

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION

Not Restricted

No. 2114 of 2005

GRIFFITHS & BEERENS PTY LTD AND ORS

Plaintiffs

v

PAUL DUGGAN AND ORS

Defendants

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JUDGE: PAGONE J  
WHERE HELD: Melbourne  
DATE OF HEARING: 3-7, 11-14, 17-19, 26-28, 31 March, 1-4, 7-11, 14-16,  
28-30 April, 1-2 May 2008.  
DATE OF JUDGMENT: 11 June 2008  
CASE MAY BE CITED AS: Griffiths & Beerens Pty Ltd and ors v Duggan and ors  
MEDIUM NEUTRAL CITATION: [2008] VSC 201

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CONTRACT - Restraint of trade covenant - Enforceability - Reasonableness of restraint - Privity - Meaning of 'same as' or 'substantially similar' - Preparatory acts - Meaning of 'involved in any way' - Provision of financial assistance - Canvassing of customers and suppliers - Interference with business relationships

CORPORATIONS LAW - Director's duties - Whether breach - Improper use of position - Improper use of information - ss 182-183 *Corporations Act 2001*

EMPLOYMENT LAW - Duty to employer - Duty of fidelity - Whether preparatory steps taken in setting up a competing business - Confidential information - Breach of confidence - Customer and supplier details

EQUITY - Fiduciary duties - Directors - Whether breach - Diversion of corporate opportunity - Whether steps taken towards and assistance provided in the establishment of a competing business

PRACTICE AND PROCEDURE - *Anton Piller* order - Whether execution improper

REMEDIES - Damages - Quantum - Method of assessment

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APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

Mr G.D. Dalton with  
Ms R.B. Sion

Foster Harris

For the Defendants

Mr P.G. Cawthorn S.C. with  
Mr R.G. Craig and  
Mr J.R. Werner

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HIS HONOUR:

- 1 The plaintiffs in this proceeding are Griffiths & Beerens Pty Ltd (“GB”), GB Products Pty Ltd (“GB Products”), Somers Engineering Pty Ltd (“Somers”) and GB Accessories Pty Ltd (“GB Accessories”), who claim to have suffered loss and damage arising from the alleged wrongful conduct of one or more of the defendants, namely, Paul Duggan, Jak Max Pty Ltd (“Jak Max”) and Adam Duggan. The latter, in turn, counterclaim for loss and damage said to arise from a wrongful exercise of an Anton Piller order granted on 31 October 2005 by Whelan J. Paul Duggan also claims, and the plaintiffs admit, an entitlement to be paid of an amount of \$91,104.18 as an outstanding payment due under the share sale deed to which I will refer later.
- 2 I shall avoid a lengthy recitation of the facts other than to give context to these reasons, to explain my reasons and, where necessary, to state my findings on disputed facts relevant to my conclusions. The proceeding occupied 33 hearing days. The transcript of evidence spans 3,368 pages. The Court Book is made up of over 21 arch-lever folders, and 270 separate exhibits were tendered. A combined narrative of facts of 65 pages was filed setting out agreed facts as well as others contended for, or disputed by, either party. The defendants’ primary written submissions was 247 pages in length plus four shorter annexures. The plaintiffs’ primary written submissions were 91 pages in length plus annexures and tables. Each handed up other written submissions, annexures and calculations during the course of argument.
- 3 The primary area of dispute is a share sale deed dated 22 April 2005 (“the share sale deed”), completed on 29 June 2005, made between Paul Duggan, Garcia Duggan Nominees Pty Ltd (“Garcia Duggan”), of the first part, the plaintiffs of the second part, and Thomas Beerens and Windtest Pty Ltd (“Windtest”), of the third part. By the share sale deed Paul Duggan and Garcia Duggan agreed to sell all of their shares in the plaintiffs to Thomas Beerens and Windtest for \$4.5 million. Before the time of making the share sale deed, and until its completion on 29 June 2005, Paul Duggan had been a director of each of the plaintiff companies and was employed as the managing director of the business which they collectively conducted. He personally

owned 5% of all of the shares in each plaintiff and together with his wife, Violetta Duggan, owned and directed Garcia Duggan, which owned 40% of the shares in each of the plaintiff companies. Adam Duggan is the eldest son of Paul Duggan and Violetta Duggan, and was employed by GB from 5 January 2000 until 24 August 2005. Since 7 September 2005 he had been a director, shareholder and employee of Jak Max.

4 Both Paul Duggan and Adam Duggan owed employment duties to their employer. In addition, Paul Duggan agreed in the share sale deed to be bound by a two year restraint from competition against the plaintiffs. On 22 April 2005 Paul Duggan also entered into a deed of confidentiality with the plaintiffs (“the confidentiality deed”) by which he agreed to keep confidential certain information.

#### **A. Liability of Paul Duggan**

5 The first allegation against Paul Duggan is that he, whilst still a director of each of the plaintiffs and the managing director of the plaintiffs’ business, breached his fiduciary and statutory obligations to the plaintiffs by diverting business opportunities and by taking steps to establish (or assisting his son Adam Duggan to establish) a business in competition with the plaintiffs. The plaintiffs further alleged that after completion of the share sale deed on 29 June 2005, Paul Duggan breached the restraint covenant in the share sale deed by being involved in a substantially similar business, namely, the business which became that of Jak Max, and by interfering with the plaintiffs’ relationships with their customers, suppliers and employees.

#### **(a) Alleged diversion of corporate opportunities by Paul Duggan**

6 The plaintiffs pleaded a number of particulars in support of their allegations that Paul Duggan had diverted corporate opportunities but, in final submissions, they pursued only one of the four particulars in the statement of claim. The opportunity said to have been diverted by Paul Duggan away from the plaintiffs was an opportunity for them to supply Sunvic portable generators to Elfving, a Finnish customer of the plaintiffs. The contention was put on behalf of the plaintiffs in their

final submission as being that Paul Duggan had breached his employment duties by knowingly allowing his son Adam Duggan, in April 2005, to impose a 30% profit mark-up on Sunvic generators to be supplied to Elfving to be made by some person other than the plaintiffs.

7 On 31 March 2005, Elfving requested information from Paul Duggan about Sunvic generators. By that date the share sale deed had not yet been executed but it had been agreed that Paul Duggan would sell his shares in the plaintiffs to Thomas Beerens and Windtest for \$4.5 million. The request on 31 March 2005 from Elfving came by email from Antti Berkan referring to a Sunvic brochure and, amongst other things, asked to be sent a price list for the products. The plaintiffs concede that Sunvic was never part of the plaintiffs' core business but it is clear that the plaintiffs had sought to sell such products. It is common ground that they did sell generators at least until April 2005, although the plaintiffs may never have sold any single generator with the Sunvic brand name. Nonetheless, they did attempt to do so, and did so to the knowledge of Paul Duggan. More importantly, however, whether that product range was or was not successful, the email request from Elfving to Paul Duggan on 31 March 2005 plainly sought details of items in a brochure produced for the plaintiffs and requested samples and a price list from the plaintiffs. Elfving was a customer of the plaintiffs at the time and the email is fairly to be regarded as an opportunity for the plaintiffs' benefit.

8 The email request from Elfving was referred by Paul Duggan to Dean Stubbs who at the time was the plaintiffs' product manager. Dean Stubbs had been a school friend of Adam Duggan and commenced employment with the plaintiffs in early 2001. In about mid-2001 he became the product manager for the plaintiffs. He resigned on 27 July 2005 and his last day at work was on 17 August 2005.

9 On Tuesday, 5 April 2005, Dean Stubbs sent an email to Paul Duggan setting out the answers to the questions which had been asked by Antti Berkan. A copy of that email was also sent to Adam Duggan. On 10 April 2005 Paul Duggan sent an email to Adam Duggan with copies to Dean Stubbs and Kua Si Lin. Kua Si Lin, through

his company Proline Private Limited (“Proline”), had been a commissioned agent for the plaintiffs since 1985. The initial connection between Kua Si Lin’s business and the plaintiffs’ business had been made between Kua Si Lin’s father and Jack Griffiths, one of two founders of the business. Kua Si Lin later met Paul Duggan when the latter was still an accountant in the plaintiffs’ business (as it then was) and over the years developed a close working, social, business, and family relationship.

10 The email which Paul Duggan sent on 10 April 2005 asked his son to answer Antti at Elfving, suggested that Dean Stubbs could help, and that Elfving could “deal direct with LiXia or KSL” and “pay them direct”. The reference to “KSL” is to Kua Si Lin and the reference to “LiXia” is to Li Xia who is the majority owner of a company which, at the time, had been a significant supplier to the plaintiffs, namely, Yangpu Dartong Industrial and Commercial Company Ltd (“Dartong”). On 11 April 2005, Adam Duggan sent an email to Elfving with the answers that Dean Stubbs had prepared together with the price list which had been requested. The price list marked up the cost price of generators by about 30% and indicated that orders could be placed through GB’s Chinese agent, Li Xia, or through Kua Si Lin (Proline). Thus, Elfving was being invited by the plaintiffs (through Adam Duggan) to obtain product directly through Dartong (the manufacturer) or Kua Si Lin (the commissioned agent) rather than the plaintiffs. The plaintiffs’ involvement (through Adam Duggan) had apparently come to an end, but a 30% mark-up on prices was quoted. The oral testimony of Thomas Anderson (on behalf of Elfving) was that no purchases were made of the product and, indeed, that it was never his intention to purchase Chinese made generators through the plaintiffs. However, from the plaintiffs’ point of view, the opportunity presented by the enquiry by Elfving on 31 March 2005 had been dealt with by suggesting to the potential customer that orders be placed other than through the plaintiffs.

11 The plaintiffs contended that this profit was to be enjoyed by Adam Duggan upon the hypothesis that it would be he, rather than the plaintiffs, who would benefit by any sales. I accept that the response to Elfving from Adam Duggan had the effect of

diverting an opportunity away from the plaintiffs. In April 2005 Adam Duggan purported to impose a profit mark-up of 30% on the Sunvic generators to be made by some unidentified person other than the plaintiffs. In August 2005 Adam Duggan resumed contact with Elfving for the supply of Sunvic generators for the benefit of the proposed new business that soon after became that of Jak Max.

12 The Elfving request on 31 March 2005 was for information from Paul Duggan (on behalf of the plaintiffs) about Sunvic generators. It was he who referred the query to Dean Stubbs to answer. It was Paul Duggan who on 10 April 2005 forwarded the email from Dean Stubbs with the attached pricing spreadsheet to Adam Duggan and sent a copy of his email to Dean Stubbs and to Kua Si Lin. It was Paul Duggan who asked Adam Duggan to answer Elfving and to tell them to deal directly with Li Xia or Kua Si Lin and “pay them direct”.

13 The email sent on 11 April 2005 by Adam Duggan to Elfving with the answers proposed by Dean Stubbs and price list (marking up the cost price of the generators by about 30%) was not for the benefit of the plaintiffs. I infer, as the plaintiffs contended, that any profit from the transaction was not intended to be realised by the plaintiffs but to be realised by the Duggans, Kua Si Lin or Li Xia. I do not accept the defendants’ explanation that the dealing was intended to assist Elfving. The most effective way to have assisted Elfving would have been for Paul Duggan to have instructed Adam Duggan to provide Elfving with the contact details of the supplier. Moreover, there would have been no need for Adam Duggan to set a price. Indeed, on 12 April 2005 Antti Berkan replied to Adam Duggan specifically stating that he did not have contacts with “Lixia” and asked Adam Duggan if he could pass on the order to her. There was no evidence that he passed on Li Xia’s contact details to anyone at Elfving. The suggestion that Elfving could deal directly with Li Xia or Kua Si Lin and pay them direct indicates that the plaintiffs were to be excluded from the transaction both in bringing it about and in receiving payment. The 30% profit mark-up was, therefore, to be received by someone other than the plaintiffs.

14 Paul Duggan denied that there would have been a profit in the transaction, but that

denial is contrary to my reading of the emails and I do not accept the denial. On 12 April 2005 Elfving sought three samples. They were not provided between April 2005 and mid-August 2005. Ultimately, Elfving did not follow through with the generators through Jak Max, the plaintiffs or anyone else. This may be relevant to any quantum of damages or to an account of profits but not to whether there was a breach of duty. I reject the denial by Paul Duggan that he was involved in any way or paid attention to the transaction. In cross-examination Paul Duggan sought expressly to distance himself from involvement in or knowledge of the dealings between his son, Dean Stubbs and Elfving, but it is clear from an email dated 26 April 2005 from father to son about the subject matter of Sunvic generators for Elfving that Paul Duggan did pay attention to the matter. Indeed, on the very next day Adam Duggan emailed his father on the same subject matter specifically asking that he (Paul Duggan) deal with the matter with Dean Stubbs because he, Adam Duggan, would be away until the following week.

**(b) Establishing a business in competition with the plaintiffs**

15 The next claim against Paul Duggan was that he breached his duties of employment as director of the plaintiffs by taking steps against their interests to establish or to assist Adam Duggan to establish a business in competition with the plaintiffs. The evidence, if not the particulars, relevant to this allegation overlap with at least one of the other allegations the plaintiffs make against Paul Duggan. The pleading in paragraph 8(b) of the second further amended statement of claim is that Paul Duggan wrongfully “took steps against the interests of the plaintiffs to establish or to assist Adam [Duggan] to establish a business in competition with the plaintiffs”. Paragraph 14(b) alleges against Paul Duggan a breach of the restraint given by him under the share sale deed as being that he had wrongfully “been involved in a business that is the same or is substantially similar to the Business” of the plaintiffs.

(i) *Jak Max (M) Sen. Bhd*

16 The first of the particulars relied upon against Paul Duggan in support of the allegation that he took steps against the interests of the plaintiffs “to establish or to assist Adam [Duggan] to establish a business in competition with the plaintiffs”, is that on or about 27 April 2005 he formed, or assisted with the formation of, Jak Max (M) Sen. Bhd., a company registered in Malaysia, to compete with the plaintiffs. The defendants maintain that the striking similarity in name between the Malaysian company and the second defendant was a “mere coincidence”. I assume that the coincidence asserted on their behalf was intended to extend as to a coincidence of name, date and location: the “Jak” in the name of the second defendant is a combination of the first letters of the given names of each of Paul Duggan’s three children (John, Adam and Kylie), and Maxwell (for which “Max” might be thought to be a common abbreviation) happens to be Paul Duggan’s middle name; Malaysia is a country with which Paul Duggan had a connection (it appears that he owned an apartment in Kuala Lumpur); and 27 April 2005 is, of course, within the month of the email concerning the Elfving requests about Sunvic generators. However, the only evidence about this matter ultimately came from the examination-in-chief of Paul Duggan by his counsel. In that evidence Paul Duggan denied any knowledge of the Malaysian company or of its directors or of what the company does. He was not, as counsel for the defendants pointed out in their written submissions, cross-examined on this evidence and no other witness gave evidence on this subject. The plaintiffs’ written submissions expressly state that they did not pursue this particular and, counsel for the defendants submitted that “there is no evidence on which the Court could conclude [that] the allegation is made out”. I doubt this to be correct but, despite my considerable reservation about the reliability of the evidence of Paul Duggan, I will proceed upon the assumption that the particular is not relied upon by the plaintiffs and that, therefore, I do not need to decide whether Paul Duggan formed or assisted with the formation of the Malaysian company with a strikingly similar name to that of the second defendant in a place in which Paul Duggan had an apartment at about the same time as Adam Duggan was writing to a customer suggesting that the customer should deal direct with Li Xia or Kua Si Lin.

*(ii) Bigpond email account*

- 17 There were other particulars set out under this allegation which were also not pursued by the plaintiff. The particulars which were pursued by the plaintiffs were largely concerned with the creation and use of what was said to be a secret email account of Paul Duggan to gain advantage for himself or for one of the other defendants.
- 18 The significance of the email account needs to be understood in the context of the circumstances in which Paul Duggan, and not Thomas Beerens, came to be selling the shares in the business. The share sale deed was not made until 22 April 2005 but it was known to the parties by mid-February 2005 that Paul Duggan would, eventually, leave the business. There was at least some, if not considerable, surprise about this outcome because there had been some expectation that it would be Paul Duggan who would acquire the interests of Thomas Beerens rather than vice versa. However, the offer made by Paul Duggan on 3 February 2005 was one which, as had been agreed between them that it should, permitted Thomas Beerens either to sell or to buy upon the terms of the offer. On 3 February 2005 Paul Duggan made three alternative offers in writing to Thomas Beerens. The first was that he would buy the shares held by Thomas Beerens for \$4.5 million; the second was that Thomas Beerens could buy his shares for \$4.5 million; and the third was that he would take ownership of GB Products and that Thomas Beerens would take ownership of GB and Somers (with some adjustments). On 10 February 2005 Thomas Beerens, perhaps to the surprise of many, accepted Paul Duggan's offer to sell his shares.
- 19 Not long after the "informal" agreement for Thomas Beerens to buy Paul Duggan's interest in the plaintiffs, the former arranged for his brother-in-law, Mark Gwynne, to be engaged by the plaintiffs as a consultant. Mark Gwynne commenced acting as a consultant to the plaintiffs on or about 14 February 2005 (only some four days after Thomas Beerens had accepted Paul Duggan's offer). Initially the role for Mark Gwynne was to prepare a business plan for the business, to assist Thomas Beerens and the plaintiffs with obtaining finance to purchase Paul Duggan's shares, and to assist in the appointment of a new CEO to replace Paul Duggan. A business plan

was prepared some time in March and April 2005.

20 Paul Duggan had started working for GB in 1974 as the company accountant. The business had been founded in 1959 with the incorporation of GB by Jack Griffiths and Neil Beerens. It started as a manufacturer of chainsaw guide bars for sale in Australia and subsequently grew through expansion and the acquisition in the mid-1980s of Somers (a sprocket manufacturing company) and GB Products (then called Chainsaw Products Pty Ltd), a distributor of chainsaw accessories and equipment. In mid-1978 Neil Beerens bought Jack Griffiths' shares in GB and appointed Paul Duggan as the general manager. Neil Beerens also gave Paul Duggan 10% of the shares in GB, and in January 1980 Paul Duggan was appointed a director of GB. After the acquisition of Somers and GB Products in the mid-1980s, Paul Duggan had become a director of those companies and owner of 40% of the shares in GB, Somers and GB Products. In 1993 he also became a director of GB Accessories at its incorporation. In 2000 Paul Duggan purchased a further 5% of the shares in the plaintiffs and from that time he owned 45% of the shares in each of the plaintiffs, 5% in his own name and 40% in the name of his family company, Garcia Duggan. From 1980 until 29 June 2005 he was the managing director and international sales manager of the plaintiffs' business.

21 Thomas Beerens is the son of Neil Beerens. He graduated from the University of Melbourne with a Bachelor of Engineering degree in 1987 and started work for GB as an engineer assisting his father in late 1987. From about the early 1990s, Neil Beerens gradually transferred ownership of his shares in the plaintiffs to his son, Thomas Beerens. In 1999 Thomas Beerens became a director of each of the plaintiffs and by about 2000 he owned 55% of the shares in the plaintiffs, 5% in his own name and 50% through his family company, Windtest.

22 From about 2004 the relationship between Paul Duggan and Thomas Beerens deteriorated, coinciding with Thomas Beerens playing a more active role in the management of the plaintiffs' business. In late 2004 Thomas Beerens told Paul Duggan that he wanted to introduce more formal planning into the management of

the business. A good deal of the evidence showed that there was substantial disharmony between Paul Duggan and Thomas Beerens in connection with the business by late 2004. In January 2005 Paul Duggan indicated that he may make an offer to buy out Thomas Beerens' interest in the plaintiffs. In either January or early February 2005, Thomas Beerens told Paul Duggan that any offer to buy the shares should be made on the basis that Thomas Beerens could either sell his own shares or buy Paul Duggan's shares at the same price per share. It was on that basis that the offer was made on 3 February 2005 and accepted on 10 February 2005 by Thomas Beerens to buy rather than to sell.

23 The circumstance that Paul Duggan had become bound to sell his shares and to relinquish his role in the business, was not by any desire, or intention, he had to retire. Indeed, not long after reaching the in principle agreement in mid-February 2005 for him to sell his shares, Paul Duggan planned to start a business of his own and discussed with Thomas Beerens the possibility of a limited restraint that would allow him to start a business of his own supplying spare parts for chainsaws, lawn mowers and other small engines. Ultimately that was not included in the share sale deed because the parties could not reach agreement on the wording of a limited restraint that would satisfy each party.

24 It was in that context that Paul Duggan began to use an email address other than the one at the plaintiffs. There was considerable evidence given about the email account set up for Paul Duggan which the plaintiffs described as "secret" and which the defendants described as "a common bigpond address". Little turns on the use of the adjective "secret" since the critical question is whether the establishment and use of the email address without the knowledge of the plaintiffs (and in that sense "secret") was relevantly a step against the plaintiffs' interest to establish or to assist Adam Duggan to establish a business in competition with the plaintiffs.

25 Some time in March 2005 Paul Duggan's other son, John Duggan, opened the bigpond email account for his father. It is probable that this occurred after 29 March 2005 being the date on which Paul Duggan purchased four Dell computers. It was

not until the end of March 2005 that Paul Duggan's plan to start a business of his own supplying spare parts for chainsaws, lawn mowers and other small engines was no longer open to him in negotiations with Thomas Beerens. The plaintiffs contended that the establishment and use of this email address was evidence of Paul Duggan's intention to correspond either in relation to his proposed business in spare parts or a business in competition with the plaintiffs.

26 The need for Paul Duggan to use or access his bigpond account until completion of the share sale deed in July is, even upon his evidence, curious. It was his evidence that he was only able to access his bigpond account from home, or from the house next door which he also owned, and not from his office at the plaintiffs' premises. Paul Duggan was employed at the plaintiffs until the date of the completion of the share sale agreement in early July and, therefore, had no compelling need to use the home office email account rather than his GB email account. Until the establishment of the bigpond account it seems that Paul Duggan never had any email account other than the one at work. However, in March 2005 Paul Duggan set up a home office from which he could operate a business; he acquired computers, and had his son John Duggan establish the bigpond email account. It is clear that Paul Duggan notified some people of his bigpond email account, including Chris Fehn, by about April 2005. Chris Fehn, at the time, was employed by GB America (then a company within the plaintiffs' corporate group) as international sales manager. He had held that position from April 2001 until 20 April 2007 when GB America was sold to an unrelated third party. It is also clear that Paul Duggan did not give a general or circular notification of his bigpond email address, and at no time informed any of the plaintiffs of its existence.

27 I accept the submission made on behalf of Paul Duggan that the establishment of an email address cannot, of itself, constitute a breach of Paul Duggan's employment duties and that there was no legal basis upon which Paul Duggan was under an obligation to disclose to the plaintiffs the fact that he had a private email address. I accept that Paul Duggan was entitled to establish a personal email address and that

he was especially able to do so in circumstances where his role at the plaintiffs was being reduced. These submissions, however, fail to deal with the point of the allegation, namely, that the use and establishment of the bigpond email address was a step in an activity in breach of his duties to the plaintiffs.

28 Chris Fehn was given Paul Duggan's bigpond email address and was using it to communicate with Paul Duggan at a time when the latter was still employed by the plaintiffs and his GB email account. On 25 May 2005, Chris Fehn sent an email to Paul Duggan at the latter's bigpond email address referring to a then recent trip and asking for confirmation that the email address was the correct one. Paul Duggan had then recently travelled to America and the tenor of the email suggests that Chris Fehn had been given the bigpond email address personally in May in America rather than by other email correspondence from Paul Duggan. Later on the same day Chris Fehn wrote to Paul Duggan at his bigpond email address discussing what, on its face, could have been innocuous business with Paul Duggan on behalf of the plaintiffs. What is curious about this, however, is that Paul Duggan was, at the time, still with the plaintiffs, continued at the time to have his office, continued at the time to have his GB email address and (as Paul Duggan himself said in evidence) could only access his bigpond address from home.

