# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Toohey v Golder & Ors* [2021] QSC 277 |
| PARTIES: | **NICOLLE TOOHEY**<br>(plaintiff)<br>**v**<br>**ANDREW GOLDER**<br>(first defendant)<br>**EMMA GOLDER**<br>(second defendant)<br>**HIGH CHURCH PTY LTD**<br>ABN 37 604 346 170<br>(third defendant) |
| FILE NO: | SC No 9524 of 2016 |
| DIVISION: | Trial Division |
| PROCEEDING: | Claim |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 28 October 2021 |
| DELIVERED AT: | Brisbane |
| HEARING DATES: | 15 to 18 February and 19 April 2021 |
| JUDGE: | Bond JA |
| ORDERS: | **The orders of the Court are:**<br>**1. Judgment for the plaintiff on her claim against the first and second defendants, in the amount of $18,668.07, exclusive of interest.**<br>**2. The plaintiff's claim against the third defendant is dismissed.**<br>**3. Judgment for the plaintiff on the defendants' counterclaim.**<br>**4. The parties will be heard on the order which should be made for interest in respect of the plaintiff's judgment and also on the question of costs.** |
| CATCHWORDS: | CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – ACCEPTANCE – BY WHOM – where the question was whether the plaintiff had contracted with two natural persons or the company which they had incorporated – alternatively whether the contract was to be regarded as a pre-incorporation agreement entered into for the benefit of the company – whether there was a novation by conduct which |

substituted the company for the two natural persons – whether the plaintiff was estopped by a convention to the effect that the contract was between the plaintiff and the corporation and not between the plaintiff and the two natural persons

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – where the contract permitted the defendants to terminate in the event of failure to achieve a contractual revenue target – whether an email congratulating the plaintiff on reaching the revenue target constituted affirmation of the contract by the defendants, and waiver of the right to terminate – whether on the proper construction of the contract and in the facts which happened the revenue target had been reached constituted affirmation of the contract, and waiver of the right to terminate

DAMAGES – ASSESSMENT OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – GENERALLY – where the plaintiff claimed damages for loss of commission income beyond an original contract term – whether the possibility of earning such income by exercise of a contract option or by further agreement with the defendants was so remote as to justify the conclusion that it should not be taken into account in the assessment of damages

*Corporations Act 2001* (Cth), s 131

*ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2012) 245 CLR 338; [2012] HCA 6, followed
*Browning v ACN 149 351 413 Pty Ltd (in liq) (formerly known as Enviren Constructions Pty Ltd)* [2016] QCA 169, followed
*Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26; [1993] HCA 27, cited
*King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251, followed
*Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37, cited
*QBE Insurance (Australia) Ltd v Cape York Airlines Pty Ltd* [2012] 1 Qd R 158; [2011] QCA 60, cited
*Sargent v ASL Developments Ltd* (1974) 131 CLR 634; [1974] HCA 40, cited
*Victoria v Tatts Group Ltd* (2016) 90 ALJR 392; [2016] HCA 5, followed

COUNSEL: N H Ferrett QC for the plaintiff
B W J Kidston for the defendants

SOLICITORS: Woods Prince Lawyers for the plaintiff
SLF Lawyers for the defendants

## Introduction

[1] In January 2014 Mr Andrew Golder, as trustee for the As Good as Golder Trust, acquired real property located at the corner of Malt Street and Brunswick Street, Fortitude Valley, in the State of Queensland (**the High Church property**).

[2] The High Church property is shown in the image below, which depicts the Brunswick Street and Malt Street sides of the property. Malt Street is the signposted street heading slightly uphill to the right of picture.[1]


[3] For present purposes, it suffices to describe the High Church property as comprised of three spaces, each of which can be seen in the image. The first space is a glass-fronted showroom on the ground level facing Brunswick Street, which has a kitchen and toilet facilities towards the back of house (**the Gallery**). The second space is a former church, positioned above the Gallery but towards the rear of the property (**the Church**). The third space is a licensed, outdoor level positioned above the Gallery but in front of the Church (**the Outdoor Area**).

[4] Following his purchase of the High Church property, Mr Golder and his wife established and traded an art gallery in the Gallery space. At the time of acquisition, the Church was leased to a third party. Following the expiration of that lease, Mr Golder re-advertised the Church and the Outdoor Area for lease.

[5] Ms Toohey had more than 20-years' experience in organising corporate functions and weddings. She had long admired the High Church property and had thought it would make an excellent functions venue. In 2014, after Mr Golder re-advertised the Church for lease, Ms Toohey and her brother-in-law had a preliminary meeting with Mr Golder to discuss the possibility of leasing the Church and the Outdoor Area (together, **the Event Space**) as a functions venue, but those discussions did not go anywhere.

[6] In February 2015 Ms Toohey learned that the Church was still being advertised for lease. She sent an email to Mr and Mrs Golder proposing that the Event Space be used as a place to hold weddings and other functions. It was common ground that a contract was eventually

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[1] The words which appear on the balcony to the left of picture having nothing to do with this proceeding.

struck enabling Ms Toohey to conduct such a business, and that she did so until about 14 September 2016 when Mr Golder terminated the contract. Ms Toohey commenced this proceeding against Mr and Mrs Golder the following day. Ms Toohey's case was that the termination breached the contract and she sought damages for breach of contract and also sought to recover some unpaid commissions.

[7] Mr and Mrs Golder defended the proceeding, including by contending that it was their company, High Church Pty Ltd, which had contracted with Ms Toohey, and not them personally. Ms Toohey later joined High Church Pty Ltd as a defendant, advancing her claims against it in the alternative, in the event that the defendants' case as to the proper contracting party succeeded.

[8] The defendants maintained that the termination of the contract was lawful and in exercise of a contractual right to terminate because the business had not achieved a contractually stated revenue goal. Accordingly, they denied any liability for damages. It appeared uncontroversial that Ms Toohey was owed some unpaid commission, however the parties differed on the precise amount owing and, in any event, the defendants sought to set off against whatever amount was owing, such part of the amount they claimed in their counterclaim as would reduce the amount owing to Ms Toohey to nil.

[9] The counterclaim advanced by the defendants sought:

(a) a declaration that the contract was between Ms Toohey and High Church Pty Ltd;

(b) damages for negligent misrepresentation;

(c) further or alternatively damages or compensation pursuant to s 236 of the *Australian Consumer Law*;

(d) further or alternatively, an order that such contract as may be found, was void, voidable or unenforceable against the contracting party, pursuant to s 237(1) of the *Australian Consumer Law*;

(e) further or alternatively, a declaration that such contract as may be so found, was lawfully terminated or rescinded on or about 15 September 2016 (either pursuant to a contractual right to terminate, or because Ms Toohey's breaches of contract conferred a right to terminate).

[10] The defendants abandoned their counterclaim in their written submissions delivered after the close of evidence in the trial. There must be judgment for Ms Toohey on the counterclaim. Prima facie, costs on the counterclaim should follow the event.

[11] For reasons which follow, there should also be judgment for Ms Toohey on her claim against the first and second defendants for the amount of her unpaid commissions, in the amount of $18,668.07. Ms Toohey was correct to contend that her contract was with Mr and Mrs Golder, but having succeeded against them, her claim against High Church Pty Ltd should be dismissed. Prima facie, Ms Toohey should not pay the company's costs, because its joinder was occasioned by the defendants' flawed allegation concerning the contracting party. Ms Toohey's damages claim must fail: Mr and Mrs Golder were entitled to exercise a contractual right to terminate because the business had not achieved a contractually stated revenue goal.

[12] The parties will be heard on the order which should be made for interest in respect of the judgment obtained by Ms Toohey and also on the question of the appropriate costs order.

**The formation of the contract**

[13] Ms Toohey argued that the contract between Ms Toohey and Mr and Mrs Golder, or alternatively, between Ms Toohey and High Church Pty Ltd, was made on or about 19 February 2015, consequent upon agreement having been struck by exchange of emails.

[14] The defendants argued that the contract was between Ms Toohey and High Church Pty Ltd and was made in writing by exchange of emails including an email sent on 20 February 2015, or, alternatively, was made partly in writing and partly by conduct. As to the latter alternative, the defendants relied on the same emails supplemented only by the email of 20 February 2015 and also on certain aspects of how the parties actually conducted their business relationship from June 2015.

[15] The defendants also relied on conduct as a basis for inferring that the contract must have been struck at some undefined time after 20 February 2015.

[16] In addition, the defendants' pleading advanced the following alternative cases:

(a) The defendants intended and the contract was to be regarded as a pre-incorporation agreement entered into for the benefit of High Church Pty Ltd before it was incorporated and that company ratified the pre-incorporation agreement within a reasonable time.

(b) Even if the initial contract was with Mr and Mrs Golder personally, there was a novation by conduct the effect of which was to substitute High Church Pty Ltd for Mr and Mrs Golder.

(c) There was a convention adopted between Ms Toohey, Mr and Mrs Golder and High Church Pty Ltd to the effect that the contract was between Ms Toohey and High Church Pty Ltd, and Ms Toohey was estopped from denying the convention.

[17] I turn first to a consideration of the evidence relevant to contract formation.

The evidence

[18] As has been mentioned, there was some contact between Ms Toohey and Mr Golder in 2014 concerning the possible use of the Event Space as a functions venue. Ms Toohey explained that she and her brother-in-law attended a meeting with Mr Golder and his real estate agent. There was a discussion concerning the price of leasing the Event Space for the purpose of conducting functions and events. The two spaces comprising the Event Space were the only spaces discussed because Mrs Golder was still running her art gallery in the Gallery space. The figure of $100,000 to $110,000 for leasing the Event Space was mentioned.

[19] Upon her return from holidays in February 2015, Ms Toohey noticed that the Event Space was still vacant. She decided to approach the owners. On 5 February 2015, she rang the art gallery and spoke with Mrs Golder. I would infer that in the same conversation she must have restated the nature of her interest in the Event Space.

[20] That same day, 5 February 2015, Ms Toohey sent an email to Mrs Golder using her art gallery email address, but addressed the email to both Mr and Mrs Golder. She signed the email with her name and gave her mobile number. It was common ground at trial that the subject under discussion in this and the subsequent emails in February 2015 was the use of that part of the High Church property which I have referred to as the Event Space. The email relevantly stated:

"Hi Emma & Andrew

Thank you so much for your time over the phone today and for the opportunity to send through the below business proposal for a boutique wedding ceremony & events space at 483 Brunswick Street Fortitude Valley.

