CITATION: *Telstra Corporation Limited v A.J. Van Den Hoek Pty Ltd and ANORS* [2007] NTMC 028

PARTIES:	TELSTRA CORPORATION LIMITED v A.J. VAN DEN HOEK PTY LTD AND MICHAEL JOHN ROHRLACH AND DIANNE PAULINE ROHRLACH TRADING AS MJ & DP ROHRLACH MECHANICAL REPAIRS
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20512349
DELIVERED ON:	1 June 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	11, 12, 13 December 2006
JUDGMENT OF:	Mr Richard Wallace

CATCHWORDS:

Contract - Identity of Parties to Contract – Determined by Course of Dealing – Negligence – Vicarious Liability – Servant or Independent Contractor – Negligence – Negligent Misstatement

REPRESENTATION:

Counsel:

Plaintiff:	J.W. Roper
1st Defendant:	N. Christrup
2nd Defendant:	D. Dalrymple

Solicitors:

Plaintiff:	Clayton Utz
1st Defendant:	Graham Cole
2nd Defendant:	Norman Czamy & Associates (Elwood, Victoria)

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 028
Number of paragraphs:	54

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

No. 20512349

BETWEEN:

TELSTRA CORPORATION LIMITED
Plaintiff

AND:

A.J. VAN DEN HOEK PTY LTD
First Defendant

AND:

MICHAEL JOHN ROHLACH AND DIANNE PAULINE ROHLACH TRADING AS MJ & DP ROHRLACH MECHANICAL REPAIRS
Second Defendant

REASONS FOR DECISION

(Delivered 1 June 2007)

Mr RICHARD WALLACE SM:

Background

1. On the 5th of April 2003, Michael John Rohrlach ("Mr Rohrlach") was doing some work with his backhoe on the verge of Robinson Road, the main street of Borroloola. In the course of that work he cut through a conduit and some cables within it. These were the property of Telstra Corporation Ltd ("Telstra"), the plaintiff. As a result of this damage, telephonic communications between Borroloola and the rest of the world were cut off. Telstra quickly effected an emergency repair to the lines: a linesman, Mr Steven John Gault, the first witness called at the hearing before me, went to

Borroloola on 6 April and did that. Later, at the end of May, the repair was upgraded so that it could be regarded as final and permanent.

2. I am satisfied by the evidence of Mr Gault and by the accounting material he produced from Telstra that the cost of those repairs was $17,613.00. I am satisfied that the two phase process – emergency, then permanent repair – was necessary, both in the interests of the citizens of and visitors to Borroloola, and in the light of the statutory obligations on Telstra to provide telephonic services. I am satisfied that that expense was incurred necessarily to restore the telephonic status quo ante, and I am satisfied that Telstra did not upgrade their cabling under the guise of repair. In particular I am satisfied that the enlargement of one pit during the repair process was necessary for the repair, not embarked on out of some other motive.

3. Mr Rohrlach, the backhoe operator, is one of the two Second Defendants. (The other is his wife, Dianne Pauline Rohrlach. She played no part in the proceedings.) Mr Rohrlach works principally as a mechanic, and hires himself out with his backhoe as a secondary line of work. His wife runs a shop in Tennant Creek and does much of the bookkeeping for the partnership, "MJ and DP Rohrlach Mechanical Repairs", that apparently embraces all of those enterprises. It is not in dispute that Mr Rohrlach came to operate his backhoe on 5 April 2003 at the instance of Mr Albert Van Den Hoek ("Mr Van Den Hoek").

4. Mr Van Den Hoek is the Managing Director of AJ Van Den Hoek Pty Ltd, the Second Defendant. That company is in the building and construction business, operating out of Tennant Creek. As mining declined in that town, the company has come to rely more and more on government work in the Barkly region, most if not all of it coming from the Department of Planning, Infrastructure and the Environment ("DIPE") and its predecessors.

5. Mr Van Den Hoek's interest in the Robinson Road job that he gave to Mr Rohrlach was at the instance of a Mr Trevor Lutz, who worked for DIPE and

from whom Mr Van Den Hoek was apparently accustomed to receive instructions for works. In respect of this particular job, however, it is not clear at whose instance Mr Lutz was acting. He didn't tell Mr Van Den Hoek who the job was for (see Mr Van Den Hoeks evidence at p52 of the transcript ("T52"), and then at T58.

> "Now did you – you mentioned that you did these works because of the initial contact from DIPI. Did you send an invoice – was an invoice sent to DIPI in relation to these works?---Yes.
>
> Did you write the invoice?---Well I write and then my wife copied it and write it properly and send it to, you know, as a tax invoice.
>
> And did you have a discussion with DIPI in relation to that invoice?---Well DIPI said, 'Sorry, Robinson Road doesn't belong to our jurisdiction, what were you doing there?' 'Well I was instructed by Trevor Lutz, not once twice to go and do the job'.
>
> What did you say in response to what DIPI told you?---And then they said, 'Send the bill to the Borroloola Council'.
>
> And what did you do then?---Sent the bill to Borroloola Council.
>
> And what happened to that bill?---Nothing."

6. The rest of the evidence in the case does nothing to clear up that mystery, although it was revealed that the reason the job needed to be done at all, and in a hurry, was that it was part of an effort to spruce up the appearance of Borroloola preparatory to a visitation by the Chief Minister. For my purposes, no party has sought to join Mr Lutz, or whichever government agency he may have been speaking for.

7. The pleadings in the matter, and the history of these pleadings, have been unexpectedly complex. I reproduce (with gratitude) the summary forming part of the Plaintiff's written submissions.

> "**The Pleadings**
>
> 13. By a Statement of Claim filed 18 May 2005, Telstra initiated these proceedings against the First Defendant.

14. On or about 10 June 2005, the First Defendant filed a defence denying, inter alia, that it had carried out the Works.

15. In the result Telstra sought and obtained leave to issue a subpoena to the Department seeking documents relevant to the Works.

16. On or about 15 August 2006, the Department advised the Court that it held no documents falling within the ambit of the Subpoena (see the Court Orders of Registrar Fong Lim dated 15 August 2006).

17. On or about 7 September 2005, the First Defendant sought and obtained leave to file a Third Party Notice within fourteen (14) days of that date. The First Defendant was also ordered to provide discovery within fourteen (14) days. Telstra relies on the Court's Orders of 7 September 2005, in this regard.

18. On 12 October 2005, the First Defendant sought and obtained an extension for the filing of a Third Party Notice and the provision of discovery for a further fourteen (14) days from the date thereof. Telstra relies on the Court's Orders of 12 October 2005, in this regard.

19. On or about 8 November 2005, the First Defendant served a List of Documents, discovering, inter alia, the documents referred to in paragraphs 7, 8, 9, 10 and 12 above.

20. On or about the same date, the First Defendant filed a Third Party Notice with the court seeking contribution and/or an indemnity from Darkamo Nominees Pty Ltd ("**Darkamo**").

21. On 13 November 2005, the First Defendant served a further "Consolidated List of Documents" giving discovery of, inter alia, the letters referred to in paragraphs 6 and 11 above.

22. At some time prior to 30 January 2006, Michael Rohrlach wrote to the First Defendant, on behalf of the Second Defendant, advising the First Defendant that the proper party to the Third Party Notice ought be the Second Defendant. A true copy of this letter and a response to the same from the solicitor for the First Defendant, appear as annexures "SJG-8" and "SJG-9" to Gault's Supplementary Affidavit.

