(tho95013)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 76 of 1988
(8814897)

BETWEEN:

BEVERLEY NOMINEES PTY LTD
Plaintiff

AND:

NORTHERN TERRITORY TOURIST COMMISSION
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 13 September 1995)

This matter concerns a dispute between the parties in respect of a proposed extension of a lease of premises at 99 Todd Street Alice Springs owned by the plaintiff, the first floor of which was occupied by the defendant pursuant to a lease. The proposed extension of the lease or as it has also been described the new lease related to an area on the ground floor at the subject premises.

The evidence was heard in Alice Springs on 8, 9 and 10 June 1994. At the conclusion of the evidence, counsel for both parties sought to make written rather than oral submissions.

I acceded to the application and by agreement the following timetable for receipt of written submissions was announced.

The defendant to provide written submissions to the Court on or before 27 June 1994.

The plaintiff to provide written submissions by 4 July 1994.

The defendants to provide submissions in reply by 11 July 1994.

In fact what occurred was as follows:

The defendant provided written submissions to the Court on 27 June 1994.

The plaintiff provided written submissions to the Court on 24 February 1995.

The defendant provided written submissions in reply on 24 May 1995.

For these reasons the delivery of a decision in this matter has been delayed for a period in excess of twelve months from the conclusion of the evidence.

This is a claim by the plaintiff company for damages for breach of contract and/or equitable damages for detriment together with interest.

The plaintiff is a company incorporated in the Northern Territory. The plaintiff was on and from 20 February 1985 the registered owner of property situated at 99 Todd Street, Alice Springs and the office building thereon. The property is more fully described as all that parcel of land situated in the Town of Alice Springs containing an area of 1606 square metres (1 Rood, 23.5 perches) or thereabouts being Lot 905 as delineated in Plan A323 deposited in the Lands Titles Office in Darwin and being the whole of the land contained in Certificate of Title Volume 125 Folio 145 (search copy of Certificate of Title (Exhibit P2).

The plaintiff was the successor in title to the original lessor of the said buildings on the property (hereinafter called "the premises") which was referred to in a certain instrument of lease dated 7 October 1982 a memorial of which instrument numbered 152775 was entered in the Register Book of Volume 20 Folio 24 on 1 February 1985 and of which the defendant was the lessee which said lease is hereinafter called the "existing lease". This lease document also referred to as the original lease was tendered and marked Exhibit P1.

Pursuant to the tenures of the existing lease (Item 8) the day of commencement of the term was 1 January 1982 and the term was five years (Item 7).

Pursuant to the terms of the existing lease (covenant 3(f) and Item 13 of the Schedule) the defendant had a right to the grant to it by the plaintiff of a lease of the premises for a further term of five (5) years after the expiry of the initial terms, exercisable on notice therein specified, at a rental to be agreed, or failing agreement, to be determined as specified in paragraph 1(2) of the said Item 13.

By letter dated 13 November 1986 addressed to Builder Real Estate as property manager for the property on behalf of the plaintiff, the defendant purported to exercise the option under Item 13 aforesaid (hereinafter "the option"). This is admitted by the defence on the pleadings.

By letter in reply dated 10 March 1987, the plaintiff's then solicitors Messrs Martin and Partners, notified acceptance of the exercise of the option (its lateness notwithstanding). This is admitted by the defence on the pleadings.

The defendant did in fact take up the option to renew the lease of the first floor of the building and remained in occupation of the first floor of the building until December 1991.

Paragraph 9 of the Statement of Claim the plaintiff claims as follows:

> "By the correspondence referred to in paragraphs 7 and 8 hereof, the Plaintiff and the Defendant reached or alternatively recorded an agreement which:
>
> (a) replaced and superseded, or alternatively was collateral to, the agreement resulting from the Defendant's exercise of the option; and
>
> (b) obliged the Plaintiff to grant and the Defendant to accept a lease of the original space together with the additional space on the terms and conditions adumbrated in that correspondence, for a term of 5 years from 1st July 1987 and otherwise in accordance with the relevant terms and conditions of the existing lease."

In the written submissions counsel for the plaintiff submits, the plaintiff's contractual cause of action is pleaded in two separate (but not inconsistent) ways. For convenience counsel referred to these as "the first agreement" and "the second agreement".

"First Agreement

1) The letter of 30 April 1987 from Builder Real Estate (hereinafter referred to as "Builder") to the defendant (Exhibit P5); and

2) The letter of 23 May 1987 from the Defendant to Martin and Partners (hereinafter referred to as "Martins") (Exhibit P6).

Second Agreement

The submission by counsel for the plaintiff is that in paragraph 10 of the Statement of Claim the plaintiff pleads a second agreement arising from:

1) The letter of 21 May 1987 from Martins to the defendant (Exhibit P7) which letter crossed in the course of delivery with the letter dated 23 May 1987 (Exhibit P6); and

2) Oral confirmation given in the course of a meeting between Ray Hanrahan, then Acting Chief Minister and Minster for Tourism (hereinafter referred to as "Mr Hanrahan") representing the defendant, and Chris Connellan (hereinafter referred to as "Mr Connellan" representing the plaintiff; and

3) The telex of 27 May 1987 from the defendant to Martins (Exhibit P8)."

I agree with the submissions of counsel for the plaintiff that it is only necessary for the Court to conclude that there was one agreement.

PROMISSORY ESTOPPEL

The plaintiff claims the conduct of the defendant induced the plaintiff to assume and believe, and the plaintiff did assume and believe that an enforceable agreement, to the effect pleaded in paragraphs 9 and/or 10 of the Amended Statement of Claim, had been reached between the plaintiff and the defendant, and that the

defendant would enter into a formal lease agreement with the plaintiff in accordance therewith and would otherwise honour and act in accordance with the terms thereof.

As a consequence of the conduct of the defendant, the plaintiff claims that it commenced performance of works on the premises, instructed its solicitors to prepare lease documentation in accordance with the correspondence between the parties and refrained from seeking an alternative tenant for the additional space. The plaintiff further claims the defendant was aware of the plaintiff acting in the manner pleaded and was further aware the plaintiff was suffering a detriment and the defendant took no steps to disabuse the plaintiff of the assumption and beliefs.

The plaintiff claims that it has incurred loss and damage as a direct consequence of the said breaches of agreement, or the failure to keep the said promises, full particulars of which are as follows:

A. Loss of Rental under the new lease

(a) From 1 July 1987 to 30 June 1992 for the additional space at $140.00 per square metre per annum taking into account a credit for the period from 1 July 1987 to 31 December 1987 being the period during which the original tenant of the additional space remained in possession as lessee holding-over under its then expired lease, such holding-over being in accordance with arrangements between the plaintiff and the defendant as set out in the aforesaid letters	$243,050.31
(b) From 1 January 1992 to 30 June 1992 for the balance of the period for the original space	$ 47,817.91

B. Cost of Building Improvement and Establishment

Costs in relation thereto to meet the requirement of the defendant

Being 1)Air-conditioning upgrade: Supply and installation costs -ground floor$70,000.00 -first floor 29,411.00	$ 99,411.00
ii)Administrative fees of Brian Forrester consultants for air-conditioning contract	$ 4,231.87
iii)Fees for preliminary architectural drawings for refurbishment of Tourist Commission building	$ 7,372.75
C.i)Plaintiff's legal costs incurred with Martin & Partners of and incidental to the negotiations and agreement for the lease	$ 1,115.20
TOTAL	$402,999.04

At the hearing the plaintiff abandoned its claim for fees for architectural drawings for refurbishment in the sum of $7,372.75.

The defendant admits that various correspondence passed between the plaintiff and its agents and the defendant and/or its agents and that the content of such correspondence speaks for itself (defence paragraph 4(1)). The defendant also agrees that various conversations took place between the plaintiff and/or its agents and the defendant and/or its agents (defence paragraph 4(b)).

The defendant's case is that on an objective assessment of the correspondence and the conversations relied upon by the

plaintiff, it is not probable that the parties had concluded an enforceable agreement to the effect claimed by the plaintiff in paragraph 9 and paragraph 10 of the Statement of Claim.

The defendant denies any agreement was reached whereby the defendant agreed to take a lease of all or any of the ground floor of the premises, either as a renewal or extension of the existing lease or separately therefrom, as alleged or at all.

In Amended Defence dated 30 November 1992 paragraph 6, the defendant states that the correspondence relied upon by the plaintiff constituted as from 10 March 1987 a valid and binding exercise of the option and therefore a grant of a lease and/or a renewal or extension of the existing lease for a period of five years from 1 January 1987 on the terms and conditions contained in the existing lease which lease renewal, or extension, related solely to the first floor of the premises and did not include any part of, or in any way, the ground floor of the premises.

