SUPREME COURT OF QUEENSLAND

CITATION:	*Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd & Anor* [2002] QSC 222
PARTIES:	**ITHACA ICE WORKS PTY LTD** **ACN 009 669 306** (plaintiff) v **QUEENSLAND ICE SUPPLIES PTY LTD** **ACN 010 201 180** (first defendant) **BRIAN BRADLEY** (second defendant)
FILE NO/S:	S6757/98
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	12 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 – 21 June 2002
JUDGE:	Philippides J
CATCHWORDS:	EQUITY – BREACH OF OBLIGATION OF CONFIDENCE – misuse of confidential information – where plaintiff and first defendant competitors – where defendants stole plaintiff's customer and price lists – where defendants used information in stolen lists to approach plaintiff's customers DAMAGES – EQUITABLE – nature of equitable compensation – assessment of compensation – principles applicable – causation – whether defendants' breach of confidence caused plaintiff's loss – where plaintiff lost customers to first defendant – where plaintiff forced to reduce its prices for some customers – whether discounts should be made for contingencies *Supreme Court Act* 1995 (Qld) *AF Ralston Associates Ltd v Ralston* [1973] NI 229 *Alemite Lubrequip Pty Ltd & Ors v Adams & Ors (t/a Price Waterhouse)* (1996) 41 NSWLR 45 *Ashcoast Pty Ltd v Whillans* [2000] 2 Qd R 1 *Bartlett v Barclays Bank Trust co Ltd (No 2)* [1980] Ch 515

Bennett v Minister of Community Welfare (1992) 176 CLR 408
Biala Pty Ltd v Mallina Holdings Ltd (1993) 11 ASCR 785
Brickenden v London Loan & Savings Co [1934] 3 DLR 465
Caffrey v Darby (1801) 6 Ves Jun 488
Canson Enterprises Ltd v Boughton & Company (1991) 85 DLR (4th) 129
Catt & Ors v Marac Australia Ltd & Ors (1986) 9 NSWLR 639
Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd [1988] 2 Qd R 1
Guerin v The Queen [1984] 2 SCR 335
Hill v Rose [1990] VR 129
Huff v Price (1990) 76 DLR (4th) 138
Lord Ashburton v Pape [1913] 2 Ch 469
Markwell Bros Pty Ltd v CPN Diesels Queensland Pty Ltd [1983] 2 Qd R 508
Permanent Building Society (in liq) v Wheeler & Ors (1994) 11 WAR 187
Powell v Evans (1801) 5 Ves Jun 839
Robb v Green [1895] 2 QB 1
Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd [1966] 2 NSWR 211
Sanders v Parry [1967] 1 WLR 753
Seager v Copydex Ltd (No 1) [1967] RPC 349
Smith Kline & French Laboratories (Aust) Pty Ltd & Ors v Secretary, Department of Community Services & Health (1990) 22 FCR 73
Stewart v Layton (t/a B M Salmon Layton & Co) (1992) 111 ALR 687
Target Holdings Ltd v Redferns & Anor [1995] 3 WLR 352
United States Surgical Corporation v Hospital Products International Pty Ltd & Ors (1984) 156 CLR 41

COUNSEL: P McMurdo QC with R Jackson for the plaintiff
A Cooper for the defendants

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
Irish Hughes & Bentley for the defendants

PHILIPPIDES J:

1. THE PLAINTIFF'S CLAIM

[1] The plaintiff brings an action for equitable compensation for losses caused by the first defendant, Queensland Ice Supplies Pty Ltd, and the second defendant, Brian Bradley, through the misuse of confidential information of the plaintiff, being a price sheet and customer list.

[2] The plaintiff carried on the business of manufacturing, packaging, selling and distributing ice, trading as Brisbane Ice Supplies. The business is owned and operated by the Mee family. Tony Mee is the sales manager and his brother, Greg Mee, oversees the dispatch of orders. The first defendant also carried on the business of manufacturing, packaging, selling and distributing ice and operated in competition with the plaintiff. The second defendant was a director of the first defendant. The plaintiff supplied packaged ice in various weights, including 3½, 5 and 10 kg bags, the most common being 5 kg bags. In addition, it also supplied blocks of ice and dry ice. The first defendant offered a similar range of products. The parties commonly supplied ice to outlets such as hotels, convenience stores and service stations, where the practice was to also supply a cabinet for the storage of ice, at no cost to the retailer. The plaintiff and the first defendant, between them, largely controlled the Brisbane market.

[3] The plaintiff alleges that, in July 1997, one John Otway, who had previously been an employee of the plaintiff, began working for the first defendant and that he told the second defendant that he had retained keys to the plaintiff's premises, and could arrange for someone to steal the plaintiff's price sheets and customer lists for $800. The plaintiff alleges that the second defendant agreed to this arrangement and caused property to be stolen from the plaintiff's premises, which included the plaintiff's price sheet and customer list. The plaintiff alleges that the defendants knew that the information on the price sheet and customer list was confidential. The plaintiff further alleges that the defendants received the lists unlawfully, as a result of breaches of Mr Otway's fiduciary duty to the plaintiff and thus in circumstances where the defendants were under a duty to the plaintiff not to use the information in the lists.

[4] The plaintiff's case was that the two lists when read together provided information as to the products supplied and prices charged by the plaintiff to those of its customers listed. The prices charged by the plaintiff varied markedly from customer to customer and the plaintiff's case is that the defendants unlawfully used the information on the stolen lists to fix their prices when approaching and canvassing the plaintiff's customers, the subject of this action. The plaintiff alleges that as a result of such approaches, the plaintiff suffered losses to its business falling within two categories; firstly, loss of profits because customers were lost by the plaintiff to the first defendant, and secondly, loss of profits because the plaintiff was required to reduce its prices for certain customers in order to retain them. In order to establish causation, the plaintiff relies on a combination of deemed admissions, oral and documentary evidence and inferences.

[5] The plaintiff, as it was ordered to do, particularised its claim in respect of each approach, the subject of a claim for loss, in two schedules; one being a "schedule of approaches to lost customers", the other being a "schedule of approaches to price reduced customers". Several versions of these schedules were compiled over the course of the litigation. For present purposes, it is relevant to note that schedules were delivered in November 2000, in respect of which the defendants provided responses in May 2001. In addition, the defendants provided responses in May 2002. Amended schedules were delivered by the plaintiff in May 2002, deleting some customers no longer the subject of a claim. The final version of the schedules relied on by the plaintiff comprise some 41 lost customers and 100 price reduced customers, compared with the November 2000 schedules which claimed some 61

lost customers and 117 reduced price customers.[1] There is some overlap between the two schedules. For example, in some cases customers were offered a reduced price, but were subsequently lost and thus appear on both schedules. The schedules particularised the date, substance and manner of each alleged approach. Generally, the approach is said to have culminated in a written quotation.

[6] The plaintiff claims damages for loss of profit to 30 June 2002. The final quantification of the plaintiff's claim is contained in a written report prepared by Mr Van Homrigh, a chartered accountant, dated 24 May 2002, the methodology being outlined in his earlier report dated May 2000.

2. DEEMED ADMISSIONS AND MATTERS IN ISSUE

(a) The Defendants' Responses to the Plaintiff's Schedules

[7] It is clear from the defendants' responses to the plaintiff's schedules that no issue is taken in respect of certain aspects of the approaches particularised by the plaintiff. In respect of many of the approaches, the defendants indicated, by letter dated 11 May 2001 from their then solicitors, that they did not require customers the subject of a claim to give evidence in relation to the matters particularised concerning the approach. By that it was meant "that the defendants had no dispute of a substantial or significant nature with the details provided in the schedules in relation to those customers." This was confirmed at trial by the defendants' counsel.

[8] In addition, the defendants raised in their responses of May 2001 specific defences in respect of certain of the specified customers. In certain cases, the defendants claimed that they had discovered, by purely innocent means, such as the disclosure by a customer, a price paid by a customer. It was conceded that the price disclosed by a prospective customer might not, in some instances, have been a truthful disclosure. However, it was submitted on behalf of the defendants that, where a prospective customer had disclosed a price, it followed that in order to secure the business, a quotation was required to at least equal that disclosed price. For that reason, it was said that where a quotation was ultimately successful after disclosure of a price, the success in obtaining the customer could only be attributed to the disclosure. These and other specific defences are dealt with in detail below.

[9] During the trial, it was discovered that the defendants had also provided responses to the plaintiff's schedules of approaches under cover of a letter dated 21 May 2002. As to the lost customers, the schedules attached to the letter of 21 May 2002 did not add anything further to the responses of May 2001. In relation to reduced price customers it could be said, as the plaintiff conceded, that the responses potentially raised a positive case for three customers; namely, Jacobs Well Bait & Tackle, Ampol Brackenridge and Ampol Bald Hills. However, the plaintiff submitted that

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[1] The following were no longer the subject of a claim as lost customers: Ampol Cleveland, Army Enoggera Food Stuffs, Burmah-Carina, Fishworks Kedron, CT Freight, Chisholm Manufacturing (Meatex), Night Owl Beenleigh, Aspley Hotel, BP Bennetts Road, Brackenridge Cellars, Browns Plains Hotel, Caboolture Hotel, Koala Tavern, Newnham Hotel, Red Hill Bottleshop, St Lucia Cellars, Taigum Tavern, Wallaby Hotel, Moreton Bay Boat Club, BP Clayfield. The following were no longer the subject of a claim for reduced price customers: Night Owl Beenleigh, Bearded Dragon Tavern, BP Mains Road (Sunnybank), two Grape Liquor Marts, Liquor Locker Wavell Heights, Ampol Samford, Ney Road Foodstore, Bellvedere Hotel, BP Capalaba, National Kuraby, National Learoyd Road, Saigon Butcher, Tree Tops Tavern, Jim & Rae's Convenience, Tip Top Nundah, BP Toowong, Raptis & Sons, BP Cannon Hill and IEC.

the late revelation of the further responses did not affect the conduct of the trial and that, in any event, the defendants did not press the issue. The claims in respect of these customers are dealt with below.

(b) Deemed Admissions

[10] Subject to the case specifically raised in their responses to the plaintiff's schedules, the defendants are deemed to have admitted the following as a result of their failure to respond to a Notice to Admit Facts dated 17 September 2001:

(a) that, in July 1997, the plaintiff's premises were entered and a price sheet, customer list and docket books, together with some cheques, were stolen;

(b) that, in July 1997, the second defendant procured the said property of the plaintiff to be stolen from the plaintiff's premises;

(c) that, in July 1997, the second defendant obtained possession of these items, knowing them to have been stolen from the plaintiff;

(d) that, in setting its prices for the supply of ice, the first defendant used information recorded within the stolen price sheet and customer list.

[11] The defendants submitted that, notwithstanding the deemed admission that the defendants used the information in the stolen lists in setting the price or prices in its approaches to the plaintiff's then customers, the following issues fall for determination:

(a) whether the use of the stolen lists was causative of either the customer being lost by the plaintiff or the plaintiff being required to reduce its price to a customer; and

(b) whether at the time of the activity, which caused either the customer to be lost or a reduction in price, that is, the provision of a quotation by the first defendant, the information contained within the stolen list remained confidential.

3. RELEVANT PRINCIPLES

(a) The Nature of Equitable Compensation

[12] In addition to those situations where information has been imparted in confidence, an action for breach of confidence is available in circumstances where confidential information is stolen or otherwise improperly or surreptitiously obtained. So much was recognised in the classic statement of Swinfen Eady LJ in *Lord Ashburton v Pape*[2]:

> "The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged."

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2 [1913] 2 Ch 469 at 475

As was observed by Gummow J in *Smith Kline & French Laboratories (Aust) Pty Ltd & Ors v Secretary, Department of Community Services & Health*,[3] "confidential information improperly or surreptitiously obtained, on the one hand, and information imparted in confidence, on the other, are treated as two species of the same genus."[4] The wrongful acquisition of information raises a presumption that the information should be protected. Thus, in *Ashcoast Pty Ltd v Whillans*[5], McPherson JA observed that the fact that information was surreptitiously obtained can be the clearest indication that it was confidential and that the defendant considered it to be so.

