SUPREME COURT OF QUEENSLAND

CITATION:	*Rishmont Pty Ltd v Tweed City Medical Centre Pty Ltd & Anor* [2001] QSC 372
PARTIES:	**RISHMONT PTY LTD ACN 082 785 966** (applicant) **v** **TWEED CITY MEDICAL CENTRE PTY LTD ACN 095 810 655** (first respondent) **and** **VIDAS JOHN MIKUS** (second respondent)
FILE NO/S:	S 7897 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	4 October 2001
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2001
JUDGE:	**Holmes J**
ORDER:	**1. the respondents are restrained from representing to any person who has not provided a patient history to the practice of the first respondent that he or she is a patient of the first respondent's practice.** **2. the first respondent shall forward to those patients who were sent its letter in relation to pneumonia vaccination, and in respect of whom no patient history had been taken by it, a corrective letter in terms to be settled.**
CATCHWORDS:	EQUITY - GENERAL PRINCIPLES - FIDUCIARY OBLIGATIONS TRADE PRACTICES – MISLEADING AND DECEPTIVE CONDUCT Application requiring delivery up or deletion of records obtained by the respondents from third party – whether

acquisition of information amounted to breach of confidence – whether breach of second respondent's fiduciary duty to applicant – whether conduct misleading within the meaning of s52 of the *Trade Practices Act* 1974 - whether injunction appropriate relief.

Trade Practices Act 1974 ss 52, 80, 87

Faccenda Chicken v Fowler [1987] Ch 117
Forkserve Pty Ltd v Jack [2000] NSWSC 1064
Slevin and Brown v Associated Insurance Brokers of Australia [1996] QCA 18
Ashcoast Pty Ltd v Whillans [2000] 2 Qd R 1
David Industries Inc v David Bryar & Associates Pty Ltd (1997) 38 IPR 389
Chan v Zacharia (1984) 154 CLR 178
SEA Food International Pty Ltd v Lam (1998) 16 ACLC 552
Canadian Aero Service Ltd v O'Malley (1973) 40 DLR (3d) 371
CBA Finance Ltd v Hawkins [1984] BCR 599
Island Export Finance v Umunna [1986] BCLC 460
On The Street Pty Ltd v Cott [1990] 3 ACSR 54
Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 14 FCR 434
Maggbury Pty Ltd v Hafele Aust Pty Ltd [2000] QCA 172
Health Services For Men Pty Ltd v D'Souza (2000) 48 NSWLR 448
Janssen-Cilag Pty Ltd v Pfizer Pty Ltd (1992) 37 FCR 526

COUNSEL: Mr M D Martin for the applicant
Mr R T Cowen (solicitor) for the first and second respondents

SOLICITORS: Bow & Company Solicitors for the applicant
Tucker & Cowen for the first and second respondents

[1] The applicant conducts a medical practice, the Healthpoint Medical Centre, at the Tweed City Shopping Centre, Tweed Heads. The second respondent is a former shareholder in, and director and employee of, the applicant, and is now a director and employee of the first respondent. The applicant seeks to restrain both respondents from making use of information in the form of names and addresses of patients of its practice, and also seeks an order requiring corrective action in respect of a letter sent by the first respondent to a number of its patients.

Background

[2] Until February 2001 the second respondent, Dr Vidas Mikus and Dr Paul Balin were the directors of and shareholders in the applicant. I infer from the material that each was employed by the applicant as a doctor in the medical practice. After

a disagreement between the two, a provisional liquidator was, on the application of Dr Balin, appointed to the applicant. An agreement was reached, however, by which the provisional liquidation was ended, the applicant purchased the second respondent's shares, and the second respondent resigned as a director. That arrangement was effected by a deed of settlement and release. Clause 12 of the deed specifically preserved the second respondent's right to set up another medical practice wherever he chose. It was agreed that if the second respondent became involved in another practice the applicant would transfer patient records upon receipt of a proper authority from the patient concerned.

[3] The first respondent was the vehicle by which the second respondent set up another medical practice known as "Tweed City Medical Centre", also at the Tweed City Shopping Centre. The second respondent is one of two directors of the first respondent. The applicant's practice manager, Ms Hermes, left the applicant's employ and took a position acting in the same capacity for the first respondent. She has provided an affidavit in which she says that the first respondent's practice has a database of some 8,181 patients. Of those, about 5, 213 have attended the practice, and, upon interview by staff members, have provided patient histories. A second source of patient information has been disks supplied by Queensland Medical Laboratories and Sullivan and Nicolaides, organisations which provide pathology services. (I will refer to them hereafter as " the pathologists".) Those disks, obtained in March 2001, contained the names and addresses of patients in respect of whom the second respondent had ordered pathology tests in the preceding six months.