As you know I have been attracted to this venue for over 4 years with this business plan in mind and spoke with Andrew early last year about potentially leasing the space. At this point of my life with a successful consulting company it is not visible for me to move forward with this option, hence I would like to put forward to you both the option of me consulting for you to build a successful venue on your behalf.

With my previous experience and track record I have complete confidence in making this joint venture extremely successful and stress free for both as owners of the venue. I have over the past years opened, marketed & built very profitable event venues including:- Gianni's Events at Portside (now Moda Events), Mirra Private Dining & Events, Lightspace, Cloudland, Sono Restaurant (more a marketing role with some events work), Gambaro's new event space and The Trans Hotel. I am more than happy for you to talk to any or all of my above clients to verify my work ethic, motivation and determination to grow their businesses.

As promised please find below a very rough business plan which will hopefully allow me the opportunity to sit down with you both to discuss the possibility of this becoming a reality in the future. I am extremely keen to be involved if you would consider this proposal as an option moving forward with this amazing space which is still vacant but has so much potential to become a successful, self-sufficient business in the future."

[21] The email went on to detail the "very rough business plan" mentioned in the last paragraph of the quotation. The following observations may be made about that plan:

(a) First it identified a "total potential revenue" comprising the addition of:

  (i) events space hire revenue, based on 103 events per year, such events being held on Friday, Saturday and mid-week;

  (ii) wedding ceremonies hire revenue, based on 165 ceremonies per year, such ceremonies to be held on a number of Friday, Saturday and Sunday ceremonies; and

  (iii) commission revenue, based on charging 10% commission on catering for catering companies used at the events and wedding ceremonies.

(b) Second, it identified what were suggested to be "one off set up costs"; namely the cost of adding extra toilet facilities, purchasing extra ceremony chairs and a catering tent, and expenses for website and advertising.

(c) Third, it identified ongoing annual costs for the "above sales", comprising:

  (i) marketing fees for Ms Toohey in the form of a 10% commission on sales and an hourly rate for an estimated 16 hours work per week;

  (ii) the cost of a full-time manager, once the business was busy enough;

  (iii) marketing costs;

  (iv) electricity, water and air-conditioning costs;

  (v) rubbish collection costs; and

  (vi) possibly public liability and liquor licence costs;

(d) Finally, it identified a total revenue per year by deducting the ongoing annual costs from the total potential revenue.

[22] The 5 February 2015 email concluded as follows:

"Again the above business plan is only a rough overview and needs more work. I initially wanted to send this through in the hope that the concept is something you would both consider and then we can hopefully discuss in more detail to structure a more concrete business plan in the hope of moving forward.

I look forward to your response to the above proposal after you have both had the chance to consider and discuss the details. Please feel free to contact me direct at any time on [mobile number] or via this e-mail address.

I would like to close by saying even if this does not work out I would always regret not at least putting the proposal forward as I have such passion and belief in your building and this project that I could not let the concept go without one more attempt to make a long standing dream of mine come true - one way or another.

Thank you in advance for your consideration."

[23] I observe that the counterclaim asserted that the communication of the figures contained in this email amounted to misleading and deceptive conduct by Ms Toohey. As I have mentioned, the counterclaim was eventually abandoned, but not until after the evidence on both sides had concluded. It is not necessary to descend to any detailed fact-finding in relation to the abandoned case. But it is relevant to the weight I place on Mr Golder's other evidence to observe that the figures presented by Ms Toohey as part of the "rough business plan" which needed "more work" were obviously rough and aspirational and the reliance evidence elicited from Mr Golder in relation to those figures was patently implausible. Not only would I not have accepted it, I regard the fact that Mr Golder was prepared to give it as having adversely affected his credit.

[24] On 9 February 2015, Mr Golder responded, using his gallery email address and signing in his name:

"Hi Nicolle

A couple of things after reading through the proposal again:

1. 25 x mid week events = $17 500 Once cleaning and other costs are taken out, not worth hiring for the day. If Friday and Saturday are $1500 couldn't mid week be $1000?

2. We would have to deduct some costs from gross takings before calculating commission. These would include marketing costs, cleaning, electricity, water and rubbish collection, your weekly wages and event management staff, security if required.

3. We will be solely responsible for rates, land tax, insurance, liquor licence, general maintenance and capital outlay for goods and chattels."

[25] On 16 February 2015, Mr Golder sent another email to Ms Toohey using his art gallery email address and signing in his name:

"Hi Nicolle

We have been to the solicitor and he has raised issues with what was presented to him.

The initial 5 years is pretty cut and dried. You take 20 percent of bookings, 10 percent of ancillary income and waive your base rate. We outlay all setup costs and waive rent and act as caretakers to the building to take 80 percent of bookings and 90 percent of ancillary income. This is based on a minimum revenue of $250 000 achieved within 18 months. Should the business not achieve $250 000 turnover within that period your contract is terminated.

At the end of 5 years should we decide to sell, you will have first option at 50% market value. Market value is determined as 3 times annual net earnings. You can then decide to either sell the business at full market value or continue running it.

Should we decide not to sell your position is guaranteed with a further five year contract with a new threshold of $400 000."

[26] Mr Golder's statement in the opening paragraph of the email that he and his wife had been to a solicitor was false. In fact he had spoken with an accountant not a solicitor. He did not explain why he described the accountant as a solicitor, but the casual misstatement in a business negotiation was concerning. Amongst other things, the accountant suggested to him that if this was to go ahead, "it should be set up as a company for tax reasons and for

asset protection". Mr Golder made no mention of that possibility in his email of 16 February 2015.

[27] Ms Toohey responded to Mr Golder at that email address on 18 February 2015:

"Hi again Andrew & Emma

Thank you for the recent e-mail after initial discussions with your solicitor. I have also had the opportunity to discuss the proposal with a 3rd party and have revised the commission only basis with the below offer to move forward on the commission only option.

On an ongoing basis I take 20 percent of gross income of both venue bookings & ancillary incomes. You outlay all setup costs and waive rent and act as caretakers to the building to take 80 percent of the total gross income. This is based on a minimum total revenue of $250,000 in gross income (including both venue bookings & ancillary income) achieved over the first 18 months. Should the business not achieve $250,000 gross turnover for that period the contract is capable of being terminated at your option, however you would be required to pay out any future commissions confirmed on bookings acquired during the initial 18 month period. Should turnover of $250,000 gross be achieved the contract is secure for the balance of the five year term.

At the end of 5 years I will have an option to acquire the business at 50% of market value. Market value is determined as 3 times annual net earnings after including the cost of the agreed rent for the space going forward. If I do not take on the option to acquire the business we can always renegotiate at that time for me to continue as a consultant on a new agreement or dissolve the contract again requiring you to pay out any commissions due on future confirmed bookings acquired during my initial 5 year consulting contract.

I look forward to discussing this advised [sic] proposal once you have had a chance to review."

[28] Mr Golder responded on 19 February 2015 using his art gallery email address and signing in his name:

"Hi Nicole

The option to buy and sell has to be on both sides.

Everything else is agreeable."

[29] Ms Toohey replied to Mr Golder at that email address on 19 February 2015:

"Hi Andrew

Of course, as long as I still have first option to buy the business if you decide you want to sell.

What's the next stage? Do you want me to sign something? Then we can meet to discuss progress of planned work/changes to the venue & schedule in a photo shoot along with setting up a website/email/social media etc etc so I can start selling!"

[30] Mr Golder responded on 19 February 2015 using his art gallery email address and signing in his name:[2]

"Hi Nicolle

You don't need to sign a contract for the consultancy part of it. First right of refusal is yours we agree and are happy to put that in writing.

The high dusting team are coming to the church next Friday to clean the beams. I have ordered chairs which will arrive mid-April. Picture attached. There are also 8 chandeliers arriving in 3 weeks, also attached. Outdoor umbrellas also ordered, 5 of, arriving soon. Pic attached. Emma is working on the marble altar/bench. Trestles ordered.

Still working on outdoor furniture. We will get the concrete painted, a sign at the entrance and the gardens tidied asap. Few other things need a handyman. You can start selling as soon as you like. I'll get some keys cut.

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[2] It was common ground that the three 19 February 2015 emails were sent and received in the order I have recorded. However, the second email suggested it was sent at 12:16pm and the third email suggested it was sent at 11:59am. That discrepancy was unresolved by the evidence.

Works have been submitted to council and out of our hands as to time frame. We hope to know soon."

[31] I interpolate that Mr Golder gave evidence that on 19 February 2015, he notified his accountant to set up the company High Church Pty Ltd with he and Mrs Golder as directors. It is a curiosity that he did not think fit to tell Ms Toohey of their intention in either of his 19 February 2015 emails, especially in the context when he was in the process of finalising an agreement on the material terms. In any event, the accountant must have followed the instruction because the company High Church Pty Ltd was incorporated on 20 February 2015, with Mr and Mrs Golder as its directors.

[32] Ms Toohey replied to Mr Golder at his art gallery email address on 20 February 2015, in an email addressed to both Mr and Mrs Golder:

"Hi Emma & Andrew

Wow I love everything you have purchased – thank you so much for believing in this concept.

I am so sure it is going to be a huge success & cannot wait to see our first ceremony, wedding & function in the space!

Look forward to seeing you on Tuesday."

[33] The Tuesday reference in the last line was to a meeting which Ms Toohey said took place on site on the following Tuesday – which would make it Tuesday 24 February 2015. The meeting was attended by Ms Toohey and by Mr and Mrs Golder. Ms Toohey said there was a discussion about the work which still needed to be done to make the space functional as an events space. She said there was a discussion about when the venue would open and she was told that 1 August 2015 was the date that Mr and Mrs Golder felt comfortable with as the date she could book it from. Ms Toohey recalled that the Event Space did in fact officially open on 1 August 2015. She gave evidence that at that meeting, Mr and Mrs Golder told her that she was not to book events to take place in the space before the opening date of 1 August 2015, but that she did hold "a couple of events" in May 2015 on a case-by-case basis.

