CITATION:	*Kone Elevators Pty Ltd v The Proprietors of Units Plan 2002/40* [2007] NTMC 053
PARTIES:	KONE ELEVATORS PTY LTD v THE PROPRIETORS OF UNITS PLAN 2002/40
TITLE OF COURT:	Local Court
JURISDICTION:	Darwin
FILE NO(s):	20522706
DELIVERED ON:	16 August 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	27, 28, 29, 30 & 31 March 2007
JUDGMENT OF:	Ms M Little SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff:	Ms Kelly
Defendant:	Ms McLaren

Solicitors:

Plaintiff:	Cridlands
Defendant:	Asha McLaren

Judgment category classification:	
Judgment ID number:	[2007] NTMC 053
Number of paragraphs:	68

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

No. 20522706

[2007] NTMC 53

BETWEEN:

KONE ELEVATORS PTY LTD
Plaintiff

AND:

THE PROPRIETORS OF UNITS PLAN 2002/40
Defendant

REASONS FOR DECISION

(Delivered 16 August 2007)

Ms M LITTLE SM:

1. A claim is made by the plaintiff company as against the defendant, the body corporate of a building known as "La Casa" on 23 Woods Street Darwin (La Casa). The plaintiff is a company Kone Elevators Pty Ltd (Kone). Further Amended Particulars of Statement of Claim was filed on the day that this hearing commenced, 27 March 2007. A defence was filed in response and the hearing commenced and proceeded over five days. I reserved decision in this matter and this is now the decision.

2. The plaintiff is claiming damages, interest and costs as a consequence of the defendant advising that they no longer require the services of the plaintiff. The La Casa building had an elevator installed during the construction phase and a Kone elevator was installed. The plaintiff's claim is that the defendant had, through its conduct, entered into a ten year service agreement with the plaintiff, an agreement to service the elevator according to what is known as a "Kone Select Service Agreement". The defendant denies that it

was a party to this agreement and pleads that it had an interim implied agreement with the plaintiff for the continuation of the provision of services.

3. The plaintiff bears the onus of proof and the burden of proof is on the balance of probabilities. I have taken into account all of the evidence before the Court and summarise the evidence as follows.

4. Each of the parties tendered an agreed bundle of documents which were number P1 and D2 respectively. These documents will be referred to throughout the decision. There was some overlap in the documentation. The first witness called was Dennis Haslam. He is a maintenance co-ordinator with Lift Tronic Pty Ltd, a company unrelated to Kone. He worked from 1998 to 2004 with Kone as a service supervisor in Darwin and then went to Brisbane. As service supervisor for Kone he provided service to the clientele including body corporates. His role was to keep the machinery running and compliant with the law. It was a balance of administration and hands on work. Steven Dodd was his manager, based in Brisbane. His manager was to administer contracts and would attend at Darwin three to four times a year. Mr Dodd would make service agreements with clients and renew contracts, liaise with clients and discuss questions of warranties. The witness Mr Haslam was more involved in the service aspect of the work.

5. In the La Casa building Kone's installation team came from Brisbane and installed the elevator. There was then a handover phase from installation to service. There is a warranty period of 12 months from installation, when the service of an elevator is undertaken at no charge. The first contact he had from anyone involved in the body corporate at La Casa was from a lady named Eva Richley. Ms Richley had said that they had been disappointed with Whittles as body corporate managers and would be speaking directly with Kone about a maintenance contract for the lift. Ms Richley asked for a price and Mr Haslam said he would get the information and pass her details

on to the appropriate person in their organisation. He contacted her again and confirmed he would get the information she was seeking. On one occasion he had a call out and did some minor work on the lift at La Casa and introduced himself. He advised that it was not his function to get the price and that he would get on to Steve Dodd. He asked who to send correspondence to and he was advised that Fiona Murphy was the contact person for the body corporate. He passed that information on.

6. Early in December 2003 Steve Dodd came to Darwin. As the warranty period had expired, Mr Dodd wanted to see the clients with respect to the La Casa building. The contract was in limbo at that stage, in a role over period. Steve Dodd made the appointment and there was a luncheon meeting between Kone representatives Steve Dodd and Dennis Haslam and La Casa body corporate representatives Fiona Murphy and Eva Richley. This involved a luncheon at a Cullen Bay restaurant and a formal presentation. After introductions there was some small talk and lunch was ordered. Some alcohol was consumed whilst waiting for lunch and there was some talk about some parts of the contract. The contracts were on the table but they were not opened. Then Steve Dodd opened the contract, gave Ms Richley a copy of the contract and went through it point by point. Mr Dodd went through what was covered by the contract, work performed and the costs, exclusions, amounts and presented it step by step. The term of the contract was initially ten years and there was discussion about a shorter term. The La Casa representatives were advised it would be more expensive each quarter if they had a shorter period on the term of the contract. Mr Dodd explained that if there was a major equipment failure they would need longer time to recover the costs hence the higher fees for a shorter agreement. Steve Dodd asked the La Casa representatives if it was prudent to commence charging given that the time had already commenced. Mr Haslam could not recall exactly what was said by the La Casa representatives.

7. He became aware that the contract commenced (to use his words) and he started to do maintenance on the elevator at the La Casa building after that. There was regular monthly maintenance including inspections and repairs to components which were worn. A job report would be done for maintenance and those job reports sent to accounts. Initially he would put the client copy of the report into the body corporate letter box at La Casa, and then he sent them to Ms Murphy electronically. If there was a call out that the lift was not working they were required to attend within one hour and carry out repairs in the lift. If it was normal wear and tear there would be no charges, as that would be covered by the agreement. With respect to the lift in the La Casa building some guide slippers had to be replaced. That was a two hour process and that was covered by the agreement – there was no charge for that service.

8. There were approximately two call outs per month to the La Casa building. The witness referred to some tax invoices and documentation in respect to the service on the elevator. Document 1.13 in Exhibit D2 is an invoice in the sum of $176.00. This related to a call out where it was found that the governor had tripped after a power failure. This was said to be out of the control of Kone and therefore was a chargeable call fee. Reference was made to document 5 from Exhibit P1, the Kone Select Service Agreement, and in particular exclusion clause 3.1(a). That was said to be the relevant exclusion clause and the explanation for the invoice for $176.00. Exclusion clause 3.1(a) reads:

> "We have no obligations or liabilities in relation to
>
> (a) light and power mains and switch gear on the supply side of the main circuit breakers."

9. The next invoice that was referred to was document number 1.21 in Exhibit D2. This related to some work at the lift on the 9 September 2004. A damaged backing plate was replaced and a test undertaken of the unit. A charge of $242.00 would normally have been incurred since the nature of the

call was beyond the control of Kone. Nevertheless Kone advised as 'a commitment to customer service' they would waive the charge. Accordingly the invoice is $0.00. The witness pointed to exclusion clause 3.1(k) of the Service Agreement document 5 in Exhibit P1. This exclusion clause relates to work or replacement required by 'other than ordinary and reasonable use of equipment such as misuse, vandalism or theft…' The exclusion clause on the basis of misuse could have been invoked but was not invoked and there was no charge. The witness gave evidence that he left Kone before the contract or agreement was terminated by La Casa Body Corporate.

