Dundee Beach Pty Ltd v Maher [2006] NTSC 96

PARTIES:	DUNDEE BEACH PTY LTD (ACN 009 631 136) v PAUL GERARD MAHER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING CIVIL JURISDICTION
FILE NO:	No 119 of 2006 (20625223)
DELIVERED:	18 December 2006
REPUBLISHED:	19 December 2006
HEARING DATES:	7 December 2006
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

PRACTICE AND PROCEDURE – Jurisdiction – Inherent jurisdiction – Officers and processes of court – Restraining solicitor from acting against previous client – Solicitor a material witness - Test to be applied – Relevant considerations – Conflict between duty to the court and interests of client.

EQUITY - Equitable remedies – Injunctions - Injunctions for particular purposes - Injunction to restrain breach of fiduciary duty against solicitors - Confidential information obtained by solicitors - Conflicting duties - Risk of use of confidential information to detriment of former client's interests

Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd [2005] NSWSC 550; *Belan v Casey* [2002] NSWSC 58; *Black v Taylor* [1993] 3 NZLR 403; *Bowen v Stott* [2004] WASC 94; *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70; *Everingham v Ontario* (1992) 88 DLR (4th) 755; *Grimwade v Meagher* [1995] 1 VR 446; *Holborow v Rudder* [2002] WASC 265; *Kallinicos and Another v Hunt and Others* (2005) 64 NSWLR 561; *Law Society(NSW) v Holt* [2003] NSWSC 629; *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015; *Newman v Phillips Fox* (1999) 21 WAR 309; *PhotoCure ASA v Queen's University at Kingston* (2002) 56 IPR 86; *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222; *Williamson v Nilant* [2002] WASC 225; - applied

Boyce (Trading as Hunt & Hunt Lawyers) v Goodyear Australia Ltd (NSWCA unreported 16 September 1996); *C I & D Industries Pty Ltd v Keeling* (NSWSC unreported 26 March 1997); *Mallesons Stephen Jacques v KPMG Peat Marwick* (1991) 4 WAR 357; *Nasr v Vihervaara* (2005) 91 SASR 222 – referred to

McVeigh v Linen House Pty Ltd [1999] 3 VR 394; *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429; *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 – not followed

REPRESENTATION:

Counsel:

Plaintiff:	C R A McDonald QC
Defendant:	R Battley

Solicitors:

Plaintiff:	De Silva Hebron
Appellant:	Paul Maher

Judgment category classification:	B
Judgment ID Number:	Sou0635
Number of pages:	35

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Dundee Beach Pty Ltd v Maher [2006] NTSC 96
No. 119 of 2006

BETWEEN:

DUNDEE BEACH PTY LTD
(ACN 009 631 136)
Plaintiff

AND:

PAUL MAHER
Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 15 December 2006)

The application

[1] By a summons on originating motion filed on 4 October 2006 the plaintiff seeks to restrain the defendant, a solicitor who was previously retained by the plaintiff, from acting on behalf of Robert George Kendray against the plaintiff in Supreme Court proceeding No 111 of 2005 and to preserve the confidentiality of information given to the defendant by the plaintiff's previous directors.

[2] The plaintiff seeks the following orders:

1. The defendant is restrained from continuing to act for Mr Robert George Kendray against the plaintiff in Supreme Court proceeding No 111 of 2005.

2. The defendant is restrained from using or disclosing to any person, other than the plaintiff and its solicitors, any information acquired or obtained about the plaintiff during the course of acting for the plaintiff in 1998.

[3] In support of the application the plaintiff relies on three affidavits of Matthew Charles Garraway respectively sworn on 3 October 2006, 23 November 2006 and 5 December 2006, a deed of loan agreement made on 1 November 1994 and certain admitted facts. The plaintiff also relies on an admission made by counsel for the defendant, Mr Battley, on 7 December 2006, that the defendant was previously retained by the plaintiff as its solicitor and not the individual directors of the plaintiff.

[4] The following facts were admitted by the defendant:

1. At all material times during 1998 David John Booth was the Chairman of the Board of Directors of the plaintiff.

2. The handwriting in the James Noonan file on the handwritten file notes and facsimiles dated 7 and 8 September 1998 and 9 and 15 October 1998 is the defendant's handwriting.

3. The account dated 19 November 1998 was signed by the defendant.

4. The defendant was instructed to draft an offer to purchase Mr Hassall's interest in the plaintiff.

5. The defendant drafted the letter attached to the facsimile dated 14 October 1998.

[5] The defendant relies on an affidavit sworn by him on 9 November 2006.

The contentions of the parties

[6] Mr McDonald QC argued that the court should restrain the continued retention of the defendant as Mr Kendray's solicitor in Supreme Court proceeding No 111 of 2005 on three bases. First, as necessary to prevent the disclosure of confidences of a former client. Secondly, to ensure the defendant's duty of loyalty to a former client, notwithstanding the termination of the defendant's earlier retainer by the plaintiff. Thirdly, to uphold as a matter of public policy the special relationship of solicitor and client.

[7] He said that the following matters were of significance in this proceeding. In Supreme Court proceeding No 111 of 2005 the plaintiff is suing Mr Kendray to recover the balance of loan monies owing under a deed of loan agreement dated 1 November 1994 together with interest. The deed of loan agreement provided for repayment of the sum of $110,250 that was lent to Mr Kendray by the plaintiff over a term of ten years. The loan was recorded in the plaintiff's minutes. In his amended defence and counterclaim filed in Supreme Court proceeding No 111 of 2005 Mr Kendray denies he is liable to repay the balance of the loan. He has pleaded, inter alia, an oral agreement made between him and other directors, including Herbert Thomas Hassall (known as Peter Hassall), on 1 November 1994, which Mr Kendray alleges excused him from payment of the instalments as required by the deed of loan agreement. There is no documentation of this collateral oral agreement in the plaintiff's records. In

his counterclaim Mr Kendray seeks specific performance of an oral Land Agreement made in about mid 1997. Mr Kendray alleges that under the Land Agreement certain blocks of land at Dundee Beach were to be transferred to him and others by the plaintiff for goods and services rendered by them to the plaintiff.

