EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 12 of 1991

HAROLD JAMES GRAHAM

Complainant

- against -

ANTONIO IETTO

and

FREDA IETTO

Respondents

BEFORE: L W Roberts-Smith, Q.C. (Deputy President)
K French and T Baban (Members)

HEARD: 22 April 1992

REASONS FOR JUDGMENT

(Delivered: 3 June 1992)

REASONS FOR JUDGMENT
GRAHAM v IETTO and IETTO

The Complainant, Mr Harold Graham, is an Aboriginal. That fact is obvious from his appearance. By a complaint dated 8/3/90 he complained to the Equal Opportunity Commission ("the Commission") that he had been unlawfully discriminated against in that he had been refused rental accommodation because of his race.

As it comes to this Tribunal, the complaint is founded on sections 36, 47 and 161 of the Equal Opportunity Act 1984 ("the Act").

There were several unsatisfactory aspects of the course of this matter which ultimately resulted in substantial difficulties and unnecessary complications at the hearing. To understand these it is necessary to say something about the initial complaint and the course of the proceedings.

In essence, the complaint recited that Mr Graham bought a copy of the "South West Times" on 6/3/90. He saw an advertisement offering a flat to rent. Before leaving for work, he telephoned the number given. He made an arrangement to see the flat later that day. During his lunch break he and his Aboriginal girlfriend went to the premises. When he asked "the lady" about the flat she told him it was no longer available. He left, very upset. When he got back to work he got his white work-mate (Mr Patrick Ryan) to telephone about the same flat. The lady told Ryan it was still available. Ryan went to the premises after work that same day. To Graham's "great disbelief" Ryan was offered the tenancy.

There was a short handwritten statement by Ryan on the bottom of Graham's complaint form. That was in the following terms:-

> "I've worked with Harold for some time and knew that he had been looking for a flat for quite a while. When I heard the lady had told him that the flat was taken, as he explained above, I rang her and made an arrangement to go

and see the flat. She showed me through and there was no problem. She said I could have it, and I said I would return with a bond deposit. Harold and I are the same age and both work on the Council. So the only reason I can see that he couldn't get the flat and I could is that in my opinion he was discriminated against."

Mr and Mrs Ietto, the Respondents, are the owners of the premises concerned.

The Acting Commissioner for Equal Opportunity wrote to the Iettos by letter dated 20/4/90. In that letter she recounted the terms of the complaint as set out above. She wrote that Graham stated that "on his arrival at the flats he spoke to a woman (name not known) and made enquiries about the flat...". This letter was addressed to the Respondents at 51 Moore Street, Bunbury, which was the address of the flats themselves. That address had been given in the advertisement.

There was no response to this letter.

On 8/6/90, the Commissioner again wrote to the Respondents at the same address. She enclosed a copy of the letter dated 20/4/90. The June letter was returned to the Commission.

On 3/8/90 the Commissioner wrote to the Respondents again. This time the letter was addressed to them "C/- Ietto and Company, South Western Highway, Brunswick, W.A." She enclosed a copy of the earlier correspondence.

On 21/8/90 Mrs Ietto telephoned the Commission and was advised to respond in writing.

On 29/8/90 the Commissioner received a letter dated the previous day, from Mrs Ietto. This was on a letterhead of "A & A J Constructions - Building Contractors". It was short. Mrs Ietto wrote:-

"In response to your letter regarding a complaint of discrimination against us, I would like to point out that

there are ten flats in the block concerned. Our caretaker does not let a flat to anyone he thinks is not suitable no matter what colour, race or nationality (sic) they may be.

Apparently Mr Graham came to view the flat unclean and in a rude manner.

We also own another block of flats in Scott St. which the same caretaker takes care of, we currently have a part aboriginal living in flat (deleted), by the name of (deleted). He has been there for the past 3 or 4 months.

Hoping you will consider that there no (sic) discrimination involved."

There was no reference here to the fact that Graham claimed he had spoken to a *woman* at the flats.

The contents of Mrs Ietto's response were notified to Graham by a letter from a Conciliation Officer of the Commission to him dated 31/8/90.

The Complainant subsequently replied to that, reiterating his earlier account and denying that he had been "loud and inconsiderate".

A conciliation conference was held on 27/2/91. That was apparently attended by Graham, Mr Ietto and the caretaker of the Moore Street flats at the relevant time, Mr de Jaeger. It was unsuccessful.

The Commissioner subsequently referred the complaint, together with her Report, to this Tribunal pursuant to section 93(1)(b) of the Act. The Commissioner's Report is undated but was apparently referred to the Tribunal on 13/8/91.

There was a preliminary hearing before the President on 11/9/91 at which the Respondents and Mr de Jaeger appeared in person. Procedural orders as to filing of points of claim and defence and mutual discovery of documents were made.

Points of Claim were filed on 26/9/91. They pleaded that -

"1. The Complainant is a person of Aboriginal descent and this is readily discernible from his physical appearance.

