

SUPREME COURT OF QUEENSLAND

CITATION: *Dwyer & Anor v Lippiatt & Ors; Re: Backpackers R Us.Com Pty Ltd* [2004] QSC 281

PARTIES: **DREW DARREN DWYER and RAELEEN KYM DWYER**
(plaintiffs)
v
JULIE FAYE LIPPIATT
(first defendant)
JUDE CHRISTOPHER KIRK
(second defendant)
AVONCORE PTY LTD
(third defendant)
BACKPACKERS R US.COM PTY LTD
ACN 099 745 730
(fourth defendant)

RAELEEN KYM DWYER
(applicant)

v
BACKPACKERS R US.COM PTY LTD
ACN 099 745 730
(first respondent)
JULIE FAYE LIPPIATTT
(second respondent)

FILE NO/S: SC No 4007 of 2003
SC No 9880 of 2002

DIVISION: Trial

PROCEEDING: Claim
Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 3 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 12-15 and 22 July 2004

JUDGE: White J

ORDER: **In proceedings SC No 4007 of 2003 judgment is given for the defendants against the plaintiffs.**

In proceedings SC No 9880 of 2002 I order that Julie Lippiatt purchase the shares of Raeleen Dwyer in Backpackers R Us.Com Pty Ltd pursuant to s 233 of the *Corporations Act 2001*

to be valued in accordance with terms to be settled with counsel

CATCHWORDS: PARTNERSHIP – GENERALLY – WHAT CONSTITUTES A PARTNERSHIP – FACTS AND AGREEMENTS EVIDENCING A PARTNERSHIP – PARTNERSHIP IN FACT – CONSIDERATION OF INTENTION OR RELATIONSHIP – whether there was a oral partnership agreement – where insufficient evidence to support such a finding

CORPORATIONS – CONSTITUTION AND LEGAL CAPACITY – INTERNAL DISPUTES – REMEDIES WHERE OPPRESSION – COMPULSORY PURCHASE OF SHARES – where application brought to wind up company on a number of grounds set out in s 461(1) of the *Corporations Act* – whether oppression of minority member’s interests – whether there was diversion of profitable undertakings to the detriment of a member and the benefit of another member

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DIRECTORS AND OTHER OFFICERS – FIDUCIARY POSITION – NOT TO MAKE INDEPENDENT PROFIT – whether second defendant owed a fiduciary duty to the company – whether the second defendant should have offered particular contracts to the company – whether second defendant made appropriate disclosure and obtained authority from the board in relation to these contracts

Corporations Act 2001 (Cth), s 9, s 206B(3), s 233, s 236(3), s 461(1)

Birtchnell v The Equity Trustees Executors & Agency Coy Ltd (1929) 42 CLR 384, cited

Re Bright Pine Mills Pty Ltd [1969] VR 1002, considered
Canadian Aero Services Ltd v O’Malley (1973) 40 DLR (3d) 371, considered

Cook v Deeks [1916] AC 554, cited

Foss v Harbottle (1843) 2 Hare 461; (1843) 67 ER 189

Phipps v Boardman [1967] 2 AC 46, cited

Queensland Mines v Hudson (1978) 52 ALJR 399 (PC), applied

Regal (Hastings) Ltd v Gulliver [1967] AC 134, considered
Rishmont Pty Ltd v Tweed City Medical Centre Pty Ltd [2002] 2 Qd R 222, cited

SEA Food International Pty Ltd v Lam & Anor; Megamix Pty Ltd v SEA Food International Pty Ltd, decision of 27

February 1998 BC 9800437 (Extract (1998) 16 ACLC 552), considered

United Dominions Corporation Ltd v Brian Pty Ltd (1985)

157 CLR 1, considered

COUNSEL: L D Bowden for the plaintiffs/ applicant
L A Stephens for the defendants/ respondents

SOLICITORS: Creswicks Lawyers for the plaintiffs/ applicant
Walker & Co for the defendants/ respondents

- [1] These two proceedings have been heard together since they arise out of the same circumstances and concern the same persons and companies. The major question for resolution is whether certain business opportunities were directed away from the rightful owner – in the *Corporations Act* proceedings, from Backpackers R Us.Com Pty Ltd (“Backpackers”) and in the other proceedings, from an alleged partnership constituted by the plaintiffs on the one hand and the first and second defendants on the other – or whether those opportunities and subsequent contracts belong to the second defendant personally.
- [2] Mr Drew Dwyer and his wife Mrs Raeleen Dwyer are the plaintiffs in what it is convenient to describe as the partnership proceedings. Mrs Dwyer was a director of Backpackers and is an 18 per cent shareholder in that company. She has brought an application to wind up the company on a number of grounds set out in s 461(1) of the *Corporations Act* but which may shortly be described as oppression proceedings. Ms Julie Lippiatt and her de facto husband, Mr Jude Kirk, are the first and second defendants in the partnership proceedings. Avoncore Pty Ltd is the third defendant whose directors are Mr Kirk and Ms Lippiatt, and Backpackers is the fourth defendant. Ms Lippiatt was and is a director of Backpackers and holder of 82 per cent of the shares. Since January 2003 Mr Kirk has been a director of Backpackers and Ms Lippiatt and Backpackers are the respondents to Mrs Dwyer’s winding-up application.
- [3] Mr and Mrs Dwyer allege that an oral agreement was reached in early 2002 with Mr Kirk and Ms Lippiatt that further business opportunities other than the then current business of Backpackers, which was the marketing of a combined phone and discount card, would be exploited and the profit split 50-50 between the two couples. They contend that certain profitable Optus contracts entered into by Mr Kirk through Avoncore Pty Ltd from November 2002, are such opportunities which belong to the partnership and seek an order for an account of profits. If the court does not find that agreement established then Mrs Dwyer contends that those Optus contracts ought to have been offered to Backpackers by Mr Kirk who, although not a director or an employee, allegedly owed a fiduciary duty to it. It is not contended by any interested party that the alleged partnership agreement to take up other commercial opportunities ought not to have been directed away from Backpackers. Mr Bowden for Mr and Mrs Dwyer submitted that the informed consent of all the members of Backpackers to that agreement is sufficient defence to any suggestion of breach of fiduciary obligation by the directors. No written minutes of meetings or resolutions of Backpackers were tendered and, it might be inferred, that none relevant to these proceedings were made.
- [4] There is some tension in the pleadings and evidence in advancing the alternative positions in the separate proceedings since in the partnership proceedings it is alleged that the operations of Backpackers were to be confined to the sale of

discount cards by use of the internet and in the *Corporations Act* proceedings it is alleged that they were not so confined.

- [5] A difficulty has been to understand with a degree of accuracy the chronology of events. Little was documented. After Mrs Dwyer, who was the first witness, gave her evidence, there was left a sense of confusion about many matters. Mr Dwyer was able to give his evidence with more clarity. Ms Lippiatt was not greatly involved until the end of January 2002 when Backpackers was about to be incorporated and thereafter not to the same extent as Mr and Mrs Dwyer and Mr Kirk. Mr Kirk gave clear enough evidence although was not devoted to dates or detail. There were, however, a number of other witnesses, namely, Mr Craig Morrissey the company accountant, and Mrs Sharna Decrock and Mr Liam Thomas who worked for Backpackers, who were able to throw light on some of the matters in issue and where issues of credit were involved were of assistance.

Background

- [6] Mr and Mrs Dwyer had had an interest in backpacker accommodation in Townsville in respect of which they were not financially successful. Before that venture they both had careers in the permanent Australian Defence Force – Mr Dwyer as an Army nurse and Mrs Dwyer as an Army dental hygienist. There was no evidence about the duration of Mr Dwyer's military employment but it seemed to have been sufficient to entitle him to a pension. Mrs Dwyer's military career was for 4 years. At a similar time Mr Kirk had business interests in backpacker accommodation in Airlie Beach in north Queensland and had met Mr and Mrs Dwyer through their common interest in the hospitality and accommodation market. At some unspecified time he became bankrupt and continued to be so until 22 October 2002. At the time with which these proceedings are concerned and at the time of the hearing Mr Kirk and Ms Lippiatt lived together in a de facto relationship with her children. By mid 2001 Mr Kirk was employed as a consultant to set up and get operational a backpackers hostel and bar in Fortitude Valley named Reefos Hostel Bar and Grill. That business was owned by Randicam Pty Ltd, the corporate vehicle of a friend, Mr Randall Hughes. Mr Stuart Dunning, another of Mr Kirk's friends, apparently had an interest in Randicam Pty Ltd.
- [7] At least a year or so earlier Mr Hughes, through Randicam Pty Ltd, and Mr Kirk established a business providing discount cards for backpackers. A website, globalexplorers.com.au was set up and a cimage machine to produce the plastic cards with magnetic strips was acquired. Businesses were approached around Australia which were prepared to offer discounts. It seems from Mr Kirk's evidence that Ms Lippiatt was involved in this early business. The card was expected to make profits by way of commission from the businesses and from advertising on the website. Mr Kirk estimated that about \$100,000 had been spent establishing the website business. It did not flourish since it was in a highly competitive field and by mid 2001 it was dormant. Virtually no one was accessing the site and no one was maintaining contact with the discounters. In mid 2001 Mr Kirk was exploring other interests and had a range of smaller consultancies to which reference will be made.
- [8] Mr and Mrs Dwyer moved to Brisbane from north Queensland. Mrs Dwyer obtained employment with Drake International in a management capacity.

