

CITATION: *Virtual Interiors (Aust) Pty Ltd v Tom Manolakas* [2008] NTMC 003

PARTIES: VIRTUAL INTERIORS (AUST) PTY LTD  
(ACN 096 974 033)

**PLAINTIFF**

v

TOM MANOLAKAS

**DEFENDANT**

TITLE OF COURT: Local Court

JURISDICTION: Darwin

FILE NO(s): 20518856

DELIVERED ON: 14 January 2008

DELIVERED AT: Darwin

HEARING DATE(s): 4 & 5 June, 7 December 2007

JUDGMENT OF: Melanie Little SM

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Plaintiff:	Mr Christrup & Ms Traeger
Defendant:	In person

*Solicitors:*

Plaintiff:	Hunt & Hunt
Defendant:	Unrepresented

Judgment category classification: C

Judgment ID number: [2008] NTMC 002

Number of paragraphs: 70

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

No. 20518856

*[2008] NTMC 002*

BETWEEN:

**VIRTUAL INTERIORS (AUST) PTY  
LTD (ACN 096 974 033)**  
Plaintiff

AND:

**TOM MANOLAKAS**  
Defendant

REASONS FOR DECISION

(Delivered 14 January 2008)

Ms LITTLE SM:

1. The plaintiff claims against the defendant in debt, damages, restitution, interest and costs in the Second Further Amended Statement of Claim. The amount in the debt claimed is \$50,952. There are also claims in damages and restitution. The defendant disputes the claim in its Amended Notice of Defence dated 23 January 2007. A hearing was conducted in the matter and the decision was reserved. This is now the decision in the matter.
2. The defendant was unrepresented, some of his cross-examination was more in the form of statements and evidence. I am satisfied the plaintiff understood the defendant's case and the defendant understood the plaintiff's case. There was oral evidence taken and documentary evidence tendered. All material was taken into account. I now summarize the evidence in the matter.
3. Exhibit P1 is the ASIC extract of incorporation for Virtual Interiors (Aust) Pty Ltd (hereinafter called Virtual Interiors). The ACN is 096 974 033.

4. The first witness called was David Spagnol, Managing Director of Virtual Interiors. His business undertakes shop fittings for food tenancies and is based in Sydney. The business designs and project manages shop fittings. Virtual Interiors undertakes the manufacture of some of the fittings including items made from sheet metal and joinery items. They have a workshop in Sydney and have been a company for seven years. A design company named DS17 asked the plaintiff to tender for a Café project in Darwin. On 24 January 2005, DS17 sent Virtual Interiors documentation with respect to the tender (P2). In evidence, the witness went through the items on the tender documentation and set out the items that were included in their tender.
5. DS17 was the defendant's designer and the plaintiff understood DS17 was working on behalf of the defendant. DS17 undertook design, prepared drawings and assisted with the tender process. Virtual Interiors faxed a quote to DS17 with respect to the tender. The quote was in the sum of \$154,400 plus GST and included installation. The quote was dated 1 February 2005 and became Exhibit P3. DS17 requested Virtual Interiors to do a breakdown of the quote. On 3 February 2005 the breakdown was done and became Exhibit P4. The breakdown was sent by fax to DS17. Jason and Paul from DS17 advised they were happy with the price. DS17 advised Virtual Interiors that the defendant was visiting Sydney and that he would come in and see some shops with them. The witness picked up the defendant and went to some Cafes in the Darlinghurst area with the defendant. The defendant showed the witness the type of Cafes he liked. The two spent the day together and the defendant suggested that the witness come to Darwin. Mr Spagnol attested that the defendant said to him "you've got the job". Mr Spagnol replied "great". They shook hands. Mr Spagnol parted on the belief that he had the green light. A contract was sent to the defendant. There was no further discussion about the price as the witness believed that Virtual Interiors had won the job on their tender price. The

defendant had suggested that the witness go to Darwin to measure up. The witness needed to work out times and flights and book accommodation.

6. The witness arrived in Darwin in early March 2005 and met the defendant and a man named Harley Paspalis at the vacant site. The witness wanted compressors that were easy to service and with good ventilation and he spoke to Harley about the location of these items. He marked out the shop and took final measurements. The items that Virtual Interiors would be manufacturing needed to suit the site and exact measurements were needed. He marked power points and drainage with spray paint. He marked out bases and spoke with a tiler and plumber on site. The proposal was for a shop front bi-fold door and he checked to see if there would be room for such a door. He spoke to a glazier and continued to mark out the shop. The defendant gave him details of a certifier and discussed the question of the size of the opening and the need to move a counter. The witness made notes and did rough drawings. He identified the drawings he had made and they were tendered as Exhibit P5. Harley and Harley's father were there. The defendant was there all the time. The defendant invited the witness back to his place for dinner. The witness had documents with him and he believed he gave the defendant the contract and invoice while in the shop. He believed everything was 'sweet'. At no stage was he thinking that he was not going to get paid. A copy of the contract and invoice had already been sent out after he had received the green light following the Sydney meeting. Exhibit P6 was the Virtual Interiors quote and contract, together with a covering letter. The express post slip which had forwarded the contract and letter to the defendant became Exhibit P7. Express post number CN0010504 is said to have been posted on 25 February 2005, with the "contracts" being sent.
7. A tax invoice was given to the defendant while the witness was in Darwin. The deposit sum was \$50,952 being 30% of the amount in the contract. The deposit was for the shop fit-out and a copy of the tax invoice dated 1 March

2005 is Exhibit P8. The tax invoice sets out that the invoice relates to a “deposit on Dolce fit-out as per contract”.

