Equity Division
Supreme Court
New South Wales

Case Title:	Seven Network (Operations) Limited & Ors v James Warburton (No 2)
Medium Neutral Citation:	[2011] NSWSC 386
Hearing Date(s):	5, 6, 7, 8, 11, 12 and 13 April 2011
Decision Date:	12 May 2011
Jurisdiction:	Equity
Before:	Pembroke J
Decision:	See paragraph [105]
Catchwords:	CONTRACT – construction – avoidance of capricious, unreasonable or inconvenient consequences UNCERTAINTY – applicable principles – complex restraint of trade clauses – multiple combinations and permutations – mere complexity insufficient ESTOPPEL – applicable principles – formal legal relationship – necessity for clear and unambiguous representation – reliance unreasonable – no reasonable expectation of reliance by representor REPUDIATION – no intention to renounce contractual obligations – no repudiation RESTRAINT OF TRADE – applicable principles – restraint contained in management equity participation deed not employment contract – legitimate interest – reasonableness of restraint period – factual considerations – confidential information – business cycle of negotiations with advertisers – significance of acknowledgement by employee of reasonableness of restraint period – significance of legal advice – pacta sunt servanda

DISCRETION – circumstances at date of hearing – relevance of gardening leave - no reasonable likelihood of misuse of confidential information after 1 January 2012 – no legitimate protectable interest after that date – injunctive relief declined after 1 January 2012

Legislation Cited: Restraints of Trade Act, 1976 (NSW)
Legal Profession Act (2004)

Cases Cited: Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (1973) 133 CLR 288
Antaios Campania Naviera SA v Salem Rederiema AB (The Antaios) [1985] AC 191
Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) 16 NSWLR 582
Australian Broadcasting Commission v Australian Performing Rights Association Ltd (1973) 129 CLR 99
Austress-Freyssinet Pty Ltd v Kowalski [2007] NSWSC 399
Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435
Baltic Shipping Co v Dillon (1911) 22 NSWLR 1
Biogen Inc v Medeva plc [1997] RPC 1
Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539
Buckley v Tutty (1971) 125 CLR 353
Central London Property Trust v High Trees House Ltd [1947] KB 130
Codelfa Construction Pty Ltd v State Rail Authority (1982) 149 CLR 337
Corporate Express Australia Ltd v Swift-McNair (Unreported, Supreme Court of New South Wales, Young J, 2 October 1998)
Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337
Dawnay Day & Co Ltd v D'Alphen [1998] ACR 1068
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423
Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] AC 269
Extraman (NT) Pty Ltd v Blenkinship (2008) 220 FLR 75
Fawcett Properties Ltd v Buckingham County Council [1961] AC 636
Franks v Equitiloan Securities Pty Ltd [2008]

NSWSC 33
Giumelli v Giumelli (1999) 196 CLR 101
Hanna v OAMPS Insurance Brokers Ltd [2010] NSWCA 267
Havyn Pty Ltd v Webster [2005] NSWCA 182
Investors Compensation Scheme Limited v West Bromwich Building Society (1998) 1 WLR 903
John Fairfax Publications Ltd v Birt [2006] NSWSC 99
Legione v Hately (1983) 152 CLR 406
McCann v Switzerland Insurance Ltd (2000) 203 CLR 579
Miles v Genesys Wealth Advisers Ltd [2009] NSWCA 25
Mobil Oil Australia Ltd v Guinea Developments Pty Ltd [1996] 2 VR 34
Orton v Melman [1981] 1 NSWLR 583
Otis Elevator Co Pty Ltd v Nolan [2007] NSWSC 593
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17
Provident Financial Group plc v Hayward [1989] 3 All ER 298
Queensland Co-operative Milling Association v Pamag Pty Ltd (1973) 133 CLR 260
Scammell (G) & Nephew Ltd v Ouston [1941] AC 251
State Rail Authority (NSW) v Heath Outdoor Pty Ltd (1986) 7 NSWLR 170
Summer Hill Business Estate v Equititrust [2010] NSWSC 776
Synavant Australia Pty Ltd v Harris [2001] FCA 1517
Thomas v SMP International Pty Ltd (No 4) [2010] NSWSC 984
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] 219 CLR 165
Tullett Prebon (Australia) Pty Ltd v Purcell [2008] NSWSC 852
Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd (1968) 118 CLR
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
Woolworth Limited v Mark Konrad Olson [2004] NSWCA 372

Texts Cited:	Gleeson AM "Contractual Uncertainty" (1985) 1 Aust Bar Rev 74 Macquarie Dictionary (5th ed. 2009)
Category:	Principal judgment
Parties:	Seven Network (Operations) Limited – first plaintiff Seven Media Group Pty Ltd – second plaintiff Seven Network Limited – third plaintiff Pleiades Media International ULC – fourth plaintiff James Warburton – defendant
Representation	
- Counsel:	A J Meagher SC, R M Goot SC, A S Bell SC and D R Sibtain – for the plaintiffs J N West QC and R S Warren (and M Seck from 11 April) – for the defendant
- Solicitors:	Johnson Winter & Slattery – for the plaintiffs Stevens & Associates Lawyers – for the defendant
File number(s):	2011/00076809
Publication Restriction:	

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JUDGMENT

Introduction

1 Mr Warburton is a highly skilled and talented television executive. At the Seven Network, he was the natural successor to David Leckie as chief executive officer. Like Caesar however, Mr Leckie was not ready to go. In late February an opportunity arose at Network Ten. Lachlan Murdoch then offered, and Mr Warburton accepted, a position as Ten's new chief executive officer to commence from 14 July 2011. Mr Warburton signed on 2 March. But there were and are contractual obstacles.

2 Mr Warburton is bound by an employment contract with Seven which runs, according to the plaintiffs, until 14 October 2011. He is also bound by a management equity participation deed (MEP Deed) which, among other things, was designed to protect the multi-million dollar investments of Seven Network Limited and Kohlberg Kravis Roberts & Co L P (KKR) in Seven Media Group Pty Ltd (SMG). When the hearing commenced, SMG was the parent of Seven Network (Operations) Limited (SNOL), the operating company in the Seven group and Mr Warburton's employer. KKR is a well-known private equity investment firm based in New York which conducts its business on a global scale. The MEP Deed imposes lengthy restraints on the executive participants in the scheme, preventing them from competing with SMG or any of its subsidiaries after the participant has ceased to be employed or engaged by a company in the group.

3 One of the abiding principles of a civilised system of law such as ours is that contracts are meant to be observed. Lawyers sometimes use the Latin phrase *pacta sunt servanda* to describe the principle. We make decisions on the assumption that contractual obligations will generally be performed and solemn commitments will not be ignored. The general policy of the law is that people should honour their contracts: *Baltic*

Shipping Co v Dillon (1991) 22 NSWLR 1 at 9 (Gleeson CJ). If there were not adherence to such a principle, the conduct of private and commercial affairs would become an uncertain jumble. And certainty is what the law of contracts strives to achieve. It matters not, as I have found in this case, that Mr Warburton may have forgotten or overlooked the terms of the MEP Deed to which he is bound. The enforcement of a commercial contract does not depend on a party's knowledge of its terms: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165 at [43] - [44].

4 There are however qualifications to the general principle that contracts are meant to be observed. Courts will generally not order specific performance of employment contracts. In principle however, they will enforce negative covenants that restrain an employee from competing against an employer: *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 346-348. But no matter what the parties have agreed, negative covenants imposing a restraint on an employee's trade will not be enforced if the restraint is not necessary for the reasonable protection of the legitimate interests of the employer or those for whose benefit it was agreed: *Buckley v Tutty* (1971) 125 CLR 353 at 376; *Curro v Beyond Productions Pty Ltd* (supra) at 344. Further still, even if the restraint is reasonable when considered as at the date of contract, the court always retains a discretion to withhold or limit injunctive relief if a proper basis is established at the hearing: *Tullett Prebon (Australia) Pty Ltd v Purcell* [2008] NSWSC 852 at [88] and [91] (Brereton J). And Section 4(1) of the Restraints of Trade Act, 1976 (NSW) arguably provides additional flexibility. The reasonableness of the restraint imposed by the MEP Deed, and the period of any injunction that should be granted to enforce it, constitute the primary issues that I have to decide.

5 The outer boundaries of the parties' competing contentions on these primary issues are clear. The plaintiffs say that Mr Warburton's employment contract will not expire until 14 October 2011. They seek to restrain him from taking employment with Network Ten or any other competitor for a further twelve (12) months after that date, namely until 14

October 2012. This is notwithstanding that when he signed his contract with Network Ten on 2 March 2011, Mr Warburton was required to leave the Seven premises and has been prevented from having access to any of Seven's confidential information, clients or staff since that date.

6 Mr Warburton, on the other hand, contends that the restraint in the MEP Deed is invalid. But if it is valid, he contends that the starting point for the commencement of the restraint should be 2 March 2011, not 14 October 2011, and that the restraint should only be for a period of six (6) months - so that Mr Warburton will be free to take up competitive employment in September. I have reached the view that a restraint for ten (10) months from 2 March 2011 is an appropriate period that is justified by the evidence.