2. The Respondents are the owners of premises known as Unit 5, 51 Moore Street, Bunbury (the premises).

3. On Tuesday 6th March 1990 the Respondents advertised in the South Western Times that the premises were to let for $100 per week.

4. On the morning of 6th March 1990 the Complainant telephoned in response to the advertisement and spoke to a female person and made arrangements to inspect the premises.

5. The Complainant and his partner, who is also a person of Aboriginal descent attended at the premises. He was advised by a female person that the premises were already let.

6. The Complainant returned to his place of employment. A co-worker Patrick Ryan (Mr Ryan) who is a white Australian telephoned in response to the advertisement and spoke to a female person, and made arrangements to inspect the premises. Mr Ryan attended the premises that day and a female person agreed that he should rent the premises.

7. By reason of the matters set out in Paragraph 3 to 6 above the Respondents by their servant or agent have discriminated against the Complainant on the ground of his race, and/or a characteristic that appertains generally to persons of Aboriginal descent, and/or a characteristic that is generally imputed to persons of Aboriginal descent, by treating him less favourably in circumstances that are the same or not materially different than they would a person who was not of Aboriginal descent by refusing his application for accommodation contrary to Section 46 of the Equal Opportunity Act 1984.

8. By reason of the unlawful discrimination referred to in Paragraph 7 the Complainant has suffered loss, hurt and humiliation and seeks

(i) Compensation
(ii) Such other orders as the Tribunal deems fit."

It is to be noted that although there was no identification of the "female person" referred to in paragraphs 4 and 5, and no express plea that she was a servant or agent of the Respondents, that was necessarily implied in paragraph 7.

The Respondents filed their Points of defence on 16/10/91. They were, again, shortly put.

> "1. The Respondents admit points 2, 3, 4, 5 and 6 of the Points of Claim.
>
> 2. The Respondents deny points 1, 7 and 8 of the Points of Claim.
>
> 3. The Respondents deny that they, their servants or agents have discriminated against the Complainant on the ground of his race, and or a characteristic that appertains generally to persons of Aboriginal descent, and or a characteristic that is generally imputed to persons of Aboriginal descent by treating him less favourably in circumstances that are the same or not materially different than they would a person who was not of Aboriginal descent and deny that the Complainant has suffered any loss, hurt or humiliation."

Whilst the allegations that the Complainant had spoken to "female person" on 6/3/90 and made arrangements to inspect the premises, and that when he subsequently attended the premises she advised him they were already let, were admitted, there was no express pleading in the Points of Defence that such person was not a servant or agent of the Respondents.

By letter to the "Listing Clerk" dated 14/11/91 Mr F Wilson advised that he had been requested to act as counsel for the Respondents on the hearing. However, he was at that stage employed as a corporate solicitor and would not be commencing his own practice until February 1992. He requested the trial be held in abeyance until March 1992.

On 25/2/92, at the direction of the President, the Registrar listed the matter to be heard on 22/4/92. That was done in consultation with Mr Wilson.

Messrs Wilson and Atkinson filed a notice that they were acting as solicitors for the Respondents, on 11/3/92.

On 19/3/92 the Registrar received a letter from Mr Wilson, dated 12/3/92. In it, he requested an adjournment of the hearing because he had not received "sworn answers to the Respondents' interrogatories."

In fact, there had been no order that answers on oath be provided by either party to the other pursuant to reg 10 Equal Opportunity Regulations 1986.

That request was treated as an application and heard on 30/3/92. The adjournment was refused. The reasons appear at pages 22-31 of the transcript.

On 8/4/92 the Respondents' solicitors filed a document entitled "Amended Points of Defence" dated 7/4/92. By letter and application dated 9/4/92 they requested a listing of a further preliminary hearing to apply for leave to amend the Points of Defence ("the Defence").

That application was heard on 16/4/92. It was opposed. After submissions by counsel for both parties leave to amend was granted (transcript pages 51-57). The effect of that was withdrawal of the Defence dated 16/10/91 and the substitution for that of the Defence dated 7/4/92, which read -

> "1. The respondents admit point 2 of the Points of Claim.
>
> 2. The Respondents do not admit points 1, 3, 4, 5 and 6 of the Points of Claim.
>
> 3. The Respondents deny points 7 and 8 of the Points of Claim.
>
> (Para 4 was in the same terms as para 3 of the Defence dated 16/10/91.)

This put in issue paragraphs 3, 4, 5 and 6 of the Points of Claim, which had previously been admitted.

There was still no express denial in the Defence that the "female person" referred to was a servant or agent of the Respondents, although Mr Wilson made it clear in argument at that preliminary hearing that it would be contended by the Respondents that Mrs de Jaeger was not an employee of theirs and had no authority, express or implied, to act as their agent.

This then, was the position when the hearing commenced on 22/4/92.

Graham gave evidence. He is presently employed as a bar person at the Lord Forrest Hotel in Bunbury. He began living with Ms Michael in Bunbury in 1987. They lived first at her parents' place. It was crowded and the two of them were looking for alternative accommodation. He saw an advertisement in the "South West Times" on 6/3/90. That read:-

> "TO LET. Furnished flat. $200 bond, $100 p.w.
> Apply Unit 5, 51 Moore St...."

