SUPREME COURT OF QUEENSLAND

CITATION:	*Multinail Australia Pty Ltd v Pryda (Aust) Pty Ltd & Anor* [2002] QSC 105
PARTIES:	**MULTINAIL AUSTRALIA PTY LTD** (plaintiff) **v** **PRYDA (AUST) PTY LIMITED** (first defendant) **CHRISTOPHER JOHN ROGERS** (second defendant)
FILE NO/S:	No. S2291 of 2000
DIVISION:	Trial Division
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	Tuesday 16 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2002 – 8 March 2002
JUDGE:	Chesterman J
ORDER:	**1. That there be judgment for the plaintiff against the first defendant for $2,559,237** **2. That there be judgment for the plaintiff against the second defendant for $2,159,237** **3. That the plaintiff's costs be assessed on the standard basis and be paid by the defendants**
CATCHWORDS:	TORT – INDUCING BREACH OF CONTRACT – INTERFERANCE WITH CONTRACTUAL RELATIONS – KNOWLEDGE – Where plaintiff had exclusive contract to supply customer – Where defendants sought to take customer away from the plaintiff – Whether defendants had knowledge of contract for exclusive supply TORT – INDUCING BREACH OF CONTRACT – INTERFERANCE WITH CONTRACTUAL RELATIONS INTENTION – Whether defendants acted with intent to induce the plaintiff's customer to breach its contract with the plaintiff TORT – INDUCING BREACH OF CONTRACT – INTERFERANCE WITH CONTRACTUAL RELATIONS INDUCEMENT – Whether breach of contract was induced by the defendant

CORPORATIONS – DIRECTOR'S LIABILITY – Where director authorised and directed the actions of the first defendant – Whether director personally liable for tort of the company

DAMAGES – ASSESSMENT OF DAMAGES – Whether the plaintiff suffered loss as a result of the defendants' inducement – Whether the plaintiff's loss exceeded amount awarded for breach of contract – Damages for loss of profit – Damages for loss of chance

DAMAGES – ASSESSMENT OF DAMAGES – EXEMPLARY DAMAGES – Where defendants showed contumelious disregard for rights of the plaintiff – Where substantial compensatory damages awarded – Where defendants sought to eliminate competitor by unlawful conduct

Jurisdiction of Courts (Cross-Vesting) Act 1987
Trade Practices Act 1974, s 87, s 52

Independent Oil Industries Ltd v Shell Co of Australia Ltd (1937) 37 SR (NSW) 394, approved
Short v The City Bank of Sydney (1912) SR (NSW) 186, approved
Short v The City Bank of Sydney (1912) 12 SR (NSW) 186, approved
Allstate Life Insurance Company v Australia & New Zealand Banking Group Ltd (1990) 58 FCR 26, approved
Masters v Cameron (1954) 91 CLR 355, cited
Graham Evans Pty Ltd v Stencraft (1999) FCA 1670, approved
Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots & Ors [1991] VR 635, cited
DC Thompson & Co v Deacon [1952] Ch 646, cited
Ritz Hotel Ltd v Charles of the Ritz Ltd (1988) 15 NSWLR 158, approved
Swiss Bank Corporation v Lloyds Bank Ltd [1979] Ch 548, distinguished
British Motor Trade Association v Salvadori [1949] Ch 556, cited
Said v Butt [1920] 3 KB 497, distinguished
O'Brien v Dawson (1942) 66 CLR 18, considered
Root Quality Pty Ltd v Root Control Technologies Pty Ltd 177 ALR 231, considered
Rutherfords v Poole [1953] VLR 130, cited
Tsaprazis v Goldcrest Properties Pty Ltd 18 ACLC 285, cited
Performing Rights Society Limited v Ciryl Theatrical Syndicate Ltd [1924] 1 KB 1, followed
Wah Tat Bank Ltd v Chen Cheng Kum [1975] AC 507, considered
C Evans & Sons Ltd v Spritebrand Ltd [1985] 1 WLR 317, followed

Kalamazoo Pty Ltd v Compact Business Systems Pty Ltd [1990] 1 Qd R 231, considered
King v Mipurrurru 136 ALR 327, considered
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, approved
Lamb v Cotogno (1987) 164 CLR 1, cited
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448, cited
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, considered
Cassell & Co Ltd v Broome [1972] AC 1027, considered
Gray v Motor Accident Commission (1998) 196 CLR 1, considered
Hospitality Group Pty Ltd v Australia Rugby Ltd (2001) 110 FCR 157, considered

COUNSEL: Mr. P.J. Flanagan with Mr. D.A. Quayle for the plaintiff
Mr. G.A. Thompson SC with Mr. T.P Sullivan for the defendants

SOLICITORS: Tucker & Cowen for the plaintiff
Allens Arthur Robinson for the defendants

Background

[1] **CHESTERMAN J:** The plaintiff is one of a group of companies, the only shareholders of which are Mr Peter Taylor and his wife. Mr Taylor has always been a director of the companies which he controls. The plaintiff's business is the manufacture and sale of nailplate to roof truss fabricators. Other companies in the group perform functions supportive of, or ancillary to, the plaintiff's business which is the core business of all the companies.

[2] The first defendant is a competitor of the plaintiff's. It has, over the years since the events with which this action is concerned occurred, changed owners a number of times. It is now a subsidiary of a large but struggling publicly listed conglomerate. The second defendant was the first defendant's managing director at all relevant times. As well he filled the role of general manager until April 1994 when Mr Anglin was appointed to that position.

[3] The production and sale of nailplate is lucrative. The items are small and cheap to produce in mass. The production of roof trusses requires bulk use of nailplates and the profits are high. It is not necessary to deal in the detail to which the evidence descended about the design and fabrication of roof trusses but some description of that process and the equipment necessary for it will be helpful in understanding the issues in the litigation.

[4] A roof truss is part of the structure of houses and small non-residential buildings. They span load bearing walls and support rafters or roof beams onto which are laid the roof itself, most commonly tiles or metal sheets. Trusses are triangular in shape, the dimensions and internal angles varying with the design of the building. They are made from timber and consist of cords, which are the three "perimeter" pieces joined to form the basic triangle, and webs which are shorter lengths of timber

interior to the triangle which join and support the cords. They vary in length and number according to the design of the truss. Where cords and webs intersect the pieces must be cut at precise angles and at precise distances to ensure a snug join. The webs and cords, where they touch, are held firmly in place by nailplates which, as their name suggests, are plates of nails driven into the timber members on both sides of the join. That is, the timber pieces are nailed together by the plates which span the joints. The component parts of the truss are put together in a metal framework which can be configured to fit trusses of varying sizes and angles and to hold the parts firmly together until, and while, the parts are nailed together. The framework is called a jig. The machines which apply pressure to the plates to force the nails into the timber are called presses. They vary in type but their function is identical. Obviously the timber webs and cords are cut to length and shape by circular saw. The nailplates themselves are thin sheets of metal about 10 centimetres square. In the process of manufacture numerous rectangular cuts are made in the sheet metal but the cut is complete on three sides of the rectangle only, leaving in each rectangle a flap or tongue of metal which is pushed until it stands at right angles to the sheet. In the process it is cut and turned so that the protruding flaps form sharp "nails" which stand in rows across the whole of the plate.

[5] Because a roof truss is an integral part of the structure of which it forms part, the trusses must comply with building codes and regulations for design and strength. An essential feature of the truss is the nailplate which fastens the members into a structural whole. The dimensions of the truss, roof loads and climatic conditions affect the number and position of webs and the number of nailplates required.

[6] To facilitate the sale of their product nailplate manufacturers like the plaintiff and first defendant have devised computer programs which allow a truss fabricator to insert basic data (such as truss shape, dimension, type of roof, cyclone loading) so the program will produce an appropriate design which the nailplate manufacturers' engineer will certify as being structurally sound and complying with all building regulations. The program is designed for ease of operation; the fabricator does not have to calculate loads but merely indicates the size and shape of truss, the type of roofing material and whether the house is in a designated high wind area. The program then performs the calculations and designates the number, dimension and configuration of members. It also produces instructions for the sawyer as to what lengths to cut and at what angles.

[7] Typically a nailplate manufacturer will supply a fabricator to whom it sells nailplate its computer software and computers themselves at no cost, or a subsidised cost, to assist it to design trusses and calculate the number and type of nailplates required. Typically, also, the nailplate manufacturer will sell truss making equipment to the fabricator at cost or for a small profit. The more efficient the fabricator, the greater will be its production and the greater will be its demand for nailplate.

[8] The business of making and selling nailplate is fiercely competitive. At times relevant to this action there were essentially three manufacturers: the plaintiff, the first defendant and a company, Gangnail Australia Ltd ("Gangnail"). The plaintiff was the smallest of the three. Gangnail was the largest though its management had lost energy and it was losing sales to its competitors who competed not only in price but in the variety and cost of services they provided. These included provision of computer software for design programs, the gift or loan of computers and the services of qualified engineers to assist with unusual or difficult truss designs.

[9] Although the nailplates made by each manufacturer look identical there are subtle differences and variations between them in the number, dimension and shape of the nails. The consequence is that the software design program of one manufacturer is specific to its product. For practical purposes a fabricator who bought nailplate from one manufacturer must utilise that manufacturer's computer design software. Principally for this reason fabricators tend to remain customers of the one manufacturer for substantial periods of time. The effort, cost and disruption in converting (as the event is known in the trade) a truss fabrication plant from the design and utilisation of one manufacturer's nailplate to another's is so considerable as to present a substantial disincentive. Conversions do occur but they are rare. The rival nailplate manufacturers, as part of their attempts to gain business from each other, do attempt to persuade fabricators to change to their product. With equal assiduity they seek to retain as customers those fabricators who buy from them. To this end they employ sales or technical representatives whose functions are to call upon truss fabricators to ascertain their needs or sources of dissatisfaction if they are existing customers, and to solicit their business if they are not. Part of their role is to keep themselves (and their employers) informed of events and developments in their industry. There was said to be a well developed "grape vine" amongst fabricators and nailplate suppliers to the extent that all participants in that market took a keen interest in each other's business.

[10] Some years ago the nailplate manufacturers realised that computers could be utilised not just to quicken the design of trusses but to control the machines which made them, particularly saws and jigs, so as to reduce labour costs and increase the speed and therefore volume of production. If, instead of a sawyer cutting each piece to measure from a cutting list produced from the design computer, a multi-bladed saw programmed by computer and with an automatic timber fitting system could cut cords and webs production could be greatly increased. Similarly if jigs could include moving parts controlled by computer which would set the members in the right position and clamp them for the nailplates to be pressed into position there would be savings in labour and a decrease in the time needed for fabrication. Accordingly, each of them experimented with computer controlled saws and jigs. Each of them maintained on staff computer programmers and engineers to design computer programs for such outcomes.

[11] For a fully computerised truss manufacturing process three programs were needed. One was to drive the machines, moving saw blades or jig componentry into requisite positions at appropriate times. The second was the one already discussed, which would produce a truss design in terms of shape, size and pattern. The third program was what was called the interface which allowed for the integration of the other two programs so that the truss design could be translated into commands to the saw to set its blades at particular angles and distances apart, and for jigs to configure themselves in certain ways when the timber lengths were put in place.

[12] All the nailplate manufacturers at relevant times had their own design program. The production of the software to drive machines was complicated and would take about a year to develop. The interface program was relatively easy to produce and could be developed within about a month.

[13] The plaintiff called its design software TrusSource. The first defendant's was ComputaRoof. Although the defendants claimed their program was superior in all respects to the plaintiff's the opinion of the fabricators was that the two programs

were about equal in overall merit. Individual features of one program were superior to or inferior to the other. The defendant's program was slightly easier for the operator to use.

[14] The first defendant held an advantage over the plaintiff with respect to the supply of automated or computer controlled saws and jigs. It had not developed them itself but had formed an arrangement with an American company, Engineering Supply Company ("ESCO") which had developed a multi-bladed fully automatic saw. It was known as an "auto-omni saw". As well ESCO had developed an automated jig which it called a "jet-set". A console attached to the saw's computer allowed the operator to program what length and what angles timber ought to be cut to produce the desired parts of a truss. The saw blades were then automatically adjusted to cut the timber as commanded. Timber was fed to the blades automatically. ESCO had developed a computer interface program to allow the saw to operate compatibly with any of the conventional software programs used by truss fabricators to design their trusses.

[15] The second defendant and ESCO had come to a loose, oral arrangement by which the first defendant was given some rights to sell the auto-omni saws in Australia. The arrangement probably was not legally binding and its terms were ill defined but, probably, its effect was that Mr Koskovich who owned and controlled ESCO would have been reluctant to sell his saws to any nailplate manufacturer in Australia other than the first defendant. However, Mr Koskovich expressly reserved the right to sell saws to any Australian truss fabricator. If it matters, I think it probable that had the plaintiff been asked to supply auto-omni saws to a truss fabricator in Australia in the first half of 1994 it could have done so by purchasing them from a Canadian company which in turn dealt with ESCO. Mr Koskovich, no doubt at the defendant's urging, later moved to restrict the Canadian company's ability to on sell saws to Australian purchasers but I expect such a sale could have occurred without difficulty in the first half of 1994.

[16] The second defendant had decided on a strategy to improve the first defendant's competitiveness. It was to develop and/or acquire the most sophisticated and technologically advanced saws and jigs, to link its design software programme to those saws and jigs and to offer them to truss fabricator as a "package". The fabricator would benefit from economies and efficiencies of manufacture. Integrated software programs could estimate the cost of trusses, design them and instruct the machines to cut and assemble the parts into a completed truss. In return for supplying this equipment at a keen price and providing instruction, training and ancillary services the first defendant would supply nailplate to the fabricators. It was for this reason that the first defendant sought access to ESCO's saws and jigs.

[17] James McEwan Limited carried on business in Queensland as timber merchants, hardware vendors and roof truss fabricators. Its business name was Campbells Timber and Hardware ("Campbells"). It owned and operated a number of truss fabrication plants which bought nailplate from two different suppliers, the first defendant and Gangnail. In about the year 1989 Campbells decided to consolidate its purchases of nailplate. It negotiated with suppliers, including both the first defendant and plaintiff. The second defendant was personally and actively engaged in formulating a proposal by the first defendant to supply nailpate to Campbells. It was unsuccessful. On 11 December 1990 Campbells signed an agreement with Multinail Truss Systems Pty Ltd (which was the plaintiff's then name) for

> "The total Truss, Nail Plate and ancillary connectors required by Campbells Timber and Hardware truss and wall framing plants for the period 1st December 1990 to 1st December 1993."

By the agreement the plaintiff promised to lend to Campbells three computers, a number of monitors, printers and plotters to a value of $50,000. As well, it agreed to provide TrusSource and to hold regular training seminars for the "computer user staff" of Campbell's fabricators and to make available engineers to assist with design and certification of trusses produced in accordance with the design program.

[18] In August 1992 a receiver was appointed to James McEwan Limited. The plaintiff was an unsecured creditor for about $120,000 which went unpaid. The receivers continued to buy nailplate from the plaintiff. In March 1993 the receivers sold the assets and business of James McEwan Limited to Jamieson Equity Limited which incorporated a new company, "The Builders Warehouse Limited" which continued to trade under the name of "Campbells Timber and Hardware". It appointed a new general manger, Mr Michael Robertson (who died in 1995). The receivership and sale of James McEwan Limited's business had effectively terminated the supply agreement with the plaintiff. To secure its position, on 20 May 1993 the plaintiff signed another agreement with Campbells whereby the plaintiff agreed:

> "… to loan to Campbells the total computer equipment set out in the Second Schedule being that already on loan … and that to be supplied … the loan shall be … until 31 December 1995 …"

In consideration for which Campbells agreed:

> "… to purchase from (the plaintiff) its total requirement for truss nail plate and ancillary connectors and bracing for its truss plant divisions up until 31 December 1995…"

This agreement also obliged the plaintiff to provide Campbells with computer support and engineering support services and to provide "staff training arrangements and facilities." The earlier agreement had apparently been intended to confer upon either party to it a right to terminate by giving the other three months notice in writing. There was no such provision in the May 1993 agreement.

[19] As well as its truss fabrication plants Campbells owned and operated hardware retail outlets and timber yards. Its contract with the plaintiff was for the exclusive supply of nailplate to its truss plants only. The first defendant supplied nailplate to Campbells' hardware outlets and supplied other metal fasteners used in forming timber wall and floor frames as opposed to roof trusses.

[20] When the agreement was signed Campbells fabricated trusses at six plants located at Oxley in Brisbane, Caloundra, Bundaberg ("the southern plants"), Rockhampton, Mackay and Townsville ("the northern plants"). The northern plants were relatively small. The biggest was Caloundra. The Oxley plant was obsolescent and inefficient. All plants had been neglected and were in need of substantial improvements in equipment and production technique if they were to remain viable.

[21] In the first half of 1994 Campbells re-equipped the southern plants with modern computerised equipment purchased from the first defendant. In September 1994, during the currency of the agreement between Campbells and the plaintiff, it completed the conversion and commenced business using ComputaRoof and the first defendant's nailplate. The plaintiff alleges that the breach of its contract by

Campbells was induced by the defendants from whom it claims substantial compensatory damages and an award of exemplary damages. The defendants resist the claim on the grounds that the first defendant negotiated with Campbells to sell it equipment and nailplate in ignorance of the contract between it and the plaintiff ("the plaintiff's contract") and that it had concluded its agreement with Campbells before it had notice of the plaintiff's contract. As well they argue that Campbell's decision to buy from the first defendant in breach of the plaintiff's contract was not induced by anything it did but was the result of Campbell's dissatisfaction with the plaintiff's ability to provide computerised equipment to allow improvement in its truss production.

