

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

Not Restricted

LIST A
SCI 10717 of 2009

DOMETIC PTY LTD (ACN 004 947 488) and
DOMETIC NEW ZEALAND LIMITED
(Company Number 2084564)

Plaintiffs

v

OLAF WOLFGANG BACH & Ors
(according to the schedule attached)

Defendants

AND

OLAF WOLFGANG BACH & Ors
(according to the schedule attached)

Plaintiffs by
Counterclaim

v

DOMETIC PTY LTD (ACN 004 947 488)

Defendant by
Counterclaim

JUDGE: Pagone J
WHERE HELD: Melbourne
DATE OF HEARING: 3-6, 10-13 October 2011
DATE OF JUDGMENT: 15 December 2011
CASE MAY BE CITED AS: Dometic Pty Ltd & Anor v Olaf Wolfgang Bach & Ors
MEDIUM NEUTRAL CITATION: [2011] VSC 651

FIDUCIARY DUTIES – Authority, rights and powers of officers of a corporation – Whether use of funds for private purposes amounts to a breach of contractual, fiduciary and statutory duties – Discretion of officer to authorise payments in operational and managerial activities of a company – Interposing of an intermediary company for the supply of goods – Whether inferences can be drawn of knowing assistance.

EMPLOYMENT – Statutory entitlements – Whether lack of notice amounted to wrongful termination of employment – Justification of summary dismissal by reason of misconduct.

APPEARANCES:

Counsel

Solicitors

For the Plaintiffs
and Defendants by
Counterclaim

Mr P Collinson S.C. with
Mr D Hyde

Baker & McKenzie

For the Defendants
and Plaintiffs by
Counterclaim

Mr L Glick S.C. with
Mr A Schlicht

Strongman & Crouch

HIS HONOUR:

- 1 In this proceeding the plaintiffs sue their former director and employees for alleged breaches of duties. They, in turn, counterclaim for unpaid entitlements arising from the termination of their employment.
- 2 The first plaintiff (“Dometic”) and the second plaintiff (“Dometic NZ”) are each members of a group (“the Dometic Group”) which is ultimately owned by Dometic Sweden AB through Dometic Waeco Pty Ltd (“Waeco”). Waeco owned Dometic NZ and Dometic Holdings Pty Ltd (“Holdings”) which, in turn, owned Dometic. The first defendant (“Olaf Bach”) was a director of Dometic, Dometic NZ and Holdings until 24 August 2009 and was the managing director of both Dometic and Holdings until about 9 September 2009. The second defendant (“Petra Turville”) is the sister of Olaf Bach, the wife of the third defendant (“Brendan Turville”), and was employed by Dometic as its general manager until 16 September 2009. Brendan Turville (Petra Turville’s husband and the brother-in-law of Olaf Bach) was employed as the warehouse manager of Dometic until 16 September 2009. The fourth defendant (“Finba”) is the Trustee of a trust known as the Finba Trust and is an entity associated with, and controlled by, Olaf Bach.
- 3 Dometic is the company in Australia through which the Dometic Group carried on business of importing and supplying products for the caravan, motor home and truck markets including air conditioners, refrigerators, awnings, cookers, sanitation systems, lighting, mobile power equipment, safety equipment, windows and doors. Dometic NZ is the company through which the Dometic Group carried on a similar business in New Zealand. The business in Australia, but not that in New Zealand, had its origins in a family business originally established by Wolfgang Bach who is Olaf Bach’s and Petra Turville’s father. Wolfgang Bach remained a director of Dometic until 8 January 2008 but substantially ceased employment in the early 2000s.

The Finba Claims

- 4 The claim of breach of duties against Olaf Bach was admitted by him during the course of the proceeding. The claim against him, and accepted by him, was essentially that he had unlawfully interposed Finba to supply goods to Dometic and to Dometic NZ from Eberspacher (UK) Ltd (“Eberspacher”) and Powrwheel (UK) Ltd (“Powrwheel”). Olaf Bach accepted that he had embarked upon a course of conduct (unlawful by him as against Dometic) of interposing Finba between the purchase of equipment by Dometic and Dometic NZ from Eberspacher and Powrwheel.
- 5 Finba was incorporated in January 2006 with its registered office as that of Mr Lal Pardasani, a family advisor to members of the Bach family over many years. A Mr Gary Bell was appointed as the sole director of Finba but the defendants admitted that he was a mere nominee and that the true controller of Finba was Olaf Bach. Olaf Bach also admitted that he was the sole beneficiary under the Finba Trust. The principal place of business for Finba was recorded as 5 George Street, North Melbourne, which was the private residential address of Mr Bell but, to the extent that Finba had any operations, it appeared to be from the same premises as Dometic at 6 Treforest Drive, Clayton. The only role and purpose of Finba was to supply goods to the plaintiffs at a price higher than Dometic and Dometic NZ would have paid if they had purchased the goods directly from Eberspacher and Powrwheel. This was achieved by employees of Dometic and Dometic NZ being required to place orders for Eberspacher and Powrwheel products exclusively through Finba.
- 6 The usual ordering process of Dometic and Dometic NZ involved the placement of orders directly with the factories producing the goods. In the case of Dometic this involved a Mr Michael Phillips placing orders directly with the relevant factory. Eberspacher was the only company from which Mr Phillips was not able to order products in that way. Mr Phillips gave evidence that Olaf Bach, as managing director of Dometic, informed him that all purchases of Eberspacher products for

Dometic were to go through Finba. Mr Phillips said that he did not challenge Olaf Bach in relation to this direction in part because (as was also the evidence of others) Olaf Bach was a dominant personality (described by Mr Phillips as a “bully”) who did not tolerate opposition from members of staff. During the period between 20 June 2006 to 6 August 2009 goods to the value of \$2,881,286.88 were supplied by Finba to Dometic.