A telephone number was given. Graham telephoned the number. A lady answered. He told her he was enquiring about the flat to let. She said that was the place. They arranged for him to go there between 5.00 and 5.30 that afternoon, after he had finished work.

He was at that stage employed by the Bunbury City Council as a grave-digger at the cemetery.

Around mid-day, Ms Michael took Graham's lunch to him at work. She had her parents' car. He asked her if she would like to go and look at the flat. He thought if he went early he might have a better chance of getting it.

So they drove to the flats at 51 Moore Street. Graham was naturally in his work clothes. He was wearing a green work shirt, an old pair of jeans with a rip at the knees and work boots. He had been digging graves that morning so his clothes were sweaty and dirty.

When they arrived Graham got out of the car. He walked up to Unit 5. From the evidence of Mrs Ietto and Mr and Mrs de Jaeger it is clear that was the de Jaeger's unit. He saw a lady sitting in a chair. When he approached the sliding screen door, she half-turned towards him. He told her his name. He said he had telephoned earlier about the flat. He said although they had arranged for him to come that afternoon he had thought it better to come earlier, before anyone else.

She told him the flat was taken. His evidence was that he then said "Fair enough" and walked off quietly back to the car.

When asked to describe this lady he gave a description which could have been of Mrs de Jaeger.

He was very upset. He discussed it with Ms Michael. He also discussed it with his workmate Patrick Ryan. Graham said he asked Ryan to ring up to see if the flat was still available. He did so. He was told it was. He made an appointment to inspect it later that afternoon.

At work the following day Ryan told Graham that he had viewed the flat and the lady had offered it to him. That made Graham "a lot more wild; more upset" and he decided to do something about it.

Ryan was also a grave-digger employed by the Bunbury City Council. He is not an Aboriginal. Nobody looking at him would think he was.

He said that after Graham told him what had happened at the flats, he telephoned and spoke to a lady. He asked if he could go around and look at the flat. She said he could. They arranged for him to do so that afternoon. He went around after work. He met a lady there. He got the impression that was the person he had spoken to on the phone. She showed him over a flat. It was occupied at the time. There was a young lady there. He "seemed to recall" that it was the lady's daughter. He was told the flat would be vacant in a couple of days.

He indicated that he wanted to take the flat. The lady told him that when he came back with the bond money the flat would be his.

She asked him no questions about where he worked nor how much he earned.

He thought this lady was an older Italian person, although he could not describe her. He thought that essentially because of her accent.

Ryan said he telephoned and then went to Moore Street because at that stage he was living in a caravan and was himself looking for other accommodation. It was put to him in cross-examination that this was inconsistent with the implication in his written statement that he did it to ascertain if what Graham had been told about the flat already having been let, was true. He explained that he did not think so; he did want accommodation himself.

Mr Ietto is a builder. He is in a partnership with his wife. He told the Tribunal that they are the joint owners of the premises at 51 Moore Street. They bought the land 14 or 15 years ago. He built the flats. About 1985 he employed Mr de Jaeger as caretaker. There was no salary nor wage. De Jaeger was given the use of Unit 5 rent free for looking after those and another block of flats.

Mr Ietto's evidence was that de Jaeger was given complete responsibility for the day to day running of the flats. He advertised vacancies, interviewed and selected prospective tenants, terminated tenancies, collected bonds and rents and generally maintained the premises. All this was done without reference to the Respondents.

Mr Ietto would call weekly to collect the rent monies from de Jaeger.

If there was any maintenance or other work required of more than a minor nature, Mr Ietto would employ a contractor to do it.

Throughout his evidence Mr Ietto was adamant that he had employed only Mr de Jaeger, not Mrs de Jaeger. He had no involvement with her at all. He never authorized Mrs de Jaeger to do anything in relation to the flats. He was never aware that she did so. He said had he heard that, he would have told Mr de Jaeger to stop her.

He knew that Mr de Jaeger had suffered a heart attack about 6/3/90. However, he did not learn that until the end of the week, when he went to Bunbury to collect the rent money. Mr de Jaeger had then just come out of hospital.

Mr de Jaeger ceased work as the Ietto's caretaker about 12 months ago.

In cross-examination Ietto insisted that in a situation in which Mr de Jaeger had to go to hospital he would not expect Mrs de Jaeger to take over her husband's responsibilities in relation to the flats. He said rather he and his son would have done so.

In her evidence, Mrs Ietto reiterated her husband's evidence that it was Mr de Jaeger alone who had been employed as caretaker. Mrs de Jaeger had no role and no responsibility in that regard.

As to the letter she wrote to the Commission dated 28/8/90, Mrs Ietto said that the statement there that

> "Apparently Mr Graham came to view the flat unclean and in a rude manner"

was a reflection of a telephone conversation she had with Mr de Jaeger in which he told her "...if he was refused the flat he was probably...didn't present himself well or was in a rude manner (sic) or in that way". He apparently had no recollection of the particular incident.

