as bringing the agreement to an end. In the circumstances, on the evidence before me, I must find that the agreement is still on foot. Furthermore, although I have had no direct evidence from the plaintiffs to this effect, I have no hesitation in inferring from their conduct of this action that they intend to enforce their agreement with Detapan insofar as it lies within their power to do so.

The plaintiffs appear to have first sought the consent of the lessor to an assignment of the lease in a letter from their solicitor, Mr. P.M. Barr to the defendant's solicitors, Morris Fletcher & Cross marked for the attention of the solicitor handling the matter for that firm, Mr. A. Wyvill. The letter was dated 13 September 1985. At that stage it was thought that Mr. & Mrs. Jongue would purchase the business themselves, so it was consent to an assignment to them that was sought. As it turned out, Mr. Wyvill was at more or less the same time sending letters to the plaintiffs, purportedly on behalf of the defendant, alleging all sorts of breaches on lease covenants on their part, requiring rectification within 14 days, and threatening forfeiture. Having received no reply to his letter, Mr. Barr again wrote to the defendant's solicitors on 25 September 1985 requesting consent to an assignment to Mr. and Mrs. Jongue. In that letter he refers to having

received instructions to the effect that the lessor had indicated to one of the plaintiffs that it would only consent to the assignment if the lessees paid $50,000 "damages", $9,000 alleged arrears of rental "being in fact the difference between the amount of rental specified in the Lease and the amount which the lessor had sought, prior to the execution of the lease, for the airconditioned premises", and another small sum which it is not necessary to describe here. A copy of this letter was amongst a bundle of documents tendered by consent.

However, as senior counsel for the defendant pointed out in his address in reply, when those documents were tendered it was expressly made clear that the terms on which the parties consented to their being received in evidence did not permit the use of hearsay parts as evidence of the truth of the assertions contained therein. The letter is therefore not evidence of the fact that the defendant withheld its consent for the reasons stated by Mr. Barr, but merely that the plaintiffs asserted through their solicitor that this was the case.

Still not having received a reply from the defendant's solicitors, Mr. Barr wrote to them for a third time on 1 October 1985. This letter informed the defendant's solicitors that the proposed assignee was now

Detapan, but Mr. and Mrs. Jongue were prepared to give personal guarantees to and enter into personal covenants with the lessor in accordance with their undertaking in the agreement for sale. It also contained an assertion implied if not directly made in Mr. Barr's earlier letters to the effect that the defendant had no objection to the Jongues on the grounds of their respectability or solvency.

Having had no response to his three letters, on 4 October 1985 Mr. Barr caused and Originating Summons (No. 568 of 1985) to be issued out of this Court against the defendant which referred to the lease and sought:

> "1. A declaration that on the true construction of the said Lease and in the events which have happened the refusal of the Defendant to grant consent to assign to the said lease to Detapan Pty. Ltd. is unreasonable.
>
> 2. A declaration that notwithstanding the said refusal the plaintiffs are entitled to assign the said lease to the said Detapan Pty. Ltd."

The summons was in the usual form calling upon the defendant to enter an appearance. It was supported by an affidavit of Mr. Barr sworn on the same day. Annexed to the affidavit were copies of Mr. Barr's three letters seeking consent and a copy of the agreement for sale. The events referred to in the first prayer to relief in the summons

must be taken to be those cutlined in Mr. Barr's affidavit and its annexures. On 22 October 1985 Morris Fletcher & Cross entered an appearance on behalf of the defendant.

The Originating Summons came on for hearing before Nader J. on 24 October 1985. Mr. T.I. Pauling Q.C. and Mr. T.F. Coulehan appeared on behalf of the defendant, instructed by Mr. Wyvill on behalf of Morris Fletcher & Cross. The plaintiffs were also represented by counsel instructed by Mr. Barr. On the following day agreement was reached between the plaintiffs' lawyers and those representing the defendant to compromise the proceedings. The terms were announced to his Honour by Mr. Pauling Q.C. and a transcript of what he said forms the only record of the settlement in evidence in this action. Taken verbatim from the transcript, the terms were:

> "That subject to the proposed assignee, Detapan Pty. Ltd., agreeing to pay from the date of its taking possession of the supermarket premises, the sum of $949.92 per month in addition to the rental specified in item F of the lease - this is to cover airconditioning - that is the sum of $3958 per month, it is agreed as follows:
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> > 'Firstly: the defendant shall consent in writing to the assignment by the plaintiffs of the lease to the Fannie Bay Supermarket premises to Detapan Pty. Ltd., and shall endorse the memorandum of transfer of lease with such consent within 24 hours of receipt of such memorandum of transfer.

Secondly: that the plaintiffs acknowledge and agree that they are liable to rectify the premises at Lot 5405 to a condition satisfactory to the various statutory authorities in order to allow the premises to open for retail trade, and that is without prejudice to the defendant's rights inter alia under the lease to require the plaintiffs to make good any structural alterations to the premises at Lot 5405 and Lot 3048 - that's the old supermarket.

Now, for the purposes of the second clause just read, it is agreed that from the consideration receivable by the plaintiffs for the sale of the Fannie Bay Supermarket business, there be paid into the trust account of Morris, Fletcher and Cross at settlement of the sale of the business the sum of $20,000, such monies to be held by Morris, Fletcher and Cross in an interest bearing deposit as stakeholder for the plaintiffs and the defendant for the purposes specified in paragraph 2, that I read. That is, for the rectification.

Fourthly: the plaintiff shall be entitled to such interest as accrues on the said sum of $20,000 and Morris, Fletcher and Cross shall pay to the plaintiffs such interest at the end of each calendar month.

Fifthly: the said sum of $20,000 or so much thereof as may be required, shall be applied for the purposes of clause 2, and claims for payment may be submitted to the stakeholder, but subject to the arbitration clause no payment shall be made without the approval of both the parties' solicitors.

Sixthly: in the event that the parties remain in dispute as to claims under clause 5, such dispute may be submitted to the arbitration of a consulting engineer nomi8nated

by the President of the Northern Territory Chapter of the Institute of Engineers (Australia), whose decision shall be final and whose costs shall be borne by the party against whom the arbitrator finds, or the matter may be referred to the court under the liberty to apply reserved.

Seventh: when the parties' solicitors are agreed that all claims have been satisfied under clause 2 hereof, then the stakeholder shall pay to the plaintiffs the balance, if any, of the said sum of $20,000 and any interest thereon not already paid.