[22] On 31 March 1994 the plaintiff commenced proceedings in the Federal Court claiming an injunction *quia timet* to restrain the sale by the first defendant of its nailplate to Campbells. On 20 May 1994 Campbells commenced proceedings in the Federal Court against the plaintiff seeking orders pursuant to s 87 of the *Trade Practices Act* 1974 that the contract between them be set aside on the grounds of the plaintiff's misleading and deceptive conduct which caused Campbells to make it. The plaintiff cross-claimed for damages for breach of contract. On 25 March 1997 Drummond J dismissed Campbells' application and gave judgment for the plaintiff on the claim and on its cross-claim for damages to be assessed. An appeal to the full Federal Court was dismissed on 6 April 1998. Damages were subsequently agreed and Campbells paid the plaintiff $720,000 on account of its claim, interest and costs. On 25 February 2000 Spender J ordered that the plaintiff's proceedings against the defendants be transferred to this court pursuant to the *Jurisdiction of Courts (Cross-Vesting) Act* 1987.

[23] According to Jordan CJ in *Independent Oil Industries Ltd v Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394 at 414-5:

> "To establish this tort it is not sufficient to prove that a third party has in fact done something which had the effect of inducing a party to a contract to break it. It must be proved that the breach was knowingly and intentionally procured . . . It is necessary to establish the third party knew of the contract, knew that the doing of a particular act by one of the parties to it would be a breach of it, and with that knowledge procured the party to do the act."

In *Short v The City Bank* (1912) 12 SR (NSW) 186 Street J said (202):

> " . . . I think that a person complaining of a breach of contractual relations brought about by these means must show that the person whose actions are complained of did something in the nature of effectually persuading or prevailing upon the other party to the contract to violate his obligations under it. The persuasion may take the form of advice or friendly solicitation, or it may take the form of intimidation or molestation, but in every case I think that it must be shown that the defendant deliberately intervened between the contracting parties either with the express design or depriving the plaintiff of the benefit of his contract, or under such circumstances that he must have known that the effect of his intervention would be to deprive the plaintiff of that benefit."

The High Court dismissed an appeal, *Short v The City Bank of Sydney* (1912) 15 CLR 148. Isaacs J said (160):

> "But to constitute that cause of action, the defendant must have induced or procured the doing of what he knew would be a breach of contract. A *bona fida* belief reasonably entertained that it was not a breach of contract would be fatal to the claim. If the defendant did not know of the existence of the contract, he could not induce its breach; if he reasonably believed it did not require a certain act to be performed, his inducing a party to the contract to do something inconsistent with it could not be regarded as an inducement or a procurement knowingly to break the contract; . . . if he believed on reasonable grounds that the contract had been rescinded, or performance waived, when in fact it had not, he could not be said to knowingly procure its breach."

In *Allstate Life Insurance Company v Australia & New Zealand Banking Group Ltd* (1990) 58 FCR 26 Lindgren J (with whom Lockhart and Tamberlin JJ agreed) said (43):

> "In my opinion, the authorities establish conclusively that the gravamen of the tort is intention. Although the treatment of knowledge of the contract is sometimes discussed as if it was a separate ingredient of the tort, it is in fact an aspect of intention. The requirement that the alleged tortfeasor have 'sufficient knowledge of the contract' is a requirement he have sufficient knowledge to ground an intention to interfere with contractual rights."

[24] To make out its claim the plaintiff must prove:

(i) that the defendants intended to induce Campbells to break the plaintiff's contract;

(ii) the defendants did induce Campbells to break the plaintiff's contract, i.e., that their conduct in fact caused Campbells to break the contract;

(iii) that the plaintiff has suffered loss as a consequence.

[25] It is necessary to review the facts.

Facts

[26] Each year the first defendant produced a lengthy document which it entitled "A Budget Narrative". In it the company assessed its performance, problems and opportunities. In its analysis for the year 1 July 1992-30 June 1993 it described its competitors. The author of the document (the second defendant) wrote:

> "Multinail is an Australian owned company which has performed well over the last year. They made a commitment to shift their base … to Brisbane and this has been well received by the Queensland truss market. As a result they are seen as a threat by us in this area … Multinail are by far the greatest threat. They are unpredictable, aggressive and cheap. They are dedicated to increasing their market share in a confined area, namely Queensland and northern NSW which are the most buoyant fabricator markets. They have managed to attain a high profile during recent years. They are unethical, for example, they copy their competitors' publications and claim them as their own. The market tends to either love or hate Multinail. … They appear determined to increase their market share which we believe

> they will achieve. … We expect them to achieve a 14 percent share of the truss market next year and we would anticipate seeing this approaching the 20 percent mark within the next three to five years. We need to put Multinail on the back foot by attempting to convert one of their larger fabricators, but this is not necessarily an easy task…"

Mr Rogers also noted in his narrative:

> "Fabricators seldom change systems unless they are totally dissatisfied with the level of service and technical support that they are receiving. Price alone is not normally sufficient."

[27] The theme is repeated in the following year's budget narrative which reads:

> " Multinail are the cheapest of the truss plate manufacturers and they have placed great emphasis on high production equipment, in the form of table presses and four-header truss cutting saws. They have recently spent a substantial amount of money setting up a large equipment manufacturing unit … Of all of our competitors, Multinail are by far the most dangerous, partially because of their unpredictability. The owner is largely unfettered by normal business ethics and he has to answer only to himself …"

[28] I digress to mention that the criticism made of Mr Taylor is, on the evidence, exaggerated. It is true that he did plagiarise one of the first defendant's sales brochures, denied his misconduct when challenged and was reluctant to withdraw the plaintiff's offending brochure. It is true also that he tended to overstate the attributes of the equipment which his company designed and/or sold and in one or two instances his evidence was inaccurate. The case is not one in which there are important issues of credit between plaintiff and defendants. If it were I would have no hesitation in preferring Mr Taylor's evidence to that of any of the principal witnesses of fact called by the defendants. Despite a searching cross-examination and a determined attempt to discredit Mr Taylor I am satisfied that his testimony was honest and is in all essential respects reliable.

[29] The defendants did not have long to wait for their opportunity. Concerned about the state of its truss fabrication plants, Mr Robertson appointed Mr John Wise as a consultant to review Campbells' truss making operation and to advise what changes to equipment and techniques should be introduced to increase profitability. Mr Wise's expertise was said to lie in the analysis of manufacturing processes, the identification of new machines and technological advances in manufacturing and the organisation of manufacture to improve productivity and to reduce costs. A significant part of his activities is the assessment of how manufacturing processes may be automated and the choice of equipment to produce automation. He is not himself a computer programmer nor particularly proficient in the art of computerisation. He employs others for that purpose.

[30] Mr Wise was appointed in about April of 1993. He quickly identified some means by which manufacturing performance could be enhanced and changes were implemented. It was obvious, however, that there could not be substantial improvement without the installation of newer and faster saws, jigs and presses.

[31] One of Campbells' retail outlets was located at Burleigh Heads which housed, in addition, a roof truss design office where local builders could submit plans and be given truss designs for their constructions. The trusses were made elsewhere, usually Caloundra, and delivered to the Gold Coast. In 1993 Campbells contemplated building a further truss fabrication plant at Burleigh Heads. To that end it employed Mr Paul Fittler to manage the proposed plant which, in the end, was never built. Mr Fittler was kept on to advise Mr Robertson as to means by which the existing truss fabrication plants could be made more efficient. He became effectively an assistant to Mr Wise.

[32] In order to learn what new truss making equipment was available Mr Fittler attended the Building Component Manufacturers Convention held in Louisville, Kentucky in November 1993 at which manufacturers displayed and/or demonstrated their new machines. There Mr Fittler was seen by Paul Harris, the first defendant's equipment manager, who learned that Fittler was "looking for high tech equipment". Mr Harris made a note to "chase him up" when he returned to Australia. The first defendant's interest in attending the convention was as the Australian supplier of auto-omni saws and jet-set jigs.

[33] While at the convention Mr Harris also met Mr Taylor and they spoke briefly. There is a dispute about the terms of the conversation and a determined attack was made on Mr Taylor's credit. He gave an account of the conversation in an affidavit sworn on 8 April 1994 some five months later. The account differs a little from Mr Taylor's evidence. That, and Mr Harris' denial of the conversation are said to discredit Mr Taylor. I think it likely that his account in the affidavit is substantially accurate, which is, that he said to Harris in a brief conversation concerning the sale of auto-omni saws in Australia, that most of the plaintiff's larger fabricators were covered by service contracts for plate but not for machinery sales. That would hardly have come as a surprise to Mr Harris who would have known of the plaintiff's 1990 contract with Campbells. I do not think that Mr Taylor tried to mislead the court. I am satisfied that Mr Harris has forgotten the conversation though he can recall speaking to Mr Taylor at the convention.

[34] The grape vine was in good working order. On 1 November 1990, six weeks before the plaintiff and Campbells actually signed their agreement, Mr Ross Robertson, an agent engaged by the first defendant to fulfil the role of technical representative, wrote to its managers:

> "They (Campbells) have signed new three year agreement with (the plaintiff) which entails supply of computers, etc at no charge to all truss plants, monthly training courses … also the upgrade of all machinery to all truss plants … plate sales $1,000,000 pa…"

[35] There is no doubt that Mr Robertson's report was read by the first defendant's senior managers. Mr Cooper, the first defendant's manager technical development, saw it as did Mr Kearon, the fabricator services manager. The second defendant was initially disinclined to accept that he had seen the report. He said he had no knowledge "whatsoever" of the terms on which the plaintiff sold nailplate to Campbells. There is no doubt he was informed of the contents of the report. I am satisfied he read it. The evidence of Cooper and Kearon as to the normal distribution of such reports, and the importance to the defendants of the contents of this one are ample support for this finding. His initial denial of the report is significant. When making that denial he had, apparently, overlooked evidence he

had given in the Federal Court which rejected the plaintiff's application for an injunction. In an affidavit he said that sometime after the first defendant had tendered for the exclusive supply of nailplate to Campbells in 1989 he:

> "… was telephoned by a Pryda employee located in Queensland who told (him) that Multinail had entered into an arrangement with Campbells for a period of time."

Despite the coyness with which the passage is phrased the second defendant ultimately conceded that he would have questioned the employee to ensure that he learned as much as the employee knew. It is, therefore, certain that the second defendant knew that the plaintiff had won the right to sell nailplate to Campbells' truss fabrication plants for a period of three years. Although he was initially inclined to contend that he did not necessarily understand that the import of the agreement was that Campbells promised to buy nailplate only from the plaintiff, the absurdity of the position was eventually confessed and he accepted that he appreciated a commitment by a fabricator to buy plate for a specified period of time was an exclusive arrangement. Mr Cooper knew, as soon as he read it, that the arrangement spoken of was an exclusive one. It is, in any event, impossible to believe that the second defendant did not learn of the result of the tendering process undertaken by Campbells in 1989. He had taken a keen interest in his company's proposal. He knew it had not won Campbells' business. Given the gossip ridden nature of his trade, in which all participants encouraged, it would be extraordinary if he had not done his best to become acquainted with the substance of the terms of the arrangement between Campbells and the plaintiff.

[36] The second defendant was a thoroughly untrustworthy witness. He is a man of considerable intelligence and shrewdness who avoided, wherever possible, telling a deliberate lie. His preference was for evasion, obfuscation and the refuge of imperfect recollection to resist telling the truth.

[37] On 30 September 1992 Mr Taylor met the second defendant at the Intercontinental Hotel in Sydney. The meeting was prearranged to allow the men to discuss some business of mutual interest. Mr Taylor has a recollection that he told the second defendant that the plaintiff had recently been successful "in securing Campbells". Mr Rogers recalls the meeting but cannot recall any such remark by Mr Taylor. A suggestion that Mr Taylor's account of the conversation was a recent invention was shown to be without foundation. I am satisfied that something like it occurred. The intimation would have come as no surprise to Mr Rogers. Apart from Mr Ross Robertson's report, in each of the years 1989 to 1993 Mr Marsh and Mr Murphy, respectively an area manager for Campbells and the manager of the Caloundra truss plant, advised sales representatives employed by the first defendant and by Gangnail of the fact that Campbells had an exclusive agreement to buy nailplate from the plaintiff. Mr Kearon effectively corroborated this evidence. In the ordinary course such information would be communicated to Messrs Kearon and Campbell and, no doubt, Rogers.

[38] In August 1993 the second defendant travelled to Queensland to visit its operations here and to call on customers. He met Mr Robertson on about 20 August 1993. The second defendant said he could not recall any of their conversation. In his affidavit filed in the Federal Court proceedings he had said that he had suggested to Robertson that the first defendant might sell nailplate to Campbells' truss plant fabricators. Robertson's reply was:

> "Don't talk to me about truss plates. I have enough on my plate at the moment."

The second defendant went on to assert that:

> "No mention was made by Robertson at this meeting of any arrangement between Multinail and Campbells."

[39] The conversation occurred three months after Robertson had signed a contract to buy nailplate from the plaintiff for a period expiring in December 1995. It occurred at about the time the second defendant would have expected the previous agreement to be about to come to an end. It is difficult to accept this version of the conversation. It is not sensible. Robertson's answer implies that he was too busy to consider negotiating with the first defendant for the purchase of nailplate and that such a discussion should be deferred. But Robertson knew that there was no point in such a discussion because of Campbell's commitment to the plaintiff. Moreover, if he had been pressed by business it would have been easier to tell Mr Rogers of the arrangement rather than invite a future discussion. It would have reduced by one the concerns he had to deal with. Moreover, there is no indication in the evidence that Mr Rogers thereafter approached Mr Robertson to open negotiations, which, surely he would have done had he believed that Campbells were free to buy nailplate from the first defendant and that a suitable opportunity to discuss the sale of nailplate should be sought. It is improbable that Rogers would not have asked whether the first defendant could supply nailplate to Campbells when the existing agreement with the plaintiff came to an end. It is hard to see why Robertson would not have told him of the new contract.

[40] In October 1993 Mr Kearon spoke to Mr Clarke, manager of Campbells' Burleigh Heads outlet, to which the first defendant supplied connectors and fasteners for wall frames and nailplate for retail hardware sales. In a letter of 29 October 1993 Mr Kearon supplied Mr Clarke with a quotation "for computer and truss plant equipment for (his) perusal and future information." It will be recalled that at this time Campbells was contemplating setting up a new truss plant at Burleigh Heads. Mr Kearon assured Mr Clarke that he "under(stood) the current position …". He sent Mr Rogers a copy of his letter to which he attached a note to say that there were indications that the first defendant might have a chance of "regaining Campbells". The note went on:

> "Mike Clarke hasn't got a lot of say at truss plant level but he has the ear of the boss."

The "boss" was Mr Robertson.

Mr Rogers asked to be kept informed. In a subsequent note Mr Kearon told him that if the first defendant "got a plant" at Burleigh Heads

> "with Dennis McKeller to manage it we could get them all back … Dennis thinks that with a Pryda system he could become the head of truss plants."

[41] Mr McKeller was employed by Campbells at Burleigh Heads to provide quotes for trusses for local builders. He had formerly been the manager of a truss fabrication plant at Southport which had utilised the first defendant's nailplate. Mr Kearon's position was that he knew of the three year agreement made between Campbells and the plaintiff in 1990 and that he expected it to come to an end in the last quarter of

1993. His notes to Mr Rogers portray a concern that the first defendant attempt to regain Campbell's business. The strategy suggested is circuitous, involving Campbell's employees furthering their own ambitions by persuading Mr Robertson to change suppliers. Nothing came of the endeavour but it is curious that the first defendant should not have made a direct approach to Campbell's to replace the plaintiff as supplier of nailplate if in fact Rogers and Kearon believed that Campbells would be free to deal with it at the end of 1993. Mr Roger's explanation for the lack of a direct attempt to sell nailplate was revealing. He said "you take what opportunities you can, what angles you can". He did not seem to think there was an opportunity to openly offer to sell nailplate to Campbells.

[42] Mr Fittler, who had been impressed by the auto-omni saws did make contact with, or was contacted by Mr Harris. By letter of 6 December 1993 Mr Harris provided Campbells with a quotation for a saw at a price of $257,000 and by a second letter of the same day quoted prices for jigs of varying sizes. At the time Campbells were seeking competitive prices for various truss making equipment. By quotation dated 7 December 1993 the plaintiff supplied prices for presses and associated equipment. Campbells also approached Gangnail which, by letter of 14 December 1993, quoted to supply a computerised multi-bladed saw.

[43] Over the next few months numerous approaches were made by Campbells to the three suppliers for various quotes for various items of equipment. It would be unnecessarily complicated to trace the history of dealings with all of them. Campbells had a limited budget and its senior management vacillated about how best to achieve modernisation in their plants at minimum cost. This resulted in frequent requests for prices on different types of equipment and different quantities of equipment. At one stage Campbells contemplated creating an entirely new truss fabrication plant to be located at Mount Gravatt which would supplant its existing fabricators. At other stages it planned only to upgrade its fabrication plants at Bundaberg and Caloundra but not Oxley. Later it abandoned the idea of a new plant at Mount Gravatt and decided to re-equip its fabrication plants at Bundaberg, Caloundra and Brisbane. I intend to trace the negotiations only so far as they are directly relevant to the issues in the litigation.

