CITATION: *DARWIN INTERNATIONAL AIRPORT V DIAH (NT) [2021] NTLC022*

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| PARTIES: | DARWIN INTERNATIONAL AIRPORT PTY LTD<br><br>V<br><br>DIAH (NT) PTY LTD as Trustee for THE AIRPORT HOTEL TRUST |
| TITLE OF COURT: | LOCAL COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | CIVIL |
| FILE NO: | 2021-00689-LC |
| DELIVERED ON: | 23rd AUGUST 2021 |
| DELIVERED AT: | DARWIN |
| HEARING DATE: | 3rd AUGUST 2021 |
| DECISION OF: | ACTING JUDGE NEILL |

**CATCHWORDS:**

*extension of existing business tenancy contract or creation of new business tenancy contract in substitution; identification of terms of business tenancy contract in either event; whether an oral statement to the effect:* "if anything changes we'll give you plenty *of* notice to remove the improvements*" had the quality of a contractual promise; if not, whether that statement operated as an estoppel against the landlord; whether the one month period in the landlord's notice to quit complied with the requirements of Division 2 of Part 13 of the* Business Tenancies (Fair Dealings) Act *NT*

*Business Tenancies (Fair Dealings) Act ss 5, 122, 123, 124,125, 127, 129, 130 and 131*

*Local Court (Civil Procedure) Act s 17*

*Local Court (Civil Jurisdiction) Rules rule 30.03(1)*

*Evidence (National Uniform Legislation) Act* NT *s 140*

*Briginshaw v Briginshaw [1938] 60 CLR 336*

*Deveraux v Cash (No 2) [2021] NTSC 53*

**REPRESENTATION:**

*Counsel:*

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| Applicant: | Mr Wade Roper |
| Respondent: | Mr Andrew Harris QC |

*Solicitors:*

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| Applicant: | Minter Ellison |
| Respondent: | HWL Ebsworth Lawyers |

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| Judgment category classification: | B |
| Judgment ID number: | NTLC022 |
| Number of paragraphs: | 85 |

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

No. 2021-00689-LC

BETWEEN

DARWIN INTERNATIONAL AIRPORT PTY LTD

APPLICANT

AND

DIAH (NT) PTY LTD as Trustee for THE AIRPORT HOTEL TRUST

RESPONDENT

REASONS FOR DECISION

(Delivered 23 August 2021)

ACTING JUDGE JOHN NEILL

1. This proceeding was commenced pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act* ("the Act") and in accordance with rule 30.03(1) of the *Local Court (Civil Jurisdiction) Rules*. It commenced with the required initiating Tenancy Application, filed on 24 March 2021 with a supporting affidavit, but then proceeded to a contested hearing nearly 4.5 months later on the basis of evidence-in-chief by way of affidavits of witnesses on both sides. This procedure is appropriate for a relatively straightforward dispute seeking the vacant possession of a property the subject of a business tenancy.

2. This procedure is not appropriate for a commercial dispute raising significant factual and legal questions which in this matter involved a commercial business lease, a dispute as to the holding over/continuation of that lease or its substitution by a new business lease, the identification and analysis of disputed terms of the relevant lease, and alternatively, the possible operation of a promissory estoppel. All of these questions were raised for consideration at the hearing of this matter listed for one day only, on 3 August 2021. It would have been preferable during the case management stage pursuant to section 17 of the *Local Court (Civil Procedure) Act* to have required formal pleadings to identify, and to limit the issues between the parties. Orders for discovery of documents could then have followed. Instead, the identification and evolution of the issues between the parties emerged only at the hearing and in an unconstrained manner.

## The Background

3. It is common ground and I find as set out in the following three sub-paragraphs:

   3.1. The Applicant manages the Darwin Airport precinct. It subleased property ("the premises") within the Airport precinct to the Respondent for the Respondent's commercial purposes. That sublease was entered into for a term of two years commencing on 1 July 2015 and being due to expire on 30 June 2017, pursuant to a formal, written sublease executed on behalf of both parties ("the lease"). In the lease the Applicant is referred to as the Operator and the Respondent is referred to as the User.

   3.2. Clause 3.2 of the lease provided:

> "*If the User continues to occupy the Premises after the Expiry Date with the Operator's express approval, the User does so as a monthly tenant under a new Sublease which will be on substantially the same terms as this Sublease as at the Expiry Date (amended as required so they are applicable to a monthly tenancy, but the Security Amount as at the Expiry Date will not be reduced):*
>
> *(a) at a rent to be determined by the Operator; and*
>
> *(b) which the Operator or the User may end by giving one month's written notice to the other ending on any day*".