[13] The remedies available in support of the action for breach of confidence include equitable compensation.[6] That remedy differs from the remedy of an account of profits, in that the measure of relief is the loss to the plaintiff rather than the gain to the defendant and is aimed to restore the injured party to the position which existed before the wrong.[7]

[14] It is convenient to consider the nature of the factors which limit awards of compensation in equity and the principles informing the measure of compensation. The obligation to pay imposed in equity is not limited by common law notions of remoteness and intervening causation which apply to the assessment of common law damages.[8] As Street J (as he then was) observed in *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd,*[9] the reason is said to be attributable to the more absolute nature of the obligations in equity, which generate claims for compensation. Accordingly, once equity is satisfied that the defendant's wrong is a cause of the plaintiff's loss, equity is not generally concerned to limit recovery either by identifying a more immediate cause[10] or by limiting liability by

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3 (1990) 22 FCR 73 at 86

4 See also *Franklin v Giddins* [1978] Qd R 72 at 80; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50 per Mason J; *Moorgate Tobacco Co Ltd v Philip Morris Ltd & Anor* (No 2) (1984) 156 CLR 414 at 438 per Deane J; *Minister for Mineral Resources v Newcastle Newspapers Pty Ltd* (1998) 40 IPR 403; *Creation Records Ltd & Ors v News Group Newspapers Ltd* (1998) 39 IPR 1

5 [2000] 2 Qd R 1at 6

6 *Smith Kline & French Laboratories (Aust) Pty Ltd & Ors v Secretary, Department of Community Services & Health* (1990) 22 FCR 73 at 83; see also Meagher, Gummow & Lehane (3rd ed) *Equity Doctrines & Remedies* at para [4127]; Parkinson (ed) *The Principles of Equity* at para [1225]; Gronow M, "Damages for Breach of Confidence" (1994) 5 AIPJ 94

7 *United States Surgical Corporation v Hospital Products International Pty Ltd & Ors* [1982] 2 NSWLR 766 at 816 per McLelland J and on appeal (1984) 156 CLR 41; *Catt & Ors v Marac Australia Ltd & Ors* (1986) 9 NSWLR 639; *Markwell Bros Pty Ltd v C P N Diesels Queensland Pty Ltd* [1983] 2 Qd R 508 at 522-524 per Thomas J

8 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 at 214-216 per Street J; *Catt & Ors v Marac Australia Ltd & Ors* (1986) 9 NSWLR 639 at 660 per Rogers J; *Hill v Rose* [1990] VR 129 at 144 per Tadgell J; *Target Holdings Ltd v Redferns & Anor* [1995] 3 WLR 352; *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 11 ASCR 785 at 852 per Ipp J; *Bartlett v Barclays Bank Trust co Ltd (No 2)* [1980] Ch 515 at 543 per Brightman LJ; *Guerin v The Queen* [1984] 2 SCR 335 at 360-362 per Wilson J; *Frame v Smith* [1987] 2 SCR 99 at 150 per Wilson J

9 [1966] 2 NSWR 211 at 214-216 per Street J; see also *Hill v Rose* [1990] VLR 129 at 144 per Tadgell J

10 *Powell v Evans* (1801) 5 Ves Jun 839; 31 ER 886; *Caffrey v Darby* (1801) 6 Ves Jun 488; 31 ER 1159; *Clough v Bond* (1838) 3 My & Cr 490; 40 ER 1016; *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 427 per McHugh J; Parkinson (ed) *The Principles of Equity* at para [1225]

reference to those policy considerations which, at law, confine the defendant's liability for unusual or unforeseeable losses.[11]

[15] Counsel for the defendants submitted that the reticence displayed in cases such as *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd*[12] to subsume "causation" into breaches of fiduciary duties is not fully applicable in this case, on the basis that this was not a case concerning loss caused by negligent use of trust property by fiduciaries, but rather for recovery for damage occasioned by misuse of confidential property. Relying on *Smith Kline & French Laboratories (Aust) Ltd & Ors v Secretary, Department of Community Services & Health & Anor*[13] and *Seager v Copydex Ltd (No 1)*,[14] it was said that actions for breach of confidence are *sui generis*. Counsel submitted that the use was the critical matter, so that if it transpired that the "use" did not cause any damage to the plaintiff, the plaintiff's claim should fail.

[16] In considering the plaintiff's claim, it is clear that, causation must, in justice, be a limitation on the plaintiff's recovery of compensation in equity[15] and the losses the plaintiff may recover are only those which, on a common sense view of causation, were caused by any breach of confidence by the defendants.[16] Nevertheless, the plaintiff is entitled to recover compensation for such loss which, but for the defendants' wrong, the plaintiff would not have suffered, and the defendants' conduct need only be a cause of the plaintiff's loss.[17]

(b) Assessment of Compensation

[17] The loss attributed to a defendant's misuse of a plaintiff's customer list is often extremely difficult to assess. The Court must do the best it can on the evidence available.[18] Thus, where the facts so demand, lost chances will be valued.[19] In appropriate cases, the assessment of compensation will be a "guesstimate".[20] In *Robb v Green*,[21] Hawkins J pointed out the difficulty, given the vicissitudes of business, in pinpointing loss to goodwill or custom. In cases where the breach leads to the loss of custom, the Court will assess the profits from the customer over the period during which the customer would reasonably have been expected to remain with the plaintiff, but depreciated for the possibility that the customer might have left in any event.[22] Similarly, where the plaintiff's business is destroyed by a breach of confidence, the Court may need to make estimates of the life of the company and

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11 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211; *Guerin v The Queen* [1984] 2 SCR 335

12 [1966] 2 NSWR 211

13 (1991) 28 FCR 291

14 [1967] RPC 349

15 *Target Holdings Ltd v Redferns & Anor* [1995] 3 WLR 352

16 *Canson Enterprises Ltd v Boughton & Company* (1991) 85 DLR (4th) 129 at 163 per McLauchlin J.

17 *Target Holdings Ltd v Redferns & Anor* [1995] 3 WLR 352; *Permanent Building Society (in liq) v Wheeler & Ors* (1994) 11 WAR 187 at 243-245 per Ipp J; *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 at 215 per Street J; *Hill v Rose* [1990] VR 129 at 144 per Tadgell J. See also *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 11 ACSR 785 at 852 per Ipp J

18 *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687 at 715 per Foster J

19 *Markwell Bros Pty Ltd v CPN Diesels Queensland Pty Ltd* [1983] 2 Qd R 508

20 *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1

21 [1895] 2 QB 1

22 See also *Sanders v Parry* [1967] 1 WLR 753 at 766-767

of its expected profits in order to derive an estimate of the goodwill of the company now destroyed.[23]

4. EVIDENCE AS TO THE USE OF THE PLAINTIFF'S PRICE LISTS

[18] The lists in question were stolen from the plaintiff's Coopers Plains depot in July 1997. The lists were print outs of lists which were electronically stored elsewhere. Although the plaintiff's principal place of business was at Hemmant, the lists had been kept at the Coopers Plains depot so that the correct prices and client details could be recorded on delivery dockets. The precise date of the lists which were stolen is uncertain. The stolen lists were never located. The evidence was that, more likely than not, the stolen lists were at least six months out of date, making the likely date of the stolen lists November 1996. Copies of the lists, as at November 1996, were reproduced and tendered at trial.

[19] The plaintiff called one Jon Winduss, a former employee of the first defendant, whose evidence as to the theft and use of the plaintiff's lists was relied upon to show the course which the defendants had set upon while Mr Winduss worked for the first defendant, and to support the inference that the defendants continued to pursue that course after Mr Winduss left.

[20] Mr Winduss had been an employee of the first defendant for a total of fifteen years. He left in November 1997 to work for Suncoast Ice at Maroochydore, which in late 1998 was taken over by the plaintiff, so that he came to be working for the plaintiff by the time of the trial. In 1996, Mr Winduss had been the Customer Service Manager of the first defendant, one of his jobs being to solicit new business. At the time, the second defendant and his wife, Mrs Bradley, also worked for the first defendant, along with their daughter, Jennifer, and some delivery drivers.

[21] Mr Winduss gave evidence that Mr Otway came to work for the first defendant in about May 1997, prior to which time Mr Otway had worked for the plaintiff. Mr Winduss gave evidence of a conversation in about July 1997, during which Mr Otway told him and the second defendant that he had retained keys to the plaintiff's premises at Coopers Plains and that he knew where the price lists were kept and could arrange for someone to get them for $500. Mr Winduss said that the second defendant had agreed to this course. According to Mr Winduss, the day following this conversation, the second defendant called him to his office at Northgate and showed him two blue folders labelled Brisbane Ice Supplies, saying that Mr Otway had got them the previous night. The folders appeared to contain a computer print out of price lists and addresses. Mr Winduss was also shown two docket books and a padlock and key, which had been stolen. Mr Winduss gave evidence that the second defendant said he had agreed to pay $800 for the theft and would have paid a couple of thousand dollars for the lists. Mr Winduss gave evidence of a conversation in the second defendant's office, when the second defendant said to him, "[Otway] wants me to get rid of all this other stuff. He is quite nervous at the moment … so we'll go down to Jennifer's office and shred some of the stuff." Mr Winduss said they went to Jennifer's office, where she cut the blue folders into small pieces, retaining their contents. The docket books and cheques were shredded. Subsequently, Mr Winduss and the second defendant disposed of two

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23 *AF Ralston Associates Ltd v Ralston* [1973] NI 229

bags of shredded material and the padlock and key. I accept this evidence of Mr Winduss.

[22] It should also be mentioned that in 1998, Mr Winduss was convicted of disposing of stolen goods on his own plea. In 2001, the second defendant was convicted of theft and receiving.

[23] Mr Winduss gave evidence that a couple of days after the theft, he went to the second defendant's house at his request. The second defendant went through the stolen lists and wrote out a list of up to a dozen clients from the stolen lists to be approached by Mr Winduss, specifying the prices at which they were to be approached. Mr Winduss specifically recalled that Arnotts and Queensland Turf Club were on the list, as were Tip Top and OBM (the latter two are no longer the subject of a claim). Mr Winduss considered that the listed customers were chosen on the basis of their turnover and the fact that they did not require ice cabinets to be supplied. The second defendant also told Mr Winduss that if he needed to check the stolen lists for information to ask Jennifer, as they would not be kept on the business premises. When asked by Mr Winduss what would happen if they were caught with the lists, the second defendant responded: "They have got no proof. We could just say someone left them at our doorstep." Mr Winduss gave evidence that he approached customers on the list drawn up by the second defendant. In addition, he approached a few customers that Mr Otway had told him about. I accept this evidence.

[24] Mr Winduss gave evidence that his practice, prior to the stolen lists being available, was to approach customers and find out how much stock they used. He would then decide on a price and leave it on a business card with the potential customer or send them a quotation. He would sometimes consult the second defendant before offering a price. Usually, he would only approach one-off customers, for example, owner-operated service stations, or a single licensee of a hotel. He said that, before the stolen lists were available, he had not been given any list of customers by the defendants. After the stolen lists were available, Mr Winduss initially used the hand-written list of customers and prices that the second defendant had given him. He said he would also ask Jennifer for prices, and she would check them off the stolen lists. He said Jennifer or the second defendant had also given him another list plus some more typed sheets with the plaintiff's customers and prices he "had to go in at". By chance, after his resignation from the first defendant, he found a copy of one page of this list in his car, which was tendered by the plaintiff. Mr Winduss kept a business diary while working for the first defendant, which contained notes of meetings with customers, which was also tendered. He also gave specific evidence as to the use of the lists in respect of certain customers the subject of a positive case by the defendants. I accept this evidence.

[25] Mr Winduss gave evidence that he had had no personal dealings with the Mees prior to leaving the first defendant. There was evidence of a record of a phone call from Mr Winduss' work mobile phone to Greg Mee on 2 July 1997. However, Mr Winduss denied ever calling Mr Mee and explained that he sometimes gave the work phone back to the second defendant and recalled that the second defendant called Greg Mee on one occasion and threatened him. This was confirmed by Greg Mee. I accept the evidence of Mr Winduss and Mr Mee and do not consider that the record of the phone call casts any doubt on Mr Winduss' credibility.

[26] It is the plaintiff's case that the approaches the subject of this action were not only made by the second defendant and Mr Winduss, but also by James Eckersley and Vicki Cunningham, the second defendant's daughter, who it appears were engaged as sales representatives to regain business lost over the 1997/1998 summer as a result of an equipment failure in December 1997. Mr Eckersley was employed between January and November 1998 and Ms Cunningham was employed in April 1998. Mr Eckersley gave evidence that he was told which potential customers to target and that the second defendant would give him the price or approve the price for submitting quotations to potential customers. Mr Eckersley's evidence was that, even as he became more experienced, the second defendant still made the final decision on price.

[27] Mr Eckersley gave no evidence concerning the use of the stolen lists. However, the plaintiff seeks to rely on an inference that the second defendant, in approving the price, did so by reference to those lists.

[28] The second defendant, Mr Winduss, Mr Eckersley and Ms Cunningham gave evidence and were cross-examined about approaches to particular customers. These matters are dealt with in detail below in relation to the defendants' specific defences.

5. PLAINTIFF'S SUBMISSIONS REGARDING CAUSATION & CONFIDENTIALITY

[29] The plaintiff submitted that the question of whether, in any particular case, the defendants' use of the information caused the plaintiff's loss should be assessed against the following:

(a) the information on the lists was so valuable to the defendants that they were prepared to steal documents to obtain it and the second defendant had told Mr Winduss he would have paid a couple of thousand dollars for the lists;
(b) knowledge of the price a customer was paying was conceded to be valuable in winning customers by the second defendant and by Mr Eckersley;
(c) the defendants' use of the information resulted in the defendants' price being lower than the plaintiff's list price, although they looked to get the highest price possible from any customer;
(d) the loss of the customer, or the reduction in price, in most cases followed shortly after the defendants' approach to that customer and it was contended that in those cases where it did not, the connection is demonstrated;
(e) the nature of the product makes it price sensitive, there being no suggestion of any qualitative difference in the product;
(f) it is inherently likely that a customer would be induced to change suppliers by the offer of a cheaper price, especially as in no case was a customer bound to continue to acquire ice from the plaintiff;
(g) moreover, in cases where the customer had some dissatisfaction with the plaintiff's service (although not sufficient to have caused it to change suppliers before the defendants' cheaper price was offered), it was said that the offer of a cheaper price would have been a particularly attractive inducement to change suppliers;

(h) it is inherently likely that a customer might also be induced to seek a lower price from the plaintiff upon receipt of the defendants' quote;

(i) in no case can the defendants point to a customer which they won at a higher price than the plaintiff's price, whether amongst the customers the subject of these claims or otherwise.[24]

[30] Accordingly, the plaintiff submitted that the Court should infer that the defendants' quotation was a cause of the loss of a customer, absent evidence in a particular case, which established that the customer would have gone to the first defendant regardless of the quotation. As to those cases where the defendants asserted that, in effect, the information had ceased to be protected, because it was communicated by the customer to the defendant, the plaintiff submitted that closer analysis was required because:

(a) in many cases, the information communicated by the customer was incorrect; and a particular advantage of having the list was in knowing whether a customer's representation as to its existing price was accurate;

(b) in several cases, the information was not given by the customer until after the quotation was given to the customer, and it is said that it is more likely that a customer would reveal the true price it paid after it had decided to change to the first defendant.