7 A similar arrangement was imposed upon Dometic NZ after acquisition of the business formerly conducted by Leisure Appliances NZ Ltd from Mr Mark White. Mr White’s company had had a history of dealing directly with Eberspacher and Mr White continued as a director of Dometic NZ after the sale of his business to the Dometic Group. Olaf Bach informed Mr White during a meeting in Dusseldorf in July 2007, whilst discussing the possible acquisition of his interests in the New Zealand business, that the New Zealand company would, in the future, need to acquire the Eberspacher products through a third party in Australia notwithstanding that previously the Eberspacher products sold by Dometic NZ had been acquired directly from Eberspacher itself. Mr White gave evidence that he was also told by Olaf Bach that “the systems were in place, and that he would never be able to prove otherwise and neither would Dometic management”. Mr White followed Olaf Bach’s instructions and implemented the arrangement to acquire Eberspacher products through Finba. Between 14 March 2008 and 14 July 2009 Dometic NZ acquired Eberspacher products via Finba to the value of GBP£205,403.63 (\$428,070.67). Powrwheel, a subsidiary of Truma, was introduced as a supplier to Dometic through Finba, although not to Dometic NZ, and it appears that there were some discussions between Olaf Bach and Mr White about sourcing Truma products in the same way.

8 It is accepted in this proceeding that Olaf Bach’s use of Finba as an intermediary for the purchase of product by Dometic and Dometic NZ was in breach of the duties owed by Olaf Bach and he accepted that judgment for the relevant amounts should be entered against himself and Finba. All parties agreed that the amount of those

claims is \$357,361.00. The plaintiffs, however, also pressed for judgment for this amount against Petra Turville and her husband, Brendan Turville. The plaintiffs' claims against Olaf Bach's sister and brother-in-law is based upon allegations of assistance and knowledge of the arrangements which Olaf Bach had put in place and through which benefits were secured through Finba.

9 The plaintiffs' claim against Petra Turville and Brendan Turville in relation to Finba relies upon the principles enunciated by Lord Selborne in *Barnes v Addy*¹ when his Lordship said:

... strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which the Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest or fraudulent design on the part of the trustees.²

The claim of liability on the part of Petra and Brendan Turville in relation to Finba relies upon the second limb of this passage commonly referred to as involving "knowing assistance".³ In *Farah Constructions v Say-Dee Pty Ltd*⁴ the High Court said:

Against this background, it has been customary to analyse the requirement of knowledge in the second limb of *Barnes v Addy* by reference to the five categories agreed between counsel in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA*:

"(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry."

In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele (BCCI)*, Nourse LJ observed that the first three categories have generally been taken to involve "actual knowledge", as understood both at common law and in equity, and the last two as instances of "constructive knowledge" as developed in equity, particularly in disputes respecting old system conveyancing. After noting that in *Royal Brunei* the Privy Council had discounted the utility of the *Baden* categorisation, Nourse LJ in *BCCI* went on

¹ (1874) LR9ChApp 244.

² Ibid 251-2.

³ *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89, 140 [112] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan J).

⁴ (2007) 230 CLR 89.

to express his own view that the categorisation was often helpful in identifying the different states of knowledge for the purposes of a knowing assistance case.⁵

The plaintiffs' pleaded case against Petra and Brendan Turville did not distinguish the material facts pleaded against Petra and Brendan Turville other than in the particulars, but the case against each requires that the evidence admissible against each be considered separately. Neither Petra nor Brendan Turville gave evidence.

10 The pleaded case was that each of Petra Turville and Brendan Turville both assisted in the conduct of Olaf Bach in relation to Finba and that both knew that the Finba conduct was not in the interests of the plaintiffs and that it had not been disclosed to the boards of directors of the plaintiffs or to the Dometic Group. The evidence, however, differed as between that admissible against Petra Turville and that admissible against Brendan Turville. In each case the plaintiffs relied upon inferences to be drawn, but in each case the inferences require evidence to support the inference relied upon.⁶ In that context the nature of the issue, and the seriousness of an allegation made, will affect the process by which reasonable satisfaction may be reached in concluding that an allegation was made out.⁷

11 There is little direct evidence of the knowledge or involvement of Petra Turville in the use of Finba by her brother in the sales to the plaintiffs. Petra Turville did not give evidence but maintained through her counsel that the evidence relied upon by the plaintiffs was insufficient to make out the case against her. It therefore becomes necessary to determine whether the evidence is sufficient to permit inferences to be drawn that she assisted her brother in the knowledge of an activity which was improper.

12 There is evidence of some involvement by Petra Turville in the Finba dealings by Dometic. On 22 June 2006 an email was sent from Petra Turville to her husband,

⁵ Ibid 163 [174] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan J) (omitting citations in footnotes).

⁶ *Jones v Dunkel* (1959) 101 CLR 298, 309–310 (Menzie J); *Protean (Holdings) Ltd v American Home Assurance Co* [1985] VR 187; *Sarkis v Deputy Commissioner of Taxation* [2005] VSCA 67.

⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362–3 (Dixon J).

Brendan Turville, containing a Finba tax invoice for \$27,237.10. Several features of the invoice suggest that its creator was Petra Turville and, therefore, that to some extent she was assisting her brother in securing improper profits to Finba from the plaintiffs. The invoice from Finba has a layout and style similar to that she had used for tax invoices from her to Dometic seeking the payment of rent. Dometic occupied premises as tenant under a lease from PECA Enterprises Pty Ltd, being a company under Petra Turville's control. There was tendered in evidence several examples of rental invoices sent by PECA Enterprises Pty Ltd to Dometic which had the same layout as the Finba invoice dated 20 June 2006. The PECA Enterprises rental invoice also had the peculiarity that the name of the landlord was misspelt on the tax invoice with the word "Enterprises" being misspelt as "Interprises". The same misspelling appeared in the email of 22 June 2006 in which Petra Turville sent to her husband the Finba invoice as an attachment. Indeed, the email sending the Finba invoice described the attachment as "PECA INTERPRISES PTY LTD0506.doc" although the attachment was in fact an invoice from Finba for the supply of goods. The date of the Finba invoice, namely 20 June 2006, is also significant since it was at around the time when the first invoice was rendered by Finba to Dometic.

- 13 The format of the Finba tax invoice is strikingly similar to the PECA Enterprises rental invoices; there is an indentation where it has the words "invoice to"; there is the same address of Dometic as the recipient; the date is in a similar position in each tax invoice; the headings "item description" are similar in type and layout, as are the layout of the items under the headings. There are some differences in the items in the headings but those differences show some appreciation of the need to adjust the content of an invoice to accommodate the difference between an invoice for the payment of rent over a period of time as compared with an invoice for the sale of goods by reference to the quantity of items and unit item price. Each invoice contains an address of the person from whom the invoice was sent. In the case of the PECA Enterprises rental invoice the address was a post office box in South Clayton. In the case of the Finba tax invoice the address was "5 George Street North Melbourne" which was the business address of Finba.