8. The witness gave the defendant a copy of the contract and the invoice. He cannot now recall if the defendant said anything. After lunch the witness went back to the Café site and finished his work. They went to a Café on the Marina and had dinner. Harley joined the defendant and the witness for dinner. There was talk about private matters. The defendant called for a taxi for the witness. They were talking and then the taxi arrived. The witness asked the defendant whether he could give him the contract and deposit. The defendant said he had a cheque and that he had gone through the contract. He did not give the witness the contract or cheque as requested. The defendant then said that the witness should not hold up the job and asked when the job could start. The witness said the job could start on Monday.
9. The witness would not normally start work without a contract but he did not question the defendant. The defendant had said that he would get the contract to him and that he was already paying rent on the Cafe. He would get the cheque to the witness. The witness then flew back to Sydney. He tendered a Virgin Blue tax invoice and travel plan travelling between Sydney and Darwin between 3-5 March 2005 and that became Exhibit P9. On Monday morning he announced that Virtual Interiors had the green light for the job and discussed the matter with his leading hand. They started the work in the factory on that day. They marked out the job. He advised that the job needed to be done quickly. The defendant was project managing the job himself and he asked for a program of works. The witness prepared a program of works for the Dolce program and sent it to the defendant. The program of works became Exhibit P10 and is dated 10 May 2005. It is marked “Attention Tom”. The shop fitting by Virtual Interiors is item 13 on the program. That was sent by fax to the defendant and a transmission report was attached to the Exhibit confirming it was faxed at 11.00am on

10 March 2005. The witness rang the defendant and confirmed he had received the program. There was no discussion about its contents. When the witness returned from Darwin a sketch had been made with respect to the refrigeration. Cutting lists were prepared. Exhibit P11 was the bundle of drawings and cutting lists prepared.

10. The witness did not receive a signed contract from the defendant. He saw him as a busy man and a big player. The next week he rang the defendant and the defendant said the documentation was coming. The defendant said that he had to go to Greece and that his son had the contract, which had been signed and his son also had the cheque. He indicated that the plaintiff would be looked after. He estimated it was Tuesday of the following week that he had spoken to the defendant and in particular spoke about the Gelati display. On the Thursday, Paul from DS17 had come in and spoken to him. On 11 March 2005 a fax was sent to the defendant from Virtual Interiors and that became Exhibit P12 (this Exhibit included the fax confirmation). The plaintiff's representative advises the defendant that the job is going full steam ahead. He asks how the contract and deposit are going. Exhibits P13 to P17 were purchase orders and invoices which related to the work undertaken by Virtual Interiors in the construction of items for the Cafe on behalf of the defendant.
11. The witness spoke to the son of the defendant asking where the cheque and contract was. The defendant's son had said that his father had given him the paperwork and that he would be back soon. The witness then rang Paul from DS17 to see if he knew what was happening. The defendant had stopped talking to the witness. The witness was ringing Harley from the shopping centre. DS17 were continuing to work on the project. In particular an email was sent on 23 March 2005 with respect to the light box and stone cladding on a column (Exhibit P18). Whilst the witness was still working on the project at that date, he was becoming very concerned. At one stage the defendant's phones were disconnected. The witness left

messages at the restaurant owned by the defendant and no-one would put him onto the defendant. After the defendant was back from Greece he said “everything was good, the money was all good and the money would happen”. The defendant said the deal was OK and not to worry. The witness was pretty worried by then. The defendant said the contract was coming. The witness was continuing to chase people. The witness ascertained that Paspaley Centrepont had pulled the deal as the defendant had not come up with the rent. The witness was told there was \$20,000 - \$25,000 owed in back rent and that someone else would be found for the Café. Harley had said to the witness that “you had done the right thing by us, we will try and use the fit-out elsewhere”. This did not occur. Exhibits P19 and 20 were letters from Virtual Interiors to the defendant of 20 April 2005 and 16 May 2005. No monies had been received by those dates.