6. THE DEFENDANTS' SUBMISSIONS AS TO CAUSATION & CONFIDENTIALITY

[31] The defendants submitted that the Court ought to treat each price on the list as a separate piece of confidential information. It was contended that where the defendants independently discovered information innocently and the innocent discovery occurred prior to the provision of a quotation by the defendants, then notwithstanding that they were also in possession of the same information by reprehensible means, the information obtained by such means ceased to be "cloaked in confidence" so that "any remedy was in vain". Likewise, it was submitted that, where the customer revealed a price, which was correct or verifiable by other sources, then the "cloak of confidence" was lifted.

[32] It was also submitted that the plaintiff was required to show that the use of the stolen lists was causally connected to the loss occasioned by the use. It was submitted that the intrinsic value of the information within the stolen lists was limited. The lists were created at the end of 1996 for the purpose of assisting the plaintiff's employee's fulfil their duties, and there was no particular "inventiveness" about the lists which gave them intrinsic value. However, it was conceded that the value of the lists was that they provided to the plaintiff's competitors an unfair advantage when approaching the plaintiff's customers in knowing what price to quote.

[33] Counsel for the defendants argued against the inferences sought to be made by the plaintiff that the use of the plaintiff's lists was causative of loss, submitting that any such inference was diminished by the following:

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[24] It should be noted that as the trial progressed, the plaintiff did not pursue claims, such as that relating to Raptis, where the customer was won at a higher price than the plaintiff's price.

(a) the fact that, at the relevant time, the plaintiff was able to acquire more business (on a volume scale) from the first defendant than vice versa;
(b) many customers were removed as a result of the "refinement" of the plaintiff's claim from the original claims in respect of lost and price reduced customers in respect of which it was no longer sought to affix the defendants with liability;
(c) competition in the industry, since the end of a "fixed price agreement cartel" operational between 1993 and 1996, had been fierce (a "price war"), for which it was inevitable, given the plaintiff's market share, that it would be the main supplier attacked.

[34] Counsel submitted that a more compelling consideration was the inference to be drawn from the evidence that the market was extremely volatile and subject to downward pressure on prices, after the price fixing years of 1993-1996. Further, it was said that customers were in a position to switch suppliers at whim.

[35] Counsel for the defendants also submitted that there must be a point at which the stolen lists generated in 1996 ceased to have causal effect on whether or not the first defendant acquired a customer from the plaintiff, whether because of:

(a) the volatility of the industry and market and the movement of customers between suppliers;
(b) the downward pressure on prices;
(c) the apparent ease of acquiring new customers without any unfair advantage as established by the evidence of Tony Mee;
(d) the collection of information obtained innocently by the first defendants' representatives; or
(e) the ability of those representatives to acquire customers themselves without any resort to reprehensible means.

[36] Counsel for the defendants pointed to the "refinement" of the plaintiff's case during the progress of the litigation by the successive versions of the schedules, and the deletions from the schedules as a consequence of this refinement. It was said that since the plaintiff's witnesses could not or would not explain why those eliminations occurred, the Court ought to find that for many customers that appeared on the schedules, the plaintiff's loss had been overstated, that customers would, in any event, have been lost at the time they were lost, or shortly thereafter, or their prices would have been reduced. It was therefore submitted that no award should be given for any loss after the financial year ending 1999.

7. FINDINGS AS TO MISUSE OF INFORMATION AND CAUSATON

[37] It is clear that the use of the plaintiff's customer and price lists in the circumstances of this case involved a breach of the duty of confidence. I accept the evidence of Mr Winduss as to the defendants' use of those lists. In addition, there is of course the deemed admission of use. That deemed admission applies except where a specific defence was raised by the defendants.

[38] There remains, however, to consider the matters of causation and confidentiality, where prices were disclosed by customers, and the other specific defences raised in

respect of particular customers the subject of a claim. I therefore now turn to deal with those matters.

[39] In all other cases, I am satisfied on the basis of the evidence presented that the information on the lists was confidential and that the use of that information was causative of loss. However, for the reasons outlined below, a discount should be made in respect of the contingency that a customer might have been lost or a price reduced, in any event, given the very competitive nature of the industry. I reject the defendants' submissions that the plaintiff's claims should not be allowed for any period after 1999.

8. SPECIFIC DEFENCES

A. Lost Customers Schedule

(a) Arnotts

[40] The plaintiff claims that it lost this customer on 7 August 1997 as a result of an approach by Mr Winduss to Mr Bowes (a store operator at Arnotts), which resulted in a written quotation from the first defendant to provide ice for 12 months at $1.50 per 10 kg bag. As at 7 August 1997, the plaintiff had been supplying 10 kg bags at $1.80 per bag, which was the price listed on the stolen price list.

[41] The plaintiff relied on Mr Winduss' evidence that he approached Mr Bowes, offering to supply ice at $1.50 per 10 kg bag. His evidence was that the price was on the original list of customers to approach given to him by the second defendant. Mr Winduss submitted a written quotation to Mr Bowes on 4 August 1997. Relying in particular on the evidence of Mr Bowes that Arnotts was "sold" on the first defendant's price, the plaintiff submitted that price was an inducement and a cause of the change. Mr Bowes' evidence was that Arnotts was "sold" on the first defendant's price "plus the proximity of their ice works to [Arnotts'] location at Virginia and the time frame from the time [Arnotts] placed the order and the quickness in which they could [supply the ice]". Mr Bowes did not suggest that there was an issue of poor service from the plaintiff, who it appears also offered a 24-hour service.

[42] The defendants' case is that this customer changed supplier for reasons other than price. The decision to change suppliers ultimately rested with Mr Lind, the Supply, Planning and Services Manager, to whom Mr Bowes referred the quotation from the first defendant. He had no recollection of any discussions with Mr Bowes. In his statement given in the criminal proceedings against the second defendant and tendered in this trial, he stated that "the decision to change to [the first defendant] was ultimately based on its proximity, and its ability to deliver 24-hour service", that "this service was offered as part of the package" from the first defendant and that "at the time of the negotiations, the prices from both companies were comparable". Price was not mentioned as a particular factor.

[43] In his oral evidence in this trial, Mr Lind stated that the decision was based upon "performance, price and reliability". Whilst agreeing that he would have taken into account the price offered by the first defendant, he considered it to be "comparable". Mr Lind stated that:

> "one of the significant issues was that [the arrangement] needed to be a reactive arrangement. That is, machines could break down at Arnotts, ice may be required at any time during the night, because it was a 24 hour operation, and [Arnotts] needed to be able to call and have ice on site within a short period of time… [and] there was an offer that there [be] a phone number that [Arnotts] could call at any time during the night to obtain service."

[44] Whilst there may be some inconsistency between Mr Lind's evidence and that of Mr Bowes as to the importance of the reduced price being offered by the first defendant, the clear impression gained from Mr Lind's evidence is that, although price was a consideration, it was not a determinative issue and that the service element in the package offered by the first defendant and their proximity (they were some 2 kilometres away) were the key matters. Nevertheless, I am satisfied that price was a factor, and I consider that the plaintiff has shown the requisite causal connection between the misuse of the price list and the loss of the customer. However, there should be a discounting of the claim to reflect the high probability that the first defendant would, in any event, have been successful in obtaining this customer based on the service being offered by it and the attractiveness that the first defendant's proximity represented. Accordingly, I find that the claim should be discounted by one third.

(b) Night Owl Convenience Stores

[45] The plaintiff claims the loss of Night Owl stores at Auchenflower, New Farm and the Valley as customers as a result of the first defendant's approaches. The plaintiff claims that Mr Winduss provided a written quotation to the Operations Manager, Mr Denmar, in October 1997, to supply ice to all Night Owl stores at $0.95 per 5 kg bag. At the dates these customers were lost, the plaintiff was supplying 5 kg bags at $1.10 per bag to each store, which was the price listed on the stolen price list.

[46] In relation to the Night Owl at Auchenflower, the plaintiff claims that it lost this customer on 22 November 1997 as a result of approaches in July 1997 by Mr Winduss to Mr McKean, a representative of that customer, and the written quotation of October 1997. In relation to the Night Owl at New Farm, the plaintiff claims that it lost this customer on 14 November 1997 as a result of the written quotation of October 1997. This customer was subsequently regained by the plaintiff on 4 May 1998. In relation to the Night Owl at the Valley, the plaintiff claims that it lost this customer on 16 December 1997 as a result of the written quotation of October 1997. This customer was subsequently regained by the plaintiff on 7 July 1998.

[47] Mr Winduss gave evidence that he approached the Night Owl Auchenflower on 15 July 1997. He subsequently phoned Mr Denmar, the product manager for the Night Owl Convenience Stores, inquiring as to supplying the group. He recalls Mr Denmar saying that, as the Night Owl stores were franchised, they were free to choose their own suppliers, but that he would circulate Mr Winduss' quotation. Mr Winduss submitted a group quotation for the Night Owl Convenience Stores on 6 October 1997 offering to supply ice at $0.95 per 5 kg bag. He did not recall specifically where he got the price from. In addition, Mr Aaron Heinrich, who was a sales representative for the plaintiff at the relevant time, gave evidence that, on 27 April 1998, he had discussions with Mr McLauchlan, co-owner of the Night Owls at

Newfarm and the Valley, who told him that the first defendant's price was better than that which they had been paying the plaintiff.

[48] The defendants' case is that the price for this customer was set other than by reference to the stolen price list. The defendants point to Mr Winduss' evidence that the first defendant was already supplying some Night Owls at $1.00 per 5 kg bag. It was submitted that any approach to the whole group had to be lower than the price then being charged to members within the group. Counsel for the defendants submitted that, notwithstanding Mr Winduss' use of the stolen price list, the real cause of the loss of the customers was the fact that the first defendant was already supplying other stores within the Night Owl group. However, on behalf of the plaintiff it was submitted that Mr Winduss gave no evidence that he had fixed the price for the quotation in relation to what the first defendant was already charging other Night Owl Stores.

[49] I consider that the plaintiff has shown a causal link between the use of the list and that loss of the customers and that it is appropriate to infer the price was obtained from the stolen lists. However, given the fact that the first defendant had already secured some of the stores within the group as customers, some discounting should be made for the contingency that a like offer would, in any event, have been made, so as to secure the group. A discount of 10% appropriately reflects that contingency.

(c) QDL Sigma Pharmaceuticals

[50] The plaintiff's claim in respect of this customer is that it was lost on 25 July 1997 as a result of an approach by Mr Winduss to Mr Skinner, the Brisbane Warehouse Manager, which resulted in a written quotation to supply dry ice for two years at $1.20 per kilogram with a $10.00 delivery fee and a subsequent offer to supply dry ice for two years at $1.15 per kilogram with a delivery fee of $5.00. At the date the customer was lost, the plaintiff was supplying dry ice at $1.50 per kilogram plus a $5.00 delivery fee. The price that appeared on the stolen price list was also $1.50 per kilogram, but with a $25.00 delivery fee.

[51] Mr Winduss gave evidence that he provided a written quotation to Mr Skinner dated 22 July 1997 offering to supply dry ice at $1.20 per kilogram with a $10 delivery fee. Mr Winduss' evidence was that Mr Otway had given him a price for either Sigma or Queensland Medical Laboratories, which were both dry ice customers.

[52] The defendants' case is that Mr Winduss had successfully approached this customer in June 1997, prior to the acquisition of any stolen list. Counsel for the defendants thus argued that the written quotation was given on 22 July 1997, after Sigma was already a customer, in order to maintain the customer. Counsel for the defendants relied upon a credit application form dated 23 June 1997[25] and Mr Winduss' evidence at the committal proceedings that he thought he had approached Sigma "around the time of the break-in." However, the evidence at the committal proceedings was given without the aid of documentary evidence available in this action. The plaintiff relied on documentary evidence as showing that Mr Winduss approached the customer on 21 July 1997 and provided a written quotation of 22 July 1997, and that the defendants' first daily deliveries to Sigma began on 28 July

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[25] Exhibit 39

1997. Counsel for the plaintiff submitted that there was no evidence of delivery prior to July 1997, nor any documentation other than the credit application to support the defendants' case.

[53] The defendants also sought to rely on evidence given in the committal proceedings that the plaintiff stopped supplying this customer in June 1997. That evidence was given without the benefit of the documentary evidence available at this trial, such as the Debtor Sales History for this customer, which shows the plaintiff's last supply was on 25 July 1997. I consider that that evidence is to be preferred.

[54] I do not accept the defendants' submissions that this customer was a customer of the first defendant prior to the list being stolen and am prepared to infer that the price quoted was based on that in the stolen lists. I allow the claim, subject to the matter of discounting mentioned below in paragraph [193].

(d) Golden Circle

[55] The plaintiff's claim in respect of this customer is that it was lost on 6 August 1997 as a result of an approach by Mr Winduss in August 1997. The plaintiff had initially claimed in its schedule of November 2000 that the approach had been made by Mr Winduss and Mr Miles in August or September 1997. The defendants in their response of May 2001 contended that the approach was made in August 1997 by Mr Winduss only. The plaintiff accepted that the approach was made by Mr Winduss in August 1997 and the defendants did not challenge this at trial. I allow this claim, subject to the matter of discounting mentioned in paragraph [193].

(e) Matilda Enoggera

[56] The plaintiff's claim in respect of this customer is that it was lost on 25 November 1998 as a result of approaches by Mr Eckersley and Ms Cunningham to Mr Madhur, the owner of Matilda Enoggera, which resulted in a written quotation dated 25 November 1998 to supply ice for one year at $0.90 per 5 kg bag on account and $0.80 per 5 kg bag for cash on delivery. There was also a subsequent offer on the same day to supply ice at $0.85 per 5 kg bag and $0.87 per block of ice on account. At the date the customer was lost, the plaintiff was supplying ice at $0.92 per 5 kg bag, although the price on the stolen list was $0.95 per 5 kg bag. The customer was regained by the plaintiff on 15 December 2001.