29 The content of the email is also curious given that it was about the retention by Chris Fehn of an interest in a new company in China in relation to sabre tooth blades; something which might more naturally be of interest to the ongoing managers of the plaintiffs rather than the outgoing one. The email related to sabre tooth blades which was a product that GB used to sell. Chris Fehn was proposing that a business be set up in China and wanted to receive 50% of anything that might be made through that venture. In May 2005 Paul Duggan's future role with the plaintiffs was, at best, going to be as a consultant. This was known both to Paul Duggan and to Chris Fehn. Paul Duggan may then still have been managing director of the plaintiffs' business, and if Chris Fehn needed the plaintiffs' approval for his plans, it may be that Paul Duggan was the person who was then still formally able to give

their approval. It is, however, curious that a matter Chris Fehn thought sufficiently important to raise with the plaintiffs was done only with the outgoing managing director at the latter's "non plaintiff" email address with no mention, reference or copy to the ongoing managers and owners.

30 Chris Fehn sent a third email on 25 May 2005 to Paul Duggan at his bigpond account. This one related to an opportunity to supply or to continue supplying bar and chain combinations to a company called Qualitas. Apparently there had been some discussion in Las Vegas between Chris Fehn, Paul Duggan and a man from Qualitas known as Roberto. Some product was needed by Qualitas which, in the usual course of events, would have been supplied directly by GB America without reference to the plaintiffs in Australia. This email to Paul Duggan, however, concluded with the curious words that the 16 inch bars were needed "immediately so I [Chris Fehn] will quote regular channels". Paul Duggan gave no explanation for the remark and Chris Fehn's evidence was, in effect, that by "regular channels" he meant the stock of bars on hand at GB America. So much may be accepted and still be left wondering why the email was sent to Paul Duggan at his bigpond address. In my view the establishment and use of the bigpond email account was a step by Paul Duggan in breach of his duties to the plaintiffs. The correspondence with Chris Fehn was one instance of that.

*(iii) Sample guide bars to Wang Wei Ming*

31 The next particular relied upon under this heading is the supply by Dean Stubbs of sample guide bars to Wang Wei Ming in April 2005 under instructions from Paul Duggan to enable Wang Wei Ming to manufacture them. Wang Wei Ming was the managing director of Qirui Tools in Hang Xiao in China. Qirui Tools manufactured, and continues to manufacture, laminated guide bars and components for guide bars for the plaintiffs. The sending of sample guide bars had been the subject of correspondence between Paul Duggan and Wang Wei Ming on 9 December 2004 and 22 January 2005. Those dates were before any acceptance by Thomas Beerens to buy Paul Duggan's shares. I accept that at that date the suggestion about the sending of

sample guide bars was for the benefit of the plaintiffs in Paul Duggan's role as managing director of the plaintiffs at the time. On 22 January 2005 Paul Duggan wrote to Wang Wei Ming saying, in part, that "more bars and drawings" would be sent to him to quote on. Thomas Beerens, however, was reluctant to send the drawings to Wang Wei Ming and said in evidence that he informed Paul Duggan of this expressly in early 2005. His reason, understandably enough, was that the designs took time to develop and he was reluctant for the information to become generally available.

32 Drawings, however, were sent to Wang Wei Ming in April 2005 after the "in principle" agreement by which ownership and management of the plaintiffs was to be relinquished by Paul Duggan. Whatever Paul Duggan's view about the desirability of sending the drawings to Wang Wei Ming in December 2004 or January 2005, by mid-February it was clear that his view was unlikely to represent the long term view or interests of the plaintiffs. Indeed, as I have said, it was Thomas Beerens' evidence that he had informed Paul Duggan of his opposition to the sending of drawings to Wang Wei Ming. The drawings were, nonetheless, sent. The evidence of Dean Stubbs was that there was a meeting in early 2005 attended by him, Nick Loschiavo and Paul Duggan at which, according to Dean Stubbs, he suggested sending samples and that everyone agreed to that suggestion. The "agreement" of Thomas Beerens was, according to the evidence of Dean Stubbs, that he took Thomas Beerens to have agreed from the fact that Thomas Beerens did not tell him not to send the sample bars. Paul Duggan gave evidence that the sample bars were packaged in a prominent place in the factory and therefore that Thomas Beerens knew that the sample bars were going to China because of the discussions. Thomas Beerens' evidence was that he was not told that Dean Stubbs was intending to send sample guide bars to Wang Wei Ming and that he was not told that he had done so.

33 In relation to this matter I prefer, and accept, the evidence of Thomas Beerens. He denied having had discussions with Dean Stubbs, Nick Loschiavo and Paul Duggan about the possibility of sending sample bars to Wang Wei Ming. Nick Loschiavo

gave no evidence of an alleged meeting and, if it be necessary, I would infer from the lack of evidence from him on that point that his evidence would not have assisted the defendants. Paul Duggan gave no detailed evidence about a meeting or discussion or recollection of any unequivocal statement by Thomas Beerens indicating his consent to the sending of drawings to Wang Wei Ming.

34 Dean Stubbs was the only person who referred expressly to a meeting and, at its highest, his evidence about consent by Thomas Beerens depends upon an inference of consent from a lack of objection to Dean Stubbs at the proposal to send the bars to China. I have found the evidence of Dean Stubbs largely unreliable (for reasons which I will explain later) and on almost any point of contest between his evidence and that of any other person, I have come to prefer the evidence of the other person. It was not put in cross-examination to Thomas Beerens that he knew that Dean Stubbs was sending sample guide bars to Wang Wei Ming and his consent is inherently unlikely. Paul Duggan knew that Thomas Beerens was opposed to sending drawings to China. It is, therefore, inherently unlikely that Thomas Beerens would allow sample bars to be sent instead of drawings. Thomas Beerens' evidence was that sending sample bars was a worse option than sending drawings and that he did not consider it desirable. His evidence, as may be self-evident, was that to ensure quality of Chinese manufacturing, it was in GB's interest to provide drawings where needed for production rather than rely upon reverse engineering from samples. Sending samples, where there were drawings, made little sense and, it was Thomas Beerens' view that reverse engineering from samples was undesirable and to be avoided.

35 The "evidence" of Paul Duggan concerning the packaging of the bars is an insecure foundation upon which to draw inferences against Thomas Beerens. There was no evidence given that Thomas Beerens actually witnessed the sample bars being packaged nor any evidence that he would have recognised a package as one containing sample guide bars to be sent to Wang Wei Ming. Nor was it put to Thomas Beerens that he did, or must have, witnessed the samples being packaged in

the factory, either generally or specifically, for sending to Wang Wei Ming.

36 The significance of this issue may be seen in the correspondence in April 2005 with Wang Wei Ming leading, as it is alleged, to the first Jak Max order numbered JM0001. On 6 April 2005 Dean Stubbs sent an email to Wang Wei Ming telling him that on that day he sent 36 different guide bars and that Paul Duggan would discuss these with him on his "upcoming visit". A note made by Wang Wei Ming's secretary in April 2005 listed a series of parts which were sent from GB. On 31 August 2005 Jak Max placed an order with Dartong for a series of products by reference to part numbers that are similar to those apparently received by Wang Wei Ming. The defendants' submissions note that only one of the bars listed in purchase order JM0001 is "the same" as the 36 sample bars sent to Wang Wei Ming on April 2005. That may be, however the fact that only one may have been ordered is hardly an answer to whether the samples had been sent as part of the preparations for subsequent production and availability.

37 The sending of the sample bars for a purpose other than the plaintiffs' business may also be inferred from the evidence of Wang Wei Ming concerning his cancellation of a proposed visit to travel to Australia. In June 2005 Wang Wei Ming had received an invitation from Paul Duggan to travel to Australia for the purpose of learning the technical know-how behind manufacturing pro bars. He gave evidence that he subsequently cancelled his visit because "at that stage the company had been separating" and that it was inconvenient for him to visit GB under those circumstances. I accept the plaintiffs' contention that there was no reason for him to cancel his trip because of a concern of "separation" of GB if the purpose of his visit had been to learn the technical know-how behind the manufacturing of the bars; that is, if his role in the production of the bars was at all times for GB, then the departure of Paul Duggan from GB would have presented no relevant occasion for him to cancel a visit. It was not put either to Thomas Beerens or to Mark Gwynne that it was an inconvenient time for them to receive Wang Wei Ming as a visitor to the factory. Indeed, Mark Gwynne gave evidence that he was not even aware that Wang

Wei Ming had been invited to visit. On 16 June 2005 Wang Wei Ming wrote to Paul Duggan enquiring about the letter of invitation which had, at that date, not yet arrived. Paul Duggan wrote back the following morning saying that it had been sent the previous week but that another would be sent. In July, Paul Duggan emailed Wang Wei Ming giving him his email address specifically requesting that the GB email address be deleted and, the following day, expressly asking that no further emails be sent to him at GB or to the old email address. Subsequently, meetings were arranged between the two, and with Li Xia, in September in China.

*(iv) Email to Dartong*

38 The plaintiffs next point to an email of 25 May 2005 from Paul Duggan to Dartong requesting that Dartong “be patient for the moment”. It is the plaintiffs’ contention that these words ask Dartong to be patient while a business was set up in competition with the plaintiffs. The defendants contended that the words “please be patient for the moment” meant nothing more than that everything would be alright in the context of an engineer, a man called Jun, who was leaving Dartong to start a business of his own.

39 The email from Paul Duggan dated 25 May 2005 to Dartong had “business” as its subject matter. It was sent in response to an email from a person called “Joan” who at the time worked at Dartong. Her email was sent on 23 May 2005 and also had as its subject matter “business”. The primary wording of her email was directed to how Dartong might seek to secure business from a company called Stens who, she feared, would be contacted by the departing purchasing colleague, Jun, and who might supply Stens with products that Dartong had exported to GB before. In that context Joan expressed some uncertainty about how “to cooperate with GB in the future” given that it was now “in a precarious status [sic]”. Paul Duggan’s response included an expression of sympathy about Jun having left and disappointment if he tried to “steal” Dartong’s business. It also noted that GB would “still be buying all the products” from Dartong and requested that those products not be offered to any other customers like Stens. He then said that when next in Shenzhen he would be

able to help Dartong with new customers and, therefore, “please be patient for the moment”.

40 It seems to me that either of the two contending readings of Paul Duggan’s email of 25 May 2005 is reasonably open. Which of them is the correct one depends upon a broader context. I do not think the reading contended for by the plaintiffs should be preferred if I were to confine my attention solely to the text of the two emails. Indeed, their contention fundamentally depends upon the hypothesis that there had already been discussions with Dartong about future business involving Paul Duggan. I think that was likely and therefore do not accept the evidence of Paul Duggan that the words “please be patient for the moment” meant nothing more than that everything would be alright for Dartong without reference to some prior knowledge of an intention to secure supply from Dartong for a business other than for that of the plaintiffs. In that context the opening words of the email from Joan to Paul Duggan remarking on not having heard from him “for a long time” is I think, to be seen as an enquiry into how previously discussed plans were developing.

*(v) Poulan email*

41 The last of the particulars relied upon under this heading is an email dated 8 June 2005 from Kua Si Lin attaching a file of the “Poulan” products price list which Paul Duggan then forwarded to his sons Adam Duggan and John Duggan, and also to Dean Stubbs. The significance which the plaintiffs put upon this email, and attached price list, is that its contents were of no use to the plaintiffs’ business but shed light on the intention and actions of the defendants, and others said to be assisting them, as at early June 2005.

42 Poulan is a large manufacturing company in the United States of America. It makes ride-on mowers, lawn mowers, tillers, trimmers, blowers, snow throwers and chainsaws. Poulan products were not sold by the plaintiffs in June 2005 but Jak Max did ultimately receive supply of some push mowers and ride-on mowers.

43 The first step in the chain of emails occurred when Kua Si Lin sent an email to Paul

Duggan attaching the Poulan price list. That was on 8 June 2005 and the importance was described as “high”. Kua Si Lin gave evidence that from time to time he received Poulan price lists and that in the ordinary course of business, when he received such price lists, he would always update his friends all over the world and routinely sent this sort of pricing compilation to a number of his contacts in the industry. That evidence is to be assessed in light of the fact that Kua Si Lin has had a long and intimate knowledge of the plaintiffs’ business as its commissioned agent for very many years.

44 The email sent by Kua Si Lin to Paul Duggan was an individual one to him and not an email sent to many people. Perhaps nothing should be made of that circumstance other than to note that it was not on its face sent by Kua Si Lin to his contacts generally or to a group of them. In any event, what happened next was that Paul Duggan at 7.41 am on 9 June 2005 forwarded the email to Dean Stubbs, Adam Duggan and John Duggan. Twenty five minutes later John Duggan sent the email to himself at his own bigpond email address.

45 The defendants contended that this email is not pleaded as a diversion of a corporate opportunity and that for a variety of reasons it could not be construed as a breach of any employment duty. The submission, however, misconceives the plaintiffs’ pleading. The email is relied upon as a particular of the taking of steps against the interests of the plaintiffs “to establish or to assist Adam [Duggan] to establish a business in competition with the plaintiffs”. The point, therefore, is not whether there was a diversion of a corporate opportunity or a breach of employment duty by the email, but rather, whether it sheds light on conduct as early as 8 June 2005 indicative of the establishment of a competing business which the defendants contended did not occur (assuming that the business of Jak Max may be regarded as competing) until September 2005 at the earliest. I accept the plaintiffs’ submission in this regard.

46 The email, as I have said, was sent by Paul Duggan to, amongst others, his youngest son John Duggan who emailed it to his own bigpond email address. John Duggan

was employed by the plaintiffs from about mid-2003 and his last position was in telephone sales for GB products. He is the youngest son of Paul Duggan and Violetta Duggan and was about 20 years old in 2005. He joined GB in about mid-2003 on a casual basis and commenced full time employment only in January 2005 for GB products as part of the telephone sales team. He had previously had an "assignment" in America for six months which, on his own evidence, was "more fun than business". He returned from America in December 2004 and began his first fulltime job in January 2005. Paul Duggan said that his son John was one of the recipients of the email as part of the general circulation of such a price list as simply the information process that was done by many people around the world. However, by June 2005, there had already been in circulation an organisational structure proposed for the business (from at least 21 May 2005) which identified others within the plaintiffs structure to whom the Poulan list should have been sent either by Paul Duggan or by any of the other three recipients. It was not sent to Mark Gwynne who was known to be taking over as the chief operating officer from Paul Duggan and identified in the organisational structure as the team leader for the sales division of the business.

47 I do not accept the evidence of Paul Duggan that the receipt of the Poulan price list, and more importantly its subsequent distribution by Paul Duggan, was no more than the circulation of generic information regularly sent to people. If that was so I would have thought that Paul Duggan would have included others in the plaintiffs' organisation to send on the information. Indeed, if the information were of a kind which a man in his position would regard as sufficiently appropriate for him to receive and then to send on, I would expect that he would have sent a message to Kua Si Lin to indicate that any such future general information for the plaintiffs should be forwarded to others at GB. I accept the plaintiffs' further submission that there was no reason whatsoever to include John Duggan in the "clan of people" to whom information of this kind should have been forwarded at that time. He was hardly part of the established "clan of people" and to the extent that Paul Duggan turned his mind to who else should have been added to the distribution list of

information of this kind, he seemingly, and strikingly, failed to include any of the people within the plaintiffs' proposed new organisational chart who, like he in the past, might have benefited from receipt of such information on behalf of the plaintiffs.

48 Although the plaintiffs' business did not include the sale of Poulan products (a fact which may be assumed to have been known to Kua Si Lin), Kua Si Lin did have a number of ride-on mowers sitting on the docks in the United States which ultimately came to be made available for sale by Jak Max in Australia. The ride-on lawn mowers had been ordered by Kua Si Lin in early 2005 and were to be shipped from the United States to China but got held up in the United States by local Customs officials. The reason for this was not fully explored but appears to have been due to some error which caused the American Customs officials to think that the mowers were being shipped to Cuba rather than to China. In any event, the delay in shipment to China meant that they would not reach China in time to be sold for the relevant season in China. Kua Si Lin's evidence was that he originally expected that the goods would reach China by July. He did not concede that he knew by early June that the Poulan ride-on mowers would not reach China in time for the Chinese summer of 2005 (namely, June to August), but by early June he must have had at least some doubt about when they would reach China and may reasonably have begun to explore other options to offload a shipment of goods that might, if not would, not reach their intended market by the intended time. Kua Si Lin did say that the transit time from the United States to China was about two to three weeks and that the unloading of goods through Customs in China takes a few days to a week. On that evidence alone the best that he could have expected in early June was that the ride-on mowers he had ordered at the beginning of the year for China would, at best, reach its intended destination well into the Chinese summer.

49 In these circumstances I accept the plaintiffs' submission that Kua Si Lin sent the price list to Paul Duggan in an email marked as of "high" importance to have the Poulan ride-on mowers sold in the Australian summer of 2005-2006. I do not accept

either his evidence or the evidence of Paul Duggan to the contrary. The two are close friends and have been so for very many years. The evidence is that Kua Si Lin has been a supporter of Jak Max and, if that evidence is to be accepted at face value, he has been the provider of finance to enable Jak Max to trade. The balance sheet for Jak Max as at 30 June 2006 shows Kua Si Lin as its largest unsecured creditor (\$296,876) after a commercial bill from its bank. I do not accept his evidence as that of a disinterested party and regard his evidence on this point as inherently unlikely in view of the facts as they were at the beginning of June 2005 and as they subsequently transpired.

50 In fact Jak Max ultimately did receive supply of Poulan mowers. Adam Duggan's evidence in this regard was that Jak Max took these mowers only as a favour to Kua Si Lin and that in the ordinary course of business Jak Max would not have placed an order for the three containers of Poulan mowers. The evidence of Nick Loschiavo was that the Poulan mowers were placed outside the premises for sale to anyone who drove down the street. Only one or two were sold in December 2005 and of the total value of goods, of about \$90,000, the gross profit made by Jak Max from the shipment was only between about \$20,000 to \$22,000. Whether or not the transaction was a success is, in my view, not to the point. What is to the point is that by June 2005 the probabilities were that, at the very least, Paul Duggan was taking steps to establish or to assist Adam Duggan to establish a business contrary to the interests of the plaintiffs and contrary to their assertions to the contrary.

51 The defendants point to two tax invoices from Proline (Kua Si Lin's company) to Jak Max to demonstrate that some of the Poulan mowers which were purchased by Jak Max were not listed on the price list that had been sent in the email to Paul Duggan. I do not regard that submission as relevant to the contention as pleaded or put. It matters not whether there were some items sold to Jak Max that were not on the price list or that the plaintiffs never sold Poulan products or ever intended to sell them. What is relevant is that by June 2005 steps were being taken to establish a business and that however marginal to that business (or however marginal to direct

competition with the plaintiffs' business) those products might have been, steps were taken in early June 2005 to establish a business.

*(vi) Breach of duties*

52 The conduct I have described above is alleged by the plaintiffs to be a breach by Paul Duggan of his employment duties causing damage to the plaintiffs or through which Paul Duggan has made a profit. The pleading of employment duties makes clear that three separate bases in law are relied upon by the plaintiffs: contractual terms of employment; the fiduciary relationship between Paul Duggan and each of the plaintiffs (fiduciary duties); and the duties imposed by ss 182 and 183 of the *Corporations Act 2001* (statutory duties).

53 There is no doubt that Paul Duggan owed duties to the plaintiffs of the kinds alleged in the statement of claim. The enquiry thus to be undertaken is whether the conduct I have described amounts to a breach of any one or more of the duties and, if so, whether it has caused loss or damage to the plaintiffs. Although three different bases are relied upon, there is substantial overlap between them. Paul Duggan was a director of each of the plaintiffs during the time of the events to which I have referred. As a director he had strict fiduciary and statutory duties<sup>1</sup>. The main function of duties imposed upon a director is to ensure the loyalty of directors to their company<sup>2</sup>. The standard of loyalty required of a director is reflected in both positive and negative obligations. Section 182 of the *Corporations Act 2001* provides, amongst other things, that a director must not improperly use his or her position either to gain an advantage for himself, herself or someone else, or to cause detriment to the corporation. Section 183 provides, amongst other things, that a director who obtains information because they are or have been a director must not improperly use that information to gain a like advantage or cause a like detriment.

54 The meaning of improper use has been considered in several cases including *Chew v*

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<sup>1</sup> Butterworths, *Ford's Principles of Corporations Law*, vol 1 (at Service 45) Part III The Law of Corporate Governance, 'Chapter 8, Acting Property and with Care' [8.010].

<sup>2</sup> *Ibid*, [8.015].

*The Queen*<sup>3</sup> and *R v Byrnes*<sup>4</sup>. In *Byrnes* it was said:

Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case.<sup>5</sup>

It does not matter that the advantage may not have been available to the plaintiffs<sup>6</sup>. Critically what is to be enquired into is whether Paul Duggan's behaviour breached the norm of conduct thought necessary for the proper conduct of commercial life so that people will have confidence that the running of the marketplace is in safe hands<sup>7</sup>. In my view he has done just that: whilst still director of the companies Paul Duggan was actively involved in assisting in the creation of a business using in that endeavour his position as director of the plaintiffs and information he was obtaining in that capacity.

**(c) Breach of restraint and share sale deed**

55 What is next pleaded against Paul Duggan is that he was in breach of various provisions under the share sale deed, the confidentiality deed and, in particular, in breach of the restraint given by him to the plaintiffs under cl 13 of the share sale deed. These pleadings, although separate, overlap substantially as did the respective submissions in final address. The parties' submissions followed an agreed template for final addresses and submissions. I will follow the order of the template as adopted in the submissions in dealing with these allegations.

**(i) Legal principles**

56 Clause 13 of the share sale deed contained a restraint of trade given by the people described as the "sellers", namely, those identified in Item 5 to Schedule 1, that is, Paul Duggan and Garcia Duggan (the latter both in its own capacity and in its capacity as trustee of the Duggan Family Trust).

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<sup>3</sup> (1992) 173 CLR 626.

<sup>4</sup> (1995) 183 CLR 501.

<sup>5</sup> (1995) 183 CLR 501, 514-515 (Brennan, Deane, Toohey and Gaudron JJ).

<sup>6</sup> *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 558; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672, 692-3 (Spigelman CJ).

<sup>7</sup> *ASIC v Vizard* (2005) 54 ACSR 394, 402 (Finkelstein J).

57 The restraint clause given by Paul Duggan in the share sale deed was preceded by specific negotiations and discussions. The minutes of a meeting of directors of GB dated 25 January 2005 recorded that Paul Duggan intended to make an offer to purchase Thomas Beerens' shares. The minutes recorded Paul Duggan's explanation based upon a comment by Thomas Beerens that the latter intended to withdraw from the company in three to five years and that, in those circumstances, it might be appropriate for Paul Duggan to make an offer to purchase Thomas Beerens' shares. The specific matters referred to in the minutes as relevant to the proposal included "different management styles of Tom and Paul, the ownership of the new factory, and the loan accounts of Neil and Paul". The minutes also recorded Paul Duggan's feeling that the business required one shareholder and that in his opinion the existing scenario could not continue because the environment was "not conducive to good cooperation and [was] leading to the confusion of staff". The minutes recorded a request to the company's accountants, Overmans, to provide a valuation and strategy whereby one "partner" could buy out the other. A "valuation" (of sorts) was prepared by Overmans and on 3 February 2005 Paul Duggan made an offer which, as had been agreed, provided for Paul Duggan to make an offer to buy out Thomas Beerens' interest (direct and indirect) and vice versa.