23. On or about 3 March 2006, the First Defendant filed an Amended Third Party Notice properly identifying Michael John

Rohrlach and Dianne Pauline Rohrlach as the appropriate Third Party.

24. Relevantly, the Amended Third Party Notice pleads:

> 1. *"On or about the 5th day of April 2003 the Third Party carried out works for and at the request of the Defendant in relation to a drain outside the crèche on Robinson Road Borroloola NT.*
>
> 2. *Whilst undertaking the said works the Third party caused damage to property owned by the Plaintiff namely a 24 fibre optic cable, a 50 pair and a 10 pair copper cable and conduit.*
>
> 3. *The said damage was done in breach of the Third Party's duty of care to the Defendant and in breach of an implied term of the contract between the Defendant and the Third party that the Third Party would carry out the Works in a good and workmanlike fashion.*
>
> 4. *The Third party failed to locate the said cables and failed to avoid damaging them with their backhoe."*

25. On or about 10 April 2006, the Second Defendant filed a Defence to the Third Party Notice in which the Second Defendant:

(a) Admits the matters pleaded in paragraph 1 of the Amended Third Party Notice;

(b) Admits the damage to the Telstra Property; and

(c) Denies any liability to the First Defendant, ostensibly on the basis that the First Defendant was negligent in the provision of instructions vis a vis the Telstra Property's location in proximity to the Works.

26. On or about 2 August 2006 and by consent, Telstra filed an Amended Statement of Claim joining the Second Defendant to these proceedings.

27. The Amended Statement of Claim relevantly pleads:

> 3. *"The Second Defendant is and was at all material times a partnership comprising Michael John Rohrlach*

and Diane Pauline Rohrlach and carrying on (sic) the business of mechanical repairs and civil works under the business name "MJ and DP Rohrlach Mechanical Repairs."

4. *On or about 5 April 2003, the First Defendant was engaged to carry out works in relation to a drain by the Northern Territory Department of Infrastructure Planning and Environment ("**DIPE**") outside the crèche on Robinson Road, Borroloola in the Northern Territory of Australia ("**the Works**").*

5. *On or about 5 April 2003, the First Defendant engaged the Second Defendant to carry out the Works for and on its behalf. The Second Defendant was the servant or agent of the First Defendant for the purposes of carrying out the Works.*

6. *While undertaking the Works on behalf of the First Defendant, the Second Defendant caused damage ("**the Damage**") to property owned by the Plaintiff. The property damaged consisted of a 24 fibre optic cable, a 50 pair and a 10 pair copper cable and conduit ("**the Plaintiff's Property**").*

7. *…*

8. *The First Defendant and the Second Defendant each owed a duty of care to the plaintiff to take all reasonable care and precautions to avoid damage to property owned by the Plaintiff in carrying out the Works".*

28. On or about 10 August 2006, the Second Defendant filed a Defence to the Amended Statement of Claim in which it relevantly pleads:

3. *"It admits the allegation contained in paragraph 3.*

4. *It does not plead to paragraph 4 as it raises no allegation against it.*

5. *Save that it admits that on or about 5 April 2003, it was engaged by the First Defendant to, relevantly, dig a 300 meter trench, approximately 600 millimetres deep and 600 millimetres wide at the surface, to be situated about 3 metres from the edge of Robinson Road, Borroloola,*

Northern Territory (Works), it denies the allegations contained in paragraph 5.

5.1 The Second Defendant says further that it was engaged by the First Defendant as an independent contractor.

6. Save that it admits that the Plaintiff's property was damaged during the course of performing the Works, the existence and precise location of such property having never been disclosed to it, it denies the allegations contained in paragraph 6.

7. …

8. It denies the allegations made against it in paragraph 8."

29. On or about the same day, the Second Defendant filed a Notice of Contribution with the Court seeking contribution from the First Defendant.

30. In its Notice of Contribution the Second Defendant relevantly pleads:

(a) The existence of an agreement between itself and the First Defendant vis a vis the conduct of the Works;

(b) That such an agreement contained terms requiring the First Defendant to:

(i) Take all reasonable and necessary care to avoid damage to the Telstra Property: and

(ii) To advise the Second Defendant of the precise location of any such property;

(c) That the First Defendant breached the agreement by, inter alia:

(i) Failing to obtain a Dial before you Dig Plan; and

(ii) Erroneously advising the Second Defendant that the Telstra Property ran parallel to the trench;

(d) In the alternative, that the First Defendant owed a duty of care to the Second Defendant of a similar effect, which

duty of care it breached for the reasons pleaded vis a vis the breach of the terms of the agreement.

31. On 1 September 2006, the Court made orders, inter alia, requiring the First Defendant to:

(a) File and serve a Defence to the Amended Statement of Claim and any Defence to the Second Defendant's Notice of Contribution within fourteen (14) days; and

(b) To make any further application to join a Third Party within fourteen (14) days.

32. On or about 1 September 2006, the solicitor for the First Defendant forwarded a letter to Clark Radin Lawyers, the solicitors of Dakarmo. A true copy of that letter and its enclosures appears as annexure "SJG-10" to Gault's Supplementary Affidavit.

33. On 13 September 2006, Clark Radin Lawyers forwarded letters to Clayton Utz and the First Defendant's solicitor, true copies of which appear as annexure "SJG-11" to Gault's Supplementary Affidavit.

34. On 21 September 2006, Clark Radin Lawyers forwarded a further letter to the First Defendant's solicitor, a true copy of which appears as annexure "SJG-12" to Gault's Supplementary Affidavit.

35. On or about 22 September 2006, the First Defendant filed a Defence to the Amended Statement of Claim. Notwithstanding the matters pleaded in the Amended Third Party Notice referred to in paragraph 24 above, the letters referred to in paragraphs 32 to 34 inclusive above and the admissions appearing in the Second Defendant's pleadings concerning the nature of the relationship between the First and Second Defendants, the First Defendant pleads as follows:

3. "The First Defendant does not know and cannot admit the allegations contained in paragraph 3.

4. The First Defendant denies the allegations contained in paragraph 4.

4.2 The First Defendant says that it was requested by the Northern Territory Department of Infrastructure

Planning and Environment to carry out the Works as part of the First Defendant's maintenance contract with the said Department.

4.3 The First Defendant engaged Dakarmo Nominees Pty Ltd ("the Company") of which the Second Defendants were the Directors and Shareholders to carry out the Works.

4.4 The Company carried out the Works and demanded payment in the sum of $4,400.00 from the First Defendant, which was paid to the Company.

4.5 …

5. The First Defendant denies the allegations contained in paragraph 5 and refers to and repeats its allegations contained in paragraph 4 hereof.

6. The First Defendant says that Michael John Rohrlach damaged the cables being the property of the Plaintiff but the First Defendant does not know and cannot admit the remaining allegations contained in paragraph 6.

8. The First Defendant says that neither it nor the Second Defendants carried out the Works and it denies that it or the Second Defendants owed a duty of care to the Plaintiff.

11. The First Defendant denies that it is vicariously liable to the Plaintiff for the acts and omissions of the Second Defendants and says that the Second Defendants were not the servants or agents of the First Defendant for the purpose of carrying out the Works. In the alternative, the First Defendant says that to the extent it engaged the [Second] Defendants to carry out the Works, the Second Defendants were independent contractors.