7 There are however a number of anterior questions that require resolution. They include the proper meaning of certain provisions of the employment contract and the MEP Deed and whether the restraint of trade clause itself is void for uncertainty. There are also several threshold issues. One issue is whether a statement made by Mr Leckie to Mr Warburton on 23 February 2011 has the legal effect of preventing the plaintiff companies, or some of them, from enforcing their legal rights under the MEP Deed. This requires consideration of the doctrine of estoppel. Another is whether, by requiring Mr Warburton to leave the premises, by quarantining him and by giving him no work to do, SNOL has repudiated the employment contract. This requires a finding that it evinced an intention either that it would no longer be bound by the contract or that it would only perform it in a manner that was substantially different to that which it was required to do. I will deal first with the issues of contractual interpretation and uncertainty. I will then deal with the estoppel and repudiation issues. They have little to commend them. I will leave to last the question of the reasonableness and validity of the restraint and the extent to which, if at all, Mr Warburton should be prevented from taking up employment as chief executive officer of Network Ten.

The Witnesses

8 As so often happens, the evidence ranged widely; beyond that which I have found necessary for the determination of the issues in dispute. I have made findings of fact, where necessary, to explain the steps in the reasoning process by which I have resolved the competing contentions, but not otherwise. The extent to which it is necessary to do so is a question of judgment as to what is appropriate in the particular case: *Evans v Evans* [2011] NSWCA 92 at [141] – [142]. In particular, although I have resolved some differences in the evidence of Mr Warburton and Mr Leckie, it has not been necessary to engage in any detailed critical analysis of the evidence given by members of the Seven Network's management team. There was a parade of witnesses in this category, all of whom, as might have been expected, were uniformly supportive of their employer's case. They included, in addition to Mr Leckie, Mr McWilliam, Mr Burnette, Ms Baker and Ms Renwick. Where I have made findings drawn from their evidence, I have done so because rational analysis or comparison with other evidence demanded it. As to Mr Leckie and Mr Warburton, I have preferred Mr Warburton's version of the conversation on 23 February 2011, but there are practical limits to the extent to which it is possible to explain all of the considerations and impressions that have led to that conclusion: *Biogen Inc v Medeva plc* [1997] RPC 1 at 45 (Lord Hoffmann); *Thomas v SMP International Pty Ltd (No 4)* [2010] NSWSC 984 at [7].

Employment Contract

9 Mr Warburton entered into his current employment contract on 14 July 2008. The meaning of two of its provisions is contentious. The first provision is Clause 1(a). It provides:

> 1(a) You will make yourself available to carry out those duties specified in Item 1 of the Schedule hereto (the Duties). Seven is entitled but not obliged to require you to perform

the Duties. You acknowledge that as Seven grows, its business may change over time, and agree that the Duties may also change.

10 Item 1 of the Schedule specifies the Duties as follows:

> A. Chief Sales & Digital Officer – Seven Media Group – and/or other duties:
>
> (i) related to that position; or
> (ii) that you are directed by the Executive to perform.
>
> B. And, as requested by the Executive but consistent with the Duties referred to in Item 1A:
>
> (i) participate in the promotion of any Seven or Seven Network program and/or in the promotion of Seven or the Seven Network;
> (ii) participate in outside promotions for Seven or the Seven Network;
> (iii) attend such business and social functions as the Executive deems necessary; and
> (iv) participate or assist in Seven or Seven Network produced special when required.

11 Clause 1(a), when read with Item 1 of the Schedule, makes clear that the "Duties" of Mr Warburton are not fixed and that SNOL may require him to perform any duties whatsoever, whether related to his position as chief sales and digital officer or not. More importantly, the clause also has the effect of permitting SNOL to require him to perform no duties at all. It is not obliged to require Mr Warburton to perform the Duties. This effectively means anything, including duties not related to his position that he may, or may not, be directed by the Executive to perform.

12 This is unsurprising. In competitive industries, where the poaching of staff is a feature of the market place, it is common for talented employees who have announced that they will be going to a competitor, to be required to serve out their term without being given any work to do. Mr Warburton knew this. I regard it as a mutually known background fact which informs

the question of construction of Clause 1(a). I would however have reached the same conclusion as a matter of textual analysis, having regard to the language and syntax of the clause.

13 In fact Clause 1(a) really does no more than enshrine the general law rule that applies except in some limited cases. Sir Owen Dixon encapsulated that general rule when he adopted John Milton's memorable last line from *On His Blindness* (1654-5) "They also serve who only stand and wait": *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 466. Those words, and the principle for which they are taken to stand, have been repeated and approved many times since. The Court of Appeal's decision in *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 342 is a recent example. *cf Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at [80] (Callinan & Heydon JJ). It follows, in my opinion, that on its proper construction, Clause 1(a) does not oblige SNOL to provide work for Mr Warburton to perform. It will be necessary to return to this issue in connection with the repudiation issue.

14 The second provision of the employment contract which is contentious is Clause 2. It provides:

> This Letter of Appointment takes effect from the date specified in Item 4 of the Schedule (the Commencement Date) and shall continue for the period specified in Item 5 of the Schedule (the Term).

15 Item 5 of the Schedule is as follows:

> TERM
>
> A Three (3) years
>
> B Unless otherwise agreed in writing, your employment with Seven will continue beyond the expiration of this Agreement, on the same terms as those in effect immediately prior to the expiration of this Agreement, until

> terminated by either party by providing the other party with three month's written notice of such termination.

16 Three immediate textual points may be made. First Clause 2 does not state that the contract shall continue up until a particular point in time but rather "for the period specified in Item 5 of the Schedule". Second, the period specified in Item 5 has two elements, both of which must be read together. Third, the specified period is described as the "TERM" and is defined in and by the totality of Clauses A and B of Item 5. Thus, the effect of Clause 2 and Item 5 of the Schedule is to prescribe a default position that applies at the end of the three year fixed term unless the parties otherwise agree in writing. In the three year period until 14 July 2011, Mr Warburton had no legal right to terminate his employment contract but he did have the right, on three months notice, to terminate the further contract which would commence from that date. It follows that, absent termination by SNOL, or agreement in writing, the earliest date by which Mr Warburton can bring his contract of employment to an end is 14 October 2011.

Management Equity Participation Deed

17 Mr Warburton entered into the MEP Deed on 20 December 2007. A number of other senior executives also did so around that time. As I have already foreshadowed, the provenance of the MEP Deed was the decision by KKR to invest in SMG. The post-employment restraint which is in issue is in the MEP Deed, not the employment contract. I will explain the scope and surrounding context of the MEP Deed more fully when dealing with the reasonableness and validity of the restraint. But there is an initial question of construction.

18 Clause 17.3(a)(i) of the MEP Deed provides that a twelve (12) month restraint takes effect from whenever the employee "ceases to be employed or engaged by a Group Company". A question arises as to what is the proper meaning of those words. Their evident commercial purpose would

appear to be to protect SMG, Seven Network Limited and KKR during a twelve month period after the employee has ceased to have access to the confidential information, clients and staff to which he would be exposed in the course of his employment. In the usual case, the cessation of that access would occur when the employment or engagement comes to an end. However, if the words are given the construction for which the plaintiffs contend, a result might well ensue whose consequences could be capricious or unreasonable.

19 Thus, in the case of an employee like Mr Warburton, who has been told to stay away from the premises and prevented from having access to any confidential information, clients or staff, but is still strictly employed by SNOL, the plaintiffs' construction will effectively extend the period during which the object of the restraint is achieved. In Mr Warburton's particular case, it will mean that he will be quarantined from Seven's confidential information, clients and staff for more than nineteen (19) months – namely for the balance of the unexpired term of the employment contract until 14 October 2011, as well as for the length of the stipulated restraint period until 14 October 2012.

20 This would be unreasonable. I acknowledge that Mr Warburton will continue to be remunerated until the expiry of his employment contract. But the effect of the clause, according to the plaintiffs' construction, is that the length of the period during which an employee could be quarantined from Seven's confidential information, clients and staff will be longer or shorter depending on when he or she announces that he is going to a competitor and is required to cease work. If the words "ceases to be employed or engaged" are given the construction for which the plaintiffs contend, the restraint would become a fickle caprice. The effective length during which its commercial purpose could be achieved would vary depending on the length of gardening leave. It could, in effect, give more protection to the plaintiffs in respect of Seven's confidential information, clients and staff than they bargained for.

21 For the reasons that follow, I have concluded that the words "ceases to be employed or engaged" should be construed so as to apply from 2 March 2011. But I should interpolate to explain that the resolution of this dispute is ultimately arid and of no consequence in the result at which I have arrived. That is because I have formed the view on the particular facts of this case, that any restraint beyond 1 January 2012 exceeds what is necessary for the reasonable protection of the legitimate interests of the plaintiffs. Even if I were wrong on the construction of Clause 17.3(a) of the MEP Deed, I would arrive at the same end result by withholding or limiting injunctive relief in the exercise of my discretion. Whether the starting point for the twelve (12) month restraint is 2 March or 14 October 2011, I do not think that it is appropriate to restrain Mr Warburton beyond 1 January 2012. I deal with these discretionary issues at paragraphs [81] to [91] below.

Ceases to be Employed or Engaged

22 The competing contentions as to the meaning of the words "ceases to be employed or engaged" raise for consideration the principle of construction explained by Gibbs J in *Australian Broadcasting Commission v Australian Performing Rights Association Ltd* (1973) 129 CLR 99 at 109:

> If the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, even though the construction adopted is not the most obvious or the most grammatically accurate.