Mr Dwyer looked after their young daughter and was not in remunerative employment. He contacted Mr Kirk in about mid 2001 or a month or so later indicating that he was seriously looking for work and was invited for a drink at Reefos Bar. Mrs Dwyer joined them after work and, in due course, Mr and Mrs Dwyer met Ms Lippiatt and a friendship was formed between the two couples. Mr and Mrs Dwyer thought that Mr Kirk was a part owner of Reefos. Mr Kirk and Ms Lippiatt gained the impression that Mrs Dwyer did not enjoy her position at Drake International. She maintains to the contrary. Mr Kirk understood Mrs Dwyer to be skilled in business management and that she was keen to return to the hospitality industry. Mr Dwyer had completed a Microsoft course through Drake International and Mr Kirk understood him to have considerable information technology skill and experience. He mentioned the globalexplorers.com business. Mr Dwyer was very interested in looking at the site to see if the business could become profitable. He was given the access codes necessary to examine the site and did so at his home and in Reefos office. He regularly discussed it and its potential with Mr Kirk and was very enthusiastic.

- [9] The witnesses were not very clear about the dates when these early explorations of the potential for the backpackers card took place. It is not important. But by about September Mr Dwyer was convinced it could be a commercial success and had persuaded Mr Kirk to that opinion. He and Mr Kirk discussed selling the card for about \$30. Should Mr Dwyer sell the card he and Mr Kirk agreed he would have a commission of \$5 per card. Mr Dwyer undertook to contact the several hundred businesses that had previously offered discounts to cardholders. There was a misunderstanding about what he did and the results. Mr Kirk understood Mr Dwyer to have contacted all of the previous businesses and that 95 per cent were interested in recommitting. Accordingly Mr Kirk persuaded Mr Hughes and Mr Dunning that the project was worth supporting again. Mr Dwyer had contacted only a few of those businesses personally and less than half were interested in re-introducing discount offers to backpackers through globalexplorers.com but a number of new businesses contacted by Mr Dwyer were interested in participating.
- [10] Mrs Dwyer took an interest in globalexplorers.com since Mr Dwyer worked on it at home and believed that she could make a contribution due to resources at Drake International which she could access and her ability to draw on information technology students seeking practical experience. Towards the end of October 2001 several students did some work on the website using facilities at Drake International. There is disagreement between the parties about the extent of Mr Dwyer's computer skills at this time and during 2002 until he left in October 2002. From the evidence of Mrs Sharna Decrock and Mr Liam Thomas, which I accept, it seems that his skills and understanding in the field of information technology were not advanced and that he was reliant upon others to carry out complicated manoeuvres and backend work. But he was competent in standard functions and was particularly keen on developing powerpoint presentations.
- [11] In early November Mrs Dwyer left her job at Drake International to become the manager of Reefos on Mr Kirk's recommendation after the manager, Mrs Decrock, left. Mrs Dwyer was paid approximately \$1,000 per week by Randicam Pty Ltd through her company Mayrae Enterprises Pty Ltd. She and her husband both devoted time to developing the discount card business at home and at Reefos. From about October until December 2001 there were numerous discussions between Mr and Mrs Dwyer and Mr Kirk about the website and the backpacker card and

how it could be better exploited. Any costs involved in developing the business were borne by Randicam Pty Ltd and/or Mr Kirk.

[12] During this period it was decided to change the web name to “BackpackersRUs.com.au” and to add a telephone card to the discount card to make it more attractive to backpackers. Both Mr Kirk and Mr Dwyer claim to have thought of the idea first. Nothing turns on it. Perhaps it evolved out of discussions about making the card more attractive. Ms Julie McEwan (Mrs Van Eps at trial) owned a telecommunications service business subcontracted to a company holding contracts with Optus which then engaged a team of people to door knock telephone subscribers endeavouring to have them change from one provider to another. Mr Kirk was interested in finding out more about this kind of business but had made no progress in accessing the right contacts in either Telstra or Optus or any other telecommunication entity. While he was operating Reefos he met Ms McEwan and her team in the bar and obtained useful information from her about what was involved in telecommunications sales contracts and marketing. I accept Ms McEwan’s evidence contrary to that of Mr Kirk that initially when he discussed these things with her he had little understanding of what was involved.

[13] Ms McEwan was introduced to the discount card and contributed some ideas. Initially Mr Kirk and Mr Dwyer gave a presentation to senior Telstra executives in Sydney but they were not interested. With contacts provided by Ms McEwan, Mr Kirk, Mr Dwyer and Ms McEwan gave a presentation to Optus in December 2001 about a combined phone card/discount card. Optus directed them to Telecorp Limited which operated the GO Talk card through CardCall Pty Limited. Including Ms Lippiatt, they travelled to Robina at the Gold Coast and gave a presentation to Telecorp executives. A letter of understanding was prepared by Telecorp dated 15 January 2002. There were two proposals

- the GO Talk prepaid phone card with the Global Explorer logo whereby the customer would purchase a GO Talk card for a certain sum and make phone calls to the value shown on the card; in addition the card would give the benefits of the Global Explorer discounts. There was no extra charge for the customer to have the benefits of the discounts;
- a Global Explorer card would have a zero value phone card pin on the reverse side. A customer would purchase a card at a retail price of \$29.95 which gave the purchaser the benefit of the Global Explorers vouchers advertised on the Backpackers R Us website. There would be a 10 digit pin number on the reverse side of the card and the customer could add \$ value to the card using a credit card via the internet by calling CardCall.

The projects were to be mutually exclusive and would be reviewed by both parties after 3 months.

[14] Mr Kirk executed the letter of understanding witnessed by Ms Lippiatt on 1 February 2002 on behalf of “Global Explorers”.

[15] To revert to the chronology, Mrs Dwyer was relieved of her position as manager of Reefos on 26 December 2001, due, it seems, to her management style in dealing with other members of staff. This is largely irrelevant save that it throws some light on her departure from Backpackers about 10 months later due, essentially, to

conflict with another member of staff and her management style which was described by witnesses as “military”. This is relevant to the allegations of oppression.

- [16] After Mrs Dwyer’s dismissal a meeting was held in late December at Reefos attended by Mr and Mrs Dwyer, Mr Kirk, Mr Hughes and Mr Dunning about various possibilities for the website. At least so far as Mrs Dwyer was concerned the meeting was heated. She was reluctant to do any further work on the Global Explorers card business until she had some form of documented interest in it. Mrs Dwyer contends that Mr Kirk and his colleagues avoided any concrete commitment but that Mr Kirk agreed to pay her \$500 a week if she would assist Mr Dwyer in developing the site. Mr Kirk said that he agreed to lend Mrs Dwyer that sum provided she and her husband worked on the site and business over the January holiday period but believed that she had sufficient money from her employment with Randicam Pty Ltd to see her through the holiday period. Mr Dwyer was undertaking work on the website and business without payment. There was no evidence that he sought payment and it seems to have been Mr Kirk’s understanding that he did not want to jeopardise whatever benefits he was receiving.
- [17] Work on the Global Explorers card was moved from Reefos to Mr Dunning’s offices in Fortitude Valley. Mrs Dwyer contacted former businesses that had offered discounts to backpackers when the website was active and Mr Dwyer was working with other information technology specialists on the site itself.
- [18] Mr Kirk’s consultancy to establish Reefos came to an end about this time. Mr Hughes and Mr Dunning were no longer interested in the website business. In part payment for his consultancy to Randicam Pty Ltd Mr Kirk had the intellectual property in the Global Explorers website transferred to him as well as the image machine. He also received a cash payment. Mr Kirk made his living at this time by working as a consultant in a range of fields either on a success basis or for a fee. For example, he consulted to Mr Hughes who was developing a resort/caravan park and hotel complex north of Noosa about the feasibility of repositioning the resort in the market for backpackers. He was also consulting for a friend in Singapore about converting a small hotel into backpackers’ accommodation. He had other small consultancies. He discussed these activities with Mr and Mrs Dwyer. They came to have unreal expectations about being included in them.
- [19] Mr and Mrs Dwyer rented a house quite close to Mr Kirk and Ms Lippiatt’s home at Yeerongpilly. Mr Kirk and Ms Lippiatt and her children were on holidays during January at the beach. Mr and Mrs Dwyer were quite agitated about their financial situation. Mrs Dwyer particularly was aggrieved that she and her husband were not receiving financial recognition for their efforts to get the discount/phone card business going. The card was still not selling despite its change of name. Mrs Dwyer was insistent that the interest which she and her husband had in the development of the card be recognised by the establishment of a company in which they would have appropriate shareholding and she communicated this to Mr Kirk.