She said she did not know whether or not they had received the first letter from the Commissioner (dated 20/4/90) and that when she did eventually receive the correspondence she initially just did not take any notice of it; she probably did not even read the letter. When she received the letter dated 3/8/90 she telephoned the Commission, then Mr de Jaeger, and then wrote her reply dated 28/8/90.

The last witness called by the Respondents was Mr de Jaeger.

He outlined his employment and responsibilities as they had been described by the Iettos. He confirmed his wife had no role in that.

He said that about 6.30 pm on 5/3/90 he had a heart attack while attending a race meeting at Harvey. He was hospitalised at Bunbury Regional Hospital for 5 days in intensive care and $2^1/_2$ days in the wards.

For obvious reasons he gave no one any instructions to take over his duties as caretaker.

He did not recall placing the advertisement in the "South Western Times" but accepted he must have done so.

When asked by Mr Wilson whether he was aware to whom the particular flat was let, he told the Tribunal that because of "all this stuff in the last couple of months" he had been checking up lease agreements and that flat had been let to "a Miss Dhu on 5/3/90. That was earlier in the day on which he had suffered his heart attack. He was asked how it came about that the flat was let to her. He said there was no particular reason. He was asked how she came to apply on 5/3/90 when the advertisement did not appear until the following day. His answer suggested she had heard of it from some other tenant or visitor.

Mr de Jaeger said he could not recall whether or not he mentioned to his wife that he had let the flat, although he may have done so.

Ms Crawford, Counsel for the Complainant, cross-examined Mr de Jaeger quite rigorously.

He insisted that by 6/3/90 there was no longer a vacant flat to rent.

Ms Crawford referred to Mr Ryan's evidence of having been offered the flat in the afternoon of 6 March. Mr de Jaeger pointed out he was not there then, but he found that suggestion hard to believe. There was then the following exchange -

"(TO WITNESS): The person said he thought that the present occupant of the flat was the daughter or some relation of the woman who showed him through?---Well, on the 6th the flat was let because I rented out the flat on the 5th.

MS CRAWFORD: Are you saying - - ?---It was not a daughter of mine. No.

Or relation of - - ?---No. Not on the 6th of March 1990. No.

Was there around that time a flat that became vacant that was occupied by a relation of your wife's?---No."

Mr de Jaeger was not able to give any explanation why the fact that the flat had been let to Ms Dhu on 5 March and was no longer available on 6 March, had not previously been mentioned.

When asked about his earlier reference to "checking up lease agreements" Mr de Jaeger said first "there must be a lease agreement" and then "Yeah, there is this one".

Taken then to the situation immediately after his heart attack, he said he would not have expected his wife to take over any of his caretaking duties. He reiterated that they would have been taken over by Mr Ietto or his son.

Questioned by the Tribunal, de Jaeger said that he had worked out that he had in fact let the flat to Ms Dhu on 5 March by checking back through the lease agreements. He said Mr Ietto has those. He was asked:

"So you went through the lease agreements and you found one of a tenancy for Miss Dhu commencing on the 5th of March 1990?---Yes, that's correct.

Did you have any actual recollection of Miss Dhu when you saw that agreement?---Yes, I do.

Can you describe her?---Four foot eight, very small girl around 18-19 years old; long blonde hair.

Yes, and where is that agreement now?---Must be in the files by Mr Ietto."

After Mr de Jaeger's evidence, Counsel for the Respondents closed his case. As it was then late afternoon the hearing was adjourned to the next available hearing date, for addresses.

The nature of the proceedings had changed significantly as a result of the evidence of the last witness for the Respondents. Whereas before it seemed the main contest was about whether or not the Respondents could be vicariously liable for the actions of Mrs de Jaeger, (although that itself was a late development not apparent until 16/4/92), now it had become whether or not the flat simply was no longer available by 6 March.

In addition to this concern, the Tribunal found it most unsatisfactory that the tenancy agreement referred to by Mr de Jaeger had not been produced and that (arguably) the most important witness apart from the Complainant, had not been called. That of course, was Mrs de Jaeger. It was not a question of her unavailability. Her husband had said in evidence on 22/4/92 that she was even then in the City doing some shopping!

The Tribunal accordingly decided to summons production of the tenancy agreement with Ms Dhu and to summons Mrs de Jaeger to attend to give evidence. That was done.

Cross on Evidence (3rd Australian Edition) notes (at p.376) that the proposition that in civil cases a judge may not call a witness without the consent of both parties, is controversial in Australia. The same text ventures the view that although the position is obscure, a judge in a criminal trial does have power to call a witness without the consent of the parties. Waight & Williams in their text "Evidence - Commentary and Materials" (3rd Edition) at page 4-5 seem to take an opposing view but recognize there is authority to the contrary.

Whatever may be the position in those jurisdictions, however, the procedure in this Tribunal is somewhat different. These

proceedings are in the nature of an inquiry (section 107(3) of the Act). There is strong authority to the effect that such a tribunal is required to adopt an actively inquisitorial approach (see eg Einfeld J in *Bennett & Anor v Everitt & Anor* [1988] EOC 92-244 at p.77, 270-1).