   3.3. Clause 29.1 of the lease provided:

> "*This Sublease constitutes the entire agreement concerning the Premises between the User and the Operator. Any previous agreements, understandings, representations and negotiations prior to entering into this Sublease have no effect and this Sublease can only be amended by an instrument in writing and signed by both parties".*

4. The Respondent's commercial use of the premises involved providing accommodation. At the commencement of the lease the Respondent installed *"…a large number of demountable buildings on the Premises…including 201 accommodation rooms, laundries, gyms and other amenity buildings*" ("the improvements") – see paragraph 3 of the affidavit of John Robinson, a director of the Respondent, affirmed 14 April 2021 and received as exhibit R9 at the hearing.

5. The occupancy of the accommodation fell below the Respondent's expectations and in January 2017 the Respondent initiated discussions with the Applicant seeking a suspension of rent payments due under the lease. Eventually, in June 2017 the parties agreed on some changes and the precise nature of these changes and their legal/equitable impact on the lease is considered in more detail below. In summary, the Respondent would no longer pay a fixed rent but instead pay 5% of turnover of income received from occupants of the accommodation from time to time, plus various outgoings.

6. There was some mention of the question of notice to be given to the Respondent when the time might come to remove the improvements from the premises. A Mr Ian Kew for the Applicant is said to have told John Robinson for the Respondent the following: "*If anything changes we'll give you plenty of notice to remove the improvements*". These discussions are all set out in paragraphs 6 to 11 inclusive in the affidavit of John Robinson being exhibit R9.

7. The Respondent's occupation of the premises continued beyond the lease expiry date of 30 June 2017. There was no evidence before the Court of any additional agreement actually reached by the parties relevant to the Respondent's occupation of the premises after the changes discussed in June 2017, or after 30 June 2017, other than the bare fact of some attempt to draft a new lease document, which was never finalised or signed by the parties.

8. The arrangement for the Respondent's occupation of the premises after June 2017 continued unchanged until the Applicant wrote to the Respondent by letter dated 11 January 2021. That letter stated it served as notice that the Applicant was terminating "*the monthly tenancy*". It advised that the Applicant required the premises to be vacated by 12 March 2021, in two months' time. That letter is exhibit A2 in the proceeding.

9. The Applicant subsequently served the Respondent with a formal Notice To Quit And Vacate Premises dated 12 February 2021 ("the Notice"), pursuant to Division 2 of Part 13 of the Act. That document referred to the lease, stated it had expired, stated that the Respondent currently occupied the premises pursuant to clause 3.2 of the lease, and it required the Respondent to vacate the premises and to remove from the premises all chattels, plant and equipment owned by the Respondent, upon the expiration of one month following service. That Notice and a covering letter dated 12 February 2021 from the Applicant to the Respondent is exhibit A3 in the proceeding.

10. The Respondent did not vacate the premises and neither did it remove the improvements, by or subsequent to 12 March 2021. The Applicant filed its initiating Tenancy Application on 23 March 2021, seeking vacant possession of the premises.

11. As at the hearing before me on 3 August 2021 the Respondent had still not vacated the premises. The evidence shows it had very recently removed almost all the improvements – this appears clearly from the photographs of the premises attached as RB-2 to the affidavit of Ross Baynes sworn 30 July 2021 when compared with the photographs of the premises taken on 3 August 2021 in exhibit R4. There was little evidence before the Court as to why the Respondent had not vacated the premises as at 3 August 2021, nearly six months after service of the Notice, and nearly seven months after the Respondent's receipt of the Applicant's letter dated 11 January 2021 giving two months' notice to vacate the premises. I was informed by the Respondent's counsel that it would be able to provide vacant possession imminently, although there was no commitment to a specific date.

## The Issues

12. Accordingly, on the admitted evidence the dispute between the parties by the hearing date was really as much about the costs of the proceeding as about obtaining or giving up vacant possession of the premises. To deal with both these matters, I need to analyse and rule on the nature and terms of the contractual and, possibly, equitable relationship between the parties as at 11 January 2021 and thereafter.

13. The Applicant's position is that the terms of the lease were unchanged before the expiry date on 30 June 2017, and after that date the sublease continued in accordance with clause 3.2 of the lease on the basis of one month's written notice by either party to end the lease, and with the rent varied as set out in paragraph 5. above. For these reasons the Applicant says the Notice was a valid step in accordance with the Act.

14. The Applicant does not positively deny the evidence of John Robinson in paragraph 9.3 of his affidavit being exhibit R9, to the effect that a Mr Kew on behalf of the Applicant had told Mr Robinson in June 2017 that "…*if anything changes we'll give you plenty of notice to remove the improvements",* but neither does it accept this evidence. Rather, the Applicant questions the reliability of Mr Robinson's recollection.

15. The Applicant says further that even if words generally to this effect were said by its agent in the conversation in June 2017, they are too broad to convey any precise meaning, and cannot be given any effect as a term of the continuing lease.