The agreement to form a company

- [20] On or about 29 January Mr and Mrs Dwyer and Mr Kirk and Ms Lippiatt met at the latter couple’s residence. By then the four regarded themselves as friends.

Mrs Dwyer made it clear that she was not prepared to do any further work on the website and business if she did not have some share in it of a formal kind. The proportion of shareholding of 18 per cent to Mrs Dwyer and 82 per cent to Ms Lippiatt was decided by reference to the earlier agreement that Mr Dwyer would have as commission \$5 out of every \$30 card that was sold. Mrs Dwyer said that she indicated that this was entirely inappropriate and related to an earlier time, but that Mr Kirk was adamant, in the absence of any financial contribution from them, about the relative shareholding. Mr Kirk and Ms Lippiatt do not recall the shareholding being an issue.

- [21] Mr Kirk, who had funded all the work on the card, or at least from the time Mr Dwyer became interested, then had no more funds available to devote to it. The two couples clearly had high expectations for its success notwithstanding Mr Kirk's evidence that he had reservations. After all, Ms Lippiatt, who until this time had been little involved in the card in any of its manifestations agreed to fund its future development by selling a home unit which she owned in Quay West and was unlikely to have done so, or have been encouraged to do so by Mr Kirk, unless they fully expected to recover her investment. Mr and Mrs Dwyer had not contributed and were unable to contribute financially.
- [22] Mr Kirk said that he would instruct his accountant, Mr Craig Morrissey, to incorporate a company to be named Backpackers R Us.Com Pty Ltd immediately. The parties agreed that Backpackers would be the owner of all the intellectual property in the website, formerly, globalexporerers.com.au. It was agreed that Mrs Dwyer and Ms Lippiatt would be the directors of the company which would be funded by Mr Kirk and Ms Lippiatt. The net profits of the company were to be distributed as dividends according to the shareholding in the company. Mrs Dwyer alleges that it was agreed she (and Mr Dwyer) would have equal control of the company with Ms Lippiatt (and Mr Kirk). I accept Ms Lippiatt's evidence that the control over the company was to be reflected in the shareholding but that in practice matters concerning the company were fully discussed and mutual decisions reached. Mrs Dwyer was a co-signatory of company cheques. Mr Morrissey, the company accountant, who discussed setting up the company with Ms Lippiatt and Mrs Dwyer was not asked to record any different control over the company than as reflected in the shareholding.
- [23] Mrs Dwyer, supported by her husband, was adamant that it was agreed that she would be paid \$1500 per week via her company, Mayrae Enterprises Pty Ltd, for her services but that since the business was not making a profit she would initially receive \$500 per week and the balance would be paid when the company was able to do so. This alleged agreement is set out in her affidavit in support of the winding up application of 29 October 2002. Ms Lippiatt denies that there was an agreement in those terms and in this she was supported by Mr Kirk. She said that since Mrs Dwyer was very concerned about finances and since she was to be funding the operation it was agreed that Mr and Mrs Dwyer would be paid \$500 a week as living expenses by her but as a loan to be paid back out of their drawings from the company when it became profitable. She said (in her statement, exhibit 35) that in due course she simply paid money into the company account which Mrs Dwyer drew upon. Mrs Dwyer, who became the office manager, did not record these drawings as wages to herself. The sums drawn amounted to \$24,206.27 and appear as a loan to D & R Dwyer in Backpackers' financial statements for the year ended

30 June 2003 prepared by Mr Morrissey on instructions from Mr Kirk and Ms Lippiatt in July 2004.

- [24] It made no commercial sense for Ms Lippiatt to provide funds on that basis to Mrs Dwyer and her instructions to her then solicitor in November 2002 after Mrs Dwyer commenced the winding up proceedings reflected this. This alleged agreement about remuneration was not communicated by Mrs Dwyer to Mr Morrissey when she and Ms Lippiatt met with him at the end of February to set up the company. It was not as though she was overshadowed in that meeting. Mr Morrissey described her as “doing all the talking” and as the one whom he though was running the business. I have concluded that the agreement in respect of remuneration for Mrs Dwyer was as described by Ms Lippiatt.

The partnership agreement

- [25] Mr and Mrs Dwyer allege that in order to induce them to enter into the agreement to form a company and to continue to develop the business of the discount card there was a further agreement between them on the one part and Mr Kirk and Ms Lippiatt on the other. The terms of that further agreement as pleaded were

- the operations of or interest of Backpackers was to be confined to the sale of discount cards to backpackers or members of the public by use of the internet;
- any other business or corporate opportunity which presented itself to Mr and Mrs Dwyer, Mr Kirk or Ms Lippiatt or to Backpackers and which was profitable and which was outside the core business of Backpackers was to be the subject of a further joint venture on the basis of a 50-50 split or interest as between Mr and Mrs Dwyer on the one part and Mr Kirk and Ms Lippiatt on the other.

The consideration for that agreement is pleaded to have been the mutual exchange of promises followed by each party acting on the oral agreement.

- [26] Mrs Dwyer’s evidence about this further agreement was that after the arrangements had been made for the shareholding in and the funding of the company by Ms Lippiatt she said to Mr Kirk and Ms Lippiatt

“What about any other business outside of the backpackers card? Are we going to do fifty-fifty on that?” and Mr Kirk said “I can’t see a problem with that,” and then Mrs Lippiatt came back, she was out of the room at the time. She came back down and Jude Kirk asked Mrs Lippiatt, “Ray and Drew would like to know that further down the track any other business that comes about that we would go fifty-fifty” and Mrs Lippiatt was very happy with that. She was very happy with the fact that Mr Kirk was going into business with us because she found us one of the honest people that she had known in some of his past dealings.” t/s 29-30

In response to a question from Mr Bowden, her counsel, whether things were put into effect straight away as far as the agreement was concerned, she said

“Can I just add that I did reiterate to Mr Kirk and Mrs Lippiatt, “so what are you saying” – this is at the meeting – “So what you are saying is that any business outside of the backpackers discount card we will go fifty-fifty?”, and they both said “Yes”, and then I said it again, “So you are telling me that anything outside the backpackers card, there will be fifty per cent will go to you Mr Kirk and you Julie, and the other fifty per cent will go to my husband and I?”, and they both agreed adamantly yes. Sorry, now can you ask me that question again?” t/s 30

- [27] Mr Dwyer said that after the company and its shareholding was agreed with Mr Kirk and Ms Lippiatt other business opportunities were discussed.

“Okay. That was agreed on the shareholdings from the previous meeting with all the people at Reefos that the 18/82 position was struck and Raeleen would hold 18 per cent share holder, Mrs Lippiatt would hold 82 per cent shareholding, and that 82 per cent shareholding went into the Jude Kirk Family Trust. Now, at the time I mentioned and brought up straight away that there was a lot of other business on the go, on the round – the business in Singapore, the establishment of new Reefos that Mr Kirk had asked us to look at managing, the entire concept and training staff and putting staff in place and also the 1900 scratchie, and going to Go Talk and all the other businesses that had started to be established or started to be created, that we were not comfortable to be doing this amount of level of work to receive 18 per cent and that we wanted a confirmation from the pair of them that 50 per cent share interest in all business outside of the phone card would be established.

Yes, and what did Mr Kirk and Ms Lippiatt say about that? –

Mr Kirk agreed, [Ms] Lippiatt agreed and she particularly agreed on the fact that she was comfortable and happy that Mr Kirk had finally had some decent business partners, not like the ones he was in with Reefos and they had established right there and then to us that everything outside of the card and all extra business would be a 50/50 shareholder.” t/s 114

- [28] At or about that time Mr Dwyer said he made notes of that conversation in a page in his wife’s diary which he read to the court (it was not tendered)

“18 per cent, Backpackers R Us. 50 per cent, all other entities. Question from Julie want to – all connections with Randall Hughes discontinued and is angry about Julie McEwan...