[57] Mr Heinrich gave evidence that he spoke to a gentleman at Matilda Enoggera after the customer had been lost, who told him that he had been offered a better price by the first defendant.

[58] Mr Eckersley gave evidence that he approached this customer as a cold call to the site. His evidence was that either an employee or the owner told him that the plaintiff was supplying ice at $0.97 per 5 kg bag, which he recorded in his sales report on 13 November 1998. (Curiously, this in fact was higher than that on the stolen price list). No quotation was given on that occasion. Ms Cunningham gave evidence that after Mr Eckersley had left the first defendant, Mr Madhur initiated further contact by phoning her on 25 November 1998 and she visited him on the same day. Ms Cunningham presented a written quotation offering to supply ice at $0.90 per 5 kg bag on account and $0.80 per 5 kg bag for cash deliveries. Her evidence was that this quote, which was rejected, was based on what was in Mr

Eckersley's report and her phone conversations with him. After the quote was provided, Ms Cunningham was shown delivery dockets by the customer which confirmed the actual volume of deliveries and the price being paid to the plaintiff, which was $0.92. Ms Cunningham's sales report dated 25 November 1998 recorded that, after further negotiations, the parties agreed on a price of $0.85 per 5 kg bag and $0.87 per block on account. Those records also reveal, as confirmed by Ms Cunningham in her evidence, that the customer was upset that the plaintiff would not supply a larger cabinet until the following January and that the customer was dissatisfied with the service he had received from the plaintiff and that price was only a small consideration for the customer. I accept Ms Cunningham's evidence on these matters.

[59] The defendants' case was that there were three intervening factors which enabled the defendants to secure this customer. Firstly, the customer disclosed to the defendants a price at which the plaintiff was supplying ice. Secondly, Ms Cunningham offered a quotation, which was rejected, and negotiations ensued. Thirdly, the customer confirmed what it was paying on recent delivery dockets prior to the final settlement of the price, so that the 1996 price list was no longer a factor, being taken over by the 1998 delivery dockets. In addition, the defendants relied on the customer's dissatisfaction with the plaintiff's service.

[60] The plaintiff submitted that it's price was not disclosed by the customer, as the price told to Mr Eckersley in November 1998 was incorrect and that the defendants were able to confirm the prices disclosed by clients by reference to the stolen price list. Furthermore, the plaintiff argued that Ms Cunningham was not shown the customer's delivery dockets until after she had provided the written quotation of 25 November 1998, and therefore did not know the actual price being paid by the customer at the time she submitted the quotation.

[61] The evidence shows that Mr Eckersley's initial approach did not result in a quotation and that it was only provided after further contact being initiated by the customer. I accept the defendants' submissions that this customer was gained by the first defendant after negotiations, following the customer's disclosure, by means of the delivery dockets, of the price it was paying. I therefore disallow this claim as I am not satisfied that the plaintiff has shown that the defendants' misuse of the price list was causative of loss. Furthermore, I consider that, on the evidence of the customer's dissatisfaction with the plaintiff's service, its initiation of the contact that resulted in the quotation and its willingness to disclose and verify the price it was paying, it is more likely than not that the customer would have been lost in any event.

(f) Quinn Group

[62] The plaintiff's claim in relation to the Quinn Group comprises two hotels, the Centenary Tavern and the Gap Tavern. The plaintiff claims that it lost the Centenary Tavern as a customer on 19 November 1998, and the Gap Tavern on 20 November 1998, as a result of an approach by Mr Eckersley to Mr Dann, the General Manager of the Gap Tavern.

[63] On 26 May 1998, Mr Eckersley approached the Quinn Group with a written quotation to supply ice at $0.88 per 5 kg bag, which was rejected. At that time, the plaintiff was supplying the customers at $1.00 per 5 kg bag, which was the price on

the stolen list. Mr Dann gave evidence that he relayed this to the manager of the Centenary Tavern and Peter Quinn, the owner of both hotels. Mr Dann also gave evidence that he made a counter offer to Mr Eckersley of $0.80 per 5 kg bag. The defendants provided a quotation at that price, which was accepted and resulted in the defendants entering into a contract in June 1998 with the Quinn Group to supply ice at this price for two years.

[64] Tony Mee, the sales manager for the plaintiff, gave evidence that after the Quinn Group had entered into a contract with the defendant, the customer offered to purchase ice at the same price from the plaintiff. The plaintiff then supplied ice at a reduced price for some months (although it does not claim compensation for loss flowing from that reduced price). Tony Mee gave evidence that the Quinn Group finally left the plaintiff in November 1998, after it had been threatened with legal action by the defendants in respect of the contract it had entered into. At the date the customers were finally lost, the plaintiff was supplying 5 kg bags at $0.80 to both customers. In addition, at the date the Centenary Tavern was lost, the plaintiff was supplying it with 3.5 kg bags at $0.70 and 10 kg bags at $1.80. Both customers were regained by the plaintiff on 25 November 2000.

[65] Counsel for the defendants submitted that there was no causal link between the use of the stolen price list and the plaintiff's loss, in that the Quinn Group was lost as a result of the counteroffer made by Mr Dann, and not Mr Eckersley's quotation. The plaintiff argued that the counteroffer could not negate the causal link between the defendants' conduct and the plaintiff's loss, since it was the initial approach by Mr Eckersley which triggered the customer's decision to change suppliers.

[66] I consider that a causal link is shown and that, even if the deemed admission does not apply to this customer, an inference can be made that the price was set by reference to the stolen list. I allow the claim subject to the matter of discounting mentioned in paragraph [193].

(g) Waterford Arms Hotel

[67] The plaintiff's claim in respect of this customer is that it lost this customer as a result of an approach by Mr Eckersley to Mr O'Conner, the manager, which resulted in a written quotation dated 14 August 1998 offering to supply ice at $0.80 per 5 kg bag. The plaintiff claims the customer ceased regular deliveries on 27 October 1998 and thereafter there were two one-off deliveries in April and August 1999. For the purposes of quantification of the plaintiff's claim, the date the customer was lost was set at 12 April 1999.

[68] The defendants in their responses dated May 2001 disputed the substance of the approach, alleging that this customer was part of the Fitzgibbon Group and that the approach to the Fitzgibbon Group was made in October/November 1998 offering to supply the whole group at $0.78 per 5 kg bag. The defendants did not pursue this argument in their submissions at trial.

[69] The plaintiff submitted that the Fitzgibbon Group acquired this customer in October 1999, but that the customer was lost in October 1998 (prior to its acquisition by the Fitzgibbon Group), as a result of the defendants' quotation in August 1998.

[70] I accept that the unchallenged documentary evidence tendered at trial which supports the plaintiff's claim. I also consider that the plaintiff has established a sufficient causal link. I therefore allow this claim, subject to the matter of discounting mentioned in [193].

(h) Fitzgibbon Group

[71] The plaintiff make a claim in relation to a number of customers which were members of the Fitzgibbon Group, including the Daisy Hill Bottle Shop; Fitzy's Hotel and Convention Centre; the Glen Hotel; Kings Bottle Shop Logan Hyperdome; Kings Bottle Shop Rochedale; and the Rat & Parrot Hotel.

[72] The plaintiff claims that these customers were all lost in early November 1999 as a result of an approach by Ms Cunningham to Mr Fitzgibbon, the owner of Fitzy's Hotel and Convention Centre, in October 1999, which resulted in a written quotation dated 12 October 1999 for the supply of ice at $0.78 per 5 kg bag. At the date when the customers were lost, the plaintiff was supplying ice to these customers at between $1.00 and $1.10, which was the price listed on the stolen list, except that the plaintiff supplied the Daisy Hill Bottle Shop at $1.10 per 5 kg bag, whereas the price on the stolen list was $1.20; and the plaintiff supplied the Rat & Parrott Hotel at $1.00 per 5 kg bag, although it appeared on the list as the Dead Rat Hotel with a price of $0.70 per 5 kg bag.

[73] Although the Kings Bottle Shops at Logan Hyperdome and Rochedale were not on the list, the plaintiff's case is that the defendants used the stolen list to set a quotation to the whole of the Fitzgibbon group, and that these two customers were part of that group. The quotation, it was submitted, was based on the prices listed in the stolen price list for certain members of the group.

[74] The defendants' case in relation to the Fitzgibbon Group is that the price was set other than by reference to the stolen price list. The second defendant's evidence was that from April 1999 the first defendant began supplying the Waterford Arms Hotel, which subsequently became part of the group, and that the price in the written quotation was set in reference to the price at which the first defendant was supplying the Waterford Arms Hotel. The plaintiff's response was that the Waterford Arms Hotel was itself a customer obtained by the defendants as a result of their misuse of the stolen price list.

[75] Counsel for the defendants also submitted that according to the stolen price list, there was no single price for the group. Specifically, the relevant prices were: $1.10 per 5 kg bag being paid by the Daisy Hill Bottle Shop, which was $1.20 per 5 kg bag on the stolen list; $1.00 per bag for Fitzy's Hotel & Convention Centre, which was the price on the stolen list; $1.00 per 5 kg bag to the Glen Hotel, which was the price on the stolen list; $1.10 per 5 kg bag for Kings Bottle Shop Logan Hyperdome, which was not on the list; $1.10 per 5 kg bag for Kings Bottle Shop Rochedale, which was not on the list; and $1.00 per 5 kg bag for the Rat & Parrot Hotel, which was $0.70 per 3.5 kg bag on the stolen list. At best, all the defendants had was a very rough guide. In relation to the Rat & Parrot Hotel, the defendants argued that according to the stolen price list, the plaintiff was supplying this customer with 3.5 kg bags at $0.70 per bag, and that at that time, the first defendant did not supply 3.5 kg bags and therefore could not apply the information in the stolen list. Counsel for the defendants also submitted that the approach made by Ms

Cunningham in October 1999 was almost three years after the date of the stolen list, and that the value of the stolen price list had by then diminished.

[76] I am satisfied that a sufficient causal link between the use of the list and the loss has been shown and allow the claim subject to the matter of discounting mentioned in paragraph [193].

(i) Lord Stanley Hotel

[77] The plaintiff's claim in respect of this customer is that it lost this customer on 18 May 1998 as a result of an approach by Mr Eckersley to Mr Joseph, the Assistant Manager of the hotel, which resulted in a written quotation to supply ice for two years at $0.80 per 5 kg bag and $0.75 per 3.5 kg bags. At the date this customer was lost, the plaintiff was supplying ice at $1.10 per 5 kg bag, which was the same as the price listed on the stolen price list. This customer was regained by the plaintiff on 7 March 2002.

[78] The plaintiff argued that this customer had been a customer of the plaintiff for some four years, and only left after it was approached with a significantly lower price. The contact was initiated by the first defendant, and no witnesses were called to rebut an inference that price was significant.

[79] The defendants' case is that this customer left the plaintiff because of poor service, and not because it was offered a better price. Mr Eckersley gave evidence that the customer had indicated that the plaintiff had promised for some time to deliver a larger ice cabinet to this customer to produce higher sales, but had failed to do so. Mr Eckersley also said that the customer was "upset that he had not received … the level of service he expected and the follow-up he expected". This was put to Tony Mee, who could not recall the incident. I accept Mr Eckersley's evidence.

[80] I am satisfied that the plaintiff has shown that price was a factor in the loss of the client and has established the requisite causative link between the loss of the customer and the misuse of the price list. I allow the claim, subject to the matter of discounting mentioned in paragraph [193].

(j) Matilda Clayfield

[81] The plaintiff's claim in respect of this customer is that it lost this customer on 23 September 1998 as a result of approaches by Mr Eckersley to Mr Henderson, the then proprietor of Matilda Clayfield, which resulted in a written quotation to supply ice for one year at $0.80 per 5 kg bag and $0.70 per 3 kg bag. At the date the customer was lost, the plaintiff was supplying ice at $1.20 per 5 kg bag, which is the price listed on the stolen price list. This client was regained by the plaintiff on 18 December 2001, soon after Mr Henderson ceased to be the proprietor in October 2001. The defendants' case was that the reduced price had nothing to do with the customer's decision to change suppliers, the customer's decision being based purely on a personal relationship.

[82] Counsel for the plaintiff argued that in the ordinary course of things, price was an inducement. It was contended that the personal acquaintance between the second defendant and Mr Henderson did not affect the causative connection between Mr

Henderson being offered a price that was two thirds of his existing price and the loss of the customer by the plaintiff.

[83] The evidence was that Mr Henderson ceased purchasing supplies from the plaintiff from September 1998, about one year after becoming proprietor. His evidence was that the second defendant had been a neighbour of his, with whom he had lost contact after moving as a result of a change of job. However, upon his taking over the Matilda Clayfield petrol station in September 1997, he was able to renew his friendship, because the second defendant had been a regular customer at the petrol station, using it for repairs to his vehicles. Mr Henderson said that one day in conversation he said to the second defendant, "Why don't you put your ice machine here", explaining that the second defendant "was spending money with [him] and [he] was just trying to return … the custom." Matilda Clayfield ceased to be a customer of the first defendant soon after Mr Henderson ceased being the proprietor in late 2001.

[84] Although Mr Henderson accepted in cross-examination that being offered a third off the price could possibly have interested him, he had no clear recollection of price being a factor in the decision to purchase supplies from the first defendant. Rather, the clear impression I gained from his evidence was that he was enthusiastic to give his custom to the first defendant. This impression is strengthened by the fact that it was Mr Henderson who initiated the approach, rather than the defendants, notwithstanding that the defendants had had the price list with the customer's details and price for over a year. Moreover, the size of the discount (from $1.20 to $0.80) offered by the first defendant is surprisingly large, if it were made based on the price in the stolen list. Further, given the clear evidence of Mr Henderson's keenness to give his custom to the first defendant and the fact of Mr Henderson initiating the approach for that purpose, I find on the balance of probabilities that this customer would, in any event, have been lost by the plaintiff and gained by the first defendant. I therefore disallow the claim.