36. On or about 22 September 2006, the First Defendant filed a Defence to the Second Defendant's Notice of Contribution in which the First Defendant relevantly:

(a) Pleads that it requested Dakarmo to carry out the Works;

(b) Denies the existence of any agreement as between itself and the Second Defendant; and

(c) Pleads that Dakarmo, as the entity allegedly carrying out the Works, owed duty to the Plaintiff to obtain a Dial Before You Dig Plan prior to commencement of the Works (see paragraph 6.2 of the First Defendant's Defence to the Second Defendant's Notice of Contribution).

37. On or about 27 September 2006, Clayton Utz forwarded a letter to the solicitor for the First Defendant, a true copy of which appears as annexure "SJG-13" to Gault's Supplementary Affidavit.

38. On or about 28 September 2006, the First Defendant's solicitor responded to Clayton Utz's letter referred to in paragraph 37 immediately above, a true copy of which response appears as annexure "SJG-14" to Gault's Supplementary Affidavit.

39. On or about 29 September 2006, Clayton Utz again wrote to the First Defendant's solicitor concerning Dakarmo, a true copy of which letter appears as annexure "SJG-15" to Gault's Supplementary Affidavit.

40. Notwithstanding the Court's orders of 1 September 2006, the First Defendant has made no application to join Dakarmo to these proceedings.

41. On or about 5 October 2006, the First Defendant filed a Notice of Contribution seeking contribution from the Second Defendant. In that Notice of Contribution the First Defendant relevantly pleads:

    1. *"On or about 5 April 2004 Michael John Rohrlach of Robinson Road, Borroloola in the Northern Territory dug a trench 600 mm deep by approximately 600 mm wide at the surface, 300 mm long and 3 m from the edge of the bitumen and cleared two access driveways.*

    2. *By their Notice of Defence the Second Defendants say that the Works were performed by them in partnership.*

    3. *During the performance of the works cables claimed by the Plaintiff to be its property were damaged by the Second Defendants.*

    4. *The First Defendant says the Second Defendants were negligent in the performance of the works by:*

4.1 Failing or refusing to request or seek out a Dial Before You Dig Plan to obtain details of the location of the cable;

4.2 Failing and/or refusing to locate the cables;

4.3 Failing to avoid damaging the cables."

42. On or about 5 October 2006, the Honourable Court set these proceedings down for hearing for an estimated two (2) days, commencing 10.00 am 11 December 2006. Telstra relies on the Court's Notice of Hearing of 5 October 2006 in this regard.

43. On or about 9 October 2006, the Second Defendant filed a Notice of Defence to the First Defendant's Notice of Contribution in which it relevantly:

(a) Admits the allegations contained in paragraphs 1 to 3 inclusive of the First Defendant's Notice of Contribution; and

(b) Denies the allegations raised in paragraphs 4 to 4.3 inclusive and refers to and repeats the particulars of its Notice Claiming Contribution against the First Defendant of 10 August 2006."

The Case for the Plaintiff

8. It seems to me to be clearly established on the evidence that both Defendants, through Mr Van Den Hoek and Mr Rohrlach respectively, owed a duty of care to Telstra to forebear from damaging Telstra's cabling by digging anywhere it was reasonably foreseeable that cabling might be encountered. Both men had experience of accidentally digging through Telstra cables, and both spoke bitterly of that experience in their evidence. Both were aware of Telstra's "Dial before you dig" Service, through which a prudent excavator may obtain plans from Telstra showing the location of cabling. According to Mr Van Den Hoek's evidence that service is not perfect – it can only be contacted during limited hours on week days, and the dialler often has to hold on for a long time before getting any service – but he and Mr Rohrlach both gave me the impression that, scarred by their

earlier mishaps with Telstra cabling, each of them had privately resolved never to dig without dialling. Neither seemed to have an explanation that he himself found satisfactory for their failure to do so in respect of the Robinson Road job – or, rather, given the urgency of the task, why each of them had not refused the work until a Dial before you dig plan could be obtained.

9. The verges of Robinson Road were obviously, in my opinion, places where there might be Telstra cable buried. There were some signs about warning of Telstra cabling, and there was some discussion between, first Lutz and Mr Van Den Hoek; then, later, Mr Van Den Hoek and Mr Rohrlach, as to where cabling lay: where it was safe to dig. The evidence in relation to the detail of those conversations will be touched on below. For the moment, it is enough to note that the existence of cabling was in the parties' minds, as was their consciousness that they did not know exactly where the cabling lay.

10. It seems to me to be clear, then that when Mr Rohrlach cut through the cable he was in breach of the duty of care, having taken less than reasonable care to avoid damage to the Plaintiff. Reasonable care would have involved at least obtaining a Dial before you dig plan.

11. The real issues in the case are those between the two Defendants: whether the First Defendant is liable wholly or in part for the negligence of the Second.

The Identity of the Second Defendant

12. It will be recalled that in its Third Party Notice of 8 November 2005 the First Defendant introduced an entity Dakarmo Nominees Pty Ltd. That company was previously called MickDi Rehab Pty Ltd, and under that name was owned by Mr Rohrlach (Mick) and perhaps his wife (Di). According to Mr Rohrlach, the company had never traded. The history of his acquisition

of the company is a sad story that comes out of the decline of Tennant Creek as a mining town. Mr Rohrlach, describing his work in the late 90s, said (T115):

> "MIM Exploration, the team I was working with moved to a joint venture in Tennant Creek with Giant's Reef Mining. 12 months later which puts us about '99 that partnership was dissolved and I then went to work for Normandy with – Normandy Exploration with the machine and Normandy was in the process of shutting down and auctioning everything off and a bloke by the name of Jack Savage, one of the guys at Peko Rehabilitation, took over the old Peko, Noble's Nob and Juno leases of which I then became associated with Jack Savage. He had offered me a contract to shift some 4 million tonnes of tailings at the old Peko mine site for which I'd drawn up papers to try and get the contract in writing for something secure. At the same time I purchased a $200,000 machine to do this work. I did actually do one month of work in 2000 – '99/2000 for him on this contract. There was no money forthcoming whatsoever and subsequently I ceased all association with Mr Jack Savage and Peko Rehabilitation. In the meantime we've got MickDi Rehab set up on the compute ready to go for this contract---"

13. At T117, Mr Rohrlach explained that he had wanted to keep his business pursuant to the Savage deal completely separate form his and his wife's other dealings – from the gift shop she ran "MJ and DP Rohrlach trading as Nicknacks", and also from his mechanical work. Hence the need for a separate entity, MickDi Rehab Pty Ltd.

14. I have no difficulty accepting Mr Rohrlach's evidence so far as it recites the history of the Fata Morgana that was the Savage deal, nor so far as it relies on the Rohrlachs' desire at that time to hive off that work from the activities of the gift shop. It is less easy to accept that Mr Rohrlach determined to separate his mechanical work from the Savage work. The reasons for this are: first, that his hopes, if realised, would have had him working full time on the Savage rehabilitation project, which evidently he expected to involve earthmoving and a lot of it; secondly, that his casual work as a backhoe operator would sit more naturally with earthmoving than with a gift shop (with or without a suspended mechanical repair business tacked on), but

most powerfully because the paperwork Mr Rohrlach had made up for the company bore not only the company's name, ACN and address, but also a two line resume of it activities:

> "Earthmoving
>
> Mechanical Repair" (see Ex4 and Ex6)

15. So my conclusion is that, to the extent Mr Rohrlach ever thought about the shape of things to come, during the month or months when he believed in the reality of the Savage project, his thoughts were that the shop would be in the name of the partnership, but that his work would be under the umbrella of MickDi Rehab Pty Ltd.