14 The creator of the Finba tax invoice required detailed knowledge of Finba and its claim against Dometic for payment of sums in respect of the purchase of identified goods. The person creating the Finba tax invoice knew the items to be supplied, knew the quantity to be supplied, knew prices of the items to be supplied, and knew the business address of Finba. The link with Petra Turville is found in the similarity between that invoice and those prepared by her for payment of rent to her company PECA Enterprises Pty Ltd. The link to her can also be seen from the email attaching the Finba invoice which indicated that it was sent by her to her husband at an early point in the course of conduct by Olaf Bach to use Finba as a means of obtaining profit for his own benefit from Dometic. It is likely that the Finba invoice was created by the same person who created the PECA Enterprises invoices associated with Petra Turville. Its possible creation by the external accountant involved in the creation of Finba can confidently be excluded. Mr Lal Pardasani was called to give evidence on subpoena. He was the accountant involved in setting up the documentation for the Finba Trust, and as such was a possible author of the Finba invoice, but Mr Pardasani gave credible and uncontroverted evidence that he did not prepare any of the Finba invoices. The probable author of the invoice was Petra Turville.

15 The evidence concerning the receipt by Dometic of the Finba invoices for payment was that of Mr Phillips. He is a qualified accountant and had become the chief financial officer with Dometic at the time of the hearing. He had been employed with Dometic and its predecessor companies (including Electrolux Pty Ltd) from 1984. In 2002 he was employed by Olaf Bach as financial controller at Dometic. His evidence concerning payment of the Finba invoices was that he received the invoices from either Petra Turville or Olaf Bach for immediate payment. The usual procedure adopted for Dometic purchases from overseas was that invoices were received from the supplier of the goods. The goods acquired through Finba, however, were not accompanied by invoices from the overseas supplier or manufacturer. A peculiarity of this difference was that none of the features commonly found in an arm's length third party invoice appeared on the Finba invoices to Dometic, although such

features could be found on the invoices between Eberspacher and Finba. An example of an Eberspacher invoice to Finba was tendered in evidence. It was addressed to Finba for delivery of goods to Dometic and contained on its front page a clear statement concerning the “conditions of sale” as between Eberspacher and Finba. The terms for sale and payment, common in such commercial documents, provided for the date of payment and a statement that the orders were carried out in accordance with the standard conditions of sale of Eberspacher stated to have been previously supplied to the buyer. Whatever those terms might have been, they were not carried forward to the dealings with those goods as between Finba and Dometic. In contrast to usual commercial dealings, Dometic received from Finba a simple invoice requiring immediate payment on an invoice containing none of the rights or obligations in respect of the goods which Finba may or may not have had by virtue of its dealings with Eberspacher and the terms upon which those dealings were made.

16 Mr Phillips did not ask Olaf Bach who Finba was but accepted the invoices received from Olaf Bach and from Petra Turville for immediate payment. Payment was to be to Finba in British pounds which Mr Phillips arranged online by generating a payment upon the Finba invoices he was given. Payment needed to be authorised by Olaf Bach and Petra Turville by using their authorising identifications and passwords to approve the payments for the remittance of the funds to Finba. An example of a payment to Finba from Dometic’s National Australia Bank account was tendered in evidence with copies of the actual signatures of both Petra Turville and Olaf Bach. Both needed to authorise payment and the signatures of both indicated that both had done so. At least 38 such transactions occurred in relation to Dometic payment of Finba invoices which Petra Turville assisted by authorising payment.

17 Petra Turville was employed as general manager of Dometic at the relevant time. She occupied a position of trust as against Dometic by virtue of her position and by virtue of her authority in respect of its funds. The need for her signature to authorise the release of funds is not a mere formality and carried with it personal

responsibility. In my view, she breached her duties to Dometic by the assistance which she afforded in relation to the authorising of payment of the Finba invoices.

18 There is also evidence from which the plaintiffs contended that I should infer that Petra Turville had the requisite knowledge to come within the second, third and fourth categories of knowledge agreed between counsel in *Baden v Société Générale*⁸ and endorsed in *Farah Constructions v Say-Dee Pty Ltd.*⁹ I accept that I may infer that a person occupying a position of general manager, with the power and authority to authorise payment to Finba, and who on one or more occasion requested Mr Phillips to arrange payments, is likely to have had some knowledge from her brother, Olaf Bach, about the role of Finba. However, there is additional evidence from which her knowledge about the role of Finba may confidently be inferred. Chief amongst that is the evidence of a Ms Helme in relation to a particular instance where Petra Turville took responsibility for resolving a difficulty which had arisen with the supply of Eberspacher products in 2009. Ms Helme said that her normal practise in relation to the need to secure Eberspacher stock would be to raise the question of stock availability with Olaf Bach directly. However on at least one occasion Olaf Bach was not available to be consulted and Ms Helme turned to Petra Turville, as general manager, to ask when the Eberspacher stock of diesel heaters could be expected to arrive. Later that day Petra Turville walked out of her office saying to Ms Helme that she had found out that the diesel heaters were being air freighted, that they were on their way and gave Ms Helme an expected time of arrival. Those goods were sourced from Eberspacher and were to be supplied to Dometic through Finba. Petra Turville plainly must have made some enquiries from someone to secure the information she relayed to Ms Helme. The information she obtained was that which was ultimately sourced from Eberspacher and was either obtained by her from Eberspacher as Finba's representative or by asking her brother. Either inference carries with it some knowledge of the arrangement by which Eberspacher products were being acquired by Dometic, of which she was managing director,

⁸ [1993] 1 WLR 509.

⁹ (2007) 203 CLR 89, 163 [174] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan J).

indirectly through Finba rather than directly from Eberspacher. Finba itself was little more than a shell having no telephone number, no email address and, critically, had provided no documentation about the shipping of the goods. For Petra Turville to supply the information needed by Ms Helme it was essential to contact either Eberspacher directly or her brother. Either way it revealed the essential elements of the dealing by which goods were being acquired by Dometic other than directly from the manufacturer and supplier.

19 Petra Turville's knowledge (and assistance) of the Finba arrangement with Dometic may also be inferred, albeit perhaps to a lesser extent, from the access she had to her brother's personal post office box. It appears that in 2006 the mail arrangements were changed in the Dometic office. Until that time a Dometic employee would be sent to the post office to pick up the mail, including the mail from Olaf Bach's personal post office box. His mail would be put on his desk for him to open with no one else being permitted to touch it except (according to one witness) for his sister. After 2006, however, Dometic staff were not permitted to collect the mail from Olaf Bach's post office box. The key to his personal post office box was removed from the key ring held at Dometic for use in collecting the mail by Dometic staff. It was Mr Phillip's evidence that only Olaf Bach and Petra Turville thereafter ever had access to the former's personal mail.