The defendant further asserts that the interpretation placed by the plaintiff on the contents of the correspondence relied upon by the plaintiff is inaccurate (paragraph 6(b)).

The defendant pleads, in the Amended Defence dated 30 November 1992, that the plaintiff could not lease any part of the ground floor of the premises as and from 1 July 1987, because in or about the month of June 1987 the plaintiff leased the whole of the ground floor of the premises to the Commonwealth of Australia as from 1 July 1987 (paragraph 6(c)).

Set out hereunder is the defence as set out in paragraph 6(d), (e) and (f) of the Amended Defence:

"6.Further to paragraph 5 above the Defendant says that:

(c) In or about the month of May 1987 the Defendant through its agents required the Plaintiff through its agents in accordance with the Plaintiff's obligations under clause 2(b) and item 13(5) of the Schedule of the existing lease to undertake certain repairs and maintenance to the first floor and the surrounds of the premises (hereinafter referred to as the "renovations") which renovations are more particularly described in paragraphs 1 (in the part

referring to the air conditioners on the first floor of the premises), 2, 3 and 4 of the letter of the 23rd of May 1987 which is described in paragraph 8 of the Amended Statement of Claim;

(e) The abovementioned renovations:-

(i) were not subject of, or consideration for, any agreement between the parties;

(ii) were part of the Plaintiff's existing obligations under the existing lease;

(iii) were entirely separate from the building improvements described in (f) below;

(f) Those parts of the correspondence described in paragraph 4(a) above which referred to a lease of all or part of the ground floor of the premises were part of negotiations which were conducted between the parties and/or their agents for the possible lease of all or a part of the ground floor of the premises by the Defendant, however, such negotations (sic) did not reach agreement principally because the Plaintiff failed or refused to agree to undertake the building improvements described in paragraphs 5, 6 and 7 of the letter of the 23rd of May 1987 which is described in paragraph 8 of the Amended Statement of Claim and which negotiations were terminated by the Defendant's solicitors of the 10th of September 1987 which is described in paragraph 18 of the Amended Statement of Claim."

Paragraph 7 of the Defence is as follows:

"In the alternative to paragraph 5 above if any agreement as described in the Amended Statement of Claim was reached (which is denied), then any such agreement (which is denied) was not valid and binding upon the Defendant because:

(a) The essential terms of any lease were not agreed;

(b) The terms of the agreement were uncertain and/or vague;

(c) The agreement was not supported by consideration;

(d) The agreement was not evidenced by a note or memorandum in writing;

(e) The agreement did not comply with the provisions of the Statute of Frauds;

(f) The agreement did not comply with the provisions of Section 116 of the Real Property Act."

In the alternative the defendant states that if any agreement to lease the ground floor of the premises was reached (which is denied) then any such agreement was not valid and binding upon the defendant or alternately the defendant surrendered such lease by letter dated 10 September 1987.

"(a) The Plaintiff implicitly accepted by failing within a reasonable time thereafter to elect to treat the lease agreement as continuing;

(b) Occurred before the Defendant took possession of or occupied any part of the ground floor of the premises;

(c) Occurred before the Plaintiff incurred any expense loss or damage in connection with the lease agreement;

(d) Occurred before any formal lease agreement was produced by the Plaintiff and/or executed by the Defendant and/or registered;

(e) Occurred before any performance of any terms of the lease agreement by either party."

The defendant denies that by its conduct it induced the plaintiff to a belief that an enforceable agreement had been reached between the plaintiff and the defendant and that the defendant would enter into a formal lease agreement with the plaintiff in accordance therewith and would otherwise honour and act in accordance with the terms therewith.

In relation to the plaintiff's claim for equitable relief the defendant says that the plaintiff is not entitled to such relief because it does not have clean hands and/or it has not done equity.

The defendant denies the plaintiff has suffered any loss, damage or detriment or if it did suffer any loss, damage or detriment (which is denied) then the plaintiff has failed to properly mitigate any such loss, damage or detriment.

The defendant denies that the plaintiff is entitled to damages, interest and costs as claimed or at all.

The following two matters are not in contention:

1) That the correspondence relied on by the plaintiff as giving rise to a contract was exchanged between the plaintiff and the defendant or their respective agents.

2) That the persons who wrote that correspondence were acting as agents for the parties.

CORRESPONDENCE

The relevant correspondence (omitting formal parts) and in chronological order are as follows:

1) Letter dated 13 November 1986 from the defendant to Builder Real Estate (Exhibit P3):

> "re:RENTAL 99 TODD STREET
>
> Further to our conversation in your office, I now confirm that the Northern Territory Tourist Commission wish to exercise the option under Item 13 to renew our lease for a further 5 years.
>
> Given that the "Special Conditions" for this further item state in part "such rental as shall have been agreed", I now await your proposal of a fair rental on the premises. I would appreciate negotiations on this matter be completed as soon as possible, as our 1987/88 budget preparations will commence in early January '87."

2) Paragraph on page 2 of letter dated 12 February 1987 from Admin Services to Builder Real Estate (Exhibit D1):

> "LOT 905 TODD STREET, ALICE SPRINGS
>
> Accordingly the Commonwealth wishes to invoke clause 3(c) of the lease and remain in occupation at 905 Todd Street on a month to month basis until such time as the new premises are ready for occupation. At this stage it is envisaged that this could be for a period of six to nine months allowing for over-runs in the construction timetable. It would therefore be appreciated if you could convey the above information to the lessor and let me have his comments and asking price for such a tenancy in due course."

3) Letter from Martins to the defendant dated 10 March 1987 (Exhibit P4):

"lease lot 99 Todd Street

We act for Beverley Nominees Pty. Ltd.

We refer to your letter to our client's agent, Builder Real Estate, dated 13th November 1986.

We are instructed that our client accepts your Commission's exercise of the option (its lateness notwithstanding).

We are further instructed that our client proposes, upon the advice of its agent, that the rent from 1st January 1987 be $6,120.75 per month, being $100.00 per sq. metre for the subject 734.49 sq. metres area. Please confirm as soon as possible that the Commission agrees to this.

The agent requests us to confirm that it has taken steps to ensure that in future requirements relative to repairs and maintenance which are the lessor's responsibility will be attended to promptly."

4) Letter from Martins to the defendant dated 14 April 1987 (Exhibit D5):

"lease lot 99 Todd Street

We refer to our letter of 10th March 1987.

Please expedite the confirmation requested."

5) Letter from Builders Real Estate to plaintiff dated 16 April 1987 (Exhibit D8):

"RE:N.T. TOURIST COMMISSION
TENANCY AT 99 TODD ST.

We confirm with you that at a meeting with Mr. Peter Davis and M/s. Colleen hombsch (sic) of the N.T. Tourist Commission the following matters were brought out for consideration to expand their existing Tenancy by 350 square metres at ground floor level.

1. Removal of evaporative cooling units and installation of additional climate control units for existing and new space at ground level.

2. Waterproof roof and window seals.

3. Remove gas lines and gas stove. Replace with micro-wave oven. Remove bulk gas installation.

4. Drain and repair driveway and carpark.

5. Interconnecting stairway to ground level.

6. Fit out ground floor offices, including, carpets, window treatments, partitions and floor covering.

7. Redesign front of building for access to Tourist Commission.

We will approach Mr. Stuart Philpott and offer his department the remainder space, subject to requirements for fit out.

At this time we have not received official contact from Department of Administrative Services."

6) Letter from Builder Real Estate to the defendant dated 30 April 1987 (Exhibit P5):

"We refer to our recent meeting when it was verbally confirmed to me that you will be taking up the option to renew leasing 99 Todd Street for 5 years.

The terms of the lease are to include an additional 350 square metres of space at ground floor level when vacant possession is obtained in July.

We attach a copy of letter to Beverley Nominees Pty Ltd setting out a basis for completion of your new tenancy and await confirmation in principle to these requirements.

The current tenancy upon which you have exercised the option to renew from January 1, 1987 is at the rental rate of $6120.75 per calendar month. On this matter we would appreciate receiving the rental in arrears from January for the four months to May 1, as follows:

$1966.18 x 4 payment $7864.72

Current rental per calendar month is $6120.75 at 734.49 square metres at $100 per square metre per annum - $73449.00.

We confirm that we anticipate vacant possession of the ground floor area as from July 1, when the agreed renovation and renewal of your total space will begin."

7) Letter from Martins to the defendant dated 14 May 1987 (Exhibit D6):

"<u>lease lot 99 Todd Street</u>

We refer to our letters of 10th March 1987 and 14th April 1987 to which we have received no reply.

We reiterate our request for expedition."

8) Letter from Martins to the defendants dated 21 May 1987 (Exhibit P7 and Exhibit D7):

"lease lot 99 Todd Street

We refer to our letters of 10th March 1987, 14th April 1987 and 14th May 1987.