58 On 10 February 2005 Thomas Beerens accepted the alternative offer to purchase the interests of Paul Duggan (direct and indirect). In the third paragraph of Thomas Beerens' letter of acceptance there was reference to it being made on the understanding that they would then prepare a formal written agreement "including a restrictive covenant". On the very next day Paul Duggan wrote to Thomas Beerens indicating that his offer did not involve "a restrictive covenant either way" and stated that it was never his intention that that would be the case. That communication went on to suggest that Thomas Beerens was not really accepting the offer but was rather making an alternative offer. It went on to indicate, however, that Paul Duggan would consider what he described as the alternative offer if Thomas Beerens could provide the "precise terms" of the restrictive covenant sought.

59 On 14 February 2005 Thomas Beerens replied to Paul Duggan taking issue with the 11 February 2005 communication and stated, in relation to the proposed restraint, that:

In my layman's terms, you cannot be paid for your interest in the business but take away the right to set up a rival business. Otherwise there is no point in paying you for your share of the good will.

Obviously, I do not seek to restrain your ability to work in the future should you so desire, simply to protect what I have paid for.

On 9 March 2005 Thomas Beerens wrote again to Paul Duggan. It is obvious that there had been some further discussions after this correspondence and, it seems, there was some agreement about how matters stood as at 9 March 2005. In any event, as at that date Thomas Beerens set out his position concerning any limitation to a general restraint of trade covenant. In paragraph numbered 3 of a letter from Thomas Beerens to Paul Duggan the former indicated his willingness to agree to an amended or limited restrictive covenant to the effect that Paul Duggan would have the right to engage in industries or fields which would be in competition with the plaintiffs, namely, "lawn mower engine parts and chain saw engine parts, but not otherwise". The letter went on to assert that "obviously" Paul Duggan could not engage in these activities whilst working for the plaintiffs without the written consent of Thomas Beerens.

60 Also on 9 March 2005 John Morrow, solicitor, wrote to both Paul Duggan and Thomas Beerens confirming his instructions to act for the former and Garcia Duggan. John Morrow had been a solicitor for the plaintiffs from time to time and in his letter of 9 March 2005 expressed his discomfort in acting for both parties and confirmed that he would proceed to draw the sale of shares agreement on the basis that he was acting for the sellers and that Thomas Beerens and his company would be seeking separate and independent legal advice. It was John Morrow, as solicitor for the sellers (including Paul Duggan), who drafted the proposed contract with the restraint of trade clause albeit not in the exact form in which the share sale deed was ultimately executed.

61 On 6 April 2005 John Morrow wrote to Keith Hoban, the solicitor who was then acting for Thomas Beerens (and, it seems, all parties other than the sellers), and (in a lengthy and detailed letter) touched upon the position in relation to the restraint clause. In paragraph 15 of the letter from John Morrow to Keith Hoban, the former, as solicitor for Paul Duggan and Garcia Duggan, set out that what had been agreed between the parties was that any restraint was to be quite specific as a restraint “on the sale of the products sold by the company as at the time of the agreement, being the catalogue items only”. John Morrow went on to explain that for this reason the agreement was quite specific in its terms. One of the other matters considered in the correspondence between the solicitors was the possible acquisition by Paul Duggan of the business name “Sunvic” which Mr Beerens did not agree to and which did not occur. It will be remembered, of course, that it is at about this time that there occurred correspondence between Paul Duggan and Antti Berkan concerning Sunvic generators which, in evidence, Paul Duggan sought to minimise in significance.

62 In any event, by 22 April 2005 formal agreement was reached between the parties, each having separate legal representation, with the final document including a restraint of trade provision but no exception to permit Paul Duggan to engage in the limited competition which Thomas Beerens had previously indicated he would accept. The reason being that final agreement on the formulation of the exception was not reached.

63 The restraint provision in clause 13 of the deed of sale provided that the sellers, that is Paul Duggan and Garcia Duggan, could not be involved in any way in the retail or wholesale sale of what were described as the catalogue items in a schedule to the share sale deed, or, except as provided, be involved in any business that was the same or substantially similar to the businesses (as defined) within a period of two years anywhere in the world. The defendants contended that, as a matter of construction, clause 13 of the share sale deed was unenforceable as being an unreasonable restraint. They also contended that the defined sense of the words “involved in any way” restricted the meaning to give to those words, and that the

plaintiffs are not, as a matter of construction, entitled to enforce clause 13 because its provision was given for the benefit of Thomas Beerens and Windtest only.

64 Clause 13 provides:

**13. RESTRAINT OF TRADE**

- (a) The Sellers must not be involved in any way in the retail or wholesale sale of the Catalogue Items described in **Item 6 of Schedule One** or, except as herein provided, be involved in any business that is the same as or is substantially similar to the Businesses (“Competing Business”), within the time period and within the territory specified in **Item 7 of Schedule One** without the prior written consent of the Buyers.

“involved in any way” includes being involved in the business alone or as a partner, manager, agent, clerk, or assistant of any person or corporation, or as a director or a majority shareholder or shareholder who has the capacity to exercise substantial control of any corporation.

- (b) The Seller, if a corporation, must ensure that each officer, majority shareholder or shareholder who has a capacity to exercise substantial control of the corporation enters into a written agreement with the Buyers in the same terms as the restraint of trade in 12 (a) hereof and produce such written agreement by no later than the Completion Date.
- (c) The Sellers will not, within the time period and within the territory specified in **Item 7 of Schedule One**, without the prior written consent of the Buyers:
- i. canvass, solicit, induce or encourage clients, customers or current suppliers of the Companies to leave the Companies with a view to obtaining the custom of that person in a Competing Business;
  - ii. canvass, solicit, induce or encourage employees to leave the Companies with a view to being employed by the Sellers or their Related Entities;
  - iii. interfere in any way with the relationship between the Companies and their clients, customers, suppliers or employees.
- (d) This restraint of trade provision is for the benefit of the Buyers, their legal personal representatives and transferees, and the Sellers acknowledge that each restriction is in the circumstances reasonable and necessary to protect the goodwill of the Companies.

65 A restraint clause is, in my view, to be interpreted like any commercial agreement giving the words and their operation a reasonable and common sense interpretation. Fundamentally the task of construction is one of ascertaining the intention of the

parties and of applying that intention<sup>8</sup>. Reading a restraint “in a sensible fashion”<sup>9</sup> will involve avoiding unreasonable constructions and unreasonable applications of them. Similarly, if the language of a provision is open to two constructions, a court should prefer the one which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust<sup>10</sup>. But, in the end, my task is to determine the true intention of the parties and to give effect to that intention to the extent to which the law allows.

66 I do not accept that this restraint, which operating upon Paul Duggan worldwide, was too wide to be enforceable. The defendants sought to make some point of the proposition that “the Plaintiffs sold product into only 46 countries” (my emphasis) and, therefore, that it has not been shown that the plaintiffs “have an interest in a business worldwide” (my emphasis). The 46 countries referred to are in addition to Australia (thereby making a business of “only” 47 countries) and were in every continent in the world (except the two polar caps), and included the United States of America, China, countries in Europe, countries in South East Asia, Argentina, and very many more. The parties agreed (as a matter of evidence) that as at 22 April 2005 and 29 June 2005 the world had a total of 191 countries. A comparison of the list of 191 countries with the list of the 47 countries in which the plaintiffs had an interest to restrict competition, in my view, makes good the proposition that a worldwide restraint upon Paul Duggan was justified in this case.

67 The reasonableness of a restraint requires a consideration of how the restraint will operate both by geography and time. In *Fitch v Dewes*<sup>11</sup> Lord Birkenhead LC said:

But it is to be noticed here, as has been said in more than one of the earlier cases, that guidance may be derived in dealing with a restriction relating to time from an examination of the restriction which is made in respect of space. And the converse remark is of course equally true. For instance, if the restriction in respect of space is extremely limited, it is evident that a very considerable restriction in respect of time may be more acceptable than

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<sup>8</sup> *Upper Hunter County District Council v Australian Chilling and Freezing Co Limited* (1968) 118 CLR 429, 437 (Barwick CJ).

<sup>9</sup> *Rentokil v Lee* (1995) 66 SASR 301, 305 (Doyle CJ).

<sup>10</sup> *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99, 109 (Gibbs J).

<sup>11</sup> [1921] 2 AC 158.

would otherwise have been the case.<sup>12</sup>

In this case the two year restraint period is quite short. Paul Duggan had been in business for the plaintiffs since 1974 and, in a real and substantial way, came to embody the goodwill of the plaintiffs' business. He was the managing director and the person responsible for international marketing and contacts. He travelled overseas for three to four months each year over 25 years in that role for the plaintiffs and in the course of his employment, developed extremely close links with some the plaintiffs' suppliers and customers, including Kua Si Lin, Dartong, Speed France and Elfving. He also developed close relationships with the plaintiffs' commissioned agents and the management and employees of GB America. He was uniquely placed to be able to damage the plaintiffs' business spanning as it did 47 countries (including Australia) covering what may be regarded as essentially the industrialised world. The dealings between GB (in Australia) and Elfving (in Finland) via the emails to which I have already referred is but one example to illustrate the point. The actual penetration of the plaintiffs into America and the intimate dealings with major industrialised countries in Europe as well as China and South East Asia clearly established for the plaintiffs a link significantly identified with Paul Duggan which the plaintiffs, as a group, wished to preserve upon his departure.

68 It is not necessary for the plaintiffs to establish that its business was carried on in every part of the world in order to justify its restraint<sup>13</sup>. In this case the reasonableness of the worldwide restraint can be seen by the breadth of the area legitimately to be protected throughout the world. That is, that the 47 countries in which the plaintiffs did trade represented a substantial part (if not most) of a truly worldwide business.

69 The defendants next contended that the specific definition of the phrase "involved in any way" in clause 13(a) had the effect of both defining and confining the

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<sup>12</sup> Ibid, 163; see also 168 (Viscount Cave).

<sup>13</sup> *Connors Brothers Ltd v Connors* [1940] 4 All ER 179, 194 (Viscount Maugham); *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535.

expressions “involved in any way” and “involved in”. I do not accept that construction because if, for no other reason, the defined phrase expressly uses the word “includes”. The ordinary and natural meaning of the word “includes” is to ensure that something is within a class or phrase in case it might not otherwise have been there or, perhaps, to remove doubt. I can see no reason to give the word “includes” the restrictive and unnatural construction for which the defendants contended. The word “includes” is a standard word well recognised amongst the drafters of legislation, instruments and contracts as generally used to enlarge the meaning of a word or expression described<sup>14</sup>. There may be circumstances where the word “includes” should be read more narrowly but I cannot see in this case any reason why I should exclude from the meaning of the words “involved in any way” anything which would ordinarily come within that phrase.

70 I also reject the defendants’ argument that the restraint cannot be relied upon by the plaintiffs; that is, that it cannot be relied upon by any contracting party other than Thomas Beerens and Windtest. The argument here depends upon the meaning and effect of clause 13(d), which is said to sever any consideration that might have moved from the plaintiffs for the goodwill, and, it is said, to make clear that it was only the buyers (that is, the executing parties excluding the plaintiffs) for whose benefit the restraint of trade provision existed.

71 Whatever the effect of clause 13(d) may have been intended to have, I cannot read it as a limitation on the right in the plaintiffs to sue upon the share sale deed. The giving of the restraint may well be for the benefit of the buyers, and of the others identified in clause 13(d), but it was given under the share sale deed without restriction. The insertion of clause 13(d) may have been no more than an attempt to overcome the inevitable legal conundrum arising when shares are traded between shareholders in a company for a price which includes the value of the goodwill

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<sup>14</sup> *Cohns Industries v Deputy Federal Commissioner of Taxation* (1979) 37 FLR 508, 510 (Young CJ, Starke and Gray JJ).

owned by the company itself. In *Pioneer Concrete Services Ltd v Galli*<sup>15</sup> Brooking J said:

Where the sale of a business carried on by a company is effected by means of a sale, not of the business itself, but of the issued capital of the company, it is commonplace for businessmen and their advisers to require that promises on the part of the vendors be given, not only to the purchaser, but also to the company whose shares are the subject of the sale. This is done, in part at all events, in an endeavour to avoid difficulties which may arise in relation to damages if the business is injured or found to be less valuable and the only covenantee is, not the owner of the business, but the parent of the owner.<sup>16</sup>

What clause 13(d) does, in my view, is simply effect, for completeness and prudence, the other side of the coin described by his Honour. In this case clause 13(d) sought to ensure that the buyers (that is, Thomas Beerens and Windtest) could sue and recover damages notwithstanding that any damage might be suffered by the company whose shares had been sold (that is, the plaintiffs). Here the promise is given as a covenant under seal<sup>17</sup>. That clause 13(d) identifies the person for whose benefit the covenant may be given does not prevent it from being a covenant given to all of the parties to the share sale deed. Furthermore, the construction urged upon me by the defendants would have the entirely capricious and absurd (not to say unjust) result that the plaintiffs (whose goodwill is sought to be protected) would be the only legal persons who would not be entitled to enforce the restraint. Ordinarily a director or shareholder of a company operating a business has no proprietary interest in the business and therefore lacks the interest that a covenantee must have to justify enforcing a restraint provision<sup>18</sup>.

72 A number of other construction arguments were put on behalf of the defendants in support of the proposition that clause 13 of the share sale deed was unenforceable as an unreasonable restraint of trade. Specifically it is said that the sum paid for the shares of Paul Duggan and Garcia Duggan were wholly referable to the value of real property, plant and machinery and the first defendant's loan account, and

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<sup>15</sup> [1985] VR 675.

<sup>16</sup> *Ibid*, 693.

<sup>17</sup> *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353, 363 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>18</sup> *Aloha Shangri-la Atlas Cruises Pty Ltd v Gaven* [1970] Qd R 438, 448 (Wanstall J); *Berry v Wong* [2000] NSWSC 1002, (Unreported, Young J, 16 October 2000) [11], [28], [40].

included no component referable to goodwill. It is also said that the sale of chainsaws, lawn mowers, brush cutters and large 500 KVA generators cannot breach the restraint when the plaintiffs did not sell such products.

73 I accept the plaintiffs' submission that it is wrong both in law and in fact to contend that the sale price was based on the value of property, plant and machinery and Paul Duggan's loan account and not on account of goodwill. The plain terms of the share sale deed make it clear that a restraint was required to protect goodwill and the consideration was not made specifically referable by the share sale deed to items excluding goodwill. There is no foundation to construe the share sale deed in any way that would justify a conclusion that no part of the consideration was referable to the goodwill. At best, and only by reference to extraneous material, the defendants might conceivably establish that the consideration was inadequate for all that was secured upon payment of the consideration for the purchase of the shares, but the question for me is not the adequacy of the consideration but rather whether I should conclude that there was insufficient consideration to enable the covenant to be enforced. Clause 13(d) specifically provided that the parties agreed that the restraint clause was "reasonable and necessary to protect the goodwill of the Companies" (my emphasis).

74 A consideration of the evidence apart from the share sale deed, however, leads to the opposite conclusion to the one contended for by the defendants. It was Paul Duggan who set the sale price and there was no evidence of the basis of his calculation of the price nor that he communicated a basis of the price to Thomas Beerens. The parties may have had different views about the value of the goodwill and of the other assets of the business. Thomas Beerens and Windtest paid Paul Duggan and Garcia Duggan \$4.5 million for their combined 45% interests in the plaintiffs. That effectively valued the plaintiffs at \$10 million. According to the plaintiffs' balance sheets as at 30 June 2004, their total net assets were only \$6,344,427. The plaintiffs also paid to Paul Duggan a number of other benefits under the share sale deed, including the transfer of a golf club membership, the transfer of ownership of three

cars and the payment of the lease and transfer of a Porsche motor vehicle. No formal valuation of the plaintiffs' business was undertaken prior to the price being set by Paul Duggan. Such "valuation" as was prepared by Overmans in late January 2005 was very general. However, the "valuation" (such as it was) was undertaken on alternative bases. One basis was on net assets as per the balance sheet; but the other basis was upon a capitalisation of the value of the business calculated by reference to the expected return on investment (and thus including some value for goodwill) plus the value of land surplus to production requirements. The alternative bases both produced figures over \$11 million with an overall valuation of the average of the two methods at \$11,185,714. There is, therefore, in my view, no foundation to say that the amount paid was not in fact referable to goodwill; the evidence is rather to the contrary.

75 The defendants' assertion that the restraint is unreasonable because the plaintiffs did not sell chainsaws, lawn mowers, brush cutters and large 500 KVA generators may also be dismissed as a response to a misunderstanding of the plaintiffs' claim. I do not understand the plaintiffs to have alleged that the sale of those items was a breach of the restraint but, rather, that an allegation that Paul Duggan's involvement in the Jak Max business is evidenced in part by his involvement in correspondence about such products.

76 The plaintiffs contended that Paul Duggan breached the restraint given by clause 13. The operative terms of the restraint in clause 13(a) have two limbs. The first limb prohibited Paul Duggan and Garcia Duggan from being involved in any way in the retail or wholesale sale of the catalogue items described in Item 6 of Schedule 1. The second limb prohibited them from being involved in any business that was the same or was substantially similar to the businesses (as defined). "Business" and "businesses" are defined by clause 1 of the share sale deed to mean all or any of the businesses conducted by the plaintiffs including but not limited to:

- (a) Griffiths & Beerens Pty Ltd - the business of sales, manufacturing, importing and exporting chainsaw accessories;
- (b) GB Products Pty Ltd - the business of sales, manufacturing, importing,

exporting and wholesale distribution of chainsaw and associated accessories and products;

- (c) Somers Engineering Pty Ltd - the business of selling, importing and exporting chainsaw accessories and associated products;
- (d) GB Accessories Pty Ltd - the business of wholesale sales, importing and distribution of chainsaw accessories and associated products;
- (e) GB America Inc - the business of wholesale sales, importing and distribution of chainsaw accessories and associated products.

The catalogue items referred to in clause 13(a) are those specified in Item 6 to Schedule 1, namely:

All products currently (as at the date of this agreement) sold, stocked or purchased by the Companies or the businesses, including but not limited to products as set out in the sales catalogues of Griffiths and Beerens Pty Ltd and GB Products Pty Ltd and in the "Sharparts" catalogue, being those catalogues current at the date of this Agreement.

The "companies" referred to in this clause, and in the share sale deed generally are defined by clause 1 to mean and to include GB, GB Products, Somers, GB Accessories and GB America.

77 The defendants contended that for there to be a breach of the first limb of clause 13(a) Paul Duggan must be found to have been involved in "the retail and wholesale sale of the Catalogue items". This they contended required that he be involved in the sale of products of GB or GB Products rather than of the products sold by some other entity like Jak Max (whatever may be the similarity or identity of the products sold). I do not accept this construction of clause 13(a). Such a construction of the restraint would defeat the evident commercial purpose which was, in my view, to prevent competition with the sale of the items sold by the plaintiffs. To limit the operation of the restraint to prevent Paul Duggan from selling the plaintiffs' products would, it seems to me, be counterproductive and not what the parties intended. Rather, by "the catalogue items" what was intended was a sale of those items by competitors.

78 The defendants submitted that the Sunvic "catalogue" was not a catalogue of the plaintiffs and, therefore, that products in the Sunvic "catalogue" were not within the

terms of the protection. I reject the contention that the Sunvic catalogue should not be regarded as a catalogue “as such”. A catalogue had been produced under the Sunvic brand name and had been circulated both to GB America and to Elfving. Whether or not it had been more widely circulated (which it appeared it had not) it was certainly a part of the marketing operations of the plaintiffs at the time of the share sale deed. Indeed, as I have previously mentioned, there was discussion about the possibility of Paul Duggan acquiring the Sunvic name; a request that was rejected and a possibility that did not occur. At most the evidence about the Sunvic catalogue is perhaps that the items in it were not a fully developed part of the plaintiffs’ marketing operations at the time of the share sale deed. It was, however, a part of the plaintiffs’ operations which was being developed and therefore contemplated to fall within that which was intended to be protected from competition.

79 The second limb of clause 13(b) requires a consideration and comparison of two businesses and, in that regard, to have an understanding of what is meant by the words “the same as” and “substantially similar”. The words “same as” appear in many contexts including in that of satisfying the continuity of business test for the purposes of a company being allowed to utilise tax losses from previous years. In that context Gibbs J held in *Avondale Motors (Parts) Pty Ltd v Federal Commissioner of Taxation*<sup>19</sup> that the words “same as” imported “identity and not merely similarity”<sup>20</sup>. I doubt that the tax cases are of much assistance in this context because the enquiry in the tax context is about whether one business has remained the same over time rather than whether two different businesses may relevantly be regarded as being in effect competitive with each other. In other words, a requirement of identity in the context of an enquiry about whether the one business has remained the same over time is not readily applicable to determine whether two different businesses may relevantly be the same for the purpose of determining whether one competes against the other. In any event, an enquiry about whether one business is the same as

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<sup>19</sup> (1971) 124 CLR 97.

<sup>20</sup> *Ibid*, 105

another is, as it must be, a question of fact. In *Spunwill Pty Ltd v Bab Pty Ltd*<sup>21</sup> Santow J said that to determine whether something was of a similar nature to something else required a determination by reference to the effect of the particular activity on overall character, or nature, of each of two businesses taken as a whole.<sup>22</sup> In that regard a guiding consideration is that the purpose of the comparison is to see whether one business is so like another as seriously to compete with it. In *Drew v Guy*<sup>23</sup> Lindley LJ said<sup>24</sup>:

I do not think that the question of similarity is to be determined by considering whether both of the establishments sell ale, or whether the houses in which they are carried on are similar in appearance, but by the consideration whether the Defendant's restaurant is so like that of *Raven* as seriously to compete with it.

The Court in that case concluded that the second business would seriously compete with the first and therefore that one restaurant was a “similar business” to the other notwithstanding the very many substantial physical and other differences.

80 In my view the business of Jak Max is substantially similar to the plaintiffs’ business although it may not be the same. Both Jak Max and the plaintiffs sell chainsaw accessories and parts, particularly guide bars, saw chain, sprockets, replacement rims, files, wedges and safety clothing. They also sell spare parts and accessories for lawn mowers and brush cutters. In the period to 30 June 2006, Jak Max sold products for the amount of \$195,075.38 that were the same as the products sold by the plaintiffs. In the 2007 financial year Jak Max sold products for the amount of \$1,927,421.13 that were the same as the products sold by the plaintiffs. The figure for the 2007 financial year excluded some products that were also substantially similar to products sold by the plaintiffs such as cordless saw chain grinders. Jak Max has sold its products to 692 customers that were customers of the plaintiffs at the time of the share sale deed and only to 60 customers that were not. In the 2007 financial year Jak Max sold 329 products that were the same as the products sold by the plaintiffs

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<sup>21</sup> (1994) 36 NSWLR 290.

<sup>22</sup> *Ibid*, 313.

<sup>23</sup> [1894] 3 Ch 25.