Eight: liberty is reserved to either party to apply for further relief or orders.

Ninth: there be no order as to costs."

When these terms were announced there were present in the courtroom two directors of the defendant company and its secretary. I reject as fanciful a submission by senior counsel for the defendant to the effect that I cannot infer the presence of these company officers from an admission contained in a set of agreed facts stating that they "were present at the hearing" on that day. It may fairly be deduced from the way the plaintiffs have conducted their case that they did not feel able to prove that these persons had authority to bind the company to the terms outlined by Mr. Pauling Q.C.

It is admitted on the pleadings in the present action that by letter dated 4 November 1985 Detapan by its solicitors advised the defendant's solicitors that Detapan agreed to pay the additional sum of $949.92 per calendar month. It is also admitted that a memorandum of transfer of lease was delivered to the defendant's solicitors on or shortly after 28 October 1985. The defendant did not return the memorandum of transfer with its consent endorsed thereon and it refuses to do so claiming, amongst other thing, that "the persons T.F. Coulehan and T.I. Pauling Q.C. who purported to make [the compromise agreement] on the Defendant's behalf had no lawful authority to do so".

On 6 December 1985 the plaintiffs caused the Writ of Summons in the present action to issue with a statement of claim endorsed thereon. In effect, the plaintiffs seek specific performance of the compromise agreement and unspecified damages for breach thereof. In due course the defendant delivered a defence and counterclaim which, like the statement of claim, has undergone several changes up to the present time. A farrago of defences have been raised, some only to be abandoned when the action came on for hearing. These included allegations of fraudulent misrepresentation, mistake and want of consideration. Now there are only three defences still strongly persisted with: want of authority; non-fulfillment of an implied condition

precedent to the defendant's obligation under the compromise agreement; and discretionary considerations peculiar to specific performance. The last, though put in various ways seem mainly to be concerned with futility and the failure of the plaintiffs to prove they are ready willing and able to perform their part of the compromise.

On 24 December 1985 I made orders in chambers to the effect that the plaintiff claim for specific performance be tried separately from the other issues in the action and counterclaim; that the trial commence on 17 February 1986; and giving detailed directions to ensure the hearing could proceed on that date.

The plaintiffs did not attempt to prove that the compromise was entered into with the express authority of persons having power to bind the company to it. Indeed, counsel for the plaintiffs expressly abandoned any reliance on express authority early on in the hearing. No oral evidence was called in support of the plaintiff's case; the evidence as to the authority of the defendant's lawyers to effect the compromise has to be found in the pleadings, the statement of agreed facts, answers to interrogatories and other documents tendered before me.

It was not contended that the two directors and the company secretary who attended the hearing had authority, actual or apparent, to bind the company save in this respect: it was submitted that because the defendant's articles of association provided for a quorum of two at a director's meeting, they could be regarded as such. Under Article 86 the directors may delegate their powers to committees but there was no evidence that they had done so or, more importantly, that they had held these two directors out as a committee having power to compromise the proceedings. Articles 91 to 93 provide for the appointment of a managing director to whom the board may delegate all or any of its powers. It was not suggested that either of the two directors who attended Court was the managing director. Otherwise the powers of the board to manage the business of the company can only be exercised in duly convened meetings of which those entitled to be present have had proper notice. Finally, whilst excluding grounds upon which the plaintiffs' case might have been conducted, I should say that it was not argued that the settlement of proceedings such as those before Nader J. was in the apparent authority of a director of the defendant company, no attempt was made to lay the groundwork for such a submission or to show that in entering into the compromise the plaintiffs or their representatives relied upon such authority. In particular, I did not hear a submission that simply by virtue of the

offices they hold, two directors and the secretary of a private company whilst not constituting the board have ostensible authority to bind it to a compromise of the kind in question. Thus the case is one which turns upon the nature and limits of a lawyer's authority to compromise an action on behalf of his client.

The question of scope of solicitor and counsel's implied and ostensible authority to settle contentious matters on behalf of their clients has been recently reviewed by the Court of Appeal in Waugh v H.B. Clifford & Sons Ltd. (1982) 2 W.L.R. 679. Brightman LJ delivered reasons with which Cumming-Bruce & Ackner LJJ agreed. The case concerned the compromise of an action for damages against a building company brought by persons to whom it had sold defective houses. The company's solicitors settled the action by agreeing that it would buy back the houses at a value to be determined by a nominated valuer and would pay the plaintiff's conveyancing costs. This they did without express authority from their client. Brightman LJ's review of the authorities was prefaced by the observation that is was:

> "... necessary to bear in mind the distinction between on the one hand the implied authority of a solicitor to

compromise and action without prior reference to his client for consent: and on the other hand the ostensible or apparent authority of a solicitor to compromise an action on behalf of his client without the opposing litigant being required for his own protection either (1) to scrutinise the authority of the solicitor of the other party, or (2) to demand that the other party (if an individual) himself signs the terms of compromise or (if a corporation) affixes its seal or signs by a director or other agent possessing the requisite power under the articles of association or other constitution of the corporation." (686-687).

Then having reviewed the earlier authorities up to Shepherd v Robinson (1919) 1 K.B. 474, he concluded:

"The law thus became well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter 'collateral to the action'; and ostensible authority, as between himself and the opposing

> litigant, to compromise the suit without actual proof of authority, subject to the same limitation; and that a compromise does not involve 'collateral matter' merely because it contains terms which the court could not have ordered by way of judgment in the action; for example, the return of the piano in the Prestwich case, 18 C.B.N.S. 806; the withdrawal of the imputations in the Matthews case, 20 Q.B.D. 141 and the highly complicated terms of compromise in Little v Spreadbury [1910] 2 K.B. 658."