12. Virtual Interiors had manufactured the banquet seating, the refrigeration, stainless steel benches, cupboards, freezer, joinery and the cake display. The witness did a breakdown of costs on his laptop, but this is now broken and he cannot access that material. He estimates the cost to Virtual Interiors of the joinery works to be \$30,000 and the refrigeration works to be \$15,000. He also incurred costs for airfares and accommodation from March 2005. His costs are the direct cost to Virtual Interiors without a profit margin. These are the costs of materials and man hours involved. They were charged at \$65 per hour. Exhibit P21 is eight photos (A-H) of the work undertaken by Virtual Interiors. The items prepared for the defendant are still in the workshop at Virtual Interiors. They are of zero value to Virtual Interiors as they are custom made for the premises. He has tried to resell the items but no-one would buy them. He wanted his costs back. He had a spreadsheet with the costings but he does not have that anymore. He was not after profit. There was a 15% profit margin on the quote (with GST on top).

13. He was then cross-examined. It was put to him that the defendant said to him to go ahead when he got the contract. That was denied. The defendant denied that he was spoken to a week after the meeting in Darwin. The witness stated that the defendant had said “don’t let the signing of the contract hold up the job”. The witness said the defendant begged the defendant to start the job. There was no re-examination.
14. The next witness was Paul Papadopoulos. He is a director of DS17 Pty Ltd an interior design company. DS17 undertakes retail and hospitality jobs from conceptual work through design and documentation. They obtain quotes on behalf of their clients, undertake quality control and work towards delivering the final product. On October 2004 a man named Harley introduced the witness to the defendant. The defendant and Harley came to Sydney and the witness showed them how they worked. They visited locations so the defendant could give the witness an idea of the type of properties he liked. An agreement was entered between the defendant and DS17 on 27 October 2004. DS17 were to act as agent in the design process on the project called the Dolce Café in Darwin. This included advice on tendering. The agreement was signed by the defendant and the company representative and dated 27 October 2004 and became Exhibit P22. The witness outlined some of the phases set out in the agreement including phase four, the documentation for tender and phase five, necessary site visits, to check the quality of the work being carried out. There could be telephone checks as well as site visits at properties such as Virtual Interiors.
15. On 24 January 2005 Kay Duffy, an employee of DS17, invited tenders on the job and a quote was given by Virtual Interiors dated 1 February 2005. A breakdown was supplied by Virtual Interiors on 3 February 2005. Of the quotes given, DS17 advised the defendant that the Virtual Interiors quote was a competent quote. DS17 recommended Virtual Interiors was the company to go with. DS17 had no hesitation in recommending Virtual Interiors. The defendant advised that he was happy to go with the judgment



of DS17. The defendant would appoint and pay for the job with Virtual Interiors. The defendant was comfortable with Virtual Interiors. The witness was of the view that they were on the way to the fit-out being completed. The defendant came to Sydney after the quote to meet with Virtual Interiors and for the DS17 team to finalise all the rest of the details. The defendant said that he was happy with the work of Virtual Interiors and he was proceeding ahead with the project.

16. Virtual Interiors flew to Darwin to measure up. The witness was not present at that meeting in Darwin. The witness spoke to Virtual Interiors and the defendant after the meeting in Darwin. After the site visit, the defendant advised the witness that he was comfortable and informed DS17 that the deal was done. He said he was preparing to send a deposit cheque as soon as possible. The process was then ongoing and the witness visited the Virtual Interiors factory on 10 March 2005 and met with David Spagnol. He was looking at the fridges and joinery details for the project. The majority of the works had been custom made. An email dated 23 March 2005 was sent to the Council by DS17. DS17 were keeping the Council in the loop. The project was going ahead one hundred percent. He told the defendant he would visit the Virtual Interiors factory where the units were being made and did that as agent for the defendant. He saw the units and the project was going OK. Some of the detail would be fitted onsite. The defendant said okay and that he needed to fix a date for delivery and installation. The defendant then did not proceed with the project. The witness heard from Dave from Virtual Interiors who was trying to track the defendant down. Dave was concerned that he had not had any contact with respect to the deposit. The witness tried to call the defendant and he received no answer. It was probably just after 23 March 2005 that there were concerns about the project not proceeding. Invoices provided by DS17 have been paid except a small amount outstanding. The witness estimated he had between 10-15%

outstanding. There was no cross-examination of this witness and that was the close of the plaintiff's case.

17. The defendant then gave evidence in defence of the claim. He had travelled to Sydney to meet people concerned in the fit-out of the Café. He agreed with a lot of material provided to the Court by the plaintiff's witnesses. He experienced a problem with funds and no-one was prepared to wait. When he spoke to David Spagnol he was fully intending to go ahead. The plaintiff was in Greece from 9 – 29 March 2005. He did not receive a lot of the material sent by the plaintiff. He was not there to answer their correspondence. They all panicked. He paid the landlord his rent. DS17 got most of their money. The first time he had been told the work by Virtual Interiors had been going ahead was when he had got back from Greece. The defendant never said for them to go ahead. The defendant spoke to David Spagnol and was amazed he had done the work on the project. He paid \$20,000 to the landlord and Harley organised a new tenant. At the meeting with David Spagnol the witness believed that David had assumed that he had the money. This is the only outstanding bill in the project. The defendant and David Spagnol hit it off well. The defendant thinks that David Spagnol assumed there was something that was not there. He came to measure up in Darwin and the defendant considered that part of the quote. The defendant would have paid for the costs of the plaintiff's company to travel to Darwin if the deal had fallen through. The defendant believed that unless you have money up front, a project such as this would not go ahead. The defendant cannot understand why Virtual Interiors would go ahead without a deposit and without a signed contract. He had "left it at that".
18. In cross-examination, he agreed he had signed an agency agreement with DS17. He agreed he had signed the contract with Virtual Interiors and this had also been witnessed. (This was not handed to the plaintiff at any relevant time). The defendant did not discover the agency agreement with DS17 in his list of documents as he did not have it in his possession. He