We now have further instructions. We summarise the present position.

1. Your Commission has exercised its option to renew the existing lease.

2. We assume the rent proposal in our letter of 10th March 1987 is accepted.

3. Rent is presently significantly in arrears: payment is required forthwith.

4. Without prejudice conversations ensued last month relative to the prospect of your Commission leasing additional ground floor space when available (which was expected to be next July). The proposition was subject to the Commission confirming its interest in writing urgently, to enable appropriate negotiations. The failure to so confirm has precluded negotiations and deferred the prospect of such space being available, probably until next January.

If you have any difficulties relative to the foregoing, please let us know within seven days hence, since we anticipate instructions to prepare the formal lease extension.

Our client requires that all future dealings on the issues be exclusively with us."

9) Letter from defendants to Martins dated 23 May 1987 (Exhibit P6):

"re:LEASE LOT 99 TODD STREET

I refer to your letter of 10 March, 1987, in accordance with our previous discussions with Mr Ian Builder and Mr Chris Connellan, and wish to confirm the acceptance by this Commission of the lease renewal option in respect of the above premises under the rental conditions prescribed by your letter.

It should be noted however, that as a result of discussions between your client's agent, Builder Real Estate, and this Commission, and as subsequently confirmed in writing by Mr Ian Builder of Builder Real Estate, the terms of the lease

are to include an estimated additional 350 sq.m of space at ground floor level when vacant possession is obtained in July.

Furthermore, in response to the Commission exercising its renewal option, the agent has agreed to undertake the following building improvements.

1. Removal of evaporative cooling units and installation of additional climate control units for existing and new space at ground level.

2. Waterproof roof and window seals.

3. Remove gas lines and gas stove. Replace with micro-wave oven. Remove bulk gas installation.

4. Drain and repair driveway and carpark.

5. Interconnecting stairway to ground level.

6. Fit out ground floor offices, including, carpets, window treatments, partitions and floor covering.

7. Redesign front of building for access to Tourist Commission."

10) Telex from the defendant to Martins dated 27 May 1987 (Exhibit P8):

"RE: LEASE LOT 99 TODD STREET

I acknowledge receipt of your letter ref. A8666/MFH of 21 May.

Your comments in respect of ground floor availability are noted. Such arrangements are perfectly satisfactory to this Commission.

Confirmation by your client that renovations to the first floor level as agreed will now commence immediately and not deferred until July would be appreciated."

11) Letter from Martins to the defendant dated 1 June 1987 (Exhibit P9):

"lease lot 905 Todd Street

We refer to your telex of 27th May 1987.

We are instructed that Builder Real Estate will liaise with your Commission relative to the renovations.

We note that all elements relative to the lease extension are agreed.

With reference to the ground floor space which your Commission is proposing to lease, we understand there is a prospect that it may wish to occupy the whole of the floor. If this is not the case, the question arises as to the precise situation of the area concerned. Please clarify the position from your Commission's viewpoint as soon as possible."

12) Letter from the defendants to Martins dated 11 June 1987 (Exhibit D17):

"RENOVATIONS TO LOT 99 TODD STREET, ALICE SPRINGS

I refer to my telex of 27 May 1987 seeking confirmation that renovations as agreed to the Tourist Commission's existing lease at 99 Todd Street will commence immediately.

To date a reply has not been received and your early response is requested."

13) Letter from Martins to the defendant dated 3 September 1987 (Exhibit D9):

"lease lot 905 Todd Street

We refer to previous correspondence.

Please let us have a reply to our letter of 1st June 1987 without further delay. The effecting of the improvements referred to in items 5, 6 and 7 of your letter of 23rd May 1987 depends on this information.

We are instructed that the improvements to which you refer in items 2, 3 and 4 of that letter are being effected, together with the upgrading of the cooling of the ground floor area to a reverse cycle refrigeration system.

We are further instructed that our client intends to similarly upgrade the cooling of the premises which your Commission presently leases. It is expected that this work will take four weeks. Commencement is dependent upon the Northern Territory Electricity Commission, since there are electrical prerequisites. Expedition is being sought.

As a consequence of this capital improvement, our client intends a rent increase of $10.00 per metre per year from 1st January 1988. This increase is in addition to the automatic rent variation pursuant to the lease."

14) Letter from Poveys to Martins dated 10 September 1987 (Exhibit P10):

"RE:NORTHERN TERRITORY TOURIST COMMISSION -
LEASE FROM BEVERLEY NOMINEES PTY. LTD. -
1st FLOOR LOT 905 TODD STREET

Please be advised we act on instructions from the Northern Territory Tourist Commission in relation to their leasing arrangements of part Lot 905 Todd Street from your clients.

We are instructed that our client does not wish to continue with the negotiations to lease all or any part of the ground floor of the premises.

Furthermore, our client does not require the installation of additional climate control units for its existing leased premises, but requires the lessor to maintain the heating and airconditioning units in the leased premises in good working order and condition especially as the summer months are drawing nigh, in accordance with your client lessors' obligations pursuant to Item 13.5 of the lease.

We note that your client intends to increase the rent as a consequence of capital improvements made or to be made to the building. There is no foundation in the lease or correspondence to attach any liability to our client to meet such increase.

Pursuant to Item 13 of the lease, as extended, the rental for the period of any extension is not to be reviewed until after the expiry of the first two year period of any such extension, and then only by the CPI increase as specified in Item 13 of the lease."

15) Letter (by facsimile) from Poveys to Martins dated 29 September 1987 (Exhibit D16):

"RE:NORTHERN TERRITORY TOURIST COMMISSION - LEASE FROM BEVERLEY NOMINEES PTY LTD, 1ST FLOOR, LOT 905, TODD STREET

We refer to our letter of the 10th September, 1987.

The airconditioning units purportedly servicing our client's leased premises are still not functioning properly. Recently a major malfunction resulted in our client's premises being damaged due to water intrusion.

Your client's continued failure to maintain the airconditioning units in a proper and functioning order is continuing to cause our client loss and damage and make working conditions in the premises intolerable.

We demand that the airconditioning units be forthwith brought up to satisfactory operating standard in accordance with your client's express covenant contained in the Lease.

Could you please advise as a matter or (sic) urgency when these matters will be attended to."

16) Letter from Martins to Poveys dated 30 September 1987 (Exhibit D15):

"re lot 905 Todd Street Alice Springs

We refer to your letter of 29th September 1987.

Our instructions are that work in relation to the air cooling is about to commence. We note that expedition has been sought, as intimated in our letters to your client of 3rd September 1987.

Further with respect to that letter, our client instructs us that it does not now intend the rent increase referred to therein."

17) Letter from Builder Real Estate to Mr C. Connellan dated 24 October 1987 (Exhibit D12):

"RE: 99 TODD STREET

We refer to telephone advice regarding the above property and we wish to confirm our recent telephone conversation with Mr. Bob Doyle regarding same.

Mr. Doyle expressed keen interest in taking the whole of the property particularly when we advised your intent to refurbish the building, particularly the front entrance and stairwells.

We are preparing a detailed proposal to the Tourist Commission in the (sic) regard and shall advise you of further progress in this matter."

18) Letter from Martin & Partners to Poveys dated 3rd December 1987 (Exhibit D10):

"re lot 905 Todd Street Alice Springs

We refer to our letter of 30th September 1987.

Further to the second paragraph of your letter of 10th September 1987, our client instructs us that in its view an agreement to lease the ground floor area was reached. We understand Builder Real Estate are to supply us with particulars to enable us to prepare a lease."

In addition to the correspondence there were conversations relevant to the negotiations for a proposed lease of the premises. The Court heard oral evidence from Mr Ray Hanrahan and Mr Christopher Anthony Connellan (Director of the plaintiff company) for the plaintiff and evidence from Mr Ian Builder, Mr Robert Doyle and Mr Peter Davis for the defence.

Mr Hanrahan gave evidence that in 1987 he was the Deputy Chief Minister and the Minister for Tourism. Mr Hanrahan stated that at the first of two meetings he had with Mr Connellan, the date of which he could not recall, he had told Mr Connellan that the Commission would be honouring the agreement that they had with the plaintiff to take up additional space on the ground floor of the building, subsequent to certain works being done by Mr Connellan. Mr Hanrahan gave the following evidence (transcript p4):

> "MR MORRIS: If you wait there again. I am sorry, Mr Hanrahan. Just confining yourself for the moment to the things you discussed with Mr Connellan, do you remember saying anything to him about any direction that you might be giving?---Well, yes, I did confirm to him that I would be directing the chairman of the Tourist Commission.
>
> And what did you tell him? That is, what did you tell Mr Connellan that you would be directing the chairman of the Tourist Commission to do?---To take up the additional space in the ground floor of the building which - the details escape me, but it was subsequent to certain works to be perform by Mr Connellan or - who was the owner of the building. And that was part of what I perceived to be the arrangement in place.
>
> When you say the extra area, do you recall how much space you were speaking about - that is on the lower floor of the building?---Well, no, I don't know exactly but it was substantial. A substantial area downstairs and it required some internal work and refit-out. But the actual amount, no, I don't have - I don't have the details although it was confirmed in writing. Those details would be available in that correspondence."