His lordship was of the view that a distinction should be drawn between the implied authority of the advocate or solicitor as between himself and his client and the ostensible authority of the advocate or solicitor vis-a-vis the opposing litigant: the former is not necessarily as extensive as the latter. He said:

> "Suppose that a defamation action is on foot; that terms of compromise are discussed; and that the defendant's solicitor writes to the plaintiff's solicitor offering to compromise at a figure of 100,000, which the plaintiff desires to accept. It would in my view be officious on the part of the plaintiff's solicitor to demand to be satisfied as to the authority of the defendant's solicitor to make the offer. It is perfectly clear that the defendant's solicitor has ostensible authority to compromise on behalf of his client, notwithstanding the large sum involved. It is not incumbent on the plaintiff to seek the signature of the defendant, if an individual, or the seal of the defendant if a corporation, or the signature of a director.
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> But it does not follow that the defendant's solicitor would have implied

> authority to agree damages on that scale without the agreement of his client. In the light of the solicitor's knowledge of his client's cash position it might be quite unreasonable and indeed grossly negligent for the solicitor to commit his client to such a burden without first inquiring if it were acceptable. But that does not affect the ostensible authority of the solicitor to compromise, so as to place the plaintiff at risk if he fails to satisfy himself that the defendant's solicitor has sought the agreement of his client. Such a limitation on the ostensible authority of the solicitor would be unworkable. How is the opposing litigant to estimate on which side of the line a particular case falls? (690)
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> It follows, in my view, that a solicitor (or counsel) may in a particular case have ostensible authority vis-a-vis the opposing litigant where he has no implied authority vis-a-vis his client. I see no objection to that. All that the opposing litigant need ask himself when testing the ostensible authority of the solicitor or counsel, is the question whether the compromise contains matter 'collateral to the suit'. The magnitude of the compromise, or the burden which its terms impose on the other party, is irrelevant. But much more than that question may need to be asked by a solicitor when deciding whether he can safely compromise without reference to his client."

Having discussed further the facts in the case before him, he continued:

> "I think it would be regrettable if this court were to place too restrictive a limitation on the ostensible authority of solicitors to bind their clients to a compromise. I do not think we should decide that matter is 'collateral' to the action unless it really involves

> extraneous subject matter, as in Aspin v Wilkinson (1879) 23 S.J. 388, and In re A Debtor [1941] 2 K.B. 758. So many compromises are made in court, or in counsel's chambers, in the presence of the solicitor but not the client. This is almost inevitable where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be affixed; or that a director should sign who can show that the articles confer the requisite power upon him; or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor. Only in the exceptional case, where the compromise introduces extraneous subject-matter, should the solicitor retained in the action be put to proof of his authority. Of course it is incumbent on the solicitor to make certain that he is in fact authorised by his corporate or individual client to bind his client to a compromise. In a proper case he can agree without specific reference to his client. But in the great majority of cases, and certainly in all cases of magnitude, he will in practice take great care to consult his client, and I think that his client would be much aggrieved if in an important case involving large sums of money he relied on his implied authority. But that does not affect his ostensible authority vis-a-vis the opposing litigant." (691)

The Court held that it was within the ostensible authority of the defendant's solicitor to settle the action by committing their client to a repurchase of the houses.

Accepting all this as sound and supported by the authorities as I do, it thus becomes apparent that one of the main issues in the case before me is whether the terms of settlement announced before Nader J. involved collateral matters. As it turns out, whether they did or not is as relevant to the question of implied authority in this case as it is to the ostensible authority of the defendant's lawyers to settle the matter.

In The Law & Practice of Compromise (1980) David Foskett says of counsel's implied authority to settle that it does not extend to matters other than those "strictly in issue" in the proceedings in which counsel is appearing. He cites Swinfin v Lord Chelmsford (1860) 5 H & N 890, 922; Strauss v Francis (1866) LR 1 Q.B. 379; Matthews v Munster (1887) 20 Q.B.D. 141; Ellender v Wood (1888) 32 Sol. Jo. 628; Kempshall v Holland (1895) 14 Rep. 336; Gordon v Gordon (1951) I.R. 301; and Hargrave v Hargrave (1850) 12 Beavan 408.

In none of these cases is the formulation "strictly in issue" used, although that does not mean it is incorrect. Few of them offer much assistance, most being cases where there could have been little doubt that the terms were within counsel or the solicitor's implied authority. As long ago as Hargrave v Hargrave (above) the question was

framed: "I do not think that this can be considered as an agreement relating to distinct [subject] matter ..." per Lord Langdale M.R. at 412 to 413. Kempshall v Holland is an important case. Lord Esher M.R. and Lopes and Rigby L.JJ held that it was beyond the implied authority of counsel for a plaintiff in an action for breach of promise of marriage to agree to a term that his client would not molest the defendant and would return his letters. At first sight this may seem remarkable, but neither the letters nor the threat of molestation were the subject of the action, so why should it be inferred that when the plaintiff instructed solicitors to conduct the action for her, she gave them and counsel authority in relation to these other matters. As the Master of the Rolls put it, "Neither of these things were matters that formed any part of the action" (338). Although it may not matter to the outcome of the present case, the Court of Appeal does seem to have adopted a different emphasis to that suggested by Mr. Foskett when, in one of the passages from Waugh cited above, Brightman L.J. speaks about matter not being collateral unless it "really involves extraneous subject matter".

Whichever approach is adopted, in an action where there are pleadings the starting point for determining what is in issue or what is the subject matter of the action is to go to the pleadings. But where, as here, there are no

pleadings the problem arises of what apart from the summons may be looked at to resolve these questions. For example, may the affidavits filed on both sides be considered in this connection? Inevitably the matter has to be approached bearing in mind that implied authority is a species of actual authority and that it is only the conduct of the client that can clothe counsel with ostensible authority: Crabtree-Vickers Pty. Ltd. v Australian Direct Mail Advertising & Addressing Co. Pty. Ltd. (1975) 133 C.L.R. 72.

The starting point in this case must be the relief claimed in the summons considered against the background of the lease and, it would seem, the events referred to in it. The subject matter of the proceedings was the withholding of the lessor's consent to the proposed assignment of the lease of the new supermarket premises to Detapan. The range of possible issues must have included: (1) whether the proposed assignee was a respectable and solvent person; (2) if he was, what grounds had the lessor for withholding consent; and (3) having regard to those grounds, could it be said that the withholding of consent was unreasonable or capricious.