[8] During 1998, while the defendant was a partner in James Noonan Solicitors, he gave advice to the plaintiff and its directors about purchasing all of the interests of Mr Hassall in the plaintiff including the forgiveness of a loan in favour of Mr Hassall and the transfer of various blocks of land at Dundee Beach to him. There is no mention in the file notes of the defendant's instructions or the correspondence contained in the file of James Noonan Solicitors about any of the various oral agreements alleged by Mr Kendray in the amended defence and counterclaim filed in Supreme Court proceeding No 111 of 2005. The file notes in James Noonan Solicitors' file support an inference that there were never any such oral agreements. The draft proposal to purchase Mr Hassall's interest in the plaintiff which was prepared by the defendant in 1998 is a potentially important document. The draft proposal to purchase Mr Hassall's interest in the plaintiff makes no reference to the alleged oral agreements referred to in Mr Kendray's amended defence and counterclaim in circumstances where the purchase of Mr Hassall's interest would have been expected to raise those obligations and entitlements if they existed at the time. The draft proposal is potentially useful in indirectly proving the plaintiff's case in Supreme Court proceeding

No 111 of 2005, directly disproving Mr Kendray's case, and on Mr Kendray's credit.

[9] The plaintiff seeks to call the defendant at the trial of Supreme Court proceeding No 111 of 2005. This would normally involve proofing the defendant and taking him to the documents on James Noonan Solicitors' file. The prospect of the defendant being a witness for the plaintiff puts him in a conflict of interest. Conflicting duties arise. It is submitted by Mr McDonald QC that it is inappropriate for the defendant to continue to act in these circumstances.

[10] The defendant opposes the application for the injunctions on the following grounds. The scope of any residual duty of loyalty that the defendant owes the plaintiff is limited to the defendant not misusing any confidential information that he may have received from the plaintiff. The defendant did not receive any confidential information from the plaintiff. Further, the matter for which the defendant was retained by the plaintiff is not a matter that is closely related to Supreme Court proceeding No 111 of 2005. There is no nexus between the matters about which the defendant advised the plaintiff and the issues now before the court in the Supreme Court proceeding No 111 of 2005. The defendant was not and could not be a material witness in Supreme Court proceeding No 111 of 2005. Mr Kendray's retainer of the defendant is not offensive to common notions of the administration of justice.

The law

[11] Following a detailed analysis of the various authorities, Brereton J has usefully summarised the law in relation to restraining solicitors from acting against a previous client in *Kallinicos and Another v Hunt and Others* (2005) 64 NSWLR 561 at par [76]. His Honour states as follows:

> [76] The foregoing authorities establish the following:
>
> • During the subsistence of a retainer, where the court's intervention to restrain a solicitor from acting for another is sought by an existing client of the solicitor, the foundation of the court's jurisdiction is the fiduciary obligation of a solicitor, and the inescapable conflict of duty which is inherent in the situation of acting for clients with competing interests: *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222.
>
> • Once the retainer is at an end, however, the court's jurisdiction is not based on any conflict of duty or interest, but on the protection of the confidences of the former client (unless there is no real risk of disclosure): *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222.
>
> • After termination of the retainer, there is no continuing (equitable or contractual) duty of loyalty to provide a basis for the court's intervention, such duty having come to an end with the retainer: *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222; *Belan v Casey* [2002] NSWSC 58; *PhotoCure ASA v Queen's University at Kingston* (2002) 56 IPR 86; *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550; contra *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501(Brooking J); *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394; *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429 .
>
> • However, the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice: *Everingham v Ontario* (1992) 88 DLR (4th) 755; *Black v Taylor* [1993] 3 NZLR 403; *Grimwade v Meagher* [1995] 1 VR 446; *Newman v Phillips Fox* (1999) 21 WAR 309; *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015; *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501; *Holborow v Rudder* [2002] WASC 265; *Williamson v Nilant* [2002]

WASC 225; *Bowen v Stott* [2004] WASC 94; *Law Society (NSW) v Holt* [2003] NSWSC 629. *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 does not address this jurisdiction at all. *Belan v Casey* [2002] NSWSC 58 and *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70 are not to be read as supposing that *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 excludes it. *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 appears to acknowledge its continued existence.

• The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice: *Everingham v Ontario* (1992) 88 DLR (4th) 755; *Black v Taylor* [1993] 3 NZLR 403; *Grimwade v Meagher* [1995] 1 VR 446; *Holborow v Rudder* [2002] WASC 265; *Bowen v Stott* [2004] WASC 94; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550.

• The jurisdiction is to be regarded as exceptional and is to be exercised with caution: *Black v Taylor* [1993] 3 NZLR 403*; Grimwade v Meagher* [1995] 1 VR 446*; Bowen v Stott* [2004] WASC 94.

• Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause: *Black v Taylor* [1993] 3 NZLR 403*; Grimwade v Meagher* [1995] 1 VR 446*; Williamson v Nilant* [2002] WASC 225*; Bowen v Stott* [2004] WASC 94.

• The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief: *Black v Taylor* [1993] 3 NZLR 403*; Bowen v Stott* [2004] WASC 94.

[12] I agree with Brereton J's analysis of the above principles at pars [31] to [76] of *Kallinicos and Another v Hunt and Others* (supra). I would add that in relation to the second dot point above, the test which the court applies in determining whether to grant an injunction restraining a solicitor from

acting against a previous client is the test of – "a real and sensible possibility that the solicitor's interest [or duty] in advancing the case of the new client might conflict with his [or her] duty to keep information given to him by the former client confidential or refrain from using that information to the detriment of the former client: *Mallesons Stephen Jacques v KPMG Peat Marwick* (1991) 4 WAR 357 per Ipp J at 362-3; *Nasr v Vihervaara* (2005) 91 SASR 222. The gist of the suit is the risk of misuse of the confidential information that the solicitor obtained from the solicitor's previous client.

[13] Brereton J's reasons for decision in *Kallinicos and Anor v Hunt and Others* (supra) are consistent with the New South Wales Court of Appeal's decision in *Boyce (Trading as Hunt & Hunt Lawyers) v Goodyear Australia Ltd* (NSWCA unreported 16 September 1996) and with Abadee J's reasons for decision in *C I & D Industries Pty Ltd v Keeling* (NSWSC unreported 26 March 1997).