had lost his paperwork including material such as his birth certificate. He agreed there was a quote on 3 February 2005. He met David Spagnol in Sydney after that date and then met in Darwin for the shop to be marked out. He considered this marking out to be in preparation for a proper quote. It was put that a quote had already been provided, including a breakdown of the quote and the witness replied “that doesn’t mean that I accepted it, it was only a price, it didn’t mean I wanted the job”. David Spagnol came up and measured up for a costing. The defendant said, “I didn’t tell him to go ahead. He was in Darwin to follow up a quote. You don’t do a job for \$154,000 without seeing the job”. The defendant said he was getting the job to go forwards, when the money did not come through. He then stopped the project. Before the Virtual Interiors stage of the project he needed to order tiles, rocks, tables, chairs and such items. He had no money to order those items. That was the end of the defence case. Submissions were then made.

19. The plaintiff bears the onus of proof, on the balance of probabilities.
20. Prior to consideration of the relevant case law, it is necessary to make some findings of fact in this matter. I will also consider the credit of the witnesses. The witness, David Spagnol often gave his evidence in a long winded and emotional way. It was clear he was stressed by the case and possibly the court room environment. Nevertheless, I found him an honest and reliable witness and do not doubt the veracity of his evidence. The witness Paul Papadopoulos was business-like and concise in his evidence. He impressed me as an honest and reliable witness.
21. The defendant conducted himself in a relatively casual manner, given the circumstances. He was in no way overwhelmed by the court room environment. While not rejecting his evidence in its entirety, I find his evidence on some important parts of the case lacked credibility. In particular, his evidence relating to Mr Spagnol’s visit to Darwin was not

convincing. The meeting in Darwin and what followed immediately upon that meeting is important in this case.

22. I make the following findings of fact. At all material times, the plaintiff was an incorporated company (P1). It is capable of suing in the name of Virtual Interiors (Aust) Pty Ltd ACN 096 974 033. Mr David Spagnol is the Managing Director of Virtual Interiors, the plaintiff company. At all relevant times Mr Spagnol was authorised to act, and was acting, as the plaintiff's representative. The defendant engaged DS17 as his agent in the proposal to establish the Dolce Café in Darwin. Exhibit P22 sets out the terms of that engagement. Clause A of the conditions of engagement set out that DS17 "is to exercise skill and care in conforming to the normal standard of design, to act as the client's agent related to their relevant contracts, to notify clients of any variation to the design, costing or timing, to notify clients if specialist consultants are required, the consultant is responsible to the client, but directed and integrated by DS17 Pty Ltd". The design contract contains a termination clause as follows – "this agreement may be terminated by either party on the expiration of reasonable notice, in writing. Upon termination, DS17 Pty Ltd shall be entitled to reasonable payment with services provided in accordance with this agreement". There is no evidence before the Court that the defendant terminated the agreement and I find that the agreement was in place at all relevant times. DS17 was acting in accordance with this agreement and arranged for the tender process to commence.
23. As agent for the defendant DS17 called for tender prices for the fit-out of the Dolce Café and recommended Virtual Interiors for the fit-out. The defendant accepted the advice of his agents on this question. The tender price from Virtual Interiors was \$154,400 + GST. The plaintiff company received verbal communication from the defendant's agent DS17 that the defendant was engaging the plaintiff to undertake the shop fit-out in pursuance of the tender quote. The plaintiff was also advised by DS17 that

the defendant was travelling to Sydney. There had been no direct contact or communication between the plaintiff and the defendant at that stage.