The terms of settlement themselves suggest two ground for withholding consent: firstly, the non-use of airconditioning plant installed in the premises; and,

secondly, defects in the premises for which the lessees were liable. Explanatory remarks made by Mr. Pauling Q.C. at the time shed some light on the first of these. The substance of what he told Nader J. was that there was an $80,000 airconditioning plant installed in the premises and the Department of Health would not permit the new supermarket to open unless it was airconditioned. It seems reasonable to infer from this, from his statement that the extra rent of $949.92 per month was to cover airconditioning, and from the absence of any mention of airconditioning in the lease, that the lessor had outlayed substantial sums in equipping the premises with airconditioning which, for one reason or another, he had not been able to get the lessees to agree to take or pay for. The lessor was therefore getting no return on his outlay. Apparently the Department of Health's requirements had changed because now the supermarket would not be able to re-open without airconditioning. From a practical point of view it seems hardly unreasonable for the lessor to have sought, as a condition of giving his consent, an agreement with the new tenants about the use of the airconditioning plant.

If Mr. Pauling Q.C. had announced at the outset of the hearing before Nader J. that these were the reasons why the defendant was withholding its consent, he would have been clearly acting within the scope of his ostensible

authority as counsel retained to appear on the hearing of the matter; and insofar as such an announcement involved admissions, as plainly it would, the would have been binding on the defendant whether they were authorised or not. Furthermore, in the absence of instructions to himself or his instructing solicitor which directly or by implication limited his authority to make these admissions, he would be acting within the scope of his implied authority as well.

So it seems to come to this: the grounds upon which the defendant was withholding its consent were potentially many and various; it lay within counsel's apparent authority to identify and delimit those grounds if in the exercise of his skill and judgment he thought it appropriate to do so and when he did, his client was bound by it so far as the Court and the other side were concerned. It seems to me to make no difference that the identification and delimitation in this case may only have come as late as when the settlement was announced. The significant thing is that what was announced came within the range of issues to which the relief sought in the originating summons had the potential to give rise. Taking a common sense approach, the real question must have appeared to all to have been: What price the lessor's consent? Provided the answer put forward by its counsel was, as here, connected with the premises themselves, it is difficult to see how it can be said to have involved extraneous matter.

I reach this view independently of a consideration of what was contained in Mr. Barr's affidavit filed in support of the summons, and what was contained in an affidavit sworn by Mr. Tsangaris on 10 October 1985 and filed in those proceedings. I think I am entitled to assume that both documents were served on the defendant's solicitors. Furthermore, I am of the view that the Court and those representing the plaintiffs were entitled to treat the responsible officers of the defendant as being aware of the contents. This really follows from the defendant's conduct in appointing solicitors who must then put on an address for service at which affidavits and other documents connected with the proceedings may be left. It was not for the Court or opposing counsel to enquire whether the defendant's solicitors had made their client aware of the documents; this they were entitled to assume. It follows from this line of reasoning that insofar as the affidavits may throw some light on what was in issue in the proceedings they may be looked at for that purpose. Additionally, there is the circumstance that the originating summons really incorporates by its reference to "the events which have happened", the materials in or annexed to Mr. Barr's affidavit.

I think it a fair summary of the effect of Mr. Barr's affidavit and the letters annexed thereto that it was

being alleged by the plaintiffs that the defendant could not and did not have any objection to the proposed assignee on grounds connected with it respectability or solvency; but was withholding consent on other grounds, principally alleged breaches of the lease by the lessee for which the defendant wanted damages, and "arrears of rent" calculated by reference to the additional rent that might have been payable had the lessees been obliged to take the airconditioning. These claims, it was said, had no proper basis and therefore the lessee was acting unreasonably and capriciously in withholding consent until they were met. Much the same can be drawn from Mr. Tsangaris' affidavit. Whether these allegations about the lessor's reason were true or false matters not; what is important is that the issues to which they give rise became the subject of the proceedings instituted by the plaintiffs and defended by Mr. Pauling Q.C. and the other members of his legal team on instructions originating from the defendant.

Mr. Barr's affidavit states that Detapan was a "shelf" company acquired by Mr and Mrs Jongue who were to be its directors. This suggests to me that it was probably solvent and that, if the question arose, it was to be argued that Detapan derived its respectability from that of its directors. Whether it was capable of doing so or not is not necessary for me to decide; the point to be made is that it

cannot be said, as counsel for the defendant appears to me to have urged, that the only issues in the proceedings before Nader J. were the respectability and solvency of Detapan. Who is to say this is how the defendant's first legal team saw it?

I was referred by counsel for the defendant to a line of authority commencing with Treloar v Bigge (1874) 9 Ex. 151 where it has been held that covenants against assignment worded similarly to Clause 1(g) are not to be construed as containing a reciprocal covenant on the part of the lessor not to withhold his consent unreasonably or capriciously, rather they permit the lessee to assign without consent in cases where it is wrongly withheld. This, it was submitted, meant that the only relief that the plaintiffs could hope to obtain on their originating summons was a declaration that an assignment to Detapan would not constitute a breach of the lease. It followed, so it was said, that a settlement which in any of its terms went beyond a concession to this effect must of necessity deal with matters extraneous to the proceedings. If this argument were correct it would seem to confine counsel's ostensible authority in proceedings for a declaration of this kind to consenting to the declaration sought or a declaration in modified form being made. I think such a narrow view would be quite untenable in practice and counter

to the views expressed by the Court of Appeal in Waugh's case. It would mean too that whenever a settlement was proposed that contained terms which the Court could not have ordered by way of judgment in the action, opposing counsel would then have to ask for evidence of his adversary's authority. This proposition was expressly rejected in Waugh's case (690), and rightly so in my view.

Counsel's ostensible authority is ultimately founded upon what may be presumed to have been his instructing solicitor's actual authority implied from the fact of the solicitor having been engaged by his client without known restriction to defend or prosecute the action. If counsel for the defendant on the summons before Nader J. had ostensible authority to offer his client's consent as a means of compromising the proceedings, then I do not see how it can be seriously argued that his authority did not extend to imposing conditions on that consent, being conditions that it might fairly be inferred from the surrounding circumstances it was in the landlord's interest to impose. The conditions contained in the terms of settlement announced by Mr. Pauling Q.C. meet any such test with ease.