As it transpired, on resumption of the hearing on 28 April neither counsel had any objection to the course proposed by the Tribunal.

When the hearing resumed and production of the Dhu tenancy agreement was called for, Mr Wilson advised that such document did not exist. He said he was aware of that when Mr de Jaeger gave evidence and it was a surprise to him that the witness gave the evidence he did.

Mrs de Jaeger was called and examined by the Tribunal.

She confirmed it was only her husband who had been employed by the Ietthos. She had no role. She said the vacancy advertised was for flat #6, but that had been filled by her husband before he had his heart attack. She identified the telephone number in the advertisement as the number for their flat.

Mrs de Jaeger did remember that the day after her husband had suffered his heart attack, and whilst he was in intensive care, an Aboriginal person came to her flat and spoke to her. He asked if there was a flat to let. She said "I'm very sorry, the flat is gone." According to Mrs de Jaeger, that person then verbally abused her. She said he was "scruffy" but she could not remember whether or not he was clean. She did not recall him telephoning earlier. She said she did not take any other telephone calls about the flat that day. She denied showing Ryan the flat.

On further questioning by the Tribunal, Mrs de Jaeger gave the following account of how the flat had come to be let to Ms Dhu -

> "How did you know the flat had already been taken?---Well, that was easy: Miss Jew? (sic) was living in flat 7 and the flat 6 came available and I said to her, because she has

always complained to me that the flat is in such a dark corner, "Well, this flat will be available, 6, but you have to make up your mind. But she wasn't sure yet. So in the meantime, my husband placed the add (sic) in the paper, like he always does, and then later on in the afternoon she came and she said "Yes. I will take it." So she then shifted from flat 7 to flat 6.

D/PRESIDENT: On the same day?---Yes, she did more or less. Yes, she did.

Which day was that?---That was - - no, she did not shift in the same day. That was on the Tuesday morning, if I can - - yes, the Tuesday morning.

Did that mean that her other previous flat was then vacant?---But that had been taken already.

How had that occurred?---Well, that other tenants - - we get tenants in from other tenants. Like, if there is a flat available, then they come and say "Well, we've got a friend, so and so. Can they rent it?" My husband let the person come and have a talk to him and if he is suitable, then we say "We'll let you know," and because I knew that girl who is in flat 7 didn't like much sitting in a dark corner, I thought I give her first option by moving into flat 6, and then flat 7 was available.

I see. So you gave her first option to move in there, did you?---Yes.

Yes. Did she discuss that with you?---Yes. She came up to me and she said "Is the flat still available?" and I said, "Well, why didn't you tell that this morning to my husband? That would have saved us putting that in the paper." She said, "Yeah. Well, I'm very sorry about it, but I would like to have it," So that's how she ended up on flat 6." (T.189-190).

These answers quite clearly showed Mrs de Jaeger having a very much more active role in the letting of this flat at least, than she or her husband, or the Iettos, had previously allowed. When that aspect was sought to be developed in subsequent questions she very quickly realized the implications of what she had said, and retreated rapidly. Thus, when asked whether *she* agreed to allow

Ms Dhu to move from flat #7 to flat #6, she said "No, no, my husband had a talk with her."

In cross-examination by Miss Crawford, Mrs de Jaeger acknowledged that there was still a vacancy available after Ms Dhu changed flats, but said flat #7 was then taken by a person who, over the weekend, was supposed to get flat #6.

She insisted it was not possible she would have shown someone over a flat on the Tuesday afternoon.

The identity of Ms Dhu did not become clear until the very end, when Mrs de Jaeger was cross-examined by Mr Wilson. It appeared Ms Dhu had attended the Harvey Trotting Meeting with Mr and Mrs de Jaeger and their son on 5 March 1990. She was then "going around with" the son and is now their daughter-in-law.

After Mrs de Jaeger's evidence Mr Wilson sought leave to re-open the case for the Respondents to tender various documents. Leave was granted over objection by Miss Crawford.

These documents were:

* Copy receipt no. 21 dated 26/2/90 for $100 paid by Ms Dhu in respect of flat #7.

* Copy receipt no. 30 dated 5/3/90 for $100 paid by Ms Dhu in respect of flat #7.

* Copy receipt no. 57 dated 19/3/90 for $100 paid by Ms Dhu in respect of flat #6.

* Copy receipt no. 33 dated 6/3/90 for $200 (being 2 weeks rent in advance) paid by a Mr J Brown. There was no flat number identified. This receipt was signed by Mrs de Jaeger (receipts 21, 30 and 57 were signed by Mr de Jaeger).