Meeting with Jude to discuss the outcome and plan for the Optus Card Call, Julie McEwan scratchies and the door knocking arrangement – door knocking. Meeting with Jude, Julie, over ownership and Ray and Drew want more than 18 per cent.” t/s 116

Mr Dwyer said that he gave the diary to his solicitor about the middle of November 2002, a month after he left Backpackers and after the winding up proceedings had commenced. Mr Dwyer was not cross-examined closely about this entry. He said he wrote it at about the time of the meeting at the end of January.

- [29] Mr Kirk's evidence about this further agreement needs to be seen in the context of earlier evidence that he had given about his way of working. He was always on the lookout for business opportunities and seems to have enjoyed "bouncing" those ideas around, and, on occasions, making use of other peoples ideas and information to further his own interests. For example, Ms McEwan thought that she would be involved in some business enterprise with Mr Kirk in the telecommunications field after giving him the benefit of her contacts and know how and being involved in presentations with him in Sydney. She severed all ties with Mr Kirk (and, it should be added, Mr and Mrs Dwyer) by about mid 2002 when it became clear to her that there was no place for her in Mr Kirk's plans.
- [30] Mr Kirk agreed that he had asked Mr Dwyer on his way back to Brisbane from Childers at some unspecified time in 2002 to come through Noosa to look at the Randicam resort development. He denied that there had been any offer to manage that resort to Mr Dwyer. It was not for him to make such an offer. As to the Singapore project, Mr Kirk said that although he and Ms Lippiatt regarded the Dwyers as friends

"We'd known them for about three months since they first came to Reefos, and I have been in business 25 years and I am not the sort of person who wants to hand out, you know, or split deals or do anything like that with the projects I do. The Backpackers R Us project was about helping the Dwyers and giving them a leg up because they'd gone through large difficulties in Townsville with their Irish bar." t/s 202

Mr Kirk denied that there was any mention of other entities or other business opportunities to be shared when the company Backpackers was agreed to be incorporated on 29 January.

- [31] Ms Lippiatt denied that there was any discussion about a partnership or a deal in respect of other business opportunities at the meeting at the end of January. She said it was "just a final decision" on the 18/82 per cent split and the agreement to form the company.
- [32] Subsequently Ms Lippiatt and Mrs Dwyer met with Mr Craig Morrissey who was to incorporate Backpackers. Mr Morrissey is a chartered accountant in private practice with extensive experience in the structuring of businesses. He was known to Mr Kirk and had given him advice about structuring the consultancy fee which he received from Randicam Pty Ltd when he left Reefos. There was no evidence that he had a long established relationship with Mr Kirk. He became the accountant for Backpackers and for Mr and Mrs Dwyer personally. It was not suggested that he was not impartial in his evidence and I found his evidence reliable and of assistance in resolving these issues.
- [33] Toward the end of February 2002, having already been given material about the company in response to instructions, he attended at the Dwyer's home where the

Backpackers' business was operating under their house and met with Ms Lippiatt and Mrs Dwyer. He said that the purpose of the meeting was to discuss a new business concerning a discount marketing card for backpackers. They were to discuss the structure of the business entity, bookkeeping issues and tax matters. Mr Morrissey said that the conversation was directed by Mrs Dwyer whom he thought was "the main operator of the business". Mr Morrissey said there was talk of ownership of shares in certain percentages which was reflected in the share ownership of Backpackers but there was no other discussion of any ownership of assets. He said the company was not going to own any plant and equipment or hostels and there were no other assets or ownership of assets or businesses discussed except, perhaps, a computer. Mr Morrissey said it was his practice that he explored with clients their future operations so that he could give them appropriate advice. He did so on this occasion.

- [34] In response to a question from Mr Stephens whether there was any mention of a 50-50 ownership in other entities or other opportunities, he answered

"No, there certainly was not. At that stage Backpackers R Us.Com was going to be a discount marketing card and that was going to be business and that's what they were doing. Raeleen was busily phoning people in North Queensland to sign them up. There was no other mention of any 50/50 arrangement or other businesses. If there – my general policy is that if I am aware of any other agreements to that regard, I usually refer them on to a couple of solicitors I know to have what I call a heads of agreement or a shareholders agreement struck. I really do find that these days we have to think about the future and plan accordingly. It is best to have an agreement struck early on so everybody knows their rights and responsibilities.

Did you do that on this occasion? – No, that was – nothing of the like was suggested. I didn't advise it. There was no, even suggestion of any other venture or any agreement or any change that – to the business other than what I was told.

Did Mrs Dwyer express an interest in documenting their interests? – No." t/s 335

Mrs Dwyer does not suggest that she raised the alleged partnership agreement at this meeting. Backpackers was incorporated on 27 February 2002.

- [35] The GO Talk – Backpackers card was to be launched in Sydney at the beginning of July 2002. To that end Mr Kirk and Ms Lippiatt rented three apartments adjacent to each other in Sydney, one to be used for an office, and hired two cars. The Dwyers, Mrs Sharna Decrock, who had joined Backpackers as a sale representative some time previously, Ms Lippiatt's adult daughter, Mr Dayal Abrahams, one of the IT students who had trained at Backpackers initially through Drake International and who was then employed by Backpackers, Mr Kirk and Ms Lippiatt went to Sydney for the launch. They all participated in the promotion of the card in different areas of Sydney, principally placing cards in backpacker establishments and targeting some retail outlets.

The Pineapple Card

- [36] Mrs Decrock worked part of inner city Sydney and identified City Convenience Stores of which there were about 100 which she learnt were amongst the biggest distributors of phone cards in Australia as a suitable venue for the Backpacker card. Thinking this was a good opportunity for wider distribution of the Backpacker card Mr Kirk met the owner Mr Bassam Suwan. Mr Suwan was not interested in handling the Backpacker card but said he wished to develop his own phone card to be called the Pineapple Card. Mr Kirk had a contact through a GO Talk employee to one Les Comans, an engineer who had apparently created early phone cards for Cable & Wireless a decade or so previously. Mr Kirk had had a number of meetings, some attended by Mr Dwyer, with Mr Comans from the end of April to the end of June 2002 and apparently discussed the Backpacker phone/discount card. Mr Kirk thought that if he could broker a deal between Mr Comans and Mr Suwan there might be some advantage in it for Backpackers. There were numerous meetings which Mr Kirk attended, to keep, he said, a Backpackers presence since, apart from the introduction, Backpackers had nothing to contribute to the deal. Mr Kirk described Mr Suwan as a difficult negotiator and negotiations continued well after the Brisbane party had returned home.
- [37] Exhibit 23 is a diagram prepared by Mr Kirk to reflect what was eventually agreed. Shares in Spot Communications Pty Ltd were held by Mr Comans and a business associate equally. That company had its own card – the Spot Card – which was not selling well. Of particular interest was the switch to which Spot had access. Mr Comans’ business partner was to sell his shares to Backpackers. There is some dispute as to whether Mr Kirk and Ms Lippiatt had sought to buy those shares for themselves and not for Backpackers. They say that the shares were offered to them personally but they were always to be for Backpackers. The shares were not paid for until after the commencement of the winding up proceedings but the acquisition was for Backpackers. Ms Lippiatt loaned the company \$3,000 to purchase the shares. Backpackers acquired 44 per cent of the shares in Spot Communications Pty Ltd, Mr Comans retained 44 per cent and 12 per cent went to a person named James who worked at Worldcom, a necessary link in buying telecommunications time, the cost of which Mr Comans was to negotiate. Mr Kirk said bringing Mr Comans and Mr Bassam Suwan together was reflected in the price of the shares.
- [38] Spot Communications Pty Ltd was to develop the new Pineapple Card. This phone card was not aimed particularly at the backpacker market but rather at the geographical Middle East market. Because of Mr Suwan’s contacts (he was said to be Jordanian) the targeted phone card users were interested in phoning that geographical area. Because of the expected high volume of use, Mr Comans had been able to negotiate good rates to the Middle-East which would, it was thought, make this phone card competitive.
- [39] The arrangement was that Pineapple Communications Pty Ltd would purchase the Pineapple Card from Spot Communications for 55 per cent of the value of the card enabling a commission of 45 per cent per card to be earned. Mr Suwan’s entity, Global Phone Cards, owned 50 per cent of Pineapple Communications and Spot Communications and Backpackers each owned 25 per cent. Mr Kirk negotiated for Backpackers to have the right to sell the Pineapple Card in Queensland with the same 45 per cent commission as Global Phone Cards enjoyed. There were some other benefits to Backpackers in terms of air-time rates.