[34] I accept that the meeting occurred and that there was a discussion about the work which had to be done. Otherwise, Ms Toohey's recollection of the detail of the discussion did not strike me as a reliable one and I do not accept it. No doubt the fact that work was being done imposed somewhat of a constraint on Ms Toohey actually holding events, but it is plain that it did not prohibit Ms Toohey from, as she put it, "selling". The objective evidence demonstrates that Ms Toohey made about 54 separate bookings before 1 August 2015 which led to about 50 payments being made into the High Church bank account in the period between 23 March 2015 and 1 August 2015.[3]

[35] Mr Golder's second email of 19 February 2015 referred to his getting keys cut for Ms Toohey. Mr Golder gave evidence that he and his wife attended a meeting with Ms Toohey in late February 2015, at which he gave Ms Toohey the keys to the Event Space. I find that the meeting to which he was referring was the same meeting to which Ms Toohey referred in the email of 20 February 2015, which responded to his email of 19 February 2015, namely a meeting on Tuesday 24 February 2015. I accept that Mr Golder gave Ms Toohey the keys at that meeting. But Mr Golder could not recall any discussion which took place at that meeting except the fact that he told Ms Toohey "that High Church was the name of the

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[3] See invoices HC0001 to HC0057 and the High Church bank account statements records of deposits made in the period between 23 March 2015 and 1 August 2015. Many of those bookings related to events which were planned to take place after 1 August 2015. I arrive at 54 and not 57 separate bookings because HC0014 was a payment request for bond from a third-party caterer; HC0047 and HC0054 related to the same booking/event, with the later invoice requesting payment for an added cost (venue extra ceremony time); and HC0056 was dated 29 October 2015.

company that was going to run the business". He also said that he told her at that meeting: "Just that for invoices and stuff in the future, that the business was going to be High Church Proprietary Limited." I thought that Mr Golder's evidence about what he told Ms Toohey at the meeting was false. No such suggestion was put to Ms Toohey during cross-examination, and the suggestion that there had been such an express statement was not reflected in the defendants' pleadings. I gained the clear impression that the evidence was a recent invention aimed at supporting the defendants' pleaded case about the company being the contracting party.

[36] Having regard to:

(a) Ms Toohey's email of 19 February 2015 which revealed her eagerness to start selling;

(b) Mr Golder's email on the same date which said she could start selling as soon as she liked and proposed getting keys cut for her;

(c) Ms Toohey's email of 20 February 2015, which expressed no demur to that proposition and conveyed continued enthusiasm;

(d) the meeting of 24 February 2015 at which Mr and Mrs Golder gave her the keys;

(e) Ms Toohey's evidence that she believed that 7 March 2015 was the first day that she "physically started pre-marketing from High Church"; and

(f) the fact that monies commenced to be paid into the High Church bank account from customers on 23 March 2015 in respect of bookings arranged by Ms Toohey,

I would infer that each side communicated their satisfaction to the other that Ms Toohey could start selling as soon as she received the keys from Mr and Mrs Golder at the meeting on 24 February 2015. That satisfaction may have been established by the reception of Ms Toohey's email of 20 February 2015, but it was certainly established by the time the keys were handed over. I would accept Ms Toohey's evidence that she actually started selling on about 7 March 2015. That conclusion is reinforced having regard to extracts from the High Church Facebook account which were in evidence and which revealed that a "book now" link appeared on posts made to the account, commencing on 8 March 2015.

[37] Commencing with an invoice dated 21 April 2015 and continuing for the duration of the contract, Ms Toohey caused tax invoices to be prepared and sent to customers of the business. Her mother, Lorraine Bauman, helped her with the bookkeeping and was the person who put the tax invoices together. Although there was no mention of the company High Church Pty Ltd on any part of the invoices, each invoice :

(a) was on its face issued on behalf of the name "High Church";

(b) had Ms Toohey's mobile number and an email address at "highchurch.com.au";

(c) stated an ABN;

(d) was dated and also numbered sequentially, starting with "HC0001";

(e) requested payment into a Bank of Queensland account named "High Church" and specified the applicable BSB and account numbers; and

(f) was (subject to credits, refunds and the like) paid to that bank account.

[38] Ms Toohey explained that Mrs Golder had come up with the name "High Church". Ms Toohey acknowledged that she knew that High Church was the name of the business. She said that she obtained the ABN by asking Mr and Mrs Golder what ABN to use. The ABN she was given and which appeared on the invoices was in fact the ABN of High Church Pty

Ltd. Ms Toohey also obtained the bank account details on the invoices from Mr and Mrs Golder. They were in fact the bank account details of the account which High Church Pty Ltd had with the Bank of Queensland. She said that she had an involvement in setting up a website and email addresses using the reference "highchurch.com.au".

[39] Ms Toohey explained that the way she established the figures which went into her invoices was that each month Mr Golder would email a list of what had gone into the High Church bank account that month and those figures were used for the calculation of her commission. Initially the information was provided by Mr Golder sending an email listing relevant deposits, but eventually he used to just send photographs which, using his mobile phone, he had taken of his computer screen, having logged into his account, and called up the page which showed the deposits for the relevant period. The evidence did not make clear when the transition to photographs of computer screens must have occurred. Nor did it make clear whether the photographs would have had the words "High Church Pty Ltd" on them. Hard copies of bank statements were in evidence. But it is not clear that the photographs would have been the same as the bank statements. In any event, the statements covering the period from 20 February 2015 to 30 June 2015 and 1 July 2015 to 25 July 2015 made it clear that the account name was "High Church", but did not make any mention of High Church Pty Ltd. The first statement, which (assuming the photographs revealed the same information as the hard copy) would have revealed that the account was held by a company, was the statement for the period 25 July 2015 to 24 August 2015 because it specified that the account was held by High Church Pty Ltd. Most of the statements thereafter made it clear that the account was held by High Church Pty Ltd.

[40] There was another series of invoices which Ms Toohey caused to be prepared and sent. They were in a similar format, but were numbered sequentially, starting with "CHC001", the "C" apparently representing "commission". This series of invoices represented a claim to an external provider like a caterer for commission on the amount which the provider charged to the client. That provider would know that it was obliged to pay the High Church business a commission. The provider would let Ms Toohey know what the commission was and she would cause an invoice in the CHC sequence to be issued accordingly, seeking a payment to be made into the High Church bank account. Like the HC series of invoices, there was no mention of the company High Church Pty Ltd on any part of the CHC series of invoices.

[41] The final relevant set of invoices were those sent by Ms Toohey on her own behalf. Commencing with invoice 0001 dated 3 June 2015 and continuing for the duration of the contract, Ms Toohey caused tax invoices to be prepared and sent stating the commission she claimed she was owed under the contract. Like the two previous invoice series, there was no mention of the company High Church Pty Ltd on the invoices. Each invoice:

(a) was on its face issued on behalf of Ms Toohey, referencing her business name "*s-e-l-f* (Sales-Events-Launches-Functions)" and ABN;

(b) was addressed to "High Church", but to the attention of Mr Golder using his art gallery email address;

(c) was calculated by reference to amounts deposited to the bank account identified in the High Church invoices; and

(d) was in fact paid by High Church Pty Ltd.

[42] Analysis of *s-e-l-f* invoices 0001, 0002 and 0003 reveals that Ms Toohey claimed commission in respect of 46 HC series invoices for the period to 31 July 2015. That finding goes to

reinforce conclusions about the extent of her selling activities before the 1 August 2015 date which I have already expressed.

[43] Ms Toohey was cross-examined at length about the billing process and the way in which the name "High Church" came to be used on the invoices. She tried to answer these questions honestly, and without seeking to advocate a position, but in my view she tended to understand questions and to answer them without being astute to the distinction between "High Church" as a reference to the name given to her as the name which had been chosen for the business and "High Church" as a reference to "High Church Pty Ltd", as a distinct and separate legal person. By way of example, she answered in the affirmative a cross-examination question to this effect: "So in 2014/2015, it's at the beginning of 2015 that you enter into an agreement with my client and the amount that's set out there is the total amount you billed to High Church – that's my client?" The question plainly sought to elicit an admission relevant to the question of the identity of the contracting parties, but I would not treat the answer in that way, or indeed as anything other than an indication that she billed the High Church business the amount referenced by the question.

[44] Ms Toohey's way of giving evidence was to be contrasted with that of Mr Golder, the tenor of whose evidence seemed to me to be calculated to advocate the position that he and his wife were never personally parties to a contract with Ms Toohey. Mr Golder, for example, on several occasions used the first-person plural to describe something done by his side of the transaction, but then self-consciously corrected that answer to make it a reference to High Church Pty Ltd. He referred to "High Church" bank accounts and then corrected himself to refer to "High Church Pty Ltd" bank accounts. And he suggested that when his emails referred to "we" they were a reference to High Church Pty Ltd, even when they were emails which preceded his obtaining advice from his accountant or the name of the company even being decided upon. I found this aspect of his evidence to be studied and most unpersuasive.

[45] Ms Toohey was never fairly and squarely confronted with a suggestion that Mr Golder had told her that her contract was to be a contract with High Church Pty Ltd, the company, as opposed to a contract with he and his wife personally and that she communicated agreement with such a statement at any time. It was never suggested to her that at any particular time she knew or believed her contract was with High Church Pty Ltd, the company, as opposed to with Mr and Mrs Golder personally. It was never suggested to her that she must have appreciated that Mr and Mrs Golder would necessarily have had that view.[4]

Analysis of initial contract formation

[46] Before examining the conclusions which should be drawn from the foregoing findings as to the way in which any contract was initially formed, it is necessary to make some introductory remarks concerning the applicable law.

[47] Ms Toohey sought to prove that a contract had been formed by the application of an offer and acceptance analysis to the emails which passed between the parties in the context of a business proposal by Ms Toohey to Mr and Mrs Golder concerning the way in which the Event Space might be used as a functions venue.

[48] Whether or not a communication amounts to acceptance or rejection of an offer (including by means of a counter-offer) is to be determined by asking what a reasonable person in the

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[4] Her subjective state of mind is not relevant to the question of contract formation: that is something for an objective assessment. However it will appear that it may be relevant to the question of estoppel by convention.

position of the recipient of the communication would have understood from the terms of the communication, viewed in context: see *NWA Realty v Christou* (2019) 19 BPR 39,825 at 39,837 [41] per Darke J, and the cases there cited.

[49] The last two of the emails on 19 February 2015 raised the possibility of a subsequent and more formal document, thereby raising *Masters v Cameron* issues.[5] What is required is an objective assessment of whether, as at the time in question, the parties intended to bind themselves to the terms of a particular contract, in advance of the creation of a formal document: *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251 at [14].[6]

[50] The defendants contended that the application of an offer and acceptance analysis would not result in the conclusion that a contract had been formed as alleged by Ms Toohey because no distinct offer and acceptance could be discerned. They submitted that, having regard to relevant subsequent conduct and by the application of the principles identified in *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd*, one could infer that a contract was nevertheless eventually formed, albeit one in which the proper contracting party on their side of the bargain was revealed to be the company High Church Pty Ltd and not Mr and Mrs Golder personally.