16. The evidence is far from clear as to when it became apparent to Mr Rohrlach that the Savage deal had become a fiasco. Perhaps it was as late as some time in 2001. Whenever it was, according to his own account, Mr Rohrlach thereafter had no need for the separate entity that was the company.

17. It is, however, clear and not in dispute that for a long time after that Mr Rohrlach (or his wife on information supplied by him) issued invoices in the name of MickDi Rehab Pty Ltd. Exhibits 4 and 6 in the hearing include bundles of such invoices, all issued to "Van Den Hoek Pty Ltd". (There is no doubt that they were in fact directed to the First Defendant AJ Van Den Hoek Pty Ltd). These invoices were issued between June 2002 and November 2003. As part of the series, the backhoe job that had cut Telstra's cable was billed in that name to the First Defendant. The First Defendant paid that bill by cheque and, as far as I can see, also paid by cheque all the other invoices of the series, the cheque being made out to MickDi Rehab Pty Ltd, according to the cheque butts, Ex5, and to Mrs Van Den Hoek, in her evidence.

18. Mr Rohrlach's evidence is that he (or his wife) paid these cheque over into their joint i.e. partnership bank account, and that MickDi Rehab Pty Ltd

never had a bank account. The records of the joint account were, it seems, not discovered by the Second Defendant, and no reason has been advanced to explain their non-discovery. Notwithstanding that, I think I accept Mr Rohrlach's evidence concerning the banking. I have no reason to believe that the First Defendant had any knowledge of, or, for that matter, interest in, the banking practices of the Rohrlachs.

19. Mr Rohrlach explained in his evidence how it had come to pass that he was issuing invoices to the First Defendant on MickDi Rehab Pty Ltd stationery.

> "As far as ongoing work that you were doing prior to the incorporation of the company what method were you using for producing invoices?---I was sent a template by my son on the computer to ---
>
> Well perhaps can I – can you explain, when you say he sent a template – well perhaps tell us, where was your son?---In Melbourne. He's computer graphics, he's in that field. And for one Christmas he sent me a little Imax set up with the company – with the invoices template on it.
>
> And that template, what name was it in?---It was in the name of Rohrlach, the original one that was produced here earlier and a I changed it. Being computer illiterate anyway I changed it to MickDi Rehab when that incorporation came through ready for the work Peko Mines and of course it didn't happen and I foolishly kept using it." (T115 – 116)

And:

> "Now, at some stage did she set up a branch of the business, a shop in fact in Tennant Creek? ---Yes, and still does run one and it was 1994. It was a giftware shop name of Nick Knacks and she runs MJ and DP Rohrlach Pty – MJ and DP Rohrlach trading as Nick Knacks in the partnership name. And with Mr Savage's deal that was supposed to be a separate entity is why we entered into the company name of MickDi Rehab for that.
>
> And are you saying that was a totally separate entity both from Nick Knacks and also from your mechanical work? ---That is correct.

Now, your son sent you to the IMAX computer with a template on it – an invoice template on it, Rohrlach. When you changed the template to the company one what jobs did you intend using that template for? ---Just for the Peko contract.

That's the rehabilitation Program?---The Peko Rehabilitation Jack Savage contract, yes.

Now, you mentioned that you're, I think – I think you might've said computer illiterate or – well just what is your knowledge or what was your knowledge then in terms of manipulating the computer and changing templates and, say, creating separate documents?---Zero.

But you knew enough to change the original Rohrlach one to the company one?---I played around with it until I found how I could change it, yes, and it kept trying to revert back to its original form which is why, or one of the reasons why I think I kept using it, simply because it stayed or I had it into a working invoice.

And so when it came to do – when you're doing mechanical – continuing with the mechanical jobs, when it came to doing an invoice all you had to do was just press a button and out would spit an invoice?---Fill it out and I had an invoice, that's correct.

Apart from changing on the computer changing the template back to the Rohrlach one, was there anything else you could've done to reflect what you understood to be the non-company nature of the mechanical work?---I didn't understand that I was actually doing anything wrong by using the registered company name because I wasn't registered in it actually until, as it turns out, in November '03 I finally realised that the contract was never ever going to happen and reverted back to our partnership invoice.

Right. But prior to November '03 were you still, in your understanding, maintaining a difference between your partnership work and your company work?---There was a difference there, yes, of course, but I was still using the company letterhead." (T117 – 118)

20. As for the entity MickDi Rehab Pty Ltd, it seems that Mr Rohrlach gave or sold it to his accountant, who later changed its name to Dakarmo Nominees Pty Ltd ("Dakarmo"), the entity that appears without further explanation in the pleadings. Dakarmo plays no further part in the matter (although as a matter of history it seems that it was Dakarmo's alarm at being served with process in this matter that led Mr Rohrlach to have his solicitor write to the

First Defendant as outlined in paragraph 22 of "The Pleadings" reproduced above from the written submissions on behalf of the Plaintiff).

21. Mr Christrup, counsel for the First Defendant submitted, correctly in my view, that the identity of contracting parties is to be determined objectively from the evidence bearing upon the contractual relationship. His submission was that for many months before, and for many months after 5 April 2003, the evidence pointed unambiguously to there being repeated contractual relations between, on the one hand AJ Van Den Hoek Pty Ltd (the entity which paid for the work Mr Rohrlach did, and which is named, more or less, on the invoices Mr Rohrlach submitted to it), and, on the other, MickDi Rehab Pty Ltd, an existing company submitting invoices in its name, and receiving payments in cheques payable to that name.

22. Mr Christrup's submission is that it does not matter what Mr Rohrlach did with the cheques, or what he thought he was doing. His submission is that even if (Mr Christrup made submissions attaching Mr Rohrlach's credibility on many points) Mr Rohrlach used MickDi Rehab Pty Ltd letterhead only because he was bamboozled by the computer; even if, in his own mind, he never thought other than that he, Rohrlach, stood vis a vis AJ Van Den Hoek Pty Ltd as he always had, that is, as a natural person doing work for a company, objectively the relationship had changed: it was now one between two companies.

23. In my judgment this submission is correct so far as it relates generally to the period when the MickDi Rehab Pty Ltd name was in use. When Mr Van Den Hoek and Mr Rohrlach spoke to each other, with the result that Mr Rohrlach took on the job at Borroloola, the pattern of their previous dealings make it fair to assume that both men would have expected this job to be on the same footing as there that had gone before, in the absence of any evidence that there was something unusual and different pertaining to the issue of who were the parties to this particular contract.

24. There is not much difference between the evidence of Mr Van Den Hoek (at T53 – 54) and that of Mr Rohrlach (at T120 – 122) as to the sequence of events that led to Mr Rohrlach taking on the job. As fate would have it, Mr Van Den Hoek and a collection of men and machinery were performing works on the Tableland Highway, 100 kilometres or so from Borroloola (which is just around the corner by local standards). I assume it was the proximity of this work party that accounted for Mr Lutz's approach to Mr Van Den Hoek, who did not want to do the job with his own backhoe (the absence of which would leave the rest of his gang at a loose end) and who, as fate would also have it, was waiting for Mr Rohrlach to attend at his work site to do some mechanical work on a truck. The need for that work had been apparent for a few days, and there had been prior communications about Rohrlach coming up to the work camp to repair the truck. Mr Rohrlach was waiting in Tennant Creek for the necessary parts to arrive when Mr Van Den Hoeks call about Lutz's Borroloola backhoe job came through. Mr Rohrlach accepted the job, and, accordingly, when the parts arrived, left Tennant Creek not in his utility, but rather in his own truck bearing the backhoe as well as his toolbox and the parts. After a rendezvous with Mr Van Den Hoek at his work camp at Cresswell Creek, they both drove to Borroloola next morning. There Mr Van Den Hoek showed the site of the job to Mr Rohrlach (as Van Den Hoek had been shown it by Lutz), explained what was wanted, and left Rohrlach to get on with the job.