20 Petra Turville's knowledge of Finba was also supported by the evidence of Ms Julie Bennett. Ms Bennett and Petra Turville appear once to have been very close friends but their friendship has not survived the events which gave rise to these proceedings. The two women, and their families, have known each other for many years and each had acted as god-parents for the other's children. The two met frequently and discussed many matters of the activities of Dometic over many years. Ms Bennett gave evidence about details of a kind that are likely to have been obtained by her from her former friend Petra Turville during happier days. Amongst the many matters about which Ms Bennett gave evidence were conversations she had had with Petra Turville in which the latter had referred to

future plans of Olaf Bach and Petra Turville to leave Dometic to set up a new business. Those conversations began in early 2008. In that context Petra Turville mentioned that Olaf Bach was going to China to source new product for this business. She informed Ms Bennett that they would be focussing on diesel heaters and that in the latter part of 2008 and into 2009 they were writing off diesel heaters in Dometic's books and shifting them to a storage unit. Diesel heaters were amongst the products being acquired by Dometic via Finba from Eberspacher.

21 I need not dwell upon whether Ms Bennett's evidence revealed an admission by Petra Turville of consciousness of a theft but, on any view, it was an admission of consciousness by Petra Turville of facts which were inconsistent with her duties as general manager of a company. The name of the new business was to be "Finch Leisure", and the writing off of the products was said by Petra Turville to Ms Bennett to be permissible because her brother had organised it. Ms Bennett was clear in her testimony that it was Petra Turville who told her that diesel heaters and diesel heater parts were being written off and were being stored in a storage facility and that, when Ms Bennett had asked about the storage facility, Petra Turville had responded by saying that the parts were in a storage facility but that they would never be found.

22 Ms Bennett's evidence about the new business which Olaf Bach had been planning (as recounted to her by Petra Turville) was that Petra Turville would leave Dometic after her brother had arranged a redundancy package for her. The plan as recounted to Ms Bennett was that Brendan Turville was to remain in the business to be the "eyes and ears into the company after they had left". Ms Bennett was informed by Petra Turville that the family had purchased a factory for the new premises in their father's superannuation account with half of the premises to be rented to a third party, although in a subsequent discussion, Petra Turville informed Ms Bennett that the purchase of the factory had not gone ahead.

23 The defendants were first suspended from their employment in about August 2009 and then dismissed in September 2009. Ms Bennett's evidence about what Petra

Turville had told her concerning the new business included details about arrangements for some graphic design work and a brochure to be undertaken by Contemporary Press. According to Ms Bennett she had been told by Petra Turville that all of the set up and stationery costs for the new (non Dometic) business had been incurred through Contemporary Press and added to Dometic's bill. The defendants called Mrs Ursula Heinsen from Contemporary Press to give evidence that all work done by Contemporary Press was done on behalf of Dometic. I have no reason to doubt the evidence of Mrs Heinsen but it does not diminish the force of the evidence of Ms Bennett concerning what she said she had been told by Petra Turville. Indeed, Ms Bennett gave evidence that in October 2009 (that is after the dismissal of the defendants) Petra Turville told her that Mrs Heinsen from Contemporary Press had phoned in a panic because Dometic had been asking questions about invoices for some of the brochures that had been prepared for Petra Turville. According to Ms Bennett, Petra Turville had said to Mrs Heinsen that she should "back it out" from the bills. This conversation was not put to Mrs Heinsen either as evidence in chief on behalf of the defendants or in cross examination on behalf of the plaintiffs. It remains, therefore, as a potential admission against interest as a statement relayed to Ms Bennett by Petra Turville. In connection with that, Ms Bennett had also asked Petra Turville whether the suspension from employment had anything to do with "the new business" and "what about the new logo and things that [Petra Turville] had on [her] laptop?" To this Petra Turville was said to have informed Ms Bennett that it was all "okay" because the "IT guy" had already wiped the laptop. I accept this evidence.

24 The evidence of Ms Bennett was challenged as having been fabricated and based upon ill will towards a former friend. I have no doubt that the two, and their families, have fallen out since the suspension and subsequent dismissal of the defendants by the plaintiffs. However, I consider Ms Bennett to be a truthful and reliable witness whose evidence I should and do accept. Ms Bennett was cross-examined about the last conversation she recalled having had with Petra Turville and her husband. The two families were together at the home of Ms Bennett for a

meal and were sitting at the kitchen table. Counsel for the defendants specifically put to Ms Bennett whether one of the items discussed on that occasion was about plans to “steal” products from Dometic. Ms Bennett’s reply was that she did not know that Petra Turville “was stealing products” but was simply being told what she had been doing and that when asked how it could be done she had been told by Petra Turville simply that they were allowed to do it and that it was authorised by her brother, Olaf Bach. Ms Bennett did not reveal an eagerness to adopt the suggestion put by counsel for the defendants that her testimony was to the effect that her former friend had been engaged in “theft” and was careful to give evidence to the best of her recollection of what was said and of what she recalled having occurred.

25 The plaintiffs also relied upon the evidence of Mr Braddon Slater about Petra Turville’s knowledge of the Finba transactions. Mr Slater became the manager of the recreational vehicle manufacturing division of Dometic in Australia but at the relevant time was a consultant for Dometic conducting business through a company known as Madagascar Pty Ltd. His evidence was not that Petra Turville had ever specifically mentioned “Finba” to him but that she had indicated that a company would be set up for the family for the future. On one occasion she informed him that she was to do a MYOB course in connection with the new business. Dometic does not use MYOB and the course would have been of no relevance to Dometic’s business. There is no doubt nothing inherently wrong with people in Petra Turville’s position having general discussions about the contemplation of future economic activity after leaving a present employer, nor with self-improvement by undertaking courses which may be of no direct or immediate importance to an existing employer, but it is consistent with the general evidence against Petra Turville from which I draw the inference that she was aware of the role played by Finba. In particular she had indicated that the new business would be a shareholding arrangement between herself and Olaf Bach for the future.