[51] The principles from *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd*, to which they referred,[7] were these:

> "It is, of course, well recognized that the classical analysis is neither necessary nor suitable to all cases. Thus, in *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd*, McHugh JA (with whom Hope and Mahoney JJA agreed) observed:
>
> > It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of 'offer', 'acceptance', 'consideration' and 'intention to create a legal relationship' which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship …. A bilateral contract of this type exists independently of and indeed precedes what the parties do. Consequently, it is an error 'to suppose that merely because something has been done then there is therefore some contract in existence which has thereby been executed'…. Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words: …. The question in this class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. The conduct of the parties, however, must be capable of proving all the essential elements of an express contract: …. Care must also be taken not to infer anterior promises from conduct which represents no more than an adjustment of their relationship in the light of changing circumstances.
>
> Three relevant propositions of legal principle can be identified in the case law.
>
> **First**, where the question of contract formation involves determining whether acceptance of an offer can be inferred in the absence of express consent, acceptance of the offer may be inferred if an objective bystander would conclude from the offeree's conduct, including its silence, that the offeree has accepted the offer and has signalled that acceptance to the offeror.
>
> **Second**, a similar objective approach is to be taken where the question of contract formation involves determining whether a contract may be inferred from conduct, even where no distinct offer and distinct acceptance can be identified. An enforceable contract may be inferred when the manifest intention of the parties, objectively ascertained, evinces a tacit agreement with sufficiently clear terms.
>
> **Third**, in both cases, care must be taken to ensure that the objective assessment of the relevant conduct in all the circumstances unequivocally points to the existence of the contract in the terms alleged by the party

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5 *Masters v Cameron* (1954) 91 CLR 353.

6 per Bond J (Fraser JA generally agreeing at [2], and Gotterson JA agreeing at [3]).

7 *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251 at [17] to [21] per Bond J (Fraser JA generally agreeing at [2], and Gotterson JA agreeing at [3]). Paragraph numbering and footnotes omitted.

seeking to prove the contract. It is not enough that the conduct is merely consistent with the terms of the alleged binding agreement, the evidence must positively indicate that both parties considered themselves bound by that agreement."

[52] Against that background, it is appropriate to turn to the conclusions which an objective bystander would make concerning the facts.

[53] **First**, Ms Toohey's email of 18 February 2015 contained all the material terms of her proposal and should be regarded as the first relevant offer, no previous offers on either side having arguably been accepted. It was an offer to Mr and Mrs Golder personally.

[54] **Second**, Mr Golder's first email of 19 February 2015 was a counter-offer from Mr and Mrs Golder to contract on the basis of acceptance of all the terms Ms Toohey proposed (as worded by her), save for a variation to the option term. The variation would be understood as a suggestion that at the end of 5 years, each side would have the option of acquiring the business on the terms specified in Ms Toohey's email of 18 February 2015.

[55] **Third**, Ms Toohey's reply email of 19 February 2015 did not accept that offer. It too should be understood as advancing a counter-offer to contract on the basis of:

(a) a continuation of Mr Golder's acceptance of all the terms Ms Toohey had proposed, save for a further variation to the option term on which there had not yet been agreement, to the effect that Mr Golder's proposal that each side have the option was acceptable so long as Ms Toohey had the first option to buy the business if Mr and Mrs Golder decided they wanted to sell;

(b) enquiring whether Mr and Mrs Golder wished to have a formal signed contract; and

(c) seeking a meeting with a view to finalising details so she could start selling.

[56] **Fourth**, reaching agreement that Ms Toohey could start selling was objectively important, because both sides had already agreed that the Mr and Mrs Golder would have a right to terminate if a specified revenue goal was not achieved by the end of an 18-month period. So by the time of Ms Toohey's 19 February 2015 email, an objective third party would conclude that the parties had not yet agreed on that important consideration.

[57] **Fifth**, Mr Golder's reply email of 19 February 2015:

(a) specifically agreed to Ms Toohey's proposal that she had the first option to buy the business if Mr and Mrs Golder decided they wanted to sell, thereby evidencing agreement on all the material terms which had been under negotiation, except for the date on which Ms Toohey could start selling;

(b) suggested to Ms Toohey that she could start selling as soon as she liked; and

(c) communicated that Mr and Mrs Golder did not insist on a formal signed contract but were willing to put the option (which they correctly referred to as a first right of refusal) in writing (implicitly, if requested by Ms Toohey).

[58] **Sixth**, an objective bystander would conclude that by 19 February 2015 the parties had agreed on everything but when Ms Toohey could start selling and whether Ms Toohey required some more formal written agreement. What was outstanding as at 19 February 2015 was a response from Ms Toohey as to whether she accepted the proposition that she could start selling whenever she wanted and whether she required a more formal written agreement.

[59] **Seventh**, an objective bystander would conclude from Ms Toohey's conduct, including her silence in her email of 20 February 2015, that once she had accepted the handover of the keys at the meeting of 24 February 2015, she had communicated to Mr and Mrs Golder that she

accepted that she could start selling whenever she wanted and that she did not require a more formal written agreement. It is arguable that it should be inferred that that occurred at the time of the email of 20 February 2015, but the more compelling conclusion is the one I have expressed. I do not think that the absence of any express response to the question whether she required a formal written agreement is an obstacle to that conclusion. I do not think an objective assessment of the evidence supports the conclusion that there was to be no binding agreement until a formal agreement was executed. Accordingly, I would find that a contract was formed on 24 February 2015.

[60] **Eighth**, on the question of who were the contracting parties:

(a) Ms Toohey had addressed her offer of 18 February 2015 to both Mr and Mrs Golder and as Mr Golder's previous communications responses had all used the first-person plural (and should be regarded as expressing a position on behalf of both Mr and Mrs Golder), so should his response to that offer. Nothing occurred to change that conclusion.

(b) There was not the slightest hint in the documentary evidence before 24 February 2015 that Mr and Mrs Golder ever communicated to Ms Toohey that the contracting party on their side was to be a corporate entity instead of them personally.

(c) I have rejected Mr Golder's evidence that he communicated that intention to Ms Toohey at the meeting of 24 February 2015. Indeed, if he had done so and Ms Toohey had accepted the proposition, one would have expected that "High Church Pty Ltd" would have been specifically mentioned on the face of all three types of invoices developed by Ms Toohey.

(d) The falsity of the further argument, advanced on behalf of Mr and Mrs Golder, that Mr Golder was not authorised by Mrs Golder to act as her agent was established in cross-examination:

> "Q: What I want to suggest to you is that, one way or another, you had always indicated to your husband that he had authority on your behalf to deal with Nicolle to set up this business?
>
> A: He does."

(e) Counsel for Mr and Mrs Golder sought to have me regard the concession in some other way than it reads. I reject that argument. I interpret the evidence as a plain admission.

(f) The only reasonable objective interpretation of the evidence is that the contract formed on 24 February 2015 was one formed between Ms Toohey on the one hand and Mr and Mrs Golder on the other.

Conclusion

[61] In find that the contract was formed on 24 February 2015 between Ms Toohey on the one hand and Mr and Mrs Golder on the other.

## Analysis of the defendants' alternative cases

The pre-incorporation contract case

[62] The defendants' argument sought to rely on s 131 of the *Corporations Act 2001* (Cth):

> **131 Contracts before registration**
>
> (1) If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract:

(a) within the time agreed to by the parties to the contract; or

(b) if there is no agreed time—within a reasonable time after the contract is entered into.

(2) The person is liable to pay damages to each other party to the pre-registration contract if the company is not registered, or the company is registered but does not ratify the contract or enter into a substitute for it:

(a) within the time agreed to by the parties to the contract; or

(b) if there is no agreed time—within a reasonable time after the contract is entered into.

The amount that the person is liable to pay to a party is the amount the company would be liable to pay to the party if the company had ratified the contract and then did not perform it at all.

(3) If proceedings are brought to recover damages under subsection (2) because the company is registered but does not ratify the pre-registration contract or enter into a substitute for it, the court may do anything that it considers appropriate in the circumstances, including ordering the company to do 1 or more of the following:

(a) pay all or part of the damages that the person is liable to pay;

(b) transfer property that the company received because of the contract to a party to the contract;

(c) pay an amount to a party to the contract.

(4) If the company ratifies the pre—registration contract but fails to perform all or part of it, the court may order the person to pay all or part of the damages that the company is ordered to pay.

[63] The defendants' argument fails at the threshold because Mr and Mrs Golder did not enter into, or purport to enter into, a contract on behalf of, or for the benefit of, High Church Pty Ltd before the company was registered on 20 February 2015. Indeed, whatever might have been their subjective personal intention concerning the position of the corporate entity in carrying on the business so far as customers of the business were concerned, they made no mention of the corporate entity to Ms Toohey before its registration and, indeed, I have found they made no mention of the corporate entity to her before the contract between them was finalised.

[64] It is not necessary to consider whether there is any evidence of ratification by the company High Church Pty Ltd.

[65] The defendants sought to advance ratification of a pre-registration contract as a basis for concluding that if the contract was initially struck with Mr and Mrs Golder personally then that position might have changed subsequently. I agree with the submissions advanced on behalf of Ms Toohey that such a conclusion should only be reached by novation or estoppel. Accordingly, I turn now to address those matters.

<u>The novation case</u>

[66] The defendants contended that the conclusion that the contract was novated so that High Church Pty Ltd became a party to it in lieu of Mr and Mrs Golder was justified by the following:

(a) Mrs Golder told Ms Toohey at the meeting on Tuesday 24 February 2015 that High Church was the name of the company that was going to run the business.

(b) Ms Toohey knowingly caused the HC series invoices to be issued to customers –

(i) on behalf of High Church;

(ii) stating High Church's name;

(iii) stating High Church's ABN; and

(iv) stating High Church's bank account details for payment.

(c) Ms Toohey knew that customers were paying the invoices into High Church's bank account as requested.

(d) Ms Toohey similarly knowingly caused her own invoices to be issued to High Church, based on payments which had been made into the High Church bank account and they were paid by High Church.

(e) Ms Toohey knew that High Church paid the initial set up costs for the business.

(f) None of the witnesses said that the performance of the contract by the issuing of the various invoices was being done in respect of Mr and Mrs Golder.

[67] For the following reasons I reject that argument.

[68] **First**, I have rejected Mr Golder's evidence as to what he said at the meeting on 24 February 2015.