- [40] Based on the large number of phone cards already sold by Mr Suwan's outlets the projected sales were of over \$1m of phone cards per month. Mr Suwan had mentioned a turnover of \$3m per month but that figure had been discounted by Mr Kirk in his discussions and projections with the Brisbane team. The projected income for Spot Communications was 4-5 per cent of turnover and Backpackers share was expected to be approximately \$22,500 per month. In the event, even this conservative turnover estimate of \$1m per month did not eventuate and it is common ground now that the Pineapple Card failed to live up to expectations. However, once the agreement was established, hopes were very high and Backpackers needed distributors and retailers in Queensland to take advantage of its shareholding in Pineapple Communications and the 45 per cent commission structure.
- [41] Mr Kirk was the only person from Backpackers negotiating with Mr Suwan and Mr Coman. Sometimes Ms Lippiatt accompanied him to Sydney. Mr Kirk said that he kept the Dwyers informed but that the negotiations in Sydney regularly broke down. He said that he did not take either of the Dwyers partly because of the expense, for which he was responsible, but partly because of their lack of sophistication in business negotiation. He says they were kept informed although they protest that they were kept in the dark. Mr Kirk and Ms Lippiatt said that attempts to explain the arrangements over the Pineapple Card to the Dwyers by use of a white board were not very successful. Their limited comprehension, particularly that of Mrs Dwyer, was demonstrated when giving evidence. It is unnecessary to detail that understanding but it is shown by exhibit 11 advanced in the Dwyer's case and explained as erroneous by Mr Kirk at t/s 227-8 and, on this, I accept his evidence. This misunderstanding has been reflected in the points of claim in the winding up proceedings in paras 11(g) and 18 where the annual turnover of the sale of phone and discount cards is pleaded to be \$12m. This was based on an assumed turnover of \$1m per month during negotiations with Mr Suwan but no actual sales ever reflected this figure. In fact Mr Comans had greatly underestimated the cost of purchasing time and from the outset Spot Communications Pty Ltd operated at a loss of about \$1m per month.

Blue Marble Unlimited

- [42] Backpackers needed a new name for distributing the GO Talk card earlier in the year since it was not aimed solely at backpackers. Mr Dwyer devised the name Blue Marble Unlimited referring to an astronaut's description of the world from outer space as looking like a blue marble and the unlimited nature of telecommunications. The logo reflected this idea. The name was registered as a business name by Backpackers on 16 May 2002. Mr and Mrs Dwyer contend that it had been agreed that the business name would be registered 50 per cent to each couple but that without their concurrence it was registered in the name of the company. Mr Kirk and Ms Lippiatt said that it was always to be registered to Backpackers. In the registration Backpackers was then described as carrying on the business of tourism and internet marketing.
- [43] Originally Blue Marble Unlimited had been envisaged as the distribution arm of Backpackers. Mr Kirk said it was apparent to him and discussed with the Dwyers and Ms Lippiatt that Backpackers did not have enough people to distribute particularly the Pineapple Card in the marketplace. He proposed that in addition to

Backpackers' own distribution arrangements that Mrs Decrock and her husband be offered distribution rights in Queensland through wholesalers and retailers deploying much of the 45 per cent commission available for the sale of the Pineapple Card, see exhibit 23. There was expected to be a return of about 5 per cent to Backpackers from Mrs Decrock's distribution. She and her husband registered Blue Marble Distributors as a business name. Mr and Mrs Dwyer seemed to have difficulty in understanding what benefit Mrs Decrock had obtained. They firmly believed that Mr Kirk had "given away" half of Backpackers' interest in the Pineapple Card to Mrs Decrock. Mrs Decrock explained that she and her husband registered the name Blue Marble Distributors which she had discussed with the Dwyers, Mr Kirk and Ms Lippiatt because it seemed an appropriate identification with Blue Marble Unlimited. She continued to work for Backpackers distributing the Backpackers card. Although Mrs Decrock said the Pineapple Card sold well initially it subsequently became unavailable in Queensland.

- [44] At the time of trial Mr Kirk was unable to say what had happened to Pineapple Communications Pty Ltd. The Pineapple Card was no longer sold. Mr Comans had caused Spot Communications Pty Ltd to be wound up.

The Optus opportunities

- [45] There is differing evidence about early contact with Optus. There was the contact via presentations in Sydney in December 2001 to interest Optus in the discount/phone card which was unsuccessful but there was subsequently an attempt to obtain Optus contracts to distribute Optus products which had been the business engaged in by Ms McEwan. Mr Dwyer suggested contact commenced in March/April 2002 for these contracts and Mr Kirk said mid 2002. Mr Kirk said that by then he had contact with the appropriate people at Optus to discuss the prospects of a marketing agreement to sell Optus residential products door-to-door or by telephone. Ms McEwan said that she had given Mr Kirk a lot of information and know how about these Optus contracts. Mr Kirk said he wanted to start making an income for himself. Mr Dwyer said that doing work for Optus was discussed by all at Backpackers including Mr Abrahams and Mr Kirk had enthusiastically predicted millions of dollars were to be made out of it without reserving the opportunity to himself. Mr Kirk says his reference to "millions" was to the Pineapple Card. The fact remains that he discussed the desire for Optus contracts in the context of Backpackers business.
- [46] Mr Dwyer said after he had the idea for the name Blue Marble Unlimited he and Dayal Abrahams started developing powerpoint presentations for Mr Kirk to take to Optus. The presentations were often work in progress but those tendered at trial were started in about June and finalised in September 2002. Mr Dwyer said that these were Backpackers (or, preferably, partnership) opportunities and not for Mr Kirk's sole benefit. Every detail, he said, of the wording of a presentation was discussed with Mr Kirk and revised many times. Mr Kirk said he had difficulty recalling the presentations shown to him in court but that they were done for him by Mr Dwyer as a friend and he had made this abundantly clear. This was never put to Mr Dwyer in cross-examination most likely because there was disagreement about whether these powerpoint presentations had been disclosed. Eventually Mr Stephens withdrew the objection to their receipt. Although Mr Abrahams, who might have been able to contribute some evidence about this was foreshadowed as a

witness by Mr Stephens, he was not called. It was not suggested that any adverse inference ought to be drawn. His statement had been made available at the commencement of the defence case. There were time constraints on the trial and Mr Stephens attempted to limit his witnesses.

[47] These powerpoint presentations to Optus became exhibits 13, 14 and 29 and require some detailed consideration since they are most relevant to the issue whether the Optus contracts should have been obtained for the benefit of either Backpackers or the alleged partnership. Mr Kirk as good as conceded that they contained, to put it politely, a deal of hyperbole. He said the Blue Marble Unlimited name was used because he had not thought of any other at the time. Exhibit 29 is a presentation in Backpackers' name for the addition of the discount card on a mobile phone screen.

[48] Exhibit 13 has a coversheet "Blue Marble Unlimited" with the logo of the world behind it. The first page reads

"The Blue Marble Profile

- Blue marble has vast experience in many areas of marketing
- Specializing in Internet based and Direct marketing programs
- Products include a full range of Telco and customer loyalty systems
- Targeting both residential and business".

Under the heading "Some of our Products & Services" appear the names "Backpackers R Us" and "Uni-students R Us". The later was another card Mr Dwyer had been working on. On p 8 the following appears:

"The Blue Marble Discount Card

- The Blue Marble/ Optus Discount Card will be offered FREE to existing and new Optus Long Distance customers
- Giving a HUGE range of discounts in local businesses (e.g.) movie theatres, pizza, fuel, chemists, video hire etc
- The card will also offer discounts at Hotels, travel and tourism activities Australia wide through the Blue Marble partner system".

Under the heading "The Optus Advantage" appears the proposition that existing Optus customers would be presented with the Blue Marble/Optus discount card by "our door to door rep completely **FREE**". The strengths of Blue Marble are set out

"The Blue Marble Direct Marketing Approach

- Blue Marble strength is its recruitment, training and management systems
- Overseen by accredited cat II trainers where each recruit/candidate is put through orientation and sales training for Two days in a classroom environment.
- Candidates are tested prior to understudying a senior salesperson in the field for a further three days
- finally being assets for a full day in the field by a sales manager/trainer
- Candidates not up to standard are offered a retread through the training again

- Each sales team consists of 7 sales reps plus One sales manager
- For each 3 sales teams there is an Area Manager
- All direct marketing rollouts are conducted using this formula
- Each sales team meets each morning prior to entering the field and is given further training in product knowledge, salesmanship and conduct
- Encouragement and incentives are presented at the meetings with an emphasis on product knowledge and conduct”.