<sup>24</sup> *Ibid*, 29.

as at the date of the share sale deed and only 39 products that were not. Jak Max obtained supply of a number of products from the same suppliers as the plaintiffs, including replacement rims from Andy Wang, saw chain from Carlton, nylon line from Speed France, files from Vallorbe and a range of products from Dartong. During the same period the employees of Jak Max had been employees of the plaintiffs and were employed by Jak Max to perform the same or very similar roles to those they have performed while working at GB or GB Products. It may be that this does not amount to the Jak Max business being the same as that of the plaintiffs' business if identity is required or even if something less than strict identity is required. It is a business, however, that is substantially similar to the plaintiffs' business when judged by reference to whether the two are competing with each other. The object of the restraint is to prevent competition and the activities of Jak Max were plainly in competition with those of the plaintiffs.

81 The critical issue, however, is whether Paul Duggan has been involved in any way as prohibited by clause 13(a). I have already said that I reject the construction of the words "involved in any way" as limited to the defined expression of that term found at the end of clause 13(a). In my view the words "involved in any way" are to be given a practical meaning to prevent any involvement consistent with what may legitimately be preserved from competition upon the sale of the shares in a business where the goodwill of the business is to be protected.

82 Whether Paul Duggan was "involved" or "involved in any way" contrary to the terms of clause 13(a) is fundamentally a question of fact. A great deal of evidence was presented directed to show that Paul Duggan had no involvement whatsoever in the creation of Jak Max which I am unable to accept. Whether there has been a breach of the restraint is something which I think can be concluded by looking at the totality of Paul Duggan's conduct in light of the evidence as a whole<sup>25</sup>, or, in this case, by looking at two principal areas of activity, namely, the provision of financial assistance to those connected with Jak Max and the contacts between Paul Duggan

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<sup>25</sup> *Gill v Osterstock* [1926] SASR 318, 324 (Richards AJ); *Scheckter v Kolbe* (1955) 3 SA 109; *Hump v Pascoe* (1990) 21 NSWLR 10.

and the suppliers and customers of the plaintiffs<sup>26</sup>.

83 There was much debate before me about the extent to which the provision of financial assistance by a person who is the subject of a restraint would be in breach of the restraint. In *Batts Combe Quarry Ltd v Ford*<sup>27</sup> Lord Greene MR held that the conduct of a father in providing the capital for his sons' business was both to "assist him carrying on" the business and to be "concerned in" the business in breach of a restraint. The facts in that case were distinguished by Pincus J in *Schindler Lifts Australia Pty Ltd v Debelak*<sup>28</sup> where the terms of the restraint were not to "carry on or be engaged in" a business. The terms of the restraint upon Paul Duggan is wider than that considered by Pincus J in *Schindler* but the facts in *Batts Combe* are not on their face the same as those with which I am concerned. In *Batts Combe Quarry* Lord Greene MR said at 53:

According to Mr. Blanco White's argument, it would not be a breach of a covenant of this kind in an assignment of the goodwill of a boot shop if the covenantor purchased another shop for his sons, fitted it up, bought the stock and arranged the window display ready for the opening of the shop on a certain date. It seems to me that in such a case a breach of covenant would be established.

Later Lord Greene MR said:

In my view, in doing what he did, the father was "concerned in" the sons' business. The word "concerned" is a quite general import. Clearly it cannot be limited to "concerned" in the sense of financial interest or of being an employee of the business. Again, I can see no more effective way of being concerned in a business than by providing the capital necessary to establish it, and the word "concerned" seems also to cover the assistance given by a father in the course of the negotiations.

In my view, in doing what he did, the father was "concerned in" the sons' business. The word "concerned" is of quite general import. Clearly it cannot be limited to "concerned" in the sense of financial interest or of being an employee of the business. Again, I can see no more effective way of being concerned in a business than by providing the capital necessary to establish it, and the word "concerned" seems also to cover the assistance given by the father in the course of the negotiations.<sup>29</sup>

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<sup>26</sup> *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275, 308 (Pincus J).

<sup>27</sup> [1943] 1 Ch 51.

<sup>28</sup> (1989) 89 ALR 275.

<sup>29</sup> [1943] 1 Ch 51, 53.

The defendants contended that whatever Paul Duggan did in relation to people or events which had a beneficial effect upon the business which became that of Jak Max, it was different from the circumstances with which Lord Greene MR was concerned, and in any event, did not amount to involvement by Paul Duggan in the relevant sense. Thus, the payment of \$100,000 to Nick Loschiavo and also to Ken Hansen is argued to be seen purely as an unconditional gift by reason of Paul Duggan's gratitude for many years of service. Similarly, money or properties given to his children which may have been used by way of security for the business established by Jak Max, are to be seen as independent events which do not amount to an involvement in the prohibited sense notwithstanding that the effect might have been the same. So much might be accepted if each event was truly to be regarded as independent and if there were not so many of them. However, the evidence taken as a whole, in the context in which they all occurred, and in light of the views that I reached about a number of the witnesses, lead me to conclude that Paul Duggan was involved in the prohibited sense.

84 The first event to which the submissions made reference was the payment of \$100,000 to Nick Loschiavo on 5 July 2005. A like sum was also paid to Ken Hansen. Nick Loschiavo had been employed by the plaintiffs for twenty-two years of which the last ten was as general manager. He resigned on 1 July 2005 and his last day of work was on 22 July 2005. Ken Hansen had commenced employment with the plaintiffs in 1978 and his last position was as harvester bar manager. He retired on 1 July 2005 and his last day of work was on 29 July 2005. Neither man admitted knowing that the other was to retire or was to receive a generous gift from Paul Duggan despite the exact coincidence of dates of resignation of two men who had worked together for many years and who each received payment of \$100,000 four days after their resignation.

85 I find that Nick Loschiavo resigned in order to work in what became the Jak Max business and that the payment of \$100,000 was an incentive for him to do so. I am unable to accept Nick Loschiavo's evidence to the contrary. Nick Loschiavo had

been employed with the plaintiffs for 22 years and throughout that time had worked closely with Paul Duggan. They had become very close friends who socialised together regularly. I conclude that Nick Loschiavo made a firm decision to leave the plaintiffs' business at about the time that he learnt that Paul Duggan was going to sell his shares to Thomas Beerens. He told Paul Duggan this in about March or April 2005 although he did not tell either Thomas Beerens or Mark Gwynne of the intention to resign. This failure to inform Thomas Beerens or Mark Gwynne was particularly striking given that Mark Gwynne and Nick Loschiavo had had discussions with him about his future role in the business in which he had been clearly identified as having a continuing management role with the plaintiffs. Nick Loschiavo gave notice of his intention to resign on 1 July 2005 being barely two days after Paul Duggan had received payment for his shares and four days later Paul Duggan gave him \$100,000. No satisfactory explanation was given by Nick Loschiavo for the timing of his resignation.

86 Nick Loschiavo's evidence was that an operative reason in his decision to resign was an intention to embark upon a mobile phone shop business with his daughter Lucy. I do not accept that as a truthful or probable explanation. Nick Loschiavo's financial circumstances were such that he could not afford to retire when he did without some assurance of financial security. At the time of his resignation his family home was still mortgaged with about \$95,000 or \$98,000 outstanding. He had two children still living at home and, if his account of events is to be believed, prior to his resignation he made no attempt to find another job despite having had at least four months in which he might have been thinking about it. He would not have found it easy to find a new job in view of his age, lack of formal qualifications, the fact that he had worked in a highly specialised industry for most of his working life, and the total absence of any evidence about feasible alternatives for employment or gainful activity after leaving the plaintiffs.

87 The suggested plan that Nick Loschiavo might start a mobile phone shop with his daughter, Lucy, cannot have provided him with any assurance of an income to pay

off his outstanding debts and to provide for his family. He gave evidence that he encouraged his daughter to leave her employment and to stay at home for a few months and that they would then do something together with a mobile phone franchise as their first option. However, he had no knowledge of how to run a mobile phone business and he had made no investigations of what was required to run such a business. The evidence of his daughter fell substantially short of that given by her father. At best it was that her father was going to help her with the financing by speaking to banks and to help her with research. The idea for a mobile phone business was, at best, abandoned after she returned from Singapore when she returned to employment with the new owners of a mobile franchise business at a different location. I accept the submission of the plaintiffs that the mobile phone business was, at best, never more than the vaguest of ideas which Nick Loschiavo did not work to advance and was never seriously entertained as an operative factor in his decision to resign.

88 The fact of receipt of \$100,000 from Paul Duggan, however, did occur. Not long after Nick Loschiavo's resignation from the plaintiffs' business, Nick Loschiavo did begin work for the business which became that of Jak Max and paid for a number of the start up expenses that the business incurred. Curiously, although providing some of the finance to the business, he was offered none of the shareholding or equity in Jak Max. In the Jak Max accounts to 30 June 2006 he is recorded as an unsecured creditor for the sum of \$32,566, even though he had been without a salary on which to live and support his family for a very substantial time since leaving the plaintiffs' employment. In the end I conclude that his account of events is inherently improbable and that his failure to inform either Thomas Beerens or Mark Gwynne of an intention to resign is more likely to be explained by the fact that there were plans for the future of a new business in which he would be the commercial manager (as ultimately occurred). Although it is perhaps not strictly necessary for me to decide, the fact that he made false or misleading statements on other important occasions adds to my unwillingness to accept his evidence. He knowingly misled the manager of the Commonwealth Bank in support of an application for credit made by Jak Max

on at least one occasion and appears to have made a false declaration in support of an insurance claim on 1 April 2005. Counsel for the defendants sought to minimise the significance of the latter and suggested that Nick Loschiavo's declaration may have had an explanation, however, I do not accept the reason suggested by counsel to be Nick Loschiavo's reason for the declaration made on the insurance claim.

89 The next event relied upon by the plaintiffs was that on 18 August 2005 Paul Duggan paid \$2,941 for graphic design software for use by his daughter Kylie Duggan. I accept the plaintiffs' submission that the software was purchased, and used, for the purpose of the business which was being formed at that time and which soon became the business of Jak Max. I reject the defendants' assertions that the graphic design software was for a different purpose, namely, an independent and unrelated purpose of a graphic design business that Kylie Duggan said that she intended to start.

90 Kylie Duggan had also been an employee of GB. She resigned in early July 2005 and left employment in late July 2005. Her subsequent graphic design business was only started in about mid August 2005 and the purchase of the software occurred at approximately the same time as the first major steps were being taken for the establishment of Jak Max. Paul Duggan had just returned from his holiday in Thailand, and Dean Stubbs had emailed a number of the plaintiffs' documents to a friend, Paul Ktenas. In mid to late August Dean Stubbs was beginning to contact suppliers and in an email dated 17 August 2005 to Proring on the subject of "safety products" there was already discussion about the creation of a dedicated catalogue focussing on safety products and offering those products throughout the world. At about the same time there was a plan for Adam Duggan and Dean Stubbs to go to the Canton Fair in the subsequent October, and Ben Canning resigned from the plaintiffs. I do not accept that the decision to purchase graphic design software was an unconnected coincidence of time and place.

91 The plaintiffs next point to the provision of unencumbered properties to his three children at a time which coincided with a need to provide security for the Jak Max

business. Paul Duggan denied that the purpose of the transfer and purchase of properties was to provide his children with security to get a loan from the Commonwealth Bank. His evidence was that he and his wife had long held a purpose to set up their children and to give them security in some form of housing to give them a start in life and that this mission had been in place since as early as 2003. I am unable to accept this as a full or accurate account of the provision of properties which occurred around September 2005.

92 It is true that in 2004 Paul Duggan had helped with the purchase of a property for his daughter Kylie Duggan. It appears that she had moved out of home in 2003, had been renting, and that Paul Duggan and his wife had always had the thought of helping out their children to buy an apartment. It is clear that the Duggan family is very close and, indeed, that each of the three children worked with their father at the plaintiffs' business almost as soon as they commenced employment. A property was purchased in 2004 by Kylie Duggan and about half of it was paid for by her parents. The other half was mortgaged and from time to time the parents assisted Kylie Duggan in meeting the mortgage requirements. Kylie Duggan was about 20 or 21 at the time of the purchase. The property cost about \$270,000 and the contribution by her parents at that time was about \$140,000. Paul Duggan paid the outstanding balance of the mortgage in September 2005 at a time which co-incided with its use as part of the security for a loan to finance the business of Jak Max.

93 Paul Duggan's evidence was that when they received the proceeds of the sale of shares in the plaintiffs, he and his wife decided that they then had enough money to do what they had wanted to do in respect of setting up their children. Curiously, the steps that they had always wanted to do were taken at exactly the same time that it became necessary for Jak Max to provide security for its business. This was so even though Paul Duggan had known that he would be in receipt of funds, if not from mid-February 2005 (at the time of the "in principle" agreement), then certainly by April 2005 (at the time of execution of the share sale deed) and beyond doubt in early July 2005 (at the time of actual receipt of the money).

94 Jak Max was incorporated on 7 September 2005 by Nick Loschiavo with Adam Duggan, John Duggan and Kylie Duggan as the directors and equal shareholders. The name “Jak” was chosen to incorporate the first letters of the three names of Paul Duggan’s children: John, Adam and Kyle. The word “Max” happens to be an abbreviation of the middle name of Paul Duggan (Maxwell). Two days previously Paul Duggan had paid the outstanding balance owing on the mortgage of Kylie Duggan’s unit in Moonee Ponds. Jak Max had applied to the Commonwealth Bank for a \$500,000 overdraft account; an application which was made through Mike Howell who had been Paul Duggan’s personal banker for many years. The bank’s credit application decision sheet records that the overdraft was to be secured by seven securities being personal guarantees by each of the three Duggan children, one property offered as security by each of the three Duggan children and some form of security by Jak Max over all of its assets and undertakings. The three properties listed as securities to be given by each of the three children were Kylie Duggan’s residence at Moonee Ponds, John Duggan’s property in Port Melbourne and Adam Duggan’s property in Southbank. The combined estimated values of the three properties was \$1,150,000.

95 The credit application contains a number of handwritten annotations including one which stated that the “applicants” father (which I take to be a reference to one of the three children rather than to the company), namely, Paul Duggan, and the general manager, namely Nick Loschiavo, were known to the approving officer through previous dealings with GB. Significantly, the annotation goes on to indicate that “the wealth of knowledge being gained with new business is very strong”. That comment was undoubtedly true if it referred to Paul Duggan, but was unlikely to be accurate as a reference to the experience (albeit significant) of Adam Duggan and not likely if it be a reference either to John Duggan or Kylie Duggan.

96 Under the heading “12. General comments” the author of the document set out the following:

Applicant company has been established as a result of members of the Duggan family leaving their existing employment and deciding to establish

their own business[. T]he family have all had vast experience in their chosen field (Chainsaws) and have built up a large network of clientele that is prepared to do business with them[. T]he application was referred to this office by Mike Howell of Private Bank who looks after the affairs of Mr Paul Duggan who is the father of the directors of the applicant company. Whilst we are relying on a cash flow to demonstrate servicing, we can gain some comfort from both the strong security position and the background of the clients. The initial referral was based around Mr Duggan (Snr) providing cash cover for the overdraft however as he signed a non competition clause when he left his last place of employment he is unable to assist the business in any way. Instead he decided to help his children and repaid their Home Loans as a measure of assistance. (My emphasis)

The note is telling in many respects and demonstrates that Paul Duggan, in providing properties to his children, had an intimate involvement in the Jak Max business, contrary to his testimony. It is clear from the note that Paul Duggan's initial intention had been to provide cash cover and that the reason told to the bank for not doing so was his perception of an impediment created by the non-competition clause. The comfort obtained by the bank in the family having "all had vast experience in their chosen field" is a reference which included Paul Duggan himself. Any doubt about this is removed by what appeared in the document in response to a requirement to explain "any unusual repayment arrangements or servicing aspects". In that context it was said that the bank could take comfort from "the family behind the business". The family referred to was the Duggan family as a whole with the father having "had over 30 years in the industry" but "cannot be involved in this business for 2 years". The note concluded by saying that "the cash flow has been put together with the combined knowledge of the Duggans and has some merit".

97 On 5 September 2005 Paul Duggan sent an email to Mike Howell requesting that he arrange the payout of outstanding mortgages for two properties being Kylie's property in Moonee Ponds and the property owned by Paul and Violetta Duggan at 47 Thompson Street, Avondale Heights. The amount payable on Kylie Duggan's property was \$149,580.57.

98 I accept the plaintiffs' contention that Paul Duggan's provision of money and properties to his three children was part of his purpose of providing backing and

capital for Jak Max. Paul Duggan denied involvement or discussions with Mike Howell about the loans to Jak Max and the securities offered by his three children. One answer given when pressed about telephone conversations with the bank manager two days before settlement of the properties was that he had nothing to do with the transfers of his children's properties but that he knew that he had played golf "with Mike Howell around that time, if that helps you." The two may have played golf, but I do not accept Paul Duggan's denials that he had anything to do with the funding of Jak Max through the bank and the provision of funds to his children. Mike Howell is still Paul Duggan's personal banker and was not called by the defendants as a witness. No explanation was given for not calling him and I infer that his evidence would not have assisted Paul Duggan or the other defendants.

99 In addition, and also independently, I infer from the timing of the provision of the unencumbered properties and of the application by Jak Max for credit that the former was for the purpose of the latter. The purchase of Adam Duggan's property and the transfer of John Duggan's property both occurred on 30 September 2005. On that day Nick Loschiavo sent a fax to the Commonwealth Bank attaching details in support of Jak Max's application including details of the properties to be offered as security. I do not accept that timing to be a coincidence. On 30 September 2005 Paul Duggan signed the transfer of land for John Duggan's property at his solicitor's office in Clifton Hill and after doing so called Nick Loschiavo twice from Fitzroy and later on that day called Mike Howell.

100 The evidence of Paul Duggan was that he had no discussions at all about the fact that his children were going to use their properties as security for a Jak Max credit application. Indeed, at one point his evidence was that he did not even know when they had applied for an overdraft from the bank. Even if I assume (contrary to my expectation of events) that Mike Howell would not have mentioned any of this to Paul Duggan when playing golf (if not during the course of the other dealings for Paul and Violetta Duggan personally), I find it implausible that in a tight knit family, as the Duggan family is, there would not have been discussions between the father

and his children that three properties (two of which were only recently acquired and the other only recently becoming unencumbered by the desire of Paul Duggan to set up his children for their future) were all about to be given as security for the new business of the children through a newly formed company. I do not believe Kylie Duggan when she said that she “never really discussed” with her father the fact that two weeks after he had paid off her property she was planning to offer the property as a security for an overdraft account for Jak Max; that is, that she was about to encumber with debt the property which her father had only two weeks earlier unencumbered. Nor do I believe her when she said, or implied, that she did not tell her father that she was planning to use the property as security for an overdraft account for Jak Max. If she did not say so to her father it can only have been because she knew that he knew it. Paul Duggan was spending a lot of money in providing his children with unencumbered properties and I find it improbable that the children would immediately mortgage the properties and expose themselves to the risk of loss without even mentioning such a risk to their father. Paul Duggan’s wealth, on his own evidence, is not such that the provision of properties amounting to \$1.1 million is so insignificant that their hazard of loss would be insignificant for him. I also find it unbelievable that Nick Loschiavo never spoke to Paul Duggan about the use of the children’s properties as security for the Jak Max application. I do not accept Nick Loschiavo’s evidence when he denied ever speaking to Paul Duggan about the properties, especially in view of the evidence of Nick Loschiavo about his knowledge of Adam Duggan’s use of money in the past which had at times required close monitoring.

101 The provision of the unencumbered properties coincided with a time when Paul Duggan was also active in “connection with” (in an attempt to use a neutral phrase) the Jak Max business. He had planned a trip to Europe and to the United States with his son Adam Duggan for September 2005 but was ultimately unable to go because of an operation. However, he did travel to China with John Duggan between 20 and 23 September 2005. I will deal later with that trip and with Paul Duggan’s actual involvement in it, but for present purposes it is sufficient to note only that the

provision of funds to the children was occurring at about the same time as the occurrence of what was some activity connected with, if not involved in, the business of Jak Max.

102 In late August and September 2005 Paul Duggan sent and received a number of emails connected with the Jak Max business. On 29 August 2005 Dartong included Paul Duggan as one of the two principal recipients of a price list for a V belt indicating that there would subsequently be supplied “the price list for all product[s] GB purchased from DARTONG one by one”. On 24 August 2005 he had received an email from Proline (Kua Si Lin’s company) about new trimmer liners from Desert Extrusion which, on 4 September 2005, he forwarded to Dean Stubbs. On 22 September 2005 he was copied in on an email about breakers and spinners which on 28 September 2005 he forwarded on to a Miguel Martin of Sociedad Industrial of Argentina being a supplier to the plaintiffs. On 25 August 2005 he was sent a catalogue from Vipecas which the following day he sent on to Dean Stubbs.

*(ii) Contacting customers and suppliers on behalf of Jak Max*

103 I also find that Paul Duggan was involved in the Jak Max business contrary to the restraint clause by reason of his contacts with customers and suppliers of Jak Max.

104 One of the contentions made on behalf of the defendants is that the allegations complained of pre-date the commencement of the Jak Max business and that, at best, the contacts by Paul Duggan are preparatory in nature and cannot constitute involvement in a business in competition since, so the contention goes, the competing business did not yet exist.

105 I accept that activities which are truly preparatory to the commencement of a business would not be in breach of a restraint such as that in clause 13(a)<sup>30</sup>. In *Pioneer Concrete Services* the Full Court held that, on the facts in that case, there was no business which the defendants were carrying on or conducting and that there was no other business in which they were engaged, concerned or interested, contrary to

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<sup>30</sup> *Pioneer Concrete Services Limited v Galli* [1985] VR 675, 705-707 (Crockett, Murphy and Ormiston JJ).

the covenant there in issue. In reaching that conclusion the Court considered a number of tax cases holding that activities which are truly preparatory to a business are not activities of a business<sup>31</sup>. In *Pioneer Concrete Services*, as the Full Court made clear<sup>32</sup>, it was not necessary to analyse precisely when a business came into existence because the Court considered the work in that case to be preparatory. The Court said:

The present case is quite clear. The work carried out up to the trial was entirely exploratory and did not even amount to the direct preparation of any quarry. Although they had elements of repetition and continuity, there were no activities which formed part of profit making or other commercial transactions. That does not lead to the conclusion that, if similar activities were carried out during the operation of a business, those activities would not form part of or be incidental to that business. But before the business gets underway, those preparatory acts cannot be characterised as constituting or forming part of a business; nor can the participants be described at that stage as carrying on or conducting a business.<sup>33</sup>

In this case it is necessary to determine at what point the business of Jak Max commenced.

106 Senior counsel for the defendants conceded, correctly, that the point at which something is preparatory is a matter of fact for each case. He relied upon the decision of Hedigan J in *Bristol-Myers Squibb Pharmaceuticals Pty Ltd v Collins*<sup>34</sup> in which his Honour concluded that the defendant's activities did not amount to the commencement of a business. The defendant's conduct in that case included the creation of a company, negotiating a draft distribution agreement for the distribution of competitive products, importing some products to trial them and seeking their registration under Federal legislation, the actual trialling and filing for registration of such products, delivery of products to potential purchasers as part of the trialling process, and the engaging of employees to be sales persons. His Honour said:

It would be self-evidently absurd to suggest that no act of preparation, in anticipation of starting up the business, might be embarked upon during the 12 month period, and indeed Mr Finkelstein did not adopt such a position. If it were so, then the benefit of the covenant would run for a period much

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<sup>31</sup> Ibid, 706 (Crockett, Murphy and Ormiston JJ).

<sup>32</sup> Ibid, 706 (Crockett, Murphy and Ormiston JJ).

<sup>33</sup> Ibid, 706 (Crockett, Murphy and Ormiston JJ).