26 The facts in the proceeding are in my view sufficient for me to draw the

unfavourable inferences against Petra Turville that she was aware of the improper role of Finba. She did not give evidence although she was present in Court for many days of the hearing and was otherwise available to give evidence on her own behalf. The failure to give evidence itself supports an inference that her evidence would not have assisted her case¹⁰ and this is particularly so where it is the party which is the uncalled witness.¹¹ I make the averse inferences against Petra Turville with greater confidence given that she could have given evidence about matters which she was plainly in a position to cast light upon.

27 The evidence of Petra Turville's involvement and knowledge of Finba's dealings with Dometic NZ is less than in relation to the Finba dealings with Dometic. The evidence of Mr White was that supply of product to Dometic NZ had to be authorised from Australia. Mr Phillips testified that he was not authorised to approve payments but would arrange for signature in Australia. The actual bank authorities for Dometic NZ were not proved and it is possible that Olaf Bach had knowledge, responsibility and control of the Finba transactions with Dometic NZ to the exclusion of his sister. Such a conclusion would be inconsistent with my other findings of her knowledge of and participation in the Finba dealings and would be inconsistent with the evidence about its purpose. Furthermore, there is no evidence upon which I should affirmatively conclude that Petra Turville had no knowledge and involvement in Finba's dealings with Dometic NZ. The evidence of her involvement and knowledge of Finba, and of its purpose including her future benefit, makes it reasonable to infer that she also knew of and assisted in the dealings between Finba and Dometic NZ.

28 The case against Brendan Turville requires a consideration of that evidence which is admissible for or against him. His position was that of warehouse manager for Dometic at the relevant time. He was the recipient of the email of 22 June 2006 from his wife's email address which attached the Finba invoice. His role as warehouse

¹⁰ *Jones v Dunkel* (1959) 101 CLR 298, 308 (Kitto J), 312 (Menzies J), 320-1 (Windeyer J).

¹¹ *Kuhl v Zurich Financial Services Australia Ltd* (2011) 276 ALR 375, 393 [63] (Heydon, Crennan and Bell JJ); *Dilosa v Latec Finance Pty Ltd* (1966) 84 WN (Pt 1) (NSW) 557, 581 (Street J).

manager made him responsible for counting stock on a regular basis, for counting the incoming stock off the containers and for organising deliveries via company trucks or third party carriers to Dometic's customers. A number of staff reported to him.

29 It is possible that Brendan Turville both participated in or knew of the role played by Finba. His position as warehouse manager provided a general context through which he could easily have obtained more detailed knowledge about Finba. His relationship as the husband of Petra Turville, and the brother-in-law of Olaf Bach, were also facts within the context through which he might have obtained knowledge of the role of Finba and had given direct assistance in the improper use of Finba. However, the inferences to be drawn against him must not depend upon mere possibilities or mere general preconceptions. In my view the evidence against him provides a less secure foundation upon which to draw confidently the inferences needed to found liability.

30 Mr Slater gave evidence that Olaf Bach had asked him to teach Brendan Turville how to install diesel heaters. Mr Slater had undertaken such tasks on other occasions by giving training to other staff but Brendan Turville, as warehouse manager, had not previously needed to perform installation work of that kind. Mr Slater's evidence in this respect is one thread from which to found an inference against Brendan Turville. Both Mr Slater and Ms Bennett gave evidence of each having been told by Petra Turville that her husband was to be involved in the plans for the new business. The evidence, however, is general and not sufficiently specific to justify an inference with confidence.

31 Ms Helme gave evidence that on one particular occasion she was handed an Eberspacher invoice (rather than a Finba invoice) by Brendan Turville. As warehouse manager Brendan Turville had no reason to have possession of such an invoice. The plaintiffs contended that this showed that the invoice had been given to him by Olaf Bach or by Petra Turville. The invoice was a list of spare parts. Ms Helme's evidence was that she gave the invoice to Olaf Bach and asked him what

she should do with the invoice. According to Ms Helme, Olaf Bach looked at the invoice and asked where she got it. Ms Helme said that she concluded that from this that she was not meant to have had it. She responded to his question by informing Olaf Bach that the invoice had been given to her by Brendan Turville and was then told by Olaf Bach to leave the matter with him. Ms Helme never heard anything further about the invoice.

32 I find this evidence equivocal about the role and knowledge of Brendan Turville in the Finba dealings and insufficient for me to make the necessary inferences required against Brendan Turville. Whilst some inferences against Brendan Turville present themselves as “possibilities”, others suggest a lack of appreciation by him about the need for Eberspacher invoices to be kept secret or confined within Finba and not shown to people in the wider Dometic Group. There was some evidence that Olaf Bach tended to be somewhat secretive and forceful in personality and character. One of the things alleged against Petra Turville was a statement by her that others might have known more about what her brother was doing than she did. Whilst I do not accept that she did not know of the arrangements involving Finba, the evidence about Olaf Bach’s general disposition and control of information makes it plausible that Brendan Turville might not have been sufficiently involved or aware of the arrangements with Finba. In the end I am unable to infer the facts necessary either way and, therefore, do not consider the claims against Brendan Turville to be made out by the plaintiffs.

The Property Claims

33 The next pleaded claim by the plaintiffs is for the recovery of monies spent by Dometic for improvement to residential and commercial properties. The amounts claimed are mostly small but totalled \$52,207.63. The first is a claim for \$400.40 paid to State Guardian Pty Ltd for alarm monitoring services at 50 Lasiandra Avenue, Forest Hill. That is the residential property of the parents of Olaf Bach and Petra Turville. The defendants conceded that the invoice relates to alarm monitoring services provided at the premises of which Wolfgang and Waltraud Bach are the

registered proprietors. A similar claim for the same amount to the same company was made in respect of the residential property of Petra Turville at Unit 1, 2 Felicia Grove, Forest Hill. A claim for \$400.40 was also made for alarm monitoring services at the property of which Olaf Bach is the registered proprietor, namely 3 Cunningham Street, South Yarra.

34 The claim in respect of repairs to roofing depended upon an invoice from Security Plus (Australia) Pty Ltd addressed to Dometic Caravan Equipment Pty Ltd dated 21 March 2007 and the evidence of Mr Phillips. The fact of payment of the invoice was admitted in Petra Turville's defence. The invoice itself gave no details of the location of the repairs but the evidence of Mr Phillips was that he was not aware of any repairs for roofing done on any of the buildings leased by Dometic in Treforest Drive at the time of the date of the invoice. Accordingly I accept that the amount was not paid for work performed on behalf of Dometic.