[49] There are other descriptions of Blue Marble’s direct marketing approach. The summary states:

- “• Blue Marble has already completed a test survey of over 100 homes in the Brisbane suburb of Gaythorne
- Residence [sic] were asked “would they change from their current long distance Telco provider, given comparable rates and the use of the discount card such as the Blue marble card”
- The results of the survey were extremely positive
- Blue marble see huge benefit in a marketing alliance with Optus long distance residential for both our companies and a Win Win for the Optus Customer”.

[50] The Optus Acquisition Proposal, exhibit 14, begins by describing Blue Marble as a “Direct Marketing Company, with over 25 years selling and marketing experience to Business and Residential customers”. According to the presentation Blue Marble proposed to market the Optus product to businesses through its current business development team consisting of mature experienced sales professionals.

“The Blue Marble in house Sales and Training division consists of only certified trainers that control all aspects of product knowledge and customer liaison

Drew Dwyer BNSc – Certificate iv assessment and training
Cat 2 train the trainer
Trainer and Development Officer
Workplace Health and Safety Trainer

Rae Bramwell [presumably Mrs Raeleen Dwyer] **BA Marketing** –
Certificate iv Assessment and Training
Huthwaite accredited sales trainer
Motivational Facilitator”

[51] In order to impress Optus with his skills and experience in utilising a door-to-door sales team Mr Kirk met with Mr Michael Barnard of Optus at a factory with pleasant offices at Browns Plains owned by a friend with whom he was doing some business consulting. Mrs Dwyer was in attendance to train (or training?) 3 people who were to sell the discount cards door-to-door. This was at a time when Backpackers offices were still under Mr and Mrs Dwyer's home.

[52] In due course Mr Kirk was asked to sign a confidentiality agreement by Mr Barnard in an email sent 1 August 2002. Mr Barnard emailed a draft Supplier Partner agreement to provide marketing services for Optus on 15 August 2002 to Mr Kirk at

his email address jude@backpackersrus.com. He seemed to have had a number of different email addresses at the time. On 21 August 2002 he sent Mr Kirk commission schedules. These documents were obtained on third party disclosure from Optus not from Mr Kirk or Avoncore. Mr Dwyer said he worked on material for the schedules at Mr Kirk's request and emailed the results to Optus. In September he sent a powerpoint presentation "from Jude Kirk" to Kevin Balzarolo of Optus in Sydney. Mr Kirk said it was a completely different division from Mr Barnard's division in Melbourne. This proposal concerned Backpackers seeking to market the Optus pre-paid rechargeable mobile phone, starter-kit and recharge card to "our backpacker market through the internet and selected alliance outlets." On 14 October 2002 (the day Mrs Dwyer left Backpackers) Mr Kirk did a hand written memo to Mr Dwyer asking him to do a Backpackers powerpoint for four major travel agents about the distribution of a phone/discount card.

Meeting of 20 September 2002

- [53] After the Backpacker team returned from Sydney Mr Kirk rented offices in Brookes St Fortitude Valley for Backpackers. All expenses associated with its business were borne by Mr Kirk or Ms Lippiatt, such as rent, wages and stationery. Mrs Dwyer was concerned to have a greater share in Backpackers to reflect the effort that she and her husband were putting in to promote its business. A meeting was arranged for 20 September between the Dwyers, Ms Lippiatt and Mr Kirk and Mr Morrissey at Backpackers' offices in Brookes Street.
- [54] The previous day Mrs Dwyer sent an email to Mr Morrissey indicating the matters to be discussed which were of most concern to her. She wrote

"Things we would like to bring up at the meeting tomorrow –

The 82 – 18% company split – need to discuss the past work etc and resources that R & D acquired to be giiven [sic] that %. In turn the opportunity to gain more of the company's shares.

Share value and fairness should be discussed not on the basis of the risk of how much money went in, due to R & D work at a level and sacrafice [sic] income, lifestyle and all the extras that go towards building a business. eg: J & J deserve a premium on the investment however can this be offset against wages etc.. in return for more shares and fed back to J & J = tax

Need to discuss the break down of future business eg: spot, pineapple etc.. (The opportunity with buying into Spot wouls [sic] not have eventuated without the joint effort over the past 12 mths) All work in past 12 mths we have done to get the company in this current position, we should have more of a vested interest.

Structures on commissions on corporate deals.

Income – What we have done & what we do & what we are worth in comparison to market salaries. Eg: R & D are worth \$100K plus each.

Whats going to be paid by coy – expenses etc..?

The structure of pineapple etc & the filter down to BPRUS – whats left from the \$3Mil per mth?”

- [55] Mr Morrissey’s perception was that there was general disharmony amongst the four. As a person outside, his observations are valuable although there is little contention about what was discussed at the meeting, the substance of which is set out in para 49 of Mrs Dwyer’s affidavit of 29 October filed in support of the winding up proceedings (it is common ground that the reference to a meeting date of 12 September should read 20 September). Mrs Dwyer wanted an increase in her shareholding to 50 per cent to reflect the contribution that she and her husband had made and she wanted a large salary; a figure of \$90,000 was mentioned for Mr Dwyer. Mr Kirk asked how the Dwyers proposed financing a greater shareholding in view of their lack of financial assets. Mrs Dwyer proposed that they (she) would forego wages and/or percentage of profits to acquire further equity in the company. Eventually Mr Kirk said that if the company performed better over the next six months it might be feasible.
- [56] Mr Morrissey was particularly concerned at the very poor performance of the company notwithstanding the great potential which the four continued to predict for its future. The figures for the first 5 months which Mr Morrissey had at the meeting (exhibit 39) showed a net loss of \$54,465.34 with an income of \$34,000 provided by Ms Lippiatt and expenses of \$88,465.34.
- [57] Ms Dwyer complained about the role of Mrs Decrock in the company, the failure to adhere to the chain of command, and the commission which Mrs Decrock was to earn on the sale of the Pineapple Card. The parties and Mr Morrissey agree that there was no mention of any earlier agreement for businesses other than those of Backpackers’ core businesses to be split 50-50. There was discussion about the Pineapple Card and Spot Communications which were seen as part of Backpackers’ business although the claim in the partnership proceedings asserts to the contrary.
- [58] Eventually Mrs Dwyer was offered an increased shareholding to 25 per cent to be deferred for 6 months. The Dwyers dispute the deferment. They said they wanted to think about the offer. They contend that they accepted that offer by email to Mr Morrissey the following day requesting him to adjust the company share register. He denied ever receiving that communication.

Departure of the Dwyers

- [59] The evidence of Sharna Decrock and Liam Thomas, who commenced work at Backpackers in October 2002, supports that of Ms Lippiatt and Mr Kirk that the Dwyers were very difficult people to work with and had poor staff management skills. Mrs Dwyer had left on a number of previous occasions and was persuaded, primarily by Ms Lippiatt, to return. On 14 October Mr and Mrs Dwyer confronted Mr Kirk with allegations that Mrs Decrock had been given a half interest in Blue Marble Unlimited. Mr Kirk attempted to explain that she and her husband were earning commission by going out and marketing the Pineapple Card and that the Dwyers could do this themselves. Mrs Dwyer took up her diary and left the office.

- [60] The following day Mr Dwyer only attended Backpackers' offices and in the presence of Mr Thomas and Ms Lippiatt (and in Mr Thomas's words) "started yelling and shouting at her about the way Jude and Julie had treated Raeleen. He towered over her and intimidated her. I was very concerned for her safety," (exhibit 37). It might be observed that Mr Dwyer is a very tall, heavily built man and Ms Lippiatt a slight woman of average height. Ms Lippiatt telephoned Mr Kirk, then in Sydney, and on his instruction told Mr Dwyer to leave. The Dwyer's maintain that they were orally abused and bad language used by Mr Kirk to Mrs Dwyer and by Ms Lippiatt to Mr Dwyer. I accept the evidence of Mrs Decrock, Mr Thomas and Ms Lippiatt and Mr Kirk that it was the Dwyers who were conducting themselves intemperately. Mr Dwyer, in the presence of Mr Thomas, took the computer on which he worked causing some damage to fittings. Mr and Mrs Dwyer returned the following day to retrieve some possessions and then left.
- [61] On 8 October 2002 Mrs Dwyer filed her winding up application. Mr Kirk contacted the Dwyers and asked them to discuss the situation. Mrs Dwyer said after the shares in Backpackers had been valued they would contact Mr Kirk and Ms Lippiatt. When that occurred the claim was for in excess of \$900,000 and no further discussions occurred.