[4] What provoked the present application was a mail-out by the first respondent of letters to persons over the age of 65 recorded on its database. The letter, on the letterhead of the Tweed City Medical Centre, bears Ms Hermes' signature (or a facsimile of it). It recommends vaccination against pneumonia. The commencing paragraph reads:

> "This letter has been sent to you as a valued patient of our practice, to inform you about an important vaccination that we believe you should have".

However, it seems probable that a number of recipients were contacted purely because their names appeared on the first respondent's database, having been obtained from the pathologists, not because they had ever set foot in the Tweed City Medical Centre practice. According to Dr Balin's affidavit, some 800 of his patients contacted him to complain of the letters.

The parties' contentions

[5] The applicant complains that the information provided by the pathologists is confidential to it. It says that there has been a breach of that confidence, and of the second respondent's fiduciary duty to the applicant as a director, by the respondents' actions in obtaining and using the information. It seeks injunctions restraining the respondents from contacting any patients of the Healthpoint Medical Centre, requiring them to deliver the relevant records and information to it, and requiring them to delete any copies from their computers. It also claims that the reference in the letters sent out to their recipients as "valued patients of our

practice" is misleading. Remedies under s 80 or s 87 of the *Trade Practices Act* 1974 should, it is submitted, be given, in the form of orders that the respondents write to each recipient a letter correcting the alleged misinformation, and that they be restrained from writing to the applicant's patients stating that they are the first respondent's patients.

[6] The respondents, on the other hand, say that any fiduciary duty owed by the second respondent ceased when he resigned his directorship. In any event the information provided by the pathologists was not confidential to the applicant. When its patients obtained the pathology services, they became clients of the pathologists, which were entitled to make their own records and to provide them to the respondents. If there were any breach of confidence, it was the patients' confidence which was breached, not the applicant's. The conduct could not fall within s 52 of the Trade Practices Act, since the patients who complained of it to the applicant were not misled or deceived.

Were the patients' names and addresses confidential information?

[7] It is well settled that a list of customers – or in this case patients – may constitute confidential information; and an employee who ceases his employment may not use such confidential information obtained in the course of his employment in order to compete with his former employer.[1] Had the second respondent simply taken from the possession of the applicant a list of patients' names and addresses compiled for use in its practice, I would have had little difficulty in concluding that it was confidential, and any use of it a breach of that confidence. In the present case however, there is a complication: the information was obtained, not from the applicant but from third parties, the pathologists.

[8] It was submitted for the applicant that the fact that the second respondent had obtained information from the third party was beside the point. Mr Martin relied on *Dart Industries v David Bryar* [2] for the proposition that an injunction may issue notwithstanding that the receipt of the confidential information by a third party is innocent. That submission, in my view, overlooks the reality that the information as provided by the pathologists to the respondents was not the applicant's information; or at any rate that there is no evidence to suggest it was. No material was put before me which would suggest that the pathologists came into possession of the patients' names and addresses merely as agents for the applicant. Rather, I would assume, in the absence of evidence to the contrary, that there was no relationship of agency or contract as between the applicant and the pathologists. What seems to me much more probable is that there was merely a reference of patients to the pathologists and that there then came into existence a contract as between patient and pathologist for the provision of services, for which each patient paid a fee.

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1 *Faccenda Chicken v Fowler* [1987] Ch 117 at 136; *Forkserve Pty Ltd v Jack* [2000] NSWSC 1064; *Slevin and Brown v Associates Insurance Brokers of Australia* [1996] QCA 18; *Ashcoast Pty Ltd v Whillans* [2000] 2 Qd R 1.

2 (1997) 38 IPR 389 at 406.

[9] Thus it seems probable that the pathologists acquired the information from the patients; and that, putting matters at their highest, the applicant may have been the agent of the patients for the purposes of provision of the requisite information to the pathologists. If a relationship of confidence existed in respect of the information in the hands of the pathologists, it was as between the pathologists and the patients. In sum, it does not seem to me that any relationship of confidence as between the pathologists and the applicant has been shown, or that the information provided by the pathologists to the respondents can be said to have been the applicant's information. That is true both as to the physical form in which the information was provided - the disks which contained the data were, one assumes, the property of the pathologists - and as to the information recorded upon them. There is no basis, therefore, for orders that the disks be delivered to the applicant, that the respondents delete the information, or that the respondents be restrained from using the information as a breach of confidence.

Was there a fiduciary duty owed by the second respondent?

[10] Mr Cowen for the respondent submitted that there had been no breach of fiduciary duty by the second respondent prior to his resignation; and there could be no continuing fiduciary relationship after his resignation, since he did not resign in any attempt to avoid fiduciary duty. There is no contest as to the factual basis of that submission. It is not suggested anything done by Dr Mikus while a director of the applicant would constitute a breach of fiduciary duty; and it seems clear from the material that his resignation was brought about by his disagreements with Dr Balin and the impossibility of their continuing in practice together. However, the proposition as to the effect of the termination of the fiduciary relationship may be too broadly stated.