[14] I do not accept Mr McDonald QC's submissions on the law to the extent that they are inconsistent with the above statement of the law. All of the Australian authorities to which the court was referred in support of Brooking J's Reasons for Decision in *Spincode Pty Ltd v Look Software Pty Ltd* (supra) involved the potential misuse of confidential information. Mr McDonald QC did not refer the court to a similar case to the present where it was held that the solicitor's duty of loyalty to his previous client prevented the solicitor from acting against his previous client. The majority

of Australian decisions support the proposition that, save for matters involving a breach of confidence, after termination of the retainer there is no continuing duty of loyalty to provide a basis for the court's intervention, such a duty having come to an end with the retainer.

The issues

[15] The principal issue in this case is whether the defendant should be restrained from acting for Mr Kendray in Supreme Court proceeding No 111 of 2005 because the defendant is likely to be a material witness in the proceeding. Although the defendant received confidential information during the course of his retainer by the plaintiff in 1998 a reasonable observer, aware of the relevant facts, would not think that there was a real, as opposed to a theoretical, possibility that the confidential information given to the defendant by the plaintiff might be used by the defendant to advance the interests of Mr Kendray to the detriment of the plaintiff. The confidential information that the defendant received from the plaintiff in 1998 is more than likely to be incapable of advancing the interests of Mr Kendray. Further, it would be futile to grant an injunction on this basis as it is more than likely that Mr Kendray knows about the instructions that were given to the defendant in 1998. He was involved in instructing the defendant in 1998 and he gave the defendant instructions about the offer to purchase Mr Hassall's interest in the plaintiff. In any event Mr Booth is to give evidence on behalf of Mr Kendray in support of his defence and counterclaim in Supreme Court proceeding No 111 of 2005. The

information that is the subject of the proceeding before the court is common knowledge to all of the parties.

The facts

[16] Having considered the whole of the evidence I make the following findings of fact.

[17] The plaintiff is a registered company. On 3 September 1986 Mr Kendray, Mr Hassall, Mr Booth and John David Sanders were appointed directors of the plaintiff. The current directors of the plaintiff are Robert Williams Woolley, Allan Charles Garraway, David Eric Walker and Danielle Maria Pokorny. The current shareholders of the plaintiff are Territory Realty Pty Ltd – 16 shares, Bishop Estate Pty Ltd – 16 shares and Excess Pty Ltd – 16 shares.

[18] The defendant is a legal practitioner whose style of practice is as a solicitor. In 1998 the defendant was a partner in the legal firm of James Noonan Solicitors. He is currently a sole practitioner and he was a sole practitioner at the time he received instructions from Mr Kendray about Supreme Court proceeding No 111 of 2005.

[19] On or about 1 November 1994 a deed of loan agreement was executed by the plaintiff, Territory Realty Pty Ltd, H & K Earthmoving Pty Ltd, Mr Kendray and Mr Hassall. Under the terms of the deed of loan agreement the plaintiff was to lend Territory Realty Pty Ltd the sum of $220,500, H & K Earthmoving Pty Ltd the sum of $220,500, Mr Kendray the sum of $110,250

and Mr Hassall the sum of $110,250 for the purpose of financing the purchase of 12 shares that were held in the plaintiff by Dowling Investments Pty Ltd. The 12 shares were to be purchased in accordance with the terms and conditions contained in a written agreement that was annexed to the deed of loan agreement dated 1 November 1994. The terms of the deed of loan agreement provided that the term of the loans shall be for 10 years from 1 November 1994 and the borrowers shall repay their respective portions of the loan to the plaintiff by equal annual instalments in arrears commencing on 1 November 1996. If any instalment was not paid within 14 days of the date upon which it became due and payable then the borrower was to pay the plaintiff penalty interest at the rate of 10 per cent per annum.

[20] On 7 September 1998 Ms Margaret Michaels, a solicitor with Clayton Utz Lawyers, sent a facsimile to Mr Booth, the Chairman of the Board of Directors of the plaintiff. In the facsimile Ms Michaels stated as follows:

> I act for Peter Hassall, a Director of Dundee Beach Pty Ltd ("Dundee"). I am instructed that:
>
> 1. You previously advised my client that the 1997/98 accounts for Dundee would be finalised last week;
>
> 2. My client has advised you that before discussing or voting on the accounts at a directors meeting, he needs time to consider and take advice on them; and
>
> 3. Earlier today, you advised my client that the 1997/98 accounts would not be distributed to directors until the directors meeting set for 11.00am tomorrow.
>
> Whilst my client appreciates that the accounts were prepared for management purposes only, prudent and capable business practice

must require that the accounts should be distributed to the directors prior to consideration by the board. It is only in this way that there can be considered and informed discussion and decisions made in relation to the accounts.

In the circumstances, my client requests:

1. A copy of the accounts be provided to him and all other directors for consideration as soon as they are available; and

2. That the directors meeting to be held tomorrow be postponed until a reasonable period after the distribution of the accounts (we suggest seven days).

There can be no reasonable objection taken to this course of action. Please confirm as a matter of urgency that the directors meeting will be postponed as requested. If I do not receive this confirmation, my client will take legal steps available to him to postpone the meeting.

[21] Following receipt of Ms Michaels' facsimile Mr Booth contacted the defendant and met with him in his capacity as a solicitor on 7 September 1998. The defendant received instructions from Mr Booth on behalf of the plaintiff. During the meeting the defendant was told the following by Mr Booth. The plaintiff had developed Dundee Downs and was now developing Dundee Beach. H & K Earthmoving Pty Ltd and Territory Realty Pty Ltd each held one third of the shares in the plaintiff and Mr Hassall and Mr Kendray each held one sixth of the shares in the plaintiff. H & K Earthmoving Pty Ltd was owned by Mr Hassall and Mr Kendray. Territory Realty Pty Ltd was owned by Mr Booth and Mr Sanders. Mr Hassall and Mr Kendray had fallen out. Mr Hassall was represented by Ms Michaels of Clayton Utz and Mr Kendray was represented by Mr George of Cridlands. Coopers and Lybrand were the accountants for the plaintiff.