23 When Gibbs J explained the basis on which a court might favour a construction which is "not the most obvious or the most grammatically accurate", he was not elucidating a principle intended to operate in isolation from the general principles of construction. He was simply recognising that in certain cases it will be apparent that the meaning that should be attributed to contractual language is not always that which is the most obvious or grammatically accurate.

24 This is merely a consequence of the intrinsically ambulatory nature of words. Language means different things to different people, even when the same words are used. That is because words are mere symbols. They can only "convey meaning according to the circumstances in which they are used": *Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337 at 401 (Brennan J). That is why there is an actual and conceptual difference between the meaning of words – "a matter of dictionaries and grammar" – and the meaning of a contractual document – "what the parties using those words against the relevant background would reasonably have understood [them] to mean": *Investors Compensation Scheme Limited v West Bromwich Building Society* (1998) 1 WLR 903 at 912-3 (Lord Hoffman); *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] 210 CLR 181 at [11]. The wisdom of Learned Hand J's mid-century warning "not to make a fortress out of the dictionary" remains as forceful today as it was when first uttered: *Cabell v Markham* 148 F.2d 737 at 739.

25 If they had turned their minds to the question at the time they made their contract, I do not think that the parties would have necessarily embraced the construction for which the plaintiffs now contend. They would have recognised that it could operate in a manner that might be unreasonable. The maximum protection which the plaintiffs sought was twelve months. The only logical reason for that protection was Mr Warburton's access to confidential information, staff and clients during the course of his employment. The parties must be taken to have recognised that circumstances could arise during the period of employment that might bring to an end the relationship of employment, if not the contract of employment, and which would deny to Mr Warburton access to any confidential information, clients or staff: *cf Tullett Prebon v Purchell* (supra) at [54]. I do not think a construction that gives to the plaintiffs the benefit of the full twelve (12) month restraint period, without credit for any period of gardening leave, accords with the presumed intention of the parties.

26 Associated with these considerations is the necessity to adopt a businesslike interpretation: *McCann v Switzerland Insurance Ltd* (2000) 203 CLR 579 at [22]. Emphasising the need to adopt a businesslike interpretation in a commercial contract is another way of saying more deftly, and with less robustness, what Lord Diplock declaimed in *Antaios Campania Naviera SA v Salem Rederierna AB (The Antaios)* [1985] AC 191 at 201:

> If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

27 I acknowledge that business commonsense is itself a topic upon which minds might differ: *Maggbury Pty Ltd v Hafele Australia Pty* Ltd (supra) at [43]. But nevertheless, I do not think that the plaintiffs' construction is businesslike. It relies on a detailed and semantic analysis which is not compelled by the language and is not the only reasonable possibility. Where the language is open to two constructions, I should prefer that which avoids a consequence that appears to be capricious or unreasonable, even if it is "not the most obvious or the most grammatically accurate".

28 On the plaintiffs' construction, the words "ceases to be employed or engaged" refer only to a contractual termination of a contract of service (employment) or a contract for services (engagement). Their contentions include, among others, that the use of the ablative "by", which qualifies "employed or engaged" in Clause 17.3, connotes only the termination of a contractual relationship. I think it is neutral. It does not, by itself, point convincingly to one construction or the other. They also point to the language of Clause 17.1(e). It refers specifically to "employment or engagement". Unlike Clauses 17.1(a)-(d), which are concerned with the Restraint Period that applies after the period of employment or engagement, Clause 17.1(e) is concerned with conduct during the period

of employment or engagement. It imposes an obligation of fidelity, preventing the employee from being elsewhere employed or engaged. If the plaintiffs' construction of "employment or engagement" and "employed or engaged" were adopted, Clause 17.1(e) might operate unfairly. It could prevent Mr Warburton until 14 October 2011 from being employed or engaged in any other business whatsoever, even if not in competition with a Group Company, and regardless of the extent of his involvement in that business, or the lack of significance that any such business might have to SMG. This is unlikely to have been intended. I acknowledge that Clause 17.5(c) provides an exception, but its operation is subject to the Investors being satisfied that the employee "will continue to be able to satisfy fully his obligations under his service arrangements with the Group". This hardly seems applicable or appropriate in circumstances such as these where, notwithstanding that the contract remains on foot, Mr Warburton's services are no longer required and are not being rendered, and the relationship of employer and employee – with its concomitant mutual trust and loyalty – has been destroyed.

29 The plaintiffs also suggested that the use of the expression "service arrangements" in Clauses 17.5(b) and (c) supported their approach. But I do not think so. The use of that expression is not compelling, especially when considered against the unreasonable and capricious consequences that I have described. Nor do I think that the use of the word "terminate" in Clause 22.27 is necessarily determinative of the plaintiffs' construction.

30 For those reasons, I have concluded that the words in Clause 17.3(a)(i) "ceases to be employed or engaged" should be construed to mean that point in time when the employee ceases to be employed or engaged in an effective practical sense. That is when the relationship, if not the contract, of employer and employee has ceased and after which the employee is prevented from performing duties and having access to the very confidential information, clients and staff that the restraint clause is designed to protect. In this case, that date is 2 March 2011.

31 Additionally, it is possible to arrive at the same result by a different approach - recognising that the words “employed” and “engaged” are joined by the disjunctive “or” and by attributing separate significance to each of them, rather than by reading the phrase “employed or engaged” collectively. On this approach, the use of the disjunctive should be regarded as a means of distinguishing between formal “employment”, which in Mr Warburton’s case is continuing, and “engagement” in the provision of his service or services, which has wholly ceased. The ordinary and natural meaning of the adjective “engaged” is “busy or occupied, involved”: *Macquarie Dictionary*, 5th edition, 2009. This is the sense in which the word “engaged” is used in Clause 17.1(a). In an effective practical sense, Mr Warburton has not been “engaged” since 2 March in the performance of duties and the provision of services to SNOL. He ceased to be “engaged” when Mr Leckie made clear that he did not want him on the premises, around the staff or dealing with clients.

32 For this additional reason, I have concluded that the trigger for the commencement of the Restraint Period – “ceases to be employed or engaged by a Group Company” – takes effect from 2 March 2011. These points of construction are admittedly finely tuned and credible arguments can be developed in both directions. Ultimately, I have preferred the construction that, in my view, best avoids consequences that may be capricious or unreasonable. I reiterate however, that the resolution of this question of construction does not affect my conclusion as to the ultimate result – for the reasons that I explained in paragraph [21] above.

Void for Uncertainty

33 The remaining question of construction is whether the restraint of trade clause in the MEP Deed is void for uncertainty. If it is, Mr Warburton is not subject to any post employment restraint. The restraints are set out in Clause 17. Clause 17.1(a) provides that each of the Participants undertakes to SMG and each of the Investors (as defined) that he or she

will not directly or indirectly carry on or be engaged or involved in, or prepare to carry on or be engaged or involved in, any trade, business or undertaking which is the same as, substantially similar, to or competes with, any business of any of the Group Companies. The restraints operate for the Restraint Period and within the Restrained Area.

34 Clause 17.3(a) defines the Restraint Period to mean:

(A) the period of 12 months from the date the Participant or Nominated Employee ceases to be employed or engaged by a Group Company, unless that period is held invalid for any reason by a court of competent jurisdiction;

(B) in which case, the period of 6 months from the date the Participant or Nominated Employee ceases to be employed or engaged by a Group Company, unless that period is held invalid for any reason by a court of competent jurisdiction;

(C) in which case, the period of 3 months from the date the Participant or Nominated Employee ceases to be employed or engaged by a Group Company.

35 Clause 17.3(b) defines the Restrained Area to mean:

(i) any region of the world (eg South and North Asia, Europe or the Americas) in which any Group Company carries on business at the time the relevant Participant or Nominated Employee ceases to be employed or engaged by any Group Company, unless that area is held invalid for any reason by a court of competent jurisdiction, then;

(ii) any country in which any Group Company carries on business at the time the relevant Participant or Nominated Employee ceases to be employed or engaged by a Group Company, unless that area is held invalid for any reason by a court of competent jurisdiction, then;

(iii) any state, county, dominion or territory within any country in which any Group Company carries on business at the time the relevant Participant or Nominated Employee ceases to be employed or engaged by a Group Company, unless that area is held invalid for any reason by a court of competent jurisdiction, then;

(iv) an area within a 300 kilometre radius of any city or town in which any Group Company carried on business at the time the relevant Participant or Nominated Employee ceases to be employed or engaged by any Group Company.

36 Clause 17.4 states that the provisions of Clause 17 have effect as several, separate and independent covenants consisting of each separate covenant set out in Clause 17.1 combined, where applicable, with each period set out in Clause 17.3(a), and each combination combined, where applicable, with each geographical area set out in Clause 17.3(b). In addition, Clause 17.6 states that each of the obligations in Clause 17 is severable and independent.

37 In this case, Mr Warburton's contention that Clause 17 is void for uncertainty depends on the supposed complexity of the clause and the number of combinations and permutations to which it gives rise. It is a truth frequently acknowledged in this context that restraint of trade clauses, with an ever diminishing and cascading series of restraints based on different restraint periods and geographical areas, have become a modern phenomenon. This is evident from a consideration of recent decided cases, most of which are collected in *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267. One that is not cited in the comprehensive review of the authorities in that decision is *Corporate Express Australia Ltd v Swift-McNair* (Unreported, Supreme Court of New South Wales, Young J, 2 October 1998).