<sup>34</sup> (1995) 31 IPR 488.

greater than 12 months, since there may be a long period required to appropriately put in place all the arrangements relating to acquisition and marketing of products, on an Australia-wide basis, that would be necessary.<sup>35</sup>

On the facts before him his Honour concluded that none of the acts “singly or in combination are more than preparatory steps preceding the establishment of a business” and, in his view, they were “still very distinct from it”<sup>36</sup>. I am unable to reach the same conclusion on the facts before me.

107 Counsel for the plaintiffs relied upon what was said by Lord Greene MR in *Batts Combe Quarry Ltd v Ford*<sup>37</sup> where it was held that a breach of covenant had occurred by the provision of capital to permit a business to be carried on. In considering the cases care must also be taken to distinguish between those concerned with a restrictive covenant given by an employee from one given by a vendor. Different considerations come into play when the issue concerns the extent to which an ex employee should be restrained from undertaking competitive behaviour as compared with when the effective vendor of goodwill should be restrained to protect the goodwill acquired from the person giving the restraint for value. The case before me against Paul Duggan, as was common ground, is of the latter rather than the former category.

108 The essence of the existence of a business activity is to have embarked upon an operation or commercial transaction for the purpose of profit making by the means giving rise to profit<sup>38</sup>. The point at which it may be said to have been commenced may often be a difficult factual enquiry<sup>39</sup> but in this case I find that commercial activities with a view to profit had been undertaken as early as April 2005 and certainly by July 2005. Those activities were taken over by Jak Max from September 2005 upon its incorporation. By September Jak Max had finance, staff, lines of

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<sup>35</sup> Ibid 496.

<sup>36</sup> Ibid 497.

<sup>37</sup> [1943] 1 Ch 51, 53.

<sup>38</sup> *Federal Commissioner of Taxation v The Myer Emporium Limited* (1987) 163 CLR 199; *Hyde v Sullivan* (1956) SR (NSW) 113, 119 (Street CJ, Roper CJ in Eq and Herron J).

<sup>39</sup> *Re Taxation Appeals* [1996] AATA 311 (Unreported, G Ettigner (Senior Member) and Stanford (Member), 12 September 1996).

supply and was actively undertaking steps to secure customers. I reject the defendants' contention that a business was only in existence once it made its first sale in 2006. I also reject the alternative contention that the business was only commenced when stock was acquired in late 2005. Whatever may have been the position in other cases, I find that in this case that Jak Max itself had commenced its business no later than upon its incorporation and its securing of funds. I also find that that business was the one which had previously been commenced in April 2005 by Adam Duggan with the participation of his brother and sister, Deane Stubbs, Nick Loschiavo, Ben Canning and the involvement of Paul Duggan.

109 The contention urged upon me for the plaintiffs was, in any event, narrower than my finding in their favour. Their contention was that the Jak Max business was in existence by early September 2005. It follows from my findings that I accept that by then there was a business which, by then, had been taken over by Jak Max. I also find that by then, and within the restraint period, Paul Duggan had been involved in that business through contacts with customers and suppliers.

110 Paul Duggan went to China between 20 and 23 September 2005 with his youngest son John Duggan. The plaintiffs submitted, and I accept, that the purpose of this visit was in part to secure supply of products for Jak Max and that, whilst there, Paul Duggan met with representatives of Dartong, with Wang Wei Ming and with Andy Wang for that purpose. Paul Duggan's evidence was that he did not know that his son John Duggan's plans when travelling to China in September 2005 included the sourcing of guide bars from Wang Wei Ming. According to Paul Duggan it was his son's purpose in travelling to China to meet as many contacts as he could. According to Paul Duggan his son asked if he could travel with his father after discovering that his father was going to China and that his father agreed. John Duggan's evidence in respect of the trip, its purpose, and the subsequent notes which he made are unsatisfactory and unconvincing.

111 The plaintiffs commenced the chronology of events leading to the September trip to China in around 19 and 20 July 2005 when Paul Duggan sent emails to Wang Wei

Ming providing his new email address and requesting that the GB email address be deleted and not be used again. The email from Paul Duggan also said that he, Paul Duggan, would soon be in touch. The explanation given by Paul Duggan for this contact was that Wang Wei Ming was a close friend and that he simply wanted to keep in touch with a close friend. I do not accept that as the explanation for the contact.

112 An email was produced in evidence bearing the date of 22 July 2005 sent to Wang Wei Ming from the email address of Dean Stubbs. There was a considerable amount of time taken during the trial about this email and the date on which it was sent. The defendants accept that the email was sent but say that it was much more likely to have been sent around September 2005 rather than the date of 22 July 2005 which it bears. Dean Stubbs stated that on 22 July 2005 he attended a function for the departure of Nick Loschiavo from the plaintiffs' employment and was in no condition or position to send an email of that kind on that date. His evidence was that the celebratory gathering began at the Braebrook Hotel at 3.30pm in the afternoon of 22 July 2005 and moved to Jimmy Wong's Chinese Restaurant in Footscray around 8.30pm to 9.00pm. He said that he had consumed significant quantities of alcohol and that after the dinner at Jimmy Wong's he went out to a nightclub. Some of his evidence is purportedly corroborated by Adam Duggan and by Nick Loschiavo, and is said to be consistent with other correspondence sent to Andy Wang on 9 September 2005 and to Li Xia on 31 August 2005. The email, however, bears a time of receipt in China at 9.44pm which would indicate (as was common ground) it having been sent from Melbourne at 11.44pm on 22 July 2005.

113 I find that the email from Dean Stubbs to Wang Wei Ming was sent on the date which it bears, namely, 22 July 2005 at about 11.44 pm. It was found on Wang Wei Ming's computer system bearing that date. Wang Wei Ming gave evidence and it was not put to him that the email was incorrectly dated or that it was not otherwise true. Dean Stubbs did not deny sending the email, indeed, he said that he would have sent a similar email but denied that it was sent on the date that it bears. More

tellingly, however, is the fact that the email contains a phone number at which Adam Duggan could be contacted that was operative during Adam Duggan's employment with the plaintiffs as at 22 July 2005 but ceased to be operative from late August 2005. In other words, the inclusion of the mobile number in the email significantly locates the time of the sending of the email as being before the mobile number for Adam Duggan changed; that is, before late August 2005.

114 The email from Dean Stubbs was not copied to Adam Duggan and, as at 22 July 2005, Adam Duggan had not yet set up a hotmail address. Emails sent by Dean Stubbs from September 2005 were frequently, if not always, also copied to Adam Duggan at the latter's hotmail address. The contents of the email are also inconsistent with the facts as they existed in September. The email said:

Hello Wei Ming,  
This e-mail is from Dean Stubbs & Adam Duggan.  
We will be visiting you very soon & look forward to working with you closely.  
We are forming a new company & we plan to take your guide bars to the world market as has previously been discussed.  
We will need 1 - 2 more months to establish the new business & then we will place substantial orders with your company (both for bars & sprockets).  
Please understand that it will take time to establish the new company, but also that we are fully committed to working with you & growing with you. Please do not make any commitments to other companies as we are are [sic] fully committed to working with you.  
If you have any questions please feel free to contact either Kua Si Lin, myself or Adam Duggan.  
Dean Stubbs mobile number is +61423743038 Adam Duggan mobile number is +61409006011 Kua Si Lin mobile number is +6596235790 Best regards, Dean Stubbs

The statement in the email that they would need "one to two more months to establish the new business" was undoubtedly true in July but inconsistent with events and circumstances in September. By September Jak Max had already placed its first order with Dartong for guide bars produced by Wang Wei Ming. No other email was produced by Dean Stubbs created in September in support of his contention of events despite a call for its production during the trial. Finally, on 23 July 2005 Dean Stubbs received an email from Isabella Wang on the subject matter "Wang Wei Ming". The email dated 22 July 2005 (the previous day) had been copied to Isabella Wang and the email from her the following day was not produced in

response to a call for production.

115 Paul Duggan said that he had no knowledge that in the middle of July 2005 there had been any discussions between Kua Si Lin, Adam Duggan and Dean Stubbs proposing a business. He also said that had they been discussing a business at that stage he would have known about it. I agree and find that discussions did occur and that he did know. Kua Si Lin was described, and described himself, as a close personal friend of Paul Duggan with whom he kept in constant contact. He appeared, as I have said, as the single largest unsecured creditor to Jak Max as at 30 June 2006.

116 In early September 2005 Dean Stubbs sent some sprocket samples to Dartong in China. On 13 September 2005 an email was sent from Dean Stubbs' hotmail account to Joan at Dartong asking that all samples be held in their office until he arrived the following week. Dean Stubbs could not recall having had a plan to go to China in late September 2005 but by 15 September 2005 Paul Duggan himself did have a firm plan to go to China the following week. In other words, on 13 September 2005 there was certainly a representation to Joan at Dartong that someone was going to be visiting the following week. The September email from Dean Stubbs was part of a chain with the subject matter "Address". It began with an email from Dean Stubbs, using Adam Duggan's email account, to Joan at Dartong informing her that some packages needed to be sent to her and requested confirmation of the address. On 13 September 2005 Joan at Dartong informed Dean Stubbs at Adam Duggan's hotmail account that the sprocket samples had arrived and asked if he wanted them to look for the price and which factory they should be sent to. It was in that context that Dean Stubbs replied on the same day, 13 September 2005, requesting Joan to hold the samples in her office until he arrived the following week. That same day she replied agreeing that they would be held and would wait for him to check the samples. Over the next couple of days there continued to be correspondence in that chain discussing the contents of the cartons and whether they had all arrived. By 16 September 2005 a further nine cartons had arrived. It is fair to assume, as I find to

have been the case, that by around 15 September 2005 there was some serious business to be transacted in the third week of September involving Dartong in China.

117 In the end Dean Stubbs did not go to China at that time and, despite the chain of emails, he could not recall having had a plan to go to China in late September 2005. Indeed, his plan at the time had been to go to the Canton Fair in October 2005. Paul Duggan, however, did have a plan to go to China on 15 September 2005 in the following week. On 15 September 2005 Paul Duggan had emailed Wang Wei Ming stating that he wanted to come and see him the next week, on 21 or 22 September 2005, requesting that the two meet in Shenzhen on 21 September 2005. Paul Duggan's evidence about this meeting was that he wanted to meet Wang Wei Ming in Shenzhen because he wanted to tell him that he, Paul Duggan, had a two year restraint against competing with the plaintiffs. This reason had not been proffered in a witness statement previously exchanged between the parties for contemplated use in the proceeding. I accept the submission on behalf of the plaintiffs that the reason given for the visit with Wang Wei Ming is of recent invention put forward to explain the emails that otherwise disclosed that he had arranged a meeting with Wang Wei Ming in the week following the exchange of emails between Dean Stubbs and Joan at Dartong which discussed, amongst other things, who would manufacture product. It appears that the emails only came to light once they were obtained from Wang Wei Ming relatively recently. Furthermore, the reason given by Paul Duggan is inherently unlikely. I am asked to believe that Paul Duggan would go to the cost and inconvenience of flying to China just so that he could tell Wang Wei Ming that he would not be in the industry for the following two years. This I am asked to believe in the context of him having earlier sent a circular letter to his contacts on 22 June 2005 and having already told Li Xia in China about the position. It also requires me to accept that Paul Duggan would require Wang Wei Ming, who does not speak English, to fly from Hangzhou to Shenzhen, only to be told, through an interpreter, that Paul Duggan would not be in the industry for two years. It is far more probable that the meeting between Paul Duggan and those at Dartong and with Wang Wei Ming had been intended as a business meeting between them and

that this intention existed at least from about 13 or 15 September 2005.

118 I am also asked to believe as credible that John Duggan, rather than his much more experienced father, was to go on the trip to transact the business foreshadowed in the email from Dean Stubbs and that it was coincidental that he discovered that his father was travelling at the same time. John Duggan's evidence was that he was instructed by his older brother, Adam Duggan, to go to China and that his father happened to be going at the same time to source marine and fishing gear and so "tagged along".

119 A close examination of the evidence of Adam Duggan and John Duggan does not present a plausible or consistent version of events. According to Adam Duggan the only instruction he gave his brother John Duggan was in relation to a chain saw carry case and that otherwise he did not know who he was going to be seeing in China. Paul Duggan's evidence was that John Duggan asked if he could come along and agreed. Paul Duggan denied that he spoke to John Duggan about the reason for John's visit to China but assumed that it was for business. John Duggan was not given any instructions about the boxes of samples that had been sent up and which Dartong had been instructed to hold until someone arrived the following week. He said that he did not even know that the samples had been sent. He had never been to China before and was barely 21. His father described him as being "a little wet behind the ears" and in giving evidence before me in 2008 gave me the impression of him still being an inexperienced young man with little self-confidence in business dealings. He had been working with the plaintiffs in telephone sales and had no experience in sourcing a product or in dealing or negotiating with manufacturers or suppliers. It is unlikely that he could have conducted useful meetings on behalf of Jak Max on his own. On the other hand, although John Duggan and Paul Duggan gave evidence that they went to China for different purposes, they did travel together to China and within China and came home to Australia together from China.

120 The trip to China began on 20 September 2005 when Paul Duggan and his son John

Duggan flew to Singapore. Kua Si Lin met them there at the airport in transit for a cup of coffee. The stopover was only an hour and from there the two flew to Shenzhen. No evidence was adduced about what was discussed between Paul Duggan, John Duggan and Kua Si Lin. On the same day Paul Duggan and John Duggan arrived in China and were picked up at the airport by Li Xia and her ex-husband Bob Wang. They were taken directly to Dartong's offices in Shenzhen where they met a number of employees from Dartong all of whom were already known to Paul Duggan. On that afternoon he went shopping with Li Xia for handbags and, according to Paul Duggan, his presence at these meetings was for introductions only but that he did not at any stage discuss business.

121 John Duggan gave evidence that Li Xia had arranged meetings for him to see Wang Wei Ming and Jin Feng for the purpose of obtaining supply of guide bars to sell throughout the world. His evidence, consistent with that of his father's, was that the latter accompanied him to Dartong's offices but did not otherwise attend the business meetings. He said that Li Xia (or possibly Renna) interpreted for him during the meetings with Wang Wei Ming (who speaks no English) and that they mainly discussed guide bars, although Wang Wei Ming had also brought some sprocket samples with him.

122 John Duggan said that he made notes of the meetings and a photocopy of some notes were produced during the process of discovery and tendered in evidence. The plaintiffs contended that the notes were falsely created during, and for the purposes of defending, the proceeding. Before considering that submission, I should note how strikingly different was the account given by the two brothers of the purpose of John Duggan's meetings in China. John Duggan's evidence about the purpose of the meetings gives them much greater importance and significance than would follow from the evidence of Adam Duggan. The notes, if accepted, would accord with John Duggan's view of the importance of the meetings, but are inconsistent with the view expressed by Adam Duggan in evidence that he did not regard the trip as particularly important, and are inconsistent with the inferences arising from the

email correspondence with Dean Stubbs and Joan of Dartong of the week before.

123 Wang Wei Ming gave evidence that he flew from Hangzhou to Shenzhen the following day, 21 September 2005. There he met with Li Xia, John Duggan and Paul Duggan at a restaurant and from there the four went to Li Xia's offices. Wang Wei Ming's evidence was that he had not previously met or spoken to John Duggan but that he met with Paul Duggan, John Duggan and Li Xia. The latter interpreted for him but after a while asked a Ms Hu (possibly Joan Ho) to interpret. Wang Wei Ming's evidence was that during the meeting he and Paul Duggan discussed laminated bars and sprockets and that he was given a number of samples of sprockets in GB boxes. He said that he made a note of the product numbers of the samples which had been given to him. After the meeting they went to dinner to celebrate Li Xia's birthday and subsequently he had sprocket drawings prepared from the samples that he had been given from which he manufactured 30 samples which he sent to Dartong. Paul Duggan's version of events was different to this, but on 7 October 2005 Wang Wei Ming sent an email to Paul Duggan attaching the sprocket drawings referring to whether some samples had been sent, asking whether he had confirmed the new order and whether he would be going to the Canton Fair. In the same email he asked, separately, for John Duggan's email address and asked, curiously, "Can you tell me ? wish to talk with = him in early date." Perhaps this question was intended to enquire into whether Wang Wei Ming was to communicate with John Duggan rather than Paul Duggan but the other contents of the email indicate the assumption by Wang Wei Ming of Paul Duggan's familiarity with business discussions which, according to Paul Duggan and John Duggan, the former did not participate in. Wang Wei Ming's assumption of Paul Duggan's familiarity with such discussions is, of course, consistent with Wang Wei Ming's evidence that Paul Duggan did participate in them. It is also inconsistent with Paul Duggan's evidence that his purpose in meeting Wang Wei Ming (involving as it did the inconvenience of travel for Wang Wei Ming) was to ensure that Wang Wei Ming knew of the restriction on competition for two years.

124 It was urged upon me not to accept the evidence of Wang Wei Ming in preference to that of Paul Duggan. Two reasons were proffered for that. The first was that his evidence was contrary to that previously contained in a sworn affidavit filed in the proceeding. The circumstances of the creation, translation and swearing of the previous affidavit were fully tested in cross-examination by video link before me. The affidavit was apparently prepared by John Morrow who was not called to give evidence on behalf of the defendants. The contents of the affidavit were all written in English and they were not interpreted by a professional interpreter. Wang Wei Ming explained in the video link evidence through an interpreter before me that the evidence in the earlier affidavit had been explained generally rather than having been explained word for word with precision. He accepted that its contents were wrong and the circumstances in which it was sworn makes his explanation plausible. The evidence he gave by video link in the proceeding was all in Chinese and at no stage did he give me any impression that he had any understanding of English. The second reason advanced for why I should reject Wang Wei Ming's evidence was that there had been preliminary discussions between Thomas Beerens, Mark Gwynne and him about a joint venture. I do not accept that that reason is a sufficient incentive for him to give false testimony. Accordingly, I accept his version of events in preference to those of John Duggan or Paul Duggan.

125 I am also unable to accept the China notes of John Duggan as a document created at the time of the meetings in China. The notes are, in my view, on their face inconsistent with the "unimportant" meetings which his brother (Adam Duggan) said the meetings were to be, and are inconsistent with my assessment of John Duggan's abilities at the time when the meetings were said to have taken place. John Duggan said in evidence that he was going to China "to see what it's all about" and then added in response to a further question and "also negotiate". His state of knowledge of the industry in September 2005 makes me conclude that it was unlikely that conversations of the kind recorded in the China notes could have taken place with John Duggan without the assistance of his father. Furthermore, the notes are written in a style that indicates that they were not made at the time of the

meeting. Phrases such as “landed in Shenzhen”, “had meeting with Wang Wei Ming”, “landed in Xian”, “had meeting w/ Andy at factory”, “discussed everything w/ Lixia ... (everything discussed)”, suggests if nothing else, that the notes were not made during the meetings (contrary to the sworn testimony of John Duggan). The original notes were not produced. John Duggan’s evidence was that the notes were made in a flip note pad but, when called, the note pad was not produced. I infer that the production of the original note pad would not have helped the defendants.

126 There is further material to suggest that the notes had been falsely created for the purpose of defending the proceeding. Many of the recorded matters in the notes appear to be responsive to allegations in the statement of claim or to documents which had been discovered prior to the discovery in the proceeding of the notes. The China notes were discovered as document 630 in the third affidavit of documents of the second and third defendants dated 16 June 2006. The amended statement of claim dated 7 December 2005 was current at the time of the discovery of the notes. Various matters in the notes address allegations in the amended statement of claim. On p.2 of the notes there are the words “asked him to set up JAKMAX website” which addresses the allegation in sub-paragraph (ix) of the particulars to paragraph 14(b). On 27 September 2005 Bob Wang (Li Xia’s ex-husband) sent an email to Paul Duggan and John Duggan on the subject matter “copy sabre chainsaw price and web” indicating, amongst other things, that a new website for Jak Max had been set up and could commence to be used as from 30 September 2005. On p.2 of the China notes there are the words “asked for quote on sabre chain” which addresses the allegation in sub-paragraph (ix) to the particulars of paragraph 14(b). The same email to which I have just referred was addressed both to Paul Duggan and to John Duggan and attached the price for the “copy sabre chain saw”. On the same page of the China notes were the words “Has lawn mower ... is sending sample” which appears to address the allegation in sub-paragraph (xiv) of the particulars. On 28 September 2005 Joan Ho from Dartong sent an email to Dean Stubbs with copies to Adam Duggan and Li Xia stating that there was attached to the email the lawn mower photos which “Paul required”. Later on p.2 of the China

notes were the words "chain saw carry case" which addressed the allegation in sub-paragraph (xii) of the particulars. That referred to an email sent by Joan Ho on 27 September 2005 to Dean Stubbs with copies to Li Xia and Adam Duggan on the subject "chain saw box" referring to a chain saw box sample "that Paul brought" to Shenzhen. On p.1 of the China notes there are the words "asked for a copy of his mailing list - he will help me w/ contacts in China" which can be seen to address the allegation in paragraph 31 in relation to the "supplier list". Also on p.1 are the words "asked about GB - want to know who to talk to" which supported the defence in paragraph 16(a)(iii) of the amended defence dated 7 June 2006. On p.3 there are the words "Dad explained two year restraint - doesn't understand." which addressed a major issue in the proceeding. On p.1 of the notes there is also reference to the meeting with Wang Wei Ming which may be seen to address the email from Wang Wei Ming dated 7 October 2005 discovered by Paul Duggan in his affidavit of documents sworn 16 March 2006 and which was exhibited to Wang Wei Ming's affidavit sworn 25 November 2005 which had been filed, at that stage, by and on behalf of the defendants. On p.1 there were also the words "asked how negotiations with bank are going" which may be seen as responsive to the document subpoenaed from the Commonwealth Bank prior to June 2005.

127 I also accept the submission made on behalf of the plaintiffs that the document, if it had been genuine, is likely to have contained matters that do not appear there. In particular there is no note of a meeting with Jin Feng on 21 September 2005. The explanation for the absence suggested on behalf of the plaintiffs is that there was, and continued to be, no allegation by the plaintiffs nor any discovered document that refers to the meeting. Nor, in the notes, is there any reference to any of the samples that Dean Stubbs had sent up before the meeting. It is difficult in the circumstances to believe that those samples were not the subject of discussion in China between John Duggan and the people at Dartong given the emails which had been exchanged the previous week in light of a meeting at which there were present both Wang Wei Ming and those at Dartong. At the very least one would have expected some note of clarification about what was to be done with the samples that

had been the subject of such communications only a week earlier.

128 On 22 September 2005 Li Xia, Paul Duggan and John Duggan flew together to Xian for the purpose, it was said, of John and Li Xia meeting Andy Wang to discuss the manufacture of rims for Jak Max. I find it improbable that such a trip would have taken place without the involvement of Paul Duggan, partly in view of the evidence of Adam Duggan, partly in view of my assessment of John Duggan, and partly in view of the actual presence of Paul Duggan in Xian. According to Paul Duggan, however, the purpose of his trip to Xian was to tell Andy Wang about his two year non-compete clause and, again according to him, he did not go to Andy Wang's factory. Rather, he went to dinner that night with Andy Wang and Li Xia. Even accepting this evidence (which I do not), I conclude that Paul Duggan's presence in Xian with John Duggan was an active endorsement by him to Andy Wang to deal with John Duggan on behalf of Jak Max and capable of being an interference with the plaintiffs' established relationship with Andy Wang. I cannot but conclude that the mere presence of Paul Duggan at the meetings was for the purpose of establishing relations on behalf of Jak Max as in fact occurred.