(k) Matilda Zillmere

[85] The plaintiff's claim in respect of this customer is that it lost this customer on 14 July 1998 as a result of approaches by Mr Eckersley to the owner, Mr Rahilly. The offer was to supply ice for one year at $0.90 per 5 kg bag. At the date the customer was lost, the plaintiff was supplying ice at $1.20 per 5 kg bag, which was the price listed on the stolen price list.

[86] The defendants' case was that the customer disclosed its price to the first defendant so that the price was no longer confidential. Alternatively, the defendants argued the disclosure formed the real basis of the quotation and thus caused the loss to the plaintiff. Mr Eckersley gave evidence in respect of his sales report of 13 August 1998 that during a "cold call" the customer had disclosed that it was being charged $1.10 by the plaintiff. The plaintiff contended that Mr Eckersley was in fact told an incorrect price and that this was an instance where the defendants used the stolen price list to cross-reference the price disclosed by the customer.

[87] I accept the plaintiff's submissions that the misuse of the price list resulted in the loss of the customer and allow the claim subject to the matter of discounting mentioned in paragraph [193].

(l) Bailey Road Discount Fuels

[88] The plaintiff's claim in respect of this customer is that this customer was lost on 9 September 1998, as a result of approaches by Ms Cunningham to Ms Von Reiche and Mr Roache, the co-owners of Bailey Road Discount Fuels, culminating in a written quotation to provide ice on account for one year at $0.70 per 3 kg bag and $0.80 per 5 kg block. At the time this customer was lost, the plaintiff was supplying ice at $1.10 per 5 kg bag, $1.00 per 5 kg block and $25.00 per 20 kg block of dry ice. The prices appearing on the stolen price list were $1.00 per 5 kg block and $1.30 per 5 kg bag. The plaintiff claims loss of custom to April 2002, it being conceded by the plaintiff that this customer closed on that date.

[89] The defendants' case is that the customer disclosed its price to the defendants so that the price was no longer confidential. Alternatively, the defendants argued that disclosure formed the real basis of the quotation and cause of the loss to the plaintiff. Ms Cunningham gave evidence that at a meeting on 27 August 1998, Ms Von Reiche from Bailey Road Discount Fuels told her that the plaintiff was supplying ice at $1.00 per 5 kg bag. However, the plaintiff argued that, on the basis of Ms Cunningham's own evidence, her quotation for this customer was the quotation given to the Neumann Group as a whole. The group quotation was given in May 1998, and since the disclosure was not made until August 1998, the plaintiff contends that the disclosure was immaterial, and that in any event, the disclosure was untrue.

[90] I accept the plaintiff's submissions that the misuse of the price list resulted in the loss of the customer and allow the claim subject to the matter of discounting mentioned below in paragraph [193].

(m) Kwiksnax & Tru Blu Snax

[91] The plaintiff's claim in relation to Kwiksnax is for both a reduction in price and for the loss of the customer. The plaintiff claims that it reduced the price for this customer from $1.10 to $1.00 on 19 May 1998, as a result of a quotation provided by Ms Cunningham to Mr Hoefkens, the general manager, which was rejected. The plaintiff also claims that it lost this customer to the first defendant on 29 October 1999 after approaches by Ms Cunningham to Mr Hoefkens in March and June 1999. The offer ultimately accepted was an offer by the first defendant to supply ice at $1.00 per 10 kg bag. At the date the customer was lost, the plaintiff was supplying ice at $1.10 per 10 kg bag, which is the price listed on the stolen price list.

[92] As a result of the same approaches, the plaintiff claims that it also reduced its price for Tru Blu Snax from $1.10 to $1.00 on 20 May 1998 and lost this customer on 27 October 1999. At the time this customer was lost, the plaintiff was supplying ice at $1.10 per 10 kg bag. The customers are shown as distinct customers on the schedule, but in fact they were the one customer, and appeared on the stolen list as "Kwiksnax". Tru Blu Snax was closed in August 2000 and the plaintiff's claim has been adjusted accordingly.

[93] The relevant events concerning this customer were as follows. Mr Hoefkens became the Chief Executive Officer of Kwicksnax in February 1998, at which time the plaintiff was supplying ice at $1.10 per 10 kg bag, which, as I mentioned, was the price on the stolen price list. Mr Hoefkens' evidence was that in mid-1998 he

received a phone call from Tony Mee, regarding a proposed price increase of $0.10 per bag. Mr Hoefkens' response was "to hold him off for a little while" and "to shop around" and "feel the market" to see if he could match or better the plaintiff's price. He initiated an approach to the plaintiff's competitor, the first defendant, and spoke to Ms Cunningham seeking a better deal and told her the price he was paying $1.00 per bag, which was untrue. His evidence as to the contact with Ms Cunningham was as follows:

> "… if I look back at 1998 as I [had] just come to Queensland, the first two or three months I would have been on to all suppliers trying to get a better deal and I would say that's why I would have got the price down."

[94] In May 1998, Ms Cunningham provided a quotation to supply ice at $1.05 per 10 kg bag, which Mr Hoefkens rejected, but appears to have used to extract a better price from the plaintiff. On 19 May 1998, the plaintiff reduced its price to $1.00. Hence the claim for loss due to the price reduction from 19 May 1998 to 1 March 1999, in addition to the claim for loss of the customer. On 20 May 1998, the plaintiff also reduced its price to $1.00 for Tru Blu Snax, which reduction is claimed until 22 June 1999 when the price returned to $1.10.

[95] The following year, on 1 March 1999, the plaintiff raised its price back up to $1.10 per 10 kg bag. In late February/early March 1999 Mr Hoefkens rang the first defendant, inquiring after Ms Cunningham and spoke to the second defendant. During the conversation, which was recorded and transcribed,[26] Mr Hoefkens mentioned that the plaintiff's deliveries had been late several times in the past two weeks and stated that he was paying $1.00 per bag to the plaintiff. The tenor of the conversation was that he was dissatisfied with the plaintiff's service. He sought a quotation from the first defendant.

[96] On 11 March 1999, Ms Cunningham provided a quotation at $1.10 per 10 kg bag. She explained the increased price from her initial quotation as reflecting a general price increase in February of each year. I reject that evidence and accept the plaintiff's submissions that the quotation was set at $1.10 by reference to the stolen price list. Mr Hoefkens rejected this quotation, as he was still looking for a better price than $1.10. On 26 July 1999, Ms Cunningham provided a further quotation at $1.00 per bag. However, this quotation was not accepted until 27 October 1999.

[97] Mr Hoefkens explained this delay by saying that at the time Kwicksnax was trying to sell its business and that caused him to think twice before changing suppliers. Mr Hoefkens also gave evidence that when he received the further quotation he "was hanging in the balance considering [he] had never dealt with [the first defendant] before" and that during the period, while he was making up his mind, what "topped off" his decision to switch to the first defendant was "bad dealings with the plaintiff". He explained that, at various times, the plaintiff had failed to deliver ice as required and that on one occasion he had had to drive a forklift to their depot and collect the ice himself.

[98] Counsel for the plaintiff put to Mr Hoefkens that in October 1999, just prior to switching suppliers, the plaintiff had intended to increase the price to $1.20. While

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[26] Exhibit 28

Mr Hoefkens vaguely recalled this as a possibility, he was clear that his decision to start shopping elsewhere started well before that. Mr Hoefkens gave evidence that service problems with the plaintiff had began in late 1998 or early 1999. Mr Hoefkens said that he had complained of deliveries being made at the wrong times, but that his complaints were ignored.

[99] The defendants' case in relation to the loss of this customer was that the cause of the plaintiff's loss was the customer's dissatisfaction with the plaintiff's service. In addition, it was submitted that the plaintiff's price was not confidential as Mr Hoefkens had disclosed it. In relation to the price reduction, the defendants' case is that it was Mr Hoefkens who instigated the reduction.

[100] The plaintiff argued that it was the use of the stolen lists which caused the plaintiff's loss, pointing to Mr Hoefkens' disclosure of an incorrect price to the defendants, who where able to verify the true price from the stolen lists. In addition, the plaintiff argued that Mr Hoefkens was essentially price-driven and any dissatisfaction with the plaintiff was not enough to cause him to switch to the first defendant. The plaintiff argued that Mr Hoefkens stayed with the plaintiff until a lower price was offered and that had service been his only concern, he would have switched much earlier when the price being offered was the same.

[101] I accept that the defendants' misuse of the plaintiff's lists was causative of loss to the plaintiff.

[102] However, as regards the question of the loss suffered by the price reduction, I am not satisfied that the plaintiff has shown that Mr Hoefkens would have maintained his custom with the plaintiff at the $1.10 per 10 kg bag price. Rather the clear impression from Mr Hoefkens' evidence was that, having joined Kwiksnax' Queensland business in February 1998, he would have sought a price reduction from the plaintiff, because he "would have been on to all suppliers trying to get a better deal" and, as he mentioned, "that's why [he] would have got the price down". Accordingly, I do not consider that the claim in respect of the price reduction should be allowed in full. I consider a discount of 50% should be applied to that claim to reflect the high probability that the plaintiff would have been required to reduce its price to retain the client, especially given the highly competitive nature of the industry, as discussed below.

[103] Nor do I consider that the claim for loss of the client from 27 October 1999, should be allowed in full. Had this customer been as price sensitive as maintained by the plaintiff one would have expected the customer to have been lost to the first defendant upon the quotation of $1.00 per 10 kg bag was made in July 1999. However, Mr Hoefkens' evidence was that he was reticent, not having dealt with the first defendant, to transfer his custom to it. The impression I gained from his evidence was that his decision was motivated by increasing dissatisfaction with service, with the plaintiff taking no notice of his complaints to the extent that, as he mentioned, it got "beyond a joke". Given that the evidence reveals that this customer had a strong reason and desire to seek an alternative supplier, I consider that there was, in any event, a high likelihood of Mr Hoefkens pursuing and securing an arrangement with the first defendant, or some other supplier, at the price offered by the first defendant. I consider that the claim for loss of this customer should also be discounted by 50%.

(n) Neumann Petroleum Sites

[104] The plaintiff's claim relates to MP Fuels Eagleby, BP Robinson Road and BP Lindum. The plaintiff's claim is that it lost these customers as a result of approaches by the second defendant and Ms Cunnigham to Mr Flynn, the then retail manager for Neumann Petroleum, in particular, a written quotation offering to supply ice to the group for 12 months at $0.70 per 3 kg bag, $0.78 per 5 kg bag, and $0.80 per 5 kg block.

[105] In relation to MP Fuels Eagleby the plaintiff claims it lost this customer on 11 May 1998. At this date, the plaintiff was supplying ice at $0.90 per 5 kg bag. The price list showed $1.00 per 5 kg block and $0.70 per 3.5 kg bag. This customer was regained by the plaintiff on 1 February 2002. In relation to BP Robinson Road, the plaintiff claims it lost this customer on 11 May 1998. At this date, the plaintiff was supplying ice at $1.10 per 5 kg bag, which was the price appearing on the stolen price list. In relation to BP Lindum, the plaintiff claims it lost this customer on 1 June 1998. At this date, the plaintiff was supplying ice at $1.00 per 5 kg bag, which was the price on the stolen list. The stolen list also listed $1.00 per 5 kg block.

[106] The defendants' case is that the cause of the plaintiff's loss was not the defendants' use of the stolen price list, but a personal connection between Ms Cunningham and Mr Flynn. Mr Flynn gave evidence that his wife had worked with Ms Cunningham's then boyfriend, which led to the defendants providing a quotation. The second defendant provided him with a written quotation; Mr Flynn did not have authority to purchase ice, but showed the quotation to the service stations under his control. Counsel for the defendants submitted that because Mr Flynn had no purchasing power, the quotation was a mere "stab in the dark" and the customers were free to purchase from whoever and at whatever price they bargained for. Counsel further submitted that the price list was of limited value because the prices of the group varied considerably and therefore this could not be described as an approach to a single customer for which the price was known. Counsel also pointed out that the quotation was largely unsuccessful, as only three customers were gained by the defendants.

[107] Counsel for the plaintiff argued that there was nevertheless a sufficient and real causal connection between the quotation to the group and the acceptance of these individual customers. I accept that submission. However, it is appropriate to discount the claim to reflect the contingency that this customer would have been approached because of the personal connection and therefore may have sought a price cut in any event. A discount of 15% is appropriate for that purpose.

(o) Matilda Biggera Waters

[108] The plaintiff's claim in respect of this customer, is that it lost this customer on 14 December 1998 as a result of an approach to a representative of Matilda who was responsible for group deals, and an offer to supply ice at $0.80 per 5 kg bag and $0.70 per 3 kg bag. At the date the customer was lost, the plaintiff was supplying ice at $0.90 per 5 kg bag, which was the price listed on the stolen customer list. The stolen price list also showed $1.00 per 5 kg block.

[109] The defendants' case is that the plaintiff failed to prove its case in relation to this customer, since there was no evidence of any approach by the defendants to this

customer. However, the plaintiff pointed to a meeting on 28 August 1998, between Mr Eckersley and the owner of Matilda Mango Hill and an additional representative from Matilda, who was responsible for organising group deals. There is evidence that Mr Eckersley provided a quotation, which was to be put to the group at the next franchise meeting. The delay between the quotation and the loss of the customer is accounted for in Mr Eckersley's sales reports, which record delays in discussions amongst the group.

[110] I accept the plaintiff's submissions that the misuse of the price list resulted in the loss of the customer and allow the claim subject to the matter of discounting mentioned in paragraph [193].