The plaintiff had four directors namely, Mr Hassall, Mr Kendray, Mr Sanders and Mr Booth. The company secretary was Mr Paul Proctor. The directors elected a Chairman of the Board of Directors from meeting to meeting. Mr Booth was getting on with Mr Sanders and Mr Kendray. Mr Booth and Mr Kendray had the day to day running of the company. Mr Richard Tucker at the ANZ Bank dealt with all shareholders and directors of the plaintiff. The financial arrangements of the plaintiff, its shareholders and directors, were under annual review. The majority of directors wished to hold a Meeting of the Board of Directors on 8 September 1998 to discuss the following topics: whether to guarantee the loans from the ANZ Bank to Mr Sanders' company; the renewal of existing arrangements including cross guarantees; the ongoing development of Dundee Beach including the low level of existing stock – only about 30 blocks of land were left for sale; and, the 1997-1998 company accounts which were to be presented at the meeting. Mr Booth, in his capacity as Chairman of the Board of Directors, had received a facsimile from Ms Michaels, the solicitor for Mr Hassall, in which she requested that the Meeting of the Board of Directors to be held on 8 September 1998 be postponed until a reasonable period after the distribution of the 1997-1998 company accounts. Mr Booth was not confident of Mr Hassall's continuing support for the development of Dundee Beach. Mr Hassall was also consulting Mr Allan Garraway.

[22] The defendant advised Mr Booth at their meeting on 7 September 1998 that Mr Hassall should be given a reasonable time to examine the company accounts; the directors should not force through the cross guarantees unless Mr Hassall voted in favour of such a step; if Mr Hassall did not vote in favour of the cross guarantees the agenda item should be adjourned; and, the directors should consider the long term viability of the company and whether the Dundee Beach development should be undertaken by another entity.

[23] After the meeting between the defendant and Mr Booth on 7 September 1998 Mr Booth replied to Ms Michaels' facsimile. He did so by letter dated 7 September 1998. The letter was on the plaintiff's letterhead. The letter stated as follows:

> Thank you for your facsimile of today's date in reference to your client Peter Hassall and the Dundee Beach Pty Ltd Board Meeting set for 11.00am tomorrow.
>
> (1) The Board Meeting has been called to discuss various matters pertaining to the good management of the company – Peter has been advised of all those issues including those that require urgent consideration.
>
> (2) The internal management accounts for the 1997/98 year will be tabled and discussed at the meeting. It is not essential that these accounts be adopted at the meeting and if Peter wishes to move a resolution that the board reschedule a further meeting in the future to specifically discuss the accounts then this is his right as a director.
>
> Taking into account the urgency and importance of the other issues relevant to the company it is my desire that the Board Meeting be held as planned.

[24] On 7 September 1998 Ms Michaels responded to Mr Booth's letter dated 7 September 1998. In her facsimile she stated the following:

> Thank you for your prompt response to my facsimile
>
> I am instructed that my client has not received: an agenda detailing the issues requiring urgent consideration; any papers in support of the matters to be discussed; or a copy of the Articles of Association for Dundee.
>
> We consider that "good management" would dictate that these documents would be provided to our client as a matter of course.
>
> In the absence of a copy of the Articles of Association, I am unable to confirm whether or not adequate notice of directors meetings has been given. Could you please advise: (1) of the minimum time period required in the articles for the calling of a directors meeting; and (2) whether or not that minimum was complied with in respect of the meeting tomorrow. I would appreciate a copy of the Articles and your response to the other matters raised in this letter by close of business this afternoon.

[25] After he received the above facsimile from Ms Michaels, Mr Booth sent a facsimile to the defendant dated 7 September 1998 enclosing Ms Michaels' further facsimile and stating that the majority of directors still wished to proceed with the Meeting of the Board of Directors at 11.00 am the following day. Mr Booth's facsimile was on the plaintiff's letterhead.

[26] On 8 September 1998 the defendant opened James Noonan Solicitors' file M98481 in the client name of the plaintiff. The name of the file was Hassall/Kendray. He also sent to the plaintiff a one page handwritten facsimile containing advice. The facsimile was marked to the attention of Mr Booth. The facsimile stated:

Today's directors meeting

I may be unavailable most of this morning, so here are a few thoughts on the Clayton Utz fax.

It is a furphy. Very few articles prescribe a minimum notice period for directors meetings. Yours do not either. The law implies a reasonable notice period. What is reasonable? That is judged by past company practice and the nature of the business.

There is no need to have an agenda or papers in support of matters to be discussed, if that has not been standard practice in the past.

I fear that there are many Reds under Mr Hassall's bed. Have your meeting as planned. I see no reason to depart from the advice I gave yesterday.

[27] On 8 September 1998 Mr Booth responded to Ms Michaels' further facsimile of 7 September 1998. Mr Booth's facsimile was on the plaintiff's letterhead. It stated as follows:

> "Unfortunately I did not get to read your latest fax until about 6.45pm last night. The Dundee Beach meeting will proceed as planned – we hope Peter will attend."

[28] On 8 September 1998 Ms Michaels responded to Mr Booth's facsimile dated 8 September 1998. In it she stated:

> We refer to your facsimile of 8 September 1998.
>
> Your attitude is unreasonable. You have failed even to confirm that today's meeting is validly constituted in accordance with Dundee's Articles of Association. If sufficient notice has not been given of the meeting, it has not been validly constituted and nothing resolved at the meeting will bind either our client as director or Dundee itself.
>
> Our client reserves his rights in relation to your actions.

> Our client will attend the meeting at 11.00am and will move a motion that the meeting be reconvened in seven days in order that an agenda for and relevant papers (including accounts) can be distributed in the meantime for proper consideration by the directors. The directors can in this way also be informed and have a considered opinion in relation to the other matters to be discussed.

[29] The Meeting of the Board of Directors was held on 8 September 1998. It was attended by all directors. After the meeting Mr Booth sent the defendant another facsimile. The facsimile was on the plaintiff's letterhead. It stated as follows:

> Thank you for your fax earlier today – that was great. Please find attached my subsequent fax to Margaret Michaels and her bullet tipped reply. We held our board meeting (Peter Hassall attended) and all went relatively well.
>
> I will fax you a copy of the minutes when they are typed up.
>
> I am inclined to ignore, for the moment, the attached fax from Margaret Michaels – what do you think?
>
> I am sure there will be a further need for your advice over the course of the ensuing weeks.

[30] On 9 September 1998 the defendant telephoned Mr Booth and confirmed that there was no need to respond to Ms Michaels' latest facsimile.