On this aspect Mr Connellan gave evidence that he had a meeting with Mr Hanrahan on Saturday 23 May 1987. When Mr Connellan arrived Mr Peter Davis, whom Mr Connellan knew to be an officer of the Tourist Commission, was leaving Mr Hanrahan's office. Mr Connellan gave evidence as to his conversation with Mr Hanrahan as follows (transcript p44):

"Just what did Mr Hanrahan tell you at the end of the meeting?---Well, I don't remember the words.

I understand you don't remember the precise words. What was the effect of what he said or the substance of what he said?---The substance of what he said was that I could expect to receive a written response from the chairman, Bob Doyle, to my previous inquiries.

And did he explain what the effect of that response would be?---Yes.

What did he say about that?---Well, the response would be that the Tourist Commission would accept the delay in taking a space on the ground floor.

And after that did you receive a letter and also - this is through your solicitors of course - a fax from the Tourist Commission. I'm sorry, I said a fax, a telex?---A telex, yes.

A letter and the telex?---Yes, that's correct."

Mr Hanrahan was hampered in the giving of his evidence in this matter because his diaries and copies of records and memorandums he made during his period as Minister for Tourism, and which would normally be held in Archives, cannot be located. Understandably, without the benefit of his diaries and records, Mr Hanrahan had difficulty in recalling the dates of his meetings with Mr Connellan and what was said by each of them at the two meetings. Mr Hanrahan's evidence is that at the time of his first meeting with Mr Connellan, he believed there was an agreement in place between the plaintiff and the defendant that the defendant would lease an area on the ground floor of the building owned by the plaintiff and the plaintiff would carry out certain work. Mr Hanrahan stated he had approved a memorandum from the Commission requesting funding for the additional lease and conveyed this approval to the Commission. Mr Hanrahan gave evidence he had inspected the site of the premises to be leased and subsequently gave a written direction to Mr Doyle relating to the Commission taking the lease of additional space on the ground floor of the building. The evidence of Mr Doyle and Mr Davis, who had access to the Commission's records, is that no such direction was ever given. Mr Doyle, who was at the relevant time Chief Executive Officer and Chairman of the Commission, gave evidence as follows (transcript p199):

"... Now, during 1987, did you on occasions receive directions from Mr Hanrahan?---For sure.

> And were they in writing?---Always.
>
> And did you receive any direction from Mr Hanrahan to lease the ground floor space - for the commission to lease the ground floor space in the building at 99 Todd Street?--- Never.
>
> Did you receive any oral instruction, if I can put it that way, instead of a written direction, to do so?---No.
>
> If you had received a written direction, what would have happened?---Well, in this particular instance we would have investigated as we were doing to the suitability of the place. If we had decided it wasn't suitable for our needs we would have written back and argued the case to the minister. It would have generated paperwork.
>
> At this time was the commission an independent body?---Absolutely."

and then in cross examination at transcript p218:

> "But you are not aware of any rule that says that formal directions have to be in writing?---No.
>
> If Mr Hanrahan had rung you up and said, "Look, Bob, I want you to do this" then you would have done it?---Well, no, not in a thing like a lease or something like this. He would have to give it in writing. I would insist upon it being in writing. I mean, if he just rang up and said, "Look, I think we should do some promotion of Tennant Creek" or something, well, I would say, "Well, okay, we can look at it." But in a thing like this which is a legal situation, I just would not accept it other than in writing."

Mr Davis, who at the relevant time was Director of Operations of the Commission, gave evidence as to the system for filing ministerial directions (transcript pp 227-228).

The effect of Mr Davis' evidence was that the Commission had a system of recording all incoming correspondence in an incoming register and all outgoing correspondence in an outgoing register. In addition the Commission maintained a file specifically in relation to the lease of premises 99 Todd Street, Alice Springs.

There is no evidence of any letters, written directions or memoranda on the Northern Territory Tourist Commission's files relevant to any communication between Minister Hanrahan and officers of the Northern Territory Tourist Commission on this issue.

I accept the evidence of Mr Doyle (transcript p217) supported by the evidence of Mr Davis (transcript p227) that the practise was for such directions to be in writing.

Mr Hanrahan gave evidence that at the first meeting with Mr Connellan, Mr Connellan was making a complaint to him about the Commission breaking an undertaking to occupy the downstairs space in his building (transcript p 14). However, the evidence of Mr Connellan given at transcript p 86 is as follows:

> "Now, Mr Hanrahan told us yesterday in his evidence that the thrust of what happened in that meeting was that you complained to him that the commission - among other things. You complained about the commission breaking an undertaking to take the ground floor?---Well, if he did, I'm not aware of it.
>
> Are you saying you didn't make that - you didn't make a complaint to Mr Hanrahan to that effect?---Correct."

Mr Hanrahan gave evidence that at this first meeting with Mr Connellan, Mr Hanrahan was not aware of correspondence between Mr Connellan's solicitors and the Commission or the correspondence between Mr Connellan's agents Builder Real Estate and the Commission.

I find on the evidence given by Mr Hanrahan and Mr Connellan that at a meeting between them on Saturday 23 May 1987, Mr Hanrahan made a commitment to Mr Connellan that he would direct the defendant to take up a lease of an area of the ground floor of premises owned by Mr Connellan. This commitment was dependent upon certain work being carried out by Mr Connellan to the building. Mr Hanrahan was not able to give evidence as to the exact nature of the work to be done.

I find that Mr Hanrahan did have the power to give such a direction to the Northern Territory Tourist Commission. The power is contained in s19 of the *Northern Territory Tourist Commission Act* which states:

> " 19. The Commission, in the performance of its functions and the exercise of its powers, is subject to the directions of the Minister."

There is no requirement for such direction to be in writing.

The defence submit that Mr Hanrahan had no authority to give such directions (*Meates v Attorney General* (1979) 1 NZLR 415 per Dawson CJ at 462). I do not accept this submission. In my opinion Mr Hanrahan had the statutory authority provided by s19 of the *N.T. Tourist Commission Act*.

Whether that direction was ever in fact given by Mr Hanrahan to officers of the Commission is more difficult to decide.

There is no documentary evidence of any written direction being given by Mr Hanrahan to the Commission. There is evidence from Mr Hanrahan that a substantial number of documents are now missing. It is Mr Hanrahan's evidence that he forwarded a memorandum to the Commission confirming that the Commission was to take the space on the ground floor of the building. It is Mr Hanrahan's evidence that he gave a direction to the Commission both orally and in writing (transcript pp8-12). Mr Doyle (transcript p199) is equally adamant no such direction, either orally or in writing, was giving to the Commission by Mr Hanrahan. I considered both men to be credible and honest witnesses. Both were, in my opinion, making every effort to honestly remember what had transpired. In the circumstances, I am not prepared to make a finding either way. This means that on this issue the plaintiff has failed to prove on the balance of probabilities that any such direction was ever communicated by Mr Hanrahan to the Commission.

However, I agree with the submission by counsel for the plaintiff that it is irrelevant whether or not Mr Hanrahan did communicate his direction to the Commission either orally or in writing. I have found on the evidence that he did give a commitment to Mr Connellan that he would direct the Commission to take up a lease of the ground floor premises. This direction was of course qualified by the provision that Mr Connellan was to carry out certain work to the ground floor of the premises.

It is the defence contention Amended Defence dated 30 November 1992 paragraph 6(c):

> "The plaintiff could not possibly lease any part of the ground floor of the premises to the defendant as and from the 1st July 1987 because in or about the month of June 1987 the plaintiff leased the whole of the ground floor of the premises to the Commonwealth of Australia as and from the 1st July 1987."

It is not disputed that the plaintiff did grant such a lease to the Commonwealth.

I agree with the submission by counsel for the plaintiff that the granting of such lease was by agreement deferred. The letter of 21 May 1987 (Exhibit D7) indicated the availability of the ground space was "deferred . . . probably until next January" and the defendant (by Exhibit P8) indicated that "such arrangements are perfectly satisfactory to this Commission".

Accordingly, I do not accept this to be a valid ground of defence.