B. Reduced Price Customers Schedule

(a) Burmac Group of Hotels

[111] The plaintiff's claim in relation to the Burmac Group comprises five hotels including Kelly's Bar, Rosalie Cellars, O'Malley's, Tree Tops and the Stafford Tavern. The plaintiff claims that it was forced to reduce its prices for hotels within this group as a result of an approach by Mr Winduss to Mr McLeod, the principal of the Burmac Hotels Group, in August 1997 offering to supply ice at less than $1.20 per 5 kg bag. The plaintiff claims that it was forced to further reduce its price as a result of a subsequent approach by the second defendant in June 1998 offering to supply ice at $1.40 per 10 kg bag, $0.80 per 5 kg bag and $0.70 per 3 kg bag.

[112] In relation to Kelly's Bar, the plaintiff claims that it was initially required to reduce its price from $1.20 per 5 kg bag to $0.85 on 24 November 1997 and to further reduce its price from $0.85 to $0.75 pr 5 kg bag on 3 August 1998. In relation to O'Malley's, the plaintiff claims that it was required to reduce its price from $1.50 per 10 kg bag to $1.40 per 10 kg bag on 20 April 1998 and to provide a further price reduction from $1.40 per 10 kg bag to $1.30 per 10 kg bag on 31 July 1998. Following this reduction, the plaintiff was able to increase its price to $1.35 on 1 July 1999 and again to $1.45 on 30 March 2000. In relation to Rosalie Cellars, the plaintiff claims that it was forced to reduce its price from $1.20 per 5 kg bag to an ultimate price of $0.75 on 15 January 1999. The plaintiff was able to increase its price to $0.90 on 19 October 1999, $0.95 on 2 March 2000 and $1.10 on 27 October 2000.[27]

[113] In relation to the initial price change in November 1997, Mr Winduss gave evidence that he had visited the Stafford Tavern, but found out that it had closed and had been bought by the Kelly Hotel. Mr Winduss' diary entry for 14 October 1997 indicated he had called into the Stafford Tavern and noted Colin McLeod as the owner of Kelly's. Mr Mee gave evidence that he met with Mr McLeod in about mid-August 1997 to discuss the possibility of the plaintiff reducing its price because of an approach to the group made by the defendants. Mr Webb, who was employed by the plaintiff as a sales representative at the relevant time, also gave evidence of a meeting with Mr McLeod in about September 1997, when Mr McLeod indicated he

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[27] Mr Van Homrigh's Schedule of Reduced Price Customers (Exhibit 2B) indicates that the plaintiff claims that it reduced its price from $1.20 per 5 kg bag to $0.75 per 5 kg bag on 15 January 1999. However, the plaintiff's schedule provided with its written submissions and the Debtor Sales History show the price went from $1.20 to $1.10 on 6 September 1997, then to $1.00 on 27 September 1997 and then to $0.75 on 12 January 1999. The claim requires adjustment accordingly.

had received an approach from the defendants offering to supply ice at lower prices. Mr Webb then submitted a revised quotation of 17 September 1997, offering to supply ice to Burmac Hotels & Bars at $0.85 per 5 kg bag and $1.50 per 10 kg bag, and to detached bottle shops at $1.00 per 5 kg bag, which was successful.

[114] In relation to the further price change in August 1998, Mr Eckersley's evidence was that he approached the Burmac Hotels Group and submitted a written quotation dated 17 June 1998 to Mr McLeod offering to supply ice to Burmac Hotels at $1.40 per 10 kg bag, $0.80 per 5 kg bag and $0.70 per 3 kg bag.

[115] The defendants' case was that Kelly's Bar and O'Malley's did not appear on the stolen price list and that although Tree Tops was on the list, the price stated for it was for 3.5 kg bags, a product the defendants did not supply. Therefore, it was said that the price list was largely unhelpful to the defendants in setting a quotation to the group. In addition, it was argued that the usefulness of the price list also diminished with the effluxion of time. Although it was initially submitted that Rosalie Cellars was not on the stolen price list, counsel for the defendants conceded that it appeared as "Liquor Locker Rosalie". The plaintiff's case is respect of that customer was that the price for that customer was therefore on the stolen list and one would readily infer that the price on the stolen list was a group price, as Mr McLeod represented the group.

[116] On the basis of the evidence concerning the group, I accept the plaintiff's submissions that there was a causal link between the misuse of the price list and the loss of the customer. I allow the claim subject to the matter of discounting mentioned in paragraph [193].

(b) Night Owl Convenience Stores

[117] In addition to the plaintiff's claim, which has already been dealt with, that as a result of the defendants' quotation to the Night Owl group, some Night Owl stores were lost, a claim is made in respect of the Night Owl stores at Aspley and the City on the basis that their custom was retained by the plaintiff, but at reduced prices.

[118] In relation to the Night Owl Aspley, the plaintiff claims that it was forced to reduce its price from $1.00 per 5 kg bag to $0.95 on 14 October 1997 and to further reduce its price to $0.85 on 14 October 1998. The plaintiff's records show that it was able to increase its price back to $0.90 on 5 October 1999, $0.95 on 13 December 2000 and $1.00 on 19 December 2000. In relation to the Night Owl City, the plaintiff claims that it was forced to reduce its price from $1.10 per 5 kg bag to $1.00 on 28 October 1997 and to further reduce its price to $0.85 on 14 October 1998. The plaintiff's records show that it was able to increase its price back to $0.90 on 10 July 1999 and $0.96 on 18 December 2000.

[119] The evidence was that Mr Winduss had submitted a written quotation to the Night Owl Head Office in October 1997, which it was submitted accounted for the initial price reductions. In respect of the second price change in October 1998, the plaintiff relied on evidence of a written quotation dated 8 May 1998 from Mr Eckersley to the Night Owl Head Office offering to supply 5 kg bags of ice at $0.95.

[120] As regards the first price reduction, counsel for the defendants relied on the submission made with respect to the lost Night Owl stores; that the price for the first quotation was set by reference to the fact that the defendants were already supplying other Night Owl stores at $1.00 per 5 kg bag and this was the real cause of the reduction in price. As regards the second reduction, the defendants' case was that there was no evidence of a contemporaneous approach by the defendants, the only quotation relied upon being one made some five months prior to the price reduction and accordingly, the Court therefore could infer from the time delay that the price reduction had occurred for other reasons.

[121] On behalf of the plaintiff, it was said that there was no evidence that Mr Winduss set the price by reference to what the first defendant was supplying other Night Owl stores. It was also said that there was no evidence that members of the Night Owl group knew what other stores were being charged and that the price varied between Night Owl stores.

[122] I am satisfied of a sufficient causal connection between the loss claimed and the misuse of the plaintiff's lists. However, it is appropriate that the claim be subject to discounting to reflect the contingency that the first defendant, having supplied some of the Night Owl stores, would have made an approach to the group, which would, in any event, have resulted in a price cut being sought. A discount of 10% is appropriate.

(c) Queensland Medical Laboratories

[123] The plaintiff's claim in respect of this customer was that it was forced to reduce its price from $1.10 per kilogram of dry ice to $1.00 per kilogram of dry ice on 1 September 1997, (although it was able to increase the price back to $1.10 on 1 November 2000). The plaintiff relies on an approach by Mr Winduss in July 1997 offering to supply ice at $0.95 per kilogram with a $10.00 delivery fee. Mr Winduss' evidence was that he provided a written quotation to this customer dated 22 July 1997, offering to supply dry ice at $0.95 per kilogram and that he thought that Mr Otway had given him a price for either Sigma or QML, both dry ice customers.

[124] The defendants' case is that Mr Winduss approached and secured this customer before the break-in, without recourse to the stolen list and that the quotation of 22 July 1997 was provided to "sure-up" the customer's business, because it had been approached by its competitor. In support of this contention as to when the customer had initially been approached, the defendants relied on the evidence of Mr Winduss given at the second defendant's committal, in which he said that he approached QML and Sigma prior to the break-in.[28] Alternatively, the defendants submitted that there was considerable time delay between Mr Winduss' quotation in July and the price reduction in September, implying other reasons for the price drop. In addition, counsel for the defendants pointed out that the reduced price was still higher than Mr Winduss' quotation of $0.95 per kilogram.

[125] The plaintiff acknowledged that Mr Winduss probably approached QML and Sigma simultaneously, as they were both dry ice customers, but contended that the documentary evidence showed the approaches were made in July 1997, following

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[28] Exhibit 3

the break-in. The first entry in Mr Winduss' diary in relation to these customers was on 21 July 1997, and the written quotation was dated 22 July 1997. I note that the committal evidence was given without reference to the documentary evidence available at this hearing. I consider that the evidence supports the plaintiff's case that the customer was approached after the break-in.

[126] I accept the plaintiff's submissions that the misuse of the price list resulted in the loss of the customer and allow the claim subject to the matter of discounting mention in paragraph [193].

(d) Vision International

[127] The plaintiff's claim for this customer is that it was forced to reduce its price from $0.90 to $0.75 on 8 April 1998, as a result of approaches by Mr Winduss in September 1997 and Mr Eckersley in March 1998. The plaintiff was able to return its price to $0.90 on 3 March 1999.

[128] It their responses to the plaintiff's schedules dated May 2001, the defendants denied that Mr Winduss made an approach in 1997, but admitted the second approach. The defendants did not make any further challenge to this claim at trial. The plaintiff submitted that the admitted approach in March 1998 caused the price change in April 1998, and that it was unnecessary to have regard to the earlier alleged approach. The documentary evidence at trial confirms that Eckersley had provided a written quotation in March 1998.

[129] I allow this claim, subject to the matter of discounting mentioned in paragraph [193].

(e) BP Kenmore Plaza

[130] The plaintiff initially claimed that it reduced its price for this customer on 26 October 1998 from $0.90 per 5 kg bag to $0.75, but did not pursue the claim, as it transpired that that reduction was the result of the customer's involvement in a promotion. After the promotion ended on 23 November 1998, the plaintiff was only able to increase the price to $0.82. The plaintiff was able to increase its price to $0.90 on 13 August 1999. Tony Mee gave evidence that this price was the result of efforts to maintain the customer, as a result of approaches by the defendants.

[131] Mr Eckersley's sales reports show he approached Mr Darroch, the manager of BP Toowong, Kenmore and the Gap, in March 1998. Following an initial cold call, a meeting was held with Mr Darroch in which Mr Eckersley gave a quotation for the supply of ice at $0.65 per 3 kg bag and $0.72 per 5 kg bag. This was recorded in Mr Eckersley's sales reports for the week ending 13 March 1998. In addition, Mr Eckersley provided a written quotation dated 10 September 1998 to Mr Montgomery, the General Category Manager of BP Australia Limited, offering to supply ice to company-owned sites at $0.70 per 3 kg bag, $0.80 per 5 kg bag and block for twelve months. Tony Mee gave evidence that he met with representatives of BP Australia, including Mr Montgomery, who said they had been approached by the defendants.

[132] The defendants' case is that the reduction in price was not caused by them. Counsel for the defendants submitted that there was a substantial time difference between the

initial quotation in March 1998 and the price reduction in October 1998 and that the quotation in March 1998 was for a lower price than that quoted in September 1998 yet was unsuccessful. It was therefore submitted that factors other than price caused the price reduction.

[133] The plaintiff submitted that the relevant quotation was the September 1998 quotation, as the BP Kenmore Plaza by had then become a BP-owned site. In March 1998, the owner had been independent of BP. Counsel for the plaintiff submitted that the effective approach was the one to head office in September, at which time this customer was a company site.

[134] I accept the plaintiff's submissions that the misuse of the price list resulted in the loss of the customer and allow the claim, subject to the matter of discounting mentioned in paragraph [193].

(f) BP Runcorn & BP Yeronga

[135] In relation to BP Yeronga, the plaintiff claimed that it was forced to reduce its price from $1.05, the price on the stolen list, to $0.85 on 9 March 1998, and to further reduce its price on 17 January 1999 to $0.82. The plaintiff increased its price in March 2000 to $0.86.

[136] In relation to BP Runcorn, the plaintiff claimed that it was forced to reduce its price for this customer on 7 May 1998 from $0.90 per 5 kg bag to $0.85 per 5 kg bag and to further reduce it on 18 February 1999 to $0.82. The plaintiff increased its price in March 2000 to $0.86. The basis of the claim in respect of this customer was not that this customer was on the stolen price list, since it was acquired on 24 December 1997, after the theft, but that it had the same owner as BP Yeronga, which was on the stolen list.

[137] The evidence showed that Mr Eckersley provided a written quotation dated 14 April 1998 to Mr Singh, the owner of BP Runcorn and BP Yeronga, offering to supply ice to BP service stations at $0.80 per 5 kg bag of ice and $0.74 per 3 kg bag of ice, the appendix to the letter specifying the size of the cabinet to be supplied to these two BP outlets. Mr Singh informed Mr Mee that he had been approached by the defendants and that, in order for the plaintiff to maintain his custom, it had to reduce its prices. Mr Mee's evidence was that he spoke to Mr Singh about price reductions on more than one occasion, and this accounts for the two separate price reductions.

[138] The defendants' case in respect of BP Yeronga is that Mr Eckersley's quotation of April 1998 could not have caused the price reduction in March 1998, because it predated it. In relation to BP Yeronga, the debtor's history shows that the price reduction from $1.05 to $0.85 per 5 kg bag was preceded by three free deliveries from 13 February 1998 to 3 March 1998, the first price reduction to $0.85 per 5 kg bag being on 9 March 1998. Whilst the free deliveries are of no consequence, the reduction on 9 March 1998 to $0.85 per 5 kg bag cannot be attributed to the first defendant's conduct, given that the reduction preceded Mr Eckersley's quotation of April 1998. Nor is there any evidence as to the substance of the second approach alluded to by Mr Mee. Accordingly, I am not persuaded that the second reduction can be attributed to any conduct of the defendants concerning its misuse of confidential information.