[44] Mr Wise, who considered the first defendant's quotes for saws and jigs, asked Mr Harris for a copy of the interface programme devised by ESCO which would have enabled the machines to respond to commands from the plaintiff's design software. Ignorant or forgetful of the strategy Mr Harris sent the program to Mr Wise. His actions came to the attention of Mr Rogers who was annoyed by it. He wrote to Mr Wise on 22 December 1993 to say, *inter alia*,

> "The supply of the saw is based upon the Auto Omni being an integral part of the Pryda system and … should any party wish to purchase the saw without choosing the Pryda system, then all interfacing … would be the responsibility of the purchaser."

Mr Rogers went on to request Mr Wise to agree not to show the interface file to "any other party", which would include the plaintiff. Mr Rogers' plan was to make it appear that the ESCO equipment could operate only with the first defendant's design software. He did not wish Campbells to realise that a relatively straight forward program would allow the equipment to be driven by the plaintiff's, or Gangnail's, software. Indeed, he had had the defendant alter sales brochures produced by ESCO which had emphasised the ease with which the equipment could be utilised by a variety of truss design software to conceal that fact.

[45] The next significant event occurred on 10 January 1994. A delegation of four Campbell's managers, together with Mr Wise, visited the first defendant's premises in Melbourne. The managers were the three southern plant managers, plus Mr Fittler. The next day they went to Gangnail's offices. Their purpose was to inquire of each what truss making equipment was available for supply, the capabilities of each item of equipment and the price at which it might be sold. To meet them the first defendant made available its managing director, Mr Rogers, who returned from holidays for the purpose, Mr Cooper and Mr Kearon. Mr Rogers opened proceedings, his notes of which appear at AB56. He allowed himself half an hour to extol the attributes of the first defendant, the benefits it could confer on Campbells in its truss fabrication business and all that it had to offer as a supplier of equipment, nailplate and services. The meeting lasted all day and concluded with a dinner hosted by the first defendant. Its final session was a peroration from Mr Rogers. The meeting assumes a significance in the defendants' case. There is no doubt that at it the defendant's employees emphasised the efficiencies of the ESCO equipment and its established compatibility with the first defendant's design software. The essence of the promotion was that if the auto-omni saws and jet-set jigs were to be purchased it would be necessary to acquire also the first defendant's software. All present would have understood that the concomitant of such a decision was that Campbells would have to buy the first defendant's nailplate. It is equally clear that the Campbell representatives had travelled to Melbourne to search for truss making equipment and nothing more.

[46] The defendants' emphasis at the meeting was on the advantages conferred by their software which was demonstrated during the course of the day. The particular advantage stressed was that it would allow utilisation of the computerised auto-omni saw and jet-sets which had so impressed Mr Fittler. It was Mr Rogers who had devised the strategy of connecting the two as a sales technique and representing, contrary to the fact, that those saws and jigs could only be acquired if the purchaser also took ComputaRoof as its software. He was adamant that the first defendant would not sell auto-omni saws or jet-sets except as part of a package which would include ComputaRoof and, therefore, the first defendant's nailplate. Mr Rogers might be thought to have been too senior an officer to be involved in a meeting between middle managers inquiring about particular machines. He seems to have involved himself and given the meeting the focus I have just described. It is, I think, clear that the technique was to use the computerised equipment as an inducement to truss fabricators also to acquire the first defendant's software and nailplate.

[47] Mr Rogers testified that in his final address he asked the Campbells' managers (and Mr Wise):

> "If there were any objections . . . or any problems they had in relation to taking up with the conversion with Pryda, was there . . . anything stopping them from doing so." (T 778.10-15).

None of the managers recall such a question being asked. Mr Cooper cannot remember it. Mr Kearon has a recollection that Mr Rogers asked two questions, one, to the effect had those present "got on" during the day, which baffled the audience. The second, "was there anything in the way of (the two companies) moving on?" which, though equally cryptic, produced a unanimous negative answer.

The questions were characterised as a "sales technique".

Mr Rogers explained that his questions were standard and were designed to identify any objection of a personal kind, or which concerned the equipment, which would make Campbells reluctant to deal with the first defendant. He was not, he said, inquiring "specifically about contractual obligations". (T 778.20-45; T 826.40).

[48] This is not how he put things to the Federal Court. (Exhibit 110 para 22). There Mr Rogers swore that his questions were designed to elicit knowledge of any contractual impediment to dealing with Campbells. He testified:

> "As I was aware that some sort of arrangement existed between Campbells and Multinail in relation to the supply of nail plates, I asked John Wise at the meeting on 10 January 1994 if Campbells would be comfortable about buying from Pryda and if they were in a position to buy from Pryda. John Wise said that there would be no problem and that Campbells had bought from Pryda on many other occasions and had always been quite satisfied. At no stage during 1993 or during the negotiations with Campbells was I aware that Campbells had entered into a contract with Multinail for the exclusive supply of nail plates . . . I do not recall any . . . conversation with . . . Mick Robertson . . . or any other representatives of . . . Campbells at which any such contract was mentioned. At all times, Campbells represented that it was free to deal with Pryda."

The last sentence is a lie. Mr Rogers admitted that no such representation from any Campbells' employee had ever been made. The passage had other significance. Mr Rogers admits to an awareness of "some sort of arrangement . . . in relation to the supply of nail plates". He was reluctant to admit to any such knowledge in this court. If he was aware of it and concerned to know what the position was it is inconceivable that he would not have asked Mr Robertson when they met in August. It is equally surprising that he should address the question to Mr Wise, the consultant, who was not an officer of Campbells. As will emerge later Mr Wise knew on 10 January 1994 of the exclusive contract between Campbells and the plaintiff. Mr Wise demonstrated an extreme partiality for the first defendant's interests. It seems extraordinary that he would give Mr Rogers, whose company he favoured, a false answer. Moreover the answer ascribed to him was known by Rogers to be wrong. "There would be no problem . . . Campbells had brought from Pryda on many other occasions . . ." was known to be false in relation to the sale of nailplates to Campbells' truss fabrication plants in the three years to December 1993.

What emerges from the affidavit is that Mr Rogers was aware of some contract for the supply of nailplate between Campbells and the plaintiff and has lied about what he was told when he inquired about it.

[49] Equally revealing is Mr Cooper's evidence. Although he cannot recall Mr Roger's inquiries he claims himself to have asked Wise at the dinner whether:

> "There (was) something there that . . . would give us a problem."

Mr Wise answered:

> "There's nothing for you to be concerned about."

He told Mr Kearon and Mr Rogers what Mr Wise had said. He himself:

> "wasn't 100 per cent (satisfied) because it sounded like there was some agreement that they were going to handle. It sounded like there was something there but . . . there wasn't anything for us to be concerned about." (T 1022.10-20)

No-one from the first defendant, not Rogers, Cooper nor Kearon ever inquired further of anyone from Campbells who might know whether Campbells were free to contract with the first defendant for the sale of nailplates.

[50] Following the meeting, on 12 and 14 January 1994 the first defendant wrote to Mr Fittler recommending and quoting to supply various items of computerised truss making equipment. Each letter included computers and the first defendant's design software as recommended products. The second letter offered nailplate at a discount of 25 per cent from its listed price.

[51] It seems likely that in about mid January 1994 Campbells baulked at the cost of the auto-omni saws. The budget to upgrade the southern plants was about a million dollars and the two saws would have cost more than half that amount. Campbells looked seriously at acquiring new presses for its three southern plants and improving sawing capacity without buying the omni saws.

[52] On 17 January 1994 Mr Cooper sent to Mr Fittler a revised price for nailplate which allowed an effective discount of 30 per cent from the list price. This was extraordinarily generous and was the largest discount ever offered by the first defendant to any customer. Mr Rogers authorised it. It was substantially below the plaintiff's price for nailplate and would, according to advice given by Mr Wise to Campbells, have reduced savings in the cost of nailplate in excess of $100,000 per year.

[53] On 21 January 1994 Mr Wise advised Mr Robertson that he had "finalised (his) review of equipment options to upgrade the capacity and improve competitiveness of (Campbells') truss plants". He recommended that Campbells "switch to the Pryda software progressively in all branches. Pryda offers savings of about $120,000 per annum in nail plate and design costs and speeds quoting and detailing by 20-30 per cent". Four days later, on 25 January 1994 Mr Wise again wrote to Mr Robertson to reflect a change in the latter's thinking to improve the plants at Bundaberg and Caloundra and delay the improvement to Oxley. This proposal would have seen "Bundaberg and Caloundra stay(ing) on Multinail but their presses . . . upgraded to increase capacity and lower costs". Mr Wise's recommended equipment for the two plants was for second-hand saws but new improved presses and jigs. He went on to advise improvements for Oxley that could be achieved at little expense. He recommended that this plant "pilot the Pryda software and ensure its effectiveness before the software was rolled out to other Branches. The Pryda software's truss design saved 20 per cent of plate costs because of better design and offers 20 to 30 per cent faster quoting and detailing".

[54] On 2 February 1994 Mr Kearon spoke to Mr Wise by telephone to ask what, if anything, Campbells had decided to do in response to the first defendant's quotes. Mr Wise told him that he had advised Mr Robertson that Campbells should change to the first defendant's product and that he would keep Mr Kearon informed.

On the next day Mr Kearon spoke to Mr Wise who told him that he and some Campbell's employees planned to visit a truss fabrication plant at Toowoomba the following day for an inspection of a plant that used the first defendant's system. Mr Kearon told Mr Wise he did not "like the idea" because the fabricator was thought to be sympathetic to the plaintiff's product and might express support for that system to the Campbell's representatives, or criticise the first defendant's system. Mr Wise told him not to worry because he "knew what (he was) looking for" and that the plaintiff did not "have the ability" to compete successfully with the first defendant.

This remark was justified by Mr Wise on the basis that it was appropriate to inform each competitive tenderer of the other's position in order to obtain the best terms. This explanation is completely implausible given that Mr Wise was assuring Mr Kearon that the plaintiff could not compete successfully.

[55] On 4 February 1994 the first defendant submitted another quote, this time to supply presses and jigs, but not saws, to the Bundaberg and Caloundra plants only. The quote would seem to reflect Campbells' decision not to purchase the auto-omni saws because of their cost. The letter which contained the quotation read:

> "This document supersedes all previous quotations. The quotations supplied herein are still based on the premise that Campbells change to the Pryda system and should not be accepted as a stand alone Equipment Quotation as we have quite clearly based our figures on such a change."

[56] Despite the terms of the letter Mr Wise and/or Mr Fittler must have spoken to Mr Kearon about the second defendant supplying second-hand, less sophisticated saws for installation at Bundaberg and Caloundra. A cost analysis of the equipment to be supplied by the first defendant was prepared by Mr Fittler for Mr Robertson on 4 February 1994. The list includes a second-hand saw for Bundaberg and one for Caloundra at a cost of $50,000 each.

[57] On 9 February 1994 the plaintiff submitted what was its last quotation for equipment for the Campbells' fabrication plants at Caloundra and Bundaberg. Mr Taylor must have been informed of the then proposal to buy second-hand saws from the first defendant. The plaintiff's quotation contained a criticism of that equipment and a quotation for the plaintiff's own saws and jigs which were new. The saws were five bladed but were not computerised. The blades had to be set manually but it was possible to develop a program to make them fully computerised. It would take about 12 months to design the program. The plaintiff's price for supplying equipment for the Caloundra plant was $490,000 and $185,000 for supplying equipment to Bundaberg. As well the plaintiff offered to provide a further discount on its nailplate prices if the new equipment resulted in an increased volume of sales.

[58] On the same day, 9 February, Mr Kearon again spoke to Mr Wise by telephone. He was told that Mr Robertson was "a long way from being convinced to change

nailplate suppliers". Mr Kearon passed the information on to Mr Rogers who said he would telephone Mr Robertson. Mr Rogers made it clear to Mr Kearon that the first defendant would be most reluctant to supply equipment without securing a commitment from Campbells to buy nailplate.

[59] On 11 February Mr Robertson compiled a summary of the first defendant's and the plaintiff's proposals noting the advantages of each. He sent it to Mr Marsh and Mr Wise with the notation:

> "Both proposals are within budget. Could you talk . . . and reach a consensus by Tuesday and let me know. Please involve Brian Murphy and Robin Petersen."

Mr Marsh was an area manager for Campbells. He was responsible for the fabrication plants at Caloundra, Bundaberg and Oxley the managers of which reported to him. He reported directly to Mr Robertson and enjoyed his confidence. Murphy and Petersen were the managers of the Caloundra and Bundaberg plants respectively. On 11 February 1994 Mr Fittler faxed Mr Taylor a request for further information about the plaintiff's quote of 9 February. Mr Fittler in particular sought information about the future computerisation of the plaintiff's five bladed saw.

[60] Having received Mr Robertson's memo Mr Marsh went to Mr Murphy's office where they telephoned Mr Petersen. Having discussed the matter the three of them agreed that the plaintiff's offer should be accepted. Mr Marsh informed Mr Wise of their opinion.

[61] Extraordinarily Mr Wise provided a copy of the plaintiff's quote of 9 February to Mr Kearon. He told him that the first defendant would have to answer the plaintiff's criticism of it. There resulted a letter of 12 February 1994 from Mr Kearon to Mr Wise answering the criticism and advancing arguments why Campbells should accept the first defendant's proposal. Mr Wise in fact assisted Mr Kearon to draft the letter. What happened was that on the afternoon of Friday 11 February Mr Wise told Mr Kearon of the plaintiff's quote. He prepared a draft reply on Saturday and faxed it to Mr Wise who had a flat in Melbourne. On the Sunday morning Mr Wise telephoned Mr Kearon to say he would make such changes to the draft as "he felt would benefit his cause". The words are Mr Kearon's and appear in a memorandum he sent to Mr Rogers and Mr Cooper on 13 February. Mr Kearon's best explanation of what Mr Wise's "cause" was was that he wished to see Campbells convert to the first defendant's program and nailplate. That afternoon Mr Kearon visited Mr Wise at his flat where he was shown the plaintiff's quotation and allowed to copy relevant parts. Mr Wise also briefed him on the internal discussions within Campbells where Mr Marsh was staunchly supporting the plaintiff's proposal. Mr Wise explained the tactics he intended to use to ensure that Campbells accepted the first defendant's proposal. Kearon's memorandum concluded:

> "John told me that in his opinion the contract will go to Pryda and he personally will take great pleasure in liaising with us."

[62] Mr Kearon's (and Mr Wise's) letter of 12 February concluded:

> "In summing up we guarantee Campbells the supply of total product range and technology for the future. . . . We are . . . a very big Australian and are not available for sale in part. The joint annual turnover of the group would be three times that of our largest

> competitor. We offer the widest range of products, technology and staff available . . . We do not wish to be drawn into an opposition slanging . . . match . . . We are clearly too big a company for that. . . . We trust that this should clear any doubts that you may have as to our ability to service Campbells should we be selected as your preferred supplier . . ."

[63] On 14 February 1994 Mr Taylor answered Mr Fittler's fax and, on the same day, Mr Truskinger sent Mr Fittler information (already provided to Mr Wise) in relation to computerising the plaintiff's equipment. Mr Truskinger was an engineer who specialised in designing computer software. He was employed by the plaintiff and was very experienced in adapting and using computer technology to design and to assist in the fabrication of trusses. He impressed me as being thoroughly competent in his expertise and reliable in his testimony. Of all witnesses who spoke in the case of the limitation and benefits of computers he was by far the most proficient and knowledgeable.

[64] By a letter dated 17 February 1994 Mr Wise advised Mr Robertson that the fabrication plant at Oxley should be re-equipped with new presses and a better, though not a new, saw. This was a departure from current thinking. Both plaintiff and first defendant had been asked to provide the equipment quotations for the truss plants at Bundaberg and Caloundra only. On the same day Mr Robertson met with Mr Wise, Mr Marsh and the managers from the southern plants. The managers' unanimous recommendation was to accept the plaintiff's proposal and adhere to it as the supplier of nailplate to Campbells.

[65] Also on 17 February, Mr Robertson met with Mr Wise and his two area managers, Mr Marsh and Mr Brough. The latter were in favour of the plaintiff's retention. Mr Robertson accepted their view and a decision was made to accept the plaintiff's quotation for equipment and to retain it as the supplier of nailplate. Mr Wise chose to raise as an issue the imposition of a sanction on the plaintiff should it not develop a fully computerised saw within 12 months. It may be remembered that the plaintiff had not quoted to deliver a computerised saw but it had indicated that its saw could be computerised within that time frame. On 18 February the plaintiff submitted a revised quote for a five bladed automatic, though not computerised, saw for a price of $120,000 "delivered and installed". That same day Mr Wise telephoned Mr Kearon to tell him that:

> "Multinail are still fighting and will not go down without a fight. (It is) basing (its) proposal on new equipment. How can (Pryda) match that."

Mr Kearon told him that the first defendant could supply a second-hand saw free of charge and/or that if Campbells should order two omni-auto saws it would get "a good deal". Three days later on 21 February Mr Wise wrote to the plaintiff:

> "As part of your offer of 14 February 1994 you indicated master 4 and 5 saws could be fully computerised. This offer needs to form part of a contract for purchase of the saws as the computerised option is essential for the competitiveness of Campbells' truss business. . . . If the computerised saw is not fully installed and working by 31 December 1994 at Caloundra Multinail will pay to Campbells liquidated damages estimated at $2,000 per week . . . limited to the value of the two saws being purchased . . . $385,000."