Mr Wilson also sought to tender a lease agreement dated 12/3/90 but apparently executed by a Mr James Brown on 13/3/90. This document was unstamped. Mr Wilson was asked if he gave his undertaking to have it stamped, and the document was received into evidence on the understanding that he did. However an examination of the transcript reveals that what he actually said was that *his clients* gave an undertaking to attend to stamping. That, of course, is not good enough. The provisions of the Stamp Act 1921 can be overcome in this regard only by a solicitor personally giving such an undertaking as an officer of the Court, leaving it to him to claim indemnity from his own client (see *Dimmock v Whymark* (1964) 65 SR (NSW) 194.

Failing a personal undertaking from Mr Wilson, section 27 Stamp Act 1921 makes the tenancy agreement with Mr Brown inadmissible; nor can secondary evidence be given of it (*Dent v Moore* (1919) 26 CLR 316) - the tender of it is accordingly rejected and the Tribunal will have no regard to it.

It will be apparent from what has been said that the way in which the evidence eventually came out was not something that could have been anticipated from the pleadings.

It is true that the formal rules of evidence and pleading do not apply to these proceedings (section 120 of the Act). But that lack of formality is directed to the quicker, less costly and generally expeditious ascertainment of the truth. The *purpose* of requiring the parties to file and serve Points of Claim and Points of Defence is therefore the same purpose which lies behind more formal pleadings. That was explained by the High Court in *Dare v Pulham* (1983) 57 ALJR 80 at 82:-

> "Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it (*Gould and Birbeck and Bacon v Mt Oxide Mines Ltd (In Liq)* ((1916) 22 CLR 490 at 517)); they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial (*Miller v Cameron* ((1936) 54 CLR 572 at 576-577)); and they give a defendant

> an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into Court. Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings."

Furthermore, in an inquiry such as this, the way in which a party has pleaded (or failed to plead) matters of fact, may be a factor going to credibility, when that is significantly in issue.

Each of Mr Graham, Ms Michael and Mr Ryan impressed as witnesses of truth. They gave their evidence simply, with apparently genuine feeling. Graham was quite forthright about both the events to which he testified and his own reaction to those events. We accept Ryan's evidence that he was looking for accommodation for himself at the time and that was his reason for telephoning the Moore Street flats - although the impetus for that no doubt came from Graham. He thought Ryan was telephoning because he had suggested it. He was in fact only partly right about that. This does not detract from the credence of their evidence overall.

Mr and Mrs Ietta were obviously anxious to establish that they had no dealings whatever with Mrs de Jaeger and she had no authority to act on their behalf in any circumstances. We formed the impression their determination to maintain that position occasionally caused them to put a greater distance between themselves and the de Jaegers (particularly Mrs de Jaeger) than was in fact the case.

Mr and Mrs de Jaeger were most unsatisfactory witnesses.

In retrospect, Mr de Jaeger's answers about the person who took flat #6 were, in our view, calculated to mislead the Tribunal. His evidence generally was less than frank. His evidence about Ms Dhu's tenancy agreement (ie the document) was simply untrue. He categorically asserted, on more than one occasion, that he had recently seen such an agreement. It is conceded by the

Respondents that there was no such document. It is hard to resist the conclusion that this discrepancy would not have come to light at all, had the Tribunal not of its own motion called for production of the tenancy agreement. We formed a most unfavourable impression of Mr de Jaeger and do not regard him as a credible witness.

We formed a similar impression of Mrs de Jaeger. We think it highly likely that she had an active involvement with her husband in the day to day running of the flats. This was reflected in the evidence she initially gave about how Ms Dhu had come to move from flat #7 to flat #6.

She was evasive, less than frank, and alert to cast her evidence in whatever way she perceived to be most advantageous to her.

The reluctant revelation (at the very end of Mrs de Jaeger's evidence) that Ms Dhu was in March 1990 a friend of her son's and subsequently became her daughter-in-law, gave strong support to Ryan's evidence that the flat he was shown through on the Tuesday afternoon was then occupied by a young woman who he seemed to recall was the lady's daughter.

We are satisfied on the balance of probabilities that the woman both Graham and Ryan spoke to on the telephone and subsequently at 51 Moore Street on 6/3/90, was Mrs de Jaeger.

Wherever there is a conflict between the evidence of Graham and Ryan and that of Mrs de Jaeger, we accept the former.

We are satisfied, again on the balance of probabilities, that the events occurred as described by Graham and Ryan. That being so, the next question is whether Mrs de Jaeger's refusal to let the flat to Graham was unlawfully discriminatory. It would be, if one of the grounds for that refusal was his race and he was, on that account, treated less favourably than a (nominal) person not of his race but in otherwise similar circumstances, would have been. It does not have to be the only ground (section 5 of the Act).

There is no contention now that the refusal had anything to do with Graham's cleanliness, state of clothing nor behaviour. It is now put simply on the basis that there was then no flat available. Of course if that were so there would be no discrimination.

We are prepared to accept that Dhu was already a tenant at 51 Moore Street at the beginning of March 1990 and that she relocated from flat #7 to flat #6 from the week commencing 5/3/90. That, however, left flat #7 vacant.