[139] In relation to BP Runcorn, given that the owner was, since 9 March 1998, enjoying a price reduction to $0.85 per 5 kg bag at his Yeronga outlet, it is not surprising that on the termination of the free deliveries to BP Runcorn from 8 March 1998 to 13 April 1998, the same price was charged for the Runcorn outlet. I am not satisfied that the plaintiff has sufficiently shown a causal link in respect of this reduction. Nor am I persuaded, as with the BP Yeronga claim, that the second reduction is attributable to any conduct of the defendants concerning its misuse of confidential information.

[140] In the circumstances, I am not satisfied that the plaintiff has shown the requisite causal connection in respect of any claim for either customer and I disallow the claim.

(g) Hi-Tech Fuels Manly & Wynnum

[141] In relation to this customer, the defendants in their responses to the plaintiff's schedules dated May 2001 disputed an approach, which is no longer in the plaintiff's current schedule. The dispute was not pressed at trial. No challenge was made in respect of this claim. I allow the claim, subject to the matter of discounting mentioned in paragraph [193].

(h) Dayboro Crown Hotel & Village Bottle Shop

[142] In relation to the Dayboro Crown Hotel, the plaintiff initially claimed compensation for a price reduction on 15 September 1997 of $0.35 from $1.20 per 5 kg bag (the price shown on the stolen price list for this customer) to $0.85. Likewise, it was claimed by the plaintiff that in respect of the Village Bottle Shop, an off licence of the hotel, it was forced to reduce its price on 19 September 1997 from $1.10 per 5 kg bag (the price on the stolen list) to $0.85 per 5 kg bag. However, the plaintiff did not adduce evidence to support either of the price reductions being in any way connected to the defendants and counsel for the plaintiff indicated during submissions that those claims were no longer pursued.

[143] The plaintiff maintained its claim in relation to the second price reductions. In relation to the Dayboro Crown Hotel, the plaintiff claimed on 6 August 1998 it was forced to reduce its price from $0.85 to $0.78, as a result of an approach in July 1998 by Mr Eckersley to the manager of the Dayboro Crown Hotel. Subsequently, the price returned to $0.85 on 19 July 1999, and was further raised to $0.90 on 2 March 2000 and to $1.00 on 12 March 2002. In relation to the Village Bottle Shop, the plaintiff claimed it was also forced to reduce its price on 30 July 1998 from $0.85 to $0.78 as a result of Mr Eckersley approach in July 1998.

[144] The evidence indicated that Mr Eckersley provided a written quotation dated 1 July 1998 to the manager of the Dayboro Crown Hotel offering to supply ice at $0.78 per 5 kg bag of ice and $0.70 per 3 kg bag of ice. Mr Heinrich gave evidence that after the hotel manager of the Dayboro Crown Hotel mentioned an approach by the defendants, who had offered a lower price, a reduced pricing structure was agreed upon.

[145] The defendants argued that the causal link between the defendants' quotation and the plaintiff's loss was not established, given these customers were the subject of substantial, independent price reductions approximately eight months earlier. In

any case, it was said that since there was a substantial reduction from the prices on the stolen list by the time Mr Eckersley gave his quotation, any use of that list could have very little effect. Counsel for the plaintiff argued against any inference being drawn as to a likelihood of a price reduction based on the September 1997 reductions.

[146] I find that the plaintiff has established a sufficient causal link between the defendants' conduct and the second price reduction. However, I only allow the claim for loss due to the second price reduction to an upper limit of $0.85 per 5 kg bag, being the price at which that the plaintiff had itself agreed to supply the customers. I therefore disallow any claim for Dayboro Crown Hotel after the price had returned to $0.85 per 5 kg bag on 19 July 1999. In respect of the Village Bottle Shop, I disallow any claim after the price returned to $0.85 per 5 kg bag.

(i) National / Liberty Service Stations

[147] The plaintiff's claims losses in respect of price reductions to members of the National and Liberty Service group of service stations, which it claims were made as a result of approaches by Mr Winduss. Nine of these service stations are subject to challenges by the defendants.

[148] The plaintiff's claim in relation to the National service stations at Acacia Ridge, Browns Plains, Slacks Creek, Springwood and Tingalpa, was that the plaintiff was forced to reduce its price from $0.90 per 5 kg bag to $0.80 in August 1997, as a result of an approach by Mr Winduss in July 1997. The plaintiff also claims that as a result of that approach, it was forced to reduce its price in July 1997 to the Liberty service stations at Virginia and East Brisbane from $0.90 to $0.80. Similarly, it also claims that, as a result of that approach, it reduced its price to the Liberty at Aspley on 11 August 1997 from $0.90 to $0.80. In relation to the Liberty service station at Underwood, the plaintiff claims it was forced to reduce its price on 31 March 1998 from $0.90 to $0.80, as a result of approach by Mr Winduss in 1997 and Mr Eckersley in March 1998.

[149] Evidence was given by Mr Winduss that he phoned Mr Uri Avarell, who appears to have had influence or control over several National service stations, on 16 July 1997. He recalled that Uri's name was given to him by Mr Otway. Mr Winduss recalled speaking to Uri, but not actually giving him a quotation. This is to be contrasted with Mr Winduss evidence at the second defendant's committal, where he said he had nothing to do with National service stations and never approached them, which the defendants sought to rely on.[29]

[150] Tony Mee's evidence was that he had dealings with Uri and Arvi Avarell, (Uri Avarell's son-in-law, who managed the National Liberty at Aspley), in relation to a number of National Liberty Sites. Mr Mee gave evidence that he was contacted by Uri Avarell, who said he had been approached and offered a better price than that which the plaintiff was supplying the group of sites. As a result, Mr Mee reduced the plaintiff's price. It appears that at that stage the service station at Underwood was not part of the group, although it subsequently became so. I accept Mr Mee's evidence.

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[29] Exhibit 31

[151] The defendants' case was that while Mr Winduss spoke to Mr Uri Avarell, he never provided a quotation for the supply of ice. Accordingly, the defendants' conduct did not cause any reduction in price for this customer. Counsel for the defendants submitted that the portion of the plaintiff's claim relying on an approach by Mr Winduss in 1997 should be excised. In relation to National Liberty Underwood, the defendants contended that this customer was not on the stolen price list and was only acquired by the plaintiff in December 1997. The Debtor Sales Histories for that customer reveal only two deliveries prior to the price reduction in March 1998.

[152] I consider the evidence supports the plaintiff's submissions that the misuse of the price list resulted in the loss of these customers. I allow the claim subject to the matter of discounting mentioned in paragraph [193].

(j) Shell Caloundra

[153] The plaintiff's claim in relation to this customer is that it was forced to reduce its price for this customer from $1.00 per 5 kg bag to $0.90 on 17 September 1997. The plaintiff claims it was further forced to reduce its price to $0.80 on 11 September 1998, as a result of approaches by Mr Eckersley.

[154] In their responses dated May 2001, the defendants claimed that the customer disclosed to Mr Eckersley the price it was paying to the plaintiff, being $0.80 per 5 kg bag and this was recorded in Mr Eckersley's sales report of 31 July 1998. This was not pressed at trial. I allow the claim, subject to the discounting referred to in paragraph [193].

(k) Mobil Kedron

[155] The plaintiff's claim in respect of this customer was that it reduced its price for this customer from $0.95 per 5 kg bag to $0.90 on 9 August 1997, as a result of an approached by Winduss in August 1997. The plaintiff was able to increase the price to $0.90 on 8 March 1999.

[156] Mr Winduss' evidence was that on 27 August 1997 he visited Mobil Kedron and after phoning the second defendant to find out at what price the plaintiff was supplying this customer, left a business card with a price lower than the plaintiff's. However, the plaintiff did not seek to make a claim for this first price reduction. The plaintiff did make a claim for a further reduction in its price to $0.86 on 20 July 1998, as a result of a written quotation from Mr Eckersley offering to supply ice at $0.70 per 3 kg bag, $0.78 per 5 kg bag and $0.80 per 5 kg block of ice. Whilst the defendants disputed having caused the first price reduction in 1997, counsel conceded causation in respect of the second reduction.

[157] I accept the plaintiff's submissions that the misuse of the price list resulted in the loss of the customer and allow the claim, subject to the matter of discounting mentioned in paragraph [193].

(l) Mobil Service Stations ("Ritchings Group")

[158] The plaintiff claimed it was forced to reduce its price for four Mobil Service Stations at Ashgrove, Keperra, Newmarket and Stafford, which formed part of a group franchised by Mr Ritchings (the "Ritchings Group").

[159] In relation to the Mobil service station at Ashgrove, the plaintiff claims it was forced to reduce its price from $0.90 per 5 kg bag to $0.86 on 21 July 1998. The plaintiff was able to increase its price back up to $0.90 on 5 March 1999. The price on the stolen list was $1.00 per 5 kg bag. In relation to the Mobil service station at Keperra, the plaintiff claims it was forced to reduce its price from $0.90 per 5 kg bag to $0.86 on 22 July 1998. The plaintiff was able to increase its price back up to $0.90 on 1 March 1999. The price on the stolen list was $1.05 per 5 kg bag. The plaintiff claimed that these price reductions resulted from a written quotation from Mr Eckersley to Ms Frost, the Field Retailer for Mobil Oil Australia Limited, dated 1 May 1998.

[160] In relation to the Mobil service station at Newmarket, the plaintiff claims it was forced to reduce its price from $0.95 per 5 kg bag to $0.90 on 14 August 1997 and to further reduce the price to $0.86 on 23 July 1998. The plaintiff was able to increase its price to $0.90 on 3 March 1999 and subsequently back to $0.95 on 1 March 2000. The price on the stolen list was $1.00 per 5 kg bag. In relation to the Mobil service station at Stafford, the plaintiff claims it was forced to reduce its price from $0.95 per 5 kg bag to $0.90 on 14 August 1997 and to further reduce the price to $0.86 on 23 July 1998. The plaintiff increased its price to $0.95 on 13 March 2000. The price on the stolen list was $1.00 per 5 kg bag.

[161] The defendants did not challenge that the price reductions in 1998 for all four service stations occurred as a result of Mr Eckersley's written quotation on 1 May 1998 to Ms Frost, the Field Retailer for Mobil Oil Australia Limited. That quotation offered to supply ice to Mobil service stations, including the Ritchings Group, at $0.75 per 3 kg bag, $0.83 per 5 kg bag and $0.85 per 5 kg block. Mr Heinrich also gave evidence that, at a meeting with Ms Frost in July 1998, she showed him the quotation she had received from the defendants and told him he had to meet or better that price. He gave evidence that he gave Ms Frost a written proposal on 19 June 1998. Mr Heinrich gave evidence that the plaintiff reduced its price to $0.86 per 5 kg bag for all Mobil franchisees as a result of the approach by the defendants.

[162] In relation to the first price reductions for Mobil Newmarket and Mobil Stafford in August 1997, the plaintiff's case is that these resulted from Mr Winduss' approach to Mobil Kedron, which was part of the Ritchings Group, which is dealt with above. The defendants relied on the evidence of Ms Purbrick, the then manager of Mobil Kedron, that she had never been approached by the defendants. Ms Purbrick had also given a police statement to this effect, which was tendered.[30] Counsel for the defendants therefore submitted that the initial price reduction had no connection to any activity of the defendants.

[163] I am not satisfied that the evidence establishes a sufficient case in respect of the 1997 reductions. I am however satisfied as to the second price reductions and allow them, subject to the matter of discounting mentioned in paragraph [193].

(m) Bribie Island Hotel

[164] The plaintiff claims that it was forced on 14 April 1998, as a result of an approach by the second defendant, to reduce its price for this customer from $1.00 per 5 kg

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30 Exhibit 35

bag (which was the price on the stolen list) to $0.80. The plaintiff claims it was forced to further reduce the price to $0.75 on 20 May 1998. Subsequently, the plaintiff was able to increase the price to $0.85 on 3 September 2001 and then $0.90 on 30 March 2002.

[165] The second defendant gave evidence that the Bribie Island Hotel was a member of the Tasqua Group, which also included the Deception Bay Hotel. The second defendant's evidence was that the manager of the Deception Bay Hotel, who was then a customer of the first defendant, contacted him, saying the Deception Bay Hotel was changing suppliers, because of a lower price of $0.74 per 5 kg bag offered by the plaintiff. The second defendant met with the manager and after offering to match the price, successfully retained the customer. The second defendant also gave evidence that in around March or April 1998 he met with Mr McCabe, the general manager of the Bribie Island Hotel, who gave him a list of hotels within the Tasqua Group and showed him a list of suppliers' information for those hotels. The second defendant's evidence was that Mr McCabe told him he was paying $1.00 per bag. The second defendant later responded with a quotation dated 27 April 1998 to supply ice for one year at $0.70 per 5 kg bag and $0.65 per 3 kg bag. His evidence was that this figure was lower than the quotation to the Deception Bay Hotel, and that he would normally quote a lower price for a group of hotels, as they usually wanted a better deal. I accept that evidence.

[166] The defendants raised two arguments with respect to this customer. Firstly, it was submitted that Mr McCabe disclosed the price he was then paying to the plaintiff, lifting the cloak of confidence. Secondly, it was submitted that, in order to be effective, the second defendant's quotation to the Tasqua Group had to be set by reference to the quotation already given to the Deception Bay Hotel. Counsel for the defendants also submitted that the Tasqua Group would have known of the price offered by the plaintiff to the Deception Bay Hotel and would have sought a similar price reduction, irrespective of the defendants' approach.

[167] The plaintiff submitted that the defendants' case ignored the fact of the deemed admissions, that is, the second defendant was armed with the stolen list and able to check the price being paid by the Bribie Island Hotel. It was also said that there was no evidence of any communication about prices between the hotels within the group. Counsel for the plaintiff submitted that there might have been a price disparity between members of the group prior to any approach by the plaintiff.