[66] By a letter dated 22 February 1994 the first defendant made a further offer to supply Campbells with equipment. This offer was for the southern plants, Bundaberg, Caloundra and Oxley. It had not been asked by Campbells to make such a quote. The plaintiff had not recently been asked to quote on the supply of equipment to three plants. The unsolicited offer followed Mr Wise's question to Mr Kearon – how could the first defendant "match" the plaintiff's offer, and Mr Wise's suggestion to Mr Robertson that Oxley be included in the re-equipment program. The quotation offered two auto-omni saws at prices very substantially below those which had earlier been indicated. The supply of these saws had been discarded as a prospect about a month earlier because of their cost. The total price for the equipping of the three plants was $820,000. This price seems to have been arrived at in a meeting between Mr Wise and Mr Cooper. The latter had costed the equipment at $970,000 but Mr Wise had indicated the price should be reduced to $820,000, which it was. Mr Cooper's note of the meeting is dated 23 February, the day after the letter but the letter must be wrongly dated or the meeting must have occurred earlier. There is no doubt the price was fixed at the meeting. The letter included a number of conditions the first of which read:

> "This price is a special package and cannot be broken down into components. As it is below cost we ask for a specified period of commitment from the Campbells' group to purchase all truss plant, nailplate and ancillaries from Pryda exclusively."

[67] On 22 February 1994 Mr Taylor wrote to Mr Robertson:

> "John Wise wrote to me on . . . 21 February . . . and included a specification of the saws that he now wants Campbells to install. These amended specifications invalidate the basis of our tender of 10 February 1994. Accordingly we should properly treat that tender as withdrawn. A new tender has been prepared which includes an itemisation of what Multinail can supply in terms of machinery and the cost of these items to Campbells. This tender is based upon the supply of equipment to both Caloundra and Bundaberg as a package. . . ."

The enclosed quotation did not provide for a fully computerised saw. Instead it noted that the plaintiff believed Campbells should not proceed with a fully computerised saw until production at Caloundra indicated the need for it and staff had been fully trained and instructed.

Mr Taylor was reluctant to commit himself to an arrangement that would have exposed his company to a large potential liability for liquidated damages. He arranged to meet Mr Robertson on 23 February at his office. He took with him his letter and the revised tender. He did not have an opportunity to hand them over. When he said he had them and wished to show them to Mr Robertson he was told that they were unnecessary because Robertson had decided to proceed with the first defendant's proposal to re-equip the truss plants at Bundaberg, Caloundra and Oxley. Mr Taylor protested that that decision would breach the agreement between the plaintiff and Campbells. Mr Robertson said he had made a decision because the first defendant's equipment was better, being more computerised, it was cheaper and the first defendant had promised to supply nailplate at lower prices than the plaintiffs. As well he said that the first defendant would not sell the equipment unless Campbells took its nailplate. Mr Robertson said that the smaller northern plants would continue to take nailplate from the plaintiff.

It should also be recorded that Mr Taylor had not informed Mr Wise of the withdrawal of his company's tender of 9 and 14 February, or the intended submission of a new proposal which did not include a computerised saw. This has a relevance which will emerge later.

[68] By a letter dated 23 February 1994 from Mr Fittler to Mr Kearon, Campbells wrote:

> "It is with pleasure to confirm our commitment to change to the Pryda system, initially at Brisbane, Caloundra and Bundaberg.
>
> We also intend to place order with Pryda for the equipment as per our discussions . . . The payment terms and installation program will need to be agreed to. John and myself will be raising an official order accompanied with an order number Friday 25 February 1994."

In fact on 2 March 1994 Mr Fittler sent a purchase order to the first defendant for two auto-omni saws, one 30 metre roller gantry press, one 20 metre roller gantry press, two mitre saws and 15 jet-set jigs. On the same date Mr Fittler wrote to Mr Kearon confirming the equipment to be purchased and the price for each item. The saws were each priced at $202,000. Initially the price had been $275,000 for one saw and $255,000 for a second saw if ordered, a saving on saws alone of $126,000. This letter caused some consternation in the first defendant. On 21 March 1994 Mr Cooper wrote to Mr Wise with respect to it. He said:

> "The first problem is the purchase order . . . It has a breakdown of component pricing that is potentially very damaging to Pryda. While the total is correct, and Campbells have any breakdown they wish, the individual components are not our figures and we would not like this purchase order to be seen by anyone other than Paul. If our competitors were leaked a copy and then showed it to our other customers, no amount of talking on our behalf would allay their fears that we have prostituted the Omni prices to get new business at their expense. Help!! Can all copies be destroyed . . .?"

Mr Fittler obligingly destroyed the documents.

[69] Meanwhile on 3 March 1994 Mr Wise wrote to Mr Cooper:

> "I refer to your proposal of 22nd February 1994. There are a number of points that need to be agreed and clarified as part of the proposal. We would like these points to be set out in a heads of agreement so there is no dispute on who is doing what down the (track).
>
> These points include:
>
> 1. Payment terms – we agree to a holding deposit of 20 per cent . . . while we will agree to progress payments . . . we would want to see some percent of the cost . . . not payable until the equipment is satisfactorily installed . . .
>
> 2. Discounts – we agree with the proposal to use the rebate structure . . . we need to agree 30 per cent discount applies to all truss plant purchases . . . Please advise what will be the impact on hardware store discounts . . .

3. Loan saw . . . we would like to agree a buy at option . . . We propose that Campbells have the right to purchase and own the saw outright . . .

4. Installation support - . . . we understand is included . . . specific tasks that we believe need to be covered by Pryda include . . .

. . .

8. Commitment to purchase – we are happy to commit to the purchase of plates and auxiliaries for a two year period provided equipment as set out in your proposal is satisfactorily installed and working by September 1994, a delivery and quality performance of plates is to agreed standards and Pryda plates work satisfactorily in the . . . press . . ."

[70] On 4 March 1994 Mr Taylor wrote to Mr Wise:

> "I express our disappointment at your decision to appoint Pryda as the equipment engineering and plate supplier to Campbells. From where we sit there must have been "hidden agendas" in this tendering and selection process. Multinail only received your partial specification of equipment . . . three days prior to the decision being announced."

Mr Taylor enclosed with his letter a copy of the agreement between Campbells and the plaintiff. Mr Wise replied by a letter of 11 March 1994:

> "The views expressed in your letter are erroneous:
>
> 1. It is Campbells' decision as to who they appoint as suppliers, not ours.
> 2. All parties in the tender process were treated fairly. Multinail in fact was given the chance to requote in consideration of you being the existing supplier.
> 3. Multinail has quoted the proposed equipment to Campbells on a number of previous occasions.
> 4. There was no partial specification – in fact a list of requirements was developed solely for Multinail as Multinail did not have an existing computerised saw.
>
> We have no interest or knowledge of the agreement between Campbells and yourselves . . . We object to the interference (sic. inference) that our conduct was not fair, reasonable and professional. Any recommendation we made was based on an independent, expert assessment of what was best for our client's business."

As will appear later many of the assertions in this letter were downright lies. Mr Wise knew as early as October 1993 of the contract between Campbells and the plaintiff. Moreover the plaintiff was not treated on the same basis as the first defendant, and Mr Wise knew it. Its quote was given to the first defendant but there was no reciprocal exchange. He never told Mr Taylor that the first defendant was offering equipment for the three plants, let alone at substantially reduced prices. Mr Taylor did not have the benefit of familiar conversations with Mr Wise as did Mr Kearon, advising him of developments and discussing with him how his company might win Campbells' business.

[71] On 10 March 1994 the plaintiff's solicitors sent separate facsimile transmissions to the defendants informing them of the contract between the plaintiff and Campbells and alleging that the defendants had "intentionally sought to induce a breach" of it. The letter sought undertakings that the first defendant would not proceed with its contract to supply nailplate to Campbells and indicated that the plaintiffs would seek damages in respect of any loss it might suffer. The reply was a letter of 11 March 1994 from the first defendant's solicitors denying knowledge of the contract and that it had acted "with the intent of procuring the breach or preventing or hindering the performance of any contract between (the plaintiff) and Campbells". On 15 March 1994 Mr Rogers wrote to Mr Robertson "further to (their) telephone discussion" and enclosed the solicitors' correspondence. Mr Rogers promised to advise Mr Robertson "of any further correspondence . . . as soon as it is to hand". This communication was the only one to which Mr Rogers was prepared to admit between him and Robertson following the plaintiff's solicitors letter of 10 March.

[72] I have already mentioned the letter of 21 March 1994 from Mr Cooper to Mr Wise. As well as expressing alarm that its extraordinary low prices might become known to its other customers it answered Mr Wise's letter of 3 March. Mr Cooper wrote:

> " . . . We . . . have agreement on most points. There are a few items however that are newly raised and must be discussed further. . . .
>
> 1. Payment terms -
> The terms vary on each piece of equipment.
> Auto-omni saws and jet-sets:-
> $120,000 due now . . . Minor problems that may surface are not to be used with whole payment of the final sum. An additional $4,000 will be due if the shipping . . . is fast tracked.
>
> Becfab roller master – we will be invoicing Campbells for the sum of $345,000 . . .
>
> 2. Discount terms –
> We have offered Campbells a total net discount of 30 per cent off list price . . . This is built up of 17.5 per cent discount applied on invoice, plus a 5 per cent standard rebate, 5 per cent advertising subsidy, and 2.5 per cent settlement discount . . .
>
> 9. Commitment to purchase –
> We suggest that Campbells commit to making the Pryda system work for a year, starting straight away. After that all of the equipment will have been installed and the staff used to its capabilities . . . A review at that time should see another yearly commitment.

> We have received litigation proceedings against us . . . While our first reaction was of incredulity . . . we are now playing it by the book . . . This has made everyone here start walking on eggshells, and doubt is now raised as to the effect this will have on the purchase order already received. Obviously we do not relish the prospect of supplying equipment only and having no ongoing product sales. . . ."

Becfab was a company which manufactured various items of machinery. It was to make a number of the presses which were included in the first defendant's quote.

[73] On 3 May 1994 Mr Wise attended a meeting of the first defendant's employees, including Mr Rogers, Mr Cooper and Mr Kearon. The purpose of the meeting seems to have been to discuss the installation of the first defendant's equipment. However the minutes of the meeting note that Mr Wise "indicated the conversion of the three northern plants is proposed. He will advise details of equipment and computer hardware at these three locations".

It will be remembered that the northern plants were covered by the contract a copy of which had been sent to the first defendant on 10 March. These plants had been exempted from Mr Robertson's decision to buy nailplate from the first defendant, no doubt as a sop to the plaintiff and as an incentive for it not to commence proceedings against Campbells lest they lose that custom too. With undeniable knowledge of the existence of the contract the first defendant's senior managers were discussing with Campbells' representative an arrangement that would breach the contract. On 10 May Mr Kearon wrote to Mr Wise to summarise agreement made at the meeting. He noted that the first defendant was "waiting on the response relating to equipment required and computers" for the northern plants.

[74] Although the first defendant seems to have placed orders with ESCO for the saws and jigs late in February following Campbells' intimation that it would accept the Pryda proposal, the first defendant did not pay anything by way of deposit to ESCO until about 26 April 1994. On that date it received payment in respect of the deposits from Campbells and passed them onto ESCO. The status of any order to ESCO prior to that date is unclear.

[75] On 28 May 1994 Mr Smith, the first defendant's Queensland fabrication services manager wrote to Mr Fittler to arrange a meeting for 3 June to "finalise all arrangements for machinery and computer installations". Those attending were to include Messrs Wise, Fittler, the three truss plant managers, Cooper, Kearon, Harris and Smith as well as a representative from Becfab. Item 5 on the agenda was Campbells' requirement for nailplate of varying types and their anticipated delivery dates. According to the minutes of the meeting signed by Mr Cooper there was no discussion on this item of business. On 5 June 1994 Mr Smith sent a memorandum to Mr Anglin which, having noted some progress toward the commissioning of equipment, drew to his attention that:

> "The issue of the supply of nailplate still has to be resolved."

On 6 June 1994 Mr Cooper wrote to Mr Fittler to enclose a copy of a "computer quote". He went on:

> "The main sticking point on supply of our software to Campbells is the litigation problem. At this point we have been advised not to hand over (ComputaRoof) to Campbells until the matter is resolved."

On 15 June 1994 Mr Anglin travelled to Brisbane to speak to Mr Robertson. His explanation for the meeting was that the implementation of the contract was "marking time" so Mr Anglin aimed to "get it back on stream".

[76] I do not accept Mr Anglin's professed motive for travelling to Brisbane. The contemporaneous documents contain no support for Mr Anglin's concern that the implementation of the contract to supply equipment was delayed. Mr Cooper's letter of 25 May 1994 to Mr Wise noted that the first defendant's "best man in Brisbane . . . has taken up the role as the central liaison for Campbells' staff . . ." and that Mr Kearon and he would come to Brisbane in early June now that they were "getting to the sharp end of the business". The letter noted adjusted target dates and noticed that training on the defendant's software would begin for Campbells' staff on 1 June. The minutes of the meeting of 3 June concluded optimistically. Mr Cooper wrote:

> "Everyone was keen to see all obstacles overcome as fast as possible. Congratulations to (Mr Smith) for coordinating this meeting and setting a valuable agenda."

There is no suggestion of delays in the delivery or installation of the equipment. The only matter that had not progressed was the supply of nailplate which Mr Smith had told Mr Anglin had to be resolved.

[77] Mr Anglin and Mr Robertson discussed the problems created by the plaintiff's litigation. Mr Robertson told Mr Anglin that he would advise the plaintiff's solicitors that Campbells intended to purchase nailplate from suppliers other than the plaintiff or the first defendant. He and Mr Anglin discussed other potential suppliers. Mr Anglin suggested Abel Cooke in New Zealand or Steelfast. The former company was related to the first defendant. Mr Robertson said he expected the plaintiff to apply for an injunction but to fail because of the availability of damages as a remedy. He also said that if the plaintiff continued with its action and if the first defendant were to become nailplate supplier to the three southern plants, it and Campbells would have to "work out some way of underwriting Campbells' damages". The passage quoted is from Mr Anglin's note of the meeting, AB182. Mr Robertson went on to say that Campbells would negotiate with the plaintiff and might offer to allow it to supply the Oxley plant as well as the three northern plants, presumably if it discontinued its action. On 6 July 1994 Mr Anglin and Mr Robertson again spoke, probably by telephone when Mr Robertson initiated the call. They discussed the proposal Mr Robertson had raised in June that the first defendant underwrite or indemnify Campbells with respect to any damages it may have to pay the plaintiff. Mr Robertson told Mr Anglin that he hoped to be able to compromise the plaintiff's suit and, to that end, he asked Mr Anglin to cooperate by sending representatives to Campbells' fabrication plants in Rockhampton and Mackay. They were to make themselves conspicuous and to examine the computer equipment at the plants. The strategy was that the plaintiff would learn of their visit and the obvious implication that it may lose those plants as well. The threat could be removed if the plaintiff discontinued its action. Mr Anglin's notes of the conversation appear to record that none of the Campbells' fabrication plants were ordering nailplate from the first defendant. Campbells first bought nailplate from the first defendant at about this time. On 5 August 1994 Mr Anglin wrote to Mr Robertson:

> "Further to our recent meetings, I would like to put to you my proposal to create a provision to assist in covering damages which might arise from the current Multinail actions.
>
> I have arranged for provision in our accounts for an amount equal to 25 per cent of the net sales of claw plates to the Caloundra, Oxley and Bundaberg truss plants. This provision would be calculated after any discounts and the rebates which are being utilised to pay for equipment. The fund will be available to either your company or Pryda in the event there is an award of damages. If not called upon, the provision would revert to Pryda."

The letter went on to request, as consideration for the provision the right of exclusive or "preferred" supplier to Campbells retail outlets and manufacturing plants.

[78] On 9 August Mr Robertson faxed to Mr Anglin the terms of an agreement but departed a little from the terms of Mr Anglin's letter of 5 August. Mr Anglin made some changes and faxed back the signed agreement on 10 August. The agreement, signed by both, provided:

> "1. Pryda will set aside a fund to meet any damages which may be awarded payable by either Campbells or Pryda. If payment on account of damages is required by both Campbells and Pryda then the amount of the fund will be distributed pro rata to the amount payable by each of Campbells and Pryda on account of damages. The fund will be applied to the first payment of damages required to be made. If subsequently, the other party is required to pay damages an adjustment will be made between Campbells and Pryda.
>
> 2. While Pryda will make payment consisting of the fund as required, if no amount is required to be paid on account of damages, then the fund will revert to Pryda . . .
>
> 3. The amount of the fund or payment to be made by Pryda will be equal to 25 per cent of the net sales of Claw Plates which Campbells purchase for use in its truss plants, which will initially be the truss plants located at Caloundra, Oxley and Bundaberg. This payment will be calculated after any discounts and rebates are applied . . .
>
> 4. The current estimates of the amount of the fund is likely to be approximately $250,000 though this is subject to final determination.
>
> 5. Campbells will give Pryda the status of the preferred supplier to its retail stores and manufacturing plants all other things being equal with respect to price, delivery and quality . . ."