DEFENCE RELATING TO PLAINTIFF'S FAILURE TO UNDERTAKE THE BUILDING IMPROVEMENTS

The defendant contends in its Amended Defence dated 30 November 1992 6(f):

> "Those parts of the correspondence . . . which referred to a lease of all or part of the ground floor of the premises were part of negotiations which were conducted between the parties and/or their agents for the possible lease of all or a part of the ground floor of the premises by the defendant, however, such negotiations did not need agreement principally because the plaintiff failed or refused to undertake the building improvements described in paragraphs 5, 6 and 7 of the letter of the 23rd May 1987 which is described in paragraph 8 of the Amended Statement of Claim and which negotiations were terminated by the defendant's solicitors of the 10th September 1987 which is described in paragraph 18 of the Amended Statement of Claim."

SUBMISSIONS BY THE PLAINTIFF IN RESPECT OF AMENDED DEFENCE DATED 30 NOVEMBER 1992 - PARAGRAPH 6(f)

Counsel for the plaintiff submits the plaintiff did not fail or refuse to agree to undertake those improvements. In a letter

from Mr Builder dated 30 April 1987 (Exhibit P5), there is reference to "the agreed renovation and renewal of your total space".

The plaintiff's submission is the defendant has not pleaded an issue in respect of the authority of Mr Builder to make a commitment on behalf of the plaintiff.

Even if Mr Builder did not have actual authority to make such a commitment for the plaintiff he had ostensible authority to do so.

The defendant sent correspondence acknowledging the existence of such an agreement:

a) The letter of 23 May 1987 (Exhibit P6) provides that "the agent has agreed to undertake the following building improvements".

b) The telex of 27 May 1987 (Exhibit P8) refers to "renovations to the first floor level as agreed".

c) The letter of 11 June 1987 (Exhibit D17) refers to "renovations as agreed to the Tourist Commissions existing lease at 99 Todd Street".

Counsel for the plaintiff further asserts that the correspondence is supported by the oral testimony of Mr Builder, which clearly confirms the existence of a concluded agreement. Counsel for the plaintiff refers to the following passage of evidence given by Mr Builder in relation to Exhibit P6 (transcript pp191.9 to 192.3):

> "In relation to the second paragraph, you would agree that the letter is accurate when it says:
>
> As a result of discussions between your client's agent, Builder Real Estate, and this commission, and as subsequently confirmed in writing by Mr Ian Builder of Builder Real Estate the terms of the lease are to include an estimated additional 350 square metres of space at ground floor level.
>
> You would agree that is an accurate reflection of the discussions which you had with the commission?---Yes.

It goes on and says:

> In response to the commission exercising its renewal option the agent has agreed to undertake the following building improvements.
>
> Now, you would accept, wouldn't you, that there was agreement to do those seven items?---Yes.
>
> So all of the conditions that were outstanding at the time of your discussions had by 23 May 1987 been satisfied?---According to this, yes.
>
> You would agree with me that at that stage there was a concluded agreement?---Yes.

I note also the following questions and answers in re-examination (transcript p192.3-192):

> "Referring to P6?---Yes.
>
> If the agent being referred to in the third paragraph is yourself - is that correct?
>
> Do you understand my question?---I understand the question. I don't think that we're the agent that's going to undertake the following building improvements but we - certainly have been asked to probably oversee that on behalf of our principals.
>
> If the agent being referred to is yourself - in other words, if it is you that it is being said in this letter had agreed to undertake the following building improvements - is that correct; is that accurate?---Well, the owner's not going to undertake any building improvements.
>
> No. Well - - -?---The agent would undertake them on behalf of his principal to - providing the principal had agreed.
>
> Yes. Had you agreed to undertake the building improvements on behalf of your principal?---No.
>
> Is that accurate - if that reflects your - - -?---Well, I don't believe it is in that case because we hadn't yet been advised by our principal that he would pursue some of those seven points that was outlined underneath.
>
> Did you at any stage advise Mr Connellan that $140 square metres was the fair market rental for the ground floor space in the building?---No. Well, we hadn't yet arrived at what work was to be undertaken on the ground floor, so it was impossible to determine the rent. I may have suggested a likely rent."

The plaintiff argues the commitment was made on behalf of the plaintiff. Even if Mr Builder had no actual authority he had

ostensible authority and the plaintiff is bound by the commitment made on its behalf by Builder.

On the submission of counsel for the plaintiff it is irrelevant that Mr Builder may have exceeded his actual authority. Accordingly, the plaintiff submits any evidence either from Mr Builder or from Mr Connellan to the effect that the plaintiff had not authorised Mr Builder to make such a commitment should properly be disregarded.

FINDINGS ON THE ISSUE OF REPAIRS AND RENOVATIONS (PARAGRAPH 6f) OF THE AMENDED DEFENCE DATED 30TH NOVEMBER 1992

I agree with the submission made by counsel for the defendant that:

> "The essential requirement of every contract for a lease is that there must be a binding contract in accordance with the general law governing contracts. To constitute a complete contract, there must be a proposal or offer to take a lease, followed by an unequivocal and unconditional acceptance without variance of any sort between it and the proposal, and communicated to the other party." Woodfall Landlord and Tenant 28th Ed (at paragraph 1-0317).

I am not satisfied Mr Connellan had "unequivocally and unconditionally" committed himself to his side of the bargain, i.e. to carry out certain work to the ground floor of the premises. I found Mr Connellan to be an unreliable witness and his evidence contradictory. On a number of occasions Mr Connellan gave evidence to the effect that he had not communicated to the defendant his agreement to do the work specified in a letter from the defendant to Martins dated 23 May 1987 (Exhibit P6). This repeats the items of work to be done as set out in a letter dated 16 April 1987 (Exhibit D8). Examples of such evidence are as follows (transcript 95.2-95.5):

> "And in the letter to you of 16 April, the commission's requirements for it to take additional space in the building are set out, aren't they?---Correct.
>
> And you understood from what you have already told us that if you from your side promised to perform those things - to

do those things that would be your part of the agreement? ---Correct.

And if in return for your promising to do those things the commission said, "We promise to take the ground floor space," there would be an agreement. Would you agree with me about that?---Correct.

So it's not correct to say that the proposal being put in the negotiations makes an agreement, is it?---No.

Now, let's come back to the part of the agreement that you understood you would have to promise, namely the works set out in - I will refer to them as the works, set out in the letter of 16 April. You understood that your part of the agreement was to - I will rephrase that. That if an agreement was to be made you were required to promise - the commission was asking you or requiring you to promise to do those things, didn't you?---Correct.

And you didn't promise to do those things, did you?---No."

A further example in evidence of Mr Connellan at transcript p96.5-97.2:

"Meaning, I suggest to you, that you were not willing to promise to undertake that work. Do you agree with that?--- That's ostensibly what it would mean.

And also - - -?---If it happened.

And also that you weren't willing to fund the fit-out of the ground floor of the building. Do you agree with that?---Agree with what?

That you were not willing to fund the fit-out of the ground floor of the building?---No, I disagree with that.

So you say you were willing to fund the fit-out of the ground floor, were you?---Yes.

And that you communicated that to the commission?---I don't recollect.

You don't recollect. See if you did - well let me go back a step. Are you saying that you agreed to fund the connecting staircase in the building?---To who?

Are you saying that you agreed with the commission to fund the connecting staircase in the building?---No."

and transcript p98:

"Well, what - let's just deal with the rest of the items in my letter of 16 April. Are you saying that you agreed to fund

the costs of removing the evaporative cooling units and the installation of additional climate control units for the existing space?---I don't recollect agreeing.

You don't recollect agreeing to that. Do you recollect agreeing to fund the cost of the installation of climate control units to the new space at the ground level?---I don't recollect agreeing.

Are you saying that you agreed to fund the costs of water proofing the roof and the window seals?---No, I don't recollect agreeing to the commission.

That you agreed to fund the costs of removing the gas lines and the gas stove and replacing with a microwave oven and removing the bulk gas installations?---No, I don't recollect agreeing.

Draining and repairing the drive-way and car-park?---I don't recollect agreeing.

We have already talked about the inter-connecting stairway, you said that you don't recollect agreeing that . Is that right?---Correct.

Funding the fit-out of the ground floor, you have said that you did agree to do that? Correct me if I am wrong?---No, I dismiss that.

I think you have said before, perhaps I was wrong, that you did agree to fund the fit-out of the ground floor offices including carpets, window treatments, partitions and floor coverings?---No, I don't recollect agreeing to that to the commission.

All right. Finally, the redesign of the front of the building for access to the Tourist Commission?---I don't agree to - - -

Don't recollect that?---I don't recollect that.

So, you don't recollect your agreeing to your side of the agreement, if I can put it that way? Do you understand? Have I been clear enough or would you like the question clarified? I will ask you this, you don't recollect making a promise to the commission to do those things?---That's correct.