[69] **Second**, the defendants' argument does not pay sufficient attention to what the law requires to be proved in order to establish a novation. The authoritative statement of those requirements was made in *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2012) 245 CLR 338 at 346 [12] and 349-350 [27] to [28], where French CJ, Crennan, Kiefel and Bell JJ described novation in the following terms (footnotes omitted):

> "A novation, in its simplest sense, refers to a circumstance where a new contract takes the place of the old. It is not correct to describe novation as involving the succession of a third party to the rights of the purchaser under the original contract. Under the common law such a description comes closer to the effect of a transfer of rights by way of assignment. Nor is it correct to describe a third party undertaking the obligations of the purchaser under the original contract as a novation. The effect of a novation is upon the obligations of both parties to the original, executory, contract. The inquiry in determining whether there has been a novation is whether it has been agreed that a new contract is to be substituted for the old and the obligations of the parties under the old agreement are to be discharged.
>
> …
>
> Handley A-JA was also correct to identify the rescission of the existing … contract as essential to its novation. "Novation" is a term derived from the civil law, Lord Selborne LC observed in *Scarf v Jardine*, and therefore from Roman law. The term is applied to two classes of case: where the parties to a contract make a new contract, with new obligations, impliedly rescinding an existing contract; and, more commonly, to tripartite agreements, where 'the obligation of a third person is by express agreement accepted by one party to an existing contract with the consent of such third person and of the other party to the contract, in lieu of the obligation of such other party, who, by the new contract, is released from his obligation under the original contract'.
>
> Lord Selborne LC in *Scarf v Jardine* described a novation as operating where: 'there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract'."

[70] **Third**, whilst in that case the High Court acknowledged that the requisite intention may be inferred from conduct (see *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* at 350-351 [32]), the learned author of *Heydon on Contract* is surely right when he observed that the significance and complexity of novations means that informal dealings are unlikely to generate them.[8] What is at question is whether it may be inferred that the parties to an existing contract formed a new contract by which they agreed that the new contract was to be substituted for the old and the obligations of the parties under the old contract were to be discharged.

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8 J D Heydon, *Heydon on Contract* (Thomson Reuters, 2019) at [13.480]

[71] **Fourth**, the resolution of that question requires the application of the law as outlined in *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* quoted at [51] above. Care must be taken to ensure that the objective assessment of the relevant conduct in all the circumstances unequivocally points to the existence of a new contract having the effect of a tri-partite novation. It is not enough that the conduct is merely consistent with the terms of such an agreement, the evidence must positively indicate that all three parties considered themselves bound by such an agreement.

[72] **Fifth**, the evidence does not support a conclusion, objectively reached, which positively indicates that all three parties (Ms Toohey, Mr and Mrs Golder, and High Church Pty Ltd) considered themselves bound by such an agreement. I observe that there was some attempt by the defendants to contend that Ms Toohey was to be treated as being deemed to admit allegations pleaded in their defence as to the state of her knowledge[9] (which would have taken the defendants part of the way to the conclusion for which they contended), because of a generally worded traverse in the pleaded reply.[10] I was not persuaded to do so because I regarded the reply as having pleaded a conclusion,[11] containing implicit assertions as to the state of her knowledge which were inconsistent with the alleged deemed admission and which were capable of being regarded as an explanation for the traverse. Although such a plea could have been struck out,[12] no such application was made, and having gone to trial without doing so, I concluded that the defendants could not validly advance the deemed admission argument.

[73] **Sixth**, although it is perhaps but another point in support of the conclusion that the evidence did not permit of an objective positive conclusion that all three parties considered themselves bound by a novation, I agree with the submission advanced on behalf of Ms Toohey that one reason not to infer novation was that Mr and Mrs Golder's evidence did not condescend to demonstrating how it was that High Church could be thought to have been able to promise to deliver what an objective third party would have appreciated was a crucial part of the bargain, namely the Event Space. Mr Golder owned the High Church property, not High Church Pty Ltd. There was no evidence that High Church Pty Ltd had any agreement with Mr Golder which enabled it to guarantee the availability of the venue for the life of the contract, or that it conveyed to Ms Toohey that it had such an agreement.

[74] The defendants' novation argument fails.

<u>The estoppel by convention case</u>

[75] It was common ground that the elements of estoppel by convention were as summarised by Applegarth J (with whom Gotterson and Morrison JJA agreed) in *Browning v ACN 149 351 413 Pty Ltd (in liq) (formerly known as Enviren Constructions Pty Ltd)* [2016] QCA 169 at [42] (footnotes omitted):

> "Such a form of estoppel is not founded on a representation. It is based on the conduct of relations between parties. To establish a common law estoppel or estoppel by convention, a plaintiff must establish (1) that it has adopted an assumption as to the terms of its legal relationship with the defendant; (2) that the defendant has adopted the same assumption; (3) that both parties have conducted their relationship on the basis of that mutual assumption; (4) that each party knew or intended that the other act on that basis; and (5) the departure from the assumption will occasion detriment to the plaintiff."

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9 Defence at [2C(g)].

10 Reply at [2A].

11 Reply at [2A(b)].

12 As a plea of a rolled-up conclusion without a sufficient articulation of material facts to support the conclusion.

[76] The defendants' argument was that Mr and Mrs Golder adopted the assumption that they, as directors of High Church Pty Ltd, were conducting the business of exploiting the Event Space with Ms Toohey, and that Ms Toohey was dealing with them on that basis; that Ms Toohey adopted the same assumption and the parties conducted their relationship on that basis for the entirety of its duration; and that the parties on each side knew the other was acting on that basis.

[77] It suffices to dispose of this argument to observe:

(a) On the findings I have made, even if Mr and Mrs Golder adopted the alleged assumption before the contract was formed, Ms Toohey certainly did not.

(b) Even after the contract was formed, and even if the alleged assumption could be proved, the alleged assumption would not in fact negate the proposition that as between the two contracting parties, Mr and Mrs Golder continued to be liable. The assumption as stated is equally consistent with the involvement of High Church Pty Ltd being an external facing involvement, such that –

(i) so far as third parties (customers, service providers and the like) were concerned Ms Toohey was the agent of High Church Pty Ltd for the purpose of bringing about contracts as between them and High Church Pty Ltd; and

(ii) so far as the relationship between Ms Toohey on the one hand and Mr and Mrs Golder on the other, High Church Pty Ltd was the agent of Mr and Mrs Golder for the purpose of discharging at least some of their obligations to Ms Toohey (even though it could only be Mr Golder and not High Church Pty Ltd who discharged the obligation to provide the Event Space).

(c) Even if the alleged assumption is to be interpreted as an assumption inconsistent with any continued personal liability of Mr and Mrs Golder on the contract as formed, no such assumption carrying that implication was ever put to Ms Toohey. Moreover, it was not suggested to her that she knew Mr and Mrs Golder were acting on the basis of any such assumption. I would not regard her as having the requisite state of knowledge and belief.

[78] The estoppel by convention argument must also fail.

**The terms of the contract**

[79] The wording of the terms of the contract derives from the emails which were exchanged, analysed in the manner explained above. The result is that I would regard the express terms of the contract formed on 24 February 2015 as comprising the following:

(a) Ms Toohey on the one hand and Mr and Mrs Golder on the other agreed to conduct the business of making the Event Space available for events such as wedding ceremonies, wedding receptions and corporate functions.

(b) Ms Toohey was responsible for the marketing of the business in return for which on an ongoing basis she would take 20% of the gross income of both venue bookings and ancillary income.

(c) Mr and Mrs Golder would be responsible for all setup costs, would waive rent and would act as caretakers to the building, in return for which they would take 80% of the gross income of both venue bookings and ancillary income.

(d) Those provisions concerning remuneration were based on a minimum total revenue of $250,000 in gross income (including both venue bookings and ancillary income) achieved over the first 18 months of a 5-year contract term.[13]

(e) If the business failed to achieve $250,000 in gross turnover over the first 18 months of a 5-year contract term, Mr and Mrs Golder could terminate the contract at their option, although they would be obliged to pay out to Ms Toohey any future commissions confirmed on bookings acquired during the initial 18-month period.

(f) But if the business achieved turnover of $250,000 gross in that period, the contract would be secure for the balance of the 5-year contract term.

(g) At the end of the 5-year contract term –

(i) Ms Toohey had the first option to buy the business if Mr and Mrs Golder decided they wanted to sell, for a price of 50% of market value, where market value was determined as 3 times annual net earnings after including the cost of the agreed rent for the space going forward.

(ii) Mr and Mrs Golder would also have the option to buy the business, for the price of 50% of market value, calculated in the same way.

(iii) The parties could renegotiate at that time for Ms Toohey to continue as a consultant on a new agreement or could dissolve the contract again requiring Mr and Mrs Golder to pay out any commissions due on future confirmed bookings acquired during the initial 5-year contract term.

[80] It will be noted that there is no express term requiring Ms Toohey to undertake the invoicing in respect of the bookings which she arranged. Nor was there any express term obliging Mr and Mrs Golder (or High Church Pty Ltd on their behalf) to pay the expenses of the business. But there was no controversy before me that those responsibilities were properly so allocated as between the two sides.

[81] The remaining issues in the trial concern whether the contract was lawfully terminated by Mr and Mrs Golder in reliance upon their contention that the business had not achieved the contractual revenue target. If the contract was lawfully terminated, then that would be the end of Ms Toohey's damages claim. But if it was not, then the question of the proper assessment of damages would remain. That would involve working out the extent of compensation required to place Ms Toohey in the position in which she would have been if the contract had been performed according to its terms. Amongst other issues, it would be necessary to make an assessment of the value of the commission income which would have been earned over the remaining 5-year contract term and whether any regard should be paid to the possibility of a further earnings from the business beyond the initial contract term. That issue raises questions whether the option should be regarded as a valuable contractual right; whether it would have been exercised; and, if not, whether there would have been a further contract term. The defendants contend the option had no value because the option was uncertain and unenforceable, and in any event depended upon them wanting to sell. They contended that there would have been no further contract term. In that context, it might become necessary to determine an argument which Ms Toohey advanced, namely that

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[13] The way I have phrased the term leaves open the question whether it was to be regarded as promissory, such that it might be regarded as breached in the event that the target was not reached. I would not regard the term in that way. The only consequence of failing to meet the target was the availability of the termination right. In any event the defendants did not advance a damages case based on failure to achieve the contractual target.

there was implied into the contract, as a matter of necessity and to give efficacy to it, a term to the effect that for so long as the business continued, Mr and Mrs Golder would ensure that the Event Space remained available to the business.