38 The weakness in the argument is that the legal doctrine of uncertainty does not depend on mere complexity. Nor is opacity, obscurity or vagueness sufficient by themselves. There must be such a lack of clarity that the clause is unworkable; that it cannot be given effect in a meaningful way. Lord Denning once said that before a clause is held to be void for uncertainty, it must be "utterly impossible" to put a meaning on the words: *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 at 678. A M Gleeson QC approved this particular statement in a paper

delivered in 1984. See *Contractual Uncertainty*, (1985) 1 Australian Bar Review 74

39 Perhaps the clearest statement of the principle is that by Lord Wright in *Scammell (G) & Nephew Ltd v Ouston* [1941] AC 251 at 268:

> The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract.

40 Sir Garfield Barwick cited this passage when he made his frequently quoted observation that courts must strive for a contractual intention, and not adopt a narrow or pedantic approach in doing so, especially in commercial arrangements: *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 436-7. Thus the first duty of a court is to give effect to the parties' contract and not to be too quick to strike it down. To find that a contractual provision is void for uncertainty should be a last resort. If that occurs, it will be a recognition that despite the parties' best intentions, and the court's best endeavours, the court is unable to attribute to the parties any particular intention. In that event, the only conclusion open is that the clause cannot be made to work and is meaningless.

41 All of this leads to the conclusion that Mr Warburton's uncertainty argument must fail. There may be a case, as Allsop P observed in *Hanna v OAMPS* (supra) at [13], where a complex and difficult restraint of trade clause, with multiple combinations and permutations, is so impenetrable as

to lack coherent meaning. But this is not such a case. In my view, Clause 17 is comprehensible and workable. I do not think that it is void for uncertainty.

Estoppel

42 I have already adverted to the threshold issue of estoppel. In broad terms, estoppel, a word of Old French derivation that has become enshrined in our law, refers to a bar or impediment preventing a party from asserting a fact or a claim that is inconsistent with a position previously taken. Mr Warburton contends for an estoppel preventing the plaintiffs from enforcing the restraint in Clause 17.3 of the MEP Deed. He says that he was led to believe that no impediment would be put in his way by the plaintiffs to his taking up employment as the chief executive officer of Network Ten at the conclusion of his current contract with Seven.

43 The starting point for this contention is a conversation between Mr Leckie and Mr Warburton on 23 February 2011. On that day, news broke that the Network Ten board had terminated the employment of its chief executive officer, Mr Grant Blackley. Mr Warburton received a message that Mr Leckie wanted to see him at 5pm. When they met, Mr Leckie asked Mr Warburton if he was going to Ten. Mr Warburton said that he had not been made an offer by Ten; that he imagined that he would be a good candidate; but that he was waiting for an offer from Mr Stokes. This was a reference to a discussion that had taken place on 17 February when Mr Stokes told Mr Warburton that he would in time be CEO of the entire group; but that this was not something that he could achieve for eighteen months; and that he would come back to Mr Warburton with an offer by Monday 21 February at the latest. Mr Stokes had added that "I need David for twelve months, possibly eighteen, and I need you for longer".

44 As the conversation on 23 February between Mr Warburton and Mr Leckie continued, Mr Warburton said, with some justification, "I'm yours to lose".

Mr Leckie asked Mr Warburton if he was close to Lachlan Murdoch. To which Mr Warburton replied "I've got to know him well". Mr Leckie then made the statement on which this aspect of the case depends. According to Mr Warburton, Mr Leckie said:

> You know me. If you want to leave to do Ten, no dramas. We will let you go and just get on with it. You know what I am like. No dramas.

45 Importantly, Mr Warburton responded by saying "Let's see what happens with the contract". This was another reference to the offer he was waiting to receive from Mr Stokes. I accept Mr Warburton's account of his conversation with Mr Leckie. In particular, I accept that Mr Leckie said words to the same or similar effect as those which Mr Warburton attributed to him. I thought Mr Warburton's recollection of those words was probably accurate. I formed the view that his evidence of this conversation was truthful. I have not however accepted his characterisation of the words or that he was justified in relying on them in the way he suggested. On the other hand, I did not find Mr Leckie's denials persuasive. I found his evidence in relation to this conversation defensive, imprecise and garrulous. I thought that it was more likely than not that he adopted the approach, and used the language, which Mr Warburton described. That approach and language accorded with my assessment of the probabilities in the particular context. I have further explained the context of the conversation in paragraph [53] below.

46 In my view, none of the requirements for an estoppel has been established so as to prevent the plaintiffs from insisting on the enforcement of the restraints in the MEP Deed. Mr Leckie's words had no effect, and were not intended to have any effect, on the legal rights of SMG and the Investors under the deed. Nor were they reasonably understood by Mr Warburton to do so. Nor could they have been so understood by any reasonable person in Mr Warburton's position. I explain each of these matters in paragraphs [51] – [54] below.

47 As is well understood, the application of the doctrine of estoppel is circumscribed by established legal principles. For sound reasons, caution must be exercised before finding that an estoppel has been established. For if found, the effect of an estoppel will be to suspend or abrogate the valuable legal rights of a party. The quality of the evidence, the commercial reality, the inherent probabilities and the detriment to the party who seeks to set up the estoppel, must indicate that there is a good reason why the other party should be prevented from having the full benefit of the bargain to which it originally agreed: *Summer Hill Business Estate v Equitrust* [2010] NSWSC 776 at [35]-[40]. In particular, an estoppel may well be difficult to establish in a formal legal relationship between arms length commercial parties, where their rights and obligations are carefully and extensively set out and formally documented: *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 585-6 (Kirby P). It is self-evident that, except for good reason, commercial parties do not usually conduct themselves in such a way as to forfeit their entitlement to exercise valuable legal rights. In such a case, it is necessary to scrutinise carefully the circumstances that are said to lead to the conclusion that it would be inequitable to permit a party to insist on its legal rights.

48 This is a paradigm case. The plaintiffs, through Mr Leckie, are alleged to have made a representation to Mr Warburton justifying an assumption by him that they would not exercise or insist upon their existing legal rights. *Central London Property Trust v High Trees House Ltd* [1947] KB 130 is an exemplar of such a case. In Australia, the well developed principles governing this type of estoppel are set out in *Legione v Hately* (1983) 152 CLR 406; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Giumelli v Giumelli* (1999) 196 CLR 101.

49 These well developed principles require consideration of three primary requirements. First, the words of Mr Leckie must have clearly and unambiguously given rise to the representation relied upon: *Legione v Hately* 152 CLR 406 at 435-437. Second, the conduct of Mr Warburton in

relying to his detriment on those words must have been reasonable: *Legione v Hately* (supra); *State Rail Authority (NSW) v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170. Third, Mr Leckie must have known or intended that Mr Warburton would act or abstain from acting in reliance on his words: *Waltons Stores (Interstate) Ltd v Maher* (supra) at 403; *Franks v Equitiloan Securities Pty Ltd* [2008] NSWSC 33 at [72].

50 The third requirement amounts to expectation of reasonable reliance. It is necessary to show that Mr Leckie had a reasonable expectation that his words would induce some detrimental reliance by Mr Warburton. Reliance by Mr Warburton that is unforeseen and unexpected, or simply foolish, will usually indicate that it is not reasonable. In particular, the reliance will not be reasonable if Mr Warburton knew or should have known that Mr Leckie's representation could not have been intended to bind all of the plaintiffs.

51 These three primary requirements have not been met in this case. Mr Leckie did not say expressly, or by necessary implication, that SMG and each of the Investors would refrain from enforcing the restraint against competition in the MEP Deed. In fact, the MEP Deed was not part of the discussion. Neither Mr Warburton nor Mr Leckie even turned their mind to it. In Mr Warburton's case, I am satisfied that he forgot or overlooked the MEP Deed, perhaps thinking erroneously that it no longer had any relevance because it was "under water", to use his expression. This was a reference to its likely investment return. In Mr Leckie's case, I doubt whether he even understood that the MEP Deed contained any restraints against competition. He certainly did not think of it in the context of his discussion with Mr Warburton on 23 February.

52 Further, Mr Warburton's employer is and was SNOL. But the parties who have the benefit of the restraints against competition under the MEP Deed, are SMG and the Investors. The Investors are Seven Network Ltd, a public company, and the KKR entity, PMI. There is nothing about the context, or the words used, which could have indicated to Mr Warburton

that Mr Leckie was assuring him that Seven Network Ltd and PMI would refrain from enforcing the restraints against competition in the MEP Deed. Mr Leckie had no actual authority to do so and Mr Warburton knew that. And he knew that KKR, through PMI, was a separate 50% partner that had to be involved in major decisions.

53 There are other relevant features of the context. Mr Leckie was prone to generalise and overstate. He did not usually make critical decisions of a legal nature without consulting Bruce McWilliam. His conversation was characterised by bonhomie, not precision of legal expression. His words were loose and ambiguous. His tone was genial. Mr Warburton, for his part, well understood Mr Leckie's business style, personality and foibles. The words of Mr Leckie simply do not have sufficient clarity in language or context to support an estoppel. They do not even have sufficient clarity to support the particular representation on which the estoppel depends. And it is implausible that Mr Warburton could have understood Mr Leckie's words to have the legal effect for which he contends. I do not think that he did. No reasonable person in his position would have done so.