24. As the representative of the Plaintiff company David Spagnol met with the defendant soon after this occurred. The defendant made a personal visit to Sydney. The defendant spent some time with Mr Spagnol, visiting different types of Cafes. Irrespective of any prior discussions between DS17 and Virtual Interiors, I find that on the day of the meeting in Sydney between the defendant and Virtual Interior's representative, Mr Spagnol, the defendant advised Mr Spagnol that Virtual Interiors had "got the job". Mr Spagnol acknowledged this advice. They shook hands on the agreement. No specific timing or dates were agreed at that point.
25. I find that on the suggestion of the defendant, Mr Spagnol travelled to Darwin in March 2005 and undertook a site visit. This site visit was undertaken as a direct consequence of the defendant's advice to Mr Spagnol that Virtual Interiors had won the tender. I find that the visit to Darwin was not to prepare a full quote for the job. It is proven on the evidence before me that Mr Spagnol was acting as a consequence of the communication by the defendant that Virtual Interiors had won the tender. In particular, I find that the meetings he had with the defendant and the work he undertook was far in excess of what would be undertaken should someone have been undertaking further preparations on this tender. This finding takes particular note of the size of the job and the time and expense which Mr Spagnol incurred in travelling from Sydney to Darwin in March 2005. For a job of this size, it is not reasonable to expect that such thorough preparation would have occurred for a quotation. I find Mr Spagnol measured and marked out the job and he spoke to the landlord, a glazier, a tiler and a plumber – all on site. This indicated that Mr Spagnol believed he had won the tender. The defendant was present during Mr Spagnol's site visit and witnessed Mr Spagnol's interactions with these other parties. The defendant

did not communicate to Mr Spagnol that the job was not going ahead or that Virtual Interiors had not won the job.

26. The defendant does not specifically dispute that Virtual Interiors had won the tender. His main area of dispute is that he had never given the green light for a go ahead of the job. Mr Spagnol's evidence is that he had received the green light and in fact the defendant had gone further and that the defendant had urged him to start the job as soon as possible. The evidence of the plaintiff persuades me that the defendant had communicated to both the plaintiff and DS17 that he wished the job to go ahead as soon as possible. Whilst I accept the defendant's evidence that he would not have expected that a job would go ahead without a deposit and without a signed contract, that is not a bar to an agreement being found. The plaintiff's representative acknowledged that he himself would not normally go ahead without a deposit and a signed contract. I find that the defendant urged Mr Spagnol to start the work as soon as possible.
27. The defendant's verbal communications and his conduct are to be considered in circumstances such as this. The trip which Mr Spagnol made to Darwin ended with a dinner. Mr Spagnol then caught a taxi to the airport to return to Sydney. I find as Mr Spagnol was about to get into the taxi Mr Spagnol specifically asked the defendant for the contract (which he assumed was signed) and the deposit. Mr Spagnol, believed there was an agreement between the parties and made that clear to the defendant. Neither the cheque nor contract was handed over. Nevertheless, I find that at this stage the defendant requested that Mr Spagnol not hold up the job and asked when the job could commence. This conversation occurred immediately after the request by Mr Spagnol for the signed contract and the deposit cheque. I prefer the evidence of Mr Spagnol on these matters and find accordingly. I find that the defendant asked when the job could start and Mr Spagnol stated that it could start on Monday (the statement being made on a Friday, that being two days later).

28. Mr Spagnol acted upon the request by the defendant and commenced work on behalf of the defendant immediately upon his return to Sydney. By commencing the work in a timely fashion, the plaintiff was ensuring that when the defendant was ready for this phase of the job, the custom made items would be ready and there would be no delays in the fit-out. This was of direct benefit to the defendant.
29. It was agreed by the defendant that he had signed the contract which had been signed Mr Spagnol and handed to him (Exhibit P6). I find that the copy of the contract signed by the defendant was not handed to the plaintiff prior to the work commencing and costs being incurred by the plaintiff. The defendant did not hand the signed contract to the plaintiff at any time prior to the discovery process in these proceedings.
30. P6 sets out that the signing of the contract constitutes acceptance and construction will commence four to six weeks from acceptance of the contract order. Notwithstanding this term, which the plaintiff has unilaterally placed into its contract (P 6), commencement of the work has occurred prior to receipt of a signed contract. The time period of 4 – 6 weeks from acceptance of the contract order has been rendered meaningless by the commencement of work prior to the signed contract being received by the plaintiff. The plaintiff argues this has occurred due to the communications between the parties. I find this is the case. The request to start the work came from the defendant.
31. Was there any communication of the acceptance of the terms of the agreement by the defendant to the plaintiff? The phone conversations as between the plaintiff's representative Mr Spagnol and the defendant are contested by the defendant. The defendant says that he was not even in Australia when some of these alleged phone conversations occurred and further that he was at an overseas location where phone contact was not

possible. The defendant was impressive in this part of his evidence. In the final analysis, not a great deal turns on this issue.