In summary there is nothing in the terms of settlement that involves matter really extraneous to the subject matter of the proceedings. That may be defined as

having been the withholding of the lessor's consent to the proposed assignment and its reasons therefore. The issues were not confined to the respectability and solvency of Detapan but extended to anything that might have afforded a ground for the lessor withholding its consent. In fact, the lessor's concerns did emerge from the terms of settlement and from the explanatory remarks made at the time. They emerge also from the affidavits filed in support of the plaintiffs' claim. There was nothing in those terms collateral to or distinct from the lessor's reasons for withholding its consent. If counsel in the exercise of their skill and judgment thought the risk that the Court would make the declaration sought was considerable, knew about the situation with respect to the airconditioning plant and the lessee's breaches, then they ought to be presumed to have had authority to make what they considered to be the best deal possible for the defendant in the circumstance. And, if there were no express limits on their authority, then they ought in the circumstances to be treated as having implied authority as well. Regardless of what the practice may be as to obtaining express approval of the terms of a proposed compromise, here there is nothing to suggest that persons clearly having the requisite authority were readily contactable. And that, not infrequently, is the case when companies are party to litigation.

Two points I should mention at this stage. This Court has not been asked to exercise any discretion to set aside the compromise. In Harvey v Phillips (1956) C.L.R. 235 the High Court recognised the existence of such a discretion where the compromise was within counsel's ostensible authority but outside the scope of his actual authority. The other point is that I have not sought to make anything of what may be treated as the nodding assent of two directors and the company secretary to Mr. Pauling Q.C.'s delineation of the issues (airconditioning and rectification) so far as concerned the lessor. Except as I have mentioned, counsel for the plaintiffs were content to treat the presence of these officers as of no significance for the purposes of this action.

A point taken by the defendant in answer to the plaintiffs' case insofar as it is founded upon ostensible authority is that there is no evidence of the plaintiffs or their legal advisers having relied upon some representation by the defendant that its legal representatives had authority to compromise. For all we know, so the argument went, it may have been the conduct of some unauthorised persons such as the two directors and the company secretary upon which the plaintiffs' lawyers relied.

Before dealing with this submission I want to draw attention to a flaw in the pleadings. Both parties have been content to allow the question of ostensible authority to be debated on the pleadings as they stand, but I doubt if it has been properly raised. In giving particulars of how the compromise was reached, the statement of claim simply alleges that it was entered into by named individuals "on behalf of" the defendant. In my view this is sufficient only to raise and allegation of actual authority residing in those individuals. Ostensible authority, as was rightly pointed out by the defendant's counsel, is an example of estoppel by representation: Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd. (1964) 2 Q.B. 480, 494-495, 498, 503; Crabtree-Vickers Pty. Ltd. v Australian Direct Mail Advertising & Addressing Co. Pty. Ltd. (above) at 79-80; Robinson v Tyson (1888) 9 N.S.W.R. 297; and Bowstead on Agency 14 Ed. 238-239. Both the representation and the reliance upon it necessary to set up a case of estoppel must be pleaded and proved. That was not done here, with the result that the issue was not properly defined as it should have been. Whether the evidence and argument suffered as a result it is not possible to say.

The defendant does not deny that it instructed Morris Fletcher & Cross to defend the summons on its behalf and for that purpose to brief counsel to appear on the

hearing of the summons. In so doing it held out the firm and counsel whom it retained as having authority to compromise the proceedings. The point of Mr. Mildren Q.C.'s submission as I understood it was that what must be shown is that in agreeing to the compromise with the defendant's counsel, the plaintiffs' lawyers relied upon this representation and not upon some other circumstances as, for example, a belief that those of the defendant company's officers present had authority to agree to the proposed compromise and had expressly authorised the defendant's counsel to enter into it. For my part, I do not think that the authorities require so fine a distinction to be drawn: cf Eburn v Eburn (1974) 4 ALR 412 per Carmichael J. at 415. In a case such as the present it would be enough, I think, for the plaintiffs to prove that in entering into the compromise they relied upon the fact of counsel's retainer by the defendant. If reliance upon that fact is shown to be causally relevant to the plaintiffs' lawyers having elected to treat with the defendant's counsel then the requirements of the doctrine of estoppel are satisfied. The logical extension of the defendant's argument is that wherever ostensible authority is relied upon in cases of this sort, it must be proved by those seeking to do so that they believed the opposing party's lawyer did not have express instructions but was relying exclusively upon his general authority. It seems to me that such a proposition runs

counter to the philosophy expressed in Waugh' a that it is necessary only to show elia e upo the fa t that counsel has been retained by the opposing party without considering whether he appeared to be getting specific instructions (and from whom) or was relying on his general authority or some mixture of both.

We know from the admission implicit from paragraph 3 of the defence that the compromise was entered into by lawyers acting on behalf of the plaintiffs (although which of them it is neither possible nor important to say) with counsel for the defendant. Of considerable importance to this issue is the admission in that same paragraph that it was counsel - defendant's counsel - who purported to make the agreement for compromise on the defendant's behalf. This occurred on the second day of the hearing of the summons before Nader J. during which the defendant was represented by these very same lawyers. It is impossible to believe that it was merely a coincidence that the plaintiffs' lawyers chose to deal with them and not somebody else. In my opinion, as a matter of common sense, I have sufficient evidence before me both direct and circumstantial to enable me to conclude that the plaintiffs' lawyers relied upon the fact that Mr. Pauling Q.C. and Mr. T. Coulehan had been retained by the defendant in entering into the agreement which the did with them. Whether they relied upon other matters as well does not seem to me to be the point.

But I have come also to the conclusion that the compromise was within the actual authority of defendant's counsel. There was, as I have found, nothing extraneous to the subject-matter of the proceedings before Nader J. in the terms agreed upon. To ascertain whether the compromise was within counsel's implied authority it is only necessary to consider whether there were any limits placed upon that authority, either expressly or by implication, from circumstances made known to them. Answers given on behalf of the defendant to interrogatories administered by the plaintiffs satisfy me that there were not.

Those answers are contained in an affidavit sworn by the defendant's managing director, Mr. Marco Aurelio Finnocchiaro. He avers that he is duly authorised to swear the affidavit on the company's behalf. It appears from other documents put into evidence that he was one of the two original subscribers to the company when it was formed in 1968. He holds the majority of the issued share capital to which voting rights are attached. He is Chairman of the Board of Directors. The other shareholders are all members of his immediate family, as indeed are the other five directors. In answer to an interrogatory which asked him to say whether there were any and if so what limits and/or prohibitions placed upon the authority of Morris Fletcher & Cross to settle or compromise the proceedings before Nader J., Mr. Finnocchiaro responded:

> "I say that Messrs Morris Fletcher & Cross had authority to conduct the defence of action No 568 of 1985. No express authority was given to the said firm by the defendant to settle the said action. There was no specific limitation placed upon the said firm's authority to conduct the defence of the said action. I am unable to further answer this question."