But you're saying, that you believe that the commission was bound to a promise to lease the ground floor arising out of this letter and the other letter of 30 April? Is that what you're saying?---Well, in - yes."

and at transcript p104.2-104.10:

"I thought you said before that you did not at any stage agree to do those things, including the stairwell and the front entrance?---I writing. You asked the question relating - - -

No, I said agree. I didn't say "in writing"; I said "agree"?---Well, my answer was in response to what I understood to be your question which said "in writing".

Well, we can check that from the transcript, Mr Connellan, but - - -?---Well, I'm trying - I'm not trying to be difficult.

No, are you saying that you had orally agreed to do those things at some stage after the letter of 16 April?---I think that's likely.

Are you saying you did or you didn't? This is an agreement we are talking about, Mr Connellan?---Well, previously you asked me whether I had agreed with the commission. That was the question I understood. And I said, no.

Did you agree to do those items orally or in writing?---In relation to doing them in writing, I don't recollect saying that I would do them in writing.

What about orally?---Orally, it is - can I put it in my own words?

You can answer the question in whatever way you wish, provided you answer the question?---I don't recollect saying. I don't recollect actually using the words but because it was my intention to comply, it is likely or possible. It is possible.

It is possible?---Yes.

Well, who - - -?---But not to the commission."

Under re-examination, Mr Connellan gave evidence as follows (transcript p165.2-165.9):

"My learned friend pressed you on a number of occasions as to whether you recall specifically agreeing to do the 7 items set out in an item of correspondence that was shown to you. Can you remember the 7 items of improvements and renovations?---Yes.

All right. Now, I ask you again to have a look at exhibit P6. And I direct your attention on this time, to the third paragraph and particularly the words, "In response to the commission exercising its renewal option, the agent has agreed to undertake the following building improvements"?---Yes, I can see that.

All right. What conclusion did you reach in your own mind as a result of reading that letter from the commission?---Through my agent I had agreed to do those works.

Mr Connellan, if I can ask you this. When you read that for the first time, did it take you by surprise that it was being said that you agreed to do those things?---No.

> All right. What was your attitude to doing those things in terms of your willingness or preparedness to do those things at the time when you received that letter?---I was quite happy to do them.
>
> And if I can ask you this. Having read that letter, what was your view - or what impression did you form as to the way that the Tourist Commission viewed your preparedness or you willingness to do those matters?---They certainly didn't seem to question my willingness to do those matters."

The thrust of Mr Connellan's evidence is that after he received the letter from the defendant dated 23 May 1987 (Exhibit P6) and the telex from the Tourist Commission dated 27 May 1987 (Exhibit P8), he formed the view that he had an agreement with the Commission to take up 350 square metres of space on the ground floor, and the delay in taking up the lease until January 1988 had also been agreed to by the Commission. Mr Connellan's evidence is that as a result of receiving the telex (Exhibit P8) he incurred expense for the installation of the airconditioning services and legal fees. It is Mr Connellan's evidence that he removed the authority of Builders Real Estate to act as his agent on the issue of the leasing of the ground floor of the building but not in respect to other parts of the building. Mr Connellan's evidence is that he knew if there was to be an agreement to lease the ground floor of 99 Todd Street, he was required to agree to do the work as specified in a letter dated 16 April 1987 (Exhibit D8). His evidence is when he met with the Minister, Mr Hanrahan, on 23 May 1987 he believed an agreement had been reached that the Commission would take a lease of 350 square metres of the ground floor of the premises.

I found Mr Connellan to be an unsatisfactory witness and his evidence was conflicting. I found him to be at times evasive and at other times his evidence was confusing. On his own evidence it would appear Mr Connellan had decided in his own mind to do the renovations to the ground floor but had not communicated this intention to the Commission.

Mr Hanrahan has given evidence that he met with Mr Connellan on two occasions. Mr Hanrahan could not remember the dates. His evidence is the second meeting was some months after the first meeting. Mr Hanrahan, in his evidence, was strongly of the opinion

that at his first meeting with Mr Connellan an agreement had been reached between Mr Connellan and the Northern Territory Tourist Commission and Mr Connellan was complaining to Mr Hanrahan that the defendant had breached an undertaking. I refer to the following two passages of evidence from Mr Hanrahan.

Transcript p13:

> "Can you recall what Mr Connellan told you about the negotiations between his company and the commission leading up to your meeting with him?---Well, without going into detail, it was obviously - it related to the fact that the Tourist Commission was not honouring an undertaking to Mr Connellan.
>
> So he told you that they had made some undertaking, did he? ---To the best of my knowledge, yes, that undertakings were given which required substantial work to take place on his part.
>
> Well - - -?---That was all part of the discussions, yes.
>
> Did he tell you that the commission had undertaken to lease the ground floor of the building?---Well, to the best of my knowledge, that was the arrangement that was in place because I had had discussions and visited the site with the chairman of the Tourist Commission; particularly walked over the site and looked at the area."

and transcript p30:

> "Mr Hanrahan, you said that those works had to be attended to?---No, that's not my understanding of it. My understanding is that an agreement was in place and that both parties had undertaken to do certain things. One, the commission had undertaken to lease the premises. The landlord, or Mr Connellan, had undertaken to do the work. They are not separate issues. I mean, they were part and parcel of the one agreement. Obviously Mr Connellan was not going to do the work if the commission is not going to take up the lease.
>
> But what work - - -?---It is my understanding that agreement was in place."

I accept the evidence of Mr Hanrahan that Mr Connellan was complaining to him the Northern Territory Tourist Commission had breached an undertaking to lease an area of the ground floor of the subject premises. This information was incorrect. As at 23 May 1987, Mr Connellan had not indicated he was prepared to undertake the necessary repairs and renovations to the ground floor. The

Northern Territory Tourist Commission was not in breach of any undertaking.

Assuming this meeting was on 23 May 1987 as asserted by Mr Connellan, then clearly at this time there had been no agreement reached between Mr Connellan and the defendant to lease an area of the ground floor of the subject premises. Mr Hanrahan appears to have given a direction to the Northern Territory Tourist Commission based upon a completely false assumption on his part that an agreement had been reached and the Northern Territory Tourist Commission was failing to honour its undertaking to take up the lease. It would appear from Mr Hanrahan's evidence that the information given to him by Mr Connellan was incorrect and misleading.

There is no documentary evidence to support a finding that as at 23 May 1987, when Mr Connellan met with Mr Hanrahan, he had reason to believe there was an agreement between himself and the Commission to lease an area on the ground floor of the premises. The fourth paragraph of letter from Martin & Partners dated 21 May 1987 (Exhibit P7 and Exhibit D7) makes it quite clear that the lease of an area on the ground floor of the premises was still very much a matter for negotiation. Martin & Partners, being the plaintiff's solicitors, presumably wrote this letter on instructions from Mr Connellan. There is no evidence that anything occurred between 21 May 1987 and the date of meeting with Mr Hanrahan two days later which could have given Mr Connellan reason to believe an agreement had been reached to lease portion of the ground floor of the premises to the Commission. In re-examination, Mr Connellan stated he relied on the letter dated 23 May 1987 (Exhibit P6) to base a conclusion that through his agent he had agreed to do the work. However, Exhibit P6 is a letter addressed to Martin & Partners. The front of the letter is stamped "received 26 May 1987. Martin & Partners". There is no evidence Mr Connellan was in possession of this letter when he met with Mr Hanrahan on 23 May 1987. In fact, it is most unlikely Mr Connellan had seen the letter (Exhibit P6) prior to his meeting with Mr Hanrahan. There is no evidence to support Mr Connellan's assertion that when he met with Mr Hanrahan on 23 May he had an agreement with the Commission to lease the ground

floor of the premises. I find that when Mr Connellan met with Mr Hanrahan on 23 May 1987, the question of the lease of the ground floor of the premises was still very much a matter for negotiation. I find Mr Connellan was either deliberately untruthful or confused about what is meant by an agreement when he told Mr Hanrahan on 23 May 1987 that there was an agreement between himself and the Commission for lease of part of the ground floor of the premises. Mr Hanrahan was given to understand an agreement already existed subject to certain work being carried out. I have already found that Mr Hanrahan's assumption was based on a false premise. On this information Mr Hanrahan gave a commitment to Mr Connellan that he would direct the Commission to proceed with the lease. The commitment made by Mr Hanrahan was based on incorrect and false information from Mr Connellan.