[82] Before turning to an examination of these issues it is necessary to identify how and in what circumstances the contract was terminated.

**Termination of the contract**

[83] On the facts which I have found (which include my regarding as unreliable some evidence of Ms Toohey which might be thought to have postponed the start date: see [33] and [34] above), there is no reason to think that the 18-month period for achieving the revenue target did not start when the contract was formed, because it was from the time the contract was formed that both parties knew that Ms Toohey could start taking bookings as soon as she liked. And it is plain that she did.

[84] Thus the first 18 months of the 5-year contract term expired on about 24 August 2016.

[85] It is at least clear that by about 8 September 2016, Ms Toohey and her mother Ms Bauman must have been astute to the possibility that the 18-month period to achieve the target revenue had expired because on that date, Ms Bauman emailed Mr Golder in these terms, attaching Ms Toohey's 18 February 2015 email and the three emails on 19 February 2015:

> "I refer you to the following email trail which confirms Nicolle's budget of $250,000 revenue in 18 months.
>
> Please find attached a workbook showing Nicolle has over achieved her 18 month prediction of $250,000 in 16 months. Please do not hesitate to contact me if you require clarification. Bookings for 16 months HC0001 to HC0209 are just over $331,500
>
> Note your 80% of the gross income does not show your expenses as Nicolle's 20% does not show her expenses including my wages.
>
> I think congratulations are in order for everyone including yourself who have worked so hard to achieve such good results."

[86] On 9 September 2016, Mr Golder emailed Ms Toohey:

> "Hi Nicolle
>
> We have received the email documenting the forward bookings and the bookings to date. Congratulations on reaching your target.
>
> We thought that the $250 000 target would be a solid start with enough interest generated to increase future bookings. However in practice, unbudgeted costs have drastically reduced our profit. These include a site manager whose job we were relying on caterers to perform both in managing the functions and setting up. We have also had very bad results from website techs which have left us with high costs, little benefit and legal bills.
>
> The building has not rented successfully during the week and solid weekend bookings are not enough to sustain the business in its current form.
>
> The business structure has proven difficult to administer and unprofitable to us, only 3.5% return on our investment, a large dollar value loss when you consider the $2.5 million we spent setting it up and 8% return we require.
>
> The forward bookings for the first half of 2017 total less than $50000 leaving us in the position where it is untenable to continue. The second half of the year may continue to book but we probably have the bulk of the first half already. On 2017 bookings High Church will close before the end of the year.
>
> We are forced to look for a solution which at this stage would be a commercial leasehold on the building. Ideally we would like a tenant who will honour the forward bookings you have made and will work through the transition period with you so that you receive all the commission you are entitled to.
>
> We will move as quickly as possible to find the right person.

Thanks for everything. Andrew"

[87] On Monday 12 September 2016, Mr Golder emailed Ms Toohey in these terms:

"Hi Nicolle

We aren't selling the business, we are leasing the building.

Forward bookings for the first six months of 2017 total less than $50 000. After GST, $45 000, $9000 in your commission. management payment of $19 000, SEO of $4000 and $5500 cleaning, $5000 rates, $5000 electricity and water. As you can see there is no business to sell. In order to keep the building we have to make a move now.

You will be getting $9000 for six months work if it continued.

Of course you have first option to lease If you wish but I didn't think that you would want to take it considering the figures. We are looking for $220k rent plus GST based on the market value of the building. You will need a bank guarantee of $250k.

There really isn't any other option for us."

[88] On Tuesday 13 September 2016, Mr Golder emailed Ms Toohey in these terms:

"Hi Nicolle

I think have found someone to take on the lease. They need a conference centre so it will fill the place during the week and not create huge amounts of noise with musicians etc. They are also willing to work out the rest of your bookings with you which is great.

They want to move pretty quickly and we would like to sign a lease on Friday with them."

[89] On Wednesday 14 September 2016, Mr Golder emailed Ms Toohey in these terms:

"Hi Nicolle

The business is failing. It will not make it through to the end of the financial year on current bookings let alone to the end of the forward bookings. We too would have preferred to have continued as but the current business model has failed. You have $80k worth of bookings for the next 13 months. That's gives us $221k for the next 36 months which would be a total of $44k to you. I doubt you want to work for 36 months for that money and I can't.

The agreement was that you were employed as a consultant, your words, and you were to be paid accordingly until such time as we wanted to sell the business, if ever, and at that time you would have first option to buy. Our forward projection is bankruptcy but are willing to pay for the bookings you have achieved and rent out the building to achieve an income.

If you would like to buy the business, please submit your offer by close of business today as we are due to sign a lease on Friday. You will be paid for your consultancy work but have no equity in the business and have been paid for all work you have done to date and will be paid fairly for forward bookings.

Thanks Andrew"

[90] Three observations may be made about Mr Golder's emails, the first two of which contribute to my having strong reservations about the reliability of his evidence.

[91] **First**, it is plain that Mr Golder was taking a cavalier approach to the contractual obligations owed to Ms Toohey. The way in which his emails described what the agreement was between the two sides was not, on any view, a fair characterisation of the contract. It simply ignored the fact that the contract had a fixed term unless terminated for failure to achieve the revenue target. That was a topic on which agreement had been plain. And it was evident that he was not then contending that the revenue target had not been achieved.

[92] **Second**, his emails conveyed the false impression that they "were due to sign a lease on Friday" with people who wanted a conference centre. The true position – which was not then disclosed to Ms Toohey – was that Mr and Mrs Golder had approached a company named Fresh Events + People Pty Ltd. That company operated what it described as "a

multifaceted organisation, including event management, catering, staffing styling and operation of a restaurant in Fortitude Valley." The deal which was signed on the Friday (i.e. Friday 16 September 2016) was a Memorandum of Understanding between High Church Pty Ltd and Fresh Events + People Pty Ltd. The recitals to the Memorandum of Understanding bearing that date were instructive as to the true intentions of Mr and Mrs Golder:

> "**Background**:
>
> The partnership between the two parties is mutually beneficial. High Church wishes to increase the venue bookings and Fresh Events wishes to increase their catering and event business.
>
> **Purpose**:
>
> This MOU provides the base for both businesses to increase their exposure and turnover. High Church wish to streamline their operation by appointing one business to oversee bookings, catering, entertainment and general event management of the events booked in the venue. Fresh Events wish to streamline their business by offering a venue space to their clients, prospective clients and general market which enables them service them within a space they control. This will assist them to grow their catering, theming and event management segments in a controlled environment."

[93] **Third**, Ms Toohey contended that Mr Golder's email of 14 September 2016 should be regarded as a repudiation of their bargain done in breach of contract, which was then accepted by Ms Toohey by the commencement of this proceeding a few days later. If termination by Mr and Mrs Golder could not be justified by reliance on a failure to meet the contractual revenue target, I would agree. The email certainly evinces an intention no longer to be bound by the contract between them, notwithstanding the failure to express any reliance on the contractual termination term. The defendants did not advance an argument that the email should be read in any other way. Moreover, as Senior Counsel for Ms Toohey recognised (by reference to *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359), the important question is whether there was actually a contractual justification for terminating, not whether the justification was intentionally relied on at the time of purported termination. It is to that question which I now turn.

## Was the termination of the contract a breach of the contract?

[94] Two issues arise in relation to the determination of the question of whether Mr and Mrs Golder repudiated the contract. First, whether, by their email of 9 September 2016 which explicitly accepted that the target had been reached, Mr and Mrs Golder should be regarded as having affirmed the contract and waived their right to terminate on the footing that the revenue target had not been reached. Second, if it was still open to Mr and Mrs Golder to rely on termination for failure to meet the revenue target, whether the business in fact had reached revenue target as Ms Toohey had asserted.

### Were Mr and Mrs Golder disentitled from relying on contractual termination by waiver?

[95] Ms Toohey's pleaded case was that even if the target had not been reached, and a contractual right to termination had arisen, the defendants' conduct of communicating to Ms Toohey the first paragraph of the email of 9 September 2016 constituted affirmation of the contract, and waiver of the right to terminate for that reason.

[96] It is true that the congratulatory language of the first paragraph was not consistent with Mr and Mrs Golder then having a belief that the target had not been reached. On the other hand, it could not be seen as an election against termination or as an affirmation of the continuation of the contract.

[97] In fact, the tenor of the email as a whole communicated that Mr and Mrs Golder had no intention that the contract would continue for the remainder of its 5-year term, thus:

(a) "… bookings are not enough to sustain the business in its current form."

(b) "… forward bookings for the first half of 2017 total less than $50 000 leaving us in the position where it is untenable to continue."

(c) "On 2017 bookings High Church will close before the end of the year."

(d) "We are forced to look for a solution which at this stage would be a commercial leasehold on the building. Ideally we would like a tenant who will honour the forward bookings you have made and will work through the transition period with you so that you receive all the commission you are entitled to. We will move as quickly as possible to find the right person."

[98] In my view it is impossible to regard the email of 9 September 2016 as making the sort of unequivocal and unqualified communication required by the authorities.[14] If a right to terminate had arisen, Mr and Mrs Golder would not have been disentitled from relying on it on the basis alleged.

Did the business reach the revenue target?

[99] Resolution of this issue requires a determination of the proper construction of the relevant terms of the contract and then a determination as to whether the revenue target was achieved having regard to that construction.

[100] The proper approach to the construction of commercial contracts is not in doubt. I take the same approach here as I outlined in *Wagners Cement Pty Ltd v Boral Resources (Qld) Pty Ltd* [2020] QSC 124 at [36], namely to regard the principles as having been sufficiently identified by French CJ, Nettle and Gordon JJ in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[15] and subsequently approved in *Victoria v Tatts Group Ltd*:[16]

> "[46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which

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14 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 646, 656; *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 39; *QBE Insurance (Australia) Ltd v Cape York Airlines Pty Ltd* [2012] 1 Qd R 158 at 167-168 [24].

15 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 per French CJ, Nettle and Gordon JJ at 116-117 [46] to [51], internal citations omitted.

16 *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392 at 401 [51].

> are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.
>
> [51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties ... intended to produce a commercial result'. Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'."

[101] Because the terms in issue were relevantly ambiguous, in order to determine the proper construction of the contract, recourse may be had to:

(a) the text of the terms, the meaning of which is disputed;

(b) the internal context within which that text occurred, namely the entire text of the agreed contract terms; and

(c) evidence of events, circumstances and things external to the contract which were known to the parties or which assist in identifying the purpose or object of the transaction.