[31] On 9 October 1998 the defendant met with Messrs Booth, Sanders and Kendray for one and a half hours. They discussed all options available to the plaintiff, its directors and shareholders, from liquidation through to carrying on. It was resolved that an offer should be made to purchase all of Mr Hassall's interest in the plaintiff and the defendant was instructed to draft an offer to purchase Mr Hassall's interests in the plaintiff for $500,000

cash and land valued at $400,000 at the retail price list. The defendant's file note of the meeting on 9 October 1998 does not record the full details of all that was discussed at the meeting.

[32] On 9 October 1998 after the meeting referred to above, the defendant had a telephone conversation with Mr Booth. During the telephone conversation Mr Booth instructed the defendant as follows. The offer to Mr Hassall was to include the repayment of a $220,500 loan account. An amount of $220,500 was owed to the plaintiff by H & K Earthmoving Pty Ltd and a further amount of $220,500 was owed to the plaintiff by Mr Kendray and Mr Hassall. The offer to purchase Mr Hassall's interests in the plaintiff was to be for the sum of $900,000 in addition to the settlement of the various loan accounts. The defendant was not to specify in the letter of offer the particular lots of land which were available to be conveyed to Mr Hassall. The offer was to refer to land generally.

[33] The defendant misunderstood the instructions that Mr Booth gave him on the telephone on 9 October 1998. He thought the amounts of $220,500 were owed by the plaintiff to H & K Earthmoving Pty Ltd and Messrs Hassall and Kendray when in fact the money was owed to the plaintiff by H & K Earthmoving Pty Ltd and Messrs Hassall and Kendray. The deed of loan agreement dated 1 November 1994 establishes that the money was owed to the plaintiff not by the plaintiff. What was in effect proposed by Mr Booth was that Mr Hassall's loans would be forgiven.

[34] On 14 October 1998 the defendant sent to the plaintiff, marked to the attention of Mr Booth, his draft of the letter of offer to purchase the whole of the interests of Mr Hassall in the plaintiff. The draft of the offer to purchase stated as follows:

> Dear Peter
>
> **Dundee Beach Pty Ltd**
>
> We are writing to put a proposal to you, which we think will be for the benefit of Dundee Beach Pty Ltd and of all the individuals involved, if it is accepted.
>
> It seems obvious to us that the business relationship between you and Bob has completely broken down, without any hope of recovery. John and David do not have the resources, or the inclination, to try to buy out all of the interests in Dundee Beach Pty Ltd held by Bob and you, either personally or through H & K Earthmoving Pty Ltd. As well as looking after our own interests, we, as directors of Dundee Beach Pty Ltd, also have to consider what is in the best interests of that company. We have therefore reached the conclusion that if Dundee Beach Pty Ltd cannot continue with the participation of <u>both</u> you and Bob, and a choice has to be made, the knowledge and experience of Bob will be of particular use to the company.
>
> The proposal is therefore to buy out your interests in Dundee Beach Pty Ltd – that is both the interests in the 16 shares which you hold jointly with Bob, and the interest in the 16 shares held by H & K Earthmoving Pty Ltd. In addition, we would like your loan account with Dundee Beach Pty Ltd to be paid out.
>
> We believe the net value of all the shares in Dundee Beach Pty Ltd is $2,700,000 that is $56,250 per share. Setting aside for the moment the fact that the 16 shares owned by H & K Earthmoving Pty Ltd (in other words, treating those shares as if they were half owned by you) this puts your interest in the company as one third shareholder at $900,000. It would be somewhat of a strain for us to provide the whole of the purchase price in cash. In any case, we thought that you would be interested in having some of the Dundee Beach land in part payment of the purchase price. The details of the proposal are therefore as follows:

1. We would procure the repayment by Dundee Beach Pty Ltd of its loan accounts with H & K Earthmoving Pty Ltd and with you and Bob jointly. In practice, Bob would lend back to the company half that amount. Each shareholder's loan is currently $220,500. Therefore, you would be repaid $110,250 and $220,500 would be paid to H & K Earthmoving Pty Ltd, from which you would presumably get your 50% entitlement.

2. Territory Realty Pty Ltd would then acquire eight of the H & K Earthmoving Pty Ltd shares for the price per share mentioned above.

3. Bob would, either directly or through an entity controlled by him, acquire your half interest in the 16 shares which you currently own as tenants in common, and the remaining 8 shares held by H & K Earthmoving Pty Ltd. The purchase price per share would be that which I have outlined above.

4. Between $400,000 and $420,000 worth of the consideration of these shares (or repayment of the loan accounts) would be paid by way of Dundee Beach Pty Ltd transferring to you, or an entity controlled by you, some land at Dundee Beach. You could select any lots adding up to that value range. Obviously, we would have to satisfy some requirements of the Corporations Law to have Dundee Beach Pty Ltd do that, but we are advised that is possible.

Our offer remains open until it is expressly withdrawn. We hope that you accept it. We believe that will help you and Bob to sort out H & K Earthmoving Pty Ltd because it will put a value on the company's investment at Dundee Beach Pty Ltd and it will also help Dundee Beach Pty Ltd to press on with its developments. Of course if you were to accept the offer and the shares were to be transferred, we would expect that you resign as an officer of Dundee Beach Pty Ltd. If you were to accept the offer, we would settle the transactions within 30 days.

We look forward to hearing from you.

David Booth John Sanders Bob Kendray

[35] On 15 October 1998 Mr Booth sent the defendant by facsimile a revised draft offer to purchase Mr Hassall's interest in the plaintiff and he sought

the defendant's comments in relation to the revised draft offer to purchase. The facsimile cover sheet was on the letterhead of Territory First National Real Estate. In response the defendant sent Mr Booth a one page written advice which stated as follows:

> Dundee Beach Pty Ltd
>
> I advise that "purchase price of your shareholding" be changed to "purchase price of your interest". Keep in mind, his shareholding is only a 50% interest in 16 shares. I think you should specifically state that you intend to include his 50% interest in the H & K Earthmoving Pty Ltd shareholding in Dundee Beach Pty Ltd.
>
> I note the loan account figure is different from the one you gave me earlier.