32. I reject the defendant's evidence that any agreement between himself and the plaintiff company was subject to him raising the finances needed for the project. I find no such condition existed and further that no such condition was communicated to the plaintiff. I do not doubt that the defendant was seeking to ensure his finances were in order for the project to move forward, nevertheless I find that this issue was not communicated to the plaintiff. As previously found, the plaintiff was lead to believe that the project was moving forwards and the plaintiff was asked to assist in the facilitation of the project being undertaken at a fairly rapid pace. Despite Mr Spagnol's usual caution, he agreed to commence works prior to receipt of the signed contract and the deposit.
33. I find that there was a conversation between the defendant and Mr Papadopoulos where the defendant stated that he was happy with the work of Virtual Interiors and was proceeding to go ahead with the project. This occurred before the defendant went to Sydney. I find that the defendant spoke to Paul Papadopoulos from DS17 after the meeting with Mr Spagnol in Darwin. I find that the defendant advised Mr Papadopoulos that he was comfortable with Virtual Interiors and that the deal was done. After the Darwin trip, the process was ongoing. Mr Papadopoulos, as agent for the defendant, visited the Virtual Interiors factory on 10 March 2005 and met with David Spagnol. On the same day, Mr Spagnol faxed to the defendant a program of works. This program of works had been requested by the defendant (P10).
34. I find that Mr Papadopoulos was acting for and on behalf of the defendant as a consequence of conversations he had with the defendant to the effect that the defendant had engaged the plaintiff company to undertake the works. Mr Papadopoulos advised the defendant he was going to visit the Virtual



Interiors factory where the units were being made and I find that the defendant did nothing to cause Mr Papadopoulos to think that the defendant had not entered into an agreement with the plaintiff. I find that the defendant advised Mr Papadopoulos that there would need to be a date fixed for delivery and installation. Findings have already been made concerning the visit to Sydney by the defendant and his communications to Mr Spagnol, including the handshake. I find that the defendant, by his conduct and communications to his agent, DS17 and also to the plaintiff company (by conversations with Mr Papadopoulos and Mr Spagnol respectively), caused his agent and the plaintiff company to believe that the project was going ahead with Virtual Interiors as the successful tenderer and that the defendant was proceeding in accordance with the tender price of \$154,400 plus GST.

35. There are cases where the offeree's consent to the written terms of the contract can be inferred from conduct, even though it may be that it is not possible to establish a precise point in time when the offer of the other party was accepted (Contract Law in Australia 3<sup>rd</sup> edition – Carter & Harlem paragraph 205).

36. With respect to the relevant case law, I refer to the case of *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666. At page 682 it is stated :

“... although there has been no formal recognition of the agreement in terms by the 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 that by that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who so dealt with them”.

37. The case of *Brogden* is authority for the proposition that conduct can be interpreted as acceptance of an offer in certain circumstances. The case of *Brogden* is different from this case in one significant way. There was no ongoing relationship between the parties in this case, whereas in the case of *Brogden* there had been a previous contractual arrangement between the

parties. Where there is no ongoing relationship, more caution should generally be taken before finding that conduct can be interpreted as acceptance of an offer.

38. Based upon the findings of fact made, I find that the defendant, by his conduct, did communicate to the plaintiff company his acceptance of their tender price. Did that extend to an acceptance of the terms of the plaintiff company's contract (P6)? That is a much more difficult question. I find that the contract had been received by the defendant. The plaintiff's representative raised the contract with the defendant and the defendant did not object to the terms. He was more focussed on getting the work started as soon as possible.
39. At no stage during the visit to Darwin in March 2005 did the defendant indicate to the plaintiff's representative that he did not accept the terms of the contract or that he had not given the "green light" for the project to go ahead with the plaintiff company to undertake the works for the fit-out. I find that at no other stage did the defendant indicate to the plaintiff that he did not accept the terms of the contract.
40. The case of *Empirnall Holdings v Machon Paull* 14 NSWLR page 523 at 535 sets out:-

"The ultimate issue is whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted".

41. In the all the circumstances of this case, I find that a reasonable bystander would regard the conduct of the defendant as signalling to the plaintiff company that the defendant had accepted the offer from the plaintiff company. The defendant was present when the plaintiff's representative was speaking with the landlord at the property and a potential subcontractor. The defendant did not do anything to indicate to the plaintiff's representative that he did not accept the offer which had been made. The plaintiff had

started work on the job and the defendant did not request that the plaintiff stop the work. The defendant told his agent (DS17) that the project was going ahead. DS17 acted upon this advice, including attending at the plaintiff's premises to inspect the work the plaintiff was undertaking on behalf of the defendant.

42. The defendant has set out in his Notice of Defence that he permitted the plaintiff to mark out the premises during the March visit to Darwin for the purposes of quoting for the job. I have found that by the time the Plaintiff made the trip to Darwin, the defendant had communicated to his agent DS17 and also the plaintiff's representative, that he had accepted the quote and had awarded the tender to the plaintiff.
43. When DS17 attended at the plaintiff's premises in Sydney, they were acting as the defendant's agent. I find that DS17 was acting as the defendant's agent when they had telephone conversations with the plaintiff. I find that the defendant did request the plaintiff to commence to carry out the works and for the works to be carried out without any delay. This request was made notwithstanding the fact that the defendant had not handed a deposit cheque or the signed contract to the plaintiff.
44. When Mr Spagnol was in Darwin, he met with a number of trades' people, including a tiler, plumber and glazier. He marked out power points and drainage with spray paint on site. The defendant gave him details of a certifier. He spoke with the landlord's representative, Harley Paspalis, about the location of compressors. This all occurred with the knowledge of the defendant and largely in the presence of the defendant. They all militate against a finding that the plaintiff's representative was attending Darwin to obtain further details for the tender or quotation process.
45. I find that the request by the defendant for a program of works to be prepared by the plaintiff's representative was 'conduct on the part of the defendant' consistent with an agreement being entered. The defendant's

principle issue at the hearing was that he had not instructed the plaintiff to incur costs and commence works on the shop fit-out. The defendant's request for a program of works is inconsistent with that evidence. The preparation of a program of works signifies that the plaintiff was undertaking work in pursuance of the shop fit-out project. Such work could hardly be expected of a service provider without there being some form of agreement, in the expectation of payment.