25. I can find no basis in the evidence of either man to conclude, or even to suspect, that either of them gave any consideration to the question: What entity am I contracting for? Or with? At a practical level, the two men, Albert and Mick, were working together as they habitually did. If pushed to it, I have no doubt that Mr Rohrlach could at the time have been induced to see that he was contracting with a company "Van Den Hoek Pty Ltd, or whatever its called". Mr Van Den Hoek's knowledge at the time might have

been more sketchy – something like "Mick, his company, whatever – I leave that sort of thing to my wife".

26. In short, there is no evidence on which I can see any basis for concluding that this job of work was in any way differentiated in the minds of Mr Rohrlach or Mr Van Den Hoek from the run of work for months before. The contract was, in my judgment and whatever Mr Rohrlach may have thought, between the two companies.

27. If I am right about this it follows that there was no contract between the First and Second Defendants; and it then follows that the pleadings between them, and the pleadings by the Plaintiff, dependant in any way upon the existence of a contractual relationship, may be disregarded. Such claims fail for want of a contract between the two: defences to such claims need not be considered further.

Vicarious Liability and the First Defendant

28. In the recent High Court case *Sweeny v Boylan Nominees Pty Ltd t/as Quirks Refrigeration* (2006) 227 ALR 46, the majority (Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ) noted that there is no single unifying principle behind or rationale for the law that has developed to make one person vicariously liable for the tort of another. Their Honours wrote (at p49):

> "Three recent decisions of this court have examined questions of vicarious liability: *Scott v Davis*, *Hollis v Vabu Pty Ltd and New South Wales v Lepore*. It is unnecessary to rehearse all that is established by those decisions. It is important, however, to begin examination of the issues in this appeal from a frank recognition of some considerations that are reflected in those decisions. First, "[a] fully satisfactory rationale for the imposition of vicarious liability in employment relationship has been slow to appear in the case law". Secondly, "the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy". That may suggest that the policy to which effect was given by "the modern

> doctrine" is clearly identified, but, as is implicit in the first proposition, the policy which is said to lie behind the development of the modern doctrine is not and has not been fully articulated. Thirdly, although important aspects of the law relating to vicarious liability are often traced to the judgment of Parke B in *Quarman v Burnett*, neither in that decision, nor in other early decisions to which the development of the doctrine of vicarious liability may be traced, does there emerge any clear or stable principle which may be understood as underpinning the development of this area of the law. Indeed, as is demonstrated in *Scott*, the development of the law in this area has not always proceeded on a correct understanding of the basis of earlier decisions."

(Kirby J, made a similar observation in the second paragraph of his dissenting judgment, on p 55.)

The majority continued (at p 49):

> "Nonetheless, as the decisions in *Scott*, *Hollis* and *Lepore* show, there are some basic propositions that can be identified as central to this body of law. For present purposes, there are two to which it will be necessary to give principal attention. First, there is the distinction between employees (for whose conduct the employer will generally be vicariously liable) and independent contractors (for whose conduct the person engaging the contractor will generally not be vicariously liable). Secondly, there is the importance which is attached to the course of employment."

29. The structure of relations between capital and labour change all the time, influenced by other changes in the real world (for example, societal changes in expectations to do with women and paid work, or technological changes affecting the time and place when work can be done) and by adventitious changes to employment law or taxation law. Many workers, as a result of the incidence of various kinds of taxation, find it more advantageous to provide their services through a corporate entity. Many employers, as a result of the incidence of various aspects of employment law, find it more advantageous to have work done by contractors and sub-contractors, rather than by directly employed natural persons. If there ever was a clear distinction between employees, on the one hand, and independently

contracting businesses, on the other, that distinction has been thoroughly blurred by developments over the last few decades.

30. When a claim dependent upon vicarious liability is brought , it becomes necessary, for the reason evident in the second quotation above from *Sweeny v Boylan*, to decide whether a given person engaged in certain work, is a "servant" or an independent contractor.

31. Is seems to me that if the work is done by an incorporated entity, then that factor would almost always and of itself, lead to a decision that the entity was an independent contractor. I do not doubt, however, that it is imaginable that a corporate entity could be so transparently a veil over what is fundamentally an ordinary wage-earner that a court could properly regard his (and its) work done as the work of a servant. Each case must be decided on its own facts.

32. The facts relevant to the decision are potentially numerous: every aspect of the working relationship between the employer / head contractor, on the one hand, and the employee / independent sub-contractor, on the other, can be brought into the decision and must be given appropriate weight. Given that there is no underlying rationale which could serve as a reference point in assigning weight to various factors, it is perhaps not surprising that opinions in a given case may differ, nor that cases not radically different in any outstanding respect may be differently characterised. Hence the dissents of Callinan J in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, and of Kirby J in *Sweeny v Boylan*, and the not vastly different circumstances of employment of the bicycle courier in the former case – held by the majority of the High Court not to be an independent contractor – and the refrigerator repairer in the latter – held by the majority to be just that.

33. In the present case, apropos of the Borroloola job, it is my opinion that Mr Rohrlach's relationship with "Van Den Hoek Pty Ltd" irrespective of the "MickDi Rehab Pty Ltd" complication is more like that of the refrigerator

repairer – indeed, bearing markedly stronger indications of independence – than it was like that of the courier. Notably, Mr Rohrlach could have declined to do the work when Mr Van Den Hoek first asked him. That is in my judgment clear beyond argument. I am also of opinion, having seen the two men give evidence, and having heard the way each spoke of the other, that Mr Rohrlach could have declined to do the work when Mr Van Den Hoek showed him the site: I am of the view on the balance of probabilities that if Mr Rohrlach had then said he would rather not do the job for some credible reason e.g. that he didn't want to take the risk of there being cables somewhere, and no Dial before you dig plan, then Mr Van Den Hoek would have accepted that decision without rancour. The case might well be different had the job of work been within the scope of the everyday dealings between the parties, i.e. the mechanical work that Mr Rohrlach habitually did to keep Mr Van Den Hoek's fleet of vehicles going. But backhoe work was something Mr Rohrlach hardly ever did for Mr Van Den Hoek, and something that Mr Rohrlach also did, occasionally, for other people. It is this feature of the job which more than any other (for examples: that Mr Rohrlach provided his own equipment, that he was left to exercise his own judgment how best to do the job) which persuades me that, even if he had been working as an individual natural person, Mr Rohrlach was an independent contractor when he dup up Telstra's cables.

34. In *Hollis v Vabu*, McHugh J (dissenting in reasoning but not in result), having discussed the history of vicarious liability and concluded that the doctrine has its basis in policy considerations, put forward the prevailing policy consideration as His Honour saw them, and was able to quote from his own (likewise dissenting) judgment in *Scott and Others v Davis* (2000) 204 CLR 333, at 346:

> "a principal is also liable for the wrongful acts of an agent where the agent is performing a task which the principal has agreed to perform or a duty which the principal is obliged to perform and the principal has delegated that task or duty to the agent, provided that the agent is

not an independent contractor. The principal is also liable for the wrongful acts of a person who is acting on the principal's behalf as a representative and not as an individual principal."