[11] A company director stands, it is clear, in a fiduciary relationship to the company. He must account for any

> "benefit or gain
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> (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain, or
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> (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it"[3].

[12] As to the circumstances in which it may be said that a benefit or gain is obtained by reason of a fiduciary position,

> "a director will act in breach of his fiduciary obligations to a company … if he or she takes up an opportunity for profit where there is a sufficient temporal and causal connection between the obligations and the

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3 *Chan v Zacharia* (1984) 154 CLR 178 at 199.

> 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"[4].

[13] And the fiduciary obligation may survive resignation[5]. In an off-cited passage from the judgment of Laskin J in *Canadian Aero Service Ltd v O'Malley*[6], this is said of the ethic relevant to fiduciary duty:

> "This ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired".

At page 391 of the same judgment the following factors relevant to considering whether there has been a breach of fiduciary duty are set out:

> "The factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the directors 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."

[14] But the facts of the present case are distinguishable from those in *Canadian Aero Service* in two important respects. Firstly, there was no specific business opportunity open to the applicant but diverted by the respondents to their own benefit. Rather there was a global opportunity, of the kind discussed in *CBA Finance Ltd v Hawkins*[7]. Secondly, there is nothing to suggest that the second respondent resigned from directorship with the applicant in order either to avoid his fiduciary obligations or to exploit any specific business opportunity.

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4 *SEA Food International v Lam* (1998) 16 ACLC 552 at 557.

5 See *Ferrari Investment (Townsville) Pty Ltd (in liq)* v *Ferrari* [2000] 2 Qd R 359 at 367; *Addstead Pty Ltd v Liddan Pty Ltd* [1997] 70 SASR 1 44, 59.

6 *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 382.

7 *CBA Finance Ltd v Hawkins* [1984] BCR 599.

[15] Although the first of the passages I have set out from *Canadian Aero Service* suggests a preclusion from seeking an opportunity in either of two situations, that is, where the resignation is prompted by the wish to acquire the opportunity or, alternatively, where it is the position with the company rather than a fresh initiative that leads to the opportunity, some caution must be exercised. That use of language was considered by Hutchison J in *Island Export Finance v Umunna*[8]*;*

> "Literally construed, this last part of the formulation could justify holding former directors accountable for profits wherever information acquired by them as such led them to the source from which they subsequently, perhaps as the result of prolonged fresh initiative, acquired business. If it is intended to mean that, it is far more widely stated than the facts of the case require: but I do not believe that is what was intended."

Hutchison J went on to conclude that former directors, like employees, acquired a "general fund of knowledge and expertise" and ought in the public interest to be free to use it in a new position. It was not the case that former directors should be held accountable

> "whenever they exploit for their own or a new employer's benefit information which, while they may have come by it solely because of their position as directors of the plaintiff company, in truth forms part of their general fund of knowledge and their stock-in-trade"[9].

[16] In the present case it is not suggested that anything done by the second respondent while a director of the applicant was in conflict with his duty as a director. The information as to patients' names and addresses used by the respondents after the second respondent's resignation was not the applicant's, nor was it obtained from the applicant. The second respondent in order to obtain that information must have relied on knowledge gained by him as an employee of the applicant that the information was in the possession of the pathologists; but I do not think that specific item of knowledge can be characterised as confidential.

[17] Taking matters at their highest, the respondents have approached patients of the applicant in circumstances in which the second respondent became aware of their existence through his role as a director and employee of the applicant, but without using information confidential to the applicant. If, as Hutchison J suggests, the former director is, like the former employee, entitled "to use his full skill and knowledge for his own benefit in competition with his former master" there seems no viable objection to the second respondent having done so; and, as is pointed out in *Faccenda Chicken*[10] such competition could have been prevented by an express

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8 *Island Export Finance v Umunna* [1986] BCLC 460 at 481.

9 At page 482.

10 At page 731.

restraint. The second respondent is not in breach of his fiduciary duty merely by competing with the applicant[11]. It follows that no injunction should issue on this ground.

Appropriateness of injunctions sought on these grounds

[18] If I am wrong in the view I take of the absence of any breach of duty I should say that I do not think it a matter in any event in which injunctions would properly have been issued requiring delivery up or deletion of records obtained from the pathologists, or abstention from any contact with the applicant's patients. It is difficult to see in the circumstances how those patients who were in truth the patients of the applicant and not the first respondent could be identified. It is clear that some former patients of the applicant had transferred to the first respondent's practice. In that case, their details would fall within both the category of patients who had given a history at the practice and that of patients whose details had been provided by the pathologists. Others might be contemplating such a move; others again might have no firm commitment to either practice, but attend both according to their convenience.