We do not accept Mrs de Jaeger's evidence that flat #7 had been let to Brown (nor anyone else) by Tuesday 6 March. The copy receipt no. 33 does not establish that - and nor would we have been prepared to rely upon the tenancy agreement with Brown dated 12/3/90 without considerably more explanation, even if that were admissible.

To the contrary, Ryan's evidence clearly shows flat #7 *was* available on the Tuesday afternoon and that Mrs de Jaeger offered it to him. We are satisfied on the balance of probabilities that it was available when Graham called to the premises at lunchtime and that Mrs de Jaeger told him otherwise because of his obvious Aboriginality - and possibly also because his clothes were torn and dirty (but without troubling to ask him about why that was so).

We are satisfied to the necessary degree that in refusing him accommodation and because of Graham's race, Mrs de Jaeger treated him less favourably than in the same circumstances she treated Ryan, a person of a different race. For reasons to which we will return in a moment, we find *vis a vis* the Complainant and for the purpose of determining her <u>personal</u> liability for her own actions, Mrs de Jaeger was then acting as ("self-appointed") agent of the Iettos. Her refusal thus constituted an act of unlawful discrimination contrary to sections 36 and 47 of the Act.

But there is no complaint against Mrs de Jaeger; she is not a Respondent to these proceedings. ***

The Complainant's case is against Mr and Mrs Ietto, whom he contends are vicariously liable for Mrs de Jaeger's act of unlawful discrimination, by virtue of section 161 of the Act.

> "161. (1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent -
>
> (a) an act that would, if it were done by the person, be unlawful under this Act (whether or not the act done by the employee or agent is unlawful under this Act); or
>
> (b) an act that is unlawful under this Act,
>
> this Act applies in relation to that person as if that person had also done the act."

Subsection (2) provides a defence to liability under this section where the person shows he or she took all reasonable steps to prevent the employee or agent doing acts of the kind referred to.

There is no evidence that Mrs de Jaeger was an employee of the Iettos. The only evidence on the point is that she was not. We so find.

Was she an "agent" for the purposes of section 161? The evidence of the de Jaegers and the Iettos is that she was not. Even if we were to entirely disbelieve Mr and Mrs de Jaeger on this, that would not be evidence that the contrary were true. At best it might make it easier to draw an inference from other evidence tending to show there was an agency.

Mr and Mrs Ietto were adamant that Mrs de Jaeger had no express authority to act on their behalf and there were no circumstances in which they would expect her to do so.

The notice advertising the vacancy had been placed by Mr de Jaeger. He then suffered a heart attack late on 5 March and was in intensive care on 6 March. In the circumstances it is unlikely

that he expressly authorized his wife to act on his behalf as caretaker. Nonetheless, she obviously did so. There is no evidence the Iettos knew anything about that at the time. We accept they did not learn about Mr de Jaeger's heart attack until at least the end of the week, or later, when he was out of hospital.

There is therefore no question of the Ietto's consenting to Mrs de Jaeger acting as their agent.

The likelihood is that had Ryan taken the premises and paid the bond and advance rent monies on 6/3/90, the Iettos would have accepted that Mrs de Jaeger had been acting on their behalf. But that would have been a matter of ratifying her acts after the event. There was certainly no evidence of any ratification by them of her refusal of Graham.

Fridman, in his text "The Law of Agency" (6th edition, 1990) recognizes several ways in which an agency relationship may come into existence. There are by contract, by ratification, by estoppel or by operation of law.

As there is no evidence here of any contract of employment between the Iettos and Mrs de Jaeger, neither is there any evidence of any contract of agency.

We have already referred to the absence of ratification.

An agency by estoppel is founded on the law's concern to protect third parties who may have acted on the reasonable inference that a relationship of principal and agent existed between the parties concerned. As Fridman expresses it (at page 98) -

> "...a person who by words or conduct has allowed another to appear to the outside world to be his agent, with the result that third parties deal with him as his agent, cannot afterwards repudiate this apparent agency if to do so would cause injury to third parties."

To establish an agency by estoppel the law requires proof of

(a) a representation made by the alleged principal;

(b) reliance on that representation by the third party; and

(c) alteration by the third party of his or her position resulting from such reliance.

The representation by the alleged principal must take the form of some statement or conduct by him or her which can reasonably be taken as indicating that the alleged agent has authority to act on his or her behalf.

Furthermore, that representation must come from the alleged principal: it cannot come from the alleged agent him or herself (*Armagas Ltd v Mundogas SA* [1985] 3 All E R 795; on appeal [1986] 2 All E R 385).

The representation must be made to the person who relies upon it; that means it must be made either to the particular individual or to the public at large (*Farquharson Bros v King & Co* [1902] AC 325 at 341).

Here, there is no evidence of any representation by conduct or words made either to Mr Graham personally or to the public generally, by Mr and Mrs Ietto (or either of them), that Mrs de Jaeger was authorized to act on their behalf.

The advertisement does not constitute such a representation because that was placed by Mr de Jaeger.