16. The Applicant says in the alternative that even if the statement concerning "*plenty of notice to remove the improvements*" is capable of conveying any precise meaning in the circumstances, it was never reduced to writing and signed by both parties as required by clause 29.1 of the lease and therefore cannot operate as an amendment of the terms of the continuing lease as provided for in clause 3.2 of the lease. The Applicant notes that there may be the same difficulty with the variation of the rent but says that is not in dispute. That varied position is evidenced by the parties' performance on that varied basis – that is, the fact of the agreed varied payments after 30 June 2017.

17. The Applicant says in the further alternative that even if a new lease in substitution for the lease was entered into either in June 2017 or from 1 July 2017, the periodicity of that new lease was still month to month. It says even if it was an enforceable term of that new lease that it would give the Respondent "…*plenty of notice to remove the improvements*", that was limited to notice to remove the improvements. Those words did not mention and did not include notice to vacate the premises. Any such term did not affect the periodicity of any new lease or the Applicant's entitlement to end any such lease on the giving of one month's written notice.

18. The Applicant says it complied in any event with any obligation to give "*plenty of notice to remove the improvements"* when it gave the two months' notice by its letter of 11 January 2021, which was adequate notice to remove the improvements in the circumstances.

19. The Respondent does not accept that the terms of the lease were unchanged before the expiry date on 30 June 2017. It says that the terms as to rent and notice were agreed to be changed in the telephone discussion between Ian Kew and John Robinson shortly before the expiry date on 30 June 2017. It says that the parties thereby entered into a new and different lease in respect of the premises from June 2017 in substitution for the lease, with the express terms as to rent and notice as identified above.

20. The Respondent says in the alternative that even if the terms of the lease were unchanged before the expiry date on 30 June 2017 then the parties entered into that new and different lease in substitution for the lease, from 1 July 2017.

21. The Respondent says that the statement concerning "*plenty of notice to remove the improvements*" is capable of conveying a sufficiently precise meaning in the circumstances, and constitutes a term of any ongoing lease arrangement. It says that "*plenty of notice*" means more than one month in the circumstances. It says that the Applicant's one month's notice in the Notice cannot therefore be relied on.

22. The Respondent says further in the alternative that the Applicant is estopped from maintaining the existence of a one month's notice period in any lease arrangement between the parties, in light of its statement to the Respondent that it would give it "*plenty of notice to remove the improvements"*. The Respondent says that it relied on that statement to its detriment. It says that the Applicant's one month's notice in the Notice therefore cannot be relied on.

## The Evidence

23. On 3 August 2021 at 10:00am before the commencement of the hearing I heard an interlocutory application by the Respondent seeking summary judgment in the proceeding on the basis of evidence as to "*plenty of notice to remove the improvements"*. I ruled against the Respondent and dismissed the application, with costs.

24. In the course of hearing that interlocutory application I received in evidence a supporting affidavit made 30 July 2021 of the Respondent's solicitor Mr Ryan Sanders, two affidavits of Ainslie Maclean both made on 3 August 2021, the affidavit of John Robinson made 14 April 2021 and an affidavit of Richard Ian Kew, former Chief Executive Officer of the Applicant, promised on 28 April 2021. However, that material was received at that time solely for the purpose of the interlocutory application. It was not received as evidence in the hearing itself.

25. This is further demonstrated by the fact that the Respondent had filed a Notice of Objection to some of the affidavit evidence sought to be relied on by the Applicant at the hearing. That Notice was dated 28 July 2021. It objected among other objections to the affidavit of Richard Ian Kew promised 28 April 2021. Ultimately in the course of the hearing itself the Applicant did not seek to rely on Mr Kew's affidavit and the Respondent's objections were therefore not considered and ruled on. Mr Kew's affidavit was not received into evidence.

26. The only live evidence called at the hearing was called by the Applicant. This was the evidence of Ross Baynes, Executive General Manager, Property and Terminal for Darwin International Airport Pty Ltd. Mr Baynes had made three separate affidavits, affirmed respectively on 28 April 2021, 28 May 2021 and 30 July 2021. Some objections were taken to some parts of the first two of these affidavits and this resulted in some deletions of some parts of them. The balances of those two affidavits and also the third affidavit were received into evidence at the hearing but through oversight, without any separate exhibit number being allocated to any of them. Each of these affidavits, with the deletions marked by me, appears in the Applicant's volume of Court Documents handed up at the outset of the hearing as an *aide memoire*. Mr Baynes gave some additional evidence in chief and was then cross-examined on behalf of the Respondent.

27. The lease itself was annexure RB-1 to the affidavit of Ross Baynes sworn 30 July 2021 which was received in evidence at the hearing.