The plaintiff's agent, Mr Ian Builder, who was called by the defendant, said he did not ever receive instructions from Mr Connellan that the plaintiff was willing to promise to do the renovation works. I refer to the following extract of evidence given by Mr Builder when asked about the seven items listed in a letter dated 16 April 1987 (Exhibit D8) transcript pp180-182:

> "Did you receive instructions from him to do firstly, items 1, 5, 6 and 7?---No, we didn't receive instructions on that basis.
>
> Did you at any stage receive instructions from him to commit that he was prepared to commit himself to do those items?---There was some discussion but there was never a committal.
>
> Never a commitment?---No.
>
> Did you pursue him about those items - - -
>
> - - -
>
> MR REEVES: You said that you received instructions about items 2, 3 and 4?---Yes.
>
> How long after 16 April was it that you received those instructions - can you recall now?---I believe it was some time around May but I'm not - - -
>
> At that time you didn't receive any instructions about 1, 5, 6 and 7?---No, I assumed that he was investigating those but he hadn't certainly given me any indication that he would be prepared to move and do that work.

Did you speak with him again about those items?---I don't believe I actually spoke directly to Mr Connellan myself on those items. But I believe I could have been instructed by - - -

- - -

MR REEVES: Tell us what you can recall at this stage, Mr Builder?---I recall having received advice that I could proceed to - - -

- - -

MR REEVES: Who did you get the advice from?---I believe the advice came from Mr Malcolm Roberts who was acting in part on behalf of the principal; he had been a principal with me in the business and - - -

Yes, go on; what did he say?---He was able to communicate with Mr Connellan and come back to me with the details of what I was allowed to proceed to do at that stage.

What was that?---To attend to the water-proof of the windows only, to try and repair the driveway and to remove the gas lines and that sort of thing.

Did you receive instructions then to do items 1, 5, 6 and 7?---No.

Or at any time subsequently?---No, I was never asked to proceed on any of those matters.

Or to make a commitment on Mr Connellan's behalf to do - - -

- - -

MR REEVES: And - - -

- - -

MR REEVES: Did you receive any instructions to make a commitment on Mr Connellan's behalf?---No."

On the correspondence there was an agreement to allow the defendant to exercise an option to renew the defendant's lease of the first floor of the premises at 99 Todd Street, Alice Springs. The defendant in fact took up this option and renewed their lease of the first floor of the building.

I accept the evidence of Mr Davis (transcript p256) that at the time the Commission vacated the building in December 1991, they were having significant problems with the failure by the owner of

the building to adequately carry out work to the first floor of the building to prevent the entry of water into the first floor of the building.

The correspondence does not, in my opinion, disclose an unequivocal and unconditional agreement to lease an area of 350 square metres on the ground floor of 99 Todd Street, Alice Springs. On the evidence to the Court, neither Mr Connellan nor Mr Builder made a commitment to the defendant to complete the renovations to the ground floor as specified in Exhibit D8 and repeated in Exhibit P6.

I accept the evidence of Mr Davis that the Commission never received any confirmation from Mr Builder that the owner was willing to undertake any of the work (transcript p235). I also accept the evidence of Mr Davis (transcript p249) that by 25 August 1987, neither Mr Connellan nor anyone on his behalf had made a commitment to undertake the items of work the Commission had specified it required be done to the ground floor of the premises.

One aspect that has resulted in considerable confusion through the correspondence, is the fact that the defendant had requested work to be carried out to the first floor of the premises where the defendant had an existing lease and to the ground floor of the premises if the defendant was to extend the lease to the ground floor. For the purpose of this case, it is only the required renovations to the ground floor which are relevant.

I do not accept the letter of 30 April 1987 (Exhibit P5) is a confirmation by the plaintiff that the work outlined in Exhibit D8 would be done in respect of the ground floor. On a total reading of this letter and in particular the third paragraph, it is clear that Builder Real Estate had not received confirmation from the plaintiff that such work would be done. From evidence given by Mr Davis (transcript p276) this was how he understood the letter. I accept the evidence of Mr Davis. I agree with his interpretation of the letter (Exhibit P5). It is not, in my opinion, an unequivocal statement that the plaintiff had agreed to carry out the renovations to the ground floor of the premises.

In submissions the plaintiff has laid great stress on the words in letter dated 23 May 1987 (Exhibit P6) "the agent has agreed to undertake the following building improvements".

However, on the evidence the agent had not made such agreement. Neither had Mr Connellan given instructions to his agent to make such commitment. Mr Builder gave evidence that he did not make such an agreement with the defendant because he had not received any commitment from Mr Connellan as director of the plaintiff company. On Mr Connellan's own evidence whatever may have been his own intentions with respect to the renovations, I am not able to find that he did communicate to anyone that he had agreed to undertake the required renovations to the ground floor. The plaintiff called no other witnesses to give evidence on this issue. I found Mr Davis to be a credible witness who was doing his best to remember the conversations and correspondence that had taken place relevant to this issue. I accept Mr Davis' evidence that he was never told by the agent or anyone else that the plaintiff had in fact agreed to carry out the work the defendant required be done to the ground floor of the premises. I find that neither the plaintiff nor the plaintiff's agent ever communicated to the defendant that the plaintiff company was prepared to do the renovations to the ground floor of the premises that the defendant required be done before they would agree to take up a lease of an area on the ground floor of the premises. I find that an agreement by the plaintiff to do the required renovations to the ground floor of the premises was an essential part of any agreement for the lease of the ground floor (350 square metres). Such agreement by the plaintiff was never forthcoming. The letter of 23 May 1987 may be poorly expressed by Mr Doyle in paragraph three, however, I do not read this letter either alone or read with Exhibit P5 as constituting an agreement between the parties for the lease of the ground floor of the premises. The fact is that neither Mr Connellan or his agent had agreed to undertake the required building improvements to the ground floor of the premises. It was essential to any agreement by the Commission to lease an area on the ground floor of the premises that the plaintiff agree to undertake certain renovations to the ground floor of the premises. This the plaintiff had failed to do.

I do not accept Mr Connellan's evidence that he assumed his agent had agreed to do the renovations to the ground floor. Mr Connellan had never given his agent such authority.

I accept the evidence of Mr Davis that the words "agreed" (in Exhibit P6) is not a reference to a binding contract but a reference to Mr Builder's agreement or acknowledgment as part of the negotiating process that such renovations were necessary if the defendant was to occupy an area on the ground floor of the premises.

There are circumstances in which a lay person can use the word "agree" without the implication that a binding contract has been reached (*Clifton v Palumbo* (1944) 2 All ER per Lord Greene at 499).

In my opinion, Exhibit P6 either read on its own or with Exhibit P5 does not indicate an intention to make a contract.

In respect of the second agreement, as pleaded by the plaintiff, in paragraph 10 of the Statement of Claim as set out on page 4 of this decision, I do not accept the letters and correspondence referred to constitute an agreement.

The letter of 21 May 1987 (Exhibit P7) obviously crossed in the mail with the letter of 23 May 1987 (Exhibit P6).

The letter Exhibit P7 indicates in point 4 of the summary that there had not been an agreement reached as to the lease of the ground floor of the premises and in particular point 4 refers to "conversations ensued last month relative to the prospect of your commission leasing additional ground floor space when available". The letter goes on to state prospects of space being available was deferred till January 1988.

I accept the evidence of Mr Builder. I find Mr Connellan did not communicate either to his agent (Mr Builder) or to the Commission he was prepared to undertake the renovations.

I have found that in the conversation between Mr Hanrahan and Mr Connellan, Mr Hanrahan did make a commitment to Mr Connellan

that he would direct the Commission to honour its agreement to take up a lease of the ground floor of the premises. Mr Hanrahan was, from his evidence, obviously aware the lease agreement was dependent upon the plaintiff doing certain renovation work to the ground floor of the premises. Mr Hanrahan did not specify what these renovations were.

I find that Mr Hanrahan relied on information he received from Mr Connellan that an agreement had been reached between the parties to lease the ground floor of the premises. On my findings, no such agreement had in fact been reached. Neither had the defendant breached any undertaking. I accept neither Mr Hanrahan or Mr Connellan were able to remember exactly what was said by each of them at the meeting. This is understandable given the passage of time and the fact that all of Mr Hanrahan's notes and records are now missing. I did not find Mr Connellan to be a credible or reliable witness and I do not accept that he presented a true picture of the facts to Mr Hanrahan at their meeting. Accordingly, I find the commitment given by Mr Hanrahan to Mr Connellan was based on a false assumption from incorrect information provided to him by Mr Connellan. Such a commitment to give a direction to the Commission would be worthless and could not be binding on the defendant. On my finding of fact there had been no agreement by the plaintiff to complete the work required by the defendant to the ground floor of the premises.

The telex of 27 May 1987 (Exhibit P8) does not take the matter any further. The defendant merely indicated they were satisfied with the plaintiff's indication that negotiations in respect of the ground floor had been precluded because of the defendant's failure to confirm its interest in writing. The plaintiff advised that the ground floor area would not be available till the following January. This does not indicate any agreement had been reached in respect of the lease of the ground floor of the premises.