129 After the trip to China there were at least four emails sent to Jak Max and Paul Duggan to which I have already referred and which I conclude disclose his involvement in Jak Max's business whilst in China: the email from Joan Ho to Dean Stubbs dated 28 September 2005 stated "[a]ttached the lawn mower photos Paul required for your reference"; the email from Joan Ho to Dean Stubbs dated 27 September 2005 in relation to "the chain saw box sample that Paul brought to Shenzhen"; the email from Bob Wang to Paul Duggan and John Duggan dated 27 September 2005 in relation to the Jak Max website and attaching sabre saw chain price lists; and the email from Wang Wei Ming to Paul Duggan dated 7 October 2005.

130 Paul Duggan's other contacts with customers and suppliers included receipt of various trade magazines including seeking information from the Taiwan Trade Directory. He received a number of emails in response, some of which he forwarded to Dean Stubbs on 28 September 2005. This, in itself, might not be a significant fact

but it is another in a chain through which he maintained an involvement in the Jak Max business. On 22 September 2005 he received an email addressed to Chris Fehn from Miguel Martin of Sociedad Industrial of Argentina being a supplier to the plaintiffs. The day he returned from his trip to China with John Duggan, Paul Duggan met Chris Fehn at The Stokehouse restaurant in St Kilda on 23 September 2005. On 28 September 2005 Paul Duggan replied to Miguel Martin that he would ask Nick Loschiavo to contact him and stated “[p]lease don’t worry as he will have a good solution for you”. A copy of the email was sent to Nick Loschiavo who, on 3 October 2005, sent an email to Dean Stubbs requesting that they talk about the breakers and spinners which had been the subject of Miguel Martin’s original email. Nick Loschiavo’s proposal was, specifically, that they could “get Rod to get for us” (that is, Jak Max). Paul Duggan’s version of these events is that his involvement was a sense of obligation towards Miguel Martin because the plaintiffs had failed to acquire the breakers and spinners ordered some time previously. However, I do not accept that version of events since no attempts were made to assist Miguel Martin by the most direct route of simply emailing Chris Fehn to make sure that GB America gave Miguel Martin the response that he had been seeking. On the contrary, it was treated as an opportunity to the advantage of Jak Max pursued by Nick Loschiavo by his email to Dean Stubbs.

*(iii) Other assistance to Jak Max*

131 There was, in my view, other assistance given by Paul Duggan to the business which became that of Jak Max. Paul Duggan admitted forwarding emails to Dean Stubbs as alleged. His evidence, however, was that he did so for information purposes implying, by that answer, that somehow that was not of assistance. In my view the receipt by Dean Stubbs of the emails was of assistance to Dean Stubbs for the work of Jak Max.

132 The plaintiffs also rely on the contents of the email from Joan Ho to Dean Stubbs of 27 September 2005 which referred to the chain saw box sample having been brought to Shenzhen by Paul Duggan. Paul Duggan denies that he took the chain saw box to

Shenzhen but said that John Duggan took it and that he (Paul Duggan) had seen it in “our luggage”. John Duggan’s evidence on this was not so clear. At first he denied having taken any samples with him to China and, in subsequent re-examination, said he could not remember if he had taken it to China or if it had been sent to China. Adam Duggan’s evidence on the point did not clarify the position. He gave evidence that he gave John “one specific task” being in relation to a chain saw carry case. However, Adam Duggan’s evidence about the carry case varied. At first he said that it was a Shindaiwa carry case and that it was very important. Later he said it was a John Deer case that he had asked Chris Fehn to take over with him from the United States. Next he said that it was an orange Husqvana carry case that John took up to China when, as it seems, Adam Duggan realised that Chris Fehn was not able to take the John Deer case with him to Australia when he went in late September 2005. As against this there is the clear email from Joan Ho referring, quite simply, to the sample box that “Paul brought” to Shenzhen. I accept the content of the email as being accurate on its face and as evidence of further assistance by Paul Duggan to the business which became that of Jak Max.

*(iv) Other facts from which involvement may be inferred*

133 The plaintiffs also rely upon, and I accept, other facts upon which the involvement of Paul Duggan may be inferred. The first arises from the nature of the relationship between Paul Duggan and the directors and shareholders of Jak Max. Indeed, his children are the only directors and shareholders of Jak Max. No shareholding was offered or discussed with Nick Loschiavo, Dean Stubbs or Ben Canning. I have already referred to the relationship that Nick Loschiavo had with the Duggan family and it may seem curious that a man in his position given the account of events which he would have me believe, was not offered equity shareholding in Jak Max in return for his loyalty, initial financing and lengthy initial work without pay. His account was, after all, that his departure from employment of the plaintiffs was to start a business with his daughter. He did subsequently get involved in a business with the children of his close friend and to some extent provided funds to enable it to pay bills at the initial stages. In the balance sheet of Jak Max for the year ending 30 June

2006 he appears as an unsecured creditor in the amount of \$32,566. Given his asserted interest in starting a business (with his own daughter) upon leaving the plaintiffs' employment, the advance of money to Jak Max, and his personal financial circumstances, I would have expected that there might at least have been discussions with him about having an equity interest in the business. It is more likely that his willingness to assist Jak Max reflects an involvement in it by his long time friend Paul Duggan.

134 Ben Canning was an old school friend of Adam Duggan's who was employed by the plaintiffs for approximately six years. He worked in telephone sales and as a sales representative before becoming national sales manager in about 2003. He resigned in mid-August 2005 giving four weeks notice. He is also Kylie Duggan's boyfriend and by mid-August 2005 had been living with her for some time. He was not offered shares or any control in the company. Dean Stubbs was also a school friend of Adam Duggan's and commenced employment with the plaintiffs in early 2001. In about mid-2001 he became the plaintiffs' product manager and resigned on 27 July 2005. He has had an important role in the business of Jak Max and, again, was offered no shareholding or directorship.

135 The evidence of both John Duggan and Kylie Duggan is essentially that their roles as directors was to do as instructed by their brother Adam Duggan. Nick Loschiavo, Dean Stubbs and Ben Canning were asked to make financial sacrifices by not getting paid a wage for at least five months and received no compensation by way of shares. I find it difficult to accept that Nick Loschiavo would take instructions from Adam Duggan, John Duggan or Kylie Duggan or any combination of them if Paul Duggan had no involvement in the business. Nick Loschiavo's experience in the industry spans twenty-two years whilst that of Adam Duggan only five. Nick Loschiavo accepted in evidence that Adam Duggan was at times irresponsible with money and I do not accept that Nick Loschiavo would put his financial security in the hands of the Duggan children alone.

136 The email correspondence between Paul Duggan and Chris Fehn on 27 August 2005

leads me to conclude that Paul Duggan had an involvement in the travel plans of Adam Duggan for the purpose of establishing the new business subsequently taken over by Jak Max. Paul Duggan wrote to Chris Fehn on 27 August 2005 revealing a precise knowledge of Adam Duggan's travel plans for the purpose of the new business. Adam Duggan had resigned from the plaintiffs only four days earlier and Paul Duggan's email to Chris Fehn on 27 August 2005 shows that within four days of his son's resignation from the plaintiffs, the father knew that his son was planning to be in America in September as well as France and Italy in mid-September and that he (Paul Duggan) would "get him" (that is Adam Duggan) to go home through America to see Chris Fehn and Rod Hampton (another employee of GB America). The email indicated that Paul Duggan would go to America in October but would not go to the Louisville Trade Show in the United States of America if the plaintiffs' people were there. He also indicated that he was going to go to the Bologna Trade Fair but that he (Paul Duggan) would "probably send" Adam Duggan in view of the expectation that Mark Gwynne might be going to the Bologna Trade Fair. The email ends with commiserations about the way things had happened and the hopeful note that they would all move on and eventually "create something that we will all be proud to be part of". This email, both as to its tenor and its contents, provides clear indication that Paul Duggan was actively directing the activities of Adam Duggan from August and September 2005 in relation to the latter's activities for Jak Max.

137 Adam Duggan denied that he and his father had planned to travel together to Paris in September 2005, however, an email chain between Adam Duggan and Suzanne Legrand between 31 August 2005 and 1 September 2005 indicates clearly that there was such a plan. I reject Adam Duggan's denials as knowingly false.

138 Adam Duggan and Dean Stubbs did go to China in mid-October 2005 but I infer that he did so because he was directed to do so by his father. Adam had never been to China previously and in about mid-2005 Adam had planned to travel to Europe for a holiday in October 2005 with some friends. On 18 August 2005 Ian Donnelley, one of the friends that Adam Duggan was going to be travelling with to Europe, sent him

an email stating that he had heard from Dean Stubbs that Adam was not able to join them on holidays in Europe because he (that is Adam Duggan) had to go to China with Dean Stubbs. Later that same day another friend who was to go on the European trip, Osman Salih, sent Adam an email asking if it was true that he, Adam Duggan, was cancelling out from the trip. Adam responded to each email expressing extreme disappointment about having to go to China. Curiously, he said in evidence that he had invented the trip to China as an excuse to his friends who were going on the European holiday “because everyone else was dropping like flies from the trip”. What is curious about this is that, in fact, Adam Duggan did go to China and it makes little sense for him to say (as he did) that in August he was telling his friends something which at the time he thought to be a lie. It is more probable, and I find it to be the case, that in August 2005 Adam Duggan and Dean Stubbs did have to go to China in the following October and that they did so because Paul Duggan told them that they should do so.

139 On 16 September 2005 Chris Fehn sent an email to Paul Duggan in relation to an opportunity to supply generators to the US Army. Considerable irrelevant evidence was given about this opportunity and about whether the provision of generators to the US army was something coming within the business of either the plaintiffs or Jak Max. The point about the email, however, is what it reveals about the state of knowledge of Chris Fehn concerning Paul Duggan’s activities and the need for secrecy as against the plaintiffs. Paul Duggan forwarded the email to Dean Stubbs. At the time Chris Fehn knew that Adam Duggan and Dean Stubbs were starting a business together and thought that Paul Duggan might be able to help source the generators. Chris Fehn met with Paul Duggan, Adam Duggan and Dean Stubbs at The Stokehouse Restaurant in Melbourne on 23 September 2005. After that meeting Chris Fehn received an email from Adam Duggan on 28 September 2005 attaching a quote for the generator. On 30 September 2005 he sent an email to Paul Duggan, Adam Duggan and Dean Stubbs stating “I am going to further distance myself from GB with a new e-mail address ... This will protect a bit more than the other.” In the context in which this email was created, it provides evidence that Paul Duggan was

known to be involved in the Jak Max business and that it was known that secrecy was needed.

**(d) Interference with the plaintiffs' business relationships**

140 The plaintiffs also alleged that Paul Duggan breached his restraint by interfering with the plaintiffs' relationships with its employees, particularly Nick Loschiavo, Dean Stubbs, Adam Duggan, John Duggan and Kylie Duggan. The plaintiffs submitted that each of these employees left the plaintiffs' employment with the intention of working in the business that soon after became that of Jak Max and that they did so because of Paul Duggan's involvement in that business. I accept that submission.

141 The prohibition against interfering in any way with the relationships between the plaintiffs and their clients, customers, suppliers or employees is in clause 13(c)(iii) which I have set out above. The defendants contended that I should give the word "interference", when used in a deed between private parties, the same meaning as contemplated by the tort of interference with contractual relations. Thus it is said that it is necessary that there be a knowing and intentional procuring of the breach, although recklessly disregarding the means of knowledge may be sufficient<sup>40</sup> to constitute a breach. I do not accept that the word "interference" used in a private deed or contract should be given anything other than its ordinary meaning. There is nothing in the share sale deed to suggest that the word was being used in a special sense or that by the deed the parties sought to confer or obtain no rights greater than might otherwise have been conferred or obtained by the law of torts.

142 In any event, if it were necessary for me to find otherwise, I would conclude on the evidence that interference in the sense urged upon me by the defendants, was established by the plaintiffs. That is, that the conduct of Paul Duggan showed deliberate steps being taken with the intention of adversely affecting the plaintiffs' relationship with its employees. I will not repeat the evidence concerning the

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<sup>40</sup> *Northern Territories v Mengel* (1995) 185 CLR 307, 342 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

resignation of Nick Loschiavo and my rejection both of the evidence he gave and that which Paul Duggan gave, to the contrary. It will be sufficient for me to note that I conclude that Paul Duggan induced Nick Loschiavo to leave his employment with the plaintiffs so that he would be available to work for the business that became that of Jak Max.

143 Dean Stubbs at one point gave evidence that he left his employment with the plaintiffs to start a kebab van business or to start his own business as a commissioned agent selling outdoor power equipment. I found a great deal of the evidence given by Dean Stubbs difficult to accept as truthful. In part that was because he admitted making false statements when it suited him in business. In any event, the facts I have found do not make plausible his assertion that he did not leave the plaintiffs' business to participate, as employee, in the business that became that of Jak Max. I have already referred to the email he sent to Wang Wei Ming dated 22 July 2005. In that email he said that he and Adam Duggan were going to start a business and they would need one to two months to set it up. He gave four weeks notice on 27 July 2005. The conclusion I draw is that on the date of resignation he had (on the barest minimum at least five days previously) resolved upon a course to go into business with Adam Duggan that would then take one to two months to set up.

144 In addition, by 18 August 2005, Adam Duggan and Dean Stubbs had a plan to go to China together in October 2005 for the purpose of the Jak Max business. Dean Stubbs' actions after resigning are inconsistent with any other conclusion than that he intended to participate in what became the Jak Max business. He rarely turned up for work with the plaintiffs after giving notice of resignation. Before leaving the plaintiffs' employment he emailed a number of the plaintiffs' documents to his friend Paul Ktenas which, although perhaps not very useful to Jak Max, were nonetheless documents relevant to the establishment of the business to be undertaken by Jak Max. On 17 August 2005 he sent an email to Aero Yang of Proring in which he stated that he and Adam were "interested in creating a

dedicated catalogue". I reject the evidence of Dean Stubbs that he sent the email on 17 August to Proring for his own purposes of a proposed spare parts business and that he was using Adam Duggan's name without the latter's knowledge and only in order to give himself more clout or credibility. That evidence was not supported by the evidence of Adam Duggan who relied upon the sentence as showing, according to his version, that they did not know what they were going to do at about that time. The version by Dean Stubbs is also inconsistent with the terms of the email and the surrounding circumstances. His evidence that he sent the emails to Paul Ktenas on 16 and 17 August 2005 for the latter to email to his hotmail address for the purpose of his own spare part business is in my view untrue.

145 I also find that the Duggan children left the plaintiffs' employment because they were given the opportunity and incentive to do so by their father's direction, support and involvement in the proposed business. Paul Duggan had no intention of retiring from business and, at most, had a fetter for only two years. It certainly did not cross John Duggan's mind that his father might go into competition with Jak Max after the two year restraint period had come to an end. None of the Duggan children had worked in any job other than at the plaintiffs' and none of them had applied for or looked for any alternative employment before resigning. John Duggan's evidence that he left the plaintiffs' employment to go to university is, in the circumstances, not credible. His own evidence was that he did not pursue the idea of going to university with any vigour. He resigned shortly after returning from the trip to Singapore at a time when it was clear that the business was going to be established. The rapid succession of events, and their dates, are not consistent with the independent stories they would have me believe.

### **B. Liability of Adam Duggan**

146 An employee owes a duty of fidelity to his or her employer. However an employee is entitled to make certain preparations for leaving employment and setting up a business in competition with a former employer, and the obligation to act in the

employer's interests ceases when the employment contract ceases<sup>41</sup>. However, whilst in employment an employee has an overriding obligation to act in the employer's interest rather than in his or her own interest<sup>42</sup>. In this case the question is whether Adam Duggan did more than is to be regarded as preparatory steps in the setting up of a business which was subsequently taken over by Jak Max, such as to have breached the duty he owed to the plaintiffs.

147 The plaintiffs submitted that what Adam Duggan did in making preparations to leave the plaintiffs and to start a competing business went beyond the permissible preliminary steps by canvassing the plaintiffs' customers and suppliers, namely, Elfving, Carlton, Kua Si Lin and Wang Wei Ming.

148 I have already largely referred to the evidence relating to Adam Duggan's dealing with the enquiry by Elfving in relation to the Sunvic generators. In April 2005 he purported to impose a mark-up of 30% on the Sunvic generators to be supplied to Elfving with the profit to be made by some person other than the plaintiffs. On 31 March 2005, Elfving had requested information from the plaintiffs through Paul Duggan about Sunvic generators. That inquiry was referred to Dean Stubbs to answer. On 5 April 2005 Dean Stubbs sent an email to Paul Duggan with the proposed answers and attached a pricing spreadsheet setting out the cost price and marked-up prices in US and Australian dollars. On 10 April 2005 Paul Duggan forwarded the email with the attached pricing spreadsheet to Adam Duggan and sent a copy to Dean Stubbs and Kua Si Lin. Paul Duggan asked Adam to answer Elfving and to tell them to deal directly with Li Xia or "KSL" (Kua Si Lin) and to "pay them direct". On 11 April 2005 Adam Duggan sent an email to Elfving with the answers that had been proposed by Dean Stubbs and a price list. The price list marked up the cost price of the generators by about 30%.

149 Any profit from the transaction, had it proceeded, was not intended by Paul Duggan and Adam Duggan to be realised by the plaintiffs but to be realised by one of the

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<sup>41</sup> *Robb v Green* [1895] 2 QB 1, 14 (Hawkins J); *Bendix Homes Systems Limited v Clayton* [1977] 5 WWR 10, 29 (Macfarlane J).

<sup>42</sup> *Wessex Dairies Ltd v Smith* [1935] 2 KB 80.

Duggans, Kua Si Lin or Li Xia. On 12 April 2005 Antti Berkan replied to Adam Duggan stating that he did not have contacts with “Lixia” and asked Adam Duggan if he could pass on the order to her. There is no evidence that he passed on Li Xia’s contact details to anyone at Elfving. The suggestion that Elfving could deal directly with Li Xia or Kua Si Lin and “pay them direct” indicates that the plaintiffs were to be excluded from the transaction both in bringing it about or in receiving payment. The 30% profit mark-up was, therefore, to be received by someone other than the plaintiffs.

150 On 12 April 2005 Elfving accepted the price of the generators and sought three samples. They were not provided between April 2005 and mid-August 2005 because Adam Duggan had not provided Elfving with the suppliers’ address. In August 2005 Adam Duggan resumed contact with Elfving in relation to the Sunvic generators. On 16 August 2005 Adam Duggan wrote to Gunilla Paro at Elfving as part of an email chain on the subject of “sunvic generators for Elfving” stating:

We are putting together the catalogue now. Sorry for the delay, but we had a few issues with the suppliers in China and now we are very confident we have the best Generator supplier in China and will forward a new catalogue within the next week.

Once again sorry for the delay but we wanted to be 100% guaranteed with the quality which we have now found.

The evidence does not support the factual assertions made or implied in the email from Adam Duggan to Gunilla Paro. It was untrue to say that the plaintiffs were preparing a new catalogue because they were not. Kylie Duggan had already prepared whatever catalogue had been prepared during her employment with the plaintiffs and by the time of the email from Adam Duggan of 16 August 2005 she had left employment with the plaintiffs. Adam Duggan’s evidence was that what he said in the email was in part to “buy time” because he knew that he was about to leave the plaintiffs’ employment also. Later on 16 August 2005 Dean Stubbs forwarded to Adam Duggan the original price list for the generators that Kua Si Lin had sent to Paul Duggan in March. Also on the same day Dean Stubbs’ friend, Paul Ktenas, emailed to Dean Stubbs twenty-three of the plaintiffs’ documents including a

document entitled "Sunvic.doc". This document was the same as the Sunvic price list that Dean Stubbs had prepared in April 2005. On 27 September 2005 Adam Duggan sent an email to Elfving to re-start negotiations in relation to Sunvic generators but this time on behalf of Jak Max.

151 In these circumstances I find that in August 2005, whilst still employed by the plaintiffs, Adam Duggan diverted an opportunity from the plaintiffs to supply Elfving and that the opportunity was diverted to the business taken over by Jak Max. This, in my opinion, was a clear breach of his employment duties. In fact Elfving did not follow through with the Sunvic generators whether through Jak Max, the plaintiffs or, it appears, anyone else. This may be relevant to any quantum of damages or an account of profits but not to whether there was a breach of duty.

152 The plaintiffs next contended that Adam Duggan breached his employment duties by discussing with Horst Braun his intention to leave GB and to start a business that could replace GB as a distributor of Carlton products in Australia. Horst Braun was the international salesman for Carlton which, until 2 February 2006, supplied the plaintiffs with Carlton branded chainsaw. On 6 July 2005 Paul Duggan and Adam Duggan met with Horst Braun, Thomas Beerens and Mark Gwynne. Paul Duggan's attendance at the meeting was in his role as a consultant to the plaintiffs' business having only recently been paid for the sale of shares. At that time Adam Duggan had had little dealing with Carlton as it was not his responsibility to purchase products from Carlton nor to sell products to Carlton. The purchase of products by the plaintiffs from Carlton was at the time the responsibility of Michael Beerens.

153 On some day around 6, 7 or 8 July 2005, Adam Duggan took Horst Braun on what has been described as a "tour". Adam Duggan's evidence was that the tour took place on 6 July 2005 although I find it more likely to have occurred on Friday, 8 July because that is consistent with Adam Duggan's witness statement, an email from Horst Braun sent to Adam Duggan which thanked him for the tour said to have occurred on "Friday", and because Thomas Beerens was unaware that Adam Duggan had planned to take Braun on a tour making it unlikely to have occurred on

the same day as Horst Braun actually met with Thomas Beerens on 6 July 2005.

154 Adam Duggan's evidence was that he did speak to Horst Braun about his "situation with GB and how" he was feeling at the time and the possibility of him leaving GB but staying in the industry. At the time Carlton had been disappointed with the recent performance of the plaintiffs as its exclusive distributor in Australia. Adam Duggan admitted to being aware from the meeting on 6 July 2005 that there was some degree of disappointment on the part of Carlton in the performance of GB. It was in that context that Adam Duggan took Horst Braun on what was described as a "tour" through Port Melbourne, St Kilda and Brighton.

155 The probability is, and I find, that Adam Duggan, whilst still employed by the plaintiffs, raised with Horst Braun the possibility of Carlton supplying product to a new business to be started by him. On 18 July 2005 Adam Duggan sent an email to Horst Braun stating "I have been seriously considering what we spoke about on the tour I gave you and will call you in the near future on this matter". It is probable, and I conclude it to have been the case, that Adam Duggan did call Horst Braun "on this matter" shortly afterwards. On 1 September 2005 Adam Duggan sent an email to Horst Braun to rearrange a meeting in Portland (USA) and apologised again for what was described as the "confusion" he had caused. Horst Braun's response the following day expressed concern about time running and remarked that his earlier visit in Australia had been "nearly two months ago". In any event, he agreed to have an answer for Adam Duggan the following morning. The meeting was with Rus German, the President of Carlton. Adam Duggan's evidence was that it was difficult to arrange a meeting with Rus German and that that was why Adam Duggan had used Horst Braun to arrange it. It is probable that any meeting that needed to be "rearranged" on 1 September 2005 must first have been arranged some time before that date. Adam Duggan had not resigned from GB until 23 August 2005 and I find it unlikely that one week would have been sufficient time for the meeting to have been considered, "arranged and confirmed" all through the agency of Horst Braun. Indeed, it is more likely, and I conclude to be the case, that the meeting was

first discussed soon after 18 July 2005 and that he had arranged the meeting during the term of his employment with the plaintiffs.