35 The defendants pleaded that expenditure for the alarm monitoring services were part of the salary package of Petra Turville and that the alarm monitoring service for 3 Cunningham Street, South Yarra was part of the salary package of Olaf Bach. No evidence was led to establish any such entitlement. Such evidence as there was on the topic came from Mr Phillips who said that there was no such allowance and that he would have recorded such payments for fringe benefits tax purposes had there been one. Accordingly, the plaintiffs have made out the claims for these amounts as against Olaf Bach and Petra Turville. Their positions in Dometic, and their control of its funds, required that they not use funds for private purposes. Each of them ought not to have permitted the expenses to be incurred. However I am not satisfied that there is sufficient evidence for these claims as against Brendan Turville.

36 The claims for improper property expenditure also include claims amounting to \$41,306.43 in respect of works at commercial properties. The first was a claim for \$2,546.50 paid by Dometic to Blue Phase Electrical Pty Ltd for the supply and installation of a three phase power circuit for a motorised roller door and the inspection of a switchboard for damage from a forklift hitting the switchboard at

11 Treforest Drive, Clayton. Those premises were leased by Dometic from PECA Enterprises Pty Ltd. The evidence of Mr Phillips was that the invoice related to a roller door which Dometic paid to have installed to divide the building leased from PECA Enterprises Pty Ltd. He expressed the view that the door was of no real benefit to Dometic as it used the whole building as a warehouse. The premises, however, were used by Dometic and the evidence of Mr Phillips that the roller door was of no real benefit to the company establishes little in light of his evidence that the whole of the building was occupied by Dometic as a warehouse.

37 The plaintiffs also rely for their claim upon clause 3.4.2 of Dometic's lease with PECA Enterprises Pty Ltd which provided that Dometic was not obliged to carry out structural repairs or to make payments of a capital nature unless the need for them resulted from the negligence of Dometic or its agents, the failure by Dometic to perform its obligations under the lease or the tenant's use of the premises. Such evidence as there was about this payment from the invoice suggests that at least part of the amount was payable by Dometic under the terms of the lease because of the damage caused by a forklift hitting the switchboard. No further evidence was tendered to establish how much of the account was referable to the damage from the forklift. The account itself does suggest that some part of the bill was referable to what, on its face, appeared to be some negligence or failure or use by Dometic of the premises. The installation and supply of the phase power circuit board may have been of a capital nature but the power circuit would appear to be an item separate from the motorised roller door. In any event, whether subsequently thought desirable, the details in the invoice disclose amounts that might come within the tenant's obligation from its use of the premises. Dometic has not satisfied me that the \$2,546.50 is either sufficiently apportionable between the two components for a reliable severance of the amounts to be made or that either amount is not within the terms of the lease as an obligation falling upon the tenant.

38 The next item in this category was a claim arising from the payment by Dometic to H&B Fencing & Gates Pty Ltd of \$8,041.00 for work done at 11 Treforest Drive,

Clayton. This work concerned the removal of an existing mesh fence and the supply and installation of fencing separating the building at 11 Treforest Drive from the building on its right. Mr Phillips gave evidence that Dometic wrote to the tenants of the adjoining building asking whether they were prepared to pay half the cost of replacing the steel fence. They declined and Dometic paid for the whole of the amount. In this proceeding they contended that the claim was of a capital nature and therefore that the tenant was not obliged to pay the amount. However, the issue is not whether Dometic might have been able to decline payment and insist upon PECA Enterprises Pty Ltd paying the amount but, rather, whether it was wrongful to procure Dometic's payment of the invoice. The chief executive officer of a company has a wide discretion in the operational and managerial activities of a company¹² and the payment of such amounts in the course of Dometic's ordinary use of the premises is not of a kind which can be said to be wrongful. The expenditure appears on the face of the invoice to be for work at premises used by Dometic in its business and for a purpose which was connected with the business. The amount was not large and of a kind (in type and amount) which the chief executive officer of a company could reasonably authorise notwithstanding that a strict reading of a lease might have made it payable by the landlord.

39 The next item was a sum of \$9,315.13 paid by Dometic to Kade Plumbing to replace a section of leaking fire service under a concrete driveway. Mr Phillips gave evidence that there was a leaking fire service between the street and the point where the fire outlet was located in the building. He explained that it was necessary to dig up the concrete and to replace the fire service. He also explained that in the case of a similar problem in the building at 6 Treforest Drive it had been the landlord, rather than Dometic, who had paid the cost of repair. That invoice was dated 8 December 2006 but on 1 August 2008 Kade Plumbing again invoiced Dometic to replace the fire service from the mains to inside the property at 11 Treforest Drive for a similar amount of \$9875.80. That invoice was also for work to replace the downpipes as had been required at 6 Treforest Drive, being the premises in respect of which Mr Phillips

¹² *Randall v Aristocrat Leisure Ltd* [2004] NSWSC 411.

had said that it had been the landlord (rather than Dometic) who had paid the cost to replace the fire service. It seems, therefore, that Dometic's payment for what might strictly have been landlord obligations was not entirely consistent as between the premises at 6 Treforest Drive, Clayton and 11 Treforest Drive, Clayton. There may have been some explanation for the inconsistency and it may have been that the quantum of the August 2008 tax invoice from Kade Plumbing referable to the downpipes at 6 Treforest Drive was not considered sufficiently large to warrant pursuing payment from the landlord. That, however, is speculation and I have no secure foundation to form any view about the payments beyond what appeared in the invoices. Payment to replace a leaking fire service under a concrete driveway may readily enough be seen to be a payment for repairs to premises which were needed to be done for its business and which had arisen from the results of Dometic's use of the premises within the meaning of clause 3.4.2. Which of the landlord or the tenant was obliged to pay for it might have been debateable and a chief executive officer may reasonably have decided to authorise an expenditure of that type and of that amount without needing first to pursue the landlord for its payment. I do not find this claim made out by the plaintiffs.