46. There will now be consideration of exhibit P6 which the plaintiff relies upon in pursuance on its claim. Exhibit P6 includes the contract for manufacture, supply and installation as between Virtual Interiors and the defendant. Firstly, it is noted that the defendant's name is spelt incorrectly in the documentation. That issue does not raise any questions as to the validity of the contract in the circumstances of this case. The defendant does not dispute he was dealing with the plaintiff with respect to the Dolce Café project. I have found the defendant was the person who engaged DS17 and dealt directly with Mr Spagnol. Clause 1 of the contract sets out as follows:-

1. At the request of a customer, the company will manufacture, supply and install the goods hereinafter.

47. Accordingly, the clause sets out that it is "at the request of the customer" the company will manufacture, supply and install the goods.

48. Clause 2 sets out as follows:-

2. Defined for the contract sum of \$154,400 + GST payable by the customer as set out below with the said goods to be installed at the business known as Dolce, 18a Paspalis Centerpoint, Smith Street Mall, Darwin, Northern Territory.

49. This represents the sum given by Virtual Interiors in the tender.

50. Clause 3 sets out as follows:-

3. The goods to be manufactured, supplied and installed shall be as set forth in the first schedule hereto, as per samples shown to and approved by the customer.

51. There is no first schedule attached to the contract which is before the Court. There is no evidence before the Court that a schedule was ever provided to the defendant and in particular, there is no evidence that a schedule was attached to documentation which was provided to the defendant. There is no evidence before the Court that the plaintiff showed the defendant samples and there is no evidence that the defendant approved samples. There is no reference to DS17 acting as an agent for the defendant (the customer) with respect to this contract.
52. Paragraph four relates to the manufacture of the goods which are to be in accordance with the drawings approved by the customer. There is no evidence of any drawings being approved by the defendant (the customer).
53. Paragraph five sets out the contract sum (\$154,400 plus GST of \$15,440) and a payment of 30% of the total cost is payable forthwith as a deposit. There is nothing to indicate what the term 'forthwith' would mean. Further progress payments are set out to take the total to 100%. There is no date on the contract. At the end of the contract are the words "This contract shall take place from ...". No date has been placed at the end of this sentence. The original contract was sent to the defendant for his signature, without any dates.
54. In the latter part of the document, under the section "Terms and Payment Conditions", it is set out that the "signing of the contract constitutes acceptance of order and construction will commence four to six weeks from acceptance of contract order. A 30% deposit of the total cost is required with the contract, with the balance payable on handover". In normal circumstances these terms and payment conditions would not lead a customer to conclude that commencement would be immediate and in particular, that commencement would occur prior to the contract being

signed. The conversation between Mr Spagnol and the defendant in Darwin shortly prior to him getting into the taxi has meant that this condition is meaningless.

55. Under the terms and payment conditions, all constructed items remain the property of Virtual Interiors until payments are made in full by the client.

56. The plaintiff is seeking judgement of the debt claim in the sum of \$50,952 plus interest. This sum represents the first payment due in pursuance of clause five of the contract, which is Exhibit P6. This clause reads in part :

“5. The said contract sum of \$154,400 plus GST of \$15,440 shall be payable as follows:-

\$50,952 forthwith; is due and payable as 30% deposit of the total cost. (The clause then sets out the rest of the payment schedule).

57. This is the sum which was rendered in tax invoice dated 1 March 2005 (P8). This sum includes \$4,632 in GST. The question arises whether the plaintiff can recover GST in these circumstances. This issue has not been raised before the court and will need to be ventilated prior to final orders being made.

58. In the alternative, the plaintiff is seeking damages for loss as a consequence of the work undertaken in pursuance of the contract. In Clause 13.1 of the Second Further Amended Statement of Claim, the plaintiff seeks a sum for the profit the plaintiff would have earned under the agreement and clause 13.2 seeks expenses incurred by the plaintiff in relation to the works set out in the particulars in paragraph 15 and 16. The damages claim is said to be in the sum of \$65,541.13 plus interest. That figure was particularised in the plaintiff’s outline of closing submissions but was not particularised in the Second Further Amended Statement of Claim.