[36] On 19 October 1998 Mr Booth sent the defendant by facsimile a copy of the signed offer of purchase that was sent to Mr Hassall and a copy of the document which contained Mr Hassall's only response to the offer to purchase his interest in the plaintiff as at 19 October 1998. The facsimile cover sheet was on the letterhead of Territory First National Real Estate. The offer of purchase was sent to Mr Hassall under the names of Messrs Booth, Sanders and Kendray, not on the plaintiff's letterhead. Mr Hassall's response related to the intention of the majority of directors to hold a Meeting of the Board of Directors on 22 October 1998. Mr Hassall advised that he was unavailable to attend the meeting on 22 October 1998 and would be unavailable for two weeks. He asked if a later date could be organised for the Meeting of the Board of Directors. Mr Booth stated in his facsimile to the defendant that the primary agenda item for the Meeting of the Board

of Directors on 22 October 1998 was the urgent need to progress the subdivisional works at Dundee Beach. He requested that the defendant telephone him to discuss the issue.

[37] The written offer to purchase Mr Hassall's interests in the plaintiff dated 15 October 1998 was signed by Messrs Booth, Sanders and Kendray. It stated as follows:

> Dear Peter
>
> Re Dundee Beach Pty Ltd
>
> We are writing to put a proposal to you, which we think will be for the benefit of Dundee Beach Pty Ltd and of all of the individuals involved, if accepted.
>
> It seems obvious to us that the business relationship between you and Bob has completely broken down, without any hope of recovery. John and David do not have the resources, or the inclination, to try to buy out all of the interests in Dundee Beach Pty Ltd held by Bob and you, either personally or through H & K Earthmoving Pty Ltd.
>
> The proposal is therefore to buy out your interests in Dundee Beach Pty Ltd – that is both the interest in the 16 shares which you hold jointly with Bob, and the interest in the 16 shares held by H & K Earthmoving Pty Ltd. Part of the offer will be the settlement of your loan accounts.
>
> It would be somewhat of a strain for us to provide the whole purchase price in cash. In any case, we thought that you would be interested in having some of Dundee Beach land in part payment of the purchase price. The details of the proposal are therefore as follows:

Purchase price of all your interests in Dundee Beach Pty Ltd		$1,129,500
Made up of:	Cash	$500,000
	Dundee Beach land at market value	$500,000
	Balance made up of net balances of loan accounts	$129,500

Our offer remains open until it is expressly withdrawn. We hope that you accept it.

If you were to accept the offer, we would settle the transaction within 30 days.

If there is any cooperation we can offer you in regard to your taxation matters we are more than happy to discuss this with you.

We look forward to hearing from you.

Yours faithfully

David Booth John Sanders Bob Kendray all signed

PS We hereby give notice of a directors meeting of Dundee Beach Pty Ltd to be held at 11.00am next Thursday, 22 October 1998.

[38] The defendant telephoned Mr Booth on 19 October 1998 and advised Mr Booth to press on with the proposed Meeting of the Board of Directors on 22 October 1998 and that perhaps he might invite Mr Hassall to attend the meeting by telephone.

[39] On 21 October 1998 Mr Booth sent the defendant a copy of a letter received from Mr Allan Garraway addressed to Messrs Booth, Sanders and Kendray

dated 20 October 1998. He did so by facsimile under a cover sheet on the letterhead of Territory First National Real Estate. The letter from Mr Allan Garraway stated:

> You are aware that I act for Peter Hassall who is away from Darwin this week.
>
> On behalf of my client I acknowledge receipt of your correspondence of 15 October 1998 making an offer to purchase all of his interests in Dundee Beach Pty Ltd (that is effectively 16 shares) for $1,000,000 (cash $500,000 and Dundee land at market value $500,000 with no forgiving of loan accounts).
>
> Given that together with my client you are all the other directors and shareholders of Dundee Beach Pty Ltd would you please confirm that your shares (that is effectively 24 shares) are likewise available for purchase for $2,000,000 (cash $1,000,000 and Dundee land at market value of $1,000,000) with no forgiving of loan accounts. Your early response would be appreciated.

[40] On 22 October 1998 the defendant's letter of advice to the plaintiff dated 8 September 1998 was tabled and accepted at the Meeting of the Board of Directors.

[41] On 5 November 1998 Mr Booth sent to the defendant a further facsimile enclosing correspondence that had been received from Mr Allan Garraway addressed to Messrs Booth, Sanders and Kendray and a draft response to the letter. The facsimile was on the letterhead of Territory First National Real Estate. In the facsimile Mr Booth stated:

> Herewith copy of letter from Garraway dated 4 November 1998 and our intended response. The second sentence of Garraway's letter refers to a verbal offer/proposal put to Hassall for all of the current directors (including Hassall) to purchase H & K Earthmoving Pty Ltd's shares in Dundee Beach Pty Ltd for a price of $1.2 million.

> Bob Oaten (H & K's) accountant will be in Darwin from tomorrow and is meeting with Garraway on Monday.

[42] The letter from Mr Allan Garraway to Messrs Booth, Sanders and Kendray dated 4 November 1998 stated as follows:

> "I refer to my letter to you dated 20 October 1998 which requested confirmation that your shares are available for purchase at the price you offered my client.
>
> I acknowledge receipt of a proposal to sell H & K Earthmoving Pty Ltd's shares in Dundee Beach Pty Ltd for a total sum of $1.2 million which is of no interest to my client.
>
> I request your confirmation that your shares are available for purchase at the price you offered my client by close of business at 5.00pm on Friday, 6 November 1998, in order for us to progress negotiations on Dundee and other matters on Monday, 9 November 1998".

[43] The proposed response of Messrs Booth, Sanders and Kendray was in the following terms:

> We refer to your letter of 4 November 1998.
>
> We hereby advise we do not wish to sell our respective interests in Dundee Beach Pty Ltd.

[44] The proposed response was not sent to Mr Allan Garraway. On 6 November 1998 Mr Booth sent a facsimile to the defendant enclosing the response that was sent to Mr Allan Garraway by Messrs Booth, Sanders and Kendray. The facsimile was on the letterhead of Territory First National Real Estate. The response was in the following terms:

> We acknowledge receipt of your correspondence of 20 October 1998 and 4 November 1998.

> Our offer of 15 October 1998 was made to Peter Hassall for all of his interests in Dundee Beach Pty Ltd (that is effectively 16 shares) and including the forgiveness of loan accounts.
>
> The remaining shares are 32 not 24.
>
> We put a proposal to Peter for Sanders/Booth/Kendray/Hassall to purchase H & K Earthmoving Pty Ltd's 16 shares for $1.2 million – which you advise Peter has rejected.
>
> If Peter submits a firm offer for our shares we will consider it. If you submit this offer by the close of business on Tuesday 10 November 1998 we will respond by 10.00am Wednesday 11 November 1998.
>
> Our offer of 15 October 1998 to Peter remains open.