40 The last items in this group of claims are four invoices totalling \$11,528.00 for the installation of air conditioners. The plaintiffs contended that each was a landlord expense being works of a capital nature. Clause 2.1.5 of the lease obliged the tenant to pay the expenses of operating, maintaining and repairing any heating, cooling or air conditioning equipment exclusively serving the premises, excluding expenses of a capital nature. The plaintiffs contended that the installation of air conditioners were of a capital nature but the evidence of Mr Phillips in cross-examination was that the air conditioners were affixed to the wall by some screws and capable of being removed. Accordingly, I am not satisfied that the plaintiffs have established that the invoices paid by Dometic to Woodpecker for the installation of air conditioners was of a capital expense which Dometic was not obliged to pay. In any event, I am not satisfied that the invoices were improperly paid even if Dometic was not strictly obliged to pay for them as between landlord and tenant. Payments of

that kind of that amount would well come within the discretion of a general manager to decide whether the amounts should be paid by Dometic in the ordinary operational and managerial activities of a company.

The Travel Claims

41 The next claim against the defendants was for misuse of company funds and property by virtue of travel expenditure paid by Dometic for travel within Australia and overseas. A number of items were claimed under this head some of which are for what might be regarded as relatively trivial figures. The claims against Brendan Turville were not pressed by the plaintiffs except insofar as they related to travel undertaken by him and his family, although counsel did not provide much assistance in identifying which claims related to whom. In any event the claims were pressed as against Olaf Bach and Petra Turville on the basis that each were co-signatories on the bank accounts for Dometic and each, by virtue of their control of company funds and of their position, ought not to have authorised the expenditure.

42 In total, some \$94,455.46 was claimed by the plaintiff against Olaf Bach and Petra Turville in respect of travel undertaken by Wolfgang and Waltraud Bach. Mr Slater had given evidence that Wolfgang Bach had effectively retired from Dometic in the early 2000 but remained a director until 2008. Mr Phillips had searched Wolfgang Bach's employment file for the purposes of giving evidence in the proceeding but could find nothing in it about his directorship that might have entitled him to travel or to have his travel costs paid for by Dometic. Indeed, Mr Phillips confirmed the absence of any such document but did testify that, although Wolfgang Bach was rarely in the office, he did attend the business premises from time to time to keep an eye on things for several hours a day especially when Olaf Bach and Petra Turville were overseas.

43 The plaintiffs' evidence established that Wolfgang Bach was a director of Dometic until 2008 and there was no evidence of Wolfgang Bach being paid for such work as he may have done as a director, limited though it may have been. In fact the

evidence of Mr Phillips suggested a more regular and useful role played by Wolfgang Bach as a director of Dometic than counsel's submissions or Mr Phillips broader conclusionary remarks might suggest. Mr Phillips described Wolfgang Bach's involvement as a director as "very little" and that he would come in "very rarely" but went on to say that Wolfgang Bach did come into the office on occasion when both Petra Turville and Olaf Bach were overseas. On those occasions he would "come into the office for a couple of hours a day just to sit in the chair and keep an eye on things." He was there to receive telephone calls from Olaf Bach whilst otherwise away and Mr Phillips estimated that would occur around August each year coinciding with the Dusseldorf show when both Olaf Bach and Petra Turville were away at the same time attending to Dometic's business interests. Mr Phillips' recollection was that Wolfgang Bach attended at the offices for four or five hours a day for probably four days a week during such times. The detailed evidence does not warrant the more general conclusion expressed by Mr Phillips that Wolfgang Bach's involvement was "very little".

44 Most of the travel expenditure incurred in respect of Wolfgang and Waltraud Bach was incurred after the time that Wolfgang Bach had effectively retired from the business but during which he continued to help out in the business and continued to be a director. He formally ceased to be a director on 8 January 2008 and two of the payments were for travel after 8 January 2008. However, the evidence of Wolfgang Bach assisting in the business as he had done did not end with the formal end of his directorship. The payments in question were not hidden from the auditors of Dometic and appear to be the kind of benefits within the management style Olaf Bach adopted for employees. It was not uncommon for Olaf Bach to give days off or to extend gratuities to staff. Mr Phillips gave evidence that "OB days" was an expression used at Dometic to refer to leave given to employees that they may not have been strictly entitled to receive. Olaf Bach's management practice with Dometic's employees, including Mr Phillips, was to reward them with discretionary benefits for work which they might have performed beyond their normal duties or to encourage them in their work for Dometic. The payment for travel over 5 years for

Wolfgang Bach is not outside the broad discretion which Olaf Bach enjoyed as the executive director of Dometic. Wolfgang Bach had previously been the managing director of the business, he was a director of Dometic until 8 January 2008 and he continued to assist in ensuring that Dometic's operation remained under supervision and control at the time when the managing director and the general manager might both be away attending the Dusseldorf Show for Dometic. I do not find this part of the claim made out by the plaintiffs.

45 One category of the travel claims concerned travel by Olaf Bach to China in 2008 and 2009. The plaintiffs' basis of these claims was that the travel to China was part of Olaf Bach's plan to establish a new business for his benefit and that the business travel to China was for that purpose rather than for Dometic's purposes notwithstanding that each trip may also have been of some benefit to Dometic. In all, these claims amounted to \$76,898.80 for travel to China on six occasions between 15 January 2008 and 29 May 2009.

46 The plaintiffs' claims in respect of the Chinese travel were not pleaded as claims that the travel expenditure was incurred by Olaf Bach in planning to set up a company contrary to the interests of Dometic. Senior counsel for Olaf Bach accepted that it may be a breach of an employee's fiduciary duty to plan to set up a company whilst employed by another. That, as counsel for Olaf Bach said, was not the case pleaded by the plaintiffs. The pleading in respect of travel expenditure was, rather, one of a number of claims gathered together in an allegation of misuse of company funds and property. Other claims within that group included the wrongful payment or use of gift vouchers, meals, health cover, personal gifts, clothing, children's games, tools and hardware supplies. Many of these claims were abandoned or not made out. The case the defendants needed to meet was that the travel expenditure was "not part of or related to the ordinary business of Dometic" and that each knew that the expenditure was "not in the interests of Dometic". I am not satisfied that Dometic has established that claim in respect of the China travel.

47 There was some evidence that Olaf Bach was in China sourcing new product for a

new business but care must be taken in respect of each piece of evidence because not all was admissible as against each of the defendants. None of the evidence concerning the expenditure on China travel was admissible against Brendan Turville as was conceded by counsel for the plaintiffs when stating that the travel expenditure claims against him were limited to that expenditure incurred for travel by him or by his immediate family. There was the evidence of Ms Bennett in relation to what Petra Turville had told her but, of course, admissions against interest admissible against Petra Turville are not admissible against Olaf Bach. Mr Slater gave some evidence about Olaf Bach's intentions in relation to a meeting with Chinese clients at the Maygood factory in which Olaf Bach said to Mr Slater that it would be better for another company to handle the window products rather than Dometic. Mr Slater also recalled a visit to China in May 2009 where Olaf Bach mentioned Finba as the company through which to import Eberspacher product for Dometic. In cross-examination Mr Slater made clear that part of the trip to China involved sourcing products that would be in competition with those of Dometic because he had been required to do so by Olaf Bach.