[168] I am satisfied that the plaintiff has shown a sufficient causal connection in respect of the claim. However, it is appropriate to discount the claim to reflect the contingency that this customer would have been approached in any event and offered a similar price as that offered in the quotation, given the circumstances of the case. Accordingly, the claim should be discounted by 15%.

(n) Ampol Waterford West

[169] The plaintiff claims that it was forced to reduce its price for this customer from $1.00 per 5 kg bag to $0.95 per 5 kg bag on 29 September 1997 and subsequently to $0.90 on 26 May 1998. The price returned to $0.95 on 11 March 1999 and then $1.00 on 7 March 2000.

[170] The defendants conceded having caused the first price reduction in 1997. Tony Mee gave evidence that the operator of the site told him they had been approached by the defendants and that the plaintiff would have to reduce its price. Although this evidence was not challenged, counsel for the defendants submitted the Court could infer that the customer was just trying to secure a price reduction.

[171] However, in relation to the second reduction on 26 May 1998, the defendants submitted that there was no conduct of the defendants which could have caused this price reduction. The plaintiff submitted that the cause of the price reduction in May 1998 was that Ampol Waterford West had become a company site and had to fall in with the other Ampol company sites. The plaintiff's case, which was not challenged, was that it was forced to reduce its price for Ampol company sites from $1.00 per 5 kg bag to $0.90, as a result of a written quotation from the second defendant to Mr Bertogna, the category manager for Australian Petroleum Pty Ltd, offering to supply Ampol company sites at $0.87 per 5 kg for one year and then $0.92 for the following two years. Accordingly, it was said that when this customer became a company site in May 1998, it also had to have its price reduced to $0.90 per 5 kg bag.

[172] I accept the plaintiff's submissions that the misuse of the price list resulted in the loss of the customer and allow the claim, subject to the matter of discounting mentioned in paragraph [193].

(o) Jacobs Well Bait & Tackle

[173] The plaintiff claims that it was forced to reduce its price for this customer from $1.10 per 5 kg bag to $1.00 on 6 October 1998, as a result of an approach by Mr Eckersley in September 1998, in which a quotation was given to supply ice at $0.80 per 3 kg bag and $0.90 per 5 kg bag.

[174] The defendants did not present evidence to establish a positive case in relation to this customer. However, in their response to the plaintiff's schedules of 21 May 2002, the defendants admitted the approach, but alleged that the price reduction was a result of this customer having run out of block ice in the previous Christmas period. The plaintiff, by its counsel, admitted that the customer did run out of block ice in the previous Christmas period and that the defendants' representative was told this in his approach in September 1998. Accordingly, to the extent that those facts are relevant to the positive case relied on by the defendants, they were admitted by the plaintiff.

[175] I accept the plaintiff's submissions that the misuse of the price list resulted in the loss of the customer and allow the claim subject to the matter of discounting mentioned in paragraph [193].

(p) Kwicksnax & Tru Blu Snax

[176] The plaintiff's claims in relation to price reductions for these customers are dealt with above, alongside the claims for the loss of these customers.

(q) Ampol Bald Hills & Brackenridge

[177] In relation to Ampol Bald Hills, the plaintiff claims it was forced to reduce its price for this customer from $1.15 to $0.90 per 5 kg bag on 2 February 1999, as a result

of an approach by Ms Cunningham offering to supply ice at $0.80 per 5 kg bag. The price on the stolen list was $1.15 per 5 kg bag. The plaintiff was able to increase its price to $0.95 on 8 November 1999; however, the price was again reduced to $0.90 on 29 March 2000.

[178] In relation to Ampol Brackenridge, the plaintiff claims it was forced to reduce its price for this customer from $1.00 to $0.95 per 5 kg bag on 13 August 1997, as a result of an approach by Ms Cunningham offering to supply ice at $0.80 per 5 kg bag. The price on the stolen list was $1.00 per 5 kg bag. The price was subsequently reduced to $0.90 on 14 December 1997, but was increased to $0.95 on 19 January 1998. The price was again reduced to $0.90 on 22 February 2000, but it also increased to $0.95 on 27 March 2002.

[179] In their responses of 21 May 2002 to the plaintiff's schedules, the defendants did not dispute the particulars of the approach, but alleged that both customers had initiated the approach, as they had been disgruntled with the plaintiff. The defendants did not require the customers to give evidence. It is significant that the defendants presented no evidence in relation to these customers.

[180] I allow this claim (subject to the matter of discounting mentioned in paragraph [193]) being satisfied as to the issue of causation.

(r) BP Stewarts Road

[181] The plaintiff's claim in respect of this customer is that it was forced to reduce its price for this customer from $0.90 per 5 kg bag to $0.75 on 23 October 1998. The plaintiff was able to increase its price to $0.82 on 18 November 1998 and then back to $0.90 on 2 August 1999. The plaintiff relied on approaches by Mr Eckersley in July and September 1998, which are evidenced by written quotations.

[182] In their responses dated May 2001 to the plaintiff's schedules, the defendants disputed an earlier approach in 1997, which is no longer claimed by the plaintiff's current schedules. I am satisfied of the causal link claimed by the plaintiff and allow this claim, subject to the matter of discounting mentioned in paragraph [193].

9. QUANTIFICATION OF THE PLAINTIFF'S CLAIM

(a) The Methodology for Quantification

[183] At the basis of Mr Van Homrigh's report quantifying the plaintiff's loss were two schedules of losses prepared by Mr Chris Newman of Newman's Accountants, the plaintiff's external accountant since 1995. The two schedules of losses were compiled from the plaintiff's accounting data, in particular, the Debtor Sales Histories, which record the plaintiff's trading history for each client, including the date, price and quantity of ice supplied by the plaintiff. In his report, Mr Van Homrigh allowed for the fact that the ice industry is seasonal with sales peaking in summer and declining in winter. For this purpose, Mr Newman looked at previous sales histories to determine the highest and lowest sales by month and allocated a percentage of annual turnover which was attributable to each month. These percentages were used by Mr Van Homrigh to reflect the seasonality.

[184] In relation to lost customers, Mr Van Homrigh's approach was to calculate an estimated annual turnover for each customer. This amount was based on the

customer's past sales history and the average seasonality of the ice industry. This annualised amount was then applied to each financial year for which the customer was lost to achieve a total loss of turnover for that customer. To calculate the net profit lost, the figure of 64% profit as a percentage of sales was applied to the lost turnover. This reflected average costs of sales of 36%, which would have been incurred had the plaintiff maintained the customers. In respect of the loss relating to price reductions, the calculation for each customer involved multiplying the amount of the reduction by the estimated number of units sold at that price for each financial year. This provided a total loss of profit for that customer. Mr Van Homrigh also took into account any subsequent reductions or increases in price.

[185] The plaintiff submitted that its approach to the calculation of loss has been conservative, in that, it was likely to incur loss beyond 30 June 2002 which was not claimed and there would have been price increases for some lost customers, which were not taken into account in the plaintiff's quantification.

[186] The defendants challenged the methodology for quantifying the plaintiff's loss on the basis of the assessment of variable costs and the failure to consider the issue of rebates. (The defendants also made submissions as to discounting which are addressed below).

[187] I do not consider that any deficiency has been demonstrated in the assessment of variable costs. Mr Van Homrigh's evidence was that the lost sales represented a very small proportion of the plaintiff's total sales, for example, only two per cent in the 1998/1999 financial year. Of course the issue does not arise in relation to reduced price customers, as costs did not vary with price.

[188] As regards the issue of rebates, the defendants submitted that the claim was overstated in that it failed, as did the Debtor's Sales Histories, to take into account the matter of rebates. The defendants relied on evidence from Mr Tony Mee that the plaintiff supplied rebates when specifically asked to by customers and that they were in the order of 2½ % to 10% of invoice value. Mr Heinrich's evidence was that rebates varied from between 1 cent to 11 cents per bag. It was therefore said that the stolen price list did not accurately reflect the true net price payable to the plaintiff by any one or group of customers, resulting in an overstatement of the plaintiff's loss. It was submitted that the plaintiff's final claim should be reduced to reflect the rebates and that because the quantum of those rebates could not be identified, an across the board discount of between 5% and 10% should be made on the plaintiff's final claim. However, Mr Newman's evidence was that the rebates were not material enough for him to have noticed them, other than in the case of one customer, being Coles, which was neither a lost nor reduced customer and, accordingly, the matter of rebates did not feature in the quantification of the claim. I do not consider that any error has been demonstrated in the methodology for quantification of loss based on the failure to account for rebates since the rebates were not of such a magnitude that they ought to have been reflected in the quantification of the plaintiff's loss.

(b) Discounting for Contingencies

[189] The plaintiff's counsel submitted that, in considering the issue of whether there should be any discounting for contingencies, it should be borne in mind that, as the claim is for past losses, some matters are no longer of concern, since they have

already been factored into the claim; for example, whether a customer might be regained or cease to operate. However, the defendants submitted that the claim was overstated because it failed to take into account the fact that the market was subject to a downward pressure on prices during the period from 1996 onwards, such that even if the plaintiff had retained a customer, it may have had to reduce its prices over the years. It was submitted that the schedule of reduced priced customers indicates a reduction range of between 5% and 20% and that the plaintiff's overall final claim should be reduced accordingly. It was also submitted that the plaintiff's claim failed to take into account the fact of fierce competition in the industry resulting in a price war, upon the termination of the price-fixing agreement in 1996 and its effect on the plaintiff given its market share.

[190] The evidence indicated that, at that time in question, the first defendant and the plaintiff were the major ice suppliers in Brisbane, with Arctic Ice being a smaller competitor. Tony Mee's evidence was that the plaintiff's current market share was approximately 75%, the first defendant's was 15%-20%, and the remaining 5% to 10% comprised an additional three competitors. This coincided with the second defendant's evidence that the first defendant had approximately 15% of the market share in the Brisbane, south coast and north coast areas, with the remaining 80% held by the plaintiff and another 5% by other minor ice works. The second defendant's evidence was that in 1997, the plaintiff had some 55% to 65% of the market, while the first defendant had 30%.

[191] The second defendant and Tony Mee gave evidence of a price-fixing arrangement in the Brisbane ice industry, which began in 1993 and ended in early to mid-1996, as a result of which competitors did not quote below agreed prices for certain products with the consequence that there appears to have been no competition during that period. However, prior to the price-fixing arrangement in 1993, there had been a price war, which re-emerged on the termination of the price-fixing arrangement. The second defendant described the competition in the industry since 1997 as very fierce. His evidence, based on the experience of the first defendant, was that the fierce competition had driven prices down. The second defendant gave evidence that up until December 1997, he had to reduce his price for 30-40 customers by between 2 cents and 20 cents, that is, 12% of customers received a price reduction of 2% to 25%. Mr Mee referred to the parties "aggressively canvassing [customers] at prices lower than what both companies are currently offering" and conceded that in a price war that it was inevitable that the parties would approach each other's customers. He gave evidence that, since mid-1997, the plaintiff had acquired possibly 76 customers from the first defendant, although the second defendant put the figure at between 30-40 customers. Mr Mee said that the impact of the price war on the plaintiff's customers had varied from customer to customer, with the plaintiff being unable to raise its prices in some cases and in other cases reducing its prices. Mr Winduss gave evidence as to the position on the north coast. While at Suncoast Ice, he had approached 60%-70% of the customers of Suncoast's main competitor on the Sunshine Coast and that competitor had also acquired some of Suncoast's clients. Mr Winduss had also obtained clients from the first defendant for Suncoast. When Mr Winduss had worked for the plaintiff, he had acquired some customers from the first defendant.

[192] In his first report based on earlier schedules, Mr Van Homrigh stated that, on an annual basis, the loss of sales for 1998 and 1999 represented about 7% of total sales. In his later report, this figure was reduced, *inter alia*, because of the exclusion of

some customers from the claim, the recalculation of the estimate of lost sales being reduced to about only 2% of total sales for 1999. There were a number of customers which were initially claimed as lost or price reduced customers, but for which a claim was not ultimately pursued. Whilst it is not clear in all cases why the claim was not pursued, in some it was apparent that the customer was lost or had its price reduced quite independently of any conduct of the first defendant and consistently with the highly competitive nature of the market, as attested to by witnesses for both parties. It should be borne in mind, however, that the plaintiff did not fare too badly as a result of the competition and that it appears (as indeed was mentioned in the submissions of the defendants' counsel) to have acquired more business from the first defendant than vice versa.

[193] In the circumstances, I consider that it is appropriate that there be some discounting to reflect the nature of the market and the contingency that the plaintiff would in any event have been required to reduce its prices and would have lost customers. I do not consider that it is appropriate that the discount be substantial. It should not extend over the whole of the claim, nor should the discount extend to those customers, in respect of which I have already determined that a discount should be made. Accordingly, 10% of the total claim should be reduced by 5%, after excluding from the total claim those customers, in respect of which I have made a specific finding that the claim should be discounted.

(c) Interest

[194] The defendants conceded that because this case involved the misuse of confidential information, the appropriate interest rate would be the mercantile interest rate. However, it was submitted that the appropriate rate was the secured overdraft lending rate for the particular period of the plaintiff's claim, rather than the default interest rate under the *Supreme Court Act* 1995 (Qld), which it was said was too high, as the period of the plaintiff's claim contained fairly low commercial interest rates.

[195] Counsel for the plaintiff, relying on *Alemite Lubrequip Pty Ltd & Ors v Adams & Ors (t/a Price Waterhouse)*[31] submitted that, in the absence of evidence as to the mercantile rate during the period in question, the appropriate interest rates were those under the *Supreme Court Act* 1995 (Qld), which were the rates used by Mr Van Homrigh in his report. I accept that submission.

10. CONCLUSION

[196] The plaintiff is entitled to an award for equitable damages in accordance with the findings I have made above. I will hear further submissions as to the calculation of those damages and the formal orders to be made.

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[31] (1996) 41 NSWLR 45