[45] On 19 November 1998 the defendant rendered an interim account to the plaintiff for his attendances and advices including conducting company searches; examining the articles of association of the plaintiff; providing advice in respect of directors' meeting; attending on Mr Booth, Mr Sanders and Mr Kendray on 9 October 1998; telephone attendance on Mr Booth on 9 October 1998; preparing a suggested draft letter from the remaining shareholders to Mr Hassall; checking your revision of that letter and examining further correspondence from Mr Booth and various other telephone attendances.

[46] In or about May 1999 Mr Hassall purchased Mr Kendray's interest in the plaintiff and Mr Kendray resigned as a director of the plaintiff. On 4 May 1999 Mr Allan Garraway became a director of the plaintiff.

[47] On 2 September 2005 the plaintiff commenced Supreme Court proceeding No 111 of 2005 against Mr Kendray to recover the balance of Mr Kendray's

loan the terms of which are set out in the deed of loan agreement dated 1 November 1994. The writ was served on Mr Kendray on 14 September 2005. On 20 September 2005 Mr Kendray filed a notice of appearance. On 18 October 2005 the defendant filed a notice of acting.

[48] On 25 October 2005 an amended defence and counterclaim was filed on behalf of Mr Kendray in Supreme Court proceeding No 111 of 2005. The following relevant matters are pleaded in the amended defence:

> 3A. On or about 1 November 1994, the plaintiff and the defendant and Territory Realty Pty Ltd and H & K Earthmoving Pty Ltd and Herbert Thomas Hassall entered into another agreement ("the Collateral Agreement") whereby the parties agreed inter alia for a release of the loan.
>
> Particulars of the Collateral Agreement
>
> 3A.1 The Collateral Agreement was oral
>
> 3A.2 The Collateral Agreement was made between David Booth, John Sanders, Herbert Hassall and the defendant as directors of and for and on behalf of the plaintiff and the defendant David Booth and John Sanders as directors of and for and on behalf of Territory Realty Pty Ltd and Herbert Hassall and the defendant as directors of and for an on behalf of H & K Earthmoving Pty Ltd and Herbert Thomas Hassall.
>
> 3A.3 The Collateral Agreement was made at the offices of Territory First National Real Estate at unit 1, 8 Knuckey Street, Darwin in the Northern Territory on or about 1 November 1994.
>
> 3A.4 A term of the Collateral Agreement was that provided the obligations of the plaintiff to its then bankers ("the bank debt") namely the ANZ Bank ("the Bank") was paid in full and upon the bank debt being paid in full the plaintiff released the defendant from the loan in

consideration of goods supplied to and services rendered to the plaintiff by the defendant.

3A.5 A further term of the Collateral Agreement was that pending payment in full of the bank debt the defendant was excused from the obligation to pay the plaintiff instalments of the loan referred to in paragraph 3.3 hereof.

3A.6 Further consideration for the Collateral Agreement was

3A.6.1 The Bank require the parties to the loan deed to enter into the loan deed to complement its position as a secured creditor of the plaintiff. The defendant will provide further particulars thereof after discovery and inspection of the plaintiff's documents;

3A.6.2 The Bank further required that the parties to the loan deed not receive payment from the plaintiff for goods supplied to and services rendered by them for the plaintiff until the bank debt was paid.

3B The defendant supplied goods to and performed services for the plaintiff for which the defendant received no consideration otherwise than pursuant to the agreements contained in the Collateral Agreement.

3C In accordance with the agreements contained in the Collateral Agreement, the defendant did not pay to the plaintiff any of the instalments of the loan referred to in sub paragraph 3.3 hereof nor did the plaintiff make any demand therefore

4. …

4A The bank debt was repaid in 1999. The defendant will provide further particulars thereof after discovery and inspection of the plaintiff's documents.

[49] The following relevant matters are pleaded in Mr Kendray's counterclaim:

7. In about mid 1997 the plaintiff on the one hand and the defendant and Herbert Hassall and David Booth and John

Sanders entered into an agreement for the transfer by the plaintiff to each of them and H & K Earthmoving Pty Ltd of a parcel of land ("the Land Agreement")

Particulars of Land Agreement

7.1 Land Agreement was oral.

7.2 The Land Agreement was made between the defendant, Herbert Hassall, David Booth and John Sanders as directors of and for and on behalf of the plaintiff and the defendant on his own behalf and David Booth on his own behalf and John Sanders on his own behalf and Herbert Hassall on his own behalf and the defendant and Herbert Hassall as directors of and for and on behalf of H & K Earthmoving Pty Ltd.

7.3 The consideration for the Land Agreement was for services rendered and to be rendered for the plaintiff or on its behalf and goods to be supplied in connection therewith.

7.4 With specific reference to the Land Agreement and the consideration therefore, the defendant performed the following services for the plaintiff or on its behalf and supplied goods and services in connection therewith: ….

7.5 On or about 25 November 1997 the defendant and Peter Hassall and David Booth and John Sanders as directors of and for and on behalf of the plaintiff and with their consent and agreement with reference to the Land Agreement allocated the following parcels of the plaintiff's land at Dundee Beach Hundred of Glyde:

Lots 3765 and 3766	H & K Earthmoving Pty Ltd
Lot 3767	Herbert Hassall
Lot 3768	John Sanders
Lot 3769	David Booth
Lot 2770 (the said land)	[Robert George Kendray]

7.6 The said land is contained and described in CUFT638873.

[50] Mr Kendray seeks specific performance of the Land Agreement pleaded in his counterclaim against the plaintiff.

[51] On 11 July 2006 Messrs Booth and Sanders respectively commenced proceedings No 77 of 2006 and No 78 of 2006 against the plaintiff in the Supreme Court. In the proceedings Messrs Booth and Sanders also claim specific performance of the Land Agreement pleaded in Mr Kendray's counterclaim dated 25 October 2005.

[52] On 6 October 2006 the Chief Justice ordered that proceeding No 111 of 2005, proceeding No 77 of 2006 and proceeding No 78 of 2006 be tried together.