[19] The class of patients to whom an injunction requiring delivery up of information would apply could vary by the day, with attendant inconvenience to the patients concerned. Similar considerations apply to the proposed order restraining the respondents from contacting "patients of the Healthpoint Medical Centre". If the information is, contrary to my finding, confidential to the applicant, it cannot be identified with the specificity necessary to warrant an injunction[12].

> "It is in general undesirable … so to frame an injunction that the question whether a breach has occurred is likely to be very debatable until settled by an order made in contempt proceedings"[13].

That observation seems apt in the present case.

Was the respondents' conduct misleading under s 52 of the Trade Practices Act 1974?

[20] I am satisfied that the first respondent, in sending out the letters suggesting vaccination, was engaging in conduct in trade or commerce. Even if it were not, s 6(4) of the *Trade Practices Act* 1974 would extend the effect of s 52 to "a thing done in the course of the promotional activities of a professional person", a description which applies to the circularisation of the patients.

[21] The first respondent's conduct was, in my view, likely to mislead if not misleading. The opening paragraph of the letter represented to recipients a relationship with the practice conducted by the first respondent, in circumstances in which it was conducted in the vicinity of the applicant's practice, with a number of personnel

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11 *On The Street Pty Ltd v Cott* [1990] 3 ACSR 54 at 61.

12 *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434 at 443; *Maggbury Pty Ltd v Hafele Aust Pty Ltd* [2000] QCA 172.

13 *Health Services For Men Pty Ltd v D'Souza* (2000) 48 NSWLR 448 at 461.

who had previously worked at the applicant's practice. The letter was signed by Ms Hermes as practice manager; she had previously been the applicant's practice manager. The likelihood was that recipients would be induced by that misrepresentation to believe that the practice they had previously attended at the Tweed City Shopping Centre was now known as Tweed City Medical Centre. I consider it probable that a significant number of the letter's recipients would have been misled into thinking that the first respondent's practice was the ongoing provider of their medical care. It is, I think, a reasonable inference from the material that the second respondent was, at the least, knowingly concerned in the first respondent's contravention. I conclude, accordingly, that both respondents have breached s52.

What relief is appropriate?

[22] The applicant, of course, was not misled by the letters. That, however, is not a bar to relief[14]. The terms of the letter sent to patients were, as I have found, such as to create the impression that it was the first respondent's practice which provided their health care. Correspondingly, the letters were likely to cause recipients to attend the first respondent's practice rather than the applicant's, and to cause the applicant to suffer loss.

[23] It was suggested in supplementary submissions provided by Mr Tucker on behalf of the respondents that certain conduct of Dr Balin – in proceeding against Dr Mikus for defamation, in making complaints of him to the police and the New South Wales Health Rights Commission, and it is said, loitering around the first respondent's premises – was relevant in deciding whether to grant relief under the *Trade Practices Act.* There is, however, no causal connection between that conduct and the loss likely to be suffered by the applicant, and I do not consider it to have any bearing on the application.

[24] Section 87 (1A) of the *Trade Practices Act* enables the court to make such an order as it thinks appropriate, where the applicant is likely to suffer loss or damage by conduct of the respondents in contravention of s 52, if it considers that the order will reduce the loss or damage suffered. An order for a correcting letter would, in my view, meet that requirement. Section 80 of the Act provides a broad injunctive power where the court is satisfied that a person has engaged in conduct constituting a contravention of s 52. That power enables a court, in addition to restraining the continuance of offending conduct, to make a mandatory order requiring publication of corrective material[15].

[25] I consider that this is an appropriate case for both restraining and mandatory injunctions. As to the former, I will hear the parties as to the appropriate terms of an order; but I would envisage something to the effect that the respondents be restrained from representing to any person who has not provided a patient history to the practice of the first respondent that he or she is a patient of the first respondent's practice. That formulation, in my view, overcomes any difficulty as to the class to

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14 *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 27 FCR 526.

15 *Janssen Pharmaceuticals Ltd v Pfizer Pty Ltd* [1986] ATPR 40-654.

which it applies. As to the mandatory injunction, I envisage an order to the first respondent to forward to those patients who were sent the earlier letter in relation to the vaccination, and in respect of whom no patient history had been taken by the first respondent, a letter in the following terms:

> "Re: Our correspondence in relation to the pneumovax 23 (pneumonia) vaccination
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> In (August) of this year we wrote stating that you were a valued patient of our practice. That statement was incorrect. You had not at that time attended at this practice. Tweed City Medical Centre is a new medical practice established in February of this year and is not associated in any way with the Healthpoint Medical Centre".

[26] I will hear the parties as to the precise form of the orders and as to costs.