54 Further, I do not accept that Mr Warburton relied on those words as having the effect which he asserts. If he had done so, it would not have been reasonable. The words could not justify the assumption which he says he made. Further still, the only detriment for which Mr Warburton contends is that on 2 March 2011, he signed a contract with Network Ten. But it was not established how or why this necessarily amounts to a detriment at all, let alone a sufficient detriment to make it inequitable for SMG and the Investors to enforce their existing legal rights under the MEP Deed. The estoppel claim cannot succeed.

Repudiation

55 Mr Warburton's repudiation case must also fail. But even if it were established, it would have no practical consequence for the outcome of the

case. It relates only to Mr Warburton's employment contract with SNOL and cannot detract from the independent rights of SMG and the Investors under the MEP Deed. If made out, it would mean no more than that the twelve (12) month restraint period under the MEP Deed commenced in March 2011 when, on Mr Warburton's case, the supposed repudiation was accepted and the employment contract came to an end. But I have already decided, for different reasons, that the restraint period commenced from 2 March 2011; and that even if it commenced from 14 October 2011, the outcome of the case would be the same.

56 The foundation of the repudiation case depends on Mr Leckie's statement to Mr Warburton on 2 March 2011. There is no doubt that on that date Mr Leckie told Mr Warburton that he should leave the premises immediately. He made clear that as Mr Warburton had now signed with Network Ten, it was untenable for him to be around the staff at Seven. It is said that this evinced an intention by SNOL that it would no longer be bound by its contractual obligations. It is then said that the letters from the plaintiffs' solicitors dated 3 and 5 March constituted a further separate act of repudiation. Their substance was to require Mr Warburton to attend SNOL's offices at Pyrmont at Mr Leckie's direction; not to perform any duties relating to his position without authorisation from Mr Leckie; and to be available to undertake other unspecified duties. In fact, Mr Warburton has been given no duties to perform. This was said to be repugnant to the terms and conditions of Mr Warburton's employment contract.

57 The difficulties with these submissions are multiple. I have already held that, on its proper construction, Clause 1(a) of the contract did not oblige SNOL to provide duties for Mr Warburton to perform. It was "entitled but not obliged" to require Mr Warburton to perform the "Duties". And I explained in paragraph [11] above the width of the definition of Duties. Additionally, the whole of the evidence, not merely the snapshot of the conversation between Mr Leckie and Mr Warburton on 2 March, indicates that SNOL was doing everything it could to enforce the employment contract rather than renounce it. Enforcement of the employment contract

was a primary concern of Mr McWilliam. He immediately perceived that Seven's best commercial interests would be served if Mr Warburton remained bound by his contract of employment for its full duration and afterwards by the post-employment restraint under the MEP Deed. Termination of the contract of employment resulting from Mr Warburton's acceptance of a repudiation by SNOL was the last thing that he wanted to see happen.

58 Additionally, Mr Warburton well understood that it was the customary practice in the industry, and certainly Seven's practice, to require an employee intending to work for a competitor, to physically leave the premises. In such a case, the employee is "walked", put on gardening leave, and the balance of the contract enforced. To Mr Warburton's knowledge, SNOL was following the customary practice; it was not manifesting an intention to repudiate its contractual obligations. The plaintiffs' solicitors' letters may have exhibited a different emphasis, but they did not detract from SNOL's obvious desire to enforce the employment contract. There is no need to engage in any detailed analytical dissection of the letters. Their thrust was obvious. Even if the letters went further than the employment contract permitted, they arguably represented no more than an erroneous understanding of the effect of the contract. In the overall context, they could not reasonably constitute a separate repudiation: *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 432-3.

59 Repudiation of a contract is, of course, a serious matter not to be lightly inferred: *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 32 (Mason J). I am not satisfied on the facts of this case there was anything like a repudiation. There is force in the plaintiffs' submission that Mr Warburton's repudiation case is a highly artificial lawyer's construct. It must fail.

Reasonableness of Restraint

60 That then leaves the reasonableness of the restraint. The real issue in relation to the restraint was the length of the restraint period, viz. twelve (12) months. This question must be addressed at the time when the MEP Deed was entered into. But the answer to that question will not by itself necessarily resolve the controversy. For the question of equitable discretionary relief must be addressed at the time of the hearing. The restraint issue is heavily fact dependent. I have set out my findings of fact in what follows from paragraphs [61] to [80]. I deal first with the lead up to the MEP Deed.

Negotiation of MEP Deed

61 The steps leading to the entry into the MEP Deed by Mr Warburton and Mr Warburton's current position under it may be summarised as follows:

(a) Mr Warburton commenced employment with SNOL on 6 August 2003 as network director of sales. He was formerly the managing director of Universal McCann. On 29 March 2006 his then employment contract with SNOL was extended for three years from 1 April 2006.

(b) On 25 September 2007 he was invited to a presentation in relation to his participation in a proposed management equity participation plan (the MEP) He was required to sign, and signed, a confidentiality agreement.

(c) In early October 2007 Mr Warburton attended a further presentation in relation to the MEP. It was conducted by Mr Lewis and Ms Liston. Mr Lewis explained the importance of the protection of SMG's confidential information and that this was achieved by the imposition of a non-compete clause under the MEP with a duration

of up to 12 months. He also explained that the rules of the MEP ensured a mutual benefit for investors and participants by the retention of participants for the full duration of the plan. He added that early departure had consequences for both investors and participants that were addressed by the rules of the MEP.

(d) One of the slides that formed part of the presentation referred to a non-compete restriction that ultimately became Clause 17.1 of the MEP Deed.

(e) On 10 December 2007 Mr Warburton was sent offer documentation for participation in the MEP. The covering letter advised him to ensure that he read the letter and the enclosed deed carefully before making a decision whether to accept the offer, and that he should obtain his own financial product advice.

(f) On 10 December 2007 the MEP Deed was executed by SNOL, SMG and PMI, which represented the interests of KKR in relation to its investment in SMG.

(g) On 13 December 2007 Mr Warburton emailed Ms Liston indicating that he was not able to respond to the MEP offer until the following week as he was “waiting on advice”.

(h) During the following week, and in particular on 19 and 20 December 2007, Mr Warburton engaged in negotiations in relation to special loan agreements and arrangements sought by him to facilitate his participation in the MEP.

(i) On 19 December 2007 Mr Warburton received employment law and taxation advice in relation to the proposed terms of the MEP Deed, including its non-compete provisions.

(j) On 20 December 2007 terms were negotiated between ClarkeKann Lawyers acting for Mr Warburton and Freehills acting for Seven. On the same day, ClarkeKann advised Mr Warburton that they had reviewed the loan agreement, suggested some changes and also advised regarding amendments to the rollover deed. ClarkeKann specialises in employment and industrial relations law.

(k) On 21 December 2007 Mr Warburton executed a deed of adherence (by which he confirmed that he had been given and read a copy of the MEP Deed and covenanted to perform and be bound by all its terms); a bonus rollover deed; a bonus rollover loan acceptance form; and a financial assistance acceptance form.

(l) As a result of the execution of these documents, Mr Warburton obtained 1,000,000 Category 1 options (which vested at grant) and 2,500,000 Category 2 options, comprising 1,250,000 Time Vesting and 1,250,000 Performance Vesting options, funded in part by a $2.5 million non-recourse loan. He also acknowledged that the restraints in Clause 17 were material to the decision of SMG and the Investors to enter into the MEP Deed; that they were fair and reasonable regarding their subject matter, area and duration; and that they were reasonably required to protect the business, financial and proprietary interests of the Group Companies and the value of the Investors' Group Securities.

(m) Seven (7) months later, on 14 July 2008, Mr Warburton entered into his current employment contract. As I have explained it was for a three (3) year fixed term plus three (3) months.

(n) In September 2008, as the global financial crisis made itself felt, Mr Warburton engaged in further negotiations in relation to the treatment of bonuses to facilitate the repayment of the earlier loan taken out for the purpose of his participation in the MEP Deed. He accepted an offer of a further bonus rollover loan, stating that he

wanted to defer payment of 100 per cent of any sales commission he became entitled to for the financial year ending in July 2008 and obtain an interest free loan for that amount to assist him to repay the personal loan he obtained in 2007 to fund the purchase of his Category 1 Options under the MEP Deed.

(o) In 2010, amendments were made to the MEP Deed. Their purpose was to re-set more generously the financial performance targets for the Category 2 Options and to extend the period in which vesting of the options could occur.

(p) Also in 2010 an additional management equity participation plan was put in place. This plan afforded to those who elected to participate in it particular benefits which will arise in certain circumstances. It did not terminate or affect the operation of the MEP Deed which continues to operate according to its terms. Mr Warburton did not participate in the 2010 plan.

(q) At 2 March 2011, the value of Mr Warburton's Category 1 Options under the MEP Deed was $1,342,100. The Category 2 Options continue to be subject to a vesting regime relating to either time or performance. A proportion of Mr Warburton's Category 2 Options are yet to vest.

The KKR Investment

62 Entry into the MEP Deed by senior executives such as Mr Warburton was an important factor in the decision by KKR to invest in SMG. I accept the evidence of Mr Reizes of KKR Australia in this regard. That investment was considerable. As I have mentioned, KKR invested approximately A$690 million in SMG for an initial 50% economic interest held by way of unsecured convertible notes. KKR's interest was held by PMI. It consisted of 177,269,571 unsecured convertible notes in SMG and 512,730,419

subordinated equity notes in an immediate wholly owned subsidiary of SMG, SMG Finco Pty Ltd.