28. An affidavit of Ms Ainslie Maclean affirmed 3 August 2021 was tendered in the Applicant's case at the hearing and received as exhibit A5. Ms Maclean was not required to give any evidence in person. This affidavit served to introduce 37 pages of remittances advices identifying payments made by the Respondent to the Applicant in respect of the premises relevant to the period between 1 December 2016 and 1 February 2021.

29. In the Respondent's case at the hearing I received the affidavit of John Robinson, a director of the Respondent, affirmed on 14 April 2021. The Applicant objected to some parts of Mr Robinson's affidavit, and some of these objections were upheld and those parts were deleted by me and marked on the affidavit. The balance of the affidavit was received as exhibit R9. Mr Robinson was not required to give any evidence in person, and was not called to do so.

30. Other than the above, there was no live evidence or affidavit evidence received at the hearing.

31. Other exhibits received were as follows:

    i) exhibit A1 – a map showing the premises and their location within the airport precinct.

    ii) exhibit A2 – a copy of the letter dated 11 January 2021 from the Applicant to the Respondent giving 2 months' notice that the Applicant is terminating "*the monthly tenancy*" and requiring vacant possession by 12 March 2021, together with a covering email dated 11 January 2021.

    iii) exhibit A3 – the Applicant's Notice To Quit And Vacate Premises dated 12 February 2021 together with an accompanying letter from the Applicant to the Respondent also dated 12 February 2021, and a covering email dated 12 February 2021.

    iv) exhibit R4 – a bundle of photographs of improvements still on the premises taken 3 August 2021 and originally being an annexure identified as AM-2.4 to a separate affidavit of Ainslie Maclean, which affidavit was not otherwise tendered in evidence.

    v) exhibit A6 – an email trail on 23 March 2021 showing instructions from the Applicant to its solicitors Minter Ellison.

vi) exhibit R7 – a letter dated 24 February 2021 from Mr Ryan Sanders of HWL Ebsworth Lawyers for the Respondent to Ross Baynes on behalf of the Applicant – this letter was received into evidence as proof of the fact that it was communicated and relevant to the question of costs, not as proof of the truth of the matters set out in it.

vii) exhibit R8 – a letter dated 28 July 2021 and a bundle of enclosures from Ryan Sanders of HWL Ebsworth Lawyers for the Respondent to Ms Sophie Cleveland of Minter Ellison for the Applicant – this letter was received in relation to the question of costs and not as proof of the truth of any matters raised in the letter or in its enclosures.

# Analysis and Findings

## The Applicability of the Act

32. Section 5 of the Act is the interpretation section. It includes a definition of "*business premises*" as follows:

> *"(a) a retail shop; or*
>
> *"(b) premises leased primarily for business purposes, whether or not the premises may be used as a residence under the business lease".*

33. Section 5 includes a definition of "*business lease*" as follows:

> *"(a) a retail shop lease; or*
>
> *"(b) any other agreement or contract (including a tenancy and sublease) under which business premises are let or hired to a person:*
>
> *(i) whether or not the right is a right of exclusive occupation; and*
>
> *(ii) whether the agreement is express or implied; and*
>
> *(iii) whether the agreement is oral or in writing, or partly oral and partly in writing".*

34. Each of the Applicant and the Respondent was and is a corporation with limited liability. Each of them at all relevant times was engaged in its own respective commercial activities. Neither counsel at the hearing made any submission or suggestion that the Act was not applicable to the lease and/or to the arrangement between the parties in respect of the premises.

35. I am satisfied and I find that at all material times the premises were business premises within the meaning of the Act. I am satisfied and I find that at all material times the lease was a business lease within the meaning of the Act. I am satisfied and I find that the provisions of Part 13 of the Act at all material times were and are applicable to the lease and to the subsequent dealings between the parties in respect of the premises. I am satisfied and I find that the provisions of Division 2 of Part 13 of the Act contained and contain the appropriate provisions whereby the Applicant could seek repossession of the premises from the Respondent.

36. The procedure provided for taking possession of land the subject of the business tenancy is to be found in a consideration of sections 127, 129, 130 and 131 of the Act. These provide follows:

> *"**127** (1) A notice to quit given by landlord and a notice of intention to quit given by a tenant may expire at any time specified in the notice if the period of notice required by this Division is given, despite the fact that the expiry of the period of the notice does not coincide with the day before a rent day or a day before the last day of the tenancy.*
>
> *"(2) A notice of intention to quit given by a tenant…* (not relevant).
>
> *"**129** A notice to quit which does not comply with the provisions of this Division does not operate so as to terminate the tenancy in respect of which the notice was given.*
>
> *"**130** (1) Subject to a term of the business lease, a landlord is not required to specify in the notice to quit a ground for the giving of notice in respect of a periodical tenancy.*
>
> *"(2) Subject to the terms of the business lease, if the lease was granted for a fixed term the landlord must specify as a ground for the giving of a notice to quit:*
>
> *(a) that the tenant has breached or failed to comply with the provision of the lease and that the breach or failure to comply was such that the landlord was justified as treating the lease is at an end; or*
>
> *(b) that the term of the lease has expired.*
>
> *"(3) The period of a notice to quit premises is the period fixed by the lease or, where the rent is payable at regular intervals, the period of one such interval.*
>
> ***"131** (1) Where a landlord has given to attend at a notice to quit which complies with this Division, the landlord or an agent authorised in writing may, at any time within 60 days after the expiry of the term of the notice, apply to the Local Court for a warrant of possession.*
>
> *"(2) The Court must specify the day on which an order for the issue of a warrant of possession takes effect".*

37. The Notice is exhibit A3 in the proceeding. It stated that the term of the arrangement for the Respondent's occupation of the premises as at 12 February 2021 had expired. It stated that the Respondent currently occupied the premises as a monthly tenant pursuant to clause 3.2 of the Sublease – that is, of the lease. It specified that the Respondent was "… *to have completely vacated the Premises and to have removed from the Premises all chattels, plant and equipment owned by the Lessee*" upon the expiry of one month following service upon the Respondent of the Notice. It did not specify any other ground for the giving of the notice.

38. Accordingly, it was not necessary for the Applicant to specify a ground in the Notice if the lease arrangement was a periodical tenancy and the notice was for that period (subsection 130(1)); or if the lease arrangement had been granted for a fixed term, and that term had expired (subsection 130(2)(b)); and in any event, the period allowed in the Notice must be the period fixed by the lease, or if not so fixed and where the rent is payable at regular intervals, the period of one such interval (subsection 130(3)).

## The Lease Before and After 30 June 2017

39. I now proceed to consider and analyse the history of the lease and to determine the arrangement for the Respondent's continued occupation of the premises after 30 June 2017.

40. The affidavit of Ross Baynes affirmed 28 April 2021 attaches as annexure RB-1 an email chain between the parties and representatives of the parties leading up to their originally entering into the lease for the premises for the period 1 July 2015 to 30 June 2017. The only discussion in that email chain relevant to the question of any period of notice appears in the email from Peter Walker to Ainslie Maclean dated 22 April 2015 at 10:07 AM, on page 10 of the affidavit. There the representative of the Applicant notes that it would expect the Respondent to require time to remove assets from the site but that it would expect the respondent to attend to that within the term of the lease.

41. I am satisfied and I find that before the parties entered into the lease the Applicant was aware at least in general terms of the significant extent of the then proposed improvements. It was also aware in general terms that the improvements would take some time to dismantle and remove in due course. There is no evidence before me to suggest that the Applicant at any time before 11 January 2021 knew or ought to have known the extent of that time with any precision.

42. I am satisfied and I find that the Respondent entered into the lease on 1 July 2015 with knowledge of the significant extent of its then proposed improvements and in general terms, that the improvements would take some time to dismantle and remove in due course. I am satisfied and I find that before the Respondent entered into the lease the Applicant had warned it and the Respondent was on notice that it would be expected to remove the improvements within the term of the then proposed lease. I find that when it entered into the lease the Respondent was aware that clause 3.2 of the lease would require it to remove the improvements on one month's notice, if it continued in occupation of the premises after 30 June 2017.

43. I am satisfied and I find that the Respondent, with the knowledge and on the notice found in the preceding paragraph, entered into the lease with the agreed notice period of one month provided for in clause 3.2 in the event that the Respondent might continue to occupy the premises after 30 June 2017. From this I infer that at the time it originally entered into the lease, the Respondent knew that if it continued to occupy the premises after 30 June 2017 it would have to remove the improvements and quit the premises, on one month's notice.

44. The evidence before me includes contemporaneous records from the period January 2017 to 1 August 2017 of communications between the parties and/or representatives of the parties on the subject of the lease and of a variation or suspension of the rent payable to the Applicant by the Respondent for its continuing occupation of the premises. This evidence consists of the email trails being annexures JR-2, JR-3 and JR-4 to the affidavit of John Robinson being exhibit R9. It further consists of paragraphs 10 to 19 inclusive in the affidavit of Ross Baynes affirmed 28 April 2021 and of annexures RB-4, RB-7, RB-8, RB-9, RB-13 and RB-15 to that affidavit.

45. Annexure RB-13 to the affidavit of Ross Baynes affirmed 28 July 2021 is an email sent on 25 July 2017 by Natasha Haffenden for the Applicant to "Foxy" Robinson for the Respondent. I know of my own knowledge after nearly 40 years in Darwin that John Robinson is widely known as "Foxy" Robinson, I believe because his hair was red.