35. If such a principle were to become the law it would certainly make cases like the present one easier to decide (but would no doubt create disputation on a new border). Very different policy considerations caused Callinan J, dissenting in reasoning and result in *Hollis v Vabu* to conclude that law reform in this area ought to be left to the legislature. (207 CLR at p 65 – 70) The "agency" basis for vicarious liability has now been twice spurned by large majorities of the High Court and is accordingly not part of the law.

36. These things being so, there is in my mind judgment no basis on which the First Defendant may be held vicariously liable for the tort of Mr Rohrlach.

The Second Defendant's Notice of Contribution

37. It will be recalled that on or about 10 August 2006 the Second Defendant filed a Notice of Contribution seeking contribution from the First Defendant. The pleading in that Notice is paraphrased on p7 to 8 of these Reasons. In part the pleading depended upon the existence of a contract between the First and Second Defendants for the reasons given above, there was no contract between these parties and that part of the pleading requires no further comment.

38. The Notice, however, also pleaded a negligent misstatement. This pleading was amended during the course of the hearing, and I reproduce it in its full and final form:

> "6. Alternatively, the first defendant owed the second defendant a duty of care when engaging it to perform the Works.
>
> **PARTICULARS**
>
> The first defendant was obliged to take all necessary and reasonable care and precautions to avoid damage to property owned by the plaintiff. Accordingly, the first

defendant was obliged to advise the second defendant of the precise location of property owned by the plaintiff in the vicinity of the Works prior to their commencement so as to enable the second defendant to avoid damaging that property when performing the Works.

7. The first defendant breached its duty of care owed to the second defendant.

PARTICULARS

The second defendant refers to and repeats the particulars subjoined to paragraph 4 above.

7A. The breaches by the First Defendant set out in paras 5 and 6 above cased the Defendant to believe that there was no Telstra cabling crossing the path of the drain/trench he had been directed by the First Defendant to clear, and therefore caused the First Defendant to damage the Plaintiff's equipment.

8. In the premises, if the second defendant is liable to the plaintiff in negligence or in contract, the first defendant is required to indemnify the second defendant for that liability, alternatively, contribute towards the discharge of the second defendant's obligations to the plaintiff."

39. The "particulars subjoined to paragraph 4 above" read:

"PARTICULARS

(i) The first defendant failed and/ or refused to request or seek out a Dial Before You Dig Plan to obtain details of the location of property owned by the plaintiff in the vicinity of the Works prior to their commencement;

(ii) Alternatively, the first defendant failed and/ or refused to locate property owned by the plaintiff in the vicinity of the Works prior to their commencement;

(iii) Erroneously, the first defendant advised the second defendant that all cable, including the plaintiff's property ran parallel with the trench; and

(iv) Prior to commencement of the Works, the first defendant failed to inform the second defendant how to avoid damaging the plaintiff's property located in the vicinity of theWorks.

40. In my opinion this pleading does not fail because the fact that, when Albert Van Den Hoek showed the job site to Mick Rohrlach in April 2001, the former was offering the work on behalf of AJ Van Den Hoek Pty Ltd, and the latter accepting it on behalf of MickDi Rehab Pty Ltd. It seems to me that if Mr Van Den Hoek (and the company he was speaking for) owed a duty of care, then he owed it to the man he was speaking to, (and to the company that man was speaking for).

41. What was it that Mr Van Den Hoek said? Here is his evidence about what Mr Lutz told (and showed) him (T51-52):

> "Thank you. And who contacted you from DPI?---Lutz(?).
>
> And how did he contact you?---He come and see me sort of in person and he took me out to the job and, 'Can you do this?' and I said, 'Well I will have a look, I'm pretty busy at the moment, maybe yes, maybe no'.
>
> And what was the job that he wanted you to do?---He wanted me to clean out the drain from the Rocky Creek plus there were a couple of culverts there they were fully blocked, 1 foot diameter pipes that size, they were fully blocked, pull them out too and clean the drain and, 'Well what about cables', and, 'No just don't over excavate just clean it out because there's cable and pipes lying along the side there'.
>
> When you say along the side, could you explain to his Honour if – can I ask you to – if you're standing on Robinson Road and you've got the drain on your right?---Yeah.
>
> Can you explain to his Honour where the cables were set to be running compared to the drain?---Well they had the drain, you had the road and then you had maybe a couple of metres, 2 or 3 metres, and then you had the drain and then on the other side of the drain, you know, away from the road.
>
> So the drain essentially separated – well the drain was in between the road and the cable?---Yeah, yes, that's it.
>
> And from – sorry, can you explain what part of the drain you're asked to - - -?---Well he took me on site and he said, 'Well this is

end of it over here', you know, wherever that is, wherever that was, 'Here's the end of it. Clean them culverts out'.

So that was one end, what was down the other end?---Well that was Rocky Creek, that's where it had to run in.

Can you get an estimate of the entire distance from Rocky Creek to where the job was meant to end?---No, I couldn't tell you. I could be anything from 5, 4, 300 metres something like that.

Certainly. And you mentioned that there were some culverts in between - - -?---Yeah, culverts, yeah, drive to get across because to get across the drain onto the properties.

Right, and the pipe was inside the culvert - - -?---Yeah, there were pipes, yeah, 1 foot diameter pipes, yeah.

And so did you just have to pull out the pipes?---Yeah, we had to pull out the pipes, yeah.

And you mentioned that maybe you could do the job maybe you couldn't?---Yeah."

42. And here he is, again in evidence in chief, as to his later discussion of the job with Mr Rohrlach (T54-55)

"What happened next in relation to the works out at Robinson Road?---Well Mick turned up on the job and fixed the truck and then we went to – I went to get a (inaudible) into Borroloola and said to him, 'Well here it starts, that's the end, the pipes got to come out. Be careful there's pipes and cables on the other side running parallel with the trench'.

Right. And why did you inform him of that?

Why did you inform him about the cable?---Well I just passed on the same thing as the inspector passed on to me.

Right?---What the inspector told me and then passed him on the same thing.

Can you remember the exact words that you used when you spoke to Mr Rohrlach?---It would have been – well, no, not the exact words, no.

> And what did Mr Rohrlach say in response to what you said about the cables?---Well I couldn't remember, but he accepted the job and, I mean it wasn't a very big job. It was mainly cleaning out the existing storm water, and because they been putting cable and pipes alongside and never compacted the trench properly and when it rained all that uncompacted dirt finished up in the existing storm – there was – had to clean it out. Had to clean the existing storm water drain out from the pipes because it was impossible to unblock them because they're only a foot diameter so we had to pull them out.
>
> Certainly. And was there anything discussed in relation to the cable crossing the drain?---Well were unable to – aware of a cable crossing. I had seen the Telecom sign where I was told that the pipes and cable were, but I never seen the other Telecom sign because these two signs to indicate the crossing, and the repairman earlier on he only seen one sign and that's all I see, I've seen only one sign.
>
> But I'm asking you was there any discussion between you and Rohrlach at that time about the cable crossing?---We did not – we did not know about the cable crossing.
>
> Thank you. Was anything discussed as to how Mr Rohrlach should clean the drain?---Not really.
>
> Was anything discussed as to how he should pull out the pipes?---Well there was just a matter of putting the backhoe bucket in and pulling them out of the ground.
>
> But was that discussed?---No, not really.
>
> Were you discussing how the pipes were going to pull out?---No.
>
> And why was that not discussed?---Well I mean he's the operator, you know, you don't have to go into details how.
>
> And what did you do then?---Then, I went back to the job again 200 kilometres down the road."