[102] The particular terms which were relevant to this question were those which derived from Mr Golder's first 19 February 2015 email, which accepted the wording of the offer made by Ms Toohey's 18 February 2015 email. It is helpful to restate the relevant terms, with emphasis on the parts which are presently important:

> Ms Toohey was responsible for the marketing of the business in return for which on an ongoing basis she would take 20% of the **gross income of both venue bookings and ancillary income**.
>
> Mr and Mrs Golder would be responsible for all setup costs, would waive rent and would act as caretakers to the building, in return for which they would take 80% of the of the **gross income of both venue bookings and ancillary income**.
>
> Those provisions concerning remuneration were based on a minimum **total revenue** of **$250,000 in gross income (including both venue bookings and ancillary income)** achieved over the first 18 months of a 5-year contract term.
>
> If the business failed to achieve **$250,000 in gross turnover** over the first 18 months of a 5-year contract term, Mr and Mrs Golder could terminate the contract at their option, although they would be obliged to pay out to Ms Toohey any future commissions confirmed on bookings acquired during the initial 18-month period.
>
> But if the business achieved **turnover of $250,000 gross** in that period, the contract would be secure for the balance of the 5-year contract term.

[103] It may be observed that the termination right was expressed in the contract term which used the phrase "gross turnover" rather than "total revenue" or "gross income". That does not matter because I think it is clear enough that the agreement between the parties used the terms "gross income", "total revenue … in gross income", "gross turnover" and "turnover … gross", interchangeably. I think it is also clear enough from the agreed wording that all four terms refer to gross income derived from both "venue bookings" and "ancillary income". And the context of the preceding emails – in particular Ms Toohey's email of 5 February 2015 – suggests that:

(a) "venue bookings" should be interpreted as a reference to income derived from hiring out the Event Space for functions and events; and

(b) "ancillary income" should be interpreted as a reference to income derived from levying some form of commission or fee to third-party service suppliers, like caterers.

[104] I received reports and oral evidence from two expert accountants, Mr Lytras (called by Ms Toohey) and Mr Thynne (called by the defendants) who had analysed and tabulated the information which could be gleaned as to the revenue of the business having regard to the invoices issued by Ms Toohey and monies received into the High Church Pty Ltd bank account over relevant periods.

[105] Annexure 11 to Mr Lytras' report recorded information concerning amounts received by the business over its life before termination. Annexure 11 was prepared from an original document prepared by Ms Toohey's son, which Mr Lytras had been asked to assume was correct and which Mr Lytras had only checked in a cursory manner. Mr Lytras concluded that the $250,000 target was reached by the end of April 2016.

[106] For his part, Mr Thynne took the same starting point as Mr Lytras, but analysed the data and made deductions from it. He analysed the receipts of the business for the period 20 February 2015 to 19 August 2016, reaching the conclusion that the total gross income from venue bookings and ancillary income during that period was $223,048. He arrived at that conclusion as follows:

| | |
|---|---|
| Gross income from Mr Lytras' annexure 11 | $362,191 |
| Less Revenue derived outside the 18-month period | $89,224 |
| Less Amounts refunded to customers during the 18-month period | $7,430 |
| Less amounts forwarded to suppliers during the 18-month period | $42,490 |
| Total | $223,048 |

[107] Subject to what follows, I regard the approach by Mr Thynne to be correct.

[108] As to the first deduction made by Mr Thynne:

(a) Senior Counsel for Ms Toohey contended that the point of the contractual target was to ensure profitability by generating a minimum level of profit-generating business. The focus, he contended, was not on when the revenue would be received, but whether the revenue-generating, and therefore profit-generating, events were organised. On that basis the target should be measured by the amounts invoiced and not merely the amounts received during the target period.

(b) I reject that argument. It does not pay sufficiently close attention to the words by which the parties expressed their agreement. The terms described at [102] above reveal that the conception of a gross figure comprising the addition of venue bookings and ancillary income was used for two purposes: the identification of how remuneration would be split between the two sides on an ongoing basis and the identification of a target revenue figure for the purposes of the termination right. And for the former purpose, each side would "take" a particular percentage of the gross figure.

(c) A reasonable businessperson would understand that the gross figure to be used for both those purposes could only be the gross figures actually received by the business which bore the character of receipts for "venue bookings" and receipts for "ancillary income".

(d) It follows that it would not be appropriate to incorporate within the calculation amounts which were not actually received by the business during the target period.

(e) Attachment 7 to Mr Thynne's report identified how he calculated the $89,224 deduction. The figure comprised two components. The first component was for income which he identified as having been received outside the 18-month target period. That figure totalled $43,593. The second component was for income where the date the customer paid the amount was unknown, but which Mr Lytras had assumed had been paid to High Church Pty Ltd on the date of the invoice issued to the customer. Mr Thynne did not make that assumption but checked those items and found that they could not be accounted for in the High Church Pty Ltd bank statements, and, accordingly, concluded that they could not be regarded as representing income received during the 18-month period. On his calculations, that figure totaled $45,631.[17]

(f) The assumption made by Mr Lytras was not a safe one. I accept Mr Thynne's logic in making both components of the deduction. I would make only a slight alteration. He deducted a payment of $695 which was received on 22 August 2016. Based on my finding that the period extended to 24 August 2016, that figure should be added back in. The total deduction which should have been made was $88,529.

[109] As to the second deduction:

(a) Mr Thynne identified six refunds totalling $7,430 (GST exclusive) which were made in respect of income received during the target period. He argued that Mr Lytras had deducted other refunds and there was no reason not to deduct the six refunds which he identified.

(b) The question is not to be resolved by seeking to attain consistency as between Mr Lytras and Mr Thynne. The question is to be resolved by determining whether a receipt which otherwise was to be regarded as going towards the target because it was a receipt for a "venue booking" or an "ancillary booking", should be regarded as losing that character because of a subsequent decision to refund some or all of the amount which had been received.

(c) The contract terms did not provide for such an adjustment. Without a careful demonstration that the circumstances surrounding each refund were such as to justify the conclusion that both parties reached a view that monies should be refunded (and therefore not taken account either in the contractual remuneration split or in calculation of the target revenue) I could not conclude that such an adjustment should be made.

(d) The defendants had the onus of proving the justification for the deduction and did not make any attempt at such a careful examination. I am not persuaded that the deduction should be made.

[110] As to the third deduction:

(a) Mr Thynne's $42,490 figure was made up of twelve amounts which were received as part of payments received from customers but ultimately paid out by the business to third party suppliers on the following dates:

| Item | Date | Supplier | Payment | GST | GST excl |
|---|---|---|---|---|---|
| 1 | 21-May-15 | Gramercy catering (Cassie main event) | 1,100 | 100 | 1,000 |

[17] On my calculations the summation of the "unknown" items in attachment 7 was $45,633, not $45,631. The difference is *de minimis*. I will use Mr Thynne's figures because they were not relevantly challenged.

| | | | | | |
|---|---|---|---|---|---|
| 2 | 13-Dec-15 | Spiros (Siemens function) | 3,876 | 352 | 3,524 |
| 3 | 18-Dec-15 | Noosh caterers (Siemens function) | 10,761 | 978 | 9,782 |
| 4 | 18-Dec-15 | Select video (Siemens function) | 3,611 | 328 | 3,283 |
| 5 | 17-Feb-16 | Noosh Caterers (Eglihton wedding) | 2,500 | 227 | 2,273 |
| 6 | 09-Aug-16 | The Other Bridesmaid (Eglihton wedding) | 900 | 82 | 818 |
| 7 | 17-Aug-16 | Zen Catering (Eglihton wedding) | 10,980 | 998 | 9,982 |
| 8 | 09-Aug-16 | The Other Bridesmaid (Michelle and Daniel wedding) | 800 | 73 | 727 |
| 9 | 17-Aug-16 | Zen Catering (Michelle and Daniel wedding) | 6,954 | 632 | 6,322 |
| 10 | 01-Sep-16 | The Other Bridesmaid (Kaela and David wedding) | 800 | 73 | 727 |
| 11 | 30-Sep-16 | Gramercy catering (Kaela and David wedding) | 1,502 | 137 | 1,366 |
| 12 | 05-Oct-16 | Gramercy catering (Kaela and David wedding) | 2,954 | 269 | 2,685 |
| | | **Totals** | **46,739** | **4,249** | **42,490** |

(b) Item 1 was an amount received from Gramercy Catering – which was used as an outside caterer – essentially as a bond in case Gramercy caused some damage to the venue. The amount of the bond was returned. The amount could not be regarded either as "venue bookings" or "ancillary bookings".

(c) Items 2, 3 and 4 referred to amounts received because a special arrangement was struck with the client (Siemens) whereby the amount invoiced included amounts which Siemens would otherwise have paid to third party suppliers and High Church Pty Ltd undertook the responsibility of paying those third-party suppliers. Those amounts could not be regarded either as "venue bookings" or "ancillary bookings".

(d) The remaining items concerned "package deals" in which the business supplied the venue and the catering for a set fee; invoiced the client for the total amount of the package and then paid third party suppliers itself direct. The amounts received from the client in respect of the third-party suppliers could not be regarded as income from either "venue bookings" or "ancillary bookings".

(e) The result is that each of the particular amounts identified by Mr Thynne and making up this deduction was received by the business as part of a payment made by a customer but in circumstances in which it was the joint contemplation of the customer and the business that the amount would be paid by the business to a third party (which Mr

Thynne has referred to as the supplier). I agree with the defendants' submission that the amounts could not be accounted for as part of the $250,000 target because they could not be regarded as falling within either "venue bookings" or "ancillary bookings".

Conclusion

[111] Once the gross income figures for the business are adjusted by reference to the amounts received outside the period and the supplier payments, it becomes apparent that the contractual target was not achieved. Mr and Mrs Golder had the right to terminate for failure to achieve the target within the 18-month period, although having done so they became obliged to pay out to Ms Toohey any future commissions confirmed on bookings acquired during the initial 18-month period.

[112] The result is that the conduct of Mr and Mrs Golder which would otherwise be regarded as repudiatory conduct can be justified by reliance on the failure of the business to achieve the contractual revenue target. It was not conduct in breach of contract and Ms Toohey's damages claims must fail.

**Further findings**

[113] In case I am wrong in my conclusion that Ms Toohey's damages claims must fail, I should address certain further matters, so as to put an appeal court in a position to assess damages if it disagrees with my conclusion.

What income would Ms Toohey have earned from the business in the remainder of the contract term?