The Optus contracts

- [62] Mr Kirk was discharged from bankruptcy in October 2002. Avoncore Pty Ltd was incorporated shortly afterwards with Mr Kirk and Ms Lippiatt as directors. As has been mentioned, after Mr Kirk signed the Optus confidentiality agreement on or about 5 August 2002 he was able to enter into serious negotiations with Optus. On 20 November 2002 Avoncore entered into a Small Business Outbound Marketing Agreement as Supplier with Optus. In January/February 2003 Optus reorganised its internal structures and offered Avoncore a telephone marketing agreement to call the same clients as under the previous agreement. In July 2003 Optus entered into an agreement with Avoncore for indirect selling mobile phones.
- [63] In early December 2003 the Outbound Marketing Agreement with Optus was unilaterally terminated by Optus. Mr Kirk for Avoncore wrote to Optus complaining about the way it had been treated. Mr Kirk sought a continuation of business relations with Optus selling telephones. Optus proposed settling the matter by a payment of \$3,000 to Avoncore. This did not eventuate because, according to Mr Kirk, he negotiated with a different division of Optus and obtained a contract for residential selling. It involved door knocking and then Avoncore established a call centre.

Was there a partnership agreement?

- [64] I have concluded that there was no oral agreement reached between Mr and Mrs Dwyer and Mr Kirk and Ms Lippiatt on 29 January 2002 to share on a 50-50 (or any) basis the profits of any future business opportunity. There was an opportunity to record this agreement at the meeting with Mr Morrissey shortly afterwards in February and no mention was made of it by Mrs Dwyer. There was no mention of it on 20 September when Mrs Dwyer was seeking a 50 per cent shareholding in Backpackers. By then the Pineapple Card was seen as offering

great opportunities for Backpackers. The pleadings in the partnership proceedings allege that the Spot Communications/Pineapple Card business was an asset of the partnership. I am not persuaded that Mr Dwyer's note in Mrs Dwyer's diary reflects any actual agreement between the parties.

- [65] Such an arrangement as alleged by Mr and Mrs Dwyer was quite contrary to the way Mr Kirk did business and I accept his and Ms Lippiatt's evidence on this. Finally, even if there was some discussion about future business opportunities being shared, even on Mr and Mrs Dwyer's evidence the arrangement was far too vague to have legally binding consequences such as to bring into existence a partnership and attendant fiduciary obligations. In *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 Mason, Brennan and Deane JJ stated at 12 that a fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached and who may never reach agreement on the consensual terms which are to govern the arrangement between them. However, their Honours were discussing a situation where prospective partners (or joint venturers) had embarked on the conduct of the partnership business or venture "before the *precise* terms of any partnership agreement have been settled", at 12 (my italics). Here no terms except an alleged 50/50 split of profits in as yet unidentified business opportunities were said to have been mentioned. The ensuing conduct of the parties was consistent with the arrangement which was subsequently documented by Mr Morrissey by the incorporation of Backpackers.

Ought the Optus contracts have been offered to Backpackers?

- [66] There are two aspects to this question. The first is to settle Mr Kirk's status vis-a-vis the company. If he is found to owe a fiduciary duty to Backpackers the second, known generally as the business opportunity rule, falls for consideration.
- [67] Mr Kirk could not be appointed a director of Backpackers at its inception because he was then an undischarged bankrupt, s 206B(3) of the *Corporations Act*. The legislation was not in 2002 materially different from the present provisions and it is convenient to refer to them. Mr Kirk described himself as a consultant to the company. Ms Lippiatt in her notes to Backpackers' solicitor at the commencement of the winding up proceedings in November 2002 described Mr Kirk as the manager of the company although she resiled from that description in oral evidence preferring to describe him as the "inspiration" of the company. It is not determinate what label is given to him. "Officer" of a corporation is defined in s 9 and relevantly in s 9(b)(i) of the *Corporations Act* as a person

"who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation"

- [68] The evidence was all one way that Mr Kirk was intimately involved in all the important decisions affecting Backpackers. He alone negotiated the deal which resulted in the Pineapple Card even though Ms Lippiatt, a director, accompanied him on most occasions. Many of the decisions were discussed among the four individuals and a consensus reached but there can be no doubt about Mr Kirk's importance to the drive and direction of the company. Indeed, it is likely that Mr Kirk falls within the other two strands of s 9(b) as a person

“(ii) who has the capacity to affect significantly the corporation’s financial standing; or
 (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act ...”

He may even fall within the definition of “director” in s 9(b)(ii) as a person in respect of whom “the directors of the company ... are accustomed to act in accordance with the person’s instructions or wishes”.

[69] Mr Kirk as an officer of the company owed it a fiduciary duty encompassing, as that duty does, loyalty, good faith, and the avoidance of a conflict of duty and self interest, *Canadian Aero Services Ltd v O’Malley* (1973) 40 DLR (3d) 371 per Laskin J at 382; Gower and Davies’ *Principles of Modern Company Law* (7th ed) (2003) 378; and, see generally, *Phipps v Boardman* [1967] 2 AC 46. It is immaterial that he was not paid a fee for his services since he had an interest through Ms Lippiatt in the fortunes of the company. What has to be determined is on what side of the line the Optus contracts entered into by Avoncore lie. Were they opportunities of a kind which may be taken up personally by a person in the position of Mr Kirk without occasioning a breach of his fiduciary obligation to Backpackers or did they fall on the other side and were opportunities which he was obliged to offer to Backpackers? If the later is the case then Mr Kirk, through his company Avoncore, must account to Backpackers for any benefits obtained.

[70] The starting point for discussion on this subject tends to be *Regal (Hastings) Ltd v Gulliver* [1967] AC 134 (judgment was given in 1942 but not reported officially until 1967) although the decision has been criticised both for the narrowness of the articulation of the principle, *Canadian Air Services* at 385; R P Austin, “Fiduciary Accountability for Business Opportunities” in Finn *Equity and Commercial Relationships* (1987) 141 at 148; and Meagher, Heydon and Leeming *Equity Doctrine & Remedies* (4th ed) (2002) para 5-100; and the oddness of the result, Gower and Davies’ at 418. In *Regal* Lord Russell of Killowen said at 149

“... the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v Sandford* and *Ex parte James* and similar authorities applies to them in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the cestui que trust in *Keech v Sandford* to obtain the lease, nevertheless the trustee was accountable.”

[71] Subsequent cases have offered other tests. Laskin J, who gave the judgment of the Supreme Court of Canada in *Canadian Air Services* summarised a review of the United States cases quoting with approval from a note in 74 Har L Rev 765 (1961) at 385 which describes the rule as

“... an imprecise ethical standard ‘which prohibits an “executive” – here defined to include either a director or an officer – from appropriating to himself a business opportunity which in fairness should belong to the corporation””.

Laskin J concluded at 391

“The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director’s or managerial officer’s relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.”

- [72] Meagher et al at para 5-100, in turn, have criticised this test as providing no clear principle to guide courts in future cases and commends the “expanded line of business” test proposed by Professor Austin at 158 and ff. Professor Austin posited a different test for full-time executive commercial fiduciaries and part-time non-commercial fiduciaries derived from the United States experience but grounded, as he contends, in Commonwealth common law authority. It is not, I think, instructive to labour at too great a length attempting to derive some general principle from these cases. The combination of facts and circumstances, for example, the difference between public and private companies, the quasi partnership nature of some of the latter, the variety of relationships encompassed by the designation of fiduciary would expose any attempt to inevitable criticism.
- [73] Cooper J in the Federal Court in *SEA Food International Pty Ltd v Lam & Anor; Megamix Pty Ltd v SEA Food International Pty Ltd*, decision of 27 February 1998 BC 9800437 (extract in (1998) 16 ACLC 552), after a close examination of the authorities proposed the following at 40

“What is to be drawn from the authorities is that a director will act in breach of his fiduciary obligations to a company (the scope of which will vary in the circumstances of each particular case) if he or she takes up an opportunity for profit where there is sufficient temporal and causal connection between the obligations and the opportunity. What is a sufficient connection will depend, in any particular case, upon a number of factors, including the circumstances in which the opportunity arises and the nature of it and the nature and extent of the company’s operations and anticipated future operations.