43. Unknown to Rohrlach, Van Den Hoek, and, I assume, Lutz, the Telstra cabling did cross the road, and it was inevitable that anyone excavating a trench parallel with the road would cut the cable where the cable crossed perpendicular to the road, if the excavation were deep enough. There was Telstra signage in the vicinity, which consisted of fairly unobtrusive star pickets, with Telstra tags on them. One or more of the tags in the pickets

near the road crossing was missing. On the evidence before me, the signage would not necessarily have caused an excavator of ordinary prudence to suspect that the cable crossed the road. The signage, such as it was, seems to have permitted the assumption by all three men that the cable ran parallel to the road, some metres back from its edge. (With the benefit of hindsight, and after the damage had been repaired, the road crossing was a lot more obvious, not least because a trench was cut across the bitumen in the course of the repairs. For all I know, the signage may have been refreshed at the same time. So, at that stage, Mr Van Den Hoek was able to say that (T80) "even a blind man could've seen there was a cable there".

44. And it may be that Mr Van Den Hoek did not consider the matter very closely when Mr Lutz was showing him the job. In cross-examination by Mr Dalrymple, counsel for the Second Defendant, Mr Van Den Hoek said (T72 – T73) ["He" is Mr Lutz: "DIPI" should read DIPE]:

> "He was pressuring you and he wanted the job to be done urgently?---He was pressuring me, yes, and then I said to him, 'Well I will contact someone in Tennant Creek and he can get someone to do it because I cannot do it'.
>
> Yes, and of course you had this contract with DIPI you were keen to maintain that relationship, weren't you?---Well I can only do so much, you know, and the bit I was doing that was in working and this was just a verbal thing from while you were there, and it's an old thing, when they instruct me to do a job and there is any Telstra involved in it they get dial before you dig. They do the dial before you dig. The reason for that is you can sit down here and dial five times a day for three weeks before you get a plan. So when they come to me and say, 'Hey, listen, you got the plan? 'No, I'm not doing it, finished'. So that's it. And that is – whenever they – whenever they instruct me to do a job and there is a Telstra cable involved in it they do the dial before you dig and they get the plan.
>
> Fine, got you on that. Now you were tossing up whether to do this job or not weren't you at Borroloola?
>
> You gave it some serious consideration?---Yes, I did, yeah.

> And would I be correct in this that you – when you were giving that consideration, you were give considerations doing that job while you were there, correct?---Yes.
>
> So you yourself were under the impression that DIPI had done the relevant investigation inquiries beforehand in respect of Telstra's cables, correct?---There was no Telstra cable involved in it according to him.
>
> Exactly. He told you certain things and from what he told you assumed, you took – you understood that they'd don the investigations and that there was no risk of hitting a Telstra cable along that part of the trench they wanted you to dig, correct?---Because the agreement is if there is Telstra involved in it you dial, not me, because it is a communication company but it can take five times a day, three days before they answer the phone.
>
> And that's your agreement with DIPI, correct?---Yep, that's the agreement. If there's any cable involved in it you do that – you get the plan, not me.
>
> Fine, all right?---Because they instruct me to go and do a job it can take up to three weeks before you get a plan."

45. As to what Mr Van Den Hoek said to Mr Rohrlach, Mr Dalrimple's cross-examination educed this (T90-91):

> "You didn't tell him that you'd been told by an inspector of DIPe, 'do not over excavate, there's a Telecom line on the edge of the drain'?---That's it, do not over excavate, yeah.
>
> You didn't tell him that, do you?---Of course I did. I told him, 'do not over excavate.' Besides that, as a contractor I get all sorts of constructions, but when I come on the job and I see something I'll say, stop, because that is a commonsense approach of a contractor and here and in this case there was a sign there and a sign on the other side and there was a trench. Well you he would've asked me where is the cable I could've told you within that far where the cable was and he totally ignored that and that's why the cable come out of the ground.
>
> HIS HONOUR: Sorry, I ignored that – I missed that Mr Van Den Hoek. You said with how far?--- There's a trench going across the road, it's that wide and back till the bitumen.

About 8 inches- - -?---There's a sign on this side and a sign on that side. Mate, you couldn't miss it, it's impossible. Even a blind man could tell you where the cable was. And that is a commonsense approach, isn't it. I tell my operators all the time, 'listen, mate, if you see a Telecom sign, stop and look around and if you're not sure ring me because it could cost $100,000', and I tell them that over and over again.

MR DALRYMPLE: And you didn't say that to Mr Rohrlach on that day, did you?---No, I employed a contractor and I don't – well should I be standing there talking the same, baby-sitting to the job, I may as well do it myself.

And you almost did do it yourself, didn't you?---No, I didn't, I employed a contractor to do the job. If I would've done it myself that cable wouldn't have come out of the ground.

What I'm asking you to concentrate on, Mr Van Den Hoek, is that you didn't mention that you'd in particular been told by the DIPE people that there was a Telstra Line running alongside?---See – see the DIPE people, that particular inspector he was totally wrong. He sent me on a job that didn't even belong to them.

HIS HONOUR: Mr Van Den Hoek - - -?---Yeah.

The question is - - -?---Okay. He never mentioned the word Telecom cable but he mentioned pipes and cables.

DR DALRYMPLE: Who?---The inspector from DIPE.

Well I'm confused now, Mr Van Den Hoek. In your letter you specifically stated - - -?---Telecom.

- - -the inspector of DIPE said, 'do not over excavate, there's a Telecom line in the edge of the drain.'?---Yeah.

Now, I understood you to be saying that that's – that – what you've said there is true, that that's what he did tell you. Is that what he told you?---Well this is going back more than three years ago. He mentioned specifically to me, 'do not over excavate, there's pipes and cables.'

Yes. Did he say to you - - -?---I don't know whether he said - - -

- - -there's a Telecom line in the edge of the drain?---Well I can't – I can't recall it. I can't recall what he exactly said to me, it's more

than three years ago. But he mentioned to me, do not over excavate, there's pipes and cables along the side.'

You've said that a number of times now, I think you've got that message through?---Yeah.

Once again though, whatever the DIPE people told you, you certainly did not say to Mr Rohrlach, 'watch out, there's a Telecom line in the edge of the drain.' You didn't say that to him, did you?---Along the edge of the drain.

You did not - - -?---He never – he never run into any cable alongside of the drain, he run into the cable what crossed the drain which was clearly marked.

Yes.

HIS HONOUR: Sorry, Mr Van Den Hoek, all Mr Dalrymple is trying to get at this - - -?---Yeah, okay.

- - -what you were told and what you told Mr Rohrlach, that's all, not what was in the ground?---Okay, righto, he's told me there's cables and pipes running parallel with the drain, don't over excavate because you'll run into them.

MR DALRYMPLE: No, the question is what you told Mr Rohrlach. Do you agree that you did not say to Mr Rohrlach, 'don't over excavate, there's a Telecom line in the edge of the drain'. You didn't say it to Mr Rohrlach, did you?---I wouldn't have said that, no, I would've said pipes and cables."

46. Mr Rohrlach's evidence is not very different. In chief:

"So you arrive at Borroloola - - -?---I went to the Transport and Works yard and well that was prior arranged prior to us leaving the camp site that we would meet there because it was around bed time and I had the machine. Albert picked me up from there in his ute, he'd caught up to me by that stage, and we went for a quick drive up Robinson Road and he showed me the job site.

And that was in his vehicle?---In his vehicle, yes.

And who was driving?---Albert Van Den Hoek.