[114] Mr Lytras' assessment of loss for the balance of the first term was $246,832 (excluding GST), calculated in this way:

| Period | Gross receipts | Ms Toohey's 20% |
|---|---|---|
| 15 September 2016 to 18 February 2017 | $109,905 | $21,981 |
| Year ended 18 February 2018 | $308,862 | $61,772 |
| Year ended 18 February 2019 | $370,634 | $74,127 |
| Year ended 18 February 2020 | $444,761 | $88,952 |
| **TOTAL** | **$1,234,162** | **$246,832** |

[115] However I would not accept that calculation. It should be adjusted in the following ways.

[116] Income should be assessed having regard to the findings I have made about the contract, namely that Ms Toohey's income would have been 20% of the likely gross figures which would have been received by the business which bore the character of receipts for "venue bookings" and receipts for "ancillary income". That would mean treating the calculation in the way I have explained above in the discussion concerning the deductions proposed by Mr Thynne.

[117] Ms Toohey contended that gross receipts of the business would have grown by 20% compounding each year and Mr Lytras proceeded by that assumption. But that figure came from Ms Toohey's assessment of what she would have been able to achieve. I was not persuaded by her evidence in this regard. She could hardly be regarded as objective and her arrival at that figure was hardly scientific. The evidence was no more than an *ipse dixit*. Although I thought her estimate was honestly expressed, I have not regarded it as sufficient to justify a finding that the gross receipts would have grown by 20% each year.

[118] On the other hand, Mr and Mrs Golder contended (supported by Mr Thynne's calculations) that having regard to the trajectory of the last few months of trading, the gross receipts would have continued downwards. I do not think that approach is a fair predictor either. I accept the submission advanced by Senior Counsel for Ms Toohey that any downwards trajectory was a temporary problem caused by the impact of some personal upheavals in her life which occurred between about January 2016 and March 2016. Any assessment should proceed by reference to an assumption that by the commencement of the third full year of the term, namely 24 February 2017, there would have no longer been any impact on earnings caused in that way.

[119] The question is what the level of annual gross receipts by the business which bore the character of receipts for "venue bookings" and receipts for "ancillary income" would have been for the remaining term. This is subject to many imponderables. Using a broad brush approach, I think the safest way to calculate loss would be:

(a) To calculate income for the second full year of the contract term (i.e. the term ending on 24 February 2017 by reference to actual receipts up until the date of termination and to proceed (as Mr Lytras did) by assuming that the remaining 5 months or so of that year would have resulted in the same revenue earned in the previous 5 full months.

(b) To do that calculation by making and not making adjustments in the way I have explained above in the discussion concerning the deductions proposed by Mr Thynne.

(c) To assume gross receipts for years 3, 4 and 5 would have been the same as gross receipts for year 2 (adjusted in the way I have suggested), but without assuming either a growth or a reduction rate.

(d) To make the foregoing assumption, notwithstanding the fact that Ms Toohey took a 7-to-8-month vacation between 23 December 2017 and August 2018. I think it is unlikely that such a lengthy vacation would have been taken had the contract not been terminated. The continuing commitment to the contract and the lure of continuation of the business beyond the 5-year term would have been enough to persuade Ms Toohey to continue taking only the usual amount of vacation time.

(e) There is no need to address mitigation of loss, because the commission which Ms Toohey sought to earn during the contract term was not to be earned by her on the basis of that being the only income producing work which she did. The assumption should be that she could have earned the lost income on top of whatever else she managed to earn employing her talents as an events organiser, juggling her various retainers.

(f) I would not discount the calculation for contingencies which might have prevented her from continuing to work for the whole of the remaining contract term. The evidence is that she would in fact have been able to do so.

[120] Neither Mr Lytras nor Mr Thynne did any calculation on the basis of those assumptions. Had I found that there was a liability to damages, I would have given the parties an

opportunity to be heard on the calculation which should be made on those assumptions. In light of my conclusion that there is no liability to damages, there is no utility in that course.

Should any account be taken of the possibility of income being earned from the business beyond the contract term?

[121] The only way in which income could have been earned by Ms Toohey from the business after the expiry of the initial contract term was if she successfully exercised the option and earned income from the business she acquired, or if, not having exercised the option, she reached an agreement with Mr and Mrs Golder for a further term.

[122] There are a number of considerations which, taken together, persuade me to conclude that the possibility of either of those courses occurring was so remote as to justify the conclusion that they should not be taken into account in the assessment of damages.

[123] First, Mr and Mrs Golder had a strong adverse view of the performance of Ms Toohey. They would not have agreed to continue the relationship if they had a choice. As at the end of the contract term on 24 February 2020, absent being bound contractually to accord Ms Toohey any rights, they would have sought a relationship with someone else, much as they in fact did with Fresh Events + People Pty Ltd.

[124] Second, Ms Toohey's case assumed that she had an option which could be exercised so as to require Mr and Mrs Golder to sell the business to her, regardless of their intentions. But that conclusion ignored the wording of her email of 19 February 2015 which referred to the option as a "first option to buy the business if [Mr and Mrs Golder] decide they want to sell". The wording conferred a first right of refusal, not an option, and that was in fact recognised by Mr Golder's email accepting that term. That creates the problem that Mr and Mrs Golder would not have wanted to sell the business to her and did not need to do so in order to enter into another relationship with another consultant. The result would have been that the "option" could not be regarded as a valuable right to Ms Toohey.

[125] Third, the option was not valuable for another reason, namely the contract did not give the business any security of tenure. Even if the business could have been purchased, there was no contractual term which obliged Mr Golder to give Ms Toohey a lease or a license to use the Event Space for any particular term or for any particular price. As to this:

(a) Ms Toohey's pleaded answer to this problem was that there should be implied in the contract, as a matter of necessity and to give efficacy to it, a term to the effect that for so long as the business continued, Mr and Mrs Golder would ensure that the Event Space remained available to the business.

(b) But that argument must fail because it could not be regarded as reasonable and equitable to tie up Mr Golder's rights over real property for an unlimited time, especially where there was no agreement as to a price and no mechanism by which price could be worked out. Nor would such a requirement be regarded as so obvious as to go without saying. Indeed, that much was effectively conceded in Ms Toohey's closing submissions which observed that: "It was not likely that the parties meant that Mr Golder would have to continue to make the venue available for so long as Ms Toohey was willing to continue to pay rent."

(c) But Ms Toohey advanced another contention in those submissions, namely that there should be implied in the option that there would be an obligation to ensure that the Event Space remained available to the business for a further period of 5 years. That was said to be what the parties considered reasonable by reference to the fact that the contract had provided for an initial 5-year contract term. Whilst minds might well

differ on whether such a term would be fair and reasonable, it is not so obvious as to go without saying. The 5-year term was an initial contract period. There was simply no term in the contract which governed how long the business could be conducted from the Event Space, if the business was purchased. Nor, even if the "option" was not exercised, and there was a negotiation for a further term, there was no provision which governed how long the further term should be. That was left completely undefined. I would reject the revised version of the term suggested to be implied to solve the security of tenure problem.

(d) Absent any security of tenure, and in the context where the landlord would not have wanted to give the option holder any security, the "option" was not a valuable right.

[126] Fourth, the option was expressed in terms which were in any event uncertain and unenforceable. The agreed formula for the price of the business was "50% of market value", where market value was "determined as 3 times annual net earnings after including the cost of the agreed rent for the space going forward." But there was no "agreed rent for the space going forward" because for reasons explained in the previous paragraph, there was no term of the contract obliging Mr Golder to give Ms Toohey a lease or a license to use the Event Space for any particular term or for any particular price and no term should be implied requiring him to do so. Whilst in some circumstances the Courts have been prepared to imply a term of either reasonable or market rent,[18] I would not be prepared to do so in the present circumstances, because the words used in this context seem to contemplate the annual price would have been agreed having regard to some conception of the nature of the tenure (i.e. "going forward") of the business within the space and there was none.

**Ms Toohey's claim for unpaid commission**

[127] The defendants did not in their final submission seek to advance an argument that Ms Toohey should not be paid whatever was the proper calculation of the amount of commission owed to her which had not been paid by the defendants.

[128] Ms Toohey's submission relied on the calculations undertaken by Mr Lytras. His calculation proceeded by reference to the figures recorded for income and for commissions paid to Ms Toohey in his annexure 11. Based on a gross income figure of $362,191.41 (excluding GST) and an entitlement of 20%, he calculated a total entitlement of $72,438.28 (excluding GST). He deducted commissions received of $46,969.31 (excluding GST) to arrive at a claimed amount of $25,468.97 (excluding GST).

[129] Ms Toohey contended that the amount awarded should include GST as it was claimed as a debt and the GST would have to be remitted. Mr Lytras calculated that the GST inclusive amount owed was $28,015.87.

[130] The defendants' submissions disputed Mr Lytras' calculations in only two respects.

[131] First, they contended that they should account for amounts refunded to customers in the sum of $7,430. For reasons already given, the defendants did not justify that conclusion. The evidence given to justify the deductions was only given by Mr Golder in cross-examination. It did not amount to the sort of careful demonstration that I might have found persuasive, even setting aside the strong reservations I have about accepting his evidence. I am not persuaded that adjustment is necessary.

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[18] See the discussion in *Sino Iron Pty Ltd and Others v Mineralogy Pty Ltd* (2019) 55 WAR 89 at 142-144 [233] to [239].

[132] Second, they contended, correctly, that Mr Lytras' calculations proceeded on the basis that Ms Toohey was entitled to commission on receipts which included amounts which were ultimately paid out to third-party suppliers. If, as I have found they are, the defendants were correct in their contention that amounts received in respect of the third-party suppliers could not be regarded either as "venue bookings" or "ancillary bookings", then Ms Toohey could not be entitled to commission on those amounts. I agree with this submission.

[133] The proper adjustment is to deduct $42,490 from Mr Lytras' starting point. That gives a gross income figure of $319,701.41. Based on an entitlement of 20%, total entitlement would become $63,940.28 (excluding GST). Deducting commissions received of $46,969.31 (excluding GST) gives an ultimate entitlement of $16,970.97 (excluding GST). The GST inclusive figure would be $18,668.07.

**Conclusion**

[134] There should be judgment for Ms Toohey on her claim against Mr and Mrs Golder, in the amount of $18,668.07, exclusive of interest. Her claim against High Church Pty Ltd must be dismissed.

[135] There should be judgment for Ms Toohey on the defendants' counterclaim.

[136] The parties will be heard on the order which should be made for interest in respect of the Ms Toohey's judgment and also on the question of costs.