[79] On 6 and 12 September Mr Anglin and Mr Robertson respectively for their companies signed the heads of agreement first adumbrated by Mr Wise in his letter of 3 March. By clause 6 Campbells agreed to purchase from the first defendant for a period of two years "all of its nail plate and ancillary requirements for its three southern Queensland truss plants (Oxley, Caloundra and Bundaberg)".

[80] To make out its case the plaintiff must prove that the first defendant intended to, and did, induce Campbells to breach its contract with the plaintiff. The first defendant contests both aspects of the tort. It is clear that the plaintiff will have failed to prove the requisite intention if the first defendant, by its managers, did not know of the contract when they negotiated with Campbells to become the supplier of equipment and nailplate. Knowledge and intention are not, of course, synonymous, but there can have been no intention to induce the breach of contract if the alleged tortfeasor was ignorant of it. In the present case the problem has two dimensions of fact. The defendants were put squarely on notice of the existence of the contract by the plaintiff's solicitors letter of 10 March 1994. If the first defendant induced Campbells to make a contract with it and thereby break its contract with the plaintiff after 10 March the plaintiff will have made a considerable start in proving this aspect of its case. The defendant argues strenuously that the agreement was made on 23 February when Campbells accepted its quotation to equip all three plants. The plaintiff disputes this but argues that, in the event, the first defendant was aware by December of 1993 or January of 1994 of the existence of the contract. To resolve the dispute it is necessary to analyse the facts.

[81] It is instructive to commence with the examination of Mr Wise's knowledge. He conducted negotiations almost exclusively on behalf of Campbells and dealt at length and with great familiarity with Mr Kearon.

In evidence in-chief Mr Wise was asked when he first knew of the possibility that the first defendant might supply nailplate to Campbells as part of any contract between them. He thought that had occurred sometime before 17 January 1994. He was then asked when he first knew that Campbells had a contract which bound it to buy nailplate from the plaintiff until the end of 1995. His answer was, unequivocally, 4 March when he was sent a copy of the contract by the plaintiff. When asked specifically if his recommendation to Campbells would have been different had he known earlier of the existence of the contract, he agreed it would have been and went on:

> "I would have stayed with the December option, because the December option in that scenario was the only option where we stayed with Multinail and – but we bought the saw we wanted and wore an integration risk." (T 897.55-898.1)

The answer is confusing. The "December option" was the acceptance of the plaintiff's quote of 9 February 1994 with the requirement that the plaintiff's saw be computerised by the end of that year. That solution would not have involved any integration risk. The computer program devised by the plaintiff for its saw would have been fully compatible with TrusSource This solution would not, however, have given Mr Wise the saw he wanted. His preference was for the auto-omni saw and if that had been bought there would have been an "integration risk", namely the devising of a program that would connect TrusSource to the saw's computer. On the evidence this was a task that would have taken about four weeks, not 12 months. In any event Mr Wise was clear that had he known of the contract between

Campbells and the plaintiff the only possible recommendation he could have made was to accept the plaintiff's quote or else recommend the purchase of an auto-omni saw direct from ESCO and have the plaintiff's engineers design the integration software.

[82] Mr Wise's testimony was false and, I conclude, deliberately false. He gave evidence in support of Campbells' unsuccessful action in the Federal Court. Indeed Drummond J described him as Campbells' principal witness. In an affidavit sworn in those proceedings on 15 November 1995 Mr Wise said:

> "31. On a number of occasions and particularly in the period from December 1993 to February 1994 I spoke with Mick Robertson about the existence of the contract between Campbells and Multinail for the supply of nail plates and the significance of that contract having regard to the possibility that the best software and equipment for Campbells might have to be acquired from a supplier other than Multinail.
>
> 34. The subject of the relationship between Multinail and Campbells first arose specifically between Mick Robertson and me when Wise Technology rejected Multinail's proposals for the re-equipment of the Caloundra and Bundaberg plants . . . This was in the period from August 1993 to October 1993."

[83] There is evidence from Mr Marsh, which I accept, that in December 1993 in the presence of Mr Wise he expressed concern to Mr Robertson that if Campbells were to acquire computerised equipment and software from the first defendant it would inevitably lead to a breach of its contract with the plaintiff. Mr Wise apparently dates the meeting in October (T 887.8 - .15) but claims not to have learnt of the agreement the discussion about which commenced just as he left the room. His earlier affidavit gives the lie to that account. Mr Wise accepts that at the meeting in Melbourne on 10 January 1994 he was asked whether there was any impediment to an arrangement between Campbells and the first defendant. He claims to have said that, to the best of his knowledge, there was not.

[84] Mr Wise's conduct is extremely puzzling. He admits that, given the existence of the contract, Multinail was realistically the only contender to supply modern truss making equipment. He sought to justify his recommendation that the first defendant be chosen by saying he did not know of the contract. The evidence was false. It is clear that Mr Wise collaborated with the first defendant's employees, particularly Mr Kearon, to give it every possible assistance to win the contract with Campbells. He advised the first defendant how to structure its proposals to make them irresistible and he did so by unfairly prejudicing the plaintiff's chances. He was thoroughly devious and indeed dishonest in the discharge of his retainer. No motive is apparent. His conduct is consistent with his having been corrupted by the first defendant to enable it to achieve its aim of replacing the plaintiff as Campbells' supplier. This proposition was not put to Mr Wise and the plaintiff does not ask me to make a finding to that effect. It is one of great seriousness and for the reasons just mentioned I should not make it. Nevertheless I approach the evidence on the basis that the first defendant's senior managers knew of Mr Wise's partiality for their product and they took advantage of the situation.

[85] Mr Wise knew of the existence of the contract. Given the extent and the openness of his conversations with Mr Kearon, and his desire to assist the first defendant, it is difficult to believe he did not impart that knowledge to Mr Kearon and Mr Cooper. He professes not to recall the conversation at dinner with Mr Cooper on 10 January 1994. No one else heard it. I am inclined to think it did not occur. If it did it does not assist the defendants as it effectively confirmed the existence of the plaintiff's contract. It is difficult to see why, if asked by Mr Cooper, he would not have told him of the contract.

[86] I have already mentioned Mr Rogers' conversation with Mr Robertson in August 1993 and noted the improbability of his account. It is, however, clear from that account and from his affidavit that Mr Rogers was eager to learn of the status of the supply arrangements between Campbells and the plaintiff. It is not true, as I have pointed out, that anyone from Campbells represented it was free to deal with the first defendant. I conclude that Mr Rogers resorted to dishonesty because the truth would have harmed the defendants' case. He wanted to know whether there was an exclusive supply contract in existence. He asked people who knew there was and who had no discernible reason not to answer his question.

[87] I am reinforced in this view by what happened subsequent to 10 March 1994. Mr Rogers described the solicitors' letter as a "bomb shell". Its intimation came as a complete surprise and a most unwelcome one. To that point Mr Rogers said he had believed there was no impediment, contractual or otherwise, to his company doing business with Campbells. He had no reason to trust the plaintiff. The obvious response was to contact Mr Robertson, whom he knew, and ask if the assertion were true. He did no such thing and could not explain why he did not. His only communication with Mr Robertson was to send the solicitors' correspondence and promise to keep him informed. This lack of reaction is only consistent with Mr Rogers having known beforehand that the defendant's negotiations with Campbells would, if successful, infringe the plaintiff's rights.

[88] A similar complacency is evident in Mr Cooper. It was he who claimed to have asked Mr Wise at dinner on 10 January 1994 if there were any reason why the first defendant could not supply nailplate to Campbells. He was told there was no reason that was of concern. If Mr Wise did give that answer it was shown to be embarrassingly wrong eight weeks later. Despite the frequency of contact between Cooper and Kearon with Wise, neither of them thought to ask for an explanation, or even to seek it in the course of one of their many conversations on the topic of the proposed supply of equipment and nailplate. Indeed on 21 March Mr Cooper wrote a letter to Mr Wise in which he referred to the "litigation proceedings" that had made "everyone start walking on eggshells", but did not advert to the conversation in which Mr Wise had assured him there would be no problem. Mr Cooper had been misled, or at least was the victim of a serious error of judgment, either of which would naturally call for some comment. There was none.

[89] The defendants' mask slipped momentarily when Mr Cooper gave evidence. He was questioned about the 10 January meeting and agreed that the Campbells' managers were only in the market for machinery but that the first defendant was "simply not interested in a proposal where equipment was supplied by itself (because) there would be little point in making a competitor's truss plant more efficient". He was asked if Campbells looking only for machinery did not "add to (his) suspicion that there was still an agreement in place between Campbells and

Multinail". His answer was that he had no recollection of a contract or of Mr Ross Robertson's report of November 1990 when dealing with the Campbells' managers. The following passage then occurred (T1027.40-55).

> "But what I'm suggesting is that their request to you was only in relation to equipment. It was Pryda that turned that request for equipment into a full conversion, wasn't it? – It was made clear from the beginning that if they wanted us to put a proposal up, then we are talking about a conversion and not just equipment, so, yes.
>
> And the reason that they were only seeking equipment is because they had a nailplate supplier in Multinail already, didn't they? - *That's what the contract said*." **(emphasis added)**

Mr Cooper sought to recover ground by claiming that he did not know that Campbells were "bound" to the contract, but this is unconvincing. The first defendant's official position was that its managers did not know of any contract between the plaintiff and Campbells or, if they did, it was one which had expired at the end of 1993. Mr Cooper inadvertently revealed the truth of what the first defendant knew.

[90] An indication that the first defendant knew of the plaintiff's contract before receipt of the letter of 10 March 1994 is that there was no discernible change in the conduct of its negotiations with Campbells when given express notice of the plaintiff's contract. The first defendant did not pause. It did not seek confirmation of the assertion that there was a contract between Campbells and the plaintiff. As far as the evidence goes it did not seek legal advice as to whether it may be exposed to any liability should it continue with its negotiations. It did not remonstrate with Mr Wise or Mr Fittler or Mr Robertson that it had been kept ignorant of an important fact. Its only reaction was to deny knowledge of the contract and insist upon its right to deal with Campbells.

[91] There is reason to suspect that the first defendant has not disclosed relevant documents in its possession. Mr Kearon's memorandum to Messrs. Rogers and Cooper of 12 February 1994 (AB 97) consisted of three pages. There were three copies of it: Mr Kearon's original and the copies sent to each of the others. It is a document of some significance outlining Mr Wise's involvement in the formulation of the response to the plaintiff's quote of 9 February. The second page of the memorandum has not been disclosed. No explanation was advanced as to why none of the three copies of the document contains a second page.

In the months of February and March 1994 Mr Kearon maintained a most elaborate diary in which he was directed to record meetings and conversations. The entries he made in February contain much detail of his contact with Mr Wise and what he was told of events concerning Campbells and the plaintiff. As well it records his responses to those communications and what was said between him and Messrs Cooper and/or Rogers. His diary for the month of March 1994 was not produced. It is likely to have contained a record of the important events of that time. There was no explanation for its disappearance.

[92] I find as a matter of inference from the circumstances described in paragraphs 26, 27, 35, 38, 39, 40, 41, 48, 82, 83, 85, 86, 87, 88 and 89 that prior to 22 February

1994 the first defendant by Rogers, Kearon and Cooper knew of the exclusive supply contract between Campbells and the plaintiff.

[93] Furthermore in my judgment there was no contract for the supply of nailplate made between Campbells and the first defendant until July or August 1994, months after the first defendant was given express notice of the contract. This, by itself, is not enough to establish the plaintiff's case but the point is important to the manner in which the parties' arguments proceeded, the defendant contending that it had made its contract before 10 March, and consequently, could not and did not intend to bring about a breach of the plaintiff's contract.

[94] The defendants point to the order form of 23 February 1994 from Mr Fittler and their placement of orders with Becfab and ESCO almost immediately (but it should be noted that Becfab did not provide its tender for the equipment it was to supply until 29 March 1994 (AB 141)). The plaintiff points to the preforatory terms of the communications. The letters speak of "intentions" and an inclination to "commit" to a contract, and require the formulation of heads of agreement to set out their respective obligations. The terms on which equipment was to be supplied varied over time. There were changes to price and specifications of the equipment as late as 6 June 1994 (AB 181). On 3 March 1994 Mr Wise for Campbells was saying that a number of points needed to be agreed and clarified and that there should be a formal contract to set out explicitly the terms of the agreement. On 21 March the first defendant noted there was agreement on "most points" thereby implicitly conceding that there was no agreement on some. It is particularly significant that there was not, before 10 March 1994, any agreement for the exclusive supply of nailplate by the first defendant to Campbells. This is obvious from the correspondence the terms of which I have set out already. This was an essential term of any agreement. This was Mr Rogers' declared position. Mr Robertson understood that. The correspondence, particularly the offer of 22 February is explicit. The whole thrust of the first defendant's approach was to tie the supply of nailplate to the sale of equipment. The first defendant's witnesses were definite on the point: they would not supply equipment, especially at the low prices quoted, unless in return they received the right to see nailplate exclusively to Campbells' largest truss plants. That agreement was not reached until September 1994.

[95] On 8 June 1994 Mr Cooper sent Mr Fittler "a copy of (a) computer quote". He explained in a note which enclosed the quote:

> "The main sticking point on supply of our software to Campbells is the litigation problem. At this point we have been advised not to hand over (ComputaRoof) to Campbells until the matter is resolved."

Such a communication and the attitude implicit in it is inconsistent with there having been in existence a binding agreement by which the first defendant was to supply its software and nailplate to Campbells.

[96] It is, I think, significant that in their meeting of 15 June 1994 Mr Anglin and Mr Robertson discussed Campbells purchasing nailplate from Abel Cooke or Steelfast. Such a purchase would have been in breach of any exclusive agreement for the supply of nailplate made between Campbells and the first defendant. It is not to be thought likely that Mr Anglin would have agreed to it, or suggested those companies as possible suppliers, if his company had a binding agreement by which Campbells was obliged to buy nailplate from it.

[97] On 21 August 1994 Mr Anglin met Mr Wise to discuss a number of outstanding issues mostly of a technical nature that had arisen with the installation of the first defendant's equipment. One item discussed was the status of the agreement. Mr Anglin noted that "the *possibility of finalising* an agreement is to be discussed between Maurie Anglin and Mick Robertson".

[98] Despite the purchase order sent in February it seems that there was no commitment to proceeding with the acquisition of the equipment until late in April 1994 when Campbells remitted sufficient moneys to the first defendant to allow it to pay deposits for the manufacture and sale of the omni saws and jet-set jigs.

[99] The defendants submit that their arrangement with Campbells prior to 10 March 1994 constituted a contract in the fourth class (in addition to the three identified in *Masters v Cameron* (1954) 91 CLR 355 at 360-361). Contracts of this type are said to be those in which:

> "The parties were content to be bound immediately and exclusively by the terms in which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms."

Per Dowsett J (with whom French and Whitlam JJ agreed) in *Graham Evans Pty Ltd v Stencraft* (1999) FCA 1670. It is argued that the first defendant and Campbells had made an agreement between 22 February and 3 March by which they were immediately bound but which they expected to be amplified by a further contract (heads of agreement) which would contain additional terms.

[100] I have difficulty with this submission. It overlooks the fact that until 12 September 1994 there was no agreement for the exclusive supply of nailplate by the first defendant for any period and this was an essential term of any contract that the first defendant intended to make. If one accepts the defendants' submission it must mean any binding contract was only for the supply of equipment. The sale of nailplate must have been one of the additional terms the parties expected to make, but had not yet made. The reality is I think, that the parties did not intend to, and did not make an agreement until they had come to terms about the supply of nailplate.

[101] They did not reach agreement for the exclusive supply of nailplate until September, and only after Mr Robertson had sought, and Mr Anglin had provided, a mechanism by which the first defendant would contribute to any damages which Campbells might be ordered to pay by reason of their repudiation of the contract with the plaintiff. That has a separate significance but for present purposes it is enough to observe that the critical agreement, the exclusive supply of nailplate, was made only after that subsidy was agreed upon. That agreement was made not only with full knowledge of the plaintiff's contract but with knowledge that the plaintiff was resolved to sue for its breach.

[102] The defendants argue that the delay in reaching agreement on the sale of nailplate to Campbells has no significance. They point out that Campbells could not use the first defendant's nailplate to make trusses until the plants had been equipped with the new machines and the new software had been installed. This did not happen until June 1994, or even later. While these facts may be accepted they are beside the point. The fact that the first defendant's nailplate could not be used did not

prevent the first defendant and Campbells making an agreement for the future supply of nailplate. They did not do so until the events I have described

Intention

[103] The next question to be addressed is whether the first defendant intended to bring about a breach of the plaintiff's contract. If it, by its managers, knew of the existence of that contract (as I have found it did) it was obvious that a contract made between Campbells and the first defendant by which Campbells were obliged to buy its nailplate from the first defendant prior to December 1995 would breach the plaintiff's contract. There can be no doubt that the first defendant desired that result and strove to bring it about. Its declared strategy since 1992 had been to capture one of the plaintiff's major customers. The opportunity arose late in 1993 when Mr Fittler inquired about equipment. Although Mr Harris was initially prepared to provide prices for equipment, Mr Rogers quickly intervened to insist upon joining the sale of nailplate to the supply of equipment. Knowing of the plaintiff's contract the inclusion of that term must inevitably have resulted (as it did) in Campbells repudiating its exclusive purchase agreement with the plaintiff. The only purpose the first defendant had in making the sale of equipment conditional upon Campbells agreeing to buy its nailplate was to supplant the plaintiff as a supplier of nailplate to Campbells. The first defendant clearly intended to make a contract with Campbells by which Campbells would purchase nailplate from it and, at the same time and by the same means, to end the supply of nailplate by the plaintiff.