And were you – was the vehicle travelling from the direction of Rocky Creek up towards the school or was it travelling in the

opposite direction towards Rocky Creek?---We went up towards – from Rocky towards the school up. Albert did visit a man up there somewhere and then we came back down Robinson Road, stopping outside the crèche and where we had a discussion in the vehicle about the job and that is where he mentioned the Telstra cables and water mains rant parallel with the drain that had to be cleaned out." (T121 – 122)

"THE WITNESS: I used the word Telstra simply because to my knowledge there are no other cables, are there?" (T123)

"MR DALRYMPLE: Well can you tell us then what features you noted along the course of the drain that you were to clear?---I walked the drain site and at the second driveway, the top one being the crèche or kindergarten, and the second one down a private house. There was a Telstra cable marker outside the fence line. I understood that to be a marker, a parallel marker or line marker for the cable that runs parallel with the drain and then further down from there there was another little road, I don't even think it's part of the town plan but it goes to the creek or somewhere, and of course down to Rocky Creek which (inaudible 12.31.19)

And that was where – that was the section where the job was to end?---At Rocky Creek, yes.

So the stretch of drain was the crèche to Rocky Creek?---That is correct, virtually.

So you started off at the crèche end?---That is correct.

And at some - - -?---(inaudible 12.31.46) pipe in their driveway which was no problems at all. Cleaned the drain out down to the second one past the cable marker and I thought if there was going to be a cable in there I would've struck it and didn't because we weren't digging new ground, we were only cleaning silt out of the existing drain. The private house driveway, pulled up the pipe that was in there and there was still a piece of concrete in the ground, grabbed that and we had cables with it. Now, at – I then continued on with the job and finished the job off and I did not think that was a Telstra cable that I had pulled up.

And why was that?---Some years earlier sewerage ponds were put in across the road and I assumed that was part of the switching gear for those sewerage ponds." (T123-124)

"Now, I was asking you before the lunch break about an aspect of the job you did in Borroloola on 5 April 2003. We've heard a lot of discussion in the case so far about the dial before you dig facility that Telstra has available. Were you aware of that service as at 5 April 2003?---Yes.

And I think it's established in the evidence that you didn't make that inquiry yourself?---No, I didn't. It was a Saturday and the urgency of the job had been expressed upon me and I - because Mr Van Den Hoek had the opportunity to the do the work prior to this I had left and trusted him to have done all that beforehand.

Did you have any understanding when you started the job as to whether or not that inquiry had been made?---No, I did not ask him specifically that he had made it.

But what did you think?---I assumed that he had done it, made all the inquiries necessary and got the clearances to do this work." (T127-128)

47. And in cross-examination by Mr Christrup, counsel for the First Defendant:

"You were driving in his ute, in his car, out there?---We drove up past the job, yes, and stopped at the northern end, I think it is, to have a look at the job.

And you agree that there was discussion about cables?---That they were running parallel to the drain, yes.

Yes, So you accept that Van Den Hoek told you that DIPE had told him that there were cables running parallel with the drain?---Yes.

Thank you. And is it also the case that Mr Van Den Hoek told you not to over excavate?---No.

He did not tell you that?---Incorrect. At that point is where we discussed the dimensions of the drain.

At what point? I thought it wasn't discussed about over excavation?---Not the over excavating, no.

MR DALRYMPLE: The witness hasn't given that evidence.

MR CHRISTRUP: And at no stage did Mr Van Den Hoek tell you the Telstra cable does not cross the drain. Van Den Hoek never said the cable does not cross the drain?---He never said it does either.

No, but he didn't say words to the effect - - -

HIS HONOUR: He agrees with you, Mr Christrup.

MR CHRISTRUP: Okay, Thank you.

And you also accept, do you not, that during the cable discussion you did not ask Mr Van Den Hoek what sort of cables they were?---Correct.

You did not ask Mr Van Den Hoek whether he'd gotten a dial before you dig plan?---No.

You did not ask Mr Van Den Hoek to expose the cable for you?---No.

You did not ask Mr Van Den Hoek to mark out the cable for you?---No.

And you did not ask Mr Van Den Hoek how you should go about avoiding damage to the cable?---There was no cable to avoid.

But you didn't - - -?---There was no cable.

You knew there was a cable and you didn't ask Mr Van Den Hoek how you should go about avoiding damage to the cable?---By sticking to this 3 metres off the bitumen.

Did you ask Mr Van Den Hoek how you should avoid damaging the cable?---No.

And you would've noticed the phone box out there when you were out there?---From memory, I can only go by the fact that there was one there. I just don't actually remember it.

And you would've also been aware that the dial before you dig is a toll free service?---I am aware of that, yes.

And you're also aware of it at the time?---Yes.

48. The accounts by the two men being so similar, and there not being any particular crucial detail or details in the statements, my decision does not materially turn upon my assessment of their honesty as witnesses. Overall I found Mr Van Den Hoek to be a reliable witness, and good, if not useful

examples of his reliability appear in some of his answers above, where he admits himself unable to remember the exact words he used.

49. I thought Mr Rohrlach was a much less reliable witness. I have rejected, as has been seen, some of his evidence in relation to the MickDi Rehab stationery; I was not persuaded by his evidence that he took photographs of the site for reasons other than those arising from his having cut the cabling; I was not persuaded by his account that he thought the cabling was not Telstra's. But as it happens, in relation to his accepting the job from Mr Van Den Hoek, his evidence, by and large, seems as likely to be correct as Mr Van Den Hoeks, where they vary.

50. Having said that, I am not persuaded on the balance of probabilities that Mr Rohrlach actually assumed that Mr Van Den Hoek had seen a Dial before you dig plan, and that Rohrlach was implicitly relying upon that assumption, any more than I am persuaded that Mr Van Den Hoek actually assumed Mr Lutz had seen one and implicitly relied on that assumption. In my opinion, having seen both men give their evidence, it is much more likely that each simply failed, for reasons neither of them can now explain, to take the precautions in relation to cabling that bitter experience should have taught them.

51. It is, I think, fair to say that Mr Van Den Hoek was as careless as Mr Rohrlach, and a court of abstract equity might therefore wish to make his company equally liable. Mr Van Den Hoek would say – did say – that he wasn't the one actually doing the job and that if he had been he would have looked a lot more closely at the signage and the lie of the land. Perhaps he would have, and perhaps that consideration might shift the abstract equities. In any event, the law of negligence is not a branch of equity.

52. My conclusion as to the facts is that Mr Van Den Hoek retailed to Mr Rohrlach the same, or materially the same information he had been told by Mr Lutz. That information, by its vagueness and generality was not

information that any reasonable contractor would rely on as a source of knowledge as to the whereabouts of Telstra cabling. On the contrary, Mr Rohrlach was clearly to use his own wits and discretion when it came to doing the job. I am not persuaded that Mr Rohrlach relied on any representation or statements made by Mr Van Den Hoek. The only thing I am satisfied of is that he did not give the matter sufficient attention.

53. Nor is this a case in which Mr Van Den Hoek had any experience, expertise, or knowledge beyond that of Mr Rohrlach. What knowledge he had, he shared. The application of expertise to the particulars of the job was the province of the man who did it. This is in my opinion no basis to attach liability to the Second Defendant for any negligent misstatement by Mr Van Den Hoek.

54. Judgement for the plaintiff against the Second Defendant in the sum of $17,613.00 plus interest at 10.5% from 30 March 2004. The claim against the First Defendant is dismissed. I will hear the parties as to costs, and as to the interest calculation, if any question arises.

Dated this 1st day of June 2007

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Mr Richard Wallace
STIPENDIARY MAGISTRATE