63 Seven Network Limited held an equivalent economic interest. The interests of both KKR and Seven Network Limited were subsequently diluted by the investment of senior management through the MEP Deed and through investments made by certain institutional mezzanine investors. When the hearing commenced, PMI and Seven Network Limited each held an approximate 45% economic interest in SMG.

64 The investment deed governing the joint venture makes it plain that KKR was required to participate in any decision to remove an employee with a salary of $750,000 or more. Mr Warburton was in this category.

Legitimate Interest

65 As I have made clear, the restraint which the plaintiffs seek to enforce in this case does not arise in an employment contract. It arises as part of a separate commercial transaction. One aspect of that transaction was that Seven Network Limited and KKR each invested approximately $690 million in SMG. Another aspect was that, through the equity participation plan, senior management were given a financial incentive to strive to maximise the value of the business. By this means, the interests of the Investors and senior management were aligned. In an effective practical sense, they became co-owners of the enterprise.

66 The commercial rationale for the MEP Deed is understandable. It resulted in the participating executives becoming the holders of shares and options in SMG. By this means, they acquired a shared financial interest in the enterprise with KKR and Seven Network Limited. The MEP Deed was designed, among other things, to enhance the prospect of senior management staying together as a team. It provided each of them with an opportunity to achieve a generous return on investment that was disproportionate to the risk being undertaken. From the perspective of

KKR and Seven Network Limited, the restraints on competition served to protect their investment. But they also served to ensure that the investment of each of the senior management participants was not undermined or devalued. The object of the restraints on competition was to reduce the risk of devaluation of the business by the departure of any executives to work for competitors; to reduce the risk of the misuse of confidential information by its provision to competitors; and to reduce the risk of dissipation or reduction in the customer connection of the business.

67 The submissions for Mr Warburton emphasised that the restraints did not form part of an employment contract and did not arise in the context of a sale of business. It was said that the restraints were not concerned with the legitimate interest of Mr Warburton's employer, but were directed to restraining persons as shareholders and option holders in the issued capital of a different entity. I do not see why this matters. On the facts of this case, I can see no logical reason for denying the existence of a legitimate financial interest to support the restraints imposed by Clause 17.3. Nor can I see any reason of policy or precedent for doing so.

68 Other judges of this division of the court have adopted a broad approach to the identification of the legitimate interest supporting a restraint of trade. In *Austress-Freyssinet Pty Ltd v Kowalski* [2007] NSWSC 399 at [14]-[15], Windeyer J held that there was a legitimate interest supporting restraints arising in a shareholders agreement. And in *Corporate Express Australia Ltd v Swift-McNair* (supra), Young J (as he then was) had no difficulty in principle with a restraint imposed by a company in the Macquarie Group on selected executive employees who accepted an invitation to subscribe for shares in the plaintiff on a favourable basis.

69 In the United Kingdom, the English Court of Appeal held in *Dawnay Day & Co Ltd v D'Alphen* [1998] ICR 1068 that an agreement entered into between the plaintiffs and the first three defendants for the development of a joint venture company, and the contribution of capital for its business, provided a clear commercial interest that justified the plaintiffs

safeguarding themselves against competition by obtaining restraints from the defendants for the agreed restraint period. In particular, the Court held that the categories of case in which covenants in restraint of trade are enforceable are neither rigid nor exclusive. They included, the Court said, any case where the covenantee has a legitimate interest of whatever kind to protect and where the covenant is no wider than necessary to protect that interest.

70 Evans LJ specifically addressed the distinction relied on by Mr Warburton in this case: "The fact therefore that Dawnay Day was neither the purchaser of a business from the managers, nor their employer, does not mean that the covenants cannot be enforced". And in the court below, Robert Walker J (as Lord Walker then was) stated: "That it is not simply a question of categorisation is a point that emerges very clearly from numerous authorities". I agree with the reasoning in *Dawnay Day* (supra). To my mind, it is rational, persuasive and obviously correct. It also sits comfortably with what Lord Wilberforce said in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 331: "The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason".

Acknowledgement & Legal Advice

71 I have already referred to the acknowledgement of reasonableness by Mr Warburton contained in Clause 17.2 of the MEP Deed. This is possibly the most important single factor in determining whether the restraint period was reasonable at the time it was entered into. It does not of course absolve the court from reaching its own conclusion, but as Emmett J observed in *Synavant Australia Pty Ltd v Harris* [2001] FCA 1517 at [85]: "The matter involves the exercise of business judgment. For that reason, considerable weight should attach to the period the parties themselves have selected".

72 That observation of Emmett J is consistent with a long line of cases, all of which speak with one voice. No doubt added force is obtained from the principle that contracts freely agreed are meant to be observed: Q*ueensland Co-operative Milling Association v Pamag Pty Ltd* (1973) 133 CLR 260 at 268 (Walsh J) and 276 (Stephen J); *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 316 (Gibbs J); *Miles v Genesys Wealth Advisers Ltd* [2009] NSWCA 25 at [66] per Handley AJA; *Woolworth Limited v Mark Konrad Olson* [2004] NSWCA 372 at [39]; *Tullett Prebon (Australia) Pty Ltd v Purcell* (supra) at [47] – [58] and [83]; *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 348 (CA).

73 An additional feature that reinforces the appropriateness of placing considerable weight on Mr Warburton's agreement to the reasonableness of the restraint, is that he had legal and taxation advice at the time of entry into the MEP Deed. He was aware of Clause 17 before he signed the deed. He had been to a presentation at which attention was drawn to it. The commercial rationale and purpose behind the clause were explained to him and must have been obvious. He understood the commercial context and KKR's motive. And he received written legal advice which specifically addressed the clause. The circumstances are not dissimilar to those with which Angel J was confronted in *Extraman (NT) Pty Ltd v Blenkinship* (2008) 220 FLR 75 at [79] – [80].

Confidential Information

74 As is usual in cases of this nature, a substantial amount of the evidence was directed to an explanation of the duties performed by Mr Warburton and the confidential information to which he was exposed in the course of his employment. By virtue of his position he had general responsibility for SMG's sales revenue. That revenue is generated from a number of businesses included SMG's free-to-air television network, its digital television stations, 7TWO and 7Mate, Pacific Magazines and Yahoo!7. Those businesses attract advertisers who pay substantial sums to SMG.

There is effectively only one market, namely Australia. SMG's largest business is its free-to-air television network. For practical purposes, there are only three commercial networks in the free-to-air market in Australia. Each network competes for a share of the expenditure which advertisers are prepared to spend each year. The business cycle is in general twelve months. Rates and terms of trade with advertisers and their media buying groups are negotiated and revised annually.

75 Most of SMG's advertising revenue is generated from five agency buying groups. Some comes from direct clients. The contracts for four of those agency buying groups are negotiated on an annual basis by reference to the following calendar year. Negotiations generally commence in September and conclude by November or December. The contract for the fifth agency buying group is usually negotiated during April and May for the forthcoming financial year. The revenue from these five agency buying groups represents the overwhelming majority of SMG's sales revenue – approximately 85% according to the plaintiffs' submissions. Although some of the top fifty (50) advertisers deal directly with SMG, the majority enjoy the collective bargaining, and the rates, discounts and incentives, which are derived directly through their participation in an agency buying group.

76 Naturally, SMG keeps confidential the differential rates and trading terms enjoyed by advertisers and agency buying groups. It would be detrimental to the business of SMG if advertisers and agency buying groups knew the rates, discounts and incentives that other advertisers and buying groups enjoyed. It would be more detrimental if competitor networks knew of those rates, discounts and incentives.

77 Mr Warburton worked closely with Mr Burnette. Until 2 March 2011, Mr Burnette was the network director of sales. He is now acting in Mr Warburton's former role. Mr Warburton and Mr Burnette would meet every day to discuss sales revenue results, sales strategy, client management issues and agency management issues. Mr Warburton was not a director

of SNOL but from time to time he would attend board meetings by invitation to present board papers and reports for whose preparation he was ultimately responsible. Those reports would usually address strategic issues relating to sales.

78 I have no doubt that prior to 2 March 2011, Mr Warburton had a sound grasp of the terms of trade entered into by SMG with the agency buying groups and major direct advertisers. He enjoyed good relations with them, regularly met with them and was involved in making pitches to them. He necessarily knew and understood SMG's negotiation strategy and the extent to which SMG was prepared at that time to offer differential rates, or discounts and incentives, to different buying groups and direct advertisers. He knew the percentage of its total advertising expenditure which each buying group had committed to spend on the Seven Network. He understood all of the fundamental integers in relation to the buying groups and the major direct advertisers. Those fundamental integers were described as the benchmark rate, the share of spend and the discounts that were applied to the benchmark rate, where applicable.

79 Prior to 2 March 2011 Mr Warburton therefore knew the core numbers. He also understood the relationships, the dynamics, the current strategies and the perceived opportunities. It is not necessary for the plaintiffs to show that he had a photographic memory for all the combinations and permutations of rates, discounts and incentives that applied to each and every buying group and major direct advertiser. Mr Warburton was at the forefront of a process of constant negotiation with advertisers and ongoing competition with other networks in a lucrative but small market. In reality it would be impossible for him, at least for some time, to keep important aspects of SMG's confidential information out of his head: *Mobil Oil Australia Ltd v Guinea Developments Pty Ltd* [1996] 2 VR 34 (CA) at 38 (Hayne JA).