48 I am satisfied that Olaf Bach, to Petra Turville's knowledge and with her assistance, had by 2008 embarked upon a plan to establish a business for their benefit contrary to the interests of Dometic and Dometic NZ. That, of course, does not mean that everything Olaf Bach did was directed to that end or that expenditure benefiting that end was not also to the benefit of Dometic. I accept that Olaf Bach used part of the trips to China to pursue his interests in breach of his fiduciary duty and that Petra Turville knew and assisted him in that design including the authorising of expenditure for travel to China. I am not satisfied, however, that the expenditure for travel to China was not also part of, or not also related to, the ordinary business of Dometic. Mr Slater had been asked to source factories in China as part of a business trip which included commercial benefits for Dometic. Mr Slater had been asked by Olaf Bach to explore possible contacts for Dometic and it was Mr Slater who identified the contacts to explore for Dometic. Following one visit QFlow entered into contractual relations with Dometic. Olaf Bach may well have had a secret

motive for his own benefit but the contacts in China were made by Olaf Bach acting on behalf of Dometic and were of benefit to Dometic, as the existence of at least one major contract revealed. The reason for being in China on one occasion was the need for Dometic to attend at a fair and the incidental enquiries does not so taint the overall expenditure on that or subsequent occasions as to take the expenditure outside the ordinary business of Dometic. Accordingly, I am not satisfied that the plaintiffs have made out their claims in respect to the China travel.

49 The last category of travel claims was of a series of items identified as personal travel ranging in amount from \$240.00 to \$27,091.42 and totalling \$62,801.89 in all. The evidence about each claim is largely that which may be deduced from the relevant invoice for the travel, although some of the travel was the subject of oral testimony. Much of the evidence, documentary and oral, was unsatisfactory as the basis for confident conclusions concerning the purpose and nature of the travel. Ms Kirsten Mills, the domestic partner of Olaf Bach, gave evidence about some of the travel to the effect that it was both business and social. Ms Mills gave credible evidence about Olaf Bach being dedicated to work and leaving her frequently to occupy herself during trips that might otherwise have been enjoyed as holidays. She also gave evidence of accompanying him as his domestic partner on business trips during which she would socialise with the wives of other business colleagues for essentially business purposes.

50 The first of the trips said to be personal travel in the evidence can be put to one side as it related to the travel of Wolfgang Bach and therefore was within the category considered above relating to expenditure for travel by Wolfgang Bach. That was evidenced by an invoice for \$7,664.28 dated 24 November 2005 for travel in March 2005 together with a largely unexplained receipt showing payment of \$240.00 by "Petra" in 2006 (a payment conceded by the plaintiffs). That claim, for the reasons I have explained above, was not established by the plaintiffs.

51 The next amount claimed was the cost of travel by Olaf Bach and Ms Mills between 19 March 2005 and 26 March 2005 to Tasmania. The invoice described the cost of

travel between Hobart and Launceston and the cost of accommodation in Hobart, Coles Bay and Launceston in the sum of \$1,900.00. Olaf Bach was well remunerated pursuant to a contract which was constituted at least in part by an unsigned letter dated March 2004. His defence pleaded an entitlement to an annual allowance of \$5,000.00 for personal expenses including an ability to make decisions for the conduct of the business and also including a broad discretion for the expenditure of money. The facts needed to establish these allegations in the defence were, however, not led. On the other hand the only evidence about the March 2005 Tasmanian trip was the equivocal invoice and itinerary and the oral evidence of Ms Mills.

52 Ms Mills was called by the plaintiffs (rather than by the defendants) to give evidence and was able to recall the trip to Tasmania with Olaf Bach in March 2005. Her evidence was that the trip was both social and business. The nature of the business was not fully explored and in part her testimony suggested that the trip was business only to the extent that Olaf Bach was conducting business on computers and telephone whilst otherwise on holiday. Ms Mills was not hostile to the party examining her in chief and no attempt was made by counsel for the defendants to cross-examine her. Some of the evidence from her was unsatisfactory because of the way in which questions were put. At one point, for instance, counsel for the plaintiffs asked:

Is it fair to say over the period of time I'm asking you about Olaf was on his email and computer just about every day, even on a holiday day?

Her answer was:

Absolutely. If Olaf can get a signal, he's there. It is a bone of contention.

I am reluctant to conclude from evidence of this kind that Ms Mills was saying little more than that her domestic partner worked even when otherwise wholly on a holiday. The leading nature of the question, and its content, make the answer largely unhelpful. Immediately before the question and answer I have quoted Ms Mills had been asked whether she had any recollection that Olaf Bach undertook some business on the occasion of the travel to Tasmania in March 2005. Her answer

was an affirmative belief that he did. Her answer when asked what he did was:

He was definitely on emails, definitely on his laptop and I believe he was also trying to make contact with a few people and on the occasional day I was on my own.

When asked if she was able to recall who Olaf Bach was trying to get in touch with she replied that she did not know but appeared to have a recollection that he received messages and left her to occupy herself without him to attend meetings. This evidence is not fairly summarised in the subsequent question which I quoted first above nor does it establish that Olaf Bach worked even when on holiday. It establishes, rather, that on the trip in March 2005 to Tasmania he was attending business meetings and that Ms Mills was there as his companion and partner to assist as circumstances required although not herself on business.

53 There was a group of claims where the only evidence was the itinerary from the travel agent. The evidence is sufficient for an inference to be drawn from these documents that the travel was not for business purposes in the absence of evidence which would connect the trip with Dometic business. One of the itineraries showed an amount of \$2,730.91 paid for travel by Ms Mills to Rome in September 2007. There was nothing to displace an inference that this trip was purely personal and to place it within the more general evidence given by her of attending international meetings as the partner of a businessman on business meetings. Some of the invoices permit adverse inferences to be made more confidently. On 20 March 2008 \$684.00 was spent for air travel to Brisbane for Petra Turville, Brendan