46. In annexure RB-13 Ms Haffenden advised Mr Robinson that she would have "legal documentation" prepared and sent to him for his execution. She set out the terms of the proposed arrangement as follows:

> "*Commencement date 1 July 2017 – term 12 months…*
>
> *"DIA will agree to the 5% rent (with no base rent) and will include the requirement to audit the books …"*

47. Annexure RB-15 to the affidavit of Ross Baynes affirmed 28 July 2021 is an email sent on 1 August 2017 at 11:46:02 am by Natasha Haffenden for the Applicant to lawyer Karen Christopher. She instructed Ms Christopher to:

> "*…prepare a Lease Agreement for the following two sites (please see attached a copy of the expired Leases for the Lodges).*
>
> *"Commencement date: 1 July 2017*
>
> *"Rent: 5% of room rate at $70 per room per night = $3.50 per room. No other rent.*
>
> *"Term: 1 Year".*

48. It is noteworthy that Ms Haffenden in neither annexure RB-13 nor RB-15 made any reference to any term of the proposed new sub-lease relevant to the notice to be given to the respondent to remove the improvements, or to any change from the original lease as to the term of the notice to quit the premises.

49. I am satisfied on the evidence and as agreed by counsel for the parties at the hearing and I find that no lease document as contemplated in annexures RB-13 and RB-15 was ever executed by the parties.

50. The email response sent on 3 April 2017 at 9:43 am from Ross Baynes for the Applicant to Ainslie Maclean for the Respondent specifically stated that "*any rental readjustment would occur post 30 June 2017".* It stated this had been agreed at a meeting which included "Foxy" Robinson for the Respondent. The email sent on 25 July 2017 at 11:55:55 am from Natasha Haffenden for the Applicant to John Robinson for the Respondent specifically

stated the new "*commencement date"* was to be 1 July 2017. There is nothing in the affidavits of Ross Baynes or John Robinson or in any of their attachments which states or suggests that the changed arrangement for the Respondent's continued occupation of the premises would commence before the expiry of the term of the lease, on 30 June 2017.

51. I am satisfied and I find that the change in the method of payment from a rental amount to a percentage of accommodation turnover commenced from 1 July 2017 – see the attachments to the affidavit of Ainslie Maclean affirmed 3 August 2021 and being exhibit A5 received at the hearing, particularly page 5 of that exhibit.

52. I am satisfied and I find that no new agreement, lease or arrangement in respect of the premises came into effect between the parties before 1 July 2017.

## The Terms

53. It is clear from the evidence I have identified above that the parties held discussions on a number of occasions over the period January 2017 to June 2017 concerning a suspension of the rent payable under the lease and instituting a different method of payment. This took place in the form of face-to-face discussions followed by email confirmations of those discussions.

54. By way of contrast, there is evidence before me of only one occasion over the same period when there appears to have been any mention of the question of any notice to be given to remove the improvements. That appears in the affidavit of John Robinson referred to above, being the reported oral assurance of Ian Kew in June 2017 that the Respondent would be given "*plenty of time to remove the improvements*". There is no suggestion of any email or other recorded confirmation of that reported assurance. I have already noted the absence of any reference to this question of notice in the emails from Ms Haffenden for the Applicant to Mr Robinson for the Respondent and to the Applicant's solicitor Ms Christopher, in annexures RB-13 and RB-15 to the affidavit of Ross Baynes affirmed 28 July 2021.

55. Again by way of contrast, there is no evidence before me, recorded or not, of any discussion or mention over the period January 2017 to June 2017 of the separate question of the notice to be given by either party to quit the premises after 30 June 2017.

56. The evidence before me does not include any contemporaneous records from the period January 2017 to 10 January 2021 - whether a note or a confirmatory email or at all - of any negotiation or discussion or communication between the parties and/or the representatives of the parties, on the question of notice of any sort, whether in respect of removing the improvements or of quitting the premises or of both. The evidence before me does not suggest that any such contemporaneous records ever existed. Neither counsel at the hearing submitted that any such contemporaneous records had ever existed.

57. The email sent on 3 April 2017 at 9:43am from Ainslie Maclean for the Respondent to Ross Baynes for the Applicant appears as part of the email trail being annexure RB-8 to the affidavit of Ross Baynes affirmed 28 April 2021. That email trail consists of some of the negotiations between the parties in respect of either a current variation of the lease or a variation after 30 June 2017. In that email Ms Maclean proposed: "*30 day rolling tenure for all leases;"* and Mr Baynes responded: "*Happy to accept 120 day rolling tenures".*

58. I neither received nor heard any further evidence at the hearing by way of explanation for this specific exchange. Neither counsel made any submission to me as to its meaning or significance. It is possible it related to the duration of a then proposed variation of the lease but the references to "*all leases"* and to "*rolling tenures"* in the plural are not consistent with that. Neither is the proposal for a lease of 12 months' duration as set out in exhibit RB-13 to the affidavit of Ross Baynes made 28 July 2021 and set out in paragraph 46. above. It may be that this exchange related to the proposed leases to third parties of all or part of the accommodation in the improvements on the premises, relevant to calculating the 5% of accommodation income turnover proposed instead of rent, but that is speculation on my part. In any event, this exchange was part of proposals and negotiations between the parties in April 2017, not part of any agreement arrived at by the parties in June 2017.