80 The business cycle that I have explained suggests the practical commercial reason why, broadly speaking, a period of twelve (12) months

was selected in the MEP Deed. The circumstances are not altogether dissimilar, as a matter of principle, to those which were found to justify the twelve (12) month restraint period in *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267 at [46] – [48]. But as time passes, particularly in this industry, circumstances change, new rates and terms of trade are negotiated and revised, new deals are struck, information becomes progressively stale and recollection diminishes or becomes irrelevant. These and other matters are relevant to the extent to which I should grant discretionary injunctive relief to restrain Mr Warburton from taking employment in competition with SMG.

Discretion & Public Policy

81 It will by now be clear that I am satisfied that the maximum twelve (12) month period agreed to in Clause 17.3(a) of the MEP Deed was reasonable when the agreement was made. It is a different question however, whether, in the particular circumstances of this case, I should grant injunctive relief for the whole of that twelve (12) month period.

82 I have reached the view that Mr Warburton should be sidelined for the balance of 2011 but no longer. During that period, Seven can be expected to negotiate and finalise, and Mr Warburton will have no knowledge of, Seven's terms of trade for calendar year 2012 for four of the major media buying groups and its terms of trade for the financial year 2011/12 for Group M. What is more, in Mr Warburton's absence, Seven can be expected to revise and renew its 2012 terms of trade for most of its major direct clients. Since the conclusion of the hearing, it has finalised the terms on which it will, for the period 2012-2016, share in the broadcast and other rights offered by the AFL. In addition, the knowledge that Mr Warburton may have had before 2 March 2011 concerning Seven's budgets and financial forecasts will become virtually extinct. So will his knowledge, if any, of the terms of trade and particular contractual arrangements for individual advertisers. He will, I am satisfied, have no material recollection

of those matters by 1 January 2012. And by that date, the information on which any such knowledge was based will have become inevitably and progressively stale, even obsolete.

83 I have already adverted to some of the underlying facts on which I have relied to reach these conclusions. But I should elaborate on their major features and set out more detailed findings of fact. The negotiations that Group M will undertake with all broadcasters for the financial year 2011/12 are occurring now (April and May) and can be expected to be finalised by June. The negotiations that the other four agency buying groups will undertake with all broadcasters for the year 2012 will take place between September and November. They are generally finalised by December to take effect in the new year. These negotiations resolve the headline terms of trade. They include the base rates and the discounts to those rates, the share of the buying group's total spend that will be directed to the particular broadcaster and other incentives that may be offered. Subsequent negotiations may deal with more minor detailed terms and conditions which are often very similar from year to year.

84 The effect of my orders will be that from 2 March 2011 Mr Warburton will have no knowledge during 2011 of Seven's strategy, objectives and negotiations in its dealings with all of the agency buying groups relating to the future. Nor will he have any knowledge of the terms of trade which Seven actually concludes with those buying groups for the forthcoming periods – for the financial year 2011/12 for Group M and for the calendar year 2012 for the other four groups.

85 If Mr Warburton becomes the chief executive officer at Network Ten from 1 January 2012, his retained knowledge of Seven's arrangements with the burying groups, if any, will only be historical. It will be limited to that which existed during the financial year 2010/11 for Group M and that which existed in the calendar year 2011 for the other four buying groups. By 1 January 2012, he will not know of Seven's current arrangements. The knowledge which he did have will have been superseded. The

understandable concern of the plaintiffs' witnesses was Mr Warburton's knowledge of Seven's current trading terms. It is obvious that his knowledge of current terms could give a competitor a significant advantage and might enable the competitor to better the terms offered. But any reasonable risk will be obviated by my orders. As I have said, by January 2012, Mr Warburton will not have any knowledge of Seven's then current arrangements with the agency buying groups.

86 I do not think that the position will be materially different in relation to Seven's direct advertisers. Some clients who place advertising through agency buying groups, also negotiate contracts with Seven. And some clients contract directly with Seven and do not use the agency buying groups. One client uses agencies that do not form part of the five agency buying groups. The contribution of these advertisers to SMG's sales revenue is, in any event, secondary to that of the five agency buying groups, whose contribution, as I have mentioned, is said to be approximately 85%. More fundamentally, there was really no evidence supporting the likelihood that by January 2012 Mr Warburton will continue to have any material knowledge of Seven's then current arrangements with any particular direct advertiser. The argument to the contrary assumes that the arrangements that were in place before 2 March 2011 with that advertiser will be unchanged in January 2012, and that in January 2012 Mr Warburton will have retained the knowledge of those arrangements that he had before 2 March 2011. I do not think such a case has been established. It is true that the negotiations with direct advertisers are generally conducted on an annual basis. And they usually do not commence until the agency buying contracts have been concluded. But there was no convincing evidence of the likelihood that any particular material contract might be unresolved between January and March 2012; let alone that Mr Warburton could be expected realistically to recall its pre-March 2011 terms or take advantage of his knowledge. Certainly there was no sufficient evidence to justify an injunction beyond 1 January 2012 on that score alone.

87 Nor do I think that , beyond 1 January 2012, there could be any realistic concern about customer and client connection or staff connection or knowledge of budgets, forecasts and strategies. The customers are Seven's not Mr Warburton's. They will go wherever they receive the best terms. This is not the sort of industry where senior executives like Mr Warburton carry their employer's customers in their back pocket. As to staff, the evidence did not support any conclusion that staff members would necessarily follow Mr Warburton to Network Ten or elsewhere because of their respect for his personality or ability and the connection which they may have formed with him at Seven. The evidence satisfied me that Seven's staff members will make up their own minds by reference to what is best for them. An injunction against Mr Warburton until 1 January 2012 will ensure that there is sufficient distance between any connection with staff that may have existed prior to 2 March 2011, and Mr Warburton's future employment. As to his knowledge of budgets, forecasts and strategies, this is affected by the point in time during the year when Mr Warburton's employment relationship came to an end, when the mutual relationship of trust and confidence ceased, and when the flow of information stopped. I have set out my factual findings in paragraph [82] above.

88 A final word is appropriate about the AFL broadcast rights package. I referred to it in paragraph [82] above. During the hearing, Mr McWilliam expressed the confident opinion that the package would be finalised by the time of the AFL grand final in September 2011. In fact, it was finalised on 28 April. Among other things, this tends to confirm the views I have reached about the likely re-negotiation of most of Seven's relevant commercial arrangements during the balance of calendar year 2011 while Mr Warburton is sidelined.

89 The plaintiffs nonetheless attempted to further advance their case in relation to the AFL rights package. Some weeks after the conclusion of the hearing, they sought to adduce further evidence to rely on the fact that the recent agreement between Seven and the AFL contemplates the sub-

licensing of broadcasting rights to other parties who could include Network Ten. In fact, this was already contemplated in a joint bidding agreement between Seven and Network Ten which was referred to during the hearing. The plaintiffs then sought to contend that the possibility of negotiations between Seven and Network Ten in relation to the sub-licensing of AFL broadcast rights for the 2012-2016 period, was a further reason for restraining Mr Warburton until at least March 2012. However the proposed fresh evidence and submissions in support of this contention were heavily suppositional. They depended on the proposition that any such negotiations had not yet commenced, but if they did, they might not conclude until March 2012 when the first AFL match, for which Seven has the rights, will be played. A foundation for the risk justifying a restraint until March 2012 was said to be that Mr Warburton "may" have an idea of what Seven in its own right had been prepared to pay for the AFL rights.

90 I do not accept that these matters are capable of making any material difference to my assessment of what is appropriate as a matter of discretion in the particular circumstances of this case. And I will not grant leave to the plaintiffs to re-open their case to adduce further evidence from Mr McWilliam. They did not, in fact, make any formal application to do so. These matters could have formed part of the hearing before me which concluded four weeks ago. Accepting Mr McWilliam's evidence at the hearing, the topic of sub-licensing negotiations between Seven and Network Ten after September 2011, was a potentially relevant matter that could have been explored, if it were thought prudent to do so. As it is, the specific factual contentions that underlie this new submission have not been put to Mr Warburton. And Mr McWilliam has not been cross-examined on these issues. In any event, I am not satisfied that, on the issue of possible negotiations over sub-licensing of the AFL broadcast rights, there is or will be a material difference from the plaintiffs' perspective between a restraint until 1 January 2012 and a restraint until 2 March 2012. The matters raised are part of the mix that makes a restraint until 1 January 2012 reasonable. But they do not go far enough to justify a further restraint until 2 March 2012. In the exercise of my discretion, I am

not prepared to allow the plaintiffs to re-open their case. Even if I were prepared to do so, the proposed untested evidence of Mr McWilliam does not persuade me that the result should be any different.

91 For all of those reasons, I do not think that the restraint on competition contained in Clause 17 of the MEP Deed will continue to serve any legitimate protectable interest after 1 January 2012. The plaintiffs will not, in my view, suffer any detriment after that date necessitating the grant of an injunction for the full twelve (12) month period until 2 March 2012. I propose to decline injunctive relief beyond 1 January 2012. The discretion to limit or withhold injunctive relief has been frequently recognised in the context of applications to enforce restraints of trade: *John Fairfax Publications Ltd v Birt* [2006] NSWSC 99 at [45]; *Otis Elevator Co Pty Ltd v Nolan* [2007] NSWSC 593 at [26] - [29]; *Tullettt Prebon (Australia) Pty Ltd v Purcell* (supra) at [88] – [96]; and *Provident Financial Group plc v Hayward* [1989] 3 All ER 298 (CA). In the events which have happened, having regard to the actual circumstances, as distinct from those which may have been contemplated when the MEP Deed was entered into, a restraint for the full twelve (12) month period would be unnecessary and excessive.