Ms Crawford relied upon the fact that the telephone number given in the advertisement was the de Jaeger's number, that Mrs de Jaeger answered the telephone and that according to the "ordinary usage of mankind" anyone so dealing with her in the circumstances would understand her to be acting with the

authority of the owners of the premises. At one level that is obviously so. The situation is referred to by Fridman at (p.99):-

> "Even in the absence of prior agreement as to authority or subsequent ratification of unauthorised acts, a person can become a principal 'by placing another in a situation in which ... according to the ordinary usage of mankind that other is understood to represent and act for the person who has placed him so'. Everything depends upon the way the situation appears to the outside world, in the light of what is usual and reasonable to infer, and upon the reliance which is placed by third parties upon the apparent authority of the person with whom they are dealing. The 'principal' is said to 'hold out' as his agent the person represented as having authority to act on his behalf. The 'agent' is said to have 'ostensible' or 'apparent' authority."

However, it is clear from the context and from the authorities cited in support of that proposition, that the perception of agency so created must always be founded upon some conduct or statement of the so-called principal amounting to a representation that the other person is his or her agent (see eg *Pole v Leask* (1836) 8 LT 645 and *MacFisheries Ltd v Harrison* (1924) 93 LJ KB 811).

The evidence here accordingly cannot support an agency by estoppel.

That brings us to agency presumed by law. Perhaps the most obvious category of such presumed authority is the "agency of necessity". By "necessity" is meant that an unforeseen situation has arisen which carries with it sudden danger to the property, or similar interests, of the person on whose behalf acts are performed. This derived historically from the position of a master of a ship who was regarded as having authority to sell or dispose of cargo or of the ship, if either was in danger of perishing. His acts were binding on his principals, the owners, even though not expressly authorized.

Although the doctrine of agency by necessity is no longer limited to any particular category of circumstances, once again it will

apply only where certain conditions are met. They are that

(1) it must be impossible to communicate with the "principal";

(2) there must be a situation of "necessity" as described;

(3) the acts of the "agent" must have been bona fide in the interests of the owner; and

(4) the action by the "agent" must have been reasonable and prudent.

(Fridman, ibid, p.123).

There was no circumstance of "necessity" (in the relevant sense) here. There was no danger to the Moore Street premises. Certainly the business of the Iettos could be expected to suffer to the extent a new tenant could not be put in; but that would not have taken long to arrange.

The situation was not one in which personal action was necessarily called for from Mrs de Jaeger. In *Condev Project Planning Ltd v Kramer Auto Sales Ltd* [1982] 2 WLR 445 there was held to be no necessity because the tenant could have communicated with the landlord before signing an agreement for the supply of power to the tenancy premises. Mrs de Jaeger's position was not as "necessitous" as that.

There is no suggestion that it would have been impossible for Mrs de Jaeger to communicate with the Iettos. Indeed, the evidence suggests she could have done so.

Nor, of course, could it be suggested that Mrs de Jaeger's act of refusing to let the flat to Mr Graham (amounting as we have found to an act of unlawful discrimination) was reasonable and prudent.

For these several reasons there is no scope for an agency of necessity here.

Mrs de Jaeger clearly purported to act as agent for the Respondents. Can her holding herself out in that way bind them - and in particular, can it visit them with vicarious liability for her own act of unlawful discrimination?

In *Boardman v Phipps* [1967] 2 AC 46 the House of Lords held (inter alia) that parties to whose acting as agents no consent had ever been given could be treated as "self-appointed agents". That proposition was referred to and applied by Hope JA (with whom Kerr CJ agreed) in *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 81. Fridman suggests *Boardman* may provide the starting point for a new departure in the law of agency.

Be that as it may, the law is very purposive about the circumstances in which an agency authority may be presumed in the absence of contract or consent.

Both *Boardman* and *Walden Properties* were cases in which the agency authority was presumed as a basis for a fiduciary duty to account to the "principal" for profits made by the dealings of the "agent". It is one thing for the law to presume an agency for the purpose of requiring the agent to account to the principal for profits made; it is quite another to presume an agency relationship for the purpose of sheeting home *liability* to the "principal" for the unlawful acts of the "agent".

Indeed, it might be thought unconscionable to fix with vicarious liability for an act of unlawful discrimination, persons who not only had no knowledge of that act but who had done nothing to authorize the discriminator to act as their agent, nor to place her in a position of ostensible authority, and who could not reasonably have been aware in the circumstances that she was so acting.

We accordingly conclude that on the evidence there is no basis upon which Mrs de Jaeger's act in refusing accommodation to Mr Graham could be regarded as having been done as an agent of the

Ietto's. The Complainant's plea that they are vicariously liable under section 161 of the Act has therefore not been made out.

The position might well have been different *vis a vis* Mrs de Jaeger had she been named as a Respondent. Liability under section 47 of the Act may be either as a principal or agent. She was clearly not a principal. Given her assumption of authority to act as the Ietto's agent, we are satisfied, and find, applying *Boardman*, that she was an agent for the purposes of section 47.

However, as Mr and Mrs Ietto are the only Respondents, and the case against them is based entirely on section 161, the complaint must be dismissed.