In answer to the further question: "What if any lawful authority had Mr. T.I. Pauling Q.C. and Mr. T. Coulehan to represent the defendant on 25 October 1985 and, if such authority was in any way limited how was it so limited"?, he replied:

> "I say that Messrs Pauling QC and Coulehan had the authority of the defendant to appear in Court on its behalf in the said action. There were no express limitations upon that authority. I am unable to further answer this Interrogatory."

Both of these responses are evasive inasmuch as neither is a complete answer to the question asked of the defendant. The questions were clearly designed to give the defendant the opportunity to say what if any were the limits on the implied authority of its counsel and solicitors to settle the proceedings. I have no hesitation in extracting from Mr. Finnocchiaro's evasive answers and admission that there were none. In the result, I am satisfied that it was within counsel's actual authority to enter into the compromise which they did.

The compromise was conditional upon Detapan agreeing to pay an extra $949.92 per month rent. The next issue to be confronted arises out of the defendant's refusal to admit that this condition has been fulfilled. However, in its defence it expressly admits that by letter date 4 November 1985 Detapan, through its solicitors, advised the defendant, by its solicitors, that Detapan agreed to pay this additional rent. Given this admission, I do not see how it can be argued that the condition has not been satisfied.

Next it was alleged that an implied condition of the compromise was that the plaintiffs would continue to observe and perform the covenants and conditions contained in the lease until the assignment to Detapan was effected. The plaintiffs did not dispute that they had failed to pay four instalments of rent, beginning with one due on 6 November 1985. Other alleged breaches were disputed; it is not necessary for me to deal with them to dispose of this point. It was argued that a consequence of these breaches was that the plaintiffs were not entitled to enforce the defendant's promise to give its consent to the proposed assignment.

The circumstances in which terms are to be implied in contractual arrangements were fully considered in Codelfa

Construction Pty. Ltd. v State Rail Authority of SW (1982) 149 C.L.R. 337, see particularly the judgment of Mason J. at 345 to 347. To dispose of this defence it is enough to say no term such as that contended for is necessary to give the compromise business efficacy. It is quite capable of standing by itself. The defendant's right to have the lease covenants observed and fulfilled were preserved by the lease itself. The opportunity to make it a condition of the compromise that consent would only be forthcoming if there were no further breaches was not availed of. In these circumstances, it is not for this Court to add an additional term, especially when there is no reason to suspect that the parties may not have deliberately refrained from doing so themselves. Perhaps it should be pointed out that it appears to have been contemplated by the parties when the terms of settlement were announced that only a few days would elapse before a transfer with the defendant's consent endorsed on it would be in the hands of the plaintiffs' solicitor. The prospect of substantial breaches occurring in the meantime is unlikely to have been of great concern. It is only because the defendant chose to renege on the compromise that so much time has now elapsed and the breaches of which the defendant now complains been allowed to occur.

The defendant resisted the grant of specific performance on a number of grounds. One that was persisted in was that the compromise agreement was now impossible to perform. This, it was said, was because Detapan was no longer obliged to proceed with the purchase of the business or, alternatively, did not intend to. I have already said that I am satisfied on the evidence before me that the agreement between the plaintiffs and Detapan is still on foot. Even if Detapan has expressed some reluctance to proceed to the completion I do not think that this Court in the proper exercise of its discretion should use that as basis for denying the plaintiffs' relief to which they are otherwise entitled. To do so would pre-empt whatever rights the plaintiffs may have to enforce their bargain with Detapan.

Four days into final addresses counsel for the plaintiffs obtained leave to amend the statement of claim to allege that the plaintiffs are and have always been ready, willing and able to complete their obligations under the compromise agreement. At no stage has the defence been drawn to put any of these matters in issue. In substance, what remains for the plaintiffs to do under the compromise is to "rectify" the premises to a condition satisfactory to the various statutory authorities such that those authorities will allow the premises to open for retail

trade, and upon completion of the sale to Detapan to pay $20,000 from the proceeds into Morris Fletcher & Cross' trust account as security for the performance of the rectification work.

It is well established that to obtain specific performance in the orthodox sense a plaintiff must be ready, willing and able to perform his part of the bargain: King v Poggioli (1923) 32 C.L.R. 22; Mehmet v Benson (1965) 113 C.L.R. 295, 307 to 309; and see the discussion of this topic in Meagher, Gummow & Lehane, Equity Doctrines & Remedies 2 ed. pars. 2023 to 2025. In some jurisdictions it is still necessary for the plaintiff to plead readiness etc., but not where there are rules of court in terms similar to those mentioned by Higgins J. in Baird v Magripilis (1925) 37 C.L.R. 321, 330 to 331:

> "Under the Queensland Rules and these pleadings, there was no issue joined on the subject of readiness and willingness. Under Order XXII., r.12, an averment of the performance or occurrence of all conditions precedent necessary is implied (not expressed) in the statement of claim (see Form XII., "statement of claim"; Wilson & Graham's Supreme Court Practice p.498); and when the performance or occurrence is denied, the condition precedent must be distinctly specified in the defence. The defendants must (under r.14) raise by the defence all matters of fact which show that the claim of the plaintiffs is not maintainable; and all grounds of defence must be pleaded which, if not raised, would be likely to take the plaintiffs by surprise. The defence

> here merely denied all the allegations of the statement of claim (not the implications); there was no issue, and, therefore, no need of a finding, as to readiness and willingness; and, in my opinion, no evidence was even admissible, on that mere subject, at the trial."

In the Northern Territory Order 23 Rules 14 and 15 do the work of the two Queensland rules referred to by Higgins J. Despite having been amended several times, the defence in this case has never raised the issue of the plaintiffs' readiness, willingness or ability to perform. It does purport to "put in issue generally all facts alleged, whether expressly or by implication, in the Statement of Claim", but this does not satisfy Rules 14 and 15; further, it offends Rule 17 which specifically prohibits setting an "ambush" by so unspecific a traverse. Even now the defendant has still not sought to amend its defence to deny the plaintiff's allegation of readiness etc.