59. I am satisfied that I cannot determine the subject or the significance of this exchange and I disregard it for the purposes of these Reasons for Decision.

60. I am satisfied and I find that no record of any negotiation or discussion or agreement between the parties over the period January 2017 to 30 June 2017 as to notice to remove the improvements or notice to quit the premises ever existed.

61. I am satisfied and I find that the evidence before me of negotiations, discussions and communications between the parties over the period January 2017 to June 2017 clearly demonstrates an agreement to vary the term of the lease relevant to a suspension of the previously agreed rent and the identification of a new arrangement based on a percentage of turnover of occupation of the accommodation on the premises plus some agreed outgoings. This is supported by the evidence of the payments by the Respondent to the Applicant in respect of the premises after 30 June 2017.

62. I am satisfied and I find that there is no other evidence before me of any concluded agreement between the parties in respect of any other terms of the lease or of any arrangement for the Respondent's continued occupation of the premises after 30 June 2017, with the sole exception of the reported statement by Mr Ian Kew to Mr John Robinson, that the Respondent would be given "*plenty of time to remove the improvements*".

## Sufficiency of Evidence as to Notice

63. The evidence for this appears in paragraph 9 of the affidavit of John Robinson affirmed on 14 April 2021 which is exhibit R9 in the proceeding. There Mr Robinson deposed to a telephone conversation "*in about June 2017*" with Ian Kew on behalf of the Applicant. Mr Robinson deposed to a statement either by him or by Mr Kew in the course of that telephone

conversation that the purpose of the call was *"… to work out the basis of DIAH's ongoing occupation of the Premises (ie following on from some of the emails I have referred to above)*". Mr Robinson deposed that in the course of that conversation Mr Kew said to him: "*If anything changes we'll give you plenty of notice to remove the improvements*". Mr Robinson deposed that he said words to the effect of: "*Alright thanks*".

64. Mr Robinson's evidence as to these words having been spoken by Mr Kew, and in this context, is of fundamental importance in this matter. It is the only evidence before me of any changed agreement as to notice of any sort in the ongoing lease arrangement between the parties after 30 June 2017. It is therefore the only evidence before me capable of displacing the continued operation of clause 3.2 in the lease as a term of that ongoing lease arrangement.

65. Because of this, I must consider this evidence and its context with particular care to determine whether it is sufficiently cogent and persuasive to satisfy me on the balance of probabilities that these words or similar words having the same import were spoken, and were intended by the speaker to be a term of an agreement between the parties. In this regard I note the famous *obiter dictum* remarks of Dixon J in *Briginshaw v Briginshaw* [1938] 60 CLR 336 at page 362 as follow:

> "*… when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence… It cannot be found as a result of a mere mechanical comparison of probabilities".*

66. This is reflected in the provisions of section 140 of the *Evidence (National Uniform Legislation) Act* NT. That section provides as follows:

> "*140* ***Civil proceedings – standard of proof***
>
> *"(1) in a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.*
>
> *"(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:*
>
> *(a) the nature of the cause of action or defence; and*
>
> *(b) the nature of the subject matter of the proceeding; and*
>
> *(c) the gravity of the matters alleged".*

67. Mr Robinson deposed on 14 April 2021 to recalling hearing the words in question spoken in a telephone conversation in June 2017, nearly four years earlier. This passage of time alone is a matter of concern when considering the reliability of this evidence.

68. No record had been made contemporaneously with or shortly after that telephone conversation, or at any time prior to Mr Robinson's affidavit, of the words spoken in the course of that conversation, or of their context. This contrasts with the practice which I have found above was often adopted by the representatives of the parties of sending confirmatory emails of their meetings and discussions.

69. In paragraph 9 of his affidavit quoted above Mr Robinson has said the words in brackets *"(ie following on from some of the emails I have referred to above)"*. A consideration of all of the emails annexed to Mr Robinson's affidavit shows that their subject matter is limited solely to the then proposed arrangement for a suspension of rent to be replaced by 5% of accommodation turnover, and the prospects of arrangements to improve accommodation turnover. Notably, there is no mention or suggestion in any of those emails of the question of any notice either to remove the improvements or of the period of any notice to quit to end the lease.