59. Notwithstanding that the plaintiff’s outline of closing submissions setting out that the sum of \$20,139.13 was claimed as the profit component in the

damages claim, Mr Spagnol, as the plaintiff's representative, did not make a claim for profit in his evidence. He was clear on this point. His evidence was that he was seeking back the costs he had incurred. He stated in evidence that he "was not after profit". While there is a claim for profit in paragraph 13.1 of the Second Amended Statement of Claim, the plaintiff has not pressed this claim. Accordingly, that sum is taken from the total damages which are claimed.

60. There is a claim for the expenses incurred by the plaintiff with respect to the manufacturing of joinery and refrigeration units. I find that a great deal of work was undertaken and there is evidence from both Mr Spagnol and Mr Papadopoulos as to the work which was undertaken by Virtual Interiors. No doubt expenses were incurred. The evidence is extremely vague as to the actual costs incurred by Virtual Interiors. The evidence of the claim with respect to the joinery was in the sum of an 'estimated' \$30,000. Mr Spagnol was not able to give an exact costing on that part of the work. Exhibit P4 sets out the breakdown of the quote for the Dolce Café fit-out and joinery is set out to be \$31,784.64.
61. The value of the work undertaken on refrigeration works was estimated by Mr Spagnol to be \$15,000. Exhibit P4 does not assist in the estimation or in the claim for damages with respect to the stainless steel refrigeration. That part of the job is broken down in the quote to represent \$67,670.96. It is not possible to determine from Exhibit P4, or any other evidence before the court, how the estimation of \$15,000 has been calculated by Mr Spagnol. Notwithstanding the claim, there is no evidence before the court on the expenses incurred in preparing the quote or accommodation in Darwin, telephone costs or the cost of three days absent from Darwin. There is evidence before the court of the cost of the airfare to Darwin – that is in the sum of \$402.00.

62. There are no admitted facts before the court on this issue. The plaintiff asserts that these estimations were not challenged. This ignores the fact that the onus of proof is on the plaintiff to prove the matters before the Court. It is accepted that with respect to the joinery, the estimation can be given some context when looking at the breakdown of costs in Exhibit P4. That is not the case with the refrigeration work.
63. It is accepted that the plaintiff has done what it could to mitigate its loss with respect to the items which have been manufactured. These items have not been able to be placed in any other premises, due to the fact that they are made to measure for the Dolce Café project. They are in storage awaiting finalisation of this Court matter.
64. The plaintiff has made a claim in damages. The claim to damages arises if the breach of contract is proven. The object of an award in damages is to compensate the plaintiff. The case of *Robinson v Harman* 154 ER 363 at page 365, sets out as follows:-

“Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed”.

65. The object is to place the plaintiff in a position which would have been occupied had the defendant performed the obligation breached. The onus of proving the extent of the damage is with the plaintiff.
66. In this case the plaintiff has claimed that expenditure was incurred by the work it undertook on the refrigeration and joinery units, and some other expenses. The plaintiff is seeking to recover what has been lost. The plaintiff is not entitled to claim an amount which exceeds the loss actually suffered. The onus is on the plaintiff to provide the evidence of the loss it is claiming has been sustained. The material which is before the Court does not allow the Court to make a reliable assessment of the loss sustained. In particular, the estimate with respect to the refrigeration units is claimed



without any evidence to substantiate the quantum of the claim. It is accepted that the claim with respect to the joinery does appear to have some link with the quotation which has been the subject of the tender.

67. In its written submissions, the plaintiff reserved the right to elect between its claim in debt and its claim for breach of contract. It made no such election at any stage during the hearing. When the matter was called on 7 December 2007 with respect to this question, the plaintiff requested time to consider whether it would elect and whether it was required to elect. Written submissions from the plaintiff were provided to the Court on 14 December 2007. The Defendant did not make submissions in response.
68. I am satisfied that the plaintiff is not required to elect. The plaintiff could have, at any stage, elected to pursue one remedy or the other. I am also satisfied that if both remedies are open on the proven facts, that the plaintiff can ask for the Court for the most favourable judgement that may flow from either cause of action. (See the Queensland Court of Appeal decision of *Wylie v The ANI Corporation Limited* (2000) 1 Qd R 320 at paragraph 42).
69. Through its written submissions of 14 December 2007, the plaintiff has chosen not to make an election as between the claim in debt and the claim for breach of contract and has left it to the Court to enter judgment which is most favourable to the plaintiff.
70. I find that there is a breach of the contract. I enter judgment in favour of the Plaintiff. I find that both remedies, debt and damages for the breach of contract, are open on the proven facts. The remedy most favourable to the plaintiff is the claim in debt, namely the sum of \$50,952 (either with or without the GST component). Once the profit component is taken from the damages claim, the claim is less than the debt claim. Further, the balance of the damages claim lacks evidence to find the quantum sought proven on the balance of probabilities. Judgment is entered for the Plaintiff against the Defendant on the debt claim. I will hear the parties on whether the judgment

sum is to include GST or not. I will also hear the parties on the question of costs and interest, and any other matters arising.

Dated this 14th day of January 2008.

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**Melanie Little**  
STIPENDIARY MAGISTRATE