10. It was then cross-examined. He agreed that he had contacted Fiona Murphy with respect to at least two call outs. He had no idea about the contract between the builders and the elevator company. He did not know what the period of the warranty was with respect to the lift. He did not know the date of practical completion for the lift at the La Casa building. He was only aware of a maintenance contract. He was not aware of the construction contract. He could not specifically state the date of the maintenance contract. He agreed that no documentation had been produced with respect to the guarantee period. He agreed that he had undertaken maintenance on the lift during the warranty period. He could not say exactly when the warranty period ended. He did not put anything in writing to Ms Richley or Ms Murphy with respect to a service agreement. He had not spoken to Ms Richley about a Kone service agreement before 1 December 2003. He was referred to document 1.21 from Exhibit D2 and he agreed that it took more than a week between the call out and the work undertaken. He could not say if the damage was through misuse. He was then asked about document 1.13 with respect to the power failure. It was put to him that the governor could trip through a fault in the lift itself. He replied the governor would only trip if the lift was over-speeding or there was interference in the supply. It was put to him that this was not an exclusion to the service agreement. He considered it was.

11. With respect to the meeting on 1 December 2003, he said that Steve Dodd had made the arrangements. He did not know how much wine was consumed but knew that at least one bottle of wine had been drunk. He himself does not drink wine. He thought lunch went for one to one and a half hours. He agreed that Ms Murphy was talking more to Mr Dodd than to himself. The service agreement was originally in an envelope. He agreed document 1.4 in the documents D2 (the Kone Select Service Agreement) was one of the two documents given to the defendant's representatives at the luncheon. It was put to him that the agreement was given to the women at the conclusion of the luncheon. He recalled parts of the contract being discussed and he was not sure if the envelope was opened. He agreed Ms Richley received the contract and that she had queried the term of the contract, namely 10 years. He agreed that Ms Richley had said that they could not accept a contract without a resolution of the body corporate. It was put that Ms Murphy had no input into these discussions and in particular discussions about the agreement and replied that he could not recall. It was put to him that Ms Murphy did not touch the document and he said she didn't to his recollection. It was put that Ms Richley had said the price was excessive. He had queried who to address the correspondence to and he was advised to continue sending correspondence to Ms Murphy. There was some discussion about invoicing to commence. Ms Richley said they would need to go to the body corporate and they could not make a decision on behalf of the body corporate. It was put that they had not accepted the contract at the meeting and that was agreed. It was put that when they left the luncheon no contract had been entered into between the body corporate and Kone and he agreed. He recalled a discussion about the pricing for the tenure being offered (10 years). He could not recall a discussion of precise costings at that time for different terms of an agreement. He could not clearly recall exclusions that were being discussed. Ms Richley had opened the contract and the witness thought Ms Richley was following Mr Dodd directions through the contract although he did not think she was really reading the

contract. It was put that the luncheon was a social occasion rather than a business occasion. He replied that lunch was called primarily as a business function not a social function.

12. He was on sick leave in April 2004 and did not attend at the call which is set out in document 1.13 of D2. It was put to him that the reason there was a fee for that call was because there was no service contract. He replied that was not correct. In the period 2002 to 2004 there were 88 elevators under contract to Kone in the Darwin area. Some were still under warranty. Steve Dodd looks after all the contracts. The witness helped set up meetings especially in the transition between the warranty and service period. There were three meetings between different clients and Kone during that visit by Mr Dodd and Mr Haslam attended each of the meetings. It was put to him he may have been mixed up about what he recalled at the different luncheons and he said that was possible. It was put that the warranty period had expired in this case and that Kone had continued servicing the lift for two months. He agreed and said 'yes that had happened in good faith'. They had no reason to believe that the body corporate would not engage them. The warranty period had expired and a contract had not been signed. He had continued working and was not aware that the contract was not in place prior to the luncheon. He believed the contract was in place and had continued with his work under the assumption that a contract was in place. In the La Casa building the guide slips and rails were replaced in the lift and that was undertaken at no charge. The witness believed that was fixed under the warranty period. He was not sure whether the car door arms were repaired under the warranty period. He disputed that it was not usual for car door arms to wear out quickly. He did not agree that new lifts do not have increased maintenance. His evidence was that there was quite a bit of settling in work during the initial period of servicing a lift. Previously reports were generated on site by the technician and sent electronically to Brisbane. Now the information is automatically generated. Previously there

were three reports – one for the Darwin office, one for Brisbane and one for the client.

13. In re-examination he said that with respect to invoice 1.21 in Exhibit D2, it was indicated on the report that the damage to the backing plate and button was caused by excessive force. With respect to Exhibit 1.13 in D2 (the invoice for $176.00) his evidence was that the cause of the power failure was on the side of the mains and therefore it was within the exclusion clause in the service agreement. Whilst he did not undertake the call he identified his writing at the bottom of the call report where it set out where the invoice was to be forwarded to. In this case it was sent to the La Casa Body Corporate Attention Fiona Murphy. The call report sets out a section about whether it is a chargeable call or not. A technician will form the view as to whether the call is chargeable or not. People are trained how to determine whether services or repairs are within exclusions and this is usually clear. If there is any doubt the technician will consult their supervisor. He was asked what was said with respect to the body corporate approval after the meeting at Cullen Bay. His impression was that neither of the two women could make a decision without consulting the rest of the people in the body corporate. He was not sure if the car door arms were replaced within the warranty period. During normal inspections they would check the ropes and if there was a need for a change they would start organising resources. The client would then be advised that the lift would be out of service for awhile and it would take three to four weeks to get this organised. This would be covered under the comprehensive agreement.

14. The next witness was Steven Dodd. He is the Accounts Manager with Kone Elevators and covers the central district of Brisbane and the Northern Territory. He has been with Kone for 27 years. In 2003 he was a Service Manager. During that time he would travel three to four times a year to Darwin and he continues to do that. He lends support to technicians, offers quality service to Darwin and he is in a support role. He is involved in

converting lifts from free service to maintenance contracts and renewing maintenance contracts. He was shown document 5 in Exhibit P1, the Kone Select Service Agreement. The services included had been ticked at page 2. He indicated that this was a full comprehensive contract for maintenance and repairs. Exclusions are set out in section 3 on page 4 of the document. Anything that is needed to be done to the lifts is to be carried out under the agreement unless it is an exclusion under clause 3. The service fee is set out on page 2 and is a quarterly fee in advance. Clause 7 on page 5 sets out the variation of the service fee and how that is calculated. These are tied to a formula which is set out in clause 7. He was referred to document 12 in bundle P1, the Kone Elevators Pty Ltd Certified Industrial Agreement dated 21 April 2004 (the EBA). Clause 7.1 of the service agreement links back to this EBA with respect to calculations to variations of the service fee. Invoices are produced in Brisbane through a computer system; they are generated and sent in advance. Fees for call outs are not covered by the service agreement. The witness was directed back to page 2 of the service agreement and he said that the term of the agreement which was set out to be 10 years from the 1 December 2003. This was a long term agreement encompassing a range of things covered by the agreement. If there was a shorter agreement Kone may lose money to honour the agreement. A long term agreement was a way to cover costs. The shortest period in an agreement would be offered is three years or five years but these agreements have a more expensive service fee.