The renovations referred to in the final paragraph of the telex are to the first floor and are not relevant to any agreement in respect of the ground floor.

In submission on behalf of the plaintiff counsel for the plaintiff also seeks to rely on a letter dated 11 June 1987 from the Northern Territory Tourist Commission to Martin & Partners (Exhibit D17). However, this letter is referable to the telex of 27 May 1987 which refers only to "renovations to the first floor" and is not relevant in respect of any proposed lease of the ground floor.

A reading of the relevant correspondence makes it clear the whole issue of renovations to the ground floor was still to be negotiated. No agreement had been reached.

I do not accept that the plaintiff did agree to undertake the necessary renovations to the ground floor.

On the evidence the plaintiff has failed to prove on the balance of probabilities that they had a contractual agreement with the defendant to lease the ground floor of the premises at 99 Todd Street, Alice Springs.

I have not dealt in detail with all the other defences raised in view of my findings in respect of the plaintiff's failure to agree to do the required renovations to the ground floor.

The defendant did also raise the defence of uncertainty as to the terms and conditions of the lease.

On the evidence, the area of 350 square metres on the ground floor had not been defined. The plaintiff relies on the evidence given by a witness called for the defence, Mr Davis as it appears at transcript p306.1:

> "... only one logical way in which the building could be subdivided into 350 square metres and that's left and right?---Yes.
>
> You couldn't logically subdivide it front and back, for example?---It was one of the options considered.
>
> But you rejected that as being unacceptable?---Yes.

> Whenever there was talk about taking 350 square metres, it was discussed on the basis that there would be a subdivision left and right?---Yes."

On the evidence I am not able to come to a conclusion as to the area that was intended by the parties. If there had been an agreement reached as to lease of an area of the ground floor, I would expect the area to be clearly specified. This had not happened (*Jenkins v Green (No. 1)* (1858) 27 Beav. 437; *Allsopp v Orchard* (1923) 1 Ch 323). Even more importantly, there was no agreement as to the rent payable for the area of the ground floor of the premises. I do not accept the submission by counsel for the plaintiff that the lease of the ground floor was to be an extension of the existing lease of the first floor and accordingly the same terms (including rent) would apply. The amount of the rent is a matter one would normally expect to be the subject of negotiations. I consider the failure by the plaintiff to specify an agreed rent for the ground floor area of the premises is a strong indication that no concluded agreement had been reached (*Pattison v Mann* (1975) 13 SASR 34 Bray J at 37).

The plaintiff refers to Exhibit P5 and P6. I do not read this correspondence as an agreement that the proposed lease of the ground floor of the premises would be at the same rental as applied to the existing lease of the first floor. The plaintiff agrees that there were subsequent discussions between the parties that the defendant should pay a higher rent in consideration of the renovations to be carried out. The plaintiff and defendant had not settled whether the defendant was to pay a higher rental if the renovations were completed. They had not come to any agreement as to the amount of rent to be paid for an area of the ground floor of the premises. The plaintiff and defendant had not come to agreement as to the 350 square metre area of the ground floor to be the subject of a lease. The plaintiff and defendant had not come to an agreement as to the period of the lease of the ground floor of the premises. The plaintiff concedes the period of the lease of the ground floor of the premises is not reflected in the "contractual correspondence". My finding on the evidence is that the negotiations had not proceeded to the point where there could be a finding as to the proposed rent, the area to be leased or the

period of the lease. To this extent I agree the terms of the agreement to lease the ground floor of the premises were uncertain and/or vague (Amended Defence paragraph 7(a) and (b)), and indicative of the fact no agreement for lease of the ground floor of the premises had been reached.

PROMISSORY ESTOPPEL

The elements of promissory estoppel are:

1. A representation by words or conduct.

2. A belief or assumption on the part of the representee, induced by that representation.

3. Reliance by the representee on the belief or assumption induced by the representation.

4. Detriment suffered by the representee as a consequence of such reliance.

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 see also *Territory Insurance Office v Adlington* (1992) 106 FLR 214.

The conduct pleaded by the plaintiff as constituting the relevant representation is of two kinds.

1) Positive conduct, in the sense of correspondence from the defendant to the plaintiff (or its agents) - paragraph 12A(c), (d) and (f) of the Statement of Claim.

2) Negative conduct, in the sense of a failure to respond to correspondence from the plaintiff's agents which clearly called for an answer - paragraph 12A(e) Statement of Claim.

It is pleaded that those representations induced the plaintiff to assume and believe, and that the plaintiff did assume and believe, that

1) an enforceable contract had been reached (Statement of Claim paragraph 12A(a)); and

2) the defendant would enter into a formal lease with the plaintiff, and would otherwise honour and act in accordance with that agreement (paragraph 12A(b) of the Statement of Claim).

The plaintiff asserts that the defendant failed to reply to the plaintiffs letter of 1 June 1987 (Exhibit P9) until 10 September 1987 (Exhibit P10). It is the plaintiff's contention that the relevant representations continued to be in effect until 10 September 1987. The plaintiff asserts the defendant has provided no explanation for not responding to the plaintiff's letter of 1 June 1987 (Exhibit P9) asserting that "all elements relative to the lease extension are agreed". It is submitted on behalf of the plaintiff that the defendant's failure to respond to the letter of 1 June 1987 (Exhibit P9) constituted by implication, a representation that the defendant accepted the proposition that "all elements relative to the lease extension are agreed". A representation sufficient to ground a promissory estoppel, may be constituted by silence rather than a positive misrepresentation (*Waltons Store (Interstate) Ltd v Maher* (supra) Deane J at 443.

On my finding of fact, I do not consider Mr Connellan had an honest belief that he had concluded an enforceable agreement with the defendant for a lease of the ground floor of the premises. I am satisfied that Mr Connellan knew that he had not committed himself to undertake the renovations to the ground floor. This commitment was essential to the formation of an agreement to lease the ground floor of the premises.

Further, I am not persuaded that the defendant knew that the works were being undertaken as a result of the plaintiff being induced by the defendant to adopt the assumption that the plaintiff had an enforceable agreement to lease the ground floor (*Freeman v Cooke* (1848) 2 ER 654 (154 ER 652).

I accept the plaintiff's submission (p73 written submissions) that the law is as expressed in The Laws of Australia, Volume 35 Section 35.6 (paragraph 71) pp62-63:

> "Whether there is found to be an intention that the representation be acted upon is a matter to be determined by examining the language and conduct of the party to be estopped. The issue is therefore not what the party subjectively intended, but what a reasonable person in the position of the representee would have understood the person to intend. If the statement is not of such a nature that a person could reasonably expect it to be acted upon, then no intention that it should be acted upon will be attributed to its maker."

The words "lease extension" in a letter of 1 June 1987 (Exhibit P9) refers to lease of the first floor. The final paragraph of the letter makes it clear there were still matters to be decided in respect of any lease of the ground floor. I do not consider a reasonable person who had received the correspondence and who was aware of the defendant's conduct, including the defendants failure to answer the letter of 1 June 1987 (Exhibit P9), would have come to the conclusion the defendant was representing that there had been a concluded agreement to lease the ground floor of the premises.

The plaintiff claims the conduct of the defendant induced the plaintiff to assume, and the plaintiff did in fact assume that he had an enforceable agreement, as a consequence the plaintiff claims it commenced certain work and incurred certain fees.

On my finding of fact, if Mr Connellan did believe he had an agreement to lease the ground floor of the premises, this belief was not based on fact. Nor do I accept any such belief he may have held was induced by the conduct of the defendant.

I find that Mr Connellan had not conveyed to his agent Mr Builder or to anyone else his agreement to undertake the work required by the defendant to the ground floor of the premises. This was a prerequisite to any agreement to lease the ground floor.

In a letter dated 1 June 1987 (Exhibit P9) after the date when the defendant says an agreement had been reached, the plaintiff's

own solicitor raises a query as to the area on the ground floor of the proposed lease.

A letter dated 11 June 1987 (Exhibit D17) refers to renovations relevant to the existing lease which is the first floor and is not relevant.

Letter of 3 September 1987 (Exhibit D9) is a clear indication from the plaintiff's own solicitors, in the first paragraph, that no agreement had been reached in respect of the lease of the ground floor.

On 10 September 1987 (Exhibit P10) the defendant advised they did not want to continue with negotiations to lease all or any part of the ground floor premises.

Letter dated 24 October 1987 (Exhibit D12) from the plaintiff's agent to Mr Connellan is not consistent with a concluded agreement for lease of the ground floor of the premises.

I do not consider the plaintiff has established a claim in promissory estoppel.

Accordingly, the plaintiff's claim is dismissed and I enter judgment for the defendant on the plaintiff's claim.

The parties are at liberty to apply on the question of costs.