[104] The first defendant's intention may be seen from its conduct after 10 March 1994. It knew then, or shortly afterwards, that Mr Robertson's intention was to allow the plaintiff to continue supplying nailplate to the northern plants while promising to buy the first defendant's nailplate for the southern plants. Notwithstanding that stated position, and with knowledge of the plaintiff's contract, the first defendant negotiated for the right to supply nailplate to the northern plants. This can only have been to make its victory over the plaintiff more comprehensive and, indeed, to humiliate the plaintiff. It did not succeed in this regard but its purpose, its intention, was plain.

[105] The agreement made by Mr Anglin to provide a fund to subsidise any damages Campbells may have to pay the plaintiff provides cogent evidence of the first defendant's intention. It also has a significance with respect to inducement which will be mentioned later. Its relevance to proving intention is that the genesis of the subsidy was Mr Robertson's reluctance to commit his company to the first defendant's nailplate because that would expose it to a claim for substantial damages by the plaintiff. The first defendant's determination to damage the plaintiff by depriving it of the profits from its contract is shown by Mr Anglin's offer to contribute to the damages. This agreement was the final inducement which persuaded Campbells to abandon its contract with the plaintiff but it is relevant also to intention. At this point inducement and intention may coalesce. As regards intention there can be no doubt that the first defendant wished to become the exclusive supplier of nailplate to Campbells. To achieve that result it offered the subsidy. To gain the contract for itself was to deprive the plaintiff of its contract. The first defendant intended both results.

Inducement

[106] According to Lindgren J in *Allstate* at 35 the words “induce” and “procure”:

> “ . . . import effort, care, management or contrivance towards the obtaining of the desired end.”

I have already set out the relevant passage in the judgment of Street J in *Short v The City Bank.* (para 23)

It is no defence that Campbells may have been irresolute in its commitment to the plaintiff. It does not matter whether it was predisposed to breaking its contract with the plaintiff or whether it required a determined effort to achieve that end. If in fact the first defendant induced or procured or solicited it to break its contract that is enough. See *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots and Ors* [1991] VR 635 at 659 and *D C Thompson & Co v Deacon* [1952] Ch 646 at 686.

[107] What in fact induced Campbells to accept the first defendant’s proposal was explained by Mr Robertson to Mr Taylor at their meeting on 23 February 1994. It was the greater automation of its machinery immediately available, together with the lower cost of the machinery and the substantially discounted nailplate price, as well as the belief he could not have the machines without buying the nailplate. Objection was taken to Mr Taylor testifying to what Robertson had said. The evidence was hearsay but its admission comes within a well recognised exception to the rule against hearsay *viz* where its purpose is to prove the state of mind of the maker of the out-of-court statement where that is relevant. The point is discussed in *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158 at 179. The passages referred to by McLelland J in *Wigmore on Evidence* support his Honour’s conclusion. Mr Robertson was Campbells’ controlling mind. His reason for deciding to break the plaintiff’s contract by buying nailplate from the first defendant is directly relevant to an issue: whether the breach was induced by the first defendant. Mr Robertson’s reasons, his state of mind, is of critical importance to that inquiry.

[108] I should, for the sake of completeness, mention one argument which is pleaded by the defendants but was not the subject of any submission. It was that the first defendant cannot have intended to bring about a breach of the plaintiff’s contract because it believed that that contract was voidable by reason of the plaintiff’s misrepresentations which induced Campbells to make it. In an appropriate case where an alleged tortfeasor honestly and reasonably believed that the contract in question is invalid it will not be possible to prove an intention to induce a breach of the contract. But as Browne-Wilkinson J said in *Swiss Bank Corporation v Lloyds Bank Ltd* [1979] Ch 548 at 580:

> “. . . It is not enough to show that there is room for honest doubt whether the defendants’ or the plaintiff’s rights have priority: if when such doubt exists a defendant chooses to adopt a course which to his knowledge would undoubtedly interfere with the plaintiff’s contract on one view of the law, in my judgment he must at least show that he was advised and honestly believed that he was legally entitled to take that course.”

No such endeavour was undertaken by the defendants. The evidence does not suggest that the first defendant's officers even considered whether the plaintiff's contract might be voidable before the plaintiff commenced proceedings. The defendants' solicitors and Campbells' solicitors then conferred and the possibility of taking action pursuant to s 52 of the *Trade Practices Act* was considered. There is no evidence that the defendants were given any advice other than that, at best, the point was arguable. There is no evidence that they believed the plaintiff's contract to be invalid. Moreover a contract induced by misrepresentation is voidable only and remains intact until avoided or set aside by decree. Campbells do not appear to have sought to avoid the contract. Instead it sought orders pursuant to s 87 of the *Trade Practices Act* that it be rescinded from inception. Until such a decree were made the contract would remain in force.

[109] There was no substance in the argument. Drummond J held that although two misrepresentations were made they had no effect at all upon Robertson's decision to make the May 1993 agreement with the plaintiff. The allegation of inducement was a pretext devised:

> "Only after it became imperative to get out of the Multinail supply agreement, because of the decision to re-equip with Pryda Plant, that some excuse had to be found to justify the clear breach of contract to which Robertson was then committed."

[110] The defendants point out that whether they induced the breach of the plaintiff's contract is a question of fact which must be answered by considering what was the cause of Campbells' decision to agree to buy Pryda nailplate. They submit that there was nothing done by the first defendant which had that effect. The argument is that Campbells chose to make the contract with the first defendant and, consequently, to break its agreement with the plaintiff without inducement by the first defendant. The evidentiary basis for the submission is said to be that Mr Robertson chose the first defendant's proposal only after the plaintiff had declined to accept the conditions imposed in Mr Wise's letter of 21 February 1994, that it produce a computerised saw within 12 months or pay liquidated damages. There is no doubt that Campbells' desire was to have computerised saws and jigs. When the plaintiff appeared unable to provide them, but the defendant had them available, Mr Robertson made his choice. It was, it is submitted, his business decision and he was not persuaded or solicited to it. The defendants emphasise the undoubted fact that on 17 February 1994 Mr Robertson had yielded to the opinions of his managers and had agreed to accept the plaintiff's proposal. They argue that this shows any inducement by the first defendant was ineffective. Despite its best endeavours it had not persuaded Campbells to buy from it. That choice was made only after, and because, the plaintiff could not provide what was wanted. The point is complicated by Mr Wise's gratuitous suggestion that the condition as to damages be imposed without telling Mr Taylor that the defendants were about to make a further proposal and that the plaintiff was at risk of losing its contract. That complication can be ignored for present purposes.

[111] There are two answers to the submission. The first is that Mr Robertson had decided to accept the first defendant's proposal *before* he knew Mr Taylor would not agree to the term as to liquidated damages. It is clear from Mr Taylor's evidence, which I accept, that when he met Mr Robertson on 23 February to give him the revised quote which would have revealed his position, Robertson told him immediately of his decision to buy Pryda nailplate. The revised quote was not then

given to Mr Robertson. Nor did Mr Taylor inform Mr Wise prior to 23 February of his position. I accept Mr Taylor's evidence at T 95-96 that he spoke briefly to Mr Wise on 21 February when he rang to confirm that Mr Taylor understood the specifications set out in Mr Wise's letter. I reject Mr Wise's version of the conversation at T 895. Factually this submission fails at the threshold.

[112] The defendants seek comfort from exhibit 84, a statement prepared for Mr Marsh by Campbells' solicitors in the earlier litigation. Paragraphs 21 and 22 recite:

> "A meeting between myself, Mick Robertson and John Wise was held on 17 February 1994 at 4.00 pm. It was agreed to let Multinail continue to be the preferred supplier if –
>
> (a) they could produce a computerised jig at a reasonable cost; and
>
> (b) they could automate their saw within the timeframe we proposed or they would make penalty payments.
>
> 22. However, shortly after that meeting Mick Robertson telephoned me to advise that Peter Taylor was not prepared to meet our demands."

Mr Marsh, in a question not objected to, confirmed that he had a telephone conversation with Mr Robertson in which he was informed that Mr Taylor was not prepared to meet the conditions. The evidence was inadmissible hearsay. It is an unsatisfactory means of contradicting Mr Taylor's evidence. Even if I were inclined to admit it, which I am not, it would not satisfy me that Mr Robertson decided to accept the first defendant's offer after, and because of, the plaintiff's refusal to promise to automate a saw within 12 months. I have already indicated my acceptance of Mr Taylor's evidence that Mr Robertson told him of the decision before he intimated the plaintiff's position. Moreover Mr Marsh's statement is consistent with Mr Robertson having learnt of Mr Taylor's attitude subsequent to his decision and seeking to justify it by reference to Mr Taylor's refusal. It is also consistent with Mr Robertson inventing the excuse to pacify Mr Marsh who was a known and vocal supporter of the plaintiff.

[113] In my opinion three factors induced Campbells to repudiate the plaintiff's contract by making a fresh one with the first defendant. They were the extraordinarily generous terms of the 22 February offer, the agreement to subsidise damages and the belief which the defendants had inculcated in Mr Robertson that Campbells could not have the equipment without their nailplate. The February proposal was simply "too good to refuse". For a price of the same magnitude as had been advanced for the modernisation of two truss plants Campbells could modernise the three southern plants. It could obtain the two most advanced computerised saws in the marketplace at savings so substantial they were begged to keep the details of the sale secret. In addition the first defendant offered to supply nailplate at a rate of discount never before offered. To savings of hundreds of thousand dollars on the price of equipment Campbells were also offered a saving of more than $100,000 a year on nailplate. It is not to be doubted that Mr Robertson spoke truly when he gave the price as to the main reason for to his decision. A price made sufficiently attractive can induce a breach of contract: see e.g., *British Motor Trade Association v Salvadori* [1949] Ch 556 at 566 per Roxburgh J.

[114] The timing of the inducement was critical. On 17 February Mr Robertson had decided to award the equipment contract to the plaintiff. On 18 February Mr Wise contacted Mr Kearon to tell him that the first defendant had “a fight on its hands” and it would have to come up with a “good deal” to win the day. On 21 February Mr Wise informed the plaintiff it would have to pay liquidated damages in the event it did not computerise its saw by the end of the year. On 22 February the first defendant presented its “good deal” and by 23 February Mr Robertson had decided he could not reject it, without having heard from the plaintiff.

[115] From early in their dealings the first defendant had advised Campbells that the sale of its advanced machinery was tied to its software and therefore nailplate. Although the early quotations had been for equipment only, from 15 January 1994 (AB 66) the first defendant made the sale of saws conditional upon the acquisition of its software. The bait was sweetened by the substantially discounted price for nailplate. It is apparent that Mr Robertson had risen to the bait. He believed he could not have one without the other and was lured by the price. On or about 21 January 1994 Mr Robertson asked Mr Wise to provide him with the cost comparison between the plaintiff’s and the first defendant’s nailplate on contemplated volumes. Mr Wise advised him that Campbells would save about $120,000 per year by buying the first defendant’s nailplate.

[116] The facts, I think, show a pattern to the defendants’ inducements. First they told Campbells the auto-omni saws and jet-set jigs, which Mr Fittler had recommended, could only operate with their software. Then there was the offer of nailplate reduced in price by almost a third. There were attempts made to denigrate the plaintiff’s ability to develop computerised equipment. Mr Kearon, an ignoramus in the capabilities and functions of computers, sought to contradict Mr Truskinger’s assessment of what TrusSource could perform and how long it would take to develop programs to drive the equipment. Then came the unprecedented reduction in equipment price which, it was thought, was below the cost to the first defendant of buying the equipment. The price was so low that it would have caused acute embarrassment if any of the first defendant’s other customers learnt of them. The final offer was put when the defendants learnt from Mr Wise that Campbells had decided to take the plaintiff’s equipment.

The conclusion is inescapable that the offer was intended to break Campbells’ resolve with respect to the plaintiff. It is clear from what Robertson told Mr Taylor that it had that effect.

[117] Even so Campbells hesitated when the plaintiff showed more tenacity than had been anticipated. It is a fair inference that Mr Robertson (and the first defendant) thought that the plaintiff would lack the determination and/or the resources to vindicate its rights at law. Mr Robertson thought it could be placated by retaining the rights to sell nailplate to the northern plants with the intended threat that it would lose those too if it did not acquiesce in the newly made arrangements with the first defendant. When the plaintiff did not bow to the pressure but threatened and commenced proceedings Campbells delayed committing itself to buy nailplate from the first defendant. It did so, as I have described, only after its exposure to the plaintiff in damages was reduced. That was the final inducement.

[118] The agreement by Mr Anglin to subsidise Campbells’ damages has a significance beyond providing evidence of intention and inducement. In my opinion it operates

as a tacit admission by the first defendant that it was responsible, at least in part, for Campbells' predicament: that it had broken or was being asked to break its contract with the plaintiff. I can see no reason for the agreement that does not have this connotation. Neither Rogers nor Anglin were able to explain it intelligibly. Both agreed it was unique to the first defendant and Mr Anglin had never heard of such an arrangement involving any other company. Mr Anglin who negotiated it had been general manager for only a few months at the time. He must have discussed it thoroughly with Mr Rogers but neither of them were prepared to divulge the details of what must have been a most important conversation. I cannot believe that Mr Anglin would have made the agreement without Mr Rogers' express authority. Mr Rogers was asked:

> "Why would Pryda pay Campbells' damages if Pryda was completely innocent of Campbells' breach of contract? - At this stage we had a customer asking us to provide some support to them in relationship to a damages claim." (T 867.1-10)

It was pointed out to him that the first defendant was not assisting a substantial customer in financial embarrassment by reducing prices or extending credit and was asked again why the first defendant agreed to pay Campbells' damages for breaking its contract with Multinail. He answered lamely:

> "We did it because we were asked to provide some relief to them, and we did it because they were the people who were taking the action. We were working with them, but they were the ones who would have the judgment against them." (T 867.10-20)

As an explanation the answer is meaningless. Mr Anglin did no better. He said (T 1184.35-1185.10):

> ". . . (We were) between a rock and a hard place, in that we had been told by Campbells that they were going to change over to our system. We received orders from them for equipment. We felt that we had, you know, responded to their request for tenders for this contract. We had a situation where we ordered equipment and some of it to special requirements to Campbells and that we had a further business relationship with Campbells in that we were the supplier of timber . . . technology to their Burleigh Heads branch . . . Mick Robertson put to us this proposition . . . We were talking to a very large customer . . . We were keen to continue to supply Campbells . . . It is not a request that we could just dismiss out of hand . . ."

This explanation is also devoid of meaning. The only reason why the first defendant might have been in difficulty was that it had made a contract to sell equipment which would prove to be quite unprofitable if it could not also persuade Campbells to buy its nailplate. Mr Anglin may have desired to appease a large customer but to give assistance in such a form cannot be justified by ordinary commercial considerations. He would, I think, have agreed to the arrangement only because the first defendant was urging Campbells to break its contract with the plaintiff and accepted that its urging would be unsuccessful without the subsidy.

[119] The plaintiff has, in my opinion, made out the first two elements of its cause of action.

The Liability of the Second Defendant

[120] Paragraph 16 of the fourth further amended statement of claim alleges that the second defendant authorised, procured, directed and knowingly acquiesced in the first defendant's wrongful inducement of Campbells to breach the plaintiff's contract. The factual basis on which the second defendant is sought to be made liable is that he was the author of the strategy to damage the plaintiff by converting one of its larger customers, and he developed the tactics to implement the strategy, namely the subterfuge practiced on Campbells' employees that if ESCO machinery were bought, the first defendant's software (and nailplate) would have to utilised. He maintained the strategy by crafting the meeting of 10 January 1994 in such a way as to present the advantages of the first defendant's software (with the obvious implication) when the Campbells' managers had come to discuss the purchase of machinery only. It was the second defendant who steadfastly refused to contemplate selling equipment without effecting a conversion of Campbells' truss plants, and it was the second defendant who must have authorised the final inducement, namely the damages agreement. The plaintiff's case is that it was the second defendant who drove the first defendant by its managers, his subordinates, to procure the breach of contract by Campbells. In essence the plaintiff submits that the second defendant directed and commanded the first defendant's tortious conduct. The submission curtly summarises the second defendant's involvement. In my opinion the second defendant was the driving force behind the activities of the first defendant and that he intended it to bring about a breach of the plaintiff's contract. I am also satisfied, as I have earlier indicated, that the second defendant knew at all relevant times of the existence of the plaintiff's contract.

[121] The defendants submit that, as a matter of law, this is insufficient to make the second defendant liable. They rely upon *Said v Butt* [1920] 3 KB 497; *O'Brien v Dawson* (1942) 66 CLR 18 and *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* 177 ALR 231 in which the earlier authorities were analysed by Finkelstein J who concluded (262-263):

> "If *Said v Butt* were applied a director or officer acting in that capacity could not be found liable for procuring his corporation to infringe the rights of another . . . In the face of these authorities it would be quite wrong . . . not to apply *Said v Butt*. Presently that case represents the law in this country and I will follow it."