15. He was then referred to the lift at La Casa building. His first contact with Ms Richley was when he invited her to lunch to present a maintenance contract to her. The lunch was on 1 December 2003. He had not met Ms Richley or Ms Murphy previously. He invited Ms Richley and she asked if Ms Murphy could attend as well. He had obtained Ms Richley's contact details from Mr Haslam. They went to an upstairs restaurant in Cullen Bay. He introduced himself and had general conversation. They ordered lunch

and ate their lunch. Near the end of lunch he presented the maintenance agreement to Ms Richley in a blue folder with a clear cover. There was an introductory letter which also included an extract from page 2 of the service agreement. There was information on Kone maintenance, Kone licences and insurances at the back of the plastic folder. Two copies of the maintenance agreement were provided. The witness took copies of the contract from the back of the folders and gave one to Eva Richley and they went through the contract together. He gave some details about the company and their commitment to service. He explained that the lift at La Casa had a two door operation and that made maintenance a little more expensive. Mrs Richley referred to the fact that it was a ten year agreement being discussed and that she thought that was a bit long. He explained that equipment is expensive and so Kone needed to spread the risk of a major job needing to be done. She asked about other terms and he said there were three and five year terms but they would be more expensive. He explained what were included in the agreement and pointed out the items that were ticked as being included. He explained that it was 24 hours a day 7 days a week service. They would not cover excessive usage but would replace parts worn during normal wear and tear. He explained about electrical fusion, the contact details of Kone were confirmed and she indicated she wanted the address changed to Ms Murphy. Page four of the contract set out the exclusions, definitions and obligations.

16. His evidence was that he has a usual practice when going through the contacts and that he undertook that usual practice in this case. He went through the obligations on the parties and the variation of the service fee. He explained the variation which is linked to the EBA as a mechanism to pass on increase in costs. He explained that all property remains the property of Kone except the manuals. He explained if the building is shut down there is no need to service the lift anymore. He had a clear recollection of these matters being discussed at the meeting of 1 December 2003. Mrs Richley was going through the pages as the witness was going

through the contract. He believed that Mrs Richley and Ms Murphy were happy with the presentation. They had nodded towards each other. The witness handed over the folder and asked them to have a look and see if they had any questions to contact him. They left. There was no discussion about what would happen next. Nothing was said about getting other quotes. They were not asked to service in an interim period. He estimated costs if they needed a replacement of the lift drive as approximately $16,000, replacement of ropes approximately $12,000. Hypothetically if in July 2004 they had reported the drive was broken that would have been replaced and there would have been no invoice to La Casa.

17. He was then cross-examined. He agreed that the lift was installed in 2002. There was a warranty period before Kone was involved. They continued to service the lift until 31 March 2005 when they were prevented from accessing the building. His involvement in the case was from the warranty period to March 2005. He agreed that Kone had sold the lift to the developers but he did not know what date that was. Kone started its servicing of the lift from October 2002 until 2005. When the warranty period started he was in charge. He agreed it was his job to know when a warranty period expired. He was asked when it expired and he said in a date in 2003. It was put to him that the date was 26 September 2003 and he agreed that was possible. The acceptance certificate was shown to him and he agreed that the warranty period expired on 26 September 2003 (document 2 of Exhibit P1). Between the period 26 September 2003 and 1 December 2003 Kone continued to maintain the lift. He agreed this happened even though there was no service agreement in place. The first time he had handed the agreement and proposal to Ms Richley was 1 December 2003. It was put to him that it was a social lunch. He disagreed and said that it was a business lunch. It was put that at least two bottles of wine were consumed at the lunch and he said he did not remember two bottles. He agreed wine was consumed. It was put that there was no extensive discussion about the

contract. He said there was a presentation and they left soon after that. He said that Ms Murphy had been looking at the contract while Ms Richley was looking at it. It was put that he could not recall exactly what he had told Ms Richley and Ms Murphy. He could only recall what he had said about the service agreement. It was put that he made a number of presentations at the time and could not recall exactly what he had said. His reply was that he goes over every contract in a similar matter at every luncheon. It was put that Ms Richley queried the long term of the contract and he agreed. He disputed that she queried the price of the contract. He denied that Ms Richley had said they couldn't accept the contract without a resolution of the Body Corporate. It was put that neither Ms Richley nor Ms Murphy accepted the service agreement before they left. After a long pause the witness answered that they had not signed it and they weren't asked to. A letter dated 3 November 2003 addressed to the Body Corporate attention Ms Richley had been prepared but had not been sent. The witness brought it with him when he had travelled to Darwin and it was included in the folder with the contracts. He agreed that the offer was said to be open for thirty days. He agreed the letter had not been given to the Body Corporate of La Casa until 1 December 2003. His evidence was that the offer only related to the question of the price. He agreed that the letter did not specify that the 30 day offer only related to the question of price. He agreed that the document said that each party needed to sign the contract. He agreed the document had not been signed. He did not agree that there could not be an oral acceptance of this agreement. He agreed that the correspondence had said for the Body Corporate to sign the agreement first.

18. He stated that not all their agreements were signed. He agreed that the agreement was not signed by the Unit Plan but stated that they had acted on the service agreement. Kone had performed service according to the agreement even though it had not been signed. It was put that between 26 September 2003 and 1 December 2003 Kone had continued to service the

lift. This was agreed. It was put that after 1 December 2003 they continued to service the lift on the same basis. This was denied and the witness said it was under the terms and conditions of the agreement which had been handed to Ms Murphy and Ms Richley at the luncheon. There had been no indications given to him that there would be a problem with the Body Corporate accepting the agreement. It was put to him that no correspondence with respect to the agreement sent to the Unit Plan holders or the Body Corporate prior to 31 March 2005. The witness said there were phone calls made including calls to Eva Richley. He recalled making two phone calls. He had left messages and he did not receive a response. He agreed that he had never sent a letter to them setting out in clear terms that they were servicing the lift and requesting they sign the agreement.

19. On 1 December 2003 he asked Ms Richley if they could start billing as per the contract and that she had said yes they could. It was put Eva Richley never accepted the contract. He replied that Eva Richley had said the contract would not be a problem and that they could commence billing. He agreed this had never been followed up with any correspondence. He agreed that the invoices were automatically generated. He said the conversation with Eva Richley when she said it was ok to go ahead with the contract was at the end of the lunch meeting. It was put to him that Ms Richley had never said it was ok to go ahead and he denied that. It was put that neither Ms Richley nor Ms Murphy had advised they had authority to accept the agreement on behalf of the Body Corporate. He replied that they never said that they didn't have the power. He agreed that they never said that they did have the power.

20. The witness was directed to clause 7.1 in the Kone Select Agreement in Exhibit D2. He was referred to the service labour index (SLI) and the reference to the schedule which defined the SLI. It was put to him that there was no schedule in the agreement. He stated that he believed the schedule related to the Kone enterprise bargaining agreement (EBA). He agreed there

was no schedule attached to the document which had been handed to Ms Richley and Ms Murphy. He denied the agreement was incomplete. He agreed that at no stage between 1 September 2003 and 31 March 2005 that the defendants had ever been given a copy of the EBA. He agreed that the service fee had increased over time. He indicated that increase had occurred in line with clause 7.1 of the service agreement. It was put that Kone had never written to the Body Corporate saying the price had increased. The witness replied that he had explained the price would go up in line with clause 7.1 of the agreement. He agreed that the Body Corporate had not been written to about these increases. It was put that certain call out fees had been charged as there was no agreement in place and he denied that.

21. Around 3 March 2005 he received a letter from Red Rock with respect to services no longer being required. He agreed that Kone continued on with their visits and the sending of invoices. He was unaware how the service providers had been gaining access to the building. They continued sending invoices to the Body Corporate. After the letter from Red Rock the matter was handed over to the legal people. It was put that no-one in the Body Corporate accepted the contract orally. The witness said he believed that they did – they gave him an indication that there would be no problem with the agreement. It was put that no-one in the Body Corporate accepted the contract by its conduct and the witness replied that he believed they did.

22. The witness was then re-examined. He was asked how an indication had been made that the contract was accepted. He replied that after he had finished explaining the contract he caught sight of them and it seemed that they had accepted the agreement. Eva Richley's parting words to him were that there won't be any problem with this agreement. On 1 December 2003 he asked Eva Richley if he could start billing and she said yes. He agreed he had not said that in evidence in chief but it had just come to him. They were maintaining the lift up until the time of the new agreement. There was

a free guaranteed period and they had given them an extra one and a half months on that guaranteed period.

23. That was the close of the Plaintiff's case. On behalf of the defendant the first witness called was Fiona Murphy. She bought one of the units in 28 Woods Street building (La Casa) and in October or November 2002 occupied the unit. Whittle's attended the first Body Corporate meeting on 25 February 2003. A decision was made by the unit holders not to engage Whittle's as property managers. She nominated and was elected chairman of the Body Corporate. Eva Richley was elected as secretary and there were nine other body corporate members. She was the Chair until 25 February 2004. At that stage they examined tenders for property managers and Elke Sinclair from Red Rock Realty was accepted as the manager.

24. The developers of the building had purchased the lift in the building from Kone Elevators. The building was operational from 27 September 2002. There was a twelve month warranty period on the lift. That period ended on 26 September 2003. She was not aware of any documentation received with respect to continuation of the servicing the lift. No documentation had been tabled at any of the Body Corporate meetings. On 1 December 2003 there was a lunch with Dennis Haslam, Steven Dodd, Eva Richley and herself. They were at the Schooners Restaurant in Cullen Bay. She had previously met Dennis Haslam who had attended for some callouts of the lift. It was the first time she had met Steven Dodd. She saw the meeting as a good opportunity to network and be a responsible chairperson. Eva Richley had invited her to the luncheon saying that the Kone people were in town and wanted to take them for lunch. No-one had said anything to her about a business meeting. She thought of it as networking. She met Steven Dodd and Dennis Haslam there. There was general conversation and food and wine was ordered. Two bottles of wine were ordered. Lunch was for approximately for an hour to an hour and a quarter. In the last five to ten minutes there was some business discussed. Steven Dodd had pushed a

proposal across the table and Eva Richley picked it up. There was not a great deal of explanation given. They said that 'we will get back to you'. The witness said that 'unfortunately' they did not get back to Kone. She said there was no detailed explanation given of the agreement. The document had not been taken out and explained to them. She had carried the document off with her and said "thank you" and "we will get back to you". She left the document in the car with Eva. She did not see the document again. In the car Eva had said that that is a contract for ten years and we won't be accepting that. The witness agreed with Ms Richley. Exhibit D2 document 4 was identified that as the document which had been given to them at the luncheon. She had not seen that document again. She could not recall any explanation given about the difference in the terms of contracts. She did recall a ten year option being raised by Mr Dodd. There was no mention of a three or five year contract. Eva had said that we did not have authority to accept the contract between the two of them and they needed a quorum of five of the Body Corporate to accept.

25. The Body Corporate did not get back to Kone and Kone did not get back to the Body Corporate. The matter got overlooked and no-one actioned it. There was a warranty period where Kone serviced the lift and after that Kone continued servicing the lift. At no stage was the witness authorised by the Body Corporate to accept the contract. The only offer that was made to them was in terms of ten years. No offers for periods of three or five years were made. There were no communications with Kone after 1 December 2003. The Body Corporate did not communicate with Kone about the agreement. Kone maintained and serviced the lift after 1 December 2003. They had installed the lift and serviced it in the warranty period. They continued to maintain it and they invoiced the Body Corporate. The Body Corporate paid the invoices. The witness herself personally ensured that two invoices were paid. She was shown document 6 from Exhibit D2 and agreed that she had received that invoice dated 9 December 2003. That

invoice was in the sum of $646.03. This sum was paid and a copy of an electronic funds transfer was identified as document 8 in Exhibit D2. Document 7 of D2 was also identified, dated 9 December 2003 an invoice in the sum of $1,938.20. This invoice was the service fee for the period 1 January 2004 to 31 March 2004. Document 10 is the electronic funds transfer for the payment of this sum. She had made some call about the lift prior to the luncheon meeting but none after the luncheon. She was the Chairman of the Body Corporate from 2 February 2003 to 25 February 2004. There was no dialogue exchanged with Kone. The letter dated 3 November 2003 which is with the documentation which was handed to them at the luncheon meeting had not been sighted by Ms Murphy until a couple of weeks prior to her giving evidence. She had not seen the letter in 2003 or 2004. The letter was not pointed out by the Kone representatives at the luncheon. After 25 February 2004 Elke was appointed as the manager of the Body Corporate and that was communicated to the plaintiffs. The witness continued to receive email reports from Kone after the new managers were appointed. These were forwarded to Red Rock Realty. Apart from the emails about maintenance records she did not receive any other communications or dialogue from Kone.

26. She was then cross-examined. Eva Richley convened the first meeting of the Body Corporate. Ms Murphy was keen to be involved. Whittles opened the meeting and they introduced all the documents. Whittles then left the meeting and Eva Richley presided over the rest of the meeting. Eva Richley had been the first point of call with Kone with respect to the Body Corporate. Eva Richley invited her to a luncheon on 1 December 2003, she did not mention it was a meeting. The witness had no dialogue with Kone. She agreed that Eva Richley did the talking at the lunch meeting. She estimated that there was a discussion at the end of the meeting which lasted five to ten minutes. She did recall some discussion about a ten year contract. That was the only thing she could recall about the contract. It was

put that as the meeting was five to ten minutes long that that could not have been all that was said. She replied that he did not address anything more to her than about the ten years. The dialogue was exchanged between Eva Richley and Kone. She did not listen nor pay attention to what was being discussed. She was referred to document 6 in D2, the tax invoice from Kone in the sum of $646 and dated 9 December 2003. In particular she was referred to the fact that the reference was entitled "reference contract commencement date 1 December 2003". She agreed that she received the invoice and paid the invoice sum. She agreed that she did not contact Kone and enquire about the commencement date of 1 December 2003. She was then referred to document 7 in D2, another invoice dated 9 December 2003. The period of that invoice was to 31 March 2004. Once again there was a reference to a contract commencing 1 December 2003. She agreed she did not contact Kone and ask what the contract was. She agreed she did not query the amount. These were the only two invoices she received. The rest of the invoices went to the Body Corporate manager. She retired as Chairman of the Body Corporate after the February 2004 meeting. She did not go to a Body Corporate meeting after that. At that stage Red Rock Realty were appointed as managers. She agreed that after the meeting in December 2003 access had been given for Kone to perform services. She also agreed the bills had been paid. No correction had been made to the assertion on the documentation that a contract commenced on 1 December 2003. She had expected to get invoices from Kone. She did not know that Kone had serviced under a warranty for twelve months.

27. The next witness called was Eva Richley. She purchased a Unit in the La Casa building and settled on the property in January 2003. She is also a real estate agent. She could not recall the dates of occupancy. The lift was handed over at the time of the hand over of the property and formed part of the title. The first AGM of the Body Corporate was in February or March 2003. Whittles property managers had been brought in from the developer

and they had called the meeting. People at the meeting asked them to be excused from the meeting. The date of the meeting was 12 February 2003 and she was present at that meeting. The committee was elected. They decided to go it alone and manage the building themselves. They were not happy with Whittles. Fiona Murphy was chair and the witness was the secretary of the Body Corporate. There were about ten other members including Kate Boyd, Monica Richley, Kate Kendall and Helen Digby.

28. The lift was being maintained on warranty by Kone. There had been no documents received from Kone about the warranty. There were no communications from Kone about the warranty. She knew Steven Dodd. She had met him when the building was being constructed. This would have been in early 2000. The twelve month warranty on the lift expired twelve months after the certificate of occupancy. She was not sure when that was but thought it may have been around November 2003. Steven Dodd had said they were getting to the end of the maintenance period and you have to get a service document. She was invited to a luncheon in Darwin with Steven Dodd and the invitation came on the day of the meeting. Before that he had contacted her about how the lift was going and she had said words to the effect "so far so good" and had a general conversation. They went to the luncheon and present was Steven Dodd, Dennis Haslam, Fiona Murphy and herself. Lunch went for one and a half hours and two to three bottles of wine were drunk. There was some general chit chat and discussion about the Darwin development landscape.

29. At the end of the lunch the Kone representatives took a contract out of an envelope and handed it to them. She identified document 4 of Exhibit D2 as the document. The document was quickly gone through saying this is your service agreement for ten years. She said that was too long and he replied that it can be shorter but it is more expensive. The options of three five or ten years were not explained to her. After going through the documents she said she would have to take this back to the committee for resolution. The

contract involved a ten year period and was for a large sum of money. She was not willing to, nor did she have the authority, to sign the paper. She needed to have a talk with the committee and get in touch with Kone. She had not accepted the document at the luncheon or at any time later. Since that time she has spoken to Kone a couple of times about the document. They finished their drinks and then went home. She went with Fiona Murphy and spoke with Fiona about the contract. About three or four months later she bumped into Steven Dodd and they did not have much conversation. Then they got a letter from Cridlands saying they were being sued. There was no other communication in between. Kone serviced the lift for awhile in 2003 and then Elke came up with some new people to do the service of the lift. An independent Body Corporate manager was appointed in early 2004 namely Red Rock Realty and Elke Sinclair was from that organisation. They had not wanted Kone to service the lift since the warranty period expired and terminated their services about six to eight months after Elke was appointed.

30. She was then cross-examined. She was asked whether there were problems in the lift from time to time and she said three or four times a month if that. Before Elke was appointed tenants would call the lift maintenance people. She was directed to document 4 in D2. She agreed the package had been brought to the restaurant. Mr Dodds had called it an agreement. It was put to her that Steven Dodd went through the contract page by page with her. She agreed that that happened. She agreed that he had gone through the services that were being offered in accordance with page 2 of the document. She denied he talked about the client details. She denied it was said that Fiona was the contact person. She agreed that Kone had never sent her maintenance reports or invoices. They had been sent to Fiona Murphy. She agreed that he did point out the service fee of $1,762 plus GST per quarter. She said that he did not explain the variation for the increase in labour costs. He had said later that it can go up with ‘some industrial relationship thing

happening' and he said over a number of years it can be lowered. There was a telephone conversation later on that he had said next time I come to Darwin we will talk about it. There were a number of telephone calls later on. It was put that Steven Dodd had said to her "can we start billing you now". She said there were no words spoken about starting to bill us. She agreed that prior to 2003 they had not received a bill from Kone. It was on warranty then. In re-examination she said she had been told much later on about industrial relations – it was at the time of her operation in 2006. They had been flipping through the document as Steven Dodd was talking about it at the luncheon. They had not been reading the document at the luncheon. That was the close of the defendant's case. Throughout the hearing there had been some rulings on the admissibility of documents. Submissions were then made and the decision reserved.

31. I will deal with issues relating to the witnesses including issues of credit. Dennis Haslam was no longer associated with the plaintiff company at the time he was giving evidence. He answered carefully and thoughtfully and, in my view, honestly. I formed the view he was the most impressive of the witnesses in the matter. To the extent he was cognizant of the facts, his evidence can be accepted as reliable. Steven Dodd was still associated with the plaintiff company in a relatively senior management role at the time of the hearing. It is possible he felt the pressure that an employer can place on an employee to 'win the case'. I do not suggest that the plaintiff company did place pressure on the witness, but that it is possible he felt some pressure. Notwithstanding the commercial realities of the business world, a witness must take off the corporate suit when they enter the courtroom. As with any witness, they must answer according to the oath or affirmation they have taken. This witness often resorted to giving evidence of his usual practice rather than what happened in the instant case. That appeared to be evasive at quite important times in his evidence. He demonstrated a great deal of irritation while being cross examined and this had a negative impact

on his evidence. He was not comfortable giving his evidence. At times he did not answer responsively to the questions put. He was not an impressive witness but I do not reject his evidence in its entirety.

32. Fiona Murphy gave evidence in a somewhat constrained way but was always extremely careful in her evidence. She gave as precise an answer as possible to the questions asked in evidence in chief and cross examination. Her evidence can be relied upon. Eva Richley was extremely ill at the time she gave evidence. At times she suffered some confusion, especially as to dates. I formed the view that this case was causing her considerable stress and that this stress may also have affected her memory. Notwithstanding this, her evidence was consistently strong on issues such as whether there was an agreement at the end of the luncheon meeting. Her evidence is relied upon in part.

33. Findings of fact will now be made. There is no signed agreement between the parties – this is not in dispute. During the hearing the plaintiff advised that they no longer relied upon an agreement being made at the luncheon meeting. The case is now formulated on the basis that, through its conduct, the defendant has accepted the plaintiff's offer in the terms of the Kone Select Service Agreement.

34. I find that Kone serviced the lift at the La Casa building at no cost from the beginning of the warranty period, 27 September 2002 until 26 September 2003. I find that Kone serviced the lift at the La Casa building at no cost from the end of the warranty period, 26/27 September 2003 until 1 December 2003. The latter period of free servicing was in part related to Kone's operational decision to have the Service Manager responsible for Darwin lifts, Steven Dodd, based in Brisbane. It was also in part due to the fact that follow up had not occurred in a timely manner – which could have occurred by way of correspondence or other forms of communication.

The plaintiff company is a large international organisation with over 100 years of experience (see material supplied in the proposal handed to the defendant on 1 December 2003 – Exhibit D2 doc 4). The Defendant Body Corporate for the La Casa building is an untutored group of people who had decided, for reasons unknown, not to engage a property manager to manage the body corporate. Ms Richley had some experience in property matters but, as a group, they were inexperienced. They were established as a Body Corporate and on 25 February 2003, at their first meeting, elected not to appoint a property manager and decided to undertake the management of the property at the La Casa building themselves. This was nine months before the meeting on 1 December 2003. As at 1 December 2003, they were a relatively new Body Corporate.

35. I find that there was no relationship between Kone and the Body Corporate prior to the luncheon meeting on 1 December 2003. Eva Richley was contacted by Steven Dodd on the day of the luncheon meeting. Mr Dodd was the person authorised by Kone to enter into discussions and/or negotiations relating to an Agreement to service the lift at the La Casa building. A luncheon meeting was held on 1 December 2003 at a Cullen Bay restaurant. Mr Dodd was authorised to speak on behalf of Kone and enter into discussions or negotiations on behalf of Kone. Mr Haslam attended the luncheon meeting but had no authority to enter into discussions or negotiations on behalf of Kone and did not do so. He was the man on the ground in Darwin from an operational point of view. There were good reasons for Mr Haslam to attend the luncheon, including that Ms Richley had first raised with him the question of the ongoing maintenance of the lift. Ms Murphy presented to the court as somewhat naïve as to why she was attending the luncheon, though I do not doubt her evidence as to her understanding of the lunch. She was invited by Ms Richley.

36. I find that the function on 1 December 2003 was a business luncheon, albeit there was very little business discussed. I find there was no reason for Kone

representatives to meet with, and pay the expenses of, Ms Richley and Ms Murphy other than as representatives of potential Kone clients and in particular as representatives of the La Casa building Body Corporate. Ms Murphy and Ms Richley, as Chairperson and Secretary of the Body Corporate, were appropriate people to meet with to discuss the ongoing maintenance and servicing of the lift in the La Casa building. While they were appropriate people to meet with, I find Ms Murphy and Ms Richley had no authority to enter into an agreement with Kone on 1 December 2003. They were invited to the luncheon meeting on the same day as the luncheon. There was no resolution of the Body Corporate giving them authority to enter into an agreement with Kone. I find this fact was verbally communicated to Mr Dodd at the luncheon meeting. Mr Dodd could hardly have been surprised about that. There was no prior communication between Kone and the Body Corporate. Body Corporates are bodies which operate according to Statute. Decisions are made by way of a resolution following the calling of a meeting. A meeting can only make a valid resolution if a quorum is present. Correspondence is ordinarily tabled at Body Corporate meetings. Mr Dodd had not sent the letter dated 3 November 2003 which was addressed to the "Body Corporate" of La Casa building. There is no evidence before the Court as to why that letter, which had enclosed a copy of the Kone Select Service Agreement, had not been sent after it was prepared. The letter was marked to the attention of Eva Richley, confirming the evidence that Ms Richley had initiated the question of the ongoing lift maintenance.

37. I find the Body Corporate had no prior notice of the Kone Select Service Agreement which was tabled at the luncheon meeting on 1 December 2003. Document 4 in Exhibit D2 is the original document handed to Ms Richley and Ms Murphy on 1 December 2003 by Mr Dodd as the Kone representative. It is in a blue plastic folder and contains the letter dated 3 November 2003 which encloses a copy of page 2 of the Agreement, a Kone

Select Service Agreement said to be between "The Body Corporate La Casa and Kone", some information about Kone, Mr Dodd's business card and a document entitled 'Details of Insurance Cover and Licences'. The material in the folder was seen on 1 December 2003 by Ms Richley and Ms Murphy for the first time. Parts of the Agreement were explained by Mr Dodd to Ms Richley and Ms Murphy. Ms Murphy was not paying a great deal of attention. Mr Dodd was directing most of his attention to Ms Richley. I find that the term of the proposed agreement (10 years) was raised in the briefing. The term proposed was queried by Ms Richley as being a long time.

38. I find there was an explanation given by Mr Dodd as to the fact the ten year agreement will lead to a less expensive quarterly fee than an agreement for a shorter period of time. While it could not be said to be a full briefing, there was no obligation on Kone to provide a full explanation of the Agreement. The material contained in the folder handed to the Body Corporate was for the Body Corporate to consider. They had decided to act as property managers for the La Casa building and part of that task was to consider documentation such as this, if they were considering entering into the Agreement. The material from Kone was never tabled at a Body Corporate meeting and the possibility of entering the agreement was never discussed at a Body Corporate meeting. Kone were never advised of these facts.

39. I find that not all the material relevant to the Kone Select Service Agreement was provided to the Body Corporate, either on 1 December 2003 or at any time that Kone was servicing the lift at the La Casa building. The Agreement sets out in clause 7.1:

> "the service fee will increase or decrease by the percentage of increase or decrease in the Kone Elevators Service Labour Index (SLI) as compared with the index for 01042003 which was 112.00. The SLI is defined in the schedule. If this index is varied,

> consolidated, replaced or ceases to exist, SLI will be a reference to such other index as we consider most closely approximates the SLI before any such variation, consolidation, replacement or cessation".

There was no schedule attached to the Agreement which was handed to the Body Corporate members. No schedule was ever provided to the Body Corporate. There was no indication of what a "SLI" was or how it could be determined. On the material provided to the defendant, the Body Corporate had no way of knowing how the service fee would increase or decrease, or how the calculations would occur.

40. Further clause 7.3 sets out in part:

> "In addition, the Service Fee will be varied in respect of any additional costs, taxes, or other expenditure arising including … any agreement, including Enterprise Bargaining Agreement (reached between a trade union or unions and an association of employers or the Company) or any which is applicable to the Lift Industry or applicable to the classifications or our employees specified in the SLI".

Clause 7.3 makes a reference to the SLI (which had not been scheduled to the Agreement). Clause 7.3 also refers to an Enterprise Bargaining Agreement (EBA) which had not been provided to the Body Corporate. Document 12 from Exhibit P1 is now before the Court which is the relevant EBA from 21 April 2004 to 1 October 2006. Clause 9 of the EBA says it was to come into force from 1 October 2003 for 3 years. The end date of the EBA (1 October 2006) seems to indicate that it was in force as at 1 December 2003, the date of the luncheon meeting. This EBA was never forwarded to the defendant at any time that Kone was servicing the lift at the La Casa building.

41. I find that the Kone Select Service Agreement handed to the Body Corporate members on 1 December 2003 did not represent the entire proposed Agreement. There was no Schedule attached to the Agreement setting out

the SLI and no copy of an Enterprise Bargaining Agreement. I find that this material was not provided to the defendant at any stage that the plaintiff was servicing and maintaining the lift in the La Casa building and invoicing for such service and maintenance.

42. Invoices sent to the Body Corporate members by the plaintiff were paid in full for some time and increases in the initial quarterly service fee can be seen. There was never any advice to the defendant as to the basis of the calculations for the increases in the fees. According to the Kone Select Service Agreement handed to the defendant, the initial service fee was $1,762 plus GST per quarter. This totalled $1,938.20 and was the figure charged for the first full quarterly period from 1 January to 31 March 2004 (see P1 document 7). The very next quarter there was an increase in the quarterly fee to $1,851.30 plus GST – totalling $2,036.43. There was no notice or explanation given for this increase in the service fee. This could have been because, as no 10 year agreement had been signed by the Body Corporate, that a higher rate was being levied against the Body Corporate. It could have been calculated by reference to the "SLI "or had some connection to an EBA. Kone never advised the defendant of the extra costs if they elected to enter an Agreement for a term less than 10 years. There was no way that this Body Corporate could have known what was the basis of the increase in the service fee. Further increases in fees occurred without notice or explanation.

43. I find that the Body Corporate paid the invoices in good faith and without intending to imply that they had entered into a ten year Kone Select Service Agreement. I find that the Body Corporate paid the invoices as they were sent. While this may have been somewhat naïve given the amounts of money concerned, and the fact that members of the Body Corporate were affected financially by these actions, I find that is what occurred.

44. Kone had not dealt with this Body Corporate, or indeed any other Body Corporate with respect to the La Casa building, before. It was not the case that this was an ongoing relationship. When assessing whether an agreement or contract can be implied the fact of an ongoing relationship can be important. I do not suggest that it is essential that there be an ongoing relationship before an agreement or contract can be implied but it is a matter to be taken into account.

45. The plaintiff knew that the defendant was a Body Corporate and could not enter into an agreement such as the Kone Select Service Agreement without a valid resolution of the Body Corporate.

46. Without any notice or prior discussion, the Kone Select Service Agreement was prepared to commence on 1 December 2003, and handed to the Body Corporate members on that day, the day of the luncheon meeting (see page 2 of the Agreement Exhibit D2 document 4). Despite Kone being told that Ms Richley and Ms Murphy had no authority to accept the proposal, invoicing commenced immediately – with the first invoice being for part of a quarterly period from 1 December 2003 to 31 December 2003 (Exhibit P1 document 6). Kone lost service fees from the La Casa building from the end of September 2003 to the end of November 2003 due to its inaction. Ms Richley has initiated the commencement of discussions between the Body Corporate and Kone by raising this with Mr Haslam. That is not to say that there would not have been an approach by Kone at some stage, but the evidence before the court is clear and uncontroversial – Kone did not initiate the discussions. The Defendant Body Corporate did. That is not an insignificant factor in this case.

47. The defendant did not communicate to the plaintiff that they had rejected the proposal put to them on 1 December 2003. They did not communicate to the plaintiff they had accepted the proposal. They did not act one way or the other. They did not communicate directly to the plaintiff their attitude as the

Kone Select Service Agreement and in particular the length of the Agreement. The length of the Agreement had a direct bearing on the quarterly service fee and I find was a key issue which Kone needed to have certainty on. It was not until 31 March 2005 that they purported to terminate the services of the plaintiff.

48. The invoices rendered to the defendant by the plaintiff stated the commencement date of the 'Contract' as being 1 December 2003, but did not mention the length of the contract period. This was the day of the luncheon meeting. The invoices then referred to a particular period for the service fee such as from 01/12/2003 to 31/12/2003 and from 01/01/2004 to 31/03/2004. The length of the contract and in particular the ten year period is not mentioned on any invoices.

49. The invoices refer to a 'Contract', they do not mention an Agreement and in particular they do not mention the Kone Select Service Agreement. While it could be said that the defendant was ill advised not to follow up what was meant by the term 'Contract', they were never advised either in writing or orally that Kone considered they were parties to a Kone Select Service Agreement for 10 years. This was despite the fact that the Agreement was never entered into in writing.

50. Clause 9 of the Kone Select Service Agreement relates to Insurance:-

> "We will for the duration of the service agreement, take out insurance against all claims arising from injuries to our employees. Where permitted by law, the policy will be endorsed to indemnify you against any liability as principle under the applicable Workers Compensation laws. We will for the duration of the service agreement effect public liability insurance to a minimum value of ten million ($10,000,000)".

51. There is no evidence before the Court that Kone complied with its stated obligations under clause 9 with respect to insurances relating to the lift at the La Casa Building. There is no evidence of notification to the Body

Corporate of such compliance. The 'Details of Insurance Cover and Licences' which are at the back of the blue plastic folder which was handed to Ms Richley and Ms Murphy sets out general insurance details and does not particularise the La Casa building with respect to Public Liability insurance. Clause 9 would have required that to have occurred. Further, each of the insurances set out expired soon after 1 December 2003 and there is no evidence before the Court that they were renewed or that advice of their renewal was given to the Body Corporate.

52. Ms Murphy was clear in her evidence that the Body Corporate had not taken a professional approach in its dealings with Kone. The Body Corporate did not get back to Kone and Kone technicians continued servicing the lift at La Casa. Nevertheless, they did respond to the invoices sent by Kone. Invoices were paid as they were rendered.

53. There was no decision made by the defendant to engage Kone to undertake the servicing of the lift either in pursuance of the Kone Select Service Agreement or under any other agreement. The Body Corporate did not act to stop the servicing of the lift by Kone. As stated previously there was a period where no charges were rendered subsequent to the end of the warranty period. Mr Haslam continued servicing the lift exactly as he had done prior to 1 December 2003. He was never advised one way or another as to whether there was a 10 year agreement in place.

54. Access to the La Casa building was not denied to Kone and they were able to undertake the servicing and maintenance of the lift as they had previously done. They were entitled to conclude that the defendants had intended there be an ongoing relationship between them. The question remains what was the nature of the relationship or the arrangement which is to be implied between the parties. The burden of proof is not on the defendant to prove the nature of the relationship. The burden of proof rests with the plaintiff and unless they discharge that burden, the claim will not be made out.

55. At no stage did the plaintiff seek to follow up the question of the signing of the Agreement by the Body Corporate. At no stage did they make any enquiries as to whether the Body Corporate accepted the terms of the Kone Select Service Agreement. The case for the plaintiff centres on the fact that the defendant did not communicate to the plaintiff that they were not committed to the Kone Select Service Agreement and the ten year period. As previously set out, the term of the Agreement had a correlation with the service fee of the Agreement. I have found that this correlation was understood by at least one of the representatives of the Defendant who attended the luncheon meeting namely Ms Richley.

56. The Kone Select Service Agreement document was prepared and not forwarded to the defendants in November 2003, even though there is a covering letter with that document dated 3 November 2003. An Agreement was handed to the defendant's representatives on the day it is stated to commence 1 December 2003. Approximately one week later invoices were rendered also dated the date of the luncheon meeting. There was no agreement that invoicing could commence and indeed the plaintiff's representative had been told that the defendant's representatives had no authority to enter into a Kone Select Service Agreement or any other Agreement. No follow up was carried out by the plaintiff to ask whether the defendant proposed entering the Agreement. It is open on the facts to find that the plaintiff relied upon the inexperience of the defendants in this transaction. The ongoing servicing of the lift and invoicing placed the defendants in a position of apparent obligation which they responded to by paying the invoices as presented to them. There had been no prior relationship between the parties.

57. The tax invoice dated 2 March 2004 in the sum of $176 (document 13 in Exhibit D2) was referred to at the hearing. This related to the call out fee for an attendance by Kone after the governor had tripped following a power failure. The call report says that it is a chargeable call. Accordingly, a call

out fee and GST was charged. The call out report makes no reference to the Kone Select Service Agreement and under which exclusion clause the call out fee was being rendered. The tax invoice makes reference to a customer number for the Body Corporate at La Casa Building but makes no reference whatsoever to any Agreement or contract. There is no reference to this call out being an exclusion under the Kone Service Select Agreement and no reference to a clause number said to be the exclusion clause from that Agreement. There is no reference to a contract commencement date, which has been listed on the invoices for the quarterly accounts. There is no basis set out for the tax invoice being rendered to La Casa Body Corporate. There is no way the Body Corporate could be aware of why they were being charged this fee. The plaintiff has not asserted in the documentation that this tax invoice relates to an exclusion under the Kone Select Service Agreement.

58. Another tax invoice which was prominent in the hearing related to a call on 9 September 2004. That was also said to be a chargeable call on the call report. On the tax invoice no charge was rendered. The call report and tax invoice became document 21 in Exhibit D2. It is stated on the tax invoice that a charge of $242 would normally have been incurred but as a commitment to customer service the fee was waived. Once again there is no reference on any of the documentation to the Kone Service Select Agreement and there was no reference to an exclusion clause which may have applied in this case. Once again the tax invoice has a customer number on it but does not have any reference to a contract commencement date (or expiry date), or an Agreement.

59. Neither of these tax invoices assist the plaintiff's case. In evidence there was an assertion that these tax invoices related to particular exclusion clauses in the Kone Service Select Agreement. This information was not communicated to the defendant at the time the invoices were rendered. Had the relevant exclusion clause been noted in the tax invoice or on the call

report, the defendant would have had some notice as to the basis of the tax invoice (or in the case of the second tax invoice the waiving of the charge). No such communication was made. The tax invoice in the sum of $176 was paid by the defendant on 21 May 2004. The defendant had continued to pay invoices as they were being rendered and this was no exception.

60. The relevant case law has been referred to in submissions and it is accepted that the leading case with respect to this issue is *Brambles Holding Ltd v Bathurst City Council* [2001] 53 NSWLR 153 a decision of the High Court of Australia. The remarks made at paragraph 74 of that decision relating to ongoing relationships do not apply in this case, but it is accepted that a contract can be found to exist even though it is not easy to locate an offer or acceptance. *Brambles* referred to the case of *Brogden v Metropolitan Rail Company* (1877) 2 AppCas 666 where at page 682 it was held:

> "…although there has been no formal recognition of the agreement in terms by one side, yet the course of dealing and conduct of the party to whom the agreement was propounded has been such as legitimately to lead to the inference that those with whom they were dealing were made aware of that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who had so dealt with them".

61. The Court in *Brambles* also referred to the case of *Meates v Attorney General* [1983] NZLR 308 at 377:

> "I would not treat difficulties in analysing the dealings into a strict classification of offer and acceptance as necessarily decisive in this field, although any difficulty on that head is a factor telling against a contract. The acid test in the case like the present is whether, viewed as a whole and objectively from the point of view of reasonable persons on both sides, the dealings show a concluded bargain".

The Court also referred to the case of *Vroon BV v Fosters Brewing Group* 2 VR 32 at page 81:

> "…agreement and thus a contract can be extracted from circumstances where no acceptance of an offer can be established or

> inferred and where the most that can be said is that a manifestation of mutual assent must be implied from the circumstances".

Further, the High Court referred to *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* 14 NSW 523 at 535 where it was stated:

> "… where an offeree with a reasonable opportunity to reject the offer of goods or services takes the benefit of them under circumstances which indicate that they were to be paid for in accordance with the offer, it is open to the tribunal of fact to hold that the offer was accepted according to its terms".

62. I find that the defendant in this case did not have a reasonable opportunity to reject the offer of the services of the plaintiff. The lift had previously been serviced by Kone, firstly on a warranty period and then during a period of service without charge. This had not been a subject of any agreement between the plaintiff and defendant but rather occurred due to the inaction of the plaintiff. The lift needed to be kept in good repair – not only for the benefit of the Body Corporate but also for other persons who used the lift. The defendant initiated discussions about servicing the lift. On 1 December 2003 the plaintiff handed documentation to the defendant's representatives (Document 4 of Exhibit D2) which included a letter of offer dated 3 November 2003. That letter advised that there was an offer which was valid for a period of 30 days. The period of the offer was therefore open until 3 December 2003, some 48 hours after the luncheon meeting. The plaintiff was aware it was dealing with a Body Corporate. They were explicitly told at the luncheon meeting that no agreement could be entered into by the defendant's representatives at the luncheon meeting. The plaintiff immediately commenced invoicing from the date of the luncheon meeting. In these circumstances, I find that the defendant did not have a reasonable opportunity to reject the offer.

63. The next issue relates to the benefits which have been obtained by the defendant. The plaintiff's case is that, had a major breakdown occurred requiring major costs to be incurred by the plaintiff, those costs would have

been borne by the plaintiff. That is the evidence of the plaintiff on this point. There was never an opportunity to test that evidence by way of a breakdown which in fact incurred significant costs. I have accepted Mr Haslam as an honest witness. Nevertheless, I find that it would not have been his decision as to whether or not this level of costs would have been incurred by Kone in a situation where a Kone Select Service Agreement for a term of 10 years had not been entered into by the Body Corporate in writing in accordance with page 3 of the Service Agreement. I am not satisfied on the evidence before me that major costs would have been incurred without the Agreement being formally entered into by way of the Body Corporate signing the Service Agreement. The risk of incurring significant costs such as this was the very reason for the proposal being put by Kone for a 10 year term. The plaintiff has not satisfied the Court they would have incurred those costs without a signed Agreement for 10 years.

64. One of the most significant benefits for the defendant under the Kone Select Service Agreement are the insurance provisions in clause 9 of the Agreement. Without Kone taking out the relevant insurances the defendant is at risk of incurring liabilities, for example, with respect to public liability. There is no evidence before the Court that the defendant received the benefit of the insurances which are referred to in clause 9 of the Agreement up to and including 31 March 2005. They may in fact still be at risk of liability for a claim. The Court is not satisfied that the defendant took all the benefits of the Agreement.

65. The High Court in *Brambles Holdings v Bathurst City Council* (cited above) sets out as follows at paragraph 81:

> "In the light of the above cases *(some of which are cited above in this decision)*, it is relevant to ask: in all the circumstances can an agreement be inferred? Has mutual assent been manifested? What would a reasonable person in the position of the Council and a reasonable person in the position of the defendant think as to whether there was a concluded bargain?"

I find in this case that a reasonable person in the defendant's position would not have believed there was a concluded bargain in terms of the Kone Select Service Agreement for 10 years. I rely on the findings and facts as set out above in coming to this conclusion.

66. In all the circumstances can an agreement be inferred? What would a reasonable person in a position of the plaintiff think as to whether there was a concluded bargain? These questions cannot be answered without taking into account all the circumstances and facts surrounding the case together with findings made. These are all taken into account and I find that a reasonable person in the plaintiff's shoes would not have concluded that there was a concluded bargain for a Kone Select Service Agreement for a 10 year period as between the plaintiff and the defendant. While all facts and circumstances are taken into account, the following matters are specifically taken into account in making this finding. There is no prior relationship between the plaintiff and the defendant. There was no canvassing of a proposed arrangement prior to 1 December 2003. Part of the material handed to the defendant was almost out of date (the letter of 3 November 2003 giving only 2 days to consider an offer said to be open for 28 days) and the proposed Agreement was dated the date of the luncheon meeting. There was clear indication that the proposal could not be agreed by the persons at the luncheon. The term of the Agreement was queried. There was no communication whatsoever as between the plaintiff and defendant with respect to the Agreement. The plaintiff continued servicing the lift as it had done up until 30 November 2003. There was no schedule attached to the Agreement and no copy of the EBA provided. There was no advice as to how the increase in service fees would be calculated. There was no proof that the relevant insurances had been taken out with respect to the lift at La Casa building in accordance with the Agreement. There was no notice as to the increase in prices of the quarterly service fee period and in particular, no notice as to how the calculations were made. These increases in costs could

have been accounted for by the fact that the 10 year agreement had not been entered into and that fees for a shorter period were now being charged. There was no reference to the Kone Select Service Agreement in any of the invoices. The reference was to a "Contract" with a commencement date and no termination date. There was never a reference to a 10 year period on any documentation. The two separate tax invoices (apart from the maintenance service fee which were rendered on a quarterly period after the first one month period) do not refer to any form of Contract or Agreement and do not give any explanation as to why these were being rendered save and accept the word "chargeable call" was listed on the call report.

67. I have considered all the evidence in the matter and find that a reasonable person in the position of the plaintiff would not have been entitled to believe that there was a concluded bargain that the defendant had entered a Kone Select Service Agreement for a ten year period. I find that the defendant did not accept the plaintiff's offer to enter into the Service Agreement by its conduct.

68. The claim of the plaintiff is dismissed. The defendant has sought an order for costs. I will hear the parties on the question of costs and any other applications at a convenient time. If orders on costs and any consequential matters are proposed to be made by consent I will ask that the parties prepare consent orders and file them in the court.

69. I will make the following orders and direct that the orders and these reasons be forwarded to the Solicitors for the parties.

70. 1. The Claim of the Plaintiff is dismissed.

71. 2. Costs reserved.

72. 3. Liberty to call on with respect to costs and any other applications consequential to the order dismissing the claim.

73. 4. Reasons for decision are published. A copy of this order and reasons are to be forwarded to the Solicitors for the Parties.

Dated this 16th day of August 2007.

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Melanie Little
STIPENDIARY MAGISTRATE