156 These dealings between Adam Duggan and Horst Braun are not, as contended on his behalf, “legitimate preparation for his leaving employment”. I find there to have been, during the course of his employment, active steps taken by him against the interests of his employer at the time. Carlton was one of the first companies that Adam Duggan made contact with on behalf of Jak Max after leaving the plaintiffs’ employment. By the end of 2005 Jak Max had replaced GB Products as exclusive distributor of Carlton branded saw chain in Australia.

157 The plaintiffs next complained about Adam Duggan’s involvement in the email sent to Wang Wei Ming on 22 July 2005 to which I have already referred at some length. The email was purportedly sent “from Dean Stubbs & Adam Duggan”. Adam Duggan’s evidence was that he did not allow Dean Stubbs to use his phone number and was surprised that Dean Stubbs used his name. I am unable to accept that evidence and find that Dean Stubbs would not have written an email to Wang Wei Ming on 22 July 2005 without having the approval of Adam Duggan and without the confident knowledge that a new business would be embarked upon. He may not have had the specific approval of Kua Si Lin and that may be the explanation why in his case the email was copied to Kua Si Lin (as a means of information to Kua Si Lin) whereas it was not copied to Adam Duggan. Kua Si Lin was a very close friend of Paul Duggan and the Duggan family generally. Whatever might be said against Dean Stubbs, I find it highly improbable that he would have sent an email to a manufacturer in China (Wang Wei Ming) with whom the Duggans and Kua Si Lin had had dealings, to have sent a copy of the email to a close personal friend of Paul Duggan (the father of his long time friend Adam Duggan), without knowing that he had Adam Duggan’s approval.

158 The plaintiffs next complained about the correspondence between Adam Duggan and Kua Si Lin in August 2005 in relation to the supply of Shindaiwai products. I accept that this correspondence was at a time when Adam Duggan was not putting

the opportunity forward as being for the benefit of GB and that Kua Si Lin was of the belief that any business carried out by Adam Duggan would not be for the benefit of GB but for the benefit of the Duggans and Adam Duggan's private interest.

159 On 10 August 2005 Adam Duggan received an email from a potential customer for the plaintiffs in Guam in relation to the supply of Shindaiwai products. On 11 August 2005 he forwarded the email to Kua Si Lin and asked whether he was "still good to sell Shindaiwai into Guam". This email did not represent an opportunity sought by Adam Duggan for GB's benefit. By 11 August 2005 Adam Duggan had formed the intention to start up his own business and Kua Si Lin replied that the sales would have to go through "Jak Int'l". Ten minutes later Adam Duggan sent an email in response to Kua Si Lin saying "Ta mate".

160 The evidence of Adam Duggan was that the suggestion of sales going through "Jak Int'l" was "off his [Kua Si Lin's] own bat". Indeed, counsel for the defendants would have me accept that the probabilities were that the name Jak "had come up" and that he (Kua Si Lin) had suggested, independently, that the sales go through the new company. The name "Jak" as I have previously said had been decided as the company name, as the evidence of the defendants was, after they had talked about a name that used the first letter of the first names of each of the three Duggan children. On 11 August 2005 Adam Duggan was still employed with the plaintiffs and if the name Jak "had come up" it is highly probable that it had come up after discussions with Kua Si Lin about the use of such a name in a new business. Indeed, if it had come up, it had by that time "come up" in its form as ultimately adopted (rather than some other variation of the three letters J, A and K). Kua Si Lin gave evidence corroborating Adam Duggan's version of events. I am not able to accept as truthful the evidence of either of them in this respect.

161 Kua Si Lin gave evidence of a conversation he had had with Adam Duggan earlier that month and the conclusion I draw from his email of 11 August 2005 was that by then it was known to Kua Si Lin that Adam Duggan was leaving GB and was starting a business which would include dealing in, at least, outdoor power

equipment and that the name “Jak” had been settled upon as the name of the company through which the new business would trade. There is no contemporary evidence suggesting that Adam Duggan sought to correct or disabuse Kua Si Lin about the suggestion which in evidence he said was made by Kua Si Lin “off his own bat”. At very least it shows that from 11 August 2005 Kua Si Lin was of the belief, based upon his discussions with Adam Duggan earlier, that all business dealings with Adam Duggan were not for the benefit of GB or the other plaintiffs.

### **Breach of Confidence against Adam Duggan**

162 The plaintiffs also alleged against Adam Duggan that he breached his duty of confidence at law and under s 183 of the *Corporations Act 2001*. In that regard I was reminded by the defendants that the allegation that an ex-employee has taken confidential information belonging to his or her former employer is a grave one<sup>43</sup> to which the principles in *Briginshaw v Briginshaw*<sup>44</sup> apply. Both parties agree about the importance of precise identification of the material said to be confidential and of the circumstances from which it may be established that the information was confidential<sup>45</sup>. In *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*<sup>46</sup> it was said that to succeed in an action based upon the misuse of confidential information a plaintiff:

- (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that;
- (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge);
- (iii) the information was received by the defendant in such circumstances as to impact an obligation of confidence; and
- (iv) there is actual or threatened misuse of that information.<sup>47</sup>

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<sup>43</sup> *Liberty Financial Pty Ltd v Scott (No. 4)* (2005) 11 VR 629, 634 (Harper J).

<sup>44</sup> (1938) 60 CLR 336; see also *Neat Holdings v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

<sup>45</sup> *O'Brien v Komesaroff* (1982) 150 CLR 310, 328 (Mason J); *Liberty Financial Pty Ltd v Scott (No. 3)* (2004) 11 VR 621; *Liberty Financial v Scott (No. 4)* (2005) 11 VR 629; *Meridian Vat Reclaim Australia Pty Ltd v Agius* [2006] VSC 503; *Industrial Rollformers Pty Ltd v Ingersoll-Rand (Australia) Ltd* [2001] NSWCA 111 (Unreported, Priestley, Meagher, Giles JJA, 24 April 2001).

<sup>46</sup> (1987) 14 FCR 434.

<sup>47</sup> *Ibid*, 443 (Gummow J).

Knowledge that is readily absorbed as part of the general background knowledge (or know-how) by being engaged in the business will ordinarily not be treated as confidential. In *Del Casale v Artedomus*<sup>48</sup> Hodgson JA said:

However, in applying these general equitable principles to the particular case of post-employment use, by an ex-employee, of the confidential information of an employer obtained during employment, there are particular considerations which tend to qualify their operation. They are that very often an employee will necessarily through employment come to have knowledge which the employer would prefer not to have generally known, that often such knowledge will become part of the employee's know-how (which the employee should be able to use after employment ceases), that very often is difficult or impossible to isolate from the employee's general know-how particular pieces of confidential information which the employee is not permitted to use while otherwise being free to use know-how generally, and that competition should not be prevented by preventing ex-employees using their know-how.<sup>49</sup>

[...]

It is clear that information may be confidential, even if it is known to persons other than the person claiming confidentiality: it may be sufficient that the information is not freely available, particularly if it is not freely available to competitors of the employer.<sup>50</sup>

[...]

However, where the confidential information is something that is ascertainable by enquiry or experiment, albeit perhaps substantial enquiry or experiment, and the know-how which the ex-employee is clearly entitled to use extends to knowledge of the question which the confidential information answers, it becomes artificial to treat the confidential information as severable and distinguishable from that know-how; and in that kind of case, courts have tended not to grant relief.<sup>51</sup>

In *Faccenda Chicken Ltd v Fowler*<sup>52</sup> Goulding J distinguished between three classes of information:

First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all.

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48 (2007) 73 IPR 326.

49 Ibid, 335.

50 Ibid, 335.

51 Ibid, 336.

52 [1985] 1 All ER 724.

Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service the law allows him to use his full skill and knowledge for his own benefit in competition with his former master;

...

Third, however, there are to my mind, specific trade secrets so confidential that, even though they may necessarily have been learnt by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's.<sup>53</sup>

The plaintiffs contended in this case that there is an impermissible breach of confidential information to be found in the email correspondence between Dean Stubbs and Paul Ktenas for which Adam Duggan is responsible.

163 On 16 August 2005 Dean Stubbs sent a number of documents by email from the plaintiffs' premises, using the plaintiffs' equipment, to his friend Paul Ktenas. The latter then sent the documents to Dean Stubbs' hotmail account on the same day. That email was found in one of the Dell computers at Paul Duggan's home as a temporary internet file. The plaintiffs have files of the same name as each of the documents listed on the email except that in the case of some the name appears to have been changed slightly. The following day, 17 August 2005, Dean Stubbs sent an email to Paul Ktenas attaching three more documents which he had created in the course of his employment with the plaintiffs.

164 One of the documents that Dean Stubbs emailed from the plaintiffs' premises to Paul Ktenas on 16 August 2005 was described as "contacts.txt." He created that document by converting his Microsoft Outlook email contacts on his computer at GB into a text file. The document contained contact emails of a number of the plaintiffs' suppliers as well as the names of personal friends. In *Peninsula Real Estate Limited v Harris*<sup>54</sup> Tipping J said:

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<sup>53</sup> Ibid, 731-2.

<sup>54</sup> [1992] 2 NZLR 216.

There is now a clear trend of authority to the effect that whether one classifies the following information as confidential or not, a departing employee may not take with him customer or client lists for the purpose of using them in a competing role.<sup>55</sup>

In *Forkserve Pty Limited v Jack*<sup>56</sup> Santow J held that the customer and supplier details contained in a teledex taken by the defendant could have been reconstructed from other sources but added:

As the authorities have held, even if not classified as “confidential”, using the test in *Wright v Gasweld* an employee who takes an employer’s customer list for use in the future in competing with the Plaintiff breaches the duty the employee owes to that employer; ... The fact that this customer list/teledex book could be reconstructed from other sources does not change the fact that a breach of duty has occurred.<sup>57</sup>

Dean Stubbs’ evidence was that he did not use the information in the contacts.txt document. I do not accept this evidence. His list of contacts in his hotmail account as at 8 September 2005 includes many of the same contacts as in the contacts document sent to himself via Paul Ktenas. I do not accept his evidence that he entered that information into his hotmail account between the time he left GB and 8 September 2005 without the assistance of the information in the contacts.txt document which he had sent to Paul Ktenas and which Paul Ktenas then sent back to him. It is improbable that he would go to all the trouble of converting his GB email contacts into a text document, email it to Paul Ktenas, have Paul Ktenas email it back to him to his hotmail account, only for him then to recreate the same information from other sources or from memory.

165 His probable reliance on the context.txt information may be seen by his email to an address that might not easily be remembered. On 17 August 2005 Dean Stubbs sent an email to Aero Yang at Proring at the email address proring@ms16hinet.net. This is one of the email addresses contained in the contacts.txt document. The evidence of Dean Stubbs was that he remembered that email address and did not use the contacts.txt for it. I do not accept this evidence. His evidence at one point had been that he could not recall his own hotmail address which was made up of his own first

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<sup>55</sup> Ibid, 219.

<sup>56</sup> (2001) 19 ACLC 299.

<sup>57</sup> Ibid, 317.

name, second name and year of birth plus the standard hotmail information; that is, deanstubbs79@hotmail.com. His explanation for having sent the material to Paul Ktenas in the first place was said to have been because he could not recall his own hotmail address and, in view of that, I do not accept his evidence that he could recall the Proring email address without the assistance of the contacts.txt information.

166 In my view, Dean Stubbs did use the information for the new business. It is probable that Adam Duggan was aware of the information having been copied by Dean Stubbs and made available for use by the new business.

167 I am not able to accept Adam Duggan's denials and indeed, found his evidence to be generally unreliable. The parties both agreed that the evidence was to be tested by reference to the principles in *Briginshaw v Briginshaw*.<sup>58</sup> In that context counsel for the defendants relied upon a passage from the joint judgment in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*<sup>59</sup> where their Honours said:

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J. commented in *Briginshaw v. Briginshaw*:

"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ..."

There are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading. In our view, it was so in the present case.<sup>60</sup>

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<sup>58</sup> (1938) 60 CLR 336.

<sup>59</sup> (1992) 67 ALJR 170.

<sup>60</sup> *Ibid*, 170-171 (Mason CJ, Brennan, Deane and Gaudron JJ).

Adam Duggan's own evidence was that he was prepared to mislead where convenient for his own interests. I have already referred to the incident concerning his "excuse" to his friends who had planned a trip to Europe. He was also cross-examined about his attempts to have another person falsely claim to have driven his motor car in excess of the legal speed limit to have that person lose licence demerit points rather than that he lose the points to enable him to save his driver's licence. When pressed he volunteered that his mother had taken points for him and knew of "mates who take [licence demerit] points for each other".

168 These were not isolated instances and go to the credit of Adam Duggan. On 9 September 2005, for example, he wrote an email to a Pier Sgarbi on the subject of a visit to Italy saying that he was in the process of starting a new business which would not have his father but would include himself "John & Kylie, Dean Stubbs, Nick Loschiavo and Ben Canning" with assistance from Kua Si Lin and Li Xia. On that same day he sent an email to Favre Yvan of Vallorbe (a manufacturer of high quality chain saw files sold in Australia by the plaintiffs) informing of his new company and in this instance that there would be several former GB employees including Ken Hansen (his brother John's godfather). In each of these, and other, instances he accepted that the information was in part false and that some names were added to gain more "credibility". When pressed about incorrect information being misleading to, in the instance, Vallorbe, Adam Duggan's response in self-justification was by saying to counsel that "[i]n your world it's misleading, in my world it's a little fib to get us a bit more credibility".

169 An article appeared in the October/November 2005 issue of the industry magazine *Power Equipment* containing an article about the new Jak Max business which included a photograph of the people expected to be involved. The photograph and much of the information in it was probably supplied by Adam Duggan. Amongst the people featured was a Tony Nigro who had also been identified as a Jak Max employee in information supplied to the bank for finance for Jak Max as the proposed warehouse manager. Ken Hansen was also listed in the details of the Jak

Max company structure as harvester bar manager. In cross-examination Adam Duggan accepted that what was stated to the bank about Tony Nigro and Ken Hansen was not correct and that he had deliberately exaggerated to the bank both who was involved with Jak Max and the level of their experience. In the end I was left with the impression that I could not safely rely upon the testimony of Adam Duggan and do not accept it whenever it is in conflict with that of others or the documents and inferences to be drawn from them.

### **Inducing breach of contract**

170 The last of the claims pursued by the plaintiffs in final address against Adam Duggan was that of inducing his father to breach the restraint provision. The claim pleaded and maintained in final address was that it was Adam Duggan who induced Paul Duggan to breach the restraint of trade clause he had given in the share sale deed. The evidence does not sufficiently support the claim as pleaded. I am by no means confident that it was Adam Duggan who was doing the inducing except perhaps by being a willing participant in the events which occurred.

### **C. Damages**

171 The plaintiffs have elected the remedy of damages over an account of profits. The object of an award of damages in the context of a claim in contract is to put the plaintiffs in the position they would have been in had the contract not been breached. The measure of damages, in other words, is that amount that will place the party in the same position as if the contract had been performed<sup>61</sup>. This involves a comparison between a hypothetical situation (that is, the situation that would have existed had the contract been performed) and the actual position in which the plaintiffs found themselves by reason of the breach<sup>62</sup>. In that task I am urged to adopt the approach described by Sir Wilfred Greene MR in *Draper v Trist*<sup>63</sup> "to use ordinary business knowledge and common sense, and to consider that one cannot

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<sup>61</sup> *Robinson v Harman* (1848) 1 Ex 850, 855 (Parke B); *Commonwealth v Amann Aviation* (1991) 174 CLR 64, 80 (Mason CJ and Dawson J).

<sup>62</sup> *Commonwealth v Amann Aviation* (1991) 174 CLR 64, 99 (Brennan J), 116 (Deane J).

<sup>63</sup> (1939) 3 All ER 512, 524.

have deceptive trading of a considerable volume without inflicting, at any rate, some measure of damage on the goodwill” of a business.

172 It is sometimes difficult to determine the precise quantum of damage that has been suffered by a wronged plaintiff. In some cases it may be that determining the quantum of damage will involve some estimation falling substantially short of certainty. In *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd*<sup>64</sup> Hayne J said:

[37] Placer undoubtedly bore the burden of proving not only that it had suffered damage as a result of Thiess Contractors' breach of contract, but also the amount of the loss it had sustained. It goes without saying that it had to prove these matters on the balance of probabilities and with as much precision as the subject matter reasonably permitted.

[38] It may be that, in at least some cases, it is necessary or desirable to distinguish between a case where a plaintiff cannot adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff has not adduced such evidence. In the former kind of case it may be that estimation, if not guesswork, may be necessary in assessing the damages to be allowed. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their most apt application in cases of the former rather than the latter kind. This case did not invite attention to such questions. Placer sought to calculate its damages precisely.

On the other hand, the general proposition that if damage is proven “the court must regardless of the circumstances make some assessment of the damages cannot be sustained”, at least as a general proposition<sup>65</sup>.

173 At the barest minimum, however, it must be for the plaintiff to establish a rational foundation for a proper assessment of damages<sup>66</sup>. In this case the plaintiffs ultimately advanced two alternative bases for the assessment of damages. The first was based upon what the plaintiffs referred to as the quantum of global loss basis said to be found in the observations of Mayo J in *Winkie Meat Works Ltd v Ballard*<sup>67</sup>. In that case it was held that the Court was entitled to look at the sales made by the

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<sup>64</sup> (2003) 196 ALR 257.

<sup>65</sup> *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 245 (Brooking J).

<sup>66</sup> *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275, 319 (Pincus J).

<sup>67</sup> [1960] SASR 312.

defendant when considering the loss which had been suffered by the plaintiff. In this case the plaintiffs contended that there is evidence before me both of the sales made by the defendants and of the sales lost by the plaintiffs. In calculating the loss suffered by reason of the breaches, I am therefore asked to compare the plaintiffs' actual position with a hypothetical position that the plaintiff would have been in but for the breach.

174 The plaintiffs tendered the expert evidence of an Andrew Malarkey of KordaMentha in which he attempted to calculate the loss said to have been suffered. The plaintiffs accepted that the hypothetical position postulated by their expert could not be sustained because they accepted that they had not made out the assumption as to the cause of the loss and, therefore, the projected sales upon which it was based. Nonetheless, the plaintiffs maintained that there was a sufficient basis in the materials to permit me to adopt the general approach of Mr Malarkey and to arrive at a reliable figure of the quantum of their loss. Specifically what was urged upon me on behalf of the plaintiffs, was that the loss of net profit was to be calculated by taking the gross margin attributable to lost sales and deducting variable expenses from that rather than by making a straight comparison of the net profit position. In that calculation I was urged to reject the approach proffered by the expert relied upon by the defendants, Mr Clovis Bonner, that took into account changes in expenses in the plaintiffs' business not connected with changes in sales. These changes, it was argued, were independent of the defendants' conduct and would have been saved by the plaintiffs in any event. On that analysis I am also asked not to have regard to depreciation in calculating the net loss because that expense was not connected with any loss of sales. It is, as was urged, an accounting treatment that would not have varied had the plaintiffs' sales been higher.

175 The first method I was asked by the plaintiffs to adopt to calculate the net profit sought, in essence, to determine the gross margin to the plaintiffs which can be said to be "attributable to lost sales". In the 2006 financial year Jak Max made sales to the plaintiffs' customers totalling \$255,182 and sold 84 different products of which 76

(90%) were the same as the products sold by the plaintiffs at the time of the restraint. In the 2007 financial year Jak Max made sales to the plaintiffs' customers of \$1,788,674 and sold 368 different products of which 329 (89%) were the same as products sold by the plaintiffs at the time of the restraint. I was then asked to assume that the plaintiffs might have retained only 70% of those sales and, therefore, that the plaintiffs lost sales to Jak Max of at least \$198,474 in 2006 and \$1,114,344 in 2007. The plaintiffs had an actual gross margin of 38% on the sale of their products and, therefore, the lost gross profit was calculated by the plaintiffs as \$75,420 in 2006 and \$423,450 in 2007. The total of these two figures was then reduced by \$75,000 said to be the increase in variable costs of the freight and discounts which would have resulted by increased sales not actually sustained. The total loss of net profit on this calculation would thus be \$423,870.

176 The alternative basis urged upon me produced a different figure. The alternative basis asked me to proceed from the actual sales in 2005 of \$22,891,000. The actual total reduction of the plaintiffs' sales in 2006 and 2007 was \$6,686,000. From that figure the plaintiffs deducted estimates of losses said to be due to factors unrelated to the defendants' wrongful conduct, namely the drought (\$200,000), loss of customers (\$3,478,000), diversion of sales through GB America (\$108,000) which, applying the same gross margin percentage of 38%, produced a quantified loss of \$1,102,000. This calculation, however, made no allowance for any quantum of loss referable to deterioration of the business due to bad staff relations or the exodus of staff. The plaintiffs concede that some allowance may be made for these factors and concede also that they should be calculated by reference to a percentage of the gross sales for 2007, namely, a percentage of \$17,887,000. A moment's reflection will show that even a relatively small percentage impact of that figure on the two factors identified would substantially reduce the quantifiable loss. In addition, the quantum for each of the alternative causes conceded by the plaintiffs was challenged by the defendants. Thus, they contended that the quantum loss attributable to the drought was not \$200,000 but \$789,000; and that the loss of customers due to factors beyond the defendants' responsibility was closer to \$4,326,505.

177 Each of the two alternatives I was asked to adopt required me to make assumptions. The first calculation, for example, requires an assumption that the plaintiffs would have retained at least 70% of the sales which went to Jak Max in the 2006 and 2007 year. The second alternative asks me to assume, for example, that some percentage of sales was lost by reference to bad staff relations and the loss of staff by the plaintiffs. Neither party sought to rely upon, or undertake, any statistical analysis of the kind used in regression analysis.<sup>68</sup>

178 There is reliable evidence that some amount of the diminution in the plaintiffs' sales was due to factors unrelated to any wrongful conduct of the defendants. The evidence establishes that there has been a drought in Australia for a number of years. It was at its worst in the summer of 2006/2007. Thomas Beerens' evidence was that summer sales of the Australian distribution business rely heavily on grass cutting and with the drought the grass did not grow and, therefore, that demand for the plaintiffs' products was "greatly diminished". A number of senior employees of the plaintiffs also put forward the drought as a reason for the decline in the plaintiffs' sales since 30 June 2005. Mark Gwynne in a letter to Horst Braun dated 23 January 2006 said that the "severe drought" was a material factor in the reduced performance of the plaintiffs. A similar comment was made in a letter to another important supplier, Carlton, on 10 February 2006. On 25 October 2005 Veronica Chua wrote to Greg Dupe, giving a similar explanation for the drop in sales as at September 2006. Veronica Chua had been employed as the plaintiffs' commercial manager by early October 2005.