I think it is right, as his Honour said, that *O'Brien v Dawson* approved *Said v Butt* as did the other authorities referred to by his Honour, *Rutherford v Poole* [1953] VLR 130 and *Tsaprazis v Goldcrest Properties Pty Ltd* 18 ACLC 285.

[122] Those cases, however, all differ from the present in a most material respect. They are all cases in which a company, the directors of whom were sought to be made personally liable for the corporation's act, was a party to the contract which was broken. The authorities establish that the officers of a company which breaks a contract cannot be liable for inducing it to break the contract or conspiring with it to break the contract. In *Said v Butt* the plaintiff sued the managing director of a theatre company which had refused to admit him to its premises to view a performance after he had bought his ticket. The contract, if there were one, would have been with the company, the managing director of which ordered its attendants to deny entry. McCardie J said (504):

> "If the plaintiff is right in his contention, it seems to follow that whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages . . ."

At p. 505 the Judge continued:

> "But the servant who causes a breach of his master's contract with the third person . . . is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract . . . and in my view an action against the agent . . . must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. This, I think, is the true answer . . ."

[123] The same point was made by Hodgson CJ in Eq in *Tsaprazis* at 288:

> ". . . This question must be decided in the context of general principles concerning contracts made by companies. In general, only the company is liable under such a contract, not its shareholders or directors, unless they guarantee the company's performance. . . . directors are not liable for the tort of inducing breach of contract, where, in exercising their functions as directors, they have caused the company to breach its contract: see *Said v Butt* and *O'Brien v Dawson*."

[124] *O'Brien v Dawson* was a case in which the defendant company broke an agreement with the plaintiff who sued the company and its directors for conspiring to cause it loss. The High Court held that the cause of action was misconceived. Starke J said (32):

> "A company 'cannot act in its own person for it has no person' . . . so it must as a necessity act by directors, managers, or other agents. The company, if it were guilty of a breach of its contracts in this case acted through its director . . . Doyle, but it is neither 'law nor sense' . . . to say that Doyle in the exercise of his functions as a director of the company combined with it to do any unlawful act or become a joint tortfeasor. Again, it is equally fallacious to assert that Doyle knowingly procured the company to break its contract. The acts of Doyle were the acts of the company and not his personal acts which involved him in any liability to the plaintiff."

McTiernan J said (34):

> "But an action by the plaintiff would not lie against the company for procuring a breach of its own contract with him nor against the individual defendants on that cause of action if in terminating the agreement they were acting in pursuance of their authority as directors (*Said v Butt*)".

[125] *Root Quality* itself was a case in which a corporate patent licensor broke the licence agreement and the licensee sued its directors for inducing the breach.

[126] In this case the second defendant is not alleged to have induced the company of which he was managing director, the first defendant, to break a contract it had with the plaintiff, or anyone else. It is said that the second defendant commanded the first defendant to induce Campbells to break the plaintiff's contract. The limitation found in the line of cases following *Said v Butt* has no application. Rather a more general principle is found in the cases which follow *Performing Right Society Limited v Ciryl Theatrical Syndicate Limited* [1924] 1 KB 1 at 14-15 per Atkin LJ:

> "Prima facia a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered or procured the acts to be done. That is authoritatively stated in *Rainham Chemical Works v Belvedere Guano Co* . . . where . . . Lord Buckmaster said: '. . . If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences . . .' . . . If the directors themselves directed or procured the commission of the act they would be liable in whatever sense they did so . . ."

The principle endorsed by the Privy Council in *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507 at 514-5:

> "A tort may be committed through an officer or servant of a company without the chairman or managing director being in any way implicated. . . . If, however, the . . . managing director procures or directs the commission of the tort he may be personally liable for the tort and the damages flowing from it; *Performing Right Society* . . . per Atkin LJ. Each case depends upon its own particular facts. In the instant case the uncontradicted evidence proves that . . . the . . . chairman and managing director . . . agreed with the directors . . . the terms upon which (the respondent's company) would continue wrongfully to convert goods consigned to the banks . . . There is no answer to the . . . contention that the respondent was personally liable for the conversion . . ."

[127] In *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 the Court of Appeal rejected an attempt to limit the liability of company officers for torts committed by their companies to cases where the officer had acted

> ". . . deliberately or recklessly and so as to make (the act) his own as distinct from the act or conduct of the company."

Slade LJ (with whom the other Lords Justices agreed) said (329):

> "The authorities . . . clearly show that a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small a company may be and however powerful his control over its affairs. Commercial enterprise and adventure is not to be discouraged by subjecting a director to such onerous potential liabilities. In every case where it is sought to make him liable for his company's torts, it is necessary to examine with care what part he played personally in regard to the act or acts complained of."

> The Court also emphasised the need to prove against a director or other officer sought to be made liable for a company's torts any state of mind necessary to constitute the tort. So if, as here, intention is essential to the tort it must be proved that the director intended to induce the breach of contract.

[128] In *Kalamazoo Pty Ltd v Compact Business Systems Pty Ltd* [1990] 1 Qd R 231 Thomas J at 258 applying this principle and by reference to the authorities, *Performing Rights Society*, *Wah Tat Bank* and *C Evans Ltd* concluded that:

> "In the usual course a director who procures or directs his company to perform a tortious act will be liable along with the company." (p 258).

[129] The liability of a director for a tort committed by his company was also considered by a Full Federal Court, *King v Milpurrurru* 136 ALR 327, all the members of which delivered separate reasons. Jenkinson and Lee JJ accepted that the relevant principles were those to be found in cases I have just reviewed but disagreed on their application to the facts before them. Beazley J agreed with Jenkinson J in the result but thought that a different principle was applicable. That is the principle, more restrictive of a director's liability, which has been enunciated in Canadian decisions and which had attracted the judge at first instance in *C Evans* but which was disapproved by the Court of Appeal in that case. The weight of authority is firmly in favour of the principle found in the English cases applied in *Kalamazoo*.

[130] The evidence is, I think clear, that the second defendant did direct the first defendant to act in such a way as to procure Campbells to break the plaintiff's contract. I am satisfied it was the second defendant's own intention to bring about such a result and that he authorised and commanded the performance of the acts which in fact induced Campbells to break its contract. It follows that the second defendant is also liable.

Damages

[131] There is no doubt that the plaintiff suffered loss by reason of Campbells' repudiation of its contract. Claims are made for damages in several categories:

(a) Lost profit from sales during the balance period of the contract, 5 July 1994 to 31 December 1995.
(b) Loss of the chance to make profits from selling nailplate to Campbells in the period subsequent to the termination date of the contract.
(c) Cost of additional working capital to compensate for the loss of income from Campbells.
(d) Loss of the chance to make further sales of nailplate to new customers.
(e) Loss flowing from the delayed development of a new product.
(f) Exemplary damages.

Loss of Profits from Sales for the Balance of the Contract

[132] The plaintiff recovered by way of its compromise with Campbells $649,000 in respect of its claim for damages for breach of contract and interest. A further sum

of $75,000 was recovered for the costs of the action. The first amount is said to be less than the loss actually sustained by the plaintiff and it seeks the difference from the defendants. Pursuant to undertakings given in interlocutory applications both the first defendant and Campbells were to record all sales of nailplates and ancillary items bought and sold respectively for the period 5 July 1994 to 31 December 1995 which should have been the subject of the plaintiff's contract. The information they supplied differs. The defendant's witnesses did not explain why they could not supply an accurate record of sales to Campbells of goods which would have been covered by the plaintiff's contract. It is most unsatisfactory that the first defendant should escape the imposition of an interlocutory injunction in part because it undertook to keep records of sales made to Campbells and then not sedulously maintain records. Mr Vincent, chartered accountant, who gave evidence for the plaintiff, has helpfully compiled a series of schedules which calculate a range of outcomes to take account of varying findings of fact. The schedules relevant to this head of damage are predicated upon three different estimates of what sales the plaintiff would have made to Campbells. The first is derived from the information provided by Campbells showing what it paid the first defendant for nailplate for the balance of the contract period. The amount was $1,145,332. This represents the product bought at the first defendant's prices. The second postulation takes the Campbells' information as a starting point but adjusts the prices to reflect the fact that the first defendant had discounted substantially and that the plaintiff would have charged higher prices for its goods. It produces a figure of $1,222,756. The third postulation is a schedule compiled by Mr Bagnall, the plaintiff's general manager, who examined the records of actual sales made by the first defendant to Campbells for the relevant period. It produces a figure of $1,342,476. This is likely to be exaggerated because it will include sales of product to Campbells' hardware outlets which the plaintiff would not have made. The defendants object to the second postulation because it may not reflect a discount of 5 per cent in its prices which the plaintiff allowed to Campbells. It is not entirely clear that the discount has not been taken into account. In any event, although the plaintiff must prove its loss I am disinclined to take too stern a view of things, given that the defendants have, by breaching their undertaking, deprived the plaintiff of accurate data to calculate their losses. In theory the second postulation should provide the correct answer but I will reduce its end result to reflect the possibility that the defendants are right about the discount.

[133] Having derived the receipts the plaintiff would have earned, $1,222,756, one must ascertained what the net profit would have been. This is done by subtracting from gross receipts the cost of sales i.e. the amount the plaintiff would have spent to earn the gross amount. In this aspect of the claim the parties are agreed that the cost of sales is equivalent to 50 per cent of gross receipts. On that basis Mr Vincent has calculated that the plaintiff should have received by way of full recompense for the loss of its contract as at 6 November 1998, the date of settlement, the sum of $785,747. In fact it received $649,000, a shortfall of $136,747. Simple interest on that sum at 10 per cent from 7 November 1998 to 28 February 2002 is $45,332, giving a loss of $182,079. I will allow $160,000 for the adjustment I have mentioned.

Loss of Chance to Supply Nailplate Beyond the Contract Period:

[134] The task for the court is to value the chance that Campbells would have continued to buy the plaintiff's nailplate when their contract expired on 31 December 1995 –

Sellars v Adelaide Petroleum NL (1994) 179 CLR 332. This involves an evaluation of the likelihood of two hypothetical facts, one past and one future. The hypotheses are that (a) the plaintiff would have continued to supply Campbells to the present time and (b) it would continue to supply Campbells in the future. The assessment of the past hypothetical fact is easier because events that have occurred and which would have affected the hypothesis can be taken into account. Having evaluated the likelihood of the occurrence of the hypothetical facts it is necessary to determine as best as possible what financial consequence would have flowed from them.

(i) To date

[135] The real question is what Campbells would have done when the contract expired in December 1995 if it had not earlier broken its contract with the plaintiff by installing machinery bought from the first defendant and converting to its software and nailplate. The defendants submit that Campbells would have done then what they did earlier for the reasons which compelled them to convert the truss plants in 1994. Those reasons are, in essence, that the first defendant could supply fully computerised equipment and its own software was more advanced allowing easier integration between its design programs and the machines. The defendants' postulate is that, without their importunity, Campbells would have waited for the contract to expire and then lawfully effected the conversion. I think this is quite wrong. The modernisation of Campbells' truss plants was a priority and could not be deferred to the end of 1995. It was not a viable option for Campbells to continue with antiquated plants until 31 December 1995 and then re-equip with the first defendant's machines. Campbells had decided to accept the plaintiff's proposals of 9 and 14 February 1994 on 17 February. Mr Wise effectively conceded that if the plaintiff's contract was not to be broken the acceptance of its quote was Campbells' only real option, even though it courted "the integration risk". I am satisfied that were it not for the defendant's tort Campbells would have proceeded with the plaintiff's proposal. Subsequent events show the integration risk to have been minimal. In 1997 when another customer asked the plaintiff to produce a fully computerised five bladed saw it did so in ten months. The defendants complain that this occurred in 1997 not 1994 but the objection is groundless. There is on the evidence no suggestion that the plaintiff could not have done in 1994 what it did three years later. It did not do so earlier because it had no reason to make such a saw. When it had an order for a computerised saw it built one.

[136] Had the plaintiff's proposal for re-equipping the plants been accepted the program would have proceeded at least as smoothly as the first defendant's, which resulted in major disruption, dissatisfaction and delay. It is to be noted that the disappointing changeover did not jeopardise the first defendant's relationship with Campbells. Indeed it is likely that modernising the plants with the plaintiff's equipment would have been less disruptive. Campbells experienced serious problems with its staff during the changeover. There was marked resistance to the change and a discernable reluctance to cooperate with the first defendant's technical staff. It is possible that the plant managers, and Mr Marsh, suspected that the plaintiff had not been treated fairly in the tendering process and that the defendants were largely responsible. In this they were right. For this, or perhaps because of annoyance that their expressed preference for the plaintiff had been disregarded, there was no good will between employees of the two companies during the conversion. Indeed several key staff members resigned from the Oxley plant rather than work with the first defendant. There ought to have been no such reaction to the plaintiff which is

known to, and respected by, the plant managers. By the end of 1994 the plaintiff would have supplied Campbells with re-equipped plants, redesigned layouts which maximised gains produced by new machinery. At the end of 1995 when the contract expired there would have been no incentive for Campbells to change nailplate supplier and the powerful disincentive already remarked: that a conversion is costly and disruptive and is to be avoided if reasonably possible. The first defendant has been, and remains the sole supplier to Campbells of nailplate since July 1994. This is indicative of the fact that truss fabricators avoid changing suppliers and do not do so except for particular reasons. None has been demonstrated on the hypothesis that the plaintiff would have re-equipped Campbells plants by the end of 1994.

[137] The plaintiff had other advantages. It had the unanimous support of the truss plant managers. It is true that they did not ultimately decide the supplier but their voice was influential, as is shown by their effect on Mr Robertson on 17 February 1994. As well the plaintiff had performed well under its existing contracts. There was no complaint about the level of service delivered by the plaintiff. What might be thought an exception, a problem with a machine installed in Townsville can be disregarded. The difficulty was not caused by any defect in the plaintiff's machine or service and was exaggerated by Robertson to justify his breach of contract. That event apart, even Mr Robertson had no complaint. By December 1995 Mr Robertson was dead and Mr Wise had moved on. To the extent that they were antipathetic to the plaintiff when the time came to decide who should supply nailplate after December 1995 they had no voice. The managers who supported the plaintiff did, however, remain in Campbells' employment.

[138] In my opinion there was a high degree of likelihood that the plaintiff would have continued to supply Campbells in the absence of the defendants' importunity. Indeed the plaintiff is right to submit that it is all but certain that it would have continued to supply Campbells to the present.

[139] Mr Vincent has again provided a schedule of outcomes. The first three postulations are artificial. They take as their starting point the record of sales made in the contract period to 31 December 1995, reduce that amount to an annual figure and project that forward for the six years 1 January 1996 to 31 December 2001. In fact the first defendant has provided figures showing the actual amount of sales for the six year period. The amount is lower than the annualised figures, perhaps reflecting the downturn in building activity that affected the market in Queensland in 1996 and beyond. Scenario D is predicated upon the first defendant's actual sales. Scenario E is the figure adjusted to take account of the fact that sales to hardware outlets may be included in D. This seems likely given the lack of differentiation in the first defendant's records between truss plants and retail sales, so it is appropriate to work from the figures appearing in scenario E. The schedule contains values of the chance displayed at increments of 10 per cent. It also adjusts gross receipts to reflect the cost of making the sales expressed at differing percentages. Another schedule includes simple interest on the assumed amounts at 10 per cent per annum calculated annually from the end of each year from 1 January 1996 to 31 December 2001.

[140] There is in this claim a dispute between the accountants as to the cost of sales. It is the only real dispute between the experts. Mr Van Homrigh contends that cost of

sales is of the order of 80 per cent of revenue. Mr Vincent believes it is about 47 per cent which he has rounded up to 50 per cent.

[141] There was also a long and fruitless debate about some perceived inaccuracies and discrepancies in the plaintiff's accounts and ledgers, and whether one should have regard to management accounts or only to statutory accounts. Despite the vigour with which the point was pursued in the cross-examination of the plaintiff's witnesses it turned out that Mr Van Homrigh had had regard to much the same material as Mr Vincent and that the disagreement between them was limited to what, conceptually, constituted cost of sales. There was no disagreement about actual figures in the accounts.

[142] Mr Van Homrigh's approach is to include as part of the cost of sales items which would normally be regarded as fixed overhead or invariable costs. He does so because, viewed globally, these fixed overhead costs do fluctuate over time with the level of business activity so that in periods of recession reductions in costs are made. Mr Van Homrigh includes the amount of these reductions in invariable costs as part of the variable cost of sales. The result of so doing is to increase costs as a proportion of total revenue from sales. This has the result of reducing net profit as a percentage of gross revenue.

[143] Despite the terms in which the matter was debated the argument is not really about the cost of sales but about whether the plaintiff effected savings by reducing overhead expenses. Mr Van Homrigh accepts that the cost to the plaintiff of making and selling its nailplate was a little under 50 per cent as Mr Vincent contended. He was, as I have mentioned, content to accept that figure for the computation of damages for the balance of the contract period. Mr Van Homrigh's point was that over a longer time, in response to the decline in business brought about by the loss of the Campbells' contract and a downturn in building generally throughout 1995, 1996 and 1997, the plaintiff in fact reduced its costs by putting off sales and administration staff, deferring items of capital expenditure and research, reducing costs of administration, and curtailing travel.