This may seem a technical basis upon which to dispose of the matter, but I am not satisfied that the plaintiffs have not walked into a trap. In the vast majority of suits for specific performance there is not question of the plaintiffs readiness, willingness or ability to perform; it is almost always the defendant's attitude that is in question. The plaintiffs' willingness is to a significant degree demonstrated by their instituting

proceedings and prosecuting them with vigour: see Alam v Preston (1938) 38 S.R. (N.S.W.) 475. It is right, in my view, that the rules reflect this situation. It may well have been the case here that the furthest thing from the plaintiffs' minds was their own position in relation to the performance of the compromise. I do not know. More importantly, I do not know whether the plaintiffs may have given evidence to prove that they for their part were ready, willing and able to perform had these matters been clearly called into question before the evidence closed. The justice of the situation requires that I deal with the point according to the rules.

For these reasons it is not really necessary for me to deal with another argument addressed to me by counsel for the plaintiffs on this issue. He referred me to the decision of Long Innes J. in Sydney Consumers Milk & Ice Co. Ltd. v Hawkesbury Dairy & Ice Society Ltd. (1931) 31 S.R. (N.S.W.) 458 where his Honour held that in a suit to compel the performance in specie of a particular term of an executed contract it is unnecessary for the plaintiff to aver and prove his readiness and willingness to perform the contract. As to what his Honour meant by an executed contract he said:

> "There is a class of suits in this Court, known as suits for specific performance of executory agreements, which agreements

> are not intended between the parties to the the final instruments regulating their mutual relations under their contracts. We call those executory contracts as distinct from executed contracts: and we call those contracts 'executed' in which that has already been done which will finally determine and settle the relative positions of the parties, so that nothing else remains to be done for that particular purpose." (462).

The distinction is also discussed in Equity Doctrines & Remedies (cited above) at pars. 2001 to 2004. Superficially it may seem there is a ready comparison between what in everyday practice typifies an executory contract, namely an agreement to assure an interest in land, with an agreement by a lessor to consent to the assignment of a lease upon terms. But, upon closer examination the comparison falls down when it is seen that the giving of consent in no way alters the position of the parties in relation to one another either under the compromise agreement or the lease. It does not of itself effect and assignment and, if and when the assignment goes through, the relationship between the lessor and the assignor remains essentially the same: Woodfall, Landlord & Tenant 28 ed. pars. 1-1750. If this view be correct, then the judgment of Long Innes J. is direct authority for the proposition that the plaintiffs do not have to prove their readiness and ability in this case.

Finally, I come to the defendant's submission that specific performance ought not be granted because of the futility of making such an order. The bases of this submission were (1) breaches of the lease covenants which had occurred since the compromise was entered into; and (2) the lessor's intention to forfeit the term and re-enter into possession of the premises. As to the latter, I am satisfied that it is the lessor's intention to re-enter just as soon as he is permitted to do so. Evidence was put before me that on 17 February 1986 the defendant issued a writ out of this Court (No.84 of 1986) claiming possession and served it on the plaintiffs. This in itself may amount to a re-entry: Canas Property Co. Ltd. v K.L. Television Services Ltd. [1970] 2 All E.R. 795. A counterclaim for possession in the present action was formally withdrawn when it became apparent that authority to give the notices upon which it was founded could not be proved.

In this action the defendant relied upon alleged breaches of two covenants to demonstrate its right to forfeit the lease: the covenant to pay rent, and what was claimed to be a covenant to carry on the business of a supermarket on the premises. This latter covenant, it was argued, is the one capable of being spelled out of Clauses 1(b) and (c) and Item H in the First Schedule to the lease.

That the plaintiffs have defaulted in paying the last four instalments of rent is not disputed. They have now made an application for relief against forfeiture in action number 84 of 1986. This was not done until after the close of addresses in the proceedings before me, but the possibility of such an application being made was foreshadowed in addresses. The plaintiffs have since sought to re-open the evidence to enable them to prove that they have raised the money necessary to pay the arrears of rent. Their application is opposed by the defendant, which argues no sufficient ground for re-opening has been shown. Senior counsel for the defendant has also foreshadowed the possibility of calling evidence in reply, instancing evidence about possible acts of bankruptcy on the part of the plaintiffs. In addition, he indicated if the evidence was admitted then the defendant would apply to have the hearing of the application for relief against forfeiture brought forward.

Clause 1(b) contains a covenant that "the lessee will not use the demised premises for any purpose other than those set out in Item H of the First Schedule" without the consent of the lessor. The purposes set out in Item H are "Supermarket and Storage". The covenant in Clause 1(c) provides that "the lessee will conduct its business on the demised premises in an orderly and respectable manner and

will not do or suffer to be done in upon or about the demised premises or any part thereof any act matter or thing which shall or may be or become a legal nuisance to the lessor ...". The defendant contends that these clauses impose an obligation on the plaintiffs to carry on a supermarket business on the premises during the term of the lease.

It appears that the plaintiffs ceased trading as long ago as before 24 September 1985; on that date the defendant's solicitors gave written notice to them complaining of the fact. Responding to this and a similar notice, Mr. Barr wrote to the defendant's solicitor on 7 October 1985 admitting that the business had been closed pending completion of the sale and, in effect, that it had been necessary to close it whilst works were carried out on the premises. This state of affairs must have continued up until 25 October 1985 when Mr. Pauling Q.C. on behalf of the defendant told my brother Nader of the "long period that this supermarket has been closed". To put the matter in some sort of perspective then, the defendant entered into a compromise knowing the business was closed and would not re-open until the new tenant was in. Indeed, on the admission of its own counsel it could not re-open until some agreement had been reached about the airconditioning. Having refused to honour its undertaking to give its consent

and having thus protracted incrdinately the period of closure, it now asks this Court to exercise its discretion against compelling it to perform its promise because of that very circumstance. Putting aside the question of any waiver or estoppel that might arise from its conduct in this regard, and assuming that the lease does require the plaintiffs to carry on the business, I am of the opinion that, in considering an application for relief against forfeiture where the forfeiture was based upon any such ground, the defendant's conduct would weigh very heavily indeed with this Court. For a discussion on the history and scope of the jurisdiction to grant relief against forfeiture see Shiloh Spinners Ltd. v Harding (1973) A.C. 691; and see generally Woodfall (op. cit.) at 1-1920.