92 I add that the same findings of fact may well also support the application of Section 4(1) of the Restraints of Trade Act, 1976 (NSW). However, I will not dwell on the issue because neither party developed submissions about the scope or construction of Section 4(1), let alone its application to the particular facts. And it is not necessary for the resolution of the issues in dispute. I will nonetheless observe that the language of Section 4(1) is enigmatic in its brevity and the explanation in *Orton v Melman* [1981] 1 NSWLR 583 (McLelland J) is neither entirely clear nor, pending an appellate decision, necessarily the last word on the subject. However, there are at least suggestions in *Tullett Prebon (Australia) Pty Ltd v Purcell* (supra) at [55] that Section 4(1) may be utilised in circumstances such as these to read down a restraint to the extent that it is excessive in its application to the circumstances of the particular breach.

Conclusion

93 Mr Warburton is clearly a redoubtable talent who is respected, sought after, and even fought over. Until early this year, he was a valuable asset for the Seven Network. I have no doubt that he has the capacity to continue to make a significant impact in the television industry in Australia. I should do no more than the minimum that is reasonably necessary to protect the plaintiffs' legitimate commercial interests. And I should strive to limit the hardship to Mr Warburton. The unfortunate but necessary consequence of my orders is that he will be sidelined for the whole of the balance of calendar year 2011. If he becomes the chief executive officer of Network Ten from 1 January 2012, Mr Warburton may well represent a competitive threat to Seven, but this will not realistically be because of his retention of confidential information acquired by him at Seven prior to 2 March 2011, but because of his skill, talent, personality and past successful record in the industry.

94 I do not think that there is any real or sensible possibility that after 1 January 2012, Mr Warburton will be in a position to take advantage inadvertently of any relevant confidential information acquired by him at Seven before 2 March 2011. And I do not think there is any prospect that he will do so intentionally. In the events that have transpired, having regard to the cycle of the industry, and the critical negotiations that Seven has undertaken and finalised, and will undertake and finalise while Mr Warburton is sidelined, there is no justification for restraining him from competition with SMG or any of its subsidiaries beyond 1 January 2012.

95 These then are the considerations that have informed the exercise of my discretion to limit injunctive relief. They lead to the same result whether the twelve (12) month restraint period under the MEP Deed runs from 2 March 2011 (as I have found) or from 14 October 2011 (as the plaintiffs contend). When account is taken of the gardening leave to which Mr Warburton has been and will continue to be subject, and allowance is

made for the absence after 1 January 2012 of any realistic likelihood of advantage to a competitor, and taking into account my desire to avoid any more hardship to Mr Warburton than is necessary to protect the legitimate interests of the plaintiffs, I have concluded that the result should be as I have explained.

Costs

96 All that remains is the question of costs. The plaintiffs have succeeded in restraining Mr Warburton from taking up employment as the chief executive officer of Network Ten on 14 July 2011. They claimed to be entitled to restrain him from competitive employment for a much longer period, namely until 14 October 2012. But to my mind this was never realistic. Nonetheless, the orders that I have foreshadowed represent substantial partial success for the plaintiffs. They should recover most of their costs. I would not however be prepared to certify that three silk were justified on the plaintiffs' part. This is not for one moment to deny the plaintiffs' entitlement to retain as many lawyers as they wish. It merely reflects my view that on a costs assessment, if one is necessary, the defendant's liability for the plaintiffs' reasonable costs should not extend to three silk. However, absent agreement between the parties, this will be a matter for the assessor and I will say no more.

97 In addition to those general considerations, there is a separate costs issue that I must address. It does not necessarily follow however that there should be a separate costs order. The circumstances in which the issue arises are these. On 7 April 2011, on the third day of the hearing, following several enquiries from me, the plaintiffs abandoned paragraphs 37-39 of the statement of claim filed on 29 March. There was never a proper basis for these allegations. The defendant seeks to recover the costs thrown away by the abandonment on an indemnity basis. The plaintiffs say that they should nevertheless be entitled to their costs of a related notice of motion dated 24 March.

98 The essence of paragraphs 37-39 was as follows. Paragraph 37 alleged that on 2 March 2011 Mr Warburton removed from SNOL's premises certain documents embodying confidential information belonging to SNOL and SMG. Paragraph 38 then alleged that "By reason of the matters referred to in paragraph 37 … [Mr Warburton] threatens to use, divulge and disclose" the confidential information.

99 The relevant facts prior to 29 March were as follows:

(a) Mr Warburton uplifted certain documents on 2 March and delivered them to his solicitors on 3 March.

(b) The plaintiffs' summons was filed on 9 March 2011. It made no complaint, and sought no relief, in relation to any documents that may have been removed, let alone any threat that Mr Warburton might use, divulge and disclose any confidential information in those documents.

(c) On 18 March, following an enquiry from the plaintiffs' solicitors, Mr Warburton's solicitor informed them that the documents could be collected at a mutually agreed time.

(d) On 21 March, the plaintiffs' solicitors collected the documents. On the same date, Mr Warburton's solicitor stated that his client would not provide an undertaking in relation to the non-disclosure or other misuse of any of the documents in the terms sought by the plaintiffs.

(e) On 22 March, the parties appeared before me. Junior counsel for the plaintiffs enthusiastically foreshadowed an interlocutory application of indeterminate content.

(f) On 24 March, the plaintiffs filed a notice of motion seeking orders that they have leave to amend their summons and that Mr

Warburton be restrained from using, copying or dealing with the confidential information of SNOL and SMG.

(g) On 25 March, Mr Warburton agreed to provide a slightly altered form of the requested undertaking. The motion did not proceed.

100 Notwithstanding this sequence of events, the plaintiffs filed, and until the third day of the hearing, persisted with, a pleading which was at odds with any reasonable inference from the known facts. As I have mentioned, the statement of claim was filed on 29 March. An amended statement of claim was delivered on 4 April. Each contained the allegations in paragraphs 37-39 that I have summarised. But the cause of action reflected in those allegations had become untenable by 25 March. That is not to say that it was necessarily tenable before that date. But after 25 March, it could not be contended reasonably, as paragraph 37 alleged, that Mr Warburton "threatens to use, divulge and disclose" the confidential information.

101 There was therefore no proper factual basis for the pleaded allegation. On 22 March, Mr West QC, on behalf of Mr Warburton, had made clear in open court that he considered the claim to have no reasonable basis. Notwithstanding this warning, and in spite of the plaintiffs' knowledge (through their solicitors) of the true facts, and notwithstanding Mr Warburton's undertaking on 25 March, the plaintiffs maintained their claim. The subsequent abandonment of the claim on 7 April, after prompting from me, served to reinforce its absence of any proper basis.

102 There should be an appropriate costs consequence. The rules and practices of court are designed to ensure that only the real issues in dispute are heard and determined. Allegations that overreach should be firmly discouraged. Practitioners must give faithful consideration to whether there is a reasonable factual basis to support each pleaded allegation. That is why, with limited exceptions, pleadings must be verified by affidavit and in all cases a certificate given under the Legal Profession

Act. Above all, the fair and efficient conduct of proceedings depends on the good sense, the experience and the restraint of the advocates who conduct cases in this court. I drew attention to the importance of some of these considerations in *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [22]:

> Counsel's duty to the court requires them, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence. In all cases, to a greater or lesser degree, the efficient administration of justice depends upon this co-operation and collaboration. Ultimately this is in the client's best interest. It is more likely to ensure that a just result is reached - sooner and with less expense.

103 The abandonment on 7 April of the allegations in paragraphs 37-39 of the statement of claim by senior counsel for the plaintiffs was entirely proper and consistent with this duty. But the allegations should never have been made in the first place. They should attract an appropriate costs consequence. The circumstances in which a court may make an award of indemnity costs are numerous. The abandonment of an untenable claim or the maintenance of a claim in wilful disregard of the facts are well-recognised examples of unreasonable conduct that may justify an indemnity costs order: *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Lahoud v Lahoud* [2006] NSWSC 126; *Frank Fat Ng v Ha Duk Chong* [2005] NSWSC 385.

104 In this case however, I do not propose to make a special order for costs in relation to the abandonment issue. Instead, a fairer and simpler result will be achieved if I take that issue into account as a factor, albeit a small factor in monetary terms, in the overall costs order. Bearing in mind the width of the original claim and taking into account the plaintiffs' substantial but partial success, and having some regard to the separate issue, I have concluded as a matter of discretion that the plaintiffs should recover 70% of their costs from the defendant.

Orders

105 The plaintiffs' claims for relief are extensive. Only the following orders and declarations, which I will summarise, are justified:

(1) A declaration that, as it applies to the defendant, the restraint on trade set out in Clause 17 of the Management Participation Deed dated 10 December 2007 is valid.

(2) An order that, until 1 January 2012, and within Australia, the defendant be restrained in the terms set out in paragraphs 7(a), (b), (c), (d) and (e) of the claims for relief set out in the amended statement of claim.

(3) A declaration in the terms set out in paragraphs 9(a), (b) and (c) of the claims for relief in the amended statement of claim, with appropriate adjustment.

(4) The cross claim should be dismissed.

(5) The defendant should pay 70% of the plaintiffs' costs of the proceedings.

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