Whatever is the precise expression or formulation of the test which will provide reasoned guidance in drawing the line between those opportunities for profit it is permissible for a director (or officer) to take up and those which it is not, it is necessary at the outset to

determine the scope of the fiduciary obligations owed by the director to the company in the circumstances of the particular case and to identify the conduct or failure to act, which is said to amount to a failure to discharge those obligations. (*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 73, 102; *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98; *Maguire v Makaronis* (1997) 71 ALRJ 781 at 788). Having done so, the question becomes whether there is a sufficient temporal and causal connection in the sense variously expressed in the authorities to which I have referred, between the fiduciary obligation or obligations and the opportunity for profit which has been or is sought to be taken up by the director.”

Holmes J in *Rishmont Pty Ltd v Tweed City Medical Centre Pty Ltd* [2002] 2 Qd R 222 made reference with approval to that passage at 226.

- [74] It is well established that where a person with an obligation to avoid a conflict of duty and self interest makes appropriate disclosure and obtains the authority of the board, in the case of an officer, or the agreement of the members entitled to vote, in the case of a director, he is absolved from liability, *Queensland Mines v Hudson* (1978) 52 ALJR 399 (PC). Mr Kirk’s evidence was that he made it quite clear to Mr Dwyer that the pursuit of these Optus contracts was for himself alone. I cannot accept that he did so. It was contrary to the general way things were done. There were a number of different avenues being explored by all associated with Backpackers over 2002, some of which were further developed such as the Pineapple Card and others which, like Ms McEwan’s 1900 scratchie, were abandoned. These activities were all done under the auspices, as it were, of Backpackers or Blue Marble Unlimited, its wider marketing name. It is highly unlikely that Mr and Mrs Dwyer would have carried out tasks such as the work on the powerpoint presentations for Mr Kirk’s benefit alone and certainly not without vociferous protest.
- [75] It is a weak response by Mr Kirk to the use of the names Backpackers and Blue Marble Unlimited to Optus to say that he had not then decided what vehicle to use and wanted to be sure that he would get the contracts before he went to the expense of registering a business name or setting up a company. In any event, there is no evidence that Mrs Dwyer or Ms Lippiatt as directors and shareholders were informed, even less that they gave their approval to Mr Kirk to embark on this enterprise for himself.
- [76] Mr Stephens submitted that well prior to his involvement with Backpackers Mr Kirk had identified and investigated, in a preliminary way, telecommunications sales opportunities from about the middle of 2001. Mr Kirk’s principle source of information was Ms McEwan. The Backpackers “team” and Ms McEwan were early involved in accessing Optus work. About midway through 2002 Mr Kirk told Mr Dwyer and others involved at Backpackers that Ms McEwan and her team would no longer be involved in plans for outside distribution of Optus products but that a Gerald Shehade would take over. There was no compelling evidence that Mr Kirk did anything to advance obtaining Optus contracts of the kind in dispute until into 2002.

- [77] It was submitted that the disputed Optus contracts involved activities quite different from that which Backpackers engaged in. But it is clear that the businesses which interested the company were many and varied and evolved as new opportunities arose. The articles and memorandum of association of Backpackers did not form part of the evidence but it has been assumed that there was nothing which prevented it from conducting any relevant businesses. To say that Backpackers was prepared to be interested in many and varied new opportunities is not to say that this would embrace every business opportunity. For example, it might be suggested, that were Mr Kirk to have set up and marketed a new nightclub in the Valley this would not have been an opportunity which he ought to have offered to Backpackers or even disclosed to it. That it was possible for Mr Kirk to go his own way in a range of activities is clear. Full disclosure and approval, when there is doubt, is always available as *Queensland Mines Limited v Hudson* demonstrates. Mr Kirk used the name of the company, its marketing name, its personnel – both in the powerpoint presentations and at the Browns Plains meeting with Mr Barnard – to his own advantage and this he was prevented from doing by his obligations to Backpackers.
- [78] The Optus marketing contracts dealing as they did with telecommunications were sufficiently close to what Backpackers could do and wanted to do. In his letter to Optus in December 2003, exhibit 24, when the contracts with Avoncore were about to be terminated Mr Kirk wrote

“We were offered the right to sell Optus pre-paid products and spent much time and money organising distribution through the backpacker industry both in Australia and overseas.”

Some of the people who worked for Backpackers worked for Avoncore such as Margaret Munro, Gerald Shehade was involved in the outside calling for Avoncore.

- [79] Mr Stephens submitted that should there be a finding that Mr Kirk owed a duty to offer the Optus contracts to Backpackers, the causal connection was broken with the termination of these agreements by Optus in December 2003. Mr Kirk said that he negotiated with a completely different division of Optus after the termination by Optus of the earlier contracts. The earlier contracts involved door-to-door sales, the later contract entailed a small amount of door-to-door selling and established a call centre. The earlier contracts were unprofitable. Significant sums were invested by Mr Kirk and Ms Lippiatt from borrowings, said to be over \$500,000. The current account losses on trading as at 30 June 2003 were \$316,834. Mr Kirk said Avoncore had achieved better results since then but will show a loss for 2004 and with hard work had expectations for improvement in the future. Neither Ms Lippiatt nor Mr Kirk have charged any amount to Avoncore for their personal exertions.
- [80] There is no clear distinction between the early Optus contracts and the new contracts which Mr Kirk was able to negotiate after December 2003. Whilst Mr Kirk could have declined to use his skills on behalf of Backpackers and could have declined to raise funding to support the exploitation of the contracts, on the authority of the cases such as *Cook v Deeks* [1916] AC 554, *Regal*, and *Birtchnell v The Equity Trustees Executors & Agency Coy Ltd* (1929) 42 CLR 384 he would not have been entitled to take up those contracts for his own benefit without the Backpackers members' approval.

Was there oppression?

- [81] Mr Stephens submitted that the winding up proceedings were misconceived being in the nature of a derivative action. Common law actions of that kind deriving from exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461; (1843) 67 ER 189 have been abolished by s 236(3) of the *Corporations Act* 2001 and replaced with a legislative regime, Part 2F.1A. Mr Bowden contended that this is not such a proceedings but is one for oppression of a minority member's interests. The diversion of profitable undertakings to the detriment of a member and the benefit of another member may be characterised as oppressive, *Re Bright Pine Mills Pty Ltd* [1969] VR 1002. That this allegation of the diversion of the Optus contracts away from Backpackers was only made by amendment on the morning of the trial does not detract from it.
- [82] I am not persuaded that any other conduct by Ms Lippiatt or Mr Kirk of which Mrs Dwyer complains in her pleadings or evidence could be characterised as oppressive. Mrs Dwyer was kept informed of the outcome of Mr Kirk's lengthy negotiations over the Pineapple Card and other matters. Giving Mrs Decrock and her husband an opportunity to earn commission on the sale of the Pineapple Card was not oppressive. It was for Backpackers' benefit that the card became distributed and known. The alleged exclusion of Mrs Dwyer from decision making in the office, if it occurred in respect of other than trivial matters, was a product of her own personality as was the manner of her leaving.

Should Backpackers be wound up or another order made?

- [83] Backpackers is still operating, although in a small way. Its operation is largely run by Mr Thomas from his office in Melbourne. The directors are able to work together amicably. It meets its debts to its outside creditors. There is no reason to wind it up. There has been an offer to purchase Mrs Dwyer's shares in Backpackers since the initiation of the winding up proceedings. The shares were then valued at \$1 by Mr Morrissey. It is doubtful if Mrs Dwyer has paid for her 18 \$1 shares. It is now accepted that there is no value in Spot Communications Pty Ltd or Pineapple Communications Pty Ltd. Any additional value to the share price of Backpackers will depend upon the valuation of the shares in Avoncore taking all proper regard for the skill of Mr Kirk and outstanding claims for remuneration. It will be appropriate to defer making a formal order as to how the shares should be valued. In *Re Bright Pine Mills* the Full Court of the Supreme Court of Victoria approached the valuation of a petitioner's shares in a company which had lost business opportunities due to breaches by the directors by treating the new company, which took the business opportunity, as if it were a wholly owned subsidiary of the subject company. That may be a useful way to proceed here.

The orders

- [84] In proceedings SC No 4007 of 2003 I give judgment for the defendants against the plaintiffs.
- [85] In proceedings SC No 9880 of 2002 I order that Julie Lippiatt purchase the shares of Raeleen Dwyer in Backpackers R Us.Com Pty Ltd pursuant to s 233 of the

Corporations Act 2001 to be valued in accordance with terms to be settled with counsel.

[86] I will hear submissions as to costs.