[144] There is some support for this view. The graphs prepared by Mr Van Homrigh, exhibits 130, 131 and 132 do show a correlation between a decrease or increase in sales and total costs. To the extent that costs are reduced the plaintiff's overall position improves. It has, in effect, reduced its losses by reducing costs. What Mr Van Homrigh has done, however, is to treat the reduction of "fixed" costs effected in response to a serious decline in revenue as part of the costs of producing and selling the goods. Despite the high regard the Court has for Mr Van Homrigh I am reluctant to accept his opinion on this point. It is at variance with his opinion that costs of sales should be taken as 50 per cent of revenue for a shorter, but still substantial period of 17 months. His explanation for the different treatment was not convincing and emerged only in cross-examination when he was reminded of what he had said when advising on the claim in the Federal Court trial. He justifies it on the basis that cost savings of a type under consideration are affected over a longer term, but if that is so it does not seem right to include them in costs of sales expressed as a percentage of revenue. It would have been more appropriate to identify the net profit by subtracting from revenue the agreed cost of sales and then adjusting that figure to reflect further savings in overhead or indirect costs effected in response to the loss of Campbells' business. Mr Van Homrigh has not done this and, indeed, it is apparent from his report, exhibit 101 pages 32-35 that he cannot do

so. The exercise is artificial. It does not (and does not attempt to) identify actual savings made in response to the loss of Campbells' business. He notes a general decline in the cost of administration and research and assumes that they are directly related to sales. Mr Van Homrigh could only approach the point globally by pointing to a general correlation between revenue and costs but could not point to any single item of cost which he says should have been taken into account in computing the cost of sales which was overlooked by Mr Vincent. The correlation is a loose one as is demonstrated by the representation prepared by Mr Vincent, exhibit 102. No doubt there are many reasons why in times of economic difficulty a company would find ways to reduce its expenses. Without close analysis, which has not been undertaken, it is not right to assume that every cost reduction directly impacts upon the cost of producing the goods which the company sells. The purpose of reducing expenditure is to increase overall profitability but Mr Van Homrigh's approach inverts this process and reduces the level of profitability when expressed as a percentage of revenue. This adds to my suspicion that the defendants' approach under estimates the level of the loss actually suffered by the plaintiff. It is, I think, significant that the first defendant calculates its cost of sales at 43 per cent of gross revenue.

[145] The effect of reducing overhead costs was to reduce the plaintiff's productivity. By curtailing capital expenditure, deferring research and development and putting off sales or research staff, the plaintiff's capacity to develop or obtain business opportunities was reduced. It does not seem right that the defendant should be given the benefit of austerity measures forced upon the plaintiff by its misconduct which, though effecting savings, further reduced the plaintiff's capacity to compete. Accordingly I think it appropriate to accept 50 per cent as the cost of sales.

[146] The defendants relied upon exhibit 129, a calculation made by the plaintiff of the profit it anticipated it would make from selling nailplate to a potential customer, ABC Frames and Trusses. This indicates that the plaintiff calculated its net profit to be 26.21 per cent of revenue. The defendants argue this corroborates Mr Van Homrigh's approach. The difficulty is that the document was not put to any of the plaintiff's witnesses for comment. It is inconsistent with Mr Vincent's detailed calculation of the costs of sales with which Mr Van Homrigh agreed, at least for the period July 1994 to December 1995. It is also inconsistent with the first defendant's own calculated cost of sales which is similar to the plaintiff's at about 43 per cent. Moreover included in the costs are items of invariable, fixed overhead costs which for the reasons I have mentioned should be disregarded in calculating the cost of producing nailplate.

[147] I assess the plaintiff's chance of retaining Campbells' business for the six year period 1 January 1996 to 31 December 2001 had the defendants not interfered at 80 per cent. The schedule scenario E suggest that the value of the lost chance is, therefore, $1,793,210. Despite the arithmetical precision of the schedules it must be remembered that they only give indications of values, dependent upon the assumptions which underlie them. It is, I think, appropriate to discount the amount to some slight extent for contingencies. Accordingly I assess damages under this head at $1,700,000.

[148] It should be noted that Mr Van Homrigh's best estimate of the plaintiff's losses for the five years 1996 to 2000 (exhibit 132) is $1,111, 503. This sum does not include interest.

(ii) Future

[149] The plaintiff claimed as well the loss of the chance that it would have sold nailplate sometime into the future. It is clear it lost that chance which has some value but there is obvious difficulty in assessing it. Campbells has again changed ownership and its new owner, Wesfarmers Ltd have an association with Gangnail. There is no immediate prospect that the first defendant will lose Campbells as a customer but there are market forces which may have that result. I think it appropriate to allow the plaintiff an amount equivalent to a 30 per cent chance that it would have continued to supply Campbells for three years from 1 January 2002 but to extend the defendants' liability no further. Mr Vincent's schedule appropriate to this claim, again using scenario E, shows the loss to be $265,442. Again I think it appropriate to discount for contingencies and I will round the figure down to $250,000.

The Cost of Additional Working Capital

[150] The rubric is misleading. What in fact is claimed is an adjustment for interest on the first head of damage because the calculation of interest for that loss is performed at yearly intervals and as at the end of each year from 31 December 1995. There is thus an hiatus between the time at which the plaintiff sustained the loss and the calculation of the interest which is meant to compensate for the loss. The loss occurs throughout each year but the assessment of the loss is made only at yearly intervals. Mr Vincent has calculated the difference at $49,237 (exhibit 100 p 26) on the basis of costs of sales being 50 per cent which is agreed in respect of this claim. I therefore allow that sum.

Loss of a Chance to Increase Sales

[151] This claim involved the notion that the plaintiff lost the chance of securing ABC Frames and Trusses as a customer. Its owner, Mr Crosoriol, contemplated changing nailplate suppliers in about 1997 because he was reluctant to buy from Gangnail which had bought out his existing supplier. He negotiated with the plaintiff to convert to its products and software. He was impressed by the plaintiff's product and support. In the end ABC remained with Gangnail. A substantial factor in its decision was that the plaintiff was involved in litigation with Campbells, a former customer. Mr Crosoriol was concerned by the prospect that the plaintiff would resort to legal proceedings in the event of a dispute with a customer. The plaintiff claims it has lost the chance of winning ABC's business. I think it had a reasonable chance of securing the business which was lost because of the litigation. I would assess the chance at 50 per cent. However it seems to me the loss claimed is too remote from the first defendant's conduct to be recoverable. The plaintiff did not lose ABC's business because it lost Campbells' business, or because the first defendant induced the breach of the plaintiff's contract. It is true that had the defendants not induced Campbells to break the plaintiff's contract it would not have been involved in litigation, but the plaintiff's decision to litigate was not inevitable, it was not intended, or indeed contemplated by the first defendant as being likely. The defendants' conduct did not cause ABC to reject the plaintiff as a potential supplier. It was Mr Taylor's decision to seek legal address which gave

Mr Crosoriol cause for concern. I do not think there is the necessary degree of connection, or causality, between Mr Crosoriol's decision and the defendants' conduct to make it liable for the lost chance.

Loss from Delayed Development of New Product

[152] This claim involves a small amount of money but a great complexity of evidence. The new product was a V or W shaped steel nailplate used to join the timber components of wall and floor frames. By late 1993 Mr Taylor, who had observed such products overseas, had identified a market for them in Australia and had decided that the plaintiff should design and manufacture its own webs or struts to which he gave the name "multistrut". This claim initially had two components: loss of profits because the plaintiff could not develop the strut itself but subcontracted its manufacture to BHP-Sankey, and losses occasioned by delays in developing the product to the point where it could be sold. The first aspect of the claim disappeared in the cross-examination of Mr Vincent who, having recalculated it, conceded that there was no loss. Indeed it emerged that the plaintiff had profited from its subcontract beyond what it would have made had it developed the product itself.

The second aspect of the claim is incalculable. I think it likely there was some delay in bringing the product to market but it is, on the evidence, impossible to find what, if any, proportion of the delay was occasioned by the first defendant inducing the loss of Campbells' custom. It was the loss of that income which caused the plaintiff to reconsider its financial commitment to the development of the multistrut and which contributed to the decision to subcontract it to BHP-Sankey. If some period of delay could be identified and an ascertainable loss identified it would be necessary to set off against it the enhanced profit, $31,500, resulting from the forced change of plan. The evidence does not allow such an exercise. Nor has the calculation of the loss resulting from delayed sales been properly attempted. I am not satisfied that Mr Vincent's computation properly addresses the nature of the loss. The plaintiff has not made out this claim.

Exemplary Damages

[153] The High Court explained in *Lamb v Cotogno* (1987) 164 CLR 1 at 8:

> "Exemplary damages . . . go beyond compensation and are awarded 'as a punishment to the guilty, to deter them from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself . . . *Mayne and McGregor on Damages* . . . contains an oft-cited description of exemplary damages:
>
> > '. . . They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights.' "

In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 Brennan J said (at 471 in a passage approved by the High Court in *Lamb* at 9):

> "As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious

> disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment . . . are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In *Merest v Harvey* . . . substantial exemplary damages were awarded for trespass of a high handed kind which occasioned minimal damage . . . The social purpose to be served by an award of exemplary damages is . . . 'to teach a wrong-doer that tort does not pay'."

[154] The plaintiff claims that the circumstances attending the first defendant's procurement of Campbells to repudiate the plaintiff's contract called for an award of exemplary damages. The defendants resist the claim. They point out that the award of such damages will be "unusual and rare": per Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 153, and that the conduct said to justify the award must be "outrageous" per Lord Reid in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1089. It must be conduct "which shocks the tribunal of fact, representing the community" per Kirby J in *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 35. The defendants stress the opinion of Hill and Finkelstein JJ in *Hospitality Group Pty Ltd v Australia Rugby Ltd* (2001) 110 FCR 157 at 194, a decision which *inter alia* set aside an award for exemplary damages. Their Honours said:

> "The award of exemplary damages is . . . an extraordinary remedy. When awarded, it gives a windfall to the plaintiff. In the case of the economic torts, in which intention is an element and damages are 'at large', a defendant must be guilty of something bordering on the malicious before the remedy will be granted. If that were not so, exemplary damages would be granted whenever a defendant commits an intentional tort, that is not the law."

I do not know that it is right to say that an award of exemplary damages is extraordinary but it is, with respect, clearly right that not every commission of an intentional tort will justify such an award. There must be something in the nature of high handedness, or malice or cynical disregard of the plaintiff's rights before an award should be made. The cases say no more than this. As the majority of the High Court said in *Gray* (at 6):

> "Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found . . . It may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. Nevertheless, the phrase . . . 'conscious wrongdoing in contumelious disregard of another's rights' describes at least the greater part of the relevant field."

[155] The authorities also emphasise the need for restraint or moderation when making such an award and of the danger that exemplary damages, when combined with an award of compensatory damages, will be excessive. See e.g., *XL Petroleum* at 463. So the need for exemplary damages, and/or the amount of such an award will be less where a very substantial sum of compensatory damages has been assessed.

[156] The defendants also point to what they claim is an anomaly: that the plaintiff seeks exemplary damages for their inducing a breach of contract when the party which actually broke the contract, Campbells, cannot be made liable to pay such an award. It is true that exemplary damages cannot be awarded for breach of contract but I do not see that that makes it anomalous that a party who intentionally brings about a breach intending to cause financial harm to a contracting party should be liable to pay exemplary damages. Whether anomalous or not, I take it to be the law that exemplary damages may be awarded for inducing a breach of contract.

[157] In my opinion this case does call for an award of exemplary damages. I think it an apt description to say that the defendants treated the plaintiff's contractual rights with both contempt and disdain, i.e., contumeliously. Both parties were participants in an industry where competition was intense and the profits to be expected from the conversion of a truss fabricator were lucrative. The plaintiff was a fierce contender for available business and had been identified by the defendants as a likely impediment to their own plans for expansion. They coolly drew up a plan to disrupt and damage their competitor's business. They implemented the plan knowing that if successful they would deprive the plaintiff of profits from its contract. That was their stated objective. Their plan was executed in the full realisation that Campbells was the plaintiff's largest customer and that the loss of its business would have a very substantial detrimental impact on the plaintiff's profitability and, perhaps its viability.

Although the defendants' witnesses denied believing that the loss of the contract might bring about the destruction of the plaintiff it is apparent from the 1994/1995 budget narrative that that outcome was seen to be distinctly possible. The narrative proceeds (AB 201):

> "Their recent loss of the Campbells' truss plant business . . . significantly weakens their market position. . . . Multinail could lose all six of Campbells truss plants. Significant care will be needed to handle the inevitable backlash from Multinail, as their owner may thrash out in any direction *to save his business*." **(emphasis added)**.

As part of its attempt to persuade Campbells to abandon the plaintiff the first defendant described itself as "a big Australian". It seems to have considered that its financial resources would overwhelm the plaintiff which would have no alternative but to accept the inevitable. That appears from its offer to subsidise any damages Campbells might have to pay the plaintiff.

I accept Mr Bagnall's evidence that the loss of Campbells' business caused a crisis for the plaintiff. He seemed to me a sensible man not given to exaggeration. A consequence of the defendants' conduct was that the plaintiff and its associated companies were obliged to retrench a large number of employees. Their personal hardship is not the plaintiff's but it is not right to ignore their plight when judging the complexion of the defendants' behaviour.

The first defendant's shares were held by substantial corporations. The plaintiff was owned by two individuals who stood to lose their livelihood and assets should the loss of Campbells' business lead to its failure.

[158] There was a marked degree of persistence in the defendants' misconduct. In March 1994 the plaintiff emphatically declared its interest in preserving its contract

with Campbells. At that time there was, as I have found, no binding contract between Campbells and the first defendant. Certainly there was no contract for the sale of nailplate. Notwithstanding the plaintiff's protests, and even its attempts to protect its position by legal process, the defendants pursued their strategy and maintained pressure on Campbells to break the contract. Moreover the defendants sought to improve their position and to inflict further damage on the plaintiff. Their initial understanding was that they would re-equip the southern plants and supply them with nailplate. They knew, or must have realised, that Campbells intended to buy nailplate for the northern plants from the plaintiff. It was to soften the blow that the loss of the southern plants would be to the plaintiff. I think it probable that Mr Rogers and Mr Anglin were made aware of this. Nevertheless the defendants continued to negotiate with Campbells for the conversion of the northern plants as well. Whatever argument the defendants might have that they had agreed with Campbells for the conversion of the southern plants in ignorance of the plaintiff's contract has no application to their attempts to deprive the plaintiff of the northern plants when they had been given express notice of the plaintiff's contractual rights. Their conduct evinces a determination to damage the plaintiff and to disregard its rights. Their conduct can, I think, be properly described as shocking.

[159] It is not without relevance that the defendants encouraged Campbells to take legal action to challenge the validity of the plaintiff's contract and made available to Campbells many of its technically qualified employees to prepare and present that case. I am satisfied that the defendants' principal witnesses in this action have lied about their knowledge of the plaintiff's contract and have obscured the truth about what they knew and intended. There has been no indication of regret or even misgiving about what they attempted. They persist in their false justifications for the harm they inflicted on the plaintiff.

[160] It is clear from the authorities that the object of exemplary damages is to punish the tortfeasor not compensate the party wronged. There is a qualification I have mentioned: the amount must be tempered if there is, as here, a substantial award of compensatory damages.

[161] One of the objectives of the law is to encourage the performance of contracts and enhance the certainty that is essential to ordinary commercial dealings. An award of exemplary damages for inducing breach of contract is apposite to reinforce the belief that contracts should be preserved.

[162] The plaintiff points out that the first defendant will have profited from its wrong even after paying compensatory damages. It made profits from the sale of nailplate to Campbells which the plaintiff should have made and has not had to pay damages for that loss. The plaintiff was largely compensated by Campbells, not the defendants. As well the plaintiff submits that there is a degree of unfairness in the process by which the plaintiff's damages for the lost chance of selling nailplate to Campbells after the contract expired are assessed. The assessment of the lost chance always takes into account the possibility that things might have gone wrong. In evaluating any hypothesis there can be no certainty. Thus the plaintiff does not receive by way of damages all the profits it would have made had it remained Campbells' supplier. The first defendant is, as incumbent, in a better position. The plaintiff therefore seeks an award of exemplary damages to make up the shortfalls.

[163] I think there is merit in both submissions but the result if both were accepted is an amount which, when taken together with the compensatory damages, would be excessive. The difference between the value of the lost chance at 80 per cent of certainty and certainty itself is almost $450,000. The profits made by the first defendant for the balance of the contract term was about $700,000.

Nevertheless I think a substantial sum should be awarded which must, necessarily, be somewhat arbitrary in its selection.

I assess exemplary damages in the sum of $400,000.

[164] The ability of a defendant to meet an award is relevant upon the evidence of Mr Vincent which was corroborated in essence by Mr Rogers and Mr Anglin, an award of $400,000 is well within its capacity. Nor is it to the point that the first defendant has changed ownership since 1994. No doubt the new owners acquired their shareholdings cognizant of the potential claim against the first defendant. If they did not know, they could and should have made inquiries.

Judgment

[165] I do not think it right to include in the judgment against the second defendant any award of exemplary damages. No evidence was adduced to show the extent of Mr Roger’s finances. Judgment against him for the amount of compensatory damages would more than adequately deter an individual of ordinary means from again engaging in like conduct.

[166] Accordingly there will be judgment for the plaintiff against the first defendant for $2,559,237 and against the second defendant for $2,159,237 in each case with costs to be assessed on the standard basis.