[53] Between 7 September 1998 and 19 November 1998 the defendant received confidential information from the plaintiff and three of its directors. As far as can be ascertained at this time the relevant confidential information received by the defendant is that set out in pars [21], [31], [32], [34], [35] to [37], [39] and [41] to [44] above. It seems that after 19 November 1998 no further instructions were received by the defendant from the plaintiff.

[54] Other than what is contained in James Noonan Solicitors' file M9848 and dependent upon it, the defendant has no recollection of the instructions he received from the plaintiff or of the discussions that he had with Mr Booth and the other directors of the plaintiff. This does not mean that the

defendant may not recall more of the details of his instructions and the discussions that he had with the directors of the plaintiff in the future if his memory is triggered in some way or other. I agree with what is said in a number of the authorities that over time a person's memory may be of variable quality. Different experiences, events or conversations or the perusal of different documents may cause a person's memory to be refreshed.

[55] On their face the instructions given to the defendant in 1998 by Messrs Booth, Sanders and Kendray about the offer to purchase Mr Hassall's interest in the plaintiff, which are set out in pars [21], [31], [32], [34], [35] to [37], [39] and [41] to [44] above, appear to be inconsistent with the matters pleaded in Mr Kendray's amended defence and counterclaim, which are set out in pars [48] to [50] above, as are the contents of the various documents which are set out in pars [34], [37] and [44] above. Why would Mr Hassall be interested in the offer to purchase his interest that was signed by Messrs Booth, Sanders and Kendray on 15 October 1998 if it had already been agreed that the loan of $110,250 he received was to be forgiven? Why would he be interested in land if he had already been allocated land under the 1997 Land Agreement? Why wasn't the offer to purchase Mr Hassall's interest in the plaintiff so far as it referred to land expressed to be in addition to the land to which Mr Hassall was already entitled as a result of the 1997 Land Agreement? Why would Messrs Booth, Sanders and Kendray be interested in a similar counter offer from Mr Hassall? Part of the answer

may be that as at the date of the offer to purchase Mr Hassall's interest in the plaintiff the ANZ Bank had not been repaid the money owed to the bank. All of these matters are relevant to the issues raised by Mr Kendray's amended defence and counterclaim.

[56] The defendant has spoken to both Mr Booth and Mr Sanders. Both of them have offered to cooperate with Mr Kendray and give evidence in support of both Mr Kendray's defence and his counterclaim.

Conclusion

[57] The evidence that the defendant is capable of giving is material to the determination of the contested issues in Supreme Court proceeding No 111 of 2005. There will be an issue in Supreme Court proceeding No 111 of 2005 as to why the oral agreements pleaded in the defence and counterclaim were not brought into account in the offer to purchase Mr Hassall's interests in the plaintiff in 1998 and were not mentioned in the facsimile referred to in par [44] above. There will also be an important issue about what instructions Messrs Booth, Sanders and Kendray gave the defendant in 1998. I agree with Mr McDonald QC that it is significant that the instructions to the defendant about the offer to purchase Mr Hassall's interest in the plaintiff in 1998 did not bring into account the pleaded oral agreements.

[58] While much of the evidence which the plaintiff seeks to lead from the defendant about the instructions that the defendant received from Messrs Booth, Sanders and Kendray in 1998 is hearsay evidence, and it is not clear

what statements, if any, were made by Mr Kendray to the defendant in 1998, the evidence of the defendant may nonetheless be admissible to prove admissions by an agent, Mr Booth, against the oral agreements pleaded in pars [48] and [49] above, to prove prior inconsistent statements made by Mr Booth and prior inconsistent conduct by Messrs Booth, Sanders and Kendray and to put the contents of the documents set out in pars [34], [37] and [44] above in context. If, as is to be expected, the evidence of Messrs Booth and Sanders is to be tendered in Supreme Court proceeding No 111 of 2005, then any evidence of prior inconsistent statements they have made about the oral agreements referred to in pars [48] and [49] above may be tendered in the proceeding against Mr Kendray.

[59] Such evidence as the defendant can give, even if his evidence is limited to what is contained in the James Noonan Solicitors' file, is more than likely to be inconsistent with the interests of Mr Kendray. His evidence may be used to refute Messrs Booth's, Sanders' and Kendray's evidence about the oral agreements pleaded in the amended defence and counterclaim. The evidence that the defendant is capable of giving is not only material evidence but is potentially powerful evidence in relation to the credit of Messrs Booth, Sanders and Kendray. The defendant will be in a position in which Mr Kendray's interests may well conflict with his obligation to the court. He will owe obligations of loyalty to Mr Kendray and he will have a duty to the court to be frank.

[60] If the defendant continues to act, a fair minded reasonably informed member of the public might think that there was a conflict of interest which might interfere with the proper administration of justice because the independent objectivity of the defendant may be compromised because of his obligation of loyalty to Mr Kendray. A fair minded reasonably informed observer would conclude that the appearance of the due administration of justice would be subverted by the defendant both continuing to act for Mr Kendray and giving evidence potentially harmful to the interests of Mr Kendray and potentially damaging to his credit.

[61] It is generally undesirable for a solicitor who is aware that he is likely to be called as a witness, other than in relation to formal or non contentious issues, to act. It is relevant though far from decisive that Rule 13 of the Professional Conduct Rules provides as follows:

> A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the plaintiff's continued retainer by the practitioner's client, the practitioner must not act, or continue to act, in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court.

[62] Having given due weight to the public interest in a litigant not being deprived of the lawyer of his or her choice and to the cost and inconvenience that will be caused to Mr Kendray of requiring the defendant to cease to act for him, it is my opinion that a fair minded reasonably informed member of the public would conclude that the defendant should be prevented from continuing to act for Mr Kendray in the interests of the

protection of the integrity of the judicial process and the appearance of the due administration of justice. There is ample time for alternative representation to be obtained for Mr Kendray and it has not been suggested that the loss of the defendant's knowledge and familiarity with the proceeding to date would be oppressive. The proceedings are not so advanced that a requirement to obtain other representation would be unduly disruptive.

Orders

[63] I make the following order:

> The defendant is restrained from continuing to act for Mr Robert George Kendray against the plaintiff in Supreme Court proceeding No 111 of 2005.

[64] I will hear the parties as to costs and any ancillary orders.