I do not think that a covenant to carry on business can be spelled out of Clause 1(b). It is negative in form. The true rule is, I believe, stated in Woodfall (op. cit.), "A covenant by a tenant not to use the premises for any other purpose than a specified business does not compel the tenant to carry on that business" (par. 1-1218). See also Australian Safeway Stores Pty. Ltd. v Toorak Village Development Pty. Ltd. (1974) V.R. 268, 271 to 273; and Foa, Landlord Tenant 8 ed. at 115, 234 to 235.

The decision of Blackburn J. in Perryman St. Clair Pty. Ltd. v The Commonwealth (1973) 21 F.L.R. 497 which was cited in argument can be distinguished on the basis that there the covenant was both positive and negative in form - or so his Honour seems to have held (498). Clause 1(c) is positive in form and the defendant's submission that an affirmative obligation to carry on business is contained within it appears to be supported by the House of Lords' decision in Charlesworth v Watson (1906) A.C. 14. There the lessees of a coal mine covenanted that they would at all times during the term fairly, duly and honestly win work and get the whole of the demised seam in a proper and workmanlike manner. It was held, in effect,that the words "win work and get" were not merely there to provide something for the associated adverbs to qualify, but themselves imported a substantive obligation. However, the positive aspect of the covenant in that case was much less a matter of form than it is here, and there was the added consideration that unless coal was won the lessor would receive only a nominal dead rent.

I do not think the fact that Clause 1(c) is positive in form concludes the matter. Nor do I believe that decisions involving the interpretation of other lease covenants at other times in other places are of much assistance. Essentially, what I find remarkable is the idea

that a commercial lawyer today would adopt the form of words used to open this sub-clause if he wished to create so singular and unqualified an obligation as requiring the lessee to carry on business. The fact is that in ordinary usage people do express negative obligations in positive terms - there is nothing unusual about that. At the very least I would have expected to find the obligation to conduct the business separated from the orderly and respectable requirement by the conjunctive phrase "and will do so" or some equivalent. The main focus of the sub-clause appears to be the manner of carrying on the business and the avoidance of nuisances and risks. If it had been intended to oblige the lessee to use the premises for the purposes stated in Item H then the more natural way of achieving that result would have been to case Clause 1(b) in a positive form. In the final analysis, Clause 1(c) is as consistent with an assumption that the premises would be used for business purposes without intending to create an obligation to do so as it is with an intention to create such an obligation.

I was not referred to nor have I been able to find any other provision in the lease that throws any light on the problem. Clause 9 contains an indication that the lessor may have a wider commercial interest in the shopping centre in which the supermarket is located, but without more

that begs rather than answers the question of whether the defendant was able to get the lessees to covenant to carry on the supermarket business. In the result, but not without hesitation, I tend to the view that the lease contains no covenant to carry on the supermarket business. If I had known more about the surrounding circumstances, particularly the condition of the premises when the lessees took possession, I might have been assisted by that knowledge in construing these covenants.

But even if I am wrong in this conclusion, then for reasons I have stated I do not think specific performance should be refused because of the plaintiffs' failure to carry on business. In its action for possession the defendant has got to overcome any question of waiver or estoppel that its past conduct may have given rise to. More important is the question of how this Court will react to the plaintiffs' application for relief against forfeiture in the light of the defendant's conduct: see Fry on Specific Performance 6 ed. pars. 961 to 968.

I was referred by counsel for the plaintiffs to the very useful discussion of futility as a ground for refusing specific performance in Spry, Equitable Remedies 2 ed. at 126 to 130 (and in relation to injunctions at 388 to 390). There the learned author points out that if the futility of

ordering specific performance is not certain, other discretionary considerations may be taken account of. I am not in a position to say that the defendant must succeed in its latest round of ejectment proceedings. The lease requires the giving of certain written notices before a re-entry can be effected. They have to be authorised by the company. Plainly some earlier ones emanating from the defendant's solicitors' office were not. I am not prepared to make any assumptions about the defendant's prospects of succeeding in the new proceedings. More importantly however, on the material before me, discount the fresh evidence which the plaintiffs wish to introduce (save that which is a matter of record, namely the action for relief against forfeiture), I would not be prepared at this stage to forecast the outcome of the plaintiffs' application for relief against forfeiture.

How should the Court exercise its discretion? Let us review the facts. The defendant has refused to honour a compromise entered into by senior and junior counsel on its behalf the terms of which were solemnly announced before this Court in the presence of the company's solicitor, its secretary and two of its directors, both members of Mr. Marco A. Finnocchiaro's family. At the time the supermarket was temporarily closed. It was not proposed to re-open it until the sale had been completed. It could not re-open

without airconditioning. There could not no airconditioning without the lessor's agreement. The sale could not be completed without the lessor's consent. These things were all known to the lessor at the time. If its management had acted honourably, there is no reason to suppose that any of the breaches of which it now complains would have occurred. In the peculiar circumstances of this case they should be regarded as largely if not exclusively its own making.

I am not satisfied that damages would be an adequate remedy. I am satisfied that the plaintiffs earnestly desire to complete the sale of their business and believe they would be considerably disadvantaged if they were limited to damages. It seems that a settlement would bring a more immediate solution to their pressing financial problems. I do not think this Court ought to delay for one minute more than is necessary in pronouncing the relief to which the plaintiffs are entitled - relief to which they were entitled from 24 hours after the receipt in Morris Fletcher & Cross' office of the letter from Detapan's solicitors dated 4 November 1985 in which that company agreed to pay the additional rent for the airconditioning.

The Court orders that the defendant forthwith endorse its consent on the Memorandum of Transfer of Lease forwarded to its solicitors under cover of Mr. Barr's letter dated 28 October 1985 and return it to Mr. Barr.

The plaintiffs have liberty to apply on 24 hours notice for any further orders that may be required to give effect to this order.

There will be judgment for the defendant in the sum of $15,832.00 on its counterclaim for arrears of rent due in the months of November and December 1985 and January and February 1986.

The hearing of the claims for damages in this action and the defendant's counterclaim for damages and interest are adjourned to take their place in the ordinary list of cases awaiting trial.

The plaintiffs may apply on 24 hours notice for declaratory relief with respect of the construction of the compromise entered into between themselves and the defendant on 25 October 1985 so far as that agreement concerns any obligation on the part of the defendant to provide airconditioning.

The defendant is ordered to pay the plaintiffs' costs of and incidental to the issues tried in this action so far.

I will hear counsel on the question of any reserved costs.