70. Mr Robinson did not attend in person to give evidence before me. Accordingly, he was not cross-examined on the reliability of his recollection that these or sufficiently similar words were spoken, or of the context within which they or any version of them were spoken. This was with the consent of the parties and I draw no adverse inference in respect of Mr Robinson or his credibility because of this. However, it means that I am left with only the brief and unexplored evidence in those few lines of that affidavit to determine a question of the greatest gravity in this proceeding.

71. I conclude that I am not satisfied on the balance of probabilities that the words deposed to by Mr Robinson or words to a sufficiently similar effect were spoken in late June 2017 by Mr Ian Kew on behalf of the Applicant to Mr John Robinson on behalf of the Respondent for the purpose of agreeing any term of any future lease of the premises between the parties, or at all.

## Estoppel

72. In *Deveraux v Cash* (No 2) [2021] NTSC 53 at page 32 Chief Justice Grant considered promissory estoppel. In paragraph [55] his Honour said: "*In order to establish a promissory estoppel it is necessary for a plaintiff to prove that…*" and he went on to identify six elements to be proven. One of these was that a party must have made a promise which induced the other party to adopt an assumption or expectation. Another was that the promise made by the first party was intended to be acted upon by the other party.

73. His Honour then went on in paragraph [56] to identify the further requirement that: "*The promise made by the defendant to induce the assumption or expectation must be clear, unequivocal and intended to be acted upon by the plaintiff*".

74. On the findings of fact I have made, I have not been satisfied that the necessary promise was made on behalf of the Applicant to the Respondent. I have therefore necessarily not been satisfied that any such promise was intended to be acted upon by the Respondent.

75. I conclude that there is no basis for any claim of promissory estoppel in this matter.

## The Operation of clause 3.2 in the Lease

76. I have found that the provisions of the lease as to the payment of rent by the Respondent to the Applicant for its continued occupation of the premises after 30 June 2017 were varied by agreement between the parties. I have found that I am not satisfied that any other terms of the lease were varied.

77. I am not satisfied that any new lease arrangement was entered into between the parties in substitution for the lease.

78. I find that the Respondent continued in occupation of the premises after 30 June 2017 in accordance with the lease, subject to that single variation as to the payment of rent. I find that this continued occupation was with the Applicant's express approval.

79. I find that after 30 June 2017 the provisions of clause 3.2 of the lease operated so that the Respondent continued to occupy the premises after that date as a monthly tenant under a new sublease on substantially the same terms as the lease as at 30 June 2017, amended as required so that they were applicable to a monthly tenancy.

80. I find that the new sublease between the parties after 30 June 2017 was a periodical tenancy within the meaning of subsection 130(1) of the Act. I find that the relevant period was one month.

## The Validity of the Notice

81. I find that the Notice To Quit And Vacate Premises dated 12 February 2021 by the Applicant to the Respondent giving one month's notice to vacate the premises was a valid notice to quit for the purposes of Division 2 of Part 13 of the Act.

## Costs

82. Both exhibits R7 and R8 were tendered for the purpose of considering costs. Exhibit R7 is a letter from HWL Ebsworth Lawyers for the Respondent dated 24 February 2021 to Ross Baynes for the Applicant setting out their position that a new lease comprised of oral terms had come into existence after June 2017 in substitution for the lease. They maintained it was a term of this new lease that the Applicant would give the Respondent plenty of notice in the event that termination and vacation of the property became necessary. They said that it would take a lot more than one month for the Respondent to remove the improvements. They maintained that therefore the Notice was not valid.

83. Exhibit R8 is a letter dated 28 July 2021 with enclosures from HWL Ebsworth Lawyers to Minter Ellison, lawyers for the Applicant. This letter maintained that the Respondent intended to vacate and surrender possession of the premises before the hearing listed on 3 August 2021. It contained an offer that the Applicant should withdraw these proceedings on the basis that each party would bear its own costs. It set out a detailed submission as to why the matter should be resolved this way, including an analysis of evidence some of which was not before me at the hearing. It advised of the Applicant's intention to make a preliminary

interlocutory application on 3 August 2021 seeking summary judgement on the basis of the evidence as to a term of any lease arrangement concerning plenty of notice to remove the improvements.

84. On the basis of my findings earlier in these Reasons, and noting that the Respondent had still not provided vacant possession of the premises as at the hearing on 3 August 2021, I am satisfied that there is nothing in either of these exhibits, or at all, to change the usual position that costs should follow the event.

## Orders

85. I make the following orders:

    1. a warrant of possession issue requiring the Respondent to give the Applicant vacant possession of 3 Cecil Cook Avenue, Eaton NT on Wednesday, 25 August 2021.
    2. The Respondent pay the Applicant's costs of and incidental to the proceeding to be taxed in default of agreement.

Dated this 23rd day of August 2021

JOHN NEILL
ACTING LOCAL COURT JUDGE