179 I am left with no doubt that the drought had an impact in reducing the plaintiffs' sales of their products. They admitted in their submissions that it is impossible to accurately quantify the extent to which the sales were reduced by reason of the drought. Nonetheless they contended that the evidence allows a rough estimation to be made of an impact of not greater than \$200,000. They contended that the drought affected only the Australian GB products business and that that business was

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<sup>68</sup> See Alan O. Sykes "An Introduction to Regression Analysis" *The Inaugural Case Lecture*. *Chicago Working Papers in Law & Economics*.

seasonal, with sales of chainsaw parts and accessories made mainly in winter, and with sales of brush cutter and lawn mower parts and accessories mainly in summer. The drought, on this view, affected the lawn mower and brush cutter part sales considerably more than the chainsaw parts. In the 2006 financial year it is said that there was little difference in the percentage loss of sales between the two categories. The total GB products sales fell by 16.1% while sales of brush cutter products fell 5.2% and the sales of lawn mower products by 17.8%. The drought did affect their sales in the 2007 financial years. In that year the total GB products sales fell by 15.9% while the sales of brush cutter products fell 34.6% and the sales of lawn mower products by 43.2%. The total dollar value of the loss of sales between 2006 and 2007 for both lawn mower and brush cutter products was \$585,000, being 43% of the total lost sales for GB products. In 2005, lawn mower and brush cutter sales represented 22% of total sales. Assuming, therefore, that without the drought there would have been no difference between chainsaw products and lawn mower and brush cutter products, the total loss due to the drought would be about \$292,500. To that figure, however, I was told that I should take into account the impact of the drought on aqua spikes. I was told that in times of drought the plaintiffs' sales of aqua spikes increased. In the 2007 year the sales of aqua spikes increased by \$180,000. If 2005 is taken as the appropriate base, aqua spike sales increased by \$95,000. It is by that calculation that the plaintiffs estimated that the impact on the plaintiffs' sales of the drought could be no greater than about \$200,000.

180 The defendants undertook a different calculation with a different end result. They also point to the impact of the drought upon the plaintiffs' sales of lawn and brush cutter related products. They said that this had an impact since 30 June 2005 and not only from after the subsequent financial year. They pointed to the products contained in the blue and dark green sections of the GB catalogue and noted that the value of the decline of brush cutter sales between 30 June 2005 and 30 June 2007 was calculated to have been \$300,000. The value of lawn mower product sales declined on one calculation during that same period by \$489,000.

181 Two other factors are admitted (in my view correctly) by the plaintiffs as having an impact upon their profitability which were described as “staff relations” and “exodus of staff”. The plaintiffs attempted to link the impact of these factors to the wrongful conduct of the defendants, but the evidence points to much deeper problems within the plaintiffs’ business that was unrelated to the defendants’ conduct. The departure of Paul Duggan from the plaintiffs’ business would probably always have had a significant impact on the fortune of the plaintiffs. Even Thomas Beerens described the strengths of Paul Duggan as being in “sales and leadership”: his departure was, therefore, always likely to have an impact on the plaintiffs’ business.

182 The assumption of managerial control by Thomas Beerens and Mark Gwynne had a significant detrimental effect on the plaintiffs’ business in many ways. Ros Ferguson gave some illustrations of the negative impact of the new management following the departure of Paul Duggan. She had been employed as the receptionist and invoice clerk for GB Products for about eight years until April 2006. She first tendered her resignation from GB Products in December 2005 but was persuaded to stay on in the expectation that things might improve. Her account of the work environment after Paul Duggan’s departure was of management making deleterious decisions which might have seemed rational in theory or in abstract, but which failed to take account of the reality of the business needs and practises of the plaintiffs as they had developed over many years. One management decision had been to move the sales team into a different building, making her role as invoice clerk inefficient and difficult. Her role, as invoice clerk, included sending out invoices, controlling stock and processing the invoicing for the sales representatives. She also took and processed orders placed by telephone and helped out in the finance department. She enjoyed her work until Paul Duggan’s departure in a place that had a system that seemed to have been governed by the actual needs and practises of the business rather than by theoretical considerations of how they might work better in abstract.

183 At some stage Ros Ferguson learned that the sales staff were to be moved to a

different building from the one in which she worked. She learnt this secondhand and assumed that it was a decision made by Mark Gwynne, who by then was the CEO. A consequence of the decision was that wrong products were being delivered to customers and that some products were being delivered to the wrong customers. A reason for that seems to have been that the change in location had an impact upon the way in which the paperwork for orders was managed. Under the old system one of her tasks had been to match the internal paperwork with sales orders sent by fax. A fax would arrive with an order which would be stapled to the back of the internal order or have some annotation made to it. The order received from the customer would thus be kept with the sales order produced for the internal purposes of the plaintiffs. Under the new systems created by management, orders arrived to a printer and stored separately from the sales orders so that the necessary paperwork was not matched. Orders sent to her arrived without any way of her being able to check whether the goods sent were those ordered. An example she gave was that many customers had different delivery addresses so that without what she described as a backing sheet she could not tell which state in Australia the goods were intended for delivery to the customer. Under the old system she would always check the back of the sales order and would be able to intercept any wrong product or wrong delivery address before the goods were sent. Thus, in one instance, a customer who had warehouses in Western Australia, New South Wales and Victoria ordered goods which were sent to the wrong state. Ros Ferguson was not able to quantify the increase in such occurrences after the commencement of the new system but identified it as "more often than it had ever" been before.

184 Another, and probably more serious, problem arose from a decrease in stock holdings which lead to an increase in back orders and an inability to supply upon orders. Thomas Beerens had wanted to reduce the level of stock, at least in some areas, and it is plain that the levels of stock did decrease after Paul Duggan left. A consequence, on Ros Ferguson's evidence, was that some orders were not able to be filled immediately and that other orders could not be filled fully. Thus, customers were in part dissatisfied by an order not being met in the required time, and the

plaintiffs' business costs increased because there were more freight costs involved by filling an order by more than one delivery on the one order.

185 Ros Ferguson gave evidence about other matters relevant to the damages claimed by the plaintiffs which was corroborated by other witnesses who, like her, I accept to be reliable and truthful. There seems to have been a general feeling of concern amongst the plaintiffs' staff when they learned that Paul Duggan was to leave. She described the work environment after his departure as "terrible". She described, and others corroborated, a sense of insecurity of their employment positions (a circumstance which might perhaps easily have been allayed), and of customers being dissatisfied with the business then being offered by the plaintiffs. The new management had visions for the business to grow into one turning over \$100 million per annum. Mark Gwynne produced a business plan to serve as a structure that might achieve the new long term vision and ambition of new management.

186 One direct and clear casualty of the new style of management was the departure of Steve Stannard who gave evidence for the defendants. Steve Stannard had been the general manager of GB Products and had occupied a senior managerial position. Thomas Beerens had identified him as a "key employee" who had been "head-hunted" in 2002 from a rival business, Bynorm, to develop the sale of lawnmower parts as an arm of the business. He had brought significant and important knowledge of the Australian lawnmower business to the plaintiffs which it did not previously enjoy. Ros Ferguson considered Steve Stannard to be a really good manager and a good "people person". He included his staff in every aspect of what was happening in the business so that they knew what was going on. He was approachable and easy to talk to. He had a complete knowledge of the products and was well regarded by the sales team. However, he left GB Products, although not to work for Jak Max, but for another rival company, Gripske.

187 Steve Stannard impressed me as a diligent and reliable worker giving evidence impartially. He had feared that the new management structure, and the goals they were seeking to achieve, was "an attempt at setting unachievable goals for [him] to

attain so that [he] might be sacked". On no view of the evidence was Steve Stannard in any way involved with the defendants' attempts to establish a new business. His reaction to events leading to his resignation in June 2005 is telling of the atmosphere which must have existed in the plaintiffs' business as early as then. The new title he was offered by Mark Gwynne was one which he considered to be a demotion, coming not long after he had been asked to accept a reduction in pay (which he had not accepted). When asked why he left the plaintiffs, he said that he was scared that he was going to be sacked and did not want to be demoted to a position which he considered to be that of a glorified warehouse manager and felt that he was being threatened into signing a contract.

188 The loss of some customers was directly attributable to the change in management style, practises and procedures unrelated to the conduct of the defendants. Laurie Tickell was a sales representative for GB Products between 1989 and April 2007. His evidence was of a significant reduction in sales in his territory after Paul Duggan left for reasons which I cannot connect to the conduct of the defendants. The sales in his territory reduced between \$50,000 and \$100,000 in the period between 30 June 2005 and the end of March 2007. Two majors customers whose sales declined were Fitzgerald Motors and Bathurst Mowerland. The restructure in the plaintiffs separating the sales and warehouse staff led to a reduction in liaison between internal sales staff and external sales staff. Stock was not delivered when it was supposed to be delivered. There was an inability to secure stock for the customers being serviced by Laurie Tickell including small line products and after market parts for mowers. This obviously had a big impact in the territory he serviced in New South Wales where quick delivery was needed and could not be provided. Laurie Tickell's evidence was that business he previously had for GB Products was being taken up by the local major opposition, Gripske. This was due to what he described as "hiccups" in the plaintiffs' warehouse in Melbourne, a lack of product knowledge in the sales team, low levels of stock held in the business making quick supply impossible. Such consequences are attributable to new management decisions.

189 Neville Lee-Archer gave evidence about the experience in his business. For some 27 years he has been involved in the wholesale supply to businesses in the powered lawn mowing and gardening industry. In the financial year ending 30 June 2005 his company purchased from GB Products chainsaw bars, chainsaws, saw chains and sprockets to the value of about \$55,000. Two years later they were still purchasing products from GB Products but by 2007 it had gone down to \$13,000 in value. A business decision was then made to exit what he described as the after market for some of the products he had previously sourced from GB Products. A factor in reducing the level of these purchases from GB Products was the perception of lack of support and inconsistency of supply by the plaintiffs. He gave evidence of placing orders and of being given a time frame for delivery that was either not met or too long for the customer. The departure of Dean Whitmore as a representative for GB Products meant that the Lee-Archer business was not being serviced as well as it had been for very many years previously. According to Neville Lee-Archer, he had known Dean Whitmore for many years and that the latter had made it a point to call in on a regular basis. Since Dean Whitmore's departure he had not seen a representative from the plaintiffs for what he thought was about two years.

190 Bradley Baber was another former sales representative of GB Products in New South Wales. He was first employed in that capacity in 1992 and described his role as creating new business, maintaining existing business that GB Products already had, and selling products in outdoor power equipment to specialist dealers. He had about 250 dealers whom he had to service in his territory. From time to time he would need to telephone the plaintiffs to make enquiries about the products and would deal either with Paul Duggan or the telephone sales staff. Bradley Baber's evidence was that after Paul Duggan left and Mark Gwynne took over the latter "changed the way that the whole company was going. He employed other people in the sales department that personally [he] didn't think were suited to the position because of the way that they wanted to take the company."

191 He gave an example of selling to a customer in New South Wales where, because of

the distance, he needed to ring the then phone sales person (Leigh Meadows) to check some stock whilst he (Bradley Baber) was standing with a customer needing information. The response from Leigh Meadows was that he would ring him back the next day because he was then too busy. Naturally Bradley Baber, and representatives like him, would fail to secure sales when stock could not be checked, or stock could not be secured, or when it was uncertain whether stock was available.

192 He also had some dealing with Veronica Chua whom he described as not very helpful (a negative view about her abilities shared by Thomas Beerens and Mark Gwynne). Her role was as person in charge of the plaintiffs' accounts after Paul Duggan's departure and, in that capacity, adopted a practice which, according to Bradley Baber, which I fully accept, was neither helpful nor calculated to increase customers. His evidence was that she "made it impossible to open accounts and to get people to deal with" the representatives. He gave as one example a new customer who had no trading reference or trading history. Because of that she insisted that before opening an account she would need a credit card number, create a debit against the account, and only once that debit was processed would regard the person as a reliable credit risk. This requirement was imposed upon the prospective new customer notwithstanding the fact that the person's family was known to Baber and had owned businesses in Newcastle before. Eventually an account was opened for this customer but only because Bradley Baber rang Mark Gwynne and "pleaded with him to give this guy an account" and "after a lot of pleading he [Mark Gwynne] did relent".

193 He gave evidence of another customer who had been spending between \$1,500 and \$2,000 a month who also experienced a delay in the opening of an account. That customer would not agree to a \$500 debit coming off a credit card and again, Bradley Baber sought the intervention of Mark Gwynne. He also gave evidence about complaints from customers about their dealings with GB Products account staff concerning what he described as "petty amounts". Small amounts due to the plaintiffs under \$100 might sometimes not be paid by customers until a subsequent

month when other items would combine to increase the total amount for which a cheque would be written in payment. In some cases the plaintiffs' new accounts staff would put these customers on "stop credit" preventing new parts being supplied to them with the consequence that customers would secure supply from other sources and, naturally, the plaintiffs would lose sales. One example he gave was of a certain David Jones who had been placing regular orders of about \$1,000 to \$1,500 who had been given a credit limit of \$500 notwithstanding a pattern of trading for the preceding six years. The response of that customer was to cancel the order and he took his business elsewhere.

194 I do not attempt to recount all of the evidence about the loss of custom that I do not attribute to the wrongful conduct of the defendants. These examples illustrate the difficulty I have in being confident about the quantification of damage referable to what on some view might be regarded as well intentioned but ill-informed management based upon theory and learning rather than practise and experience. Another major loss of business to the plaintiffs may have been due to the loss of the Carlton dealership, the seeds of which pre-dated the creation of Jak Max and, I infer, pre-dated even the contemplation of the departure of Paul Duggan.

195 Another impact on the plaintiffs' sales was the unrelated and independent change of Oregon's practice of selling its product in Australia which had the effect of substantially reducing the price of its competing Oregon bar. Glen Campbell was a purchasing officer for a Victorian business sourcing products of the kind sold by the plaintiffs. GB Products sold a bar and chainsaw bar at a price substantially lower than the equivalent Oregon bar which Glenn Campbell regarded as being of a better quality. Some time after 30 June 2005 Oregon's practise of selling in Australia through a third party changed with the result that the Oregon product came down in price and some purchasers switched products from the GB product to the Oregon bar, which they considered better than the GB Products equivalent. The evidence of Glenn Campbell was that the impact of the change in practise by Oregon was that his purchases from GB Products were reduced by some 90%. In fact the figures

appeared to be a drop from just under \$52,000 in the 2005 financial year to just over \$3,500 in the 2007 financial year.

196 These factors have an important impact upon the assessment of any damages claimed by the plaintiffs. It would be wrong to consider these factors as evidence of the plaintiffs being in the position of having suffered loss and damage which is impossible to ascertain in the sense in which that expression is sometimes used. It is sometimes the case that a person has suffered loss or damage but that that damage is impossible to ascertain. However, the existence of the factors which I have set out above do something more to the plaintiffs' claim: they undermine the confidence with which to conclude that any diminution in the plaintiffs' business was caused by or was referable to any loss or damage caused by the wrongful conduct of the defendants. In other words, the existence of these factors do not simply point to the difficulty of ascertaining an amount but, more fundamentally, point to the breaking of a causal nexus between the loss and the breach.

197 I can readily accept that the conduct of the defendants has caused some loss or damage to the plaintiffs. Thus I accept that their conduct may have interfered with employees, suppliers and customers. I can also readily accept that the connection between Jak Max and Paul Duggan may have caused the plaintiffs to suffer a competitor that it would not otherwise have faced during the restraint period. I can even accept as a matter of general principle that the expected, natural and direct consequence of what happened to the plaintiffs' business as a result of Paul Duggan's conduct was a loss of sales. But the fact is that there are other supervening factors which are equally attributable to a loss to the plaintiffs' business which may have occurred in any event.

198 The second of the two alternative bases on which I was urged to calculate the quantum of loss is one, therefore, which I am unable to adopt. Under it the plaintiffs claim \$1,102,000 upon the assumption that the amounts I should allow as the loss attributable to other causes is \$3,786,000 plus some such amount as I may determine for the loss referable to "staff relations" and "exodus of staff". The evidence before

me indicates that the impact of the change in management style was a significant contributing factor to a major loss suffered by the plaintiffs. Counsel for the plaintiffs candidly said that he was unable to assist me in determining what percentage I should attribute to those causes. Even a modest figure of 5% for each would wipe out the claim and I do not see how I could not allow an amount of at least 10% for what might be described as the consequence of unfortunate, if not bad, business practises upon a change of management. I also accept the submission of the plaintiffs' counsel that I should also err on the side of caution in determining the amount attributable to the impact of the drought and the loss of customers so that, in the end, if I were to determine damages on the second basis urged upon me I would reduce the loss by estimating at least a combined 10% impact for "staff relations" and "exodus of staff" and would increase the quantum referable to "drought" and "loss of customers" to the midway point between the amounts urged upon me by the plaintiffs and those urged upon me by the defendants. The net effect would be that no damages would be payable under this method of calculation.

199 The first basis upon which I was urged to calculate the loss has some merit. The theory behind it is an assumption that the measure of the plaintiffs' loss is a proportion of the sales made by Jak Max to the former customers of the plaintiffs of products of the kind which they had been purchasing from the plaintiffs in the past. The most significant variable in its calculation by the plaintiffs is the assumption that 70% of the Jak Max sales would have been retained by the plaintiffs.

200 A 70% assumed retention is not appropriate in this case given the impact of the change to the plaintiffs' management practises with its impact upon representatives. That was a significant factor and its impact would reduce the percentage of customers that I can safely assume that the plaintiffs would have retained. What that percentage should be is largely a matter of impression and on the material available to me I assess the negative impact of matters other than the defendants' conduct upon the plaintiffs' business to be more than 50% of any loss: that is, that the impact upon the plaintiffs' business of its new management style and practises was a

negative impact of more than half of what it lost. Erring on the side of caution, I will, therefore, assume that the plaintiffs would only have retained an amount of 45% of the sales which went to Jak Max during the 2006 and 2007 financial year. Assuming, therefore, the facts as set out above about the sales made by Jak Max to the former customers of the plaintiffs in respect of the products sold by the plaintiffs, I calculate that upon the assumption that the plaintiffs would have retained 45% of those sales, it lost sales to Jak Max of \$103,348 in the 2006 financial year and \$716,363 in the 2007 financial year. Applying the plaintiffs' actual gross margin of 38%, the lost gross profit for the combined years is \$311,490.52. From that I need to deduct the increase in variable costs of freight and discounts of some amount which, I assume, is some figure less than the 75% previously proffered by the plaintiffs. In fairness to the defendants I will assume the same figure giving a total loss of net profits of \$236,490. However, I accept the plaintiffs' submission that no further allowance is appropriate or needed for such matters on depreciation as had been made by the defendant's expert (Mr Clovis Bonner).

#### **D. Anton Piller order**

201 The defendants' counterclaim was for an amount of \$91,104.18 due to Paul Duggan under the share sale deed and for damages for physical inconvenience, distress, vexation and humiliation arising from what they describe in their submissions as the execution of an *Anton Piller* order on the premises of Paul Duggan in a "high-handed and unwarranted intrusion of a private home". The first of the claims is admitted by the plaintiffs and Paul Duggan is, therefore, entitled to an order in the sum of \$91,104.18.

202 On 31 October 2005 Whelan J granted an *ex parte* order upon counsel for the plaintiffs, on instructions, giving an undertaking to the Court that they would pay to the defendants any damages which the Court or a Judge may be of the opinion ought to be paid to cover any loss or damage sustained by reason of the order. In *Columbia Pictures Industries v Robinson*<sup>69</sup> Scott J said:

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<sup>69</sup> [1987] Ch 38.

Damages for breach of a cross-undertaking ought, in my judgment, to be primarily compensatory. But I do not think, in the present case, that is the whole of the basis on which damages can be granted. It is well settled that an increased level of damages, sometimes described as aggravated damages, can be awarded where trespass to land or trespass to goods has been accompanied by circumstances of contumely or affront ... That has been so in the present case by reason, in my judgment, of the excessive and oppressive manner in which the *Anton Piller* order was executed. There is not, in terms at least, any claim for exemplary damages in the present case. One of the categories of cases identified by the judgment of Lord Devlin in *Rookes v. Barnard* [1964] A.C. 1129 in which exemplary damages may be claimed is that of cases which involve oppressive, arbitrary or unconstitutional action by servants of the government. Solicitors who execute an *Anton Piller* order do so, in important part, as officers of the court. It is the court which places them in a position to do that which would, without the court authority, be a flagrant and inexcusable trespass. They are placed in a position in which their actions are likely to cause shock, distress and often outrage to those against whom the orders are executed. If, in execution of these orders, they act outside the terms of the order oppressively or excessively, I am disposed to think that Lord Devlin would have included the case in the category to which I have referred.<sup>70</sup>

In that case Scott J ordered that damages of £10,000 be paid in damages by the plaintiffs to the defendants under the cross-undertakings. That amount was, in effect, £2,500 to the company and £7,500 to Mr Robinson reflecting the fact that individuals are affected by contumely and affront whilst inanimate corporations are not.

203 The decision was referred to with approval in *Flocast Australia Pty Ltd v Purcell (No. 2)*<sup>71</sup> where Heerey J added:

I do not think this Court should wash its hands and decline to adjudicate on the respondent's complaint that the applicant abused the exceptional power which the Court gave it.<sup>72</sup>

In this case the defendants pointed to the matters which were put to Whelan J in support of the *Anton Piller* order which they say have been shown to be wrong. One matter which was put, and has since been found to be wrong, was an important element of the expert evidence given by Marco Gallichio suggesting that Paul Duggan's email files had been overwritten. In subsequent expert evidence given to me by Marco Gallichio he accepted that there was no overwriting of emails and both

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<sup>70</sup> Ibid, 87.

<sup>71</sup> [1999] FCA 309 (Unreported, Heerey J, 31 March 1999).

<sup>72</sup> Ibid, [20].

he, and the expert witness called for the defendants on this point, both agreed that there was no overwriting of emails.

204 In granting the order sought Whelan J said:

It is alleged against Mr Adam Duggan that he breached his duty of loyalty before he left employment by undertaking preparations to establish a competing business. The affidavits depose to a number of matters said to be relevant to this allegation. It seems to me that the material which is most compelling in this respect concerns the dealings with Elfving, a Finnish company interested in obtaining generators. It appears from the emails that have been produced to me that the business opportunity represented by this company's interests was diverted from GB in a manner involving Mr Adam Duggan at a time when he was still employed by the plaintiffs or one of them.

There were other circumstances which also give rise to concern but the emails concerning the generators appear to me to establish the sort of strong prima facie case which is necessary before an order of this kind can be made.

It may be, as the defendants contended, that some of the material relied upon in support of the *Anton Piller* order was inaccurate or incomplete. However I do not find any of the material to have been inaccurate in any culpable sense. The evidence of Marco Gallichio explained any error in his conclusions by the limited information then available to him and the limited time he had to complete his tasks. He gave evidence as an independent witness with no interest in the outcome or in seeing either side prevail. His evidence was given fairly and helpfully and I accept that the material available to him at the time of the evidence given in support of the *Anton Piller* order honestly and fairly permitted him to reach the conclusions which he reached at that time. More importantly, the prima facie conclusion reached by his Honour concerning the Elfving emails, accords with my own conclusions after having heard all of the evidence. In the circumstances I do not find that the execution of the *Anton Piller* order was improperly sought, improperly obtained or improperly executed. I therefore dismiss the claim for damages. If, contrary to the view I reached on this matter, I had found that the claim had been made out, I would award only nominal damages of \$1 in view of the conclusions I have reached more generally about the conduct and evidence of the defendants.

### E. Orders

205 The parties have asked that I not make any cost order until they have had the opportunity to put other matters before me. The findings I have made, and the conclusions I have reached about damages, may also have an impact upon what, if any, costs should be awarded. In the circumstances, I will decline to order any costs until hearing further submissions from the parties. Those submissions should deal also with the potential application of r 63.23 *Supreme Court (General Civil Procedure) Rules 2005*.

206 The parties also agreed that any judgment order in favour of the plaintiffs should simply be set off by the amount admitted to be due to Paul Duggan. I should also add, for completeness, that I consider the separate liability of the defendants interwoven and impossible to disentangle. Accordingly, on the claim and counterclaim I will order that the defendants pay to the plaintiffs the sum of \$145,385.82.

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