Tiwi Aboriginal Land Trust & Anor v Munupi Wilderness Lodge Pty Ltd
[2014] NTSC 5

PARTIES:	TIWI ABORIGINAL LAND TRUST AND TIWI LAND COUNCIL v MUNUPI WILDERNESS LODGE PTY LTD (ACN 106 081 065)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No. 25 of 2013 (21311040)
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JUDGMENT OF:	HILEY J

CATCHWORDS:

ABORIGINALS – Aboriginal land – Aboriginal land held by Land Trust - Rights to enter or remain on Aboriginal land and waters - Permits - Meaning of "the traditional Aboriginal owners" - Whether a permit can be issued by one or more persons who are members of the group of persons comprising the traditional Aboriginal owners - Rights of broader group to be consulted - *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 70, 71, 73 - *Aboriginal Land Act 1978* (NT) ss 5, 5(2)

ABORIGINALS – Aboriginal land - Functions and powers of a Land Trust - Functions and duties of a Land Council - Dealing with the estates and interests in Aboriginal land - *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) - ss 4, 5, 6, 19,23, 27

CONTRACTS – Construction and interpretation - Implied terms - Application of tests in *B.P. Refinery (Westernport) Pty Ltd v Hastings Shire Council*

LANDLORD AND TENANT – Possession - Re-entry and forfeiture - Validity of statutory notice - Need to identify the lease referred to – substantial compliance - Prescribed form - *Law of Property Act 2000* (NT) s 137

LANDLORD AND TENANT - Relief against Forfeiture - Relevant principles - Breach of obligation to pay rent – Conditions - *Law of Property Act 2000* (NT) s 138

LANDLORD AND TENANT - Relationship between lease and licence annexed to the lease - Rights and interests conferred under the lease - Implied terms linking lease with licence

LANDLORD AND TENANT - Exercise of option to renew lease - Equitable lease - *Law of Property Act 2000* (NT) s 143(2)

Alderson v Northern Land Council (1982) 20 NTR 1; *B. P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council* [1977] HCA 40; (1977) 52 ALJR 20; *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157, applied.

Ex parte Taylor [1980] Qd R 253, distinguished.

Elsafty Enterprises Pty Ltd v Mermaids Café & Bar Pty Ltd [2007] QSC 394; *Ex parte Whelan* [1986] 1 Qd R 500; *Hace Corp Pty Ltd v F Hannan (Properties) Pty Ltd* (1995) 7 BPR 14,326; *Jam Factory v Sunny Paradise*

Pty Ltd [1989] VR 584; *Legione v Hately* [1983] 152 CLR 406; *Legune Land Pty Ltd v Northern Territory Land Corporation and Northern Territory of Australia* [2012] NTSC 99; *McKay v Blumson* [2000] QSC 65; *Mercantile Credits Ltd v The Shell Company of Australia Ltd* (1975) 136 CLR 326; *Northern Territory of Australia & Ors v Arnhem Land Aboriginal Land Trust & Ors* (2008) 236 CLR 24; *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562 (NSWSC); *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; *Riviera Holdings Pty Ltd v Fingel Glen Pty Ltd* [2013] SASC 77; *Shiloh Spinners Ltd v Harding* [1973] AC 691; *Suga Pty Ltd v Trust Co of Australia Ltd* BC200103681 (unreported, 5 June 2001, Jones J); *Wurridjal v The Commonwealth of Australia* [2009] HCA 2; (2009) 237 CLR 309, referred to.

Aboriginal Land Act 1978 (NT) ss 4, 5, 5(1), 5(2), 5(4), 5(5), 5(7),
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ss 3, 4, 4(1), 5, 5(1), 5(2), 6, 12, 19, 19(3), 19(4A), 19(13), 21, 23, 23(3), 27, 70, 70(1), 71, 71(1), 73, 77A.
Interpretation Act 1980 (NT) s 68.
Law of Property Act 2000 (NT) ss 136, 137, 137(1), 137(2), 137(3), 137(5), 138, 143, 143(2).
Native Title Act 1993 (Cth) s 251A, 251B.
Northern Territory National Emergency Response Act 2007 (Cth) ss 31, 34(4), 35(1).
Property Law Act 1974 (Qld) s 124(8).
Supreme Court Act 1980 (NT) s 84.

REPRESENTATION:

Counsel:

First and Second Plaintiffs:	L. Silvester
Defendant:	T. Anderson

Solicitors:

First and Second Plaintiffs:	Midena Lawyers
Defendant:	Mylne Lawyers

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

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No. 25 of 2013 (21311040)

BETWEEN:

TIWI ABORIGINAL LAND TRUST
First Plaintiff

AND:

TIWI LAND COUNCIL
Second Plaintiff

AND:

MUNUPI WILDERNESS LODGE PTY LTD (ACN 106 081 065)
Defendant

CORAM: HILEY J

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(Delivered 13 February 2014)

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Introduction

These proceedings

[1] By Originating Motion and Summons on Originating Motion, both filed on 14 March 2013, the Tiwi Aboriginal Land Trust (the **TALT**) and the Tiwi Land Council (the **TLC**) (the **plaintiffs**) sought orders under s 137 of the *Law of Property Act 2000* (NT) (the **LPA**) for possession of the premises and land subject of a lease to the defendant, and for re-entry and forfeiture under the lease, and payment of arrears of rent and interest.

[2] The premises and land comprise an area of approximately 1.86 ha near Pirlangimpi on Melville Island shown on a survey plan attached to a Memorandum of Lease between the TALT and the defendant (the **Lease**) and are described therein as "the **Demised Land**". The Lease was for a term of 5 years commencing 1 July 2005.

[3] The Lease referred to and attached a document entitled "Grant of Licence Pursuant to a Lease" which was also for a term of 5 years commencing 1 July 2005 (the **Licence**). The Licence permitted the Licensee to take its guests fishing and hunting on certain areas which

belonged to any of five land-owning groups, Marrikawuyanga, Munupi, Wurankuwu, Malawu and Jikilaruwu (the **Licensed Area**).

[4] In addition to resisting the plaintiffs' claim the defendant sought relief against forfeiture under s 138 of the LPA in the event that the plaintiffs are otherwise successful in establishing their entitlement to orders for possession, re-entry and forfeiture.

Main issues

[5] Although these proceedings were commenced by Originating Motion, the parties prepared and filed pleadings thereby better identifying the relevant issues. Most of the evidence was adduced by affidavit and documents annexed thereto. There was some cross-examination of deponents at the hearing which occurred from 21 to 23 October 2013.

[6] Much of the trial concerned what rights, if any, the defendant had to occupy the Demised Land and to use the Licensed Area after the initial terms of the Lease and Licence expired on 30 June 2010. In their written submissions of 7 November 2013 the plaintiffs conceded that the Lease was duly renewed and that it continued as an equitable lease from 1 July 2010 on the same terms and conditions as the Lease apart from the option to renew. Consequently they now concede that the defendant was entitled to have such a lease perfected at law from 1 July 2010.

[7] Accordingly some of the evidence tendered during the hearing regarding the exercise of the option to renew and the conduct of the respective parties and their solicitors is of more limited relevance than it otherwise appeared to be. However much of that evidence is still relevant to other issues including the defendant's application for relief against forfeiture and costs.

[8] In relation to the rights of the defendant to continue to take its clients to fish on waters of any of the five land-owning groups after 1 July 2010:

(a) the plaintiffs contend that such rights continued under the Licence, pursuant to the holding over provisions in clause 10(d), until the Licence was revoked by the Notice of Revocation served in January 2013;

(b) the defendant contends that it held, and still holds, such rights:

(i) pursuant to the Lease, in particular under clause 6.5; alternatively

(ii) pursuant to an equitable licence in the same terms as the Licence, it having been renewed when the Lease was renewed, because the Licence was effectively incorporated into the Lease; alternatively

(iii) pursuant to permits issued by various Munupi people.

[9] In respect of the period from soon after 15 January 2013:

(a) The plaintiffs contend that the Lease was terminated following service of one or both of two notices served under s 137 of the LPA, as a consequence of which the TALT

(b) is entitled to re-entry and possession and payment of arrears of rent and mesne profits.

(c) The defendant contends that the Lease was not validly terminated and continues to operate; alternatively that it should be granted relief against forfeiture.

The parties

[10] The first plaintiff, the Tiwi Aboriginal Land Trust, is a Land Trust established under s 4 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**).[1] It is the holder of an estate in fee simple in the land known as the Tiwi Islands, including Melville and Bathurst Islands, pursuant to deeds of grant made under s 12 of ALRA.[2]

[11] The second plaintiff, the Tiwi Land Council, is a Land Council established under s 21 of ALRA for the area in which the Tiwi Islands

1 Exhibit JH-1 /1 - Commonwealth of Australia Gazette No. S138, 21 July 1978.
2 Exhibit JH-1/2 - Deed of grant and certificate of title.

are situated. Its functions include giving directions to Land Trusts holding Aboriginal land in its area.

[12] Mr Hicks, who has been the Chief Executive / Secretary of the TLC since 1986, gave evidence about the structure and decision-making processes of the TLC and the TALT. The land and waters which are held by the TALT under its deeds of grant comprise the lands and waters of eight groups of Aboriginal people, referred to as "land-owning groups" or "decision-making groups". The names of each of those groups and the areas of land and waters which belong to those groups are depicted on a map a copy of which is attached to the Licence referred to below. Since its formation in 1978 the TLC has maintained registers on which are listed the names of the members of each of the decision-making groups. The TLC recognises each decision-making group as being the "traditional Aboriginal owners" of their particular part of the Tiwi Islands and adjacent seas.

[13] Mr John Wilson Wuribudiwi, who has been a member of the TALT for about 6 years and a member of the TLC since 1994 provided a detailed affidavit about Tiwi traditional laws and customs including those concerning land ownership and decision-making.

[14] Mr Hicks deposed that each of the eight decision-making groups chooses one of its members to be a member of the TLC. Each such member is referred to as the "Trustee" for their decision-making group.

The Trustee then chooses four other persons from their decision-making group to be members of the TLC. Thus the TLC comprises those 40 people, five from each decision-making group.

[15] The decision-making group in relation to the land and waters at Pirlangimpi, including the Demised Land, is the Munupala group, whose members are usually referred to as Munupi people. As at December 2012 there were approximately 340 members of the Munupala group, of whom about 260 were adults.

[16] Mr Lawrence Costa, one of the defendant's witnesses, said that he is a Munupi Traditional Owner and is also a senior member of the Tunganompila group. He said that the Munupi "clan" are the traditional owners of the north-western part of Melville Island. The Munupi clan has four distinct landholding groups within it, one of which is the Tunganompila group. He said that the Tunganompila group is the "group for the area that includes the town of Pirlangimpi (also known as Garden Point)" and that the fishing lodge at Pirlangimpi is on Tunganompila land.

[17] The defendant, Munupi Wilderness Lodge Pty Ltd (**MWL**), is a company registered under the *Corporations Act 2001* (Cth)[3]. The company was incorporated in August 2003. Michael Benton and David Taat were the original shareholders; however David Taat subsequently

[3] Exhibit JH-1/10 - ASIC company extract.

transferred part of his shareholding to Kerri-Ann Benton, and retained a 20% interest. Mr and Mrs Benton first came to Melville Island in October 1990 and have spent most of their lives since then at Pirlangimpi. Mr Taat has lived on the Tiwi Islands since the age of 11 (apart from a few years spent boarding at Kormilda College in Darwin).

Facts

[18] Since the 1990s there has been a building on the Demised Land known as the Munupi fishing lodge (**the Lodge**). From about 1997 a local resident Mr Mark Nesbitt operated a fishing business from there. The defendant took over the business from Mr Nesbitt in about September 2003 and rented the fishing lodge from the Pirlangimpi Progress Association. Mr Benton estimates that the defendant and those involved in running the business have spent about $250,000 on improvements over the years.

[19] The proposed lease was discussed and agreed to at a meeting of the Munupala group on 30 September 2005. The proposed lease and licence were also discussed and agreed to at a meeting of the Munupala group and four other land-owning groups, Marrikawuyanga, Wurankuwu, Malawu and Jikilaruwu, on 15 December 2005. The defendant was requested to prepare the lease and licence for execution.

[20] The tenure and the scope of the defendant's fishing business were formalised in 2005 by the agreement(s) reflected in the Lease and the Licence.

Prior to 1 July 2010

[21] From early 2008 there were discussions between Mr and Mrs Benton and Mr Taat and a significant number of Munupi people regarding amending the Lease in order to provide the defendant with a longer term. Mr Lawrence Costa gave evidence about and produced a document signed by about 100 Munupi people in 2008 requesting the TLC to amend the Lease so that it would commence on 1 December 2008, be for a term of 10 years and contain an option for a further 10 years subject to the consent of the TALT. He said that the TLC ignored that request. He said that in March 2009 the Tunganompila group met and decided to ask the TLC again to grant a new lease for the Lodge. He provided a copy of draft minutes of a meeting held at Garden Point for Tunganompila land owners on 10 March 2009. He said that this request was also ignored by the TLC.

[22] On 16 June 2009 the defendant wrote to the TALT and the TLC requesting that the Lease and Licence be renewed for the further term of five years specified at Item 11 of the Schedule of the Lease, and also foreshadowing negotiations regarding the grant of a further term of the

Lease for five years in accordance with clause 43 of the Lease. There is no evidence of any written response to this letter.

[23] On 16 September 2009 the defendant's then solicitors, De Silva Hebron, wrote to the TLC. That letter referred to the defendant's letter of 16 June and to a subsequent discussion with Mr Hicks who advised that it was premature for the defendant to be making such requests. The letter set out the relevant provisions of clause 21 of the Lease regarding renewal and repeated the request that the Lease be renewed. It also referred to clause 12 of the Licence which does contemplate that a request for a further licence can only be made during the last two months of the term granted under the Licence, and suggested that "given that we are requesting the option to renew pursuant to the Lease we would request your client consider granting a further licence at this time so that the two issues can be dealt with together and run concurrently with one another." The letter also requested other information, some of which had been requested in an earlier letter of 9 June 2009.

[24] None of these requests were acceded to. Rather the TLC expressed concerns, which it passed on to the defendant, about its unsatisfactory compliance with the requirements of the Lease and Licence, in particular the irregular payments of rent and failures to provide proper notice of bookings. Complaint was also made about the defendant's method of calculating the licence fees (which I discuss below at [133]).

For example, on 15 January 2010 the TLC wrote to the defendant expressing these and other complaints and threatening to revoke the Licence pursuant to clause 8(e)(i) of the Licence and to issue a "Notice to Remedy Breach of Covenant" under s 137 of the LPA pursuant to clause 17.1 of the Lease. The defendant's solicitors, Mylne Lawyers, Bundall, Queensland, wrote back to the TLC on 25 January 2010 and addressed various complaints that had been made and also sought clarification of some points.

[25] The TLC responded by letter of 18 March 2010 and insisted upon "strict compliance with the Lease and the Licence … at all times". Under a heading "No renewal" the letter pointed out that the "Licence's current term expires on 30 June 2010", stated that "the Tiwi Aboriginal Land Trust does not intend to renew or grant a further licence to the Licensee beyond that date of 30 June 2010 whether in the same terms, substantially the same terms or similar terms" and advised that "any permits previously / later granted to enter Aboriginal land and which relate to, or are / were granted under, that Licence will lapse on 30 June 2010 if they have not lapsed or expired or been revoked beforehand." The letter concluded by saying: "Accordingly, you should bear the above in mind in respect of your future arrangements."

[26] Further correspondence ensued between Mylne Lawyers and solicitors retained by the TLC, Middletons, Melbourne, Victoria. By letter of 11 June 2010 Middletons repeated that the "Licence will not be renewed

and will expire on 30 June 2010" and reserved all "rights in relation to the Lease and Licence including without limitation taking action in relation to previous or ongoing breaches of the same." On 17 June Mylne Lawyers responded to this letter complaining of the lack of particularisation of the complaints and suggesting mediation.

[27] By letter dated 21 June 2010 Mylne Lawyers wrote to Middletons giving notice that "pursuant to clause 21 of the lease" the defendant "wishes to exercise its option to renew the lease for the further term". The letter also stated that the "lessee also requests a parallel extension of the licence pursuant to the lease."

[28] Mylne Lawyers wrote again on 24 June, complaining about the TLC's refusal to provide the defendant "with a lease for the further term for execution", referring to clause 21 of the Lease, enclosing a copy of the letter of 16 June 2009 when the defendant first exercised its option to renew and referring to subclauses 21.1.1 and 21.1.2 of the Lease and s 143(2) of the LPA. The letter went on to assert that:

> "from 1 July 2010 our client has the benefit of a lease in equity, which as between the parties is the equivalent of a lease at law. Correspondingly, your client has a duty to execute a renewal of the lease (see *Swanville Investment Pty Ltd v Riana Pty Ltd* [2003] WASCA 121 and the authorities referred to therein). This necessarily carries with it an obligation to renew the licence (clauses 6.4 and 6.5)."

[29] The letter again suggested mediation, and sought assurances that the TLC would not take any step to regain possession of the leased

premises, would continue to issue permits as required for the conduct of the defendant's business, would not interfere with the conduct of the defendant's business and would not take any action which may prejudice the defendant in obtaining a legal lease of the premises in place of its equitable lease. The letter threatened the commencement of legal proceedings in this Court and stated that the defendant would rely on the letter and earlier correspondence for the purposes of Practice Direction No. 6 of 2009 and costs.

[30] Middletons wrote back on 28 June 2010 and acknowledged the Mylne Lawyers' "letter of 21 June 2009 [sic] purporting on behalf of your client to exercise the option to renew the Lease under clause 21" and stating that "my client is considering its position in relation to the same." In relation to the reference to clauses 6.4 and 6.5 of the Lease the letter said that "those clauses relate only to areas covered by the Lease (not the Licence) and have no relevance to the Licence." The letter reiterated that "the Licence will not be renewed and will expire on 30 June 2010."

From 1 July 2010

[31] The next communication was Middletons' letter of 2 July 2010 (which I shall refer to as **the 2 July 2010 letter**). It provided as follows:

> "I refer to previous correspondence in this matter regarding the Lease previously granted to your client (the Lodge Lease).

> My client has now considered its position.
>
> Under Section 31 of the terms of the Northern Territory National Emergency Response Act 2007 (Cmwlth) (NTNER Act), the relevant leased premises fall within the boundaries of the 5 year intervention lease imposed by the Commonwealth on the township of Pirlangimpi.
>
> As your client's Lodge Lease is not registered, then sections 34(4) and 35(1) of the NTNER Act have the effect of making the Commonwealth the lessor in respect of the Lodge Lease.
>
> You have provided no evidence that your client's purported exercise of option was served on the Lessor in respect of the Lodge Lease on or by 30 June 2010, as required by the terms of the Lodge Lease.
>
> Accordingly, the Lodge Lease has expired and your client is overholding.
>
> Accordingly, my client does not recognize your client's purported exercise of option or any continuing proprietary interest in the subject premises.
>
> Accordingly, your client should be taking steps to vacate the subject premises as soon as practicable."

[32] On 18 August 2010 the TLC received a letter dated 13 August 2010 addressed to its Chairman from the Acting Branch Manager, Land Reform, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government.[4] It included the following:

> "Thank you for your letter of 14 July 2010 to the Minister … the Hon Jenny Macklin MP, about the expiry of a lease and

[4] Ex JH2 – 30.

> requesting that the Commonwealth evict a tenant at Pirlangimpi. …
>
> On 1 April 2009, the originally legislated five-year lease boundaries were reduced, at which time the land on which Munupi Wilderness Lodge sits was excluded from the Pirlangimpi five-year lease area (see map at Attachment A). Since the Lodge site falls outside the current five-year lease boundary for Pirlangimpi, the Commonwealth has no tenure over that land which would enable the Commonwealth to evict Mr Benton.
>
> I note that the day-to-day operation of the permit system, including the issuing and revocation of permits remains a matter for the Land Councils, traditional owners and the police as required."

[33] Unfortunately, neither this letter nor its contents were conveyed to the defendant, apparently until some time after those proceedings commenced. A copy of the letter was attached to Mr Hick's affidavit of 7 August 2013. In his affidavit of 15 October 2013 Mr Hicks provided more information about the "5 year Statutory Lease at Pirlangimpi" created in favour of the Commonwealth pursuant to s 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) and said (and I accept) that since he had made his previous affidavit he become aware that the Minister, Jenny Macklin MP, had written to the TALT care of the TLC a letter dated 26 February 2009 which "advised that the 5 year Statutory Lease boundary at Pirlangimpi would be reduced, effective from 1 April 2009, so that, and I verily believe that, the leased premises ceased, on 1 April 2009 to be subject to the five-year Statutory Lease at Pirlangimpi." That letter attached a description

of the "new lease boundary" and an aerial photograph which clearly showed the new lease boundary and that the Demised Land was to be excluded.

[34] It appears that the defendant did not become aware of the true situation until Mr Benton read those affidavits of Mr Hicks sworn on 7 August and 15 October 2013.[5] Mr Hicks said that had the defendant enquired of the plaintiffs about the effect of the five-year Statutory Lease or "about the meaning or effect of" the 2 July 2010 letter, he would have, at least after receiving the letter dated 13 August 2010, informed the defendant that the five-year Statutory Lease at Pirlangimpi ceased to apply to the leased premises as of 1 April 2009 and that the defendant should continue to pay the rent to the TLC in accordance with the terms of the Lease.

[35] In their final submissions the plaintiffs conceded that the 2 July 2010 letter was wrong and misleading in two respects: first, that the lessor was in fact the TALT, not the Commonwealth; second, that the defendant had in fact exercised the option of renewal contained in clause 21 of the Lease as a result of which the Lease had in fact been renewed. It follows that the plaintiffs had no right to require the

[5] On 15 October 2013 the defendant sought and obtained leave to amend its Summons to remove the references to the Commonwealth of Australia and to acknowledge that the rent for the period from 1 July 2010 was payable to the plaintiffs. See [60] below.

defendant to take "steps to vacate the subject premises as soon as practicable".

[36] From 2 July 2010 the defendant ceased paying any rent to the TLC and paid it instead into the trust account of its solicitors, Mylne Lawyers. It also ceased providing the TLC with notice of bookings. The defendant obtained permits from individual Munupi people which purported to confer rights upon the defendant's guests (the **Munupi permits**).

[37] Mr Benton said that the defendant did this for several reasons. These included the fact that by then the plaintiffs had not accepted that the option to renew the Lease had been duly exercised and had clearly indicated that a new licence would not be issued and that the TLC would no longer issue permits. Added to this was the assertion in the 2 July 2010 letter that the Commonwealth was the lessor.

[38] He said that pending contact from the Commonwealth and resolution of how the Lease was to be administered by them, the defendant continued to trade as normal and obtained permits for its guests from various Munupi people who were traditional Aboriginal owners of the land. He said that they operated in this way with the full knowledge and support of the Munupi clan. He said that he and his wife consulted with a number of Munupi elders, and informed them of the proposal to obtain permits from them and to "put the appropriate amount of money

aside pending a resolution of the problem created by TLC's refusal to deal with us further."

[39] Mr Lawrence Costa said that:

> "By the middle of 2010 the Tunganompila were aware that the TLC had refused to renew the lease for the lodge. Michael Benton spoke to us about it. We told them to stay and keep operating the business. Michael told us that he planned to keep the rent and licence fees in a trust fund until the lease problem could be sorted out. We agreed that was a good idea.
>
> We knew that the TLC would not give the lodge's fishing tourists permits to come to the islands. The Munupi people agreed to give their own permits to the fishing tourists so the business could continue without anyone breaking the law. We did that. Many Munupi TOs signed such permits."

[40] Mr Emmanuel (Manny) Rioli gave similar evidence, including the following:

> "We knew that the TLC would not give the lodge's fishing tourists permits to come to the islands. But we also knew that the law allowed us to give such permits. The Munupi people agreed to give their own permits to the fishing tourists so the business could continue without anyone breaking the law."

[41] He also said that he thought the licence fees collected should be paid into the Munupi Family Trust account. He considered that the Munupi permits would only apply to Munupi land and waters and agreed that Munupi people had no right to authorise fishing on the waters of other "clans". Several other witnesses called by the defendant, including Sister Barbara Tippolay and Clinton Rioli, also considered that the Munupi permits only applied to Munupi land and waters.

[42] The defendant continued to occupy the Demised Land and to conduct its fishing business, apparently in much the same way as it had previously been doing. The plaintiffs were aware of this. For example there were two TLC Executive Management meetings in July 2010 when discussions took place concerning the ongoing situation.

[43] At a meeting of the Munupala land-owning group on 22 November 2010, some people expressed concerns about the defendant's apparent lack of compliance with its obligations to pay rent. Mr Lawrence Costa informed the meeting that he had spoken with the defendant's lawyers and was told that all monies owed by the defendant were being paid into "an account until things clear up" and that "all money is put into a trust fund until an agreement is reached between the Traditional Land Owners and the Land Council." Mr Hicks says, and I accept, that he has no recollection of those notes, and that had the TLC received such advice from the defendant or its solicitors it would probably have sought an explanation.

[44] During this time the defendant was still engaged in discussions with a number of Munupi people about the possible grant of a fresh lease and licence which would give the defendant a longer term.

[45] In late 2010 over 30 people, said to be Tunganompila people, signed a document entitled "The Tunganompila people and Munupi Wilderness

Lodge" (which I shall refer to as the **Tunganompila document**). It included:

> "We the Tunganompila people put forward our agreement, along with other members of the Munupi clan on 10 March 2009, that Munupi Wilderness Lodge be given a 10 years lease with a 10 years option on the land is presently occupies.
>
> …
>
> During March 2009, 103 people of the Munupi clan signed a document that we wanted the owners of Munupi Wilderness Lodge to have a longer term lease to provide the owners with security, and we the Tunganompila people with certainty as to who would occupy our traditional land and live together with us in our small community.
>
> At that time, when we sought a 10 years lease with a 10 years option to be granted to Munupi Wilderness Lodge, nothing was done about our decision by the Tiwi land Council.
>
> …
>
> In much the same way as we have fought hard for our land rights, we support the standard of Munupi Wilderness Lodge and its owners to remain on our land, even though its formal lease may have expired.
>
> We think it is reasonable, and gives security to Munupi Wilderness Lodge, its owners and the Tunganompila people, that Munupi Wilderness Lodge be granted a 20 years lease with a 20 years option over the land it presently occupies.
>
> As a commercial enterprise engaged in fishing and other recreational pursuits for visitors, we support the provision of a further fishing licence to Munupi Wilderness Lodge to run with the lease.

> We have considered this matter both individually and collectively as Traditional Owners of the land, and attach our signatures to this letter fully supporting the views it contains."

[46] Mr Benton said he was given a copy of the Tunganompila document in late 2010 and did not know what to do because he had not heard anything from the Commonwealth. He contacted his local member, Ms Scrymgour, and gave her a copy of the Tunganompila document. She arranged for him to meet with Mr Kelvin Leitch, a Commonwealth public servant to discuss the matter. He met with Mr Leitch in his office in Darwin on 4 March 2011. During that meeting Mr Benton discussed with Mr Leitch both the Tunganompila document and the defendant's desire to be granted a longer lease, and his uncertainty about the Commonwealth's interest as lessor under the current lease. Mr Leitch was not able to answer his questions and said in his evidence that he had asked Mr Benton to provide him with details as to where the Lodge was situated before he could do so. Mr Benton had a different understanding as to what was to happen. He said that Mr Leitch said that he would make enquiries and get back to him but never did.

[47] Unfortunately, notwithstanding that both the TLC and the Commonwealth had been aware of the true situation regarding the five-year Statutory Lease since February 2009, and that both were in the possession of an aerial photograph clearly showing the excision of the

Demised Land, the defendant remained unaware that the position asserted in the 2 July 2010 letter was wrong.

[48] On 27 April 2011 the Chairman of the TLC wrote to the defendant. The letter referred back to "various notices from 2006 through 2010 requesting compliance with payments and conditions" pursuant to the Licence, repeated that the TLC had determined not to extend the Licence beyond 30 June 2010, stated that "all permits granted to the Licensee to enter Aboriginal land which related to or were granted under the Licence, lapsed" and asserted that the defendant was continuing to operate its tourist fishing business "illegally". The letter foreshadowed legal action and raised a number of questions for response. These included information regarding details of guests, length of stays, areas where they have fished, and an "account of revenue owing to Tiwi land owners from the last 10 months of fishing, calculated on the basis of the fee arrangements under the now expired Licence which would otherwise have applied to operations over the last 10 months." The letter also sought explanations as to the legal authority by which the defendant's guests have entered Aboriginal land including details as to the alleged grantor of any permit, and "an explanation of by what and whose authority you continue to occupy the Munupi Wilderness Lodge premises at Pirlangimpi / Garden Point." Apart from the last item, the letter made no reference to the Lease or to

the reference in the 2 July 2010 letter to the Commonwealth being the lessor.

[49] On 26 July 2011 the defendant's solicitors, Mylne Lawyers, responded to the TLC letter of 27 April. Amongst other things the letter said:

> "We note the demand that you make of our client to provide certain information and, under the threat of litigation, it is not appropriate that our client respond other than to advise that funds are being separately held, which would be the equivalent to the sum payable to the Tiwi Land Council pursuant to the agreement. Clearly the impasse is that the Tiwi Land Council will not issue the permits itself, therefore our client cannot pay the Tiwi Land Council a permit fee for a permit it will not issue. Equity supports that the funds set aside by our client belong to somebody, and that somebody is yet to be determined."

The letter also repeated an earlier proposal that a mediator be engaged.

[50] Mr Benton said that the TLC letter of 27 April 2011 was the only letter he (or his lawyers) received from the TLC or its lawyers between 2 July 2010 and late October 2012.

[51] On 19 October 2012, Paul Maher, then the solicitor for the plaintiffs, wrote a detailed letter to the defendant, for the purposes of Practice Direction 6 of 2009 of the Supreme Court (**PD6**). Amongst other things the letter asserted that "… the TALT was not obliged to grant a lease for a further term [from 1 July 2010] and has not done so. Munupi is therefore holding over pursuant to clause 19 [of the Lease]." It referred back to breaches of the Lease prior to 30 June 2010 and

asserted that "the preconditions for the grant of a new lease for a further term set out in clause 21 of the lease (namely that Munupi had remedied any default and had not persistently defaulted throughout the term) were not satisfied." The letter also referred to the Licence and alleged various breaches of the Licence between 1 July 2005 and 30 June 2010. The letter asserted that "since 1 July 2010, Munupi has continued to act as licensee pursuant to clause 10(d) of the Licence 'on a monthly licence from the Licensor on the same terms and conditions … as contained within this Licence'."

[52] Shortly after that, the plaintiffs engaged Midena Lawyers to act for them instead of Maher Lawyers. On 25 October 2012 Midena Lawyers wrote another letter to the defendant repeating the same information as had been conveyed in the letter of 19 October 2012 from Maher Lawyers.

[53] On 17 December 2012 Medina Lawyers wrote to Mylne Lawyers and requested the defendant's "voluntary agreement to immediately vacate the licensed area for the purposes of clause 10(e)(i) of the Licence dated 15 December 2005" and enclosed a draft of a "Notice of Revocation of Licence." The letter advised that if the defendant did not so agree by Friday 4 January 2013 "we will assume that your client does not voluntarily agree to immediately vacate the licensed area."

[54] On 15 January 2013 the plaintiffs executed a "Notice of Revocation of License and of Revocation of Permits" and a "Notice to Remedy Breach of Covenant", which were subsequently served on the defendant.

[55] On 6 March 2013 Mylne Lawyers wrote to Midena Lawyers repeating their assertion that the defendant has a subsisting lease until 2015, repeating the request for mediation, and foreshadowing an application for relief from forfeiture if the plaintiffs did not agree to mediation. On 12 March 2013 Midena Lawyers responded and repeated a number of requests and demands made in the letters of 19 October, 25 October and 24 December 2012.

[56] On 14 March 2013 the plaintiffs instituted these proceedings by Originating Motion, under s 137(3) of the LPA. The plaintiffs sought the following orders:

> "1. The first plaintiff is authorized to exercise its rights of re-entry to the leased premises (described below) and forfeiture under the lease the subject of the Memorandum of Lease executed on or about 15 December 2005 by which the first plaintiff granted a lease to the defendant of certain land near Pirlangimpi, Melville Island, Northern Territory ("the leased premises"); the leased premises being more particularly described in Item 1 of the Schedule of, and the survey plan attached to, the said lease, a copy of which survey plan is attached to this order, being an area of approximately 1.86 hectares within Northern Territory Portion 1644 from Compiled Plan 004194.
>
> 2. On and from the date of this order, the first plaintiff have possession of the leased premises.

3. The defendant pay such reasonable costs and expenses of the plaintiffs, properly incurred, as are agreed or taxed."

[57] On the same day the plaintiffs also filed a Summons seeking the same orders, and affidavits of Brett Ian Medina, Simon Dennis Harari and John Sydney Hicks. The plaintiffs subsequently filed another two affidavits of Mr Hicks, the first sworn on 7 August 2013, the other on 15 October 2013, an affidavit of John Anthony Wilson Wuribudiwi of 5 August 2013 and two further affidavits of Mr Medina made on 28 August 2013 and 9 October 2013.

[58] On 14 May 2013 the defendant filed a Summons seeking the following orders:

"1. The plaintiffs grant the defendant a lease and licence consistent with the defendant's exercise of its option to renew the lease the subject of the proceedings.

2. The plaintiffs reimburse the defendant all rent paid pursuant to the lease the subject of the proceedings for the period 17 February 2008 to 17 August 2012.

3. The defendant pay all rent owing pursuant to the lease the subject of the proceedings for the period 17 February 2008 to 17 August 2012 to the Commonwealth of Australia.

4. The defendant pay all rent owing pursuant to the lease subject of the proceedings for the period after 17 August 2012 to the plaintiffs.

5. The defendant be granted relief from forfeiture pursuant to s 138 of the *Law of Property Act (NT)*.

6. The plaintiffs pay the defendant's costs."

[59] On 14 and 15 May 2013 the defendant filed affidavits of Michael Craig Benton, Kerri-Ann Benton, Clinton Rioli, Emmanuel (Manyi) Rioli, David Taat, Lawrence Costa, Sister Barbara Tippolay and Peter Glen Mylne. The defendant subsequently filed a second affidavit of Mr Milne on 24 May 2013.

[60] On 16 October 2013 the defendant filed an Amended Summons removing paragraphs 2 and 3 and amending paragraph 4, acknowledging that the rent for the period after 1 July 2010 was payable to the plaintiffs, not to the Commonwealth of Australia.

[61] The hearing began on 21 October 2013. The affidavits filed were read, with certain parts omitted or corrected by agreement. The plaintiff called Kelvin Russell William Leitch and John Sydney Hicks to give oral evidence, and the defendant called Michael Craig Benton, Clinton Rioli, Emmanuel (Manyi) Rioli, Sister Barbara Tippolay and Kerri-Ann Benton.

[62] Written submissions were filed on behalf of the plaintiffs on 7 November and amended on 18 November, and on behalf of the defendant on 18 November. The plaintiffs filed submissions in reply on 22 of November. Oral submissions occurred on 25 and 26 November. In light of a number of issues that arose during those oral submissions the parties were given liberty to file further written submissions. The plaintiffs filed a "Supplementary Submission in

Reply" on 25 November and "Further Submissions in Reply" on 4 December, and the defendant filed "Further Written Submissions" on the 11 December 2013.

[63] On 24 October 2013 $163,444.72 was paid into court by Mylne Lawyers, being the monies which it had held in its trust account on account of rent and licence fees payable under the Lease and Licence.

Statutory framework

[64] The Demised Land is Aboriginal land within the meaning of ALRA, and is owned by the TALT. So too is the other land on the Tiwi Islands that is the subject of this litigation, but only to the low water mark. The land and waters seaward of the low water mark (which I shall refer to as **the sea**) are not the subject of any formal legal title but they may well be lands and waters to which the *Native Title Act 1994* (Cth) (**NTA**) applies.[6]

[65] The TALT holds the title "for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission" (s 4(1) ALRA). Its functions are

[6] Unless otherwise stated references in these reasons to land and waters are references to Aboriginal land.

to hold title to the land and to exercise its powers as owner of the land "for the benefit of the Aboriginals concerned" (s 5(1) ALRA).

[66] Any dealings in relation to Aboriginal land are regulated by ALRA and complementary legislation of the kind contemplated by s 73 ALRA, in particular by the *Aboriginal Land Act 1978* (NT) (**ALA**).

Dealing with Aboriginal land

[67] The ALRA identifies the functions and powers of Land Trusts, and also those of Land Councils both in relation to Aboriginal land (held by Land Trusts) and other land within the area of the Land Council.

[68] Although the TALT is the legal owner of the relevant land it can only exercise its functions in relation to the land in accordance with directions given to it by the TLC. Section 5(2) of ALRA provides that:

> "A Land Trust:
>
> (a) shall not exercise its functions in relation to land held by it except in accordance with a direction given to it by the Land Council for the area in which land is situated; and
>
> (b) where such a direction is given to it—shall take action in accordance with that direction."

[69] A Land Trust is not empowered to accept moneys (s 6 ALRA).

[70] An Aboriginal Land Trust is not permitted to "deal with or dispose of, or agree to deal with or dispose of, any estate or interest in [relevant] land" except as provided by s 19 of ALRA (s 19(1)). A reference in s

19 to an estate or interest in land includes a licence granted in respect of that land (s 19(11)).

[71] Section 19(4A) provides that:

> "With the consent, in writing, of the Minister[7], and at the direction, in writing, of the relevant Land Council, a Land Trust may, subject to subsection (7), grant an estate or interest in the whole, or any part, of the land vested in it to any person for any purpose."

[72] Section 19(5) provides that:

> "A Land Council shall not give a direction under this section for the grant, transfer or surrender of an estate or interest in land unless the Land Council is satisfied that:
>
> (a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed grant, transfer or surrender and, as a group, consent to it;[8]
>
> (b) any Aboriginal community or group that may be affected by the proposed grant, transfer or surrender has been consulted and has had adequate opportunity to express its view to the Land Council; and
>
> (c) in the case of a grant of an estate or interest—the terms and conditions on which the grant is to be made are reasonable."

[73] Section 23(1) sets out the various functions of a Land Council. They include ascertaining, expressing and protecting the interests of traditional Aboriginal owners and of other Aboriginals interested in

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7 The consent of the Minister is not required for the grant of an estate or interest the term of which does not exceed 40 years (s 19(7)).

8 Section 77A of ALRA provides a mechanism for the obtaining of such consent, somewhat similar to that provided under ss 251A and 251B of the NTA.

Aboriginal land within their area, consulting with such people in relation to any proposals concerning the use of such land, negotiating with persons desiring to obtain an estate or interest in such land,[9] and assisting Aboriginals to carry out commercial activities.

[74] Section 23(3) provides that:

> "In carrying out its functions with respect to any Aboriginal land in its area, a Land Council shall have regard to the interests of, and shall consult with, the traditional Aboriginal owners (if any) of the land and any other Aboriginals interested in the land and, in particular, shall not take any action, including, but not limited to, the giving of consent or the withholding of consent, in any matter in connection with land held by a Land Trust, unless the land Council is satisfied that:
>
> (a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed action and, as a group, consent to it; and
>
> (b) any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view to the Land Council."

[75] Section 27 sets out the powers of a Land Council. These include the power to "do all things necessary or convenient to be done for or in connexion with the performance of its functions" including to "give lawful directions to Land Trusts holding land in its area concerning the performance of their functions" and to "receive moneys due and owing

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[9] Like s 19(11), s 23(4) expressly provides that this reference to an estate or interest in land includes a reference to a licence in respect of that land.

to Land Trusts holding, or established to hold, land in its area and give a valid discharge for those moneys."

Right of entry onto Aboriginal land

[76] Entry to and remaining on Aboriginal land is heavily regulated.

[77] Section 70(1) of ALRA prohibits a person from entering or remaining on Aboriginal land. However s 70(2)(a) permits a person to enter and remain on Aboriginal land where that person has an estate or interest in it, but only for "any purpose that is necessary for the use or enjoyment of that estate or interest by the owner of the estate or interest".

[78] Section 19(13) of ALRA provides that if a Land Trust grants an estate or interest in Aboriginal land under s 19 it may "authorise a specified person, or any person included in a specified class of persons, to enter or remain on the land for a specified purpose that is related to that estate or interest." Section 70(2B) provides that it is a defence for an offence against subsection (1) if the person enters or remains on the land in accordance with such an authorisation.

[79] Section 71 of ALRA confers rights for Aboriginal people to enter, use or occupy Aboriginal land to the extent that such entry, occupation or use is in accordance with Aboriginal tradition governing rights with respect to that land.

[80] Where a person does not have the right to enter and remain on Aboriginal land, for example as the holder of an estate or interest and or an authorisation of the kind referred to in sections 19, 70(2)(a) and 70(2B) or under some other provision of ALRA such as s 71, he or she may still be permitted to do so in accordance with a law of the Northern Territory of the kind contemplated by s 73 ALRA, such as the ALA. See s 70(2A)(h) ALRA.

[81] Section 4 of ALA provides that, subject to any contrary provisions elsewhere, "a person shall not enter onto or remain on Aboriginal land … unless he has been issued with a permit to do so in accordance with this Part."

[82] Section 5 provides for the issue of permits for a person to enter onto and remain on Aboriginal land. Permits to enter onto and remain on Aboriginal land may be issued by the Land Council for the area in which that land is situated (s 5(1) ALA) or by "the traditional Aboriginal owners of" that land (s 5(2) ALA). Such permits must be in writing (s 5(3)).

[83] The permit system under the ALA would operate in circumstances where an individual did not otherwise have permission to enter or remain on Aboriginal land, for example under a lease or licence or some other provision of ALRA. For example in the *Blue Mud Bay*

case,[10] it was clear that the mere holding of a fishing licence would not constitute such authorisation.

[84] Accordingly where a person who does not have a right of entry under one or other of the provisions of ALRA wishes to access and remain on Aboriginal land or waters, such a person can seek and obtain a permit under the ALA.

Right to conduct a business on Aboriginal land

[85] The plaintiffs contended that such permits (under s 5 ALA) cannot also authorise activities such as the conduct of a commercial enterprise involving the taking of paying guests fishing on Aboriginal land or waters. They pointed to the fact that various parts of s 19 of ALRA refer to particular businesses and purposes. However those provisions refer to the granting of an estate or interest in Aboriginal land for such purposes, not to the conduct of the business per se. Of course if the conduct of the business required a licence in respect of particular Aboriginal land which constituted an estate or interest in land of the kind covered by s 19, a Land Trust would not be entitled to grant such a licence except in accordance with that section.

[86] In the present matter s 19 was utilised both for the purposes of the Lease, which authorised the defendant to use the Demised Land for

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[10] *Northern Territory of Australia & Ors v Arnhem Land Aboriginal Land Trust & Ors* (2008) 236 CLR 24 (*Blue Mud Bay*). See for example [61].

tourist and staff residential accommodation and for conducting the fishing business under the Licence, and for the purposes of the Licence which authorised the defendant to access and use the Licensed Area for conducting its fishing business.

[87] Although the word "licence" can have a very broad meaning which would include permits to access and remain on land (of the kind contemplated by the ALA), I do not consider that by deeming a licence to be an estate or interest in land for the purposes of s 19 it was intended to bring every kind of licence within the ambit of s 19.

[88] I would think that permits are and can often be granted under the ALA for people to enter and remain on Aboriginal land for any number of reasons, including fishing. In the *Blue Mud Bay* decision it seems to have been assumed by the plurality (at [61]) that such permission could be given to a commercial fisherman. That person's right to fish for commercial purposes was conferred under his or her fishing licence granted under the *Fisheries Act 1988* (NT). It was not suggested that he or she would also require a licence under s 19 of ALRA in order to access and use the waters overlying Aboriginal land for such commercial purposes.

[89] I consider that the power to issue a permit under s 5 ALA also enables the Land Council to authorise a person to enter and remain on Aboriginal land for certain purposes, including commercial fishing.

The Land Council can impose conditions as to the purpose for which and the manner by which the permit holder can enter and remain on the land. (Of course, if the person also required some other authority to engage in such activity, such as a commercial fishing licence under the *Fisheries Act 1988* (NT), or for example a practising certificate under the *Legal Profession Act 2006* (NT) if one wanted to give legal advice while on the relevant land, such other authority would also need to be held, and such a requirement might be included as a condition to the s 5 ALA permit.)

[90] Before commencing to issue permits under s 5 ALA, the Land Council must consult with and come to an agreement with the traditional Aboriginal owners of the relevant area as to the terms and conditions upon which the Land Council may issue such permits (s 5(7) ALA). Consequently the relevant Aboriginal traditional owners would have much the same rights to be involved in the process as they would have in the case of a dealing under s 19 of ALRA.

[91] For the reasons given below when I discuss the Munupi permits, I agree with the plaintiffs' contentions that the references in s 5 of the ALA to the traditional Aboriginal owners are references to the group of people who comprise the traditional Aboriginal owners and not to one or more individual members of that group. I also agree with the contentions that the relevant group would make such decisions using such processes as may be required under their traditional law and

custom and, if there were no such processes, pursuant to a decision-making process agreed to and adopted by them in relation to the particular decision.[11]

[92] I also note the concession of the plaintiffs that because s 71(1) ALRA permits an Aboriginal or a group of Aboriginals to enter upon Aboriginal land and use and occupy that land to the extent that such entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that person or group with respect to that land, such a person or group may invite someone else to enter use and occupy the land if permitted by the relevant Aboriginal tradition. Whilst one can readily assume that the relevant Aboriginal tradition would enable an Aboriginal or a group of Aboriginals to invite another person or persons onto their land, it could not so readily be assumed that the Aboriginal tradition extended to permitting another person to engage in a commercial enterprise such as fishing, without first consulting the broader group of traditional Aboriginal owners.

The Lease

[93] The Memorandum of Lease included the following:

> "Tiwi Aboriginal Land Trust … (called the "Lessor") … being the proprietor of an estate in fee simple in the Northern Territory, over all that land comprised in Slap Datum Pirlangimpi 411 NTS 1054, Northern Territory Portion 1644

[11] Cf *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ,), s 77A.

(Townsite of Pirlangimpi, Melville Island) and 1.86 ha over part of the Northern Territory Portion 1644 shown on survey plan CP 4194 Melville Island and comprised in Certificate of Title Volume 639 Folio 210 (called the Land") and having received written directions from the Tiwi Land Council pursuant to subsection 19(3) of the Aboriginal Land Rights (Northern Territory) Act 1976, those written directions having been given by the Tiwi Land Council on its being satisfied that:

A. the traditional aboriginal owners of the Land understand the nature and purpose of this lease and, as a group consent to it;

B. that the aboriginal communities and groups which may be affected by the lease have been consulted and have had adequate opportunity to express their views to the Tiwi Land Council; and

C. the terms and conditions of this Lease are reasonable

hereby grants to Munupi Wilderness Lodge Pty Ltd … trading as Munupi Wilderness Lodge ("the Lessee") *a lease* of part of the Land being that land described in Item 1 of the Schedule (herein called the "Demised Land") *together with a Licence* for the Lessee and the Lessee's Employees and Visitors to have access to the Demised Land subject to the covenants, terms and conditions of this Lease to be held by the Lessee for a term of 5 years ("the Term") commencing on the date specified in Item 2 of the Schedule (" the Commencement Date") at the Rent specified in the Item 3 of the Schedule (" the Rent").

The Lessee hereby acknowledges and agrees that Tiwi Land Council may, subject to legislation providing otherwise, enforce this Lease on behalf of the Lessor."

(emphasis added by me)

[94] The lease document then sets out various definitions and terms and conditions. These include provisions regarding rent (clause 2),

permitted uses (clause 6), holding over (clause 19), renewal (clause 21), waiver (clause 28) and negotiation of a further term (clause 43).

[95] The "Demised Land" is defined as the Land described in Item 1 of the Schedule, which is "that area of land shown outlined in red on the attached survey plan." The attached survey plan bears the description "Proposed lease area over part of NT Portion 1644 on Plan CP 4194 Melville Island". It identifies the area of 1.86 ha. It also shows the location of an "existing jetty" and the Aspley Strait apparently adjacent to the western boundary of the Demised Land.

[96] Unfortunately the Lease and Licence documents contain a number of errors and ambiguities. Indeed, the first paragraph of the grant erroneously refers to s 19(3) ALRA rather than s 19(4A) as being the provision which would have been relevant.

Rights and interests

[97] At various points the Memorandum of Lease refers to licences, permits and other authorities. These include:

(a) the "Licence for the Lessee and the Lessee's Employees and Visitors to have access to the Demised Land" which is expressed to be granted "together with" the lease of the Demised Land;

(b) a "Licence for Operations" referred to in clauses 6.1 and 34;

(c) "the attached Licence herewith being a Licence to Fish and a Licence to Hunt within areas defined by the Lessor" referred to in Item 8 of the Schedule;

(d) a "Licence for Operational Purposes" referred to in Item 13 of the Schedule;

(e) the permission for accessing the Demised Land and for carrying out works on the Demised Land, referred to in clause 6.4; and

(f) the permit granted by the TLC "for the purposes of section 5 of the *Aboriginal Land Act* (NT) permitting the Lessee and the Lessee's Employees and Visitors all rights of access to Aboriginal Land as reasonably necessary to exercise its rights under clause 6.4" referred to in clause 6.5.

[98] Despite the different terminology used at different points I consider that the Memorandum of Lease contemplates three kinds of rights and interests, namely:

(a) the leasehold interest in the Demised Land;

(b) the right of access to the Demised Land referred to as part of the grant and also in clause 6.4 (which I shall refer to as **the Access Authority**); and

(c) the rights conferred under the Licence.

[99] I consider that the leasehold interest in the Demised Land and the Access Authority are part of the Lease, having been granted under the Memorandum of Lease. I also consider that the permit referred to in clause 6.5 was a permit thought to be necessary for the purposes of satisfying the statutory requirements of s 4 of the ALA, notwithstanding that it relates to the same right of access as that conferred by the Access Authority.

[100] I consider that the references to licences in clauses 6.1 and 34 of the Memorandum of Lease, and in Items 8 and 13 of the Schedule, are references to the Licence and the rights and interests conferred thereunder.

Rent

[101] Clause 2 of the Lease requires the Lessee "to pay to the Lessor or at its direction the Rent in the manner specified in Item 4 of the Schedule." "Rent" is defined in clause 1.1 to mean the amount specified in Item 3 of the Schedule. (I shall refer to this as **the Rent**.) Item 3 of the Schedule identifies the Rent as comprising:

(a) a yearly amount of $480 for the first year increased by CPI over the remaining 4 years plus Goods and Services Tax (which I shall refer to as the **Base Rent**)

(b) "plus Licence fees as calculated under 'Permit Use'."

[102] Unfortunately there is no definition of "Permit Use". However there are references in the Lease to "Permitted Use", for example in clause 1.1 (the definition clause), in clause 6 (which is headed "Permitted Use") and in Item 8 of the Schedule. Item 8 provides as follows:

> "Permitted Use: (1) Tourist and Staff Residential accommodation by way of lease. Off lease purposes as defined in the attached License herewith being a License to Fish and a Licence to Hunt within areas defined by the Lessor."

[103] Clauses 1, 2, 3, 7 and 8 of the Licence provided for the payment of licence fees based upon the numbers of paying guests. The fee stipulated was $49.50 (including GST) "per paying guest, per 24 hour day or part thereof". It was accepted by the parties that these were the "Licence fees" referred to in Item 3 of the Schedule and thus formed part of the Rent.

[104] Clause 3 of the Lease states that the Rent will be indexed in accordance with the "CPI Formula" set out in Item 6 of the Schedule. Although the Licence fees were the largest component of the Rent as defined in Item 3, there does not appear to have been any suggestion elsewhere that the CPI increase was to apply to that part of the Rent. Rather, the parties have assumed and accepted that the daily licence fee of $49.50 per guest was to remain the same, at least during the five year term of the Licence.

Permitted use - clause 6.

[105] Clause 6.1 of the Lease provides as follows:

> "The Lessee must not without the prior written consent of the Lessor, also defined as a LICENCE for operations pursuant to this lease, use or permit the Demised Land to be used for any purpose other than as specified in the LICENCE FOR OPERATIONS and Item 8 of the Schedule ("the Permitted Use").

[106] I construe this provision as permitting the Lessee to only "use or permit the Demised Land to be used" for:

(a) "tourist and staff residential accommodation" - see Item 8, first sentence; and

(b) "off lease purposes as defined in the" Licence - see Item 8, second sentence and my conclusions in [100] above.

[107] I appreciate that this construction does not appear to give separate recognition to other parts of clause 6.1 which referred to purposes:

(a) "specified in the LICENCE FOR OPERATIONS"; or

(b) with the "prior written consent of the Lessor, also defined as LICENCE for operations pursuant to this lease" - see first two lines of clause 6.1.

[108] Apart from the Lease and the Licence there does not appear to have been any other document that appears to constitute or evidence a "Licence for operations" or any "prior written consent of the Lessor" of the kind referred to in clause 6.1. Thus there does not appear to be

any basis for concluding that those parts of clause 6.1 referred to some other licence or document. Accordingly I consider that the purposes permitted under clause 6.1 of the Lease were confined to those set out in [106] above.

[109] As is common with other commercial leases the Lease specifies the kind of activity or business that may be conducted on the leased land. Thus it would not be permissible for the lessee to use the land for some other kind of business, such as a bakery or car repair business. The ability to use the Demised Land for the "off lease purposes as defined in the attached Licence" would enable that land to also be used for purposes ancillary to activities carried out under the Licence, for example storing and maintaining fishing and hunting equipment and vessels, cleaning fish and carrying out administrative work associated with the business being operated under the Licence.

[110] Whilst clause 6.1 only related to the Demised Land, clause 6.4 provided authorisation for the Lessee and its employees and visitors to have "access to the Demised Land for the Permitted Use in accordance with this Lease" and to bring transportable dwellings onto or off the Demised Land. It also permitted the Lessee to construct or alter access roads and carry out other works ancillary to obtaining and maintaining such access. This is the Access Authority referred to at [98] and [99] above.

[111] Clause 6.5 purported to be a permit by the TLC for the purposes of s 5 of the ALA "permitting the Lessee and the Lessee's Employees and Visitors all rights of access to Aboriginal Land as reasonably necessary to exercise its rights under clause 6.4", namely the access rights conferred by the Access Authority. Whilst clause 6.4 permitted access to the Demised Land, clause 6.5 permitted access to such other Aboriginal Land as was reasonably necessary in order to obtain access to the Demised Land.

[112] Neither clause 6.4 nor clause 6.5 conferred any rights of access to or use of any other land (or waters). Nor did any other provision in the Lease provide any rights of access or otherwise in respect of any land or waters apart from the Demised Land and access thereto.

The Licence

[113] The cover page of the Licence document included the words "Grant of Licence Pursuant to a Lease. June 2005." The document included the following:

> "The Tiwi Aboriginal Land Trust **...** (called the "Licensor"), is vested as the owner of the land on Melville and Bathurst Islands, Northern Territory, more particularly described as NT Portion 1640 from Plan CP004186, NT Portion 1644 from Plan CP004194 and NT Portion 3042 from Plan CP004186, being all the land comprised in Certificate of Title Register Book Volume 536 Folio 188 (called "the land") AND having received written directions from the Tiwi Land Council pursuant to sub-section 19(4A) of the Aboriginal Land Rights (Northern Territory) Act 1976, those written directions having been given by the Tiwi Land Council on it being satisfied that:

A. the traditional Aboriginal owners of the land understand the nature and purpose of this Licence and, as a group, consent to it;

B. the Aboriginal communities and groups which may be affected by the Licence have been consulted and have had adequate opportunity to express their view to the Tiwi Land Council; and

C. the terms and conditions of this Licence are reasonable;

hereby grants to Munupi Wilderness Lodge Pty Ltd … trading as Munupi Wilderness Lodge (called "the Licensee") a non-exclusive Licence to enter certain land, sea and inland waterways on and around Melville Island in the Northern Territory of Australia, namely the waters of Marrikawuyanga; Munupi, Wurankuwu; Malawu and Jikilaruwu Land Owning groups adjacent to the waters of the northern coast of Melville and Bathurst Islands and Apsley Strait and the Timor Sea as marked on the plan annexed to this Licence (called "the licensed area") and to operate a business enterprise providing recreational fishing and hunting tours (called "the licensed activities")

together with a licence for the servants, directors, members, guests and invitees of the Licensee to have access to the licensed area, to be held by the Licensee for a term of five years (5) years commencing on 1 July 2005 and expiring on 30 June 2010."

[114] The document then sets out a number of terms and conditions including:

(a) provisions concerning the quantum of the licence fee (clauses 1, 2 & 7);

(b) the requirement that the licence fee be payable on the last Friday of each month to the office of the TLC (clauses 3 & 8);

(c) permission for the Licensee "to access the licensed area to conduct recreational fishing activities with its guests and invitees, and to access the licensed area to conduct hunting activities for male water buffalo, pigs and wild fowl with its guests and invitees" (clause 4);

(d) various covenants on the part of the Licensee (clause 9) and covenants on the part of the Licensor (clause 10);

(e) provisions regarding the serving of notices (clause 11), the grant of a further licence (clause 12) and waiver (clause 14(f)).

[115] Attached to the document is a map of the Tiwi Islands entitled "Map 2 - Land Ownership". It shows the 8 areas comprising the Tiwi Islands and identifies the land-owning group for each area.

[116] The covenants on the part of the Licensee in clause 9 include covenants:

(a) Not to "use or permit the licensed area to be used for any purpose other than for the provision of recreational fishing and hunting activities for paying guests and invitees, and the accommodation of paying guests" without the prior written consent of the Licensor (clause 9(a)).

(b) That it will comply with all applicable laws and regulations such as "the *Firearms Act 1997* (NT) and Regulations" (clause 9(b)).

(c) "That the Licensee will provide notice to the Licensor in advance of all guest and non-guest bookings and shall permit the Licensor to regularly each month sight the advance bookings obtained and confirmed by the Licensee" (clause 9(c)). (This was referred to in these proceedings as the "accounting obligations").

(d) "That the Licensee will employ at least one Tiwi person to work on the Tiwi Islands and where possible encourage and assist other Tiwi persons to gain employment with the Licensee" (clause 9(d)).

(e) "That the Licensee will only employ those non-Tiwi staff who have been approved by the Licensor in writing prior to that person's employment, such approval not to be unreasonably withheld, and the Licensee shall maintain permits for those staff to visit and remain on the licensed area and any land being the property of the Licensor" (clause 9(e)).

(f) That the Licensee will be responsible for insurance in relation to the safety of all employees, guests and invitees (clause 9 (f)).

(g) "That the Licensee will duly and punctually pay the licence fee to the Tiwi land Council in accordance with this Licence without deduction or set off" (clause 9(g)).

(h) That the Licensee will conduct its operations in an orderly and respectable manner, keep the Licensed Areas in satisfactory

condition, remove fixtures or plant and equipment when requested to do so, and ensure compliance with relevant laws (clauses 9(h) to (j)).

(i) "That this Licence is an annexure to a lease granted in favour of the Licensee and is personal to the Licensee … and terminates in accordance with the terms of the lease other than should the Licensee cease to conduct the licensed activities, or fails to conduct the licensed activities for eight (8) months" (clause 9(k)).

(j) "That the Licensee acknowledges that this Licence creates no grant of an interest in any fish or water buffalo, pigs or wild fowl taken or shot by the Licensee or an interest in anything in or about the land or the licensed area" (clause 9(l)).

(k) "That the Licensee acknowledges that this Licence creates no interest in favour of the Licensee in any land of the Licensor other than a lease granted for the purposes of the accommodation of guests and staff of the Licensee, and that this Licence is revocable by the Licensor under the conditions of that lease" (clause 9(m)).

[117] The covenants on the part of the Licensor in clause 10 include covenants:

(a) For the Licensee to conduct its activities on the Licensed Area without any interruption or disturbance, and that the Licensor will

not "issue a Licence to conduct the licensed activities on the licensed area to any person while this Licence is in force" (clause 10(a)).

(b) Reserving the rights of Tiwi people to enter and use the Licensed Area for various purposes without notice (clause 10 (b)).

(c) Reserving the rights of Tiwi people to enter into arrangements with other people for the purpose of providing "access to and egress from the licensed area or adjoining lands" (clause 10 (c)).

[118] Clause 10(d) provides for what happens upon expiry of the (five year) term:

> "At the expiration of the term should this Licence not be renewed or in the event that no further licence is granted to the Licensee and in the event that the Licensee with the Licensor's consent express or implied continues and remains in occupation of the licensed area the Licensee shall hold the licensed area on a monthly licence from the Licensor on the same terms and conditions (unless repugnant to a monthly licence) as contained within this Licence."

[119] Clause 10(e) provides remedies to the Licensor where the licence fee is in arrears or remains unpaid for one month after it is payable or where there are other defaults on the part of the Licensee. These include a right to give the Licensee a Notice of Revocation of Licence requesting the Licensee to leave the Licensed Area within 48 hours, and after that a right to issue a Trespass Notice to the Licensee and remove fixtures, plant and equipment of the Licensee.

Rights and interests

[120] I consider that the rights and interests conferred under the Licence were merely usufructuary rights in the nature of rights to enter and use the Licensed Area, and that the Licence did not confer any proprietary rights in the land or waters. So much is apparent from the terms of the grant itself, the clear expression in clause 4 of the primary rights conferred, and the provisions of subclauses 9(k), (l) and (m).

[121] I have reached this conclusion despite the reference in clause 11(m) to "a lease granted for the purposes of the accommodation of guests and staff of the Licensee". This would seem to be a reference to the Lease and the rights and interests conferred thereunder, not to some other leasehold rights intended to be conferred under the Licence.

[122] In summary, the rights conferred by the Licence were to enter the Licensed Area and to provide recreational fishing and hunting tours on that area.

The Licensed Area

[123] The plaintiffs contended that "the licensed area" included all of the land and waters of the Munupi and of the other four land-owning groups, namely the Marrikawuyanga, Wurankuwu, Malawu and Jikilaruwu, and therefore included the Demised Land.

[124] I consider that the Licensed Area was confined to the waters of the five land-owning groups, and did not include land above the high water mark. This would include waters overlying the intertidal zone, waters in creeks and rivers, and waters further out to sea which although not overlying Aboriginal land vested in the TALT would be considered to be part of the "sea country" of one or other of the land-owning groups according to Aboriginal law and custom.

[125] The main reason for me reaching this conclusion is that the grant confers a right to "enter *certain* land, sea and inland waterways … *namely the waters of*" the five land-owning groups (emphasis added by me).

[126] The plaintiffs' argument was mainly based upon the fact that the description of the Licensed Area went on to refer to the markings on the "plan" annexed to the Licence. However I consider that the only purpose of those markings was to identify the eight areas of land (and waters) forming part of the Tiwi Islands and the relevant land-owning groups for each of those areas. There is nothing on the plan or in the terms of the grant to suggest that the Licensed Area was to include all of the lands and waters of those groups. The reference in the grant to the markings on the plan was a reference to the relevant land-owning groups and their respective traditional country, not to the "waters" subject of the grant. Indeed the plan contains no markings that would indicate the extent of the waters.

[127] The plaintiffs also pointed to the fact that the Licence also permits hunting of animals which would be found on or over land, namely water buffalo, pigs and wild fowl. Whilst this does provide some support to the plaintiffs' argument there is no reason to suppose that such hunting activity could not also take place from waters within the Licensed Area or when the tide is out.

[128] Despite this possible anomaly I think that the clear words of the grant confine the Licensed Area to the relevant waters. Had it been intended to include the lands of the five land-owning groups it would have been simple for whoever drafted the document to use the common expression "land and waters" instead of "waters" when identifying the "certain land, sea and inland waterways" subject of the grant.

Termination, revocation and renewal

[129] Unlike the Lease, the Licence did not confer any right of renewal. All that it provided, apart from the "monthly holding over" provision in clause 10(d), was a "right" for the Licensee to make a written request for a further licence (clause 12). However such request could only be made during the last 2 months of the existing term of the Licence.

[130] More importantly, there was no requirement for the Licensor to accede to such a request. And, even if the Licensor was inclined to grant a further licence, the period, licence fee and other terms and conditions of such a further licence would have to be agreed. In reality I do not

consider that clause 12 conferred any right at all, beyond acknowledging the possibility that the parties could negotiate for a fresh licence if they both wished to do so. There was no obligation on the Licensor to renew the Licence.

[131] The Licence contained some provisions which contemplated its earlier termination, in some cases even while the Lease continued. These included:

(a) where the Licensee ceased to conduct the licensed activities, or failed to conduct the licensed activities for eight months (clause 9(k));

(b) following the giving of a Notice of Revocation of Licence and a Trespass Notice, following a relevant breach of the Licence (clause 10(e)); and

(c) "under the conditions of" or "in accordance with the terms of" the Lease (clauses 9(k) and (m)).

[132] Whilst there are references in the Lease to the Licence and vice versa there is nothing in either document that says that the Licence cannot be revoked even where the Lease continues. More relevantly, there is nothing in either document that says that the Licence can be renewed or otherwise continued upon the expiry of its five year term (otherwise than under the holding over provision).

The licence fee

[133] Questions have arisen as to how the licence fee was to be calculated, and what it was for.

[134] The "licence fee" is referred to in various parts of the Licence including clauses 1, 2, 3, 7, 8, 9(g), 10(e) and 12.

[135] Clauses 1, 2 and 3 of the Licence provided as follows:

> "1. The licence fee payable for this Licence shall be calculated on the basis of per paying guest of the Licensee per 24 hour day or part thereof but shall not include a payment in respect of non-paying guests of the Licensee who may include promotional, advertising and tour familiarisation invitees of the Licensee, such invitees not to exceed twenty (20) per year.
>
> 2. The licence fee shall be a payment of forty-nine dollars and fifty cents ($49.50) (including GST) per paying guest, per 24 hour day or part thereof, and include any payment made pursuant to clause 7 of this licence.
>
> 3. The licence fee shall be payable on the last Friday of each month of the term of this Licence to the office of the Tiwi Land Council at the address specified in clause 11 of this Licence and each payment shall be noted "Munupi Wilderness Lodge Fishing and Hunting Licence payment."

[136] Clause 7 provided that the licence fee would also include additional payments in respect of animals shot by guests engaged in hunting activities.

[137] I have previously noted that the Licence was an annexure to the Lease and could be terminated in accordance with the terms of the Lease

(clause 9(k)), or in various other circumstances such as for failure to pay the licence fee (clause 10(e)).

[138] I consider that the licence fee was payable for, and only for, the Licence. This is evident from the clear wording at the beginning of clause 1: "The licence fee payable for this Licence is …". The licence fee is the consideration provided in exchange for the rights conferred under the Licence, namely for the Licensee to conduct its business on the Licensed Area and to take guests onto the Licensed Area at any time during the (5 year) term of the Licence.

[139] The issue between the parties concerning the calculation of the licence fee turns on the meaning of the references in clauses 1 and 2 to "per paying guest… per 24 hour day or part thereof." The word "guest" is not defined. The defendant contends that the fee was only payable for each day (or a part thereof) when each guest actually went fishing or hunting. On the other hand the plaintiffs say that it was payable in respect of each day (or part thereof) during which each guest stayed at the Lodge.

[140] Mrs Benton said that until about late 2008 or early 2009, the person she dealt with at the TLC was Denise Callander, who she understood to be the Company Secretary of the TLC. She used to notify Ms Callander of the dates of arrival and departure of guests, to and from the "lodge" (which I take to refer to the accommodation on the

Demised Land), and Ms Callander would issue permits accordingly. She also used to pay the licence fees to Ms Callander.

[141] Mrs Benton said that she used to calculate the fees by reference to the number of days or part days which guests spent fishing, and that she understood that the TLC agreed with this approach. She also said that she calculated a licence fee for guests who only came for cultural or history tours as if they were fishing. She said that in all her dealings with the TLC during that period no one queried her method of calculating the licence fee. Nor did anyone from the TLC complain about it being paid late or otherwise not in accordance with clause 3 of the Licence, until late in 2009.

[142] In October 2009 Ms Callander's successors at the TLC, Ms Moe Valentine and Mr Peter Gardiner, noticed a difference between the dates for which permits were being requested and issued and the number of days for which the licence fees were being paid. No further complaint was made about the method of calculating the fees until October 2012 when the plaintiffs' solicitors raised it in the PD6 letters.

[143] I prefer the interpretation advanced on behalf of the plaintiffs, namely that the licence fee was payable in respect of each day (or part thereof) during which each guest stayed at the Lodge. Unlike the situation in respect of hunting activities where the additional payment was clearly referable to each particular animal shot, there is no indication

elsewhere that the licence fee only applies to the actual carrying out of any activity under the Licence. I consider that the fee was payable as consideration for the Licence itself, which enabled access to and use of the Licensed Area at any time. The fee was payable for the rights conferred under the Licence, rather than only for each time when such a right was exercised (by taking a guest fishing).

[144] I consider that the guests referred to are the guests of the defendant at the fishing lodge on the Demised Land. Such a conclusion follows from the fact that the main purpose of the Licence was to provide those guests with access to the Licensed Area, the requirement that the Licensee provide advance notice of "all guest and non-guest bookings" (clause 9(c)) and the requirement that the Licensed Area only be used by "paying guests" and invitees. The evidence was to the effect that payments made by "guests" to the defendant were payments solely based on time spent at the Lodge and that the bookings notified under clause 9(c) were bookings for accommodation at the Lodge. There was no suggestion that the defendant charged its guests separately when it took them fishing.

[145] Further, if the licence fee was only payable for days when the defendant's guests went fishing, it would not have been possible for the parties to calculate the licence fee payable unless they maintained additional records that showed the number of guests who went fishing

on each day. If this was intended clause 9(c) would have been worded differently.

[146] Accordingly I consider that the licence fee was to be calculated according to the length of time during which a person was accommodated at the Lodge as a guest, irrespective of whether and how often each guest went fishing.

[147] I reject the defendant's contention that the apparent acquiescence on the part of Ms Callander and the TLC until late 2009 gives rise to some kind of estoppel or waiver. After 1 July 2010 the occasion did not arise for the plaintiffs to pursue the point as the defendant had ceased to pay any licence fees to the TLC and the plaintiffs were not to know the basis on which the defendant was calculating the fees which it was paying into its solicitor's trust account. Further, as the plaintiffs do not now rely upon that particular underpayment of licence fees (which I understand to amount to $4455) as a material breach, I fail to see how the defendant could be said to have acted to its detriment in reliance upon that conduct. I also consider that the non-waiver clauses in both the Lease and the Licence operate, as a result of which the fee would have been payable according to the true construction of the relevant provisions of the Licence.

[148] My conclusion that the licence fee was only payable in exchange for the Licence also leads to the conclusion that the licence fee was

payable only for so long as the Licence continued. Once the Licence expired or was revoked, there was no continuing right to a licence fee. Accordingly no "Licence fees" were payable under the Lease. The only rent payable would then have been the Base Rent of approximately $480 per year plus GST.

[149] Even if the defendant continued to carry on its business and take its guests fishing (or hunting) on what was previously the Licensed Area, it was not entitled to do so pursuant to the Licence.

Relationship between the Lease and the Licence

[150] Both parties have relied on the relationship between the Lease and the Licence for different reasons.

[151] The plaintiffs contended that the Lease was breached by reason of the defendant breaching a number of conditions of the Licence, in addition to the obligation to pay the licence fees.

[152] The requirement in clause 2 of the Lease that the Lessee pay the Rent, which in turn is largely based upon the licence fee payable under the Licence, coupled with the remedies provided to the Lessor under the Lease for failure to pay the Rent, necessarily leads to the conclusion that a breach of that part of the Licence which relates to the licence fee will also constitute a breach of the Lease.

[153] Otherwise, there appears to be nothing in the Lease to the effect that some other breach of the Licence would necessarily constitute a breach of the Lease. Of course, if the Lessee was to use the Demised Land for a purpose other than for tourist and staff residential accommodation and other than for a purpose specified in the Licence, the Lessor would have a remedy. However such a remedy would flow from the breach of the Lease itself, in that case clause 6.1, not from the breach of the Licence. This point will become more relevant when I turn to consider the breaches of the Lease alleged by the plaintiffs in their notices under s 137 LPA and the defendant's application for relief against forfeiture.

[154] The defendant contended that the Licence necessarily continues for as long as the Lease continues. Whilst I havenoted various references in the Lease to the Licence and vice versa, I also concluded that there is nothing in either document that says that the Licence cannot be revoked or determined even where the Lease continues or is renewed.

[155] The defendant contended that "by one route or another it must be determined that the terms of the Licence are terms of the equitable lease because the original Lease and the Licence were inextricably intertwined."

[156] The defendant advanced a number of arguments, namely that:

(a) The equitable lease provided access to the Licensed Area by virtue of clause 6.5. I have already rejected that argument at [112] above.

(b) Alternatively, "by giving a sensible meaning to the Lease and the Licence when read together in context."

(c) Alternatively, "by the recognition of implied terms."

Were the Lease and the Licence "inextricably intertwined"?

[157] Despite the unhappy drafting in various parts of the Lease and the Licence documents I do not consider there to be any particular ambiguity or uncertainty that requires the relevant provisions to be construed in a particular way. Nevertheless it is worth noting the following passage in *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* at [1353],[12] that was cited by both parties.

> "Contractual interpretation involves the identification of the objective intentions of two parties who have reached a concluded agreement and embodied it in a document. The court, particularly in a commercial context will strain to give a documentary contract a sensible meaning. Ambiguity or uncertainty will not defeat it. See *Upper Hunter County District Council v Australian Chilling PL & Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429, 437 (per Barwick CJ)."

[158] It was clearly the intention of the parties that the defendant could operate its fishing and hunting business for the five years of the

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12 [2012] WASCA 157.

Licence and have secure tenure for the accommodation of its guests and staff under the Lease. While the Lease conferred an interest in land, the Licence conferred a permissive right authorising the defendant to take its guests hunting and fishing on the Licensed Area.

[159] The agreement concerning the licence fee component of the Rent provided both parties with incentives and rewards in relation to the successful operation of the defendant's hunting and fishing business. Although the Lease conferred security of tenure for a further five years by giving the defendant the option to renew, the Licence was to expire on 30 June 2010, unless it had previously been revoked. At that time both parties would be freed of their obligations under the Licence, and at liberty to renegotiate a fresh licence, for example to include other areas and perhaps to adjust the fees that had previously been agreed under the Licence for fishing and hunting. (Clause 12 of the Licence expressly provided the opportunity for this to occur during the last two months of the term of the Licence.)

[160] Alternatively, if agreement could not be reached on terms suitable to the defendant, the defendant could have chosen not to exercise its option to renew the Lease. Or, as the defendant submitted in its written submissions, the defendant could have chosen to "continue to trade in a more limited way than that originally envisaged … by fishing the 'blue' water beyond the low water mark and such waters as any

traditional owner (authorised by traditional law to do so) may permit entry to on any given occasion in accordance with the ALA."

[161] Such an arrangement would appear to have had good commercial sense.

[162] There are a number of important differences between the express terms of the Lease and the Licence that are consistent with such an objective and that lead to the conclusion that they are not so "intertwined" as the defendant suggests.

(a) The first is the fact that the Lease contains an option to renew, but the Licence does not. Rather clause 12 of the Licence expressly contemplates a fresh licence.

(b) Secondly, the Lease if renewed would contain the same terms, apart from the option to renew. On the other hand clause 12 of the Licence contemplates a fresh licence for a further period to be agreed, a licence fee to be agreed and on such other terms and conditions as are agreed.

(c) Thirdly, the Licence could be revoked for reasons different to those available under the Lease - for example where the Licensee ceased to conduct the licensed activities for eight months or more (cl 9(k)), or where the Lease was terminated (cl 9(k) & (m)).

(d) Fourthly, the Licence could be revoked and re-entry achieved by the simple process of giving a Notice of Revocation of Licence

followed by a Trespass Notice 2 days later (cl 10(e)), whereas the Lease could only be terminated following the much more detailed processes contained in the Lease itself and the LPA.

(e) Fifthly, the "holding over" periods are different, the Licence providing for a monthly holding over (cl 10(d)), the Lease a quarterly holding over (cl 19).

[163] Accordingly I do not consider that the Lease and the Licence are "intertwined" to have the effect contended for by the defendant, namely to bring about a result that the Licence was necessarily renewed with the Lease. Further, such a conclusion would render nugatory a number of the provisions in the Licence such as those relating to revocation, and would result in inconsistencies between the Licence and the Lease, for example in relation to holding over periods.

Implied terms

[164] In its written submissions of 18 November 2013 the defendant said:

> "To give proper effect to the right of renewal it must be the case that the permit to access the relevant Aboriginal Land covered by water for the purpose of fishing, by one means or another, continues for the term of the equitable lease. If this does not occur by virtue of clause 6.5 and by reference to the terms of the Licence, it must be an implied term of the Lease that renewal of the Lease requires renewal of the Licence, or that access otherwise continues upon renewal."

[165] In its Further Written Submissions of 11 December 2013 the defendant submitted that one or more terms should be implied into the Lease. I

had requested counsel for the defendant to provide the wording of the implied terms asserted, bearing in mind the fourth requirement in *BP Refinery* (below).

[166] Before dealing with each of those contentions I should briefly set out the well-known passage from the decision of the Judicial Committee of the House of Lords in *B. P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council* [13], at p 26 where their Lordships said:

> "Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract." (at p.606)

[167] The first term which the defendant says should be implied related to clause 6.5 of the Lease which I have construed as not applying to the Licensed Area. The defendant contends that the following sentence should be added to clause 6.5:

> "For the avoidance of doubt, this clause permits access to the licensed area as defined in the Licence attached to this lease."

[168] I do not consider that such a term can be implied. It does not meet the second and third tests in *BP Refinery* and would not be consistent with

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13 [1977] HCA 40; (1977) 52 ALJR 20 (*BP Refinery).*

clause 6.5 as I have construed it to mean. Moreover, if such a term were part of the Lease, there would be no need for the Licence. The main purpose of the Licence is to authorise access to the Licensed Area.

[169] Secondly, the defendant submitted, alternatively to the above submission about clause 6.5, that "it must be an implied term of the Lease that renewal of the Lease requires renewal of the Licence." It said that would be achieved by adding the words "and the Licence attached to this lease" into clause 21 of the Lease so that the final words of that clause would read "renew this lease and the Licence attached to this lease for the Further Term."

[170] Again I do not consider that this term can be implied. It does not meet the second and third tests in *BP Refinery* and would considerably expand the meaning and effect of clause 21. Moreover it would be inconsistent with the intention of the parties which is evident from those parts of the Licence which make it clear that the Licence cannot be renewed. Nor would it be "reasonable and equitable" for the plaintiffs to be bound to the Licence for a further five years in those circumstances.

[171] Thirdly, the defendant submitted that "a further alternative would be to recognise the following implied terms:

> ‘For so long as the Lessee remains in occupation of the Demised Land pursuant to this lease, the Lessee and its invitees are permitted to have access to the licensed area on the terms of the Licence attached to this lease, notwithstanding that the Licence may have expired, may not have been renewed, and the Licensor may not have expressly or impliedly consented to the Lessee / Licensee holding over on the Licence. For the avoidance of doubt, the Rent payable pursuant to this lease includes the Licence Fees notwithstanding that the Licence may no longer be in force.’”

[172] I do not consider that this term can be implied. Like the other two implied terms advanced, it does not meet the second and third tests in *BP Refinery* and would considerably expand the meaning and effect of the whole Lease. It too would be inconsistent with the intention of the parties which is evident from those parts of the Licence which make it clear that the Licence finishes on 30 June 2010 and cannot be renewed. Nor would it be “reasonable and equitable” for the plaintiffs to be bound to the Licence for a further five years in those circumstances.

Conclusions

[173] I consider that each of the Lease and the Licence granted an “estate or interest in land” of the kind covered by s 19 ALRA and therefore provided the authorisations required by s 70 ALRA. Both were duly granted under s 19(4) and both included authorisations for the defendant and other persons of the kind referred to in s 19(13), namely “any person included in a specified class of persons”, to “enter or remain on the land for a specified purpose that is related to” the respective estate or interest. Consequently both grants permitted the

defendant and its guests to enter and remain on the relevant land "for any purpose that is necessary for the use or enjoyment of that estate or interest" by the defendant and those other persons included within the class of persons identified in the relevant grant. See s 70(2)(a) & (2B) ALRA.

[174] For the reasons previously stated I consider that the Lease and the Licence conferred different rights and interests in respect of different areas.

[175] The Lease conferred:

(a) upon the defendant, rights and interests in the nature of leasehold rights in the Demised Land for the purposes of tourist and staff residential accommodation and purposes ancillary to activities carried out under the Licence;[14] and

(b) upon the defendant and its employees and guests, rights of access to and from the Demised Land for the purposes of using that land[15]. These rights (granted in clause 6.4) were complemented by the permission granted in clause 6.5 for access over other Aboriginal land in order to exercise the right of access conferred under clause 6.4.

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14 See [109] above.
15 See [110] above.

It did not confer any other rights in relation to any other land or waters.

[176] The Licence conferred:

(a) upon the defendant, the right to enter the "licensed area", namely the waters of the five land-owning groups, and to operate a business enterprise providing recreational fishing and hunting tours; and

(b) upon the defendant, and its "servants, directors, members, guests and invitees", rights to access the Licensed Area and engage in recreational fishing activities and hunting.

Rights and interests after 30 June 2010

[177] It is common ground that the Lease was duly renewed and continued after 30 June 2010. I find that the Licence expired on the 30 June 2010 and that a further licence was not granted (pursuant to clause 12 or otherwise). The next question to consider is what right, if any, did the defendant have to continue to operate its fishing and hunting business on waters of any of the five land-owning groups after 30 June 2010.

[178] Apart from the possibility that the defendant had no right to continue these activities (and therefore acted unlawfully) the other possibilities advanced were that:

(a) the Licence continued as a monthly licence pursuant to the "holding over" provisions in clause 10(d) of the Licence;

(b) the defendant held those rights under clause 6.5 of the Lease;

(c) the defendant held an equitable licence in the same terms as the Licence; or

(d) such rights were conferred by the Munupi permits.

[179] For the reasons previously given at [111] and [112] above, I do not consider that clause 6.5 of the Lease conferred any rights to enter or use the Licensed Area.[16] That indeed was the primary purpose of the Licence. It was the Licence that provided the defendant and its guests with the authorisation required under ALRA, in particular s 70.[17] No further authorisation was required under the ALA or otherwise while the Licence was in force. If, as the defendant contended, clause 6.5 of the Lease conferred those rights, the Licence would have been unnecessary.

[180] For the reasons that follow I do not consider that an equitable licence came into effect following the expiry of the Licence on 30 June 2010. Nor do I consider that the Munupi permits had any relevant and lawful effect, even in respect of Munupi waters.

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16 See too [175] above.

17 See *Aboriginal Land Rights (Northern Territory) Act 1976*, ss 19(1), (4A), (11) & (13) and 70(2) & (2B).

Monthly licence under clause 10(d)

[181] I agree with the plaintiffs' contentions that the Licence continued as a monthly licence pursuant to the "holding over" provisions in clause 10(d) of the Licence.

[182] Notwithstanding that the TLC had clearly stated that it would not be granting a fresh licence once the Licence expired on 30 June 2010, the plaintiffs well knew that the defendant was continuing to carry on its business which included taking its guests onto Aboriginal land and waters to engage in fishing. The plaintiffs took no formal steps towards preventing the defendant from continuing with such activities until it served the Notice of Revocation of Licence and of Revocation of Permits dated 15 January 2013 on the defendant, purporting to revoke the Licence on numerous grounds including for non-payment of the licence fees.

[183] I find that the defendant remained in occupation of the Licensed Area with the implied consent of the TALT from 1 July 2010 until 29 January 2013 when the Notice of Revocation of Licence was served on the defendant.

Equitable licence

[184] The defendant contended that it continued to hold an equitable licence from 1 July 2010. It based this contention upon the proposition that

the Licence was inextricably linked to and part of the Lease, and remained so during the term of the equitable lease. The defendant submitted that a renewal of the Lease necessarily caused the renewal of the Licence. I have already rejected this contention when considering the relationship between the Lease and the Licence.

[185] The defendant pointed to a number of things in support of its contention that the Lease and the Licence were so inextricably linked that the Licence necessarily continued, albeit as an equitable licence, with the equitable lease. These included:

(a) The contention, which I have rejected, that clause 6.5 of the Lease related to and conferred rights in respect of the Licensed Area;

(b) The contention that the Lease would effectively have no utility if the Licence did not continue with the Lease. But this contention is inconsistent with the defendant's concession quoted in [160] above to the effect that the defendant could continue to trade albeit in a more limited way, and in the next paragraph of its submissions where it said: "therefore, even in the worst case scenario for the defendant, the equitable lease retains some value."

(c) The contention, which I have rejected, that "it must be an implied term of the Lease that renewal of the Lease requires renewal of the Licence, or that access otherwise continues upon renewal".

[186] I do not consider that the defendant held an equitable licence. Unlike the situation in relation to the Lease, the defendant did not have a right to a licence, for example pursuant to an option to renew or pursuant to some other agreement.

[187] Furthermore, the defendant's conduct after 1 July 2010 is inconsistent with it operating under an equitable licence. Although the defendant continued to comply with the fundamental requirement of the Lease by setting aside the Rent payable (including the licence fees), albeit paying the monies to its solicitor's trust account rather than the plaintiffs, the defendant did not continue to comply with the other terms of the Licence as one would expect it would if it thought that the Licence still existed, albeit as an equitable licence. For example, it did not comply with important parts of the Licence such as the accounting obligations, the obligations to obtain prior approval from the TALT for the employment of non-Tiwi staff and to obtain permits under the ALA for them, and the requirement to comply with relevant legislation, in particular the ALRA and the ALA. Rather, its conduct in obtaining and using the Munupi permits was inconsistent with it continuing to hold an equitable licence.

The Munupi permits

[188] From 2 July 2010 the defendant obtained permits from various people who were or purported to be members of the Munupala land-owning

group (the **Munupi permits**). The defendant continued to obtain such permits and had obtained 222 such permits by 10 April 2013.

[189] The Munupi permits were in the same form as front side of the permits that had previously been issued by the TLC (the **TLC permits**) except that they did not bear the logo and name of the TLC on the top, and they did not purport to be issued by a "Delegate of the Tiwi Land Council" or a "Delegate of the Tiwi Traditional Owners". Rather they purported to be issued and signed by one or more people described as "Tiwi Traditional Owners".

[190] Like the TLC permits, the Munupi permits:

(a) purported to be permits to "enter onto and remain on Aboriginal land or seas adjoining Aboriginal land (under the Aboriginal Land Act of the Northern Territory);

(b) purported to authorise the persons named thereon "to enter onto Land / Seas owned by the Tiwi people of Bathurst and Melville Island … at *Pirlangimpi* – Melville Island and there to remain" from one specified date to another, for a particular purpose, in most cases "Guided Fishing Trip" [emphasis added by me];

(c) included the proviso that the defendant and the respective permit holders acknowledge and accept the "general conditions (listed on

the reverse side of this form) and any special conditions listed below under which this permit is granted";

(d) on the line entitled "Special Conditions of Issue", often included the words "fishing" or "fishing permit", and also calculations apparently based upon a daily figure of $49.50 per guest.

[191] Even if they were valid, these permits only purported to authorise the permit holder to enter onto and remain on Tiwi lands and waters at Pirlangimpi. They did not purport to authorise entry onto other Aboriginal land or waters, in particular land and waters not situated at Pirlangimpi including those belonging to other land-owning groups.

[192] Moreover, despite the reference to conditions "listed on the reverse side of this form", the Munupi permits that were produced at trial did not have anything on their reverse side. However the TLC permits did contain, on the reverse side, a long list of conditions, consistent with the kind of conditions contemplated by s 5 of the ALA.[18]

[193] As to their validity, the defendant contends that the permits were issued pursuant to the authority conferred on traditional Aboriginal owners under s 5(2) of the ALA. I disagree.

[194] Whilst s 5(2) ALA does permit "the traditional Aboriginal owners of an area of Aboriginal land" to "issue a permit to a person to enter onto

[18] See Ex P2.

and remain on that Aboriginal land", it does not permit one or more individuals who are considered to be traditional Aboriginal owners to do so unless they comprise the group of people who meet the description of "traditional Aboriginal owners" as defined in s 3 of the ALRA.

[195] Section 3 ALRA defines "traditional Aboriginal owners" as follows:

> "traditional Aboriginal owners" , in relation to land, means a local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land."

[196] If it was intended that one or more individuals who belong to the group of persons comprising the traditional Aboriginal owners, could issue a permit, the legislature could easily have used different language to reflect such an intention. For example it could have provided that "a traditional Aboriginal owner" or that "one or more traditional Aboriginal owners" could issue a permit, or set up some mechanism whereby the (group comprising the) traditional Aboriginal owners could delegate to one or more of them the authority to issue permits on behalf of the group.

[197] The conclusion that a general reference of this kind to "the traditional Aboriginal owners" also includes one or more individuals who fall within that group is also inconsistent with the foundations upon which both the ALRA and ALA are structured. For example s 77A of ALRA sets up a mechanism for ascertaining consents required of the traditional Aboriginal owners of an area of land, which in turn recognise the need to adhere to particular processes required under the traditional laws and customs of the group of traditional Aboriginal owners or at least to give that group of people the ability to decide and adopt their own decision-making processes. Similarly it is clear that a Land Council would not be complying with its obligations, for example under s 23(3)(a) of ALRA, if it only consulted one or more members of the group instead of attempting to consult with the broader group comprising "the traditional Aboriginal owners".

[198] Further, it would be odd if, without more (such as a delegation of the kind contemplated by s 5(4) ALA), one or more traditional owners could grant or refuse to grant a permit or to otherwise authorise access to and use of Aboriginal land, particularly where they did not at least comprise a majority of those persons said to comprise the group of traditional Aboriginal owners. This could lead to absurd and unfair consequences where, for example, different traditional owners had different views about whether and where and on what conditions a permit should be issued. This is all the more so in light of s 77AA of

ALRA which provides that a permit under s 5 of ALA can only be revoked by the issuer of the permit.

[199] The proposition that an individual traditional owner could effectively veto a decision of the larger group was considered and rejected as long ago as 1983 in *Alderson v Northern Land Council*[19] at pp 7 – 11. That decision predated the enactment of s 77A ALRA which, like s 251A of the *Native Title Act 1993* (Cth) (NTA) in relation to native title holders and 251B of the NTA relation to native title claimants, provides mechanisms by which the group can operate for the purpose of the legislation.

[200] In the present matter it is clear that there are a large number of Aboriginal people who belong to the group or groups of people comprising the traditional Aboriginal owners of the relevant land and waters. Even in respect of the land and waters belonging to the Munupala land-owning group, there would appear to be many more people than those who have signed the Munupi permits.

[201] I consider therefore that the Munupi permits were not valid permits for the purposes of the ALA, and that the only authority which the defendant and its guests had to access, use and remain on the Demised Land and other Aboriginal land and waters, was that conferred under the Lease and the Licence.

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19 (1982) 20 NTR 1.

Termination / revocation of Lease & Licence

Notices in January 2013

[202] On 15 January 2013 the plaintiffs executed two documents directed to the defendant, namely:

(a) a "Notice to Remedy Breach of Covenant" purportedly under s 137(5) of the LPA; and

(b) a "Notice of Revocation of Licence and of Revocation of Permits" purportedly under clause 10(e)(i) of the Licence and s 5(5) of the ALA respectively;

and the TALT executed a "Notice of Agent" purportedly under clause 24 of the Lease, authorising the TLC and Brett I Medina, solicitor, Medina Lawyers to act as its agent under the Lease.

[203] On 21 January 2013 Mr Medina also executed a "Notice to Remedy Breach of Covenant" which was in the same terms as the notice of 15 January 2013.

[204] Mr Medina also wrote four letters to the defendant and/or its solicitor enclosing those four documents. All four letters were posted by prepaid mail on 22 January 2013 to various addresses outside the Northern Territory. With the exception of the Notice of Agent, the letters were sent to the registered address of the defendant, namely

"The Clocktower Building", Suite 4, Level 1, 26-30 Railway Street, Woy Woy, NSW.

[205] It seems that they were not posted to the defendant at the address stipulated in Item 12 of the Schedule to the Lease, namely to "Michael Benton, Managing Director. Munupi Wilderness Lodge. Pirlangimpi. Melville Island. NT 0822." Some were posted to a different address in Woy Woy, NSW, which had been the registered address of the defendant until March 2007 and which was the address stipulated in the Licence for the sending of notices.

[206] On 23 January 2013 Mr Harari, a legal and commercial advisor employed by the TLC, attended at the Munupi Wilderness Lodge and spoke to Mr David Taat. Mr Taat advised him that neither Mr Michael Benton nor Mrs Kerri Benton were on the premises. Mr Harari gave Mr Taat the four letters and notices and asked Mr Taat to hand them on to Mr and Mrs Benton as soon as possible.

[207] On 27 February 2013 Mr Medina wrote a further letter to the defendant confirming that the Licence had been revoked and advising that "the Licensor has 're-entered' the licensed area and you have no rights under the Licence to enter, occupy or use the licensed area." The letter also confirmed that all permits granted under the ALA "for the purposes of the Licence or the Lease … have been revoked." However it seems that that letter was only posted to the defendant's previous

registered office in Woy Woy, New South Wales. That letter was returned to Midena Lawyers on 8 March 2013 marked "RTS – L/Address".

[208] On 28 February 2013 the TLC executed a "Notice of Revocation of Permits to Enter Aboriginal Land" advising that any permits held by Mr and Mrs Benton, any employees etc of the defendant or any guests of the defendant have been "cancelled and / or revoked as of 15 January 2013" and that "entry onto Melville Island by any such person without a written permit issued by the Tiwi Land Council or without statutory authority is unlawful and constitutes a trespass and any such person must forthwith leave the Tiwi Islands."

[209] On 2 March 2013 Mr Harari again attended the Lodge and gave Mrs Benson a copy of Mr Medina's letter of 27 February and a copy or an original of the TLC notice dated 28 February 2013.

[210] Mr Hicks testified that the plaintiffs received no reply from the defendant (or its solicitors) to any of those notices.

[211] Despite the fact that there does not appear to be any evidence that the s 137 notices were served on Mr Benton in accordance with the notice provisions in the Lease, I find that because they and the Notice of Revocation of Licence and of Revocation of Permits were posted on 22 January 2013 to the registered address of the defendant in Woy Woy, NSW, the defendant did receive those notices on or about 29 January

2013, namely 4 business days after they were posted.[20] Although the defendant has now challenged the validity of each Notice to Remedy Breach of Covenant, in the course of its written submissions filed 18 November 2013, no point was taken about the question of service of any of these documents. In any event I consider that service upon the registered address of the defendant constituted sufficient service for the purposes of s 137(2) LPA.

Breach of the Lease

[212] Mr Hicks said that since 30 June 2010 and at least until the end of the dry season in 2012, the defendant continued to conduct its business on the Demised Land and other parts of the Licensed Area and to bring paying guests onto Melville Island. He said that the defendant has not paid the plaintiffs any of the Base Rent for the period from 1 July 2011, or any licence fees for the period from 1 July 2010. None of this is disputed by the defendant.

[213] Mr Hicks also said that since 30 June 2010 the defendant provided no notice of any guest and non-guest bookings, and has failed to comply with other requirements of the Licence including the procedure for the issue of permits for guests of the defendant, to continuously employ at

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20 *Corporations Act 2001* (Cth), s 109X and *Evidence (National Uniform Legislation) Act 2011* (NT), s 160(1).

least one Tiwi person, and to obtain approval in advance for the employment of non-Tiwi staff.

[214] In their Notice to Remedy Breach of Covenant dated 15 January 2013,[21] the plaintiffs alleged two breaches, namely:

(a) the failure of the defendant to pay the Rent (comprising "lump sum rent" for the year 1 July 2011 to 30 June 2012 amounting to $585.64 inclusive of GST, and licence fees not paid since 1 July 2010); and

(b) the failure of the defendant "to account for the Licence fee by providing notice to the Tiwi Aboriginal Land Trust in advance of all guest and non-guest bookings" (i.e. the accounting obligation).

[215] In relation to the accounting obligation, although this was a requirement under the Licence (clause 9(c)), the plaintiffs contend that this failure also constituted a breach of the Lease. The plaintiffs contend that this "accounting obligation" was a mechanism to enable the licence fee to be calculated and checked, and therefore formed a necessary part of the Lease. I disagree. If that was intended, it would have been easy to include the provision in the Lease itself, either expressly or by reference to that part of the Licence.

[21] A notice in identical terms was also signed by Midena Lawyers as solicitor for the plaintiffs, on 21 January 2013.

[216] The plaintiffs also rely upon the concession by the defendant in its points of response to the effect that implied in the Lease is the obligation that the defendant comply with the Licence.

[217] With respect, I disagree. I do not consider that the well established principles regarding the implication of terms support the implication of such a term. Whilst there clearly were links between the Lease and the Licence there was no express requirement in the Lease that the defendant comply with the Licence in all respects. Obviously the defendant had to comply with the licence fee requirements in the Licence in order to comply with the requirement to pay the Rent under the Lease. But the Licence itself provided remedies to the plaintiffs where any of its terms, such as the accounting obligation, were breached.

[218] It is not disputed, and I find, that the defendant failed to pay the Rent as the plaintiffs alleged in their Notice to Remedy Breach of Covenant. I find that such failure constituted a breach of the Lease.

[219] Nor is it disputed, and I find, that the defendant failed to comply with the accounting obligations. However I do not consider that such failures constitute a breach of the Lease.

Validity of the Notice to Remedy Breach of Covenant

[220] It is common ground that the provisions of Division 4 of Part 8 of the LPA apply to the Lease. These include:

(a) s 137 – "restriction on forfeiture" - which for present purposes precludes the plaintiffs from exercising a right of re-entry and forfeiture unless authorised to do so by the Court under s 137(3);

(b) s 138 – "relief against forfeiture" - which for present purposes entitles the defendant to seek relief against forfeiture of the Lease and permits the Court to grant relief on such terms as it thinks just;

(c) s 143 – "relief against loss of lessee's option" - which would have precluded the plaintiffs from refusing to renew the Lease on the basis of breaches committed prior to the time when the defendant exercised its option to renew the Lease, because the plaintiffs had not served the notice required under the section.

[221] The plaintiffs' primary task in these proceedings is to obtain an order for re-entry and forfeiture of the Demised Land under s 137(3) LPA. Section 137(3) entitles a lessor to apply for such an order if notice has been served on the lessee under s 137(2) and the lessee has failed "within a reasonable time after service of the notice to comply with the notice."

[222] In the course of its final submissions the defendant challenged the validity of the notices purportedly issued under s 137(2) LPA (I shall refer to them collectively as the **s 137 notices**).

[223] Section 137(2) LPA provides as follows:

> "If a lessee breaches a covenant, obligation, condition or agreement (whether express or implied) in the lease that gives rise to a right of re-entry or forfeiture on the part of the lessor and the lessor wishes to enforce the right, the lessor must serve on the lessee a notice that:
>
> (a) specifies the particular breach complained of;
>
> (b) if the breach is capable of remedy - requires the lessee to remedy the breach; and
>
> (c) if the lessor claims compensation in money for the breach - requires the lessee to pay the compensation."

[224] Section 137(5) states that a "notice served under this section is to be in the prescribed form." The form is contained in Schedule 2 of the Law of Property Act Forms.

[225] The defendant contends that the s 137 notices were and are of no effect because they related to the wrong lease.

[226] The defendant points to the parts in the prescribed form that require the "date of the lease" and the "date of commencement" to be inserted. The defendant acknowledges that the definition of "lease" in s 136(2)

is broad enough to include an equitable lease and says that the s 137 notices should have referred to the equitable lease, namely the five-year lease that commenced on 1 July 2010.

[227] The relevant part of the s 137 notices stated:

> "You being the lessee pursuant to a Memorandum of Lease executed on or about 15 December 2005 ("the Lease") by which the Tiwi Aboriginal Land Trust granted a lease to you of the land described in item 1 of the Schedule of the Lease ("the Demised Land") for a term of 5 years commencing on 1 July 2005."

[228] The defendant contends that the equitable lease is a new and different lease to the lease referred to in the s 137 notices, namely the Lease. The defendant referred to the reference to "a new lease, a new demise" in *Mercantile Credits Ltd v The Shell Company of Australia Ltd*,[22] one of the leading cases concerning the nature of rights to renew leases. At pp 334-5 Gibbs J said that a right of renewal:

> "is an incident of the lease and directly affects the nature of the term itself. However, it is clear that when the right is exercised 'a new lease, a new demise' comes into being … The right of renewal is so intimately connected with the term granted to the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains under the lease."

[229] The only authority that was referred to me regarding compliance with a form similar to that required by s 137(5) is *Ex parte Taylor*.[23]. Section

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22 (1975) 136 CLR 326.
23 [1980] Qd R 253.

124 of the *Property Law Act 1974* (Qld) was similar to s 137 of the LPA, particularly in regard to the information that s 137(2) requires the notice to contain. Like s 137(5) LPA, s 124(8) of the Queensland Act required the notice to be in a particular form. And, somewhat like the form prescribed under s 137(5) LPA, the Queensland form included a note advising the lessee that "the lessors will be entitled to re-enter or forfeit the lease in the event of the lessee failing to comply with this notice within a reasonable time." D M Campbell J held that the omission of that note invalidated the notice, because "the object of the note at the end of the statutory notice is to ensure that the lessee is apprised of the lessor's rights in the event of non-compliance within a reasonable time".[24] It is readily understandable why the court regarded the inclusion of such a note to be so important.

[230] *Ex parte Taylor* was referred to in another Queensland Supreme Court decision, *Suga Pty Ltd v Trust Co of Australia Ltd*,[25] which concerned the omission of a different note which is similar to Note 2 on the Northern Territory form. Jones J distinguished the decision in *Ex parte Taylor*, observing that whilst the note referred to in *Ex parte Taylor* was "quite important because it identifies the very action which would flow from the failure to have regard to the notice", the note in that case "has a different purpose … It is really to give particulars of the arrears

24 *Ex parte Taylor* [1980] Qd R 253 at p 258 (*Ex parte Taylor*).
25 BC200103681 (unreported, 5 June 2001, Jones J).

and the particulars of the period for which the arrears are claimed. It does not identify any additional rights other than the one to receive those particulars. Consequently, I see a distinction between the present situation and the case of *Ex parte Taylor* relied on by the applicant."

[231] There have been a number of other Queensland decisions where the validity of such notices has been challenged and considered. In *Ex parte Whelan,*[26] the Full Court held that a notice that contained the wrong heading for two paragraphs of calculations set out in the notice was valid because it "could not and did not mislead the tenants". In *McKay v Blumson,*[27] the court held a notice to be valid although it referred to breaches of two leases between the same parties, notwithstanding that the notice did not clearly indicate which breach pertained to which lease. In *Elsafty Enterprises Pty Ltd v Mermaids Café & Bar Pty Ltd,*[28] the court held a notice to be invalid because it contained a significant overstatement of the amount said to be due which would not have been apparent to the lessee.

[232] Per D M Campbell J in *Ex parte Taylor*, at p 256:

> "The section was based on s 14 of the *Conveyancing Act* 1881 concerning which Lord Russell C.J. said *in Horsey Estate Ltd v Steiger* [1899] 2 Q.B. 79, at p. 91:

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26 [1986] 1 Qd R 500.
27 [2000] QSC 65.
28 [2007] QSC 394.

> "The object seems to be to require in the defined cases (1) that a notice shall precede any proceeding to enforce a forfeiture, (2) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him"."

[233] Although the *Conveyancing Act 1881* did not prescribe a form of notice, the passage quoted seems consistent with the objectives of s 137 of the LPA including its notice requirements.

[234] Whilst I accept that it would have been helpful if the s 137 notices expressly referred to the equitable lease or acknowledged that the lease being referred to was in the same terms as the Lease which had been renewed and therefore operated for 5 years from 1 July 2010, it was clear that the plaintiffs were referring to and relying upon the rights and obligations under the Lease as renewed. There can have been no doubt in the mind of the defendant that that was the lease subject of the notices. There was no other lease between the parties and thus no possibility of the defendant being unaware of what lease was being referred to. This was all the more so here because of what had been

said by the plaintiffs' solicitors in their PD6 letters of 19 and 25 October 2012.

[235] The essential requirements of s 137(2), namely that the notices specify the particular breaches complained of and require the lessee to remedy the breaches, were satisfied. In any event, compliance with the prescribed form was not required.[29]

[236] I therefore conclude that the s 137 notices were valid and effective.

Estoppel

[237] The defendant contended that the plaintiffs are estopped from relying on the s 137 notices, because its breaches were caused by the plaintiffs' conduct in sending the 2 July 2010 letter and not correcting the misrepresentations contained therein until after the notices were issued and indeed until after these proceedings were under way.

[238] At the outset it is noted that the letter did not say that the Rent should no longer be paid to the plaintiffs. The letter also acknowledged that the defendant was "overholding", which I assume to mean "holding over" as a quarterly tenant pursuant to clause 19 of the Lease.

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29 *Interpretation Act 1980* (NT), s 68.

[239] Even if the Demised Land was included within the 5-year Statutory Lease, the Rent would still have been payable to the relevant owner, in this case to the TLC on behalf of the TALT.[30]

[240] Although there can be little doubt that the defendant was confused and perhaps misled by the assertions in the letter I do not think it was reasonable for the defendant to do what it did and to continue to do so for so long without making further enquiries of its own about the role of the Commonwealth.

[241] Moreover I consider that the defendant should have been more transparent and informed the TLC earlier and more clearly of what it was doing, in particular that it was paying the rent monies into its solicitor's trust account and departing from the previous practice of advising the TLC of the names of each person who was entering and using Tiwi land and waters.

[242] The letter from the TLC of 27 April 2011 to Mylne Lawyers raised a number of legitimate enquiries that should have been answered, but were not. It does seem that the defendant believed, although incorrectly, that it could unilaterally depart from its obligations under the Lease to pay the Rent to the TLC and that it could comply with the permit requirements under the ALA by obtaining the Munupi permits.

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30 See *Wurridjal v The Commonwealth of Australia* [2009] HCA 2; (2009) 237 CLR 309 at 340 [31] and 461-2 [430] – [433].

I do not consider that these actions could be said to be in reasonable reliance upon the misrepresentations on the letter of 2 July 2010.

[243] The true legal position was that the defendant remained obliged to comply with the terms of the Lease, irrespective of whether it had been duly renewed, which has always been the defendant's position, or whether it continued on a monthly basis. The defendant continued to occupy the Demised Land, and to operate its fishing business. It was not entitled to deprive the plaintiffs of their corresponding entitlements under the Lease.

[244] The plaintiffs also contended that the defendant did not rely upon the 2 July 2010 letter. They contended that the defendant had already made other arrangements in the belief that the Lease and Licence would not continue after 30 June 2010, namely to obtain the necessary permits from Munupi people. This contention was supported by the fact that the first of the Munupi permits was issued on 2 July 2010, the same day as the letter was sent by Middletons and received by the defendant's solicitors.

[245] I agree that there must have been discussions prior to 2 July 2010 and contingency plans made, at least to obtain the Munupi permits in respect of guests and others who would no longer be issued with permits by the TLC or covered under the Licence. As I have already indicated, the defendant seems to have operated under the mistaken

belief that because those permits were issued by individual Munupi traditional owners, they would authorise access to and use of Aboriginal land and waters, including land and waters belonging to other land-owning groups.

[246] The plaintiffs also point out that the defendant did not refer to or seek clarification of the letter of 2 July 2010, for example when its solicitors, Mylne Lawyers, responded to the TLC letter of 27 April 2011. Nor did the defendant inform the TLC that it was not paying the Rent to the plaintiffs because it was uncertain that it should be doing so, until after these proceedings commenced.

[247] I conclude that the defendant did not rely upon the 2 July 2010 letter when it departed from the previous practice of notifying the TLC of the names and relevant details of guests, as required by the accounting obligations, and seeking and receiving permits from the TLC.

[248] Also, the fact that the defendant believed, erroneously, that the licence fees were payable in exchange for the TLC permits, suggests that it considered that the fees should no longer be paid to the TLC but should be paid into some other account while further negotiations were taking place. There was some uncertainty in the evidence as to whether it was expected that some or all of the fees should be paid to some or all of the Munupi people.

[249] I consider that the defendant had already decided not to continue with the accounting obligations and not to pay further fees to the TLC until and unless the plaintiffs changed their minds and conceded that the Lease and the Licence would continue. The 2 July 2010 letter merely added further justification for that decision.

[250] Accordingly I do not think that the defendant relied upon the 2 July 2010 letter in adopting the course that it did, namely ceasing to comply with its obligations under the Lease and the Licence.

[251] Even if I was wrong about that, as I have already said, it was not reasonable to continue to rely upon the representations made in the letter for as long as it did. Had the defendant been more transparent in its dealings with the TLC and made further and proper enquiries, starting with a simple enquiry as to whether the Rent should then be paid to the Commonwealth or still to the TLC, the relevant issues would have been brought to a head much earlier. The plaintiffs would have been forced to concede that the Lease continued until it was validly terminated and to repeat its expectations that the Rent would still be paid to the TLC and not to the Commonwealth, following which a reasonable person in the position of the defendant would have then recommenced paying the rent to the TLC and paid any arrears, thereby avoiding ongoing breach.

Re-entry and forfeiture of the Lease

[252] Having found that notice of the kind required by s 137 LPA was duly served on 29 January 2013, and that the defendant has breached the Lease by not paying the Rent to the plaintiffs and continued to do so for six weeks at least after service of the notice, which I find to be a reasonable time, I find that the plaintiffs were entitled to apply to the Court for an order for possession of the leased premises under s 137(2) LPA.

[253] Clause 17.1 of the Lease entitles the Lessor or any person duly authorised by the Lessor in that behalf to re-enter upon the Demised Land if the Rent was "unpaid for a period of thirty (30) days following which the Lessor has given notice of default to the Lessee demanding that payment be made on or before the end of the next sixty (60) days following such notice."

[254] I find that the s 137 notices contained such a demand and were therefore effective for the purposes of clause 17. Thus, according to clause 17 of the Lease, the TALT was entitled "immediately to re-enter upon the Demised Land or any part thereof in the name of the whole and thereupon, the term created in this Lease will absolutely cease and determine."

[255] However because the defendant has not "abandoned or voluntarily given up possession of" the Demised Land, the TALT has not been

permitted to exercise its right of entry under the Lease, unless authorised to do so by an order of the Court made under s 137(3) LPA (s 137(1) LPA).

[256] Before the Court makes such an order, permitting re-entry and forfeiture, it must consider and deal with the defendant's application for relief against forfeiture.

Revocation of the Licence

[257] Unlike the Lease, there are no statutory requirements relevant to the revocation and termination of the Licence. This was dealt with in clause 10(e) of the Licence.

[258] I find that the Notice of Revocation of Licence dated 15 January 2013, and served on 29 January 2013, was a notice of the kind permitted and contemplated by clause 10(e)(i). While the notice alleged a wide range of breaches, including breaches prior to 30 June 2010, it is not necessary for me to examine and make findings in respect of all of those allegations.

[259] However it follows from what I have already said that I consider that the defendant breached the Licence in several respects including:

(a) failing to pay the licence fee to the plaintiffs after 1 July 2010, contrary to clauses 1, 3 and 9(g) of the Licence;

(b) failing to comply with the accounting obligations in clause 9(c); and

(c) failing to obtain the Licensor's prior written approval to the employment of non-Tiwi staff, as required by clause 9(e).

[260] The defendant contended that the plaintiffs were estopped from relying upon these breaches, not only because of the misrepresentations in the 2 July 2010 letter but also because the TLC stated that it would not continue to issue permits as it had been doing until 30 June 2010. I have already rejected this argument in so far as it relates to the 2 July 2010 letter and the payment of the licence fees.

[261] In relation to the permits that had previously been issued by the TLC, I have already concluded that most of these were not necessary, because the necessary authorisation, at least for the defendant and its guests and employees to access the Demised Land, was already contained in clauses 6.4 and 6.5 of the Lease. In any event, it was the Licence, not the TLC permits, that authorised access to and use of the Licensed Area. The accounting obligations, and the right and need for the TLC to know who was entering, using and working on Aboriginal land, remained, irrespective of the earlier practice of the TLC when it issued those permits. Further, no evidence was advanced by the defendant to indicate how any alleged refusal of the TLC to issue permits prevented the defendant from complying with the accounting obligation.

[262] Further, there is no evidence that the defendant sought any permits from the TLC after 30 June 2010. Rather, it embarked upon the different process of obtaining the Munupi permits.

[263] I reject the defendant's contentions in this regard.

[264] On 11 December 2013, after the parties had made their final submissions the defendant raised two new grounds, namely that "the Notice of Revocation relies on a false basis (i.e. that the defendant was holding over …) and relies on numerous false allegations (or at least allegations that have not been proved)." After listing a number of "false allegations" the defendant submitted that "as a consequence of these numerous falsehoods and inaccuracies the Notice of Revocation is invalid, or the plaintiffs cannot be permitted to rely on it."

[265] Because these grounds were raised so late the plaintiffs have not have an opportunity to respond to them. As was the case with the attack on the validity of the s 137 notices and frequent resort to estoppel arguments in the course of submissions, the defendant should have raised these responses much earlier, indeed after receiving the PD6 letters in October 2012, various notices in January 2013, and during the hearing of the proceedings. Moreover they raise a number of factual matters that should have been identified and put to the plaintiffs' witnesses during the hearing.

[266] In any event I do not consider that the new grounds can be sustained. The Notice of Revocation did not rely on the false basis alleged. It relied upon the basis that the Licence continued under the holding over provisions. That was the basis that the plaintiffs had identified in their PD6 letters and which I have found to be the case.

[267] The alleged false allegations include allegations that "the defendant failed to obtain approval in writing prior to employing non-Tiwi people" and that "the defendant failed to ensure non-Tiwi staff had permits". Those allegations were not false. The evidence clearly demonstrates that non-Tiwi people were employed after 1 July 2010 and that the defendant did not approach the plaintiffs and obtain such approvals and permits. Other alleged false allegations were said to be "misstatements of a legal nature". Even if some of the assertions about the legal situation were inaccurate, and even if some of the other assertions in the notice were wrong, I do not consider that the notice was therefore invalid. Unlike s 137 of the LPA, there was no requirement for the notice to contain any particular information. Provided one of the preconditions existed, such as the licence fee being in arrears for one month after it became payable, clause 10(e) of the Licence permitted the Licensor "to give the Licensee a Notice of Revocation of Licence requesting the Licensee to leave the licensed area within forty-eight (48) hours".

[268] I do not consider that the Notice of Revocation of Licence was invalid and I reject those recent contentions.

[269] I therefore conclude that the Licence was duly revoked on 29 January 2013 when the Notice of Revocation of Licence dated 15 January 2013 was received by the defendant.

Relief against forfeiture

Legal principles

[270] In its Summons filed 14 May 2013 the defendant sought an order that "the defendant be granted relief from forfeiture pursuant to s 138 of the *Law of Property Act (NT)*". This provision only applies to leases (as defined in s 136 of the LPA) and therefore would not apply to the Licence, unless, contrary to my conclusions expressed above, the Licence formed part of the Lease.

[271] Section 138 of the LPA enables a lessee to seek and the Court to grant relief against forfeiture. The plaintiffs concede that the grounds for such an application and the conditions on which relief might be granted are each very broad. The jurisdiction expressly conferred by s 138 LPA is somewhat similar to that which has always been held by a court

such as this as part of its inherent jurisdiction sitting as a court of equity to provide relief against forfeiture of property.[31]

[272] Section 138 LPA provides as follows:

> "138 Relief against forfeiture
>
> (1) If a lessor:
>
> (a) commences proceedings to enforce a right of re-entry or forfeiture under the lease; or
>
> (b) has re-entered the leased premises without commencing proceedings,
>
> the lessee may, in the lessor's or other proceedings (if any) or in proceedings commenced by the lessee, apply to the Court for relief.
>
> (2) If a lessee makes an application for relief under subsection (1), the Court may, having regard to the proceedings, the conduct of the parties under section 137 and to any other circumstances it thinks appropriate, grant or refuse relief as it thinks just.
>
> (3) The Court may grant relief on the terms as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any similar breach in the future, as the Court in the circumstances of each case thinks just.
>
> (4) If a lessee commences proceedings referred to in subsection (1), the institution of the proceedings is not of itself to be construed as an admission on the part of the lessee that:
>
> (a) a breach referred to in section 137(2) has occurred;
>
> (b) notice has been served on the lessee under section 137(2); or

[31] See for example observations by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691 referred to in various Australian authorities including *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 57 at [55], [58] – [60] and [71], and *Riviera Holdings Pty Ltd v Fingel Glen Pty Ltd* [2013] SASC 77.

(c) a right of or cause for re-entry or forfeiture has accrued or arisen under the lease,

and the Court may grant relief without making a finding or final determination that the breach has occurred, the notice has been served or the right has accrued or cause arisen.

(5) The rights and powers conferred by this section are in addition to and not in derogation of any other right to relief or power to grant relief against forfeiture.

(6) This section:

(a) applies to leases made before or after the commencement of this Act; and

(b) has effect despite any term of a lease to the contrary."

[273] The principles regarding relief against forfeiture of property where a lessee has breached the terms of a lease have been recently discussed in *Riviera Holdings*.[32]

[274] Where the breach is based only upon the non-payment of rent, a court will only refuse relief in "very special circumstances".[33] This is because the lessor and other persons concerned can usually be restored to the position that they would have been in but for the breach, for example by payment of arrears, interests and costs, and perhaps by providing additional security to guarantee future compliance.[34]

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32 *Riviera Holdings Pty Ltd v Fingel Glen Pty Ltd* [2013] SASC 77

33 This expression was used by Hope J in *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562 (NSWSC) in a passage quoted by Nicholson J in *Riviera Holdings* at [13] who went on to identify numerous more recent authorities which have adopted that passage "as a starting point when considering an exercise of the discretion to relieve against forfeiture for non-payment of rent".

34 See for example *Riviera Holdings* at [12] – [16].

[275] Where however there are breaches of other covenants, "more onerous requirements might obtain".[35]

[276] The House of Lords' decision in *Shiloh Spinners Ltd v Harding*[36] involved a substantial number of breaches of covenant committed by the defendant who had purchased the interests of a third-party to whom the plaintiffs had previously assigned their leasehold interest. Lord Wilberforce, with agreement of the other members of the House of Lords, said at 725 at E:

> "Failures to observe the covenants having occurred, it would be right to consider whether the assignor should be allowed to exercise his legal rights if the essentials of the bargain could be secured and if it was fair and just to prevent him from doing so."

[277] His Lordship identified a number of considerations "guiding the exercise of equity's jurisdiction to relieve against forfeiture for breach of covenants":

> "It would be necessary, as stated above, to consider the conduct of the assignee, the nature and gravity of the breach, and its relation to the value of the property, which might be forfeited. Established and, in my opinion, sound principle requires that wilful breaches should not, or at least should only in exceptional cases, be relieved against, if only for the reason that the assignor should not be compelled to remain in a relation of neighbourhood with a person in deliberate breach of his obligations."

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35 *Riviera Holdings* at [14].

36 *Shiloh Spinners Ltd v Harding* [1973] AC 691.

[278] The plaintiffs point out that similar considerations have been applied in other cases in Australia where relief is sought against forfeiture of other kind of rights such as where a vendor seeks specific performance under a contract for sale. These include the High Court's decision in *Legione v Hately*,[37] where relevant considerations included whether the conduct of the vendor contributed to the purchaser's breach, whether the purchaser's breach was trivial, slight, inadvertent and not wilful, what damage or other adverse consequences did the vendor suffer by reason of the purchaser's breach, what is the magnitude of the purchaser's loss and the vendor's gain if the forfeiture is to stand, and whether specific performance with or without compensation would be an adequate safeguard for the vendor?

[279] The question of wilful and persistent non-payment of rent was an important factor considered in the *Riviera Holdings* case. The Court noted that the lessee did "play ducks and drakes with Riviera and probably also with other trade creditors in an effort to manage its cash flow difficulties"[38] and that there "may well have been a deliberate strategy in the past on the part of [the lessee] to delay payments from time to time." However His Honour considered that:

> "this more than likely was an effort to buy time as a result of the financial pressures Fingal was under rather than a deliberate attempt to avoid paying rent and outgoings entirely or to deny

[37] *Legione v Hately* [1983] 152 CLR 406 at [32].
[38] Supra at [33].

> Riviera its entitlements under the lease. Fingal's conduct was not wilful in this sense. Fingal's past behaviour in this respect has been characterised by Riviera as a lack of clean hands and as unconscionable behaviour and as, of itself, a disentitling factor. Its greater relevance is as to the extent to which past conduct might bear on the question of Fingal's capacity and willingness to pay future rent and outgoings as and when they fall due."[39]

[280] The Court proceeded to order relief against forfeiture, notwithstanding those misgivings and despite the fact that a liquidator had been appointed to the lessee company on the ground of insolvency. This was largely because the Court concluded that Riviera would suffer little, if any, prejudice if relief was granted. All arrears of rent had been paid. On the other hand the lessee would suffer significant financial loss if the lease was forfeited.

[281] The plaintiffs sought to distinguish the present case from the *Riviera Holdings* matter. They submitted that the defendant has been in continuing breach of the requirements to pay rent and of the accounting obligations since 1 July 2010. They submitted that the defendant's actions were "wilful attempts to sidestep the accounting requirements for determining the payable licence fees and substantially deny the plaintiffs of the benefit of the lease."

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[39] Supra at [34].

[282] They referred to a passage quoted in *Riviera Holdings* at [49] from *Jam Factory v Sunny Paradise Pty Ltd*[40] at p 591:

> "The power to refuse relief is clearly reserved for cases of consistently lengthy defaults which may fairly lead to an inference that, even if relief be given, there is a reasonable likelihood that the rent will not be paid in future, at least for some considerable time after the due date for payment."

[283] Another factor that may need to be taken into account concerns the necessity or otherwise for the parties to be able to maintain a cordial and workable relationship notwithstanding the previous breaches on the part of the lessee. [41]

[284] However I do not consider this to be a major factor in the present case. Although their relationship with relevant officers and members of the TLC would appear to be strained, there is little if any need for regular contact with them. The Rent is to be paid to an address in Stuart Park Darwin, but could, I would think, be paid directly into a relevant bank account. Mr and Mrs Benton and Mr Taat seem to still have a strong ongoing relationship with a significant number of Aboriginal people with whom they deal on a daily basis, namely Munupi people who are members of the land-owning group at Pirlangimpi and where the Demised Land is situated.

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40 [1989] VR 584 per Ormiston J.

41 See for example comments by McLelland J in *Hace Corp Pty Ltd v F Hannan (Properties) Pty Ltd* (1995) 7 BPR 14, 326; BC9504783.

[285] The relationship of the defendant with members of other land-owning groups would not be relevant as, now that the Licence has ended, the defendant has no rights to access and use their land and waters. In order to obtain such rights the defendant would either have to negotiate a new licence, or obtain permits under s 5 ALA, both of which would require the consent of the TLC following due consultation with relevant traditional Aboriginal owners.

Relevant conduct

[286] The plaintiffs contend that the defendant should not have the benefit of relief against forfeiture because its breaches and other conduct were so significant that the Court should not exercise its discretion to grant such relief.

[287] The breaches and conduct asserted by the plaintiffs include the following:

(a) The failure to pay rent since 1 July 2010 (apart from the Base Rent of $554.30 for 2010-11) and continued failure to authorise payment out to the plaintiffs of the monies held in Court and held by the defendant's lawyers.

(b) The failure to provide notice of bookings as required by clause 9(c) of the Licence (the accounting obligations), since 1 July 2010 as a result of which the plaintiffs were unable to:

(i) know who was entering and using the lands and waters of the TALT;

(ii) control such entry and use; and

(iii) ascertain and verify the licence fees payable under the Lease and Licence.

(c) "… the defendant's repudiation of the ALRA, ALA and the traditional decision-making processes of the TLC, and what may only be characterised as the unwillingness of the defendant's directors, Mr and Mrs Benton to acknowledge the primacy of those processes, and to drive a wedge between some members of the Tunganapila / Munupi, and the TLC in an effort to bypass those traditional decision-making processes, to get what they wanted. Beginning with not giving a 10 plus 10 lease, and ending with a scheme to repudiate the authority of the TLC and those traditional decision-making processes."

(d) The failure to seek and obtain approvals for the employment of non-Tiwi staff, as required by clause 9(e) of the Licence.

(e) Inadequate compliance during the initial term of the Lease and Licence including irregular payments of rent and poor compliance with the accounting obligations, which was subject of various complaints by the plaintiffs and were also given as reasons for not

committing to the renewal of the Lease and the granting of a fresh Licence.

(f) The defendant unlawfully taking its guests fishing on waters of the five land-owning groups since January 2013, when the Licence was revoked. Whilst there was evidence of the defendant taking people fishing on Munupala waters there is little if any evidence of people being taken fishing on other Aboriginal land or waters since January 2013. Also, although I have also found that the Munupi permits do not authorise fishing on Munupala waters I consider that the defendant took people there on the mistaken assumption that this was permitted under the Munupi permits.

[288] The complaint about the defendant repudiating the ALRA, ALA and the traditional decision-making processes of the TLC arises from the fact that from 2 July 2010 the defendant sought and obtained permits from Munupi individuals instead of continuing with the previous practice of obtaining permits from the TLC, and apparently relied upon them as though they were valid and effective permits not only to authorise access to Munupala land and waters, but also to authorise access to other lands and waters including those of other land-owning groups. Indeed this conduct was particularly emphasised by the plaintiffs' counsel when the hearing commenced and were described as "contumelious" during final submissions.

[289] In light of the fact that the Lease was in fact renewed and the Licence continued until January 2013, and my conclusions about the rights and interests thereby conferred, I do not consider that there were relevant breaches of ALRA or ALA, at least until January 2013. I do agree however that the defendant's conduct in proceeding this way, apparently without advising or consulting the TLC, was inappropriate and discourteous; not only because the permits purported to confer rights in respect of Munupi land and waters without proper consultation with other Munupi people, but also because it seems that the defendant also relied upon them when accessing lands and waters of other land-owning groups. (Although I have found that the Munupi permits were unlawful and did not authorise such access, access was permitted under the Licence, until it was revoked in January 2013).

[290] Another part of this criticism of the defendant's conduct was that procuring permission from Munupi people to access lands and waters of other Tiwi people demonstrated a disregard for traditional Tiwi laws and customs which are to the effect that each land-owning group has primary rights over its own areas of land and waters and should be consulted before others, including other Aboriginal people, are allowed to access and use its land and waters. There was some uncertainty between some of the Munupi people who gave evidence, as to whether they intended the permits which they signed to operate beyond Munupi land and waters. Whilst I agree that the defendant should not have

relied upon the Munupi permits for the purposes of accessing other land and waters, there was very little evidence of the defendant having taken guests onto Aboriginal land or waters of other land-owning groups. I suspect that when this did occur, the defendant did not fully appreciate this discourtesy, as it was doing so with the apparent approval of other aboriginal people, namely the Munupi people who signed the permits, who should have known the relevant Tiwi law and custom themselves and advised the defendant accordingly.

[291] In relation to the defendant's poor compliance with various obligations during the initial term of the Lease and Licence, I do not consider that this was due to any deliberate or wilful decision on the part of the defendant. Rather I think that the defendant was overly casual in its approach to such things and on some occasions was allowed too much latitude by individual members of the TLC with whom it was dealing. For example at one stage it seems that the defendant had in fact overpaid the rent due. Despite numerous complaints and indications that the Lease would not be renewed and that a fresh licence would not be granted, the plaintiffs did not exercise their right under clause 21 (and s 143(2) LPA) to refuse to renew the Lease and did not proceed to take any formal action against the defendant on account of those breaches until January 2013. I do not think those transgressions extending back beyond eight years or so are relevant now that the Licence has been revoked and the defendant is now, particularly as a

result of these proceedings, very clearly aware of the need for it to comply with its obligations under the Lease if relief against forfeiture is allowed.

[292] On the other hand, and in response, the defendant points to conduct on behalf of the plaintiffs including the following:

(a) The plaintiffs' refusal to acknowledge that the defendant had duly exercised its option to renew the Lease for over four years, from 16 June 2009 when the defendant first purported to exercise its option to renew until 7 November 2013 when, in the course of its written final submissions, the plaintiffs acknowledged that the defendant continued to hold an equitable lease. In their written submissions in reply filed 22 November 2013 the plaintiffs conceded that the defendant's solicitors were correct in their assertions in their letter of 24 June 2010 that s 143(2) of the LPA operated to preclude the plaintiffs from relying on any previous breaches as a basis for not accepting that the defendant was entitled to the renewal. This point seems to have been ignored and missed until then.

(b) The misrepresentations in the 2 July 2010 letter including the representation that the Commonwealth of Australia was the lessor, which representation was not corrected shortly before the hearing of these proceedings.

(c) The failure of the plaintiffs to say anything about the Lease and the nature of the defendant's ongoing occupation of the Demised Land, notwithstanding that the plaintiffs were aware that the defendant was still using that land in the same way as it had prior to 1 July 2010, until October 2012, when they asserted that the defendant was holding over pursuant to clause 19 of the Lease (rather than occupying the land pursuant to the equitable lease).

[293] It seems to me that there have been fault and misunderstandings on both sides which has resulted in the acrimony between the parties and the pursuit of this litigation. This includes:

(a) The defendant's early failures to pay rent and to comply with the accounting obligations with the regularity required by the Licence extending back as far as 2006, but with the apparent acquiescence of the plaintiffs until late 2009.

(b) The plaintiffs' refusals to acknowledge that the defendant had exercised its option to renew the Lease and their assertion in the 2 July 2010 letter that the lessor was the Commonwealth of Australia, and on the other hand the defendant's failure to make further enquiries of the plaintiffs in relation to those assertions.

(c) The plaintiffs' failure to tell the defendant of the true situation regarding the 5-year Statutory Lease until August and October 2013 when it was disclosed by Mr Hicks in his affidavits filed in

these proceedings, although the plaintiffs' had become aware of that position much earlier, on about 18 August 2010, and on the other hand, the defendant's failure to make proper enquiries about the true situation, either of the plaintiffs or of the Commonwealth.

(d) The defendant's conduct in paying the rent due from 1 July 2010 into its solicitor's trust account without clearly advising the plaintiffs of that for some time, and on the other hand, the plaintiffs' failure to make enquiries of the defendant about unpaid rent until earlier than it did.

(e) The defendant's conduct in failing to provide the TLC with notice of bookings after 1 July 2010, and on the other hand, the plaintiffs' failure to enquire about such bookings or to otherwise insist upon compliance with the accounting obligations.

(f) The plaintiffs' apparent acquiescence in the defendant holding over under the Licence until January 2013 notwithstanding its insistence before 30 June 2010 that a new licence would not be issued and its warning in the 2 July 2010 letter that the defendant "should be taking steps to vacate the subject premises as soon as practicable".

(g) The defendant procuring the issue of the Munupi permits and not continuing to seek the issue of permits by the TLC after 1 July

2010 as it had previously done and, on the other hand, the plaintiffs' not objecting to that practice.

Conclusions

[294] I consider that the defendant should have relief against forfeiture of the Lease, subject to conditions.

[295] Of particular relevance in this regard is the fact that the defendant has always been prepared to pay the Rent and has in fact paid what it considered to be the proper amounts into the trust account of its solicitors, Mylne Lawyers, with the intent that it be ultimately paid to whoever was entitled to it.

[296] Although the failure to pay the Rent to the TLC constituted a breach of the Lease, and also of the Licence, such failure was initially induced by the plaintiffs' 2 July 2010 letter, and did not constitute wilful or similar conduct of the kind referred to in the authorities relating to relief against forfeiture. I reject the plaintiffs' contentions that by withholding the Base Rent and licence fees and obtaining the Munupi permits the defendant engaged in a calculated action "to undermine TLC's exercise of its statutory responsibilities and its contractual responsibilities in order to bully it into granting a new long-term lease and licence."

[297] Because of my conclusion that the failure to pay the rent was the only breach of the Lease, the other conduct on the part of the defendant should not be important unless it suggests that there will be further breaches of the Lease if the relief sought is granted. I do not regard the defendant's poor conduct prior to 1 July 2010 as very relevant because it occurred so long ago. The defendant's failures to comply with the accounting obligations and other obligations since 1 July 2010, whilst wrong, are not as serious as they would have been if the defendant had done nothing. Rather the defendant complied with the basic intent of those requirements by dealing, albeit wrongly and mistakenly, with Munupi individuals instead of the TLC. Further, its relevance is limited because the relief is being granted in relation to forfeiture of the Lease, not the revocation of the Licence.

[298] Even if I was wrong about my conclusion that the breach of the accounting obligations in the Licence did not constitute a breach of the Lease, I understand that the defendant has now provided the plaintiffs with full information regarding all of its bookings since 1 July 2010 as a result of which the parties will be able to calculate the licence fees payable since then. Accordingly that breach has now been effectively rectified.

[299] Further, the Lease will expire on 30 June 2015. Accordingly the plaintiffs will be free to deal with the Demised Land after that as they wish. I have not been informed of any particular prejudice to the

plaintiffs as a result of the Lease continuing until then, for example of any other prospective tenant.

[300] On the other hand the defendant contended that its business will come to a premature end if it is denied relief. It cannot move to other premises and keep trading as many businesses could, because there are no other premises from which it can trade. The defendant also contended that third parties will be affected because David Taat will lose his job and his interest in the business, and a number of other Aboriginal people who have been involved in the business will also lose their jobs. I consider that that submission is largely misconceived as it fails to appreciate that the business would no longer be so busy and successful without the Licence and until and unless a fresh licence can be negotiated. But I accept that there will be some prejudice to the defendant and possibly third parties if the defendant could not continue to occupy the Demised Land for the balance of the term.

[301] I realise that because the Licence has been terminated, the Lease is of considerably less value to both parties. Indeed the plaintiffs submitted that it would be futile for relief to be granted as the Lease would be of little value without the Licence, that being an essential part of the defendant's business. I agree that unless the defendant is able to negotiate a further licence, or obtain appropriate permits under the ALA, it will not be able to take its guests fishing and hunting. However, as I have previously noted at [160] and [185](b) above, the

defendant accepts that the Lease is still of value to it. Conversely the plaintiffs will only be entitled to the Base Rent, unless they negotiate a further licence with the defendant in lieu of the Licence, or unless they enter into some other arrangement with the defendant or other third parties permitting them access to Tiwi land and waters in exchange for a fee.

[302] I note the assertions of Mr Hicks and various other representatives of the plaintiffs to the effect that they do not wish to continue dealing with the defendant and Mr and Mrs Benton. Whilst that may well make it difficult for a fresh licence to be negotiated, or for some permits to be granted under the ALA, such concerns should not preclude the parties from seeking permits under the ALA and should not prevent the TLC from continuing to act in the interests of and in accordance with the wishes of relevant traditional Aboriginal owners, such as Munupala people who are still prepared to deal with the defendant.

Conditions of any relief granted

[303] It is apparent from s 138 (3) that a broad range of conditions may be imposed when relief against forfeiture is granted.

[304] The plaintiffs have argued that as a minimum the defendant should:

(a) "properly calculate, account for and pay all lease rent and licence fees unpaid since 1 July 2010;

(b) pay the plaintiffs' costs on an indemnity, alternatively standard, basis;

(c) satisfy the Court that it will henceforth abide by the terms of a lease and licence until they expire on 30 June 2015;

(d) accept that the TLC and the TALT will not renew the lease and licence for any term beyond 30 June 2015; and

(e) accept that the TLC/TALT is the ultimate decision-making authority with regard to (d) above."

[305] I agree that the parties should calculate the full extent of the rent due and that the defendant must pay that amount to the TLC on behalf of the TALT in full.

[306] I also agree that the defendant should satisfy the Court that it will abide by the terms of the Lease until it expires on 30 June 2015.

[307] I do not agree that payment of the plaintiffs' costs should be a condition of the grant of relief. Unfortunately this sorry situation may well not have eventuated but for the plaintiffs' conduct in failing to acknowledge the renewal of the Lease and its misrepresentations in the 2 July 2010 letter which it did not correct for many years afterwards. This conduct, coupled with other conduct of both parties, will be relevant if the Court is required to consider the question of costs of these proceedings.

[308] As to the suggestions that the defendant accepts that the plaintiffs will not renew the Lease and or grant a licence beyond 30 June 2015, and

that the plaintiffs are the ultimate decision-making authority in relation to such renewal or grant, I do not consider that such "acceptances" can or should be the subject of conditions. Whether or not the defendant accepts those propositions cannot derogate from whatever legal rights and obligations and commercial considerations exist at the time.

[309] Although the plaintiffs have not sought interest under clause 20 of the Lease, they have sought interest pursuant to s 84 of the *Supreme Court Act 1980* (NT). I find that they are entitled to interest under s 84 and that that amount should also be paid to the plaintiffs as a condition of the relief against forfeiture.

[310] The defendant accepts that it must pay the arrears of rent to the plaintiffs and is prepared to give enforceable undertakings to the Court in relation to the means and regularity of future payments of rent including by making advance payments on account if considered necessary.

[311] Because of my conclusion that the Licence has been revoked and that since then the licence fee component of the Rent no longer exists, the only rent payable from 29 January 2013 will be the Base Rent. I consider it reasonable that the defendant pay $500 in addition to what is payable already towards the payment of rent for its ongoing tenancy.

Conclusions and relief

Summary

[312] In summary, I have reached the following conclusions about the Lease:

(a) The Lease was renewed and the defendant continued to hold an equitable lease on the same terms as the Lease apart from the option to renew.

(b) The defendant breached the equitable lease by failing to pay rent, following which the first plaintiff, the TALT, duly brought this application for leave to exercise its right of re-entry and forfeiture under the equitable lease.

(c) The defendant is entitled to relief against re-entry and forfeiture, on conditions, primarily that the defendant pay all outstanding rent to the second plaintiff on behalf of the first plaintiff together with interest thereon.

(d) The rent payable under the equitable lease comprises the Base Rent plus licence fees calculated to 29 January 2013.

(e) The defendant will be entitled to be granted a lease at law once it has complied with the conditions of the grant of relief against forfeiture.

[313] I have reached the following conclusions about the Licence:

(a) The Licence continued on a monthly basis until it was duly revoked by notice given on 15 January 2013 which I have found was served on 29 January 2013.

(b) No licence fee is payable for the period subsequent to 29 January 2013.

(c) Any access to and use of Aboriginal land or waters that was previously within the Licensed Area as defined in the Licence since 29 January 2013 was not lawful under the Lease, the Licence or the Munupi permits.

Remedies for unlawful access following revocation of the Licence

[314] The plaintiffs submitted that notwithstanding its revocation of the Licence, the TALT should still be paid licence fees for so long as the Lease continued because of the fact that the Rent included licence fees.

[315] The plaintiffs contended that because the reference to the licence fees in Item 3 of the Schedule was to "Licence fees as calculated under 'Permit Use'" the fees were still payable. They point out that Item 3 does not say "Licence fees payable under 'Permit Use'". They submitted that the provisions relevant to calculating, paying and verifying the Licence Fees - that is clauses 1 to 3 concerning calculation and payment of the licence fees, and clause 9(c) concerning advance notice of all bookings and permitting related inspections -

must be imported into the Lease. I have already rejected the last point, namely that the obligations under clause 9(c) of the Licence form part of the obligations under the Lease.

[316] I do not agree with this contention (that the fees are still payable under the Lease because they can still be "calculated under" the Licence even if it no longer exists). As I have previously concluded, once the Licence came to an end neither party could continue to claim the benefits under it. The defendant was no longer entitled to the authorisations conferred under the Licence and the Licensor was not entitled to the fees payable under the Licence.

[317] The plaintiffs also submitted, in the alternative, that if I was to find, as I have, that the licence fees are payable only while the Licence continued to exist, the defendant is liable to pay an amount equal to the licence fees that would have been payable had the Licence continued, by way of equitable compensation or damages.

[318] They contend that any monies formerly held in the Mylne Lawyers trust account and now paid into Court are "held for the plaintiffs by way of a remedial constructive trust sourced from equity's concern with unconscionable behaviour." They refer back to, and rely upon, a sentence in the letter from Mylne Lawyers dated 26 July 2011 when the author advised the TLC that funds "equivalent to the sum payable to TLC pursuant to the agreement" were being "separately held" and that

"equity supports that the funds set aside by our client belong to somebody, and that somebody is yet to be determined." However that letter was written at a time when the Lease and the Licence still existed. The present question concerns monies that may have been paid into the Mylne Lawyers trust account or into Court, in respect of fishing activities on the Licensed Area after the Licence was revoked.

[319] There is considerable force in the point that the defendant should not be unjustly enriched by retaining the benefit of monies that it has collected from its guests for such fishing activities carried out since the Licence was revoked, some or all of which may have been subsequently paid into the Mylne Lawyers trust account or into Court. However it does not follow from that that either of the plaintiffs is entitled to those monies. For example, it may well be that guests or other third parties are entitled to some kind of refund or payment out of those funds.

[320] The plaintiffs also contend that damages would be payable on account of the defendant having trespassed on Aboriginal land. However, even if this was a trespass claim, I would have thought that the assessment of damages would involve other considerations, for example, evidence and conclusions about circumstances surrounding each particular act of trespass. I have already referred to the scanty evidence in relation to the defendant accessing the Licensed Area subsequent to 29 January 2013.

[321] I am particularly concerned that even if the TALT was entitled to the fee under the Lease or to some other damages from the defendant, or even if monies collected for activities carried out subsequent to 29 January 2013 should be held in trust by the TLC, that would not cure any unlawful conduct on the part of the defendant, its directors, employees and guests. Any or all of those may still be liable for whatever consequences might flow from any breaches of the ALRA or the ALA. These might involve prosecutions and or civil claims based on trespass. These are different remedies, and may involve different complainants and or plaintiffs, and many and different defendants, than those involved in the present matter. They might also involve defences such as claims of right based upon one or more of the Munupi permits. Such proceedings would probably necessitate the calling of witnesses in order to prove or challenge the fact, frequency and nature of any alleged breaches and or trespasses, and an independent assessment by the relevant court as to the appropriate penalty, damages or other relief.

[322] I did consider whether the conditions of relief against forfeiture of the Lease should include an additional payment commensurate to the licence fee that would have been payable but for the revocation of the Licence. However I do not consider that would be appropriate, particularly bearing in mind what I have just said.

[323] I consider that the monies which have been collected and paid into the Mylne Lawyers trust account or into Court in relation to fishing activities since 29 January 2013 should not be returned to the defendant until further order of the Court. Before such an order is made I consider that the parties, and others who may have an interest in any of those monies, should have the opportunity to consider these reasons and what claim if any they might wish to make upon any of those monies.

Amendments to Originating Motion

[324] On 15 October 2013 I gave leave for the Originating Motion to be amended to add the following claims:

> "2A. The defendant pay the rent due but unpaid pursuant to the Memorandum of Lease referred to at order 1 above, or damages in lieu of such rent, to the second plaintiff on behalf of the first plaintiff.
>
> 2B. The defendant pay interest on rent due but unpaid pursuant to s 84 of the *Supreme Court Act*."

[325] On various occasions in the course of final submissions the plaintiffs sought leave to further amend the Amended Originating Motion. These applications followed partly from the plaintiffs' concession that the defendant held an equitable lease, and also following discussions about what remedies were available to the plaintiffs in respect of any unlawful occupation of the Demised Land and any unlawful use of the

Licensed Area following any forfeiture of the Lease and revocation of the Licence.

[326] The final version was that set out in the Plaintiffs' Further Submissions in Reply filed 4 December 2013. The plaintiffs sought to:

(a) Amend paragraph 1 to expressly recognise the fact that the application for re-entry and forfeiture relates to the Lease as renewed by adding the words "and which lease was renewed to apply in the period from 1 July 2010 for five (5) years", and to make a consequential amendment to paragraph 2A.

(b) Amend paragraph 2A by deleting the words struck out and adding the words underlined:

> "The defendant pay ~~the~~ such amount for rent as the Court finds is due ~~but~~ and unpaid pursuant to the ~~Memorandum of Lease~~ lease referred to at order 1 above, or damages for trespass, by way of mesne profits or otherwise, in lieu of such rent, after 1 July 2010 to the second plaintiff on behalf of the first plaintiff."

(c) Adding a new paragraph 2C to read as follows:

> "2C. Insofar as the rent referred to in paragraph 2A may be held not to include monies held in Mylne Solicitors trust account or paid into Court in respect of licence fees calculated pursuant to clauses 1 to 3 to the "Grant of Licence" executed on or about 15 December 2005 ("the Licence"), the defendant shall pay such monies to the second plaintiff on behalf of the first plaintiff by way of remedial constructive trust, plus interest (pursuant to section 84 of the *Supreme Court Act*) until payment."

(d) Amend paragraph 3, which relates to costs and expenses, to add the words "on an indemnity or, alternatively, standard basis,".

[327] I allow the amendments referred to in [326](a) and [326](d) above. It has been common ground from the outset that these proceedings relate to a lease which was either the Lease continuing under the holding over provisions or an equitable lease following the renewal of the Lease. I do not consider there to be any prejudice caused to the defendant as a result of that amendment, or as a result of the further clarification of the application for costs in the proposed amendment to paragraph 3.

[328] I reject the proposed amendment to paragraph 2A in so far as it is sought to add the words "for trespass … or otherwise". Whilst a claim for mesne profits (whether or not it be properly characterised as a form of damages) is commonly recognised as falling within the kind of relief which can be sought and granted in an application such as this,[42] I consider that a claim for trespass involves a different cause of action. Such a claim would normally be brought in different proceedings and would involve pleadings and additional or different evidence than is the case in a matter such as this. I consider it far too late for such a claim to be introduced in this proceeding.

[329] I allow the other amendments that are proposed to paragraph 2A.

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[42] See for example *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 and *Legune Land Pty Ltd v Northern Territory Land Corporation and Northern Territory of Australia* [2012] NTSC 99 at [11] et ff.

[330] I reject the proposed addition of paragraph 2C. As I have said the issue concerning monies collected in relation to activities carried out on the Licensed Area since the Licence was revoked on 29 January 2013 potentially involves a wide range of other people who might have a legitimate interest in some of those monies and therefore might wish to be heard. Accordingly I do not propose to allow this amendment.

[331] However there does appear to be a real question as to what should happen to any such monies. I propose to grant liberty to apply when I deliver these reasons, mainly to enable the parties to perform the necessary calculations in accordance with my findings and then to submit draft orders for me to make. If in that process it is discovered that there are monies in Court that solely relate to fishing activities carried out on the Licensed Area since the Licence was revoked, I will hear the parties further as to what should happen to such monies.

Interest

[332] The defendant should pay interest on the monies owing to the second plaintiff, under s 84 of the *Supreme Court Act 1980* (NT).

Costs

[333] I do not propose to deal with the question of costs until the parties have had the opportunity to consider these reasons and their respective positions. In light of some of the views which I have expressed in

these reasons particularly when I discussed the claim for relief against forfeiture, it may well be that there should be no order as to costs. However I will of course consider whatever submissions either party wishes to make on costs and determine the question then.

Orders

[334] There are a number of calculations to be carried out, including those concerning the quantum of Base Rent, licence fees and interest. Also, I expect that the parties will be able to agree on particular wording in relation to some other orders, including the conditions to be applied to the grant of relief from forfeiture and orders regarding payment out of monies held in Court. I propose that the parties attempt to agree on and file proposed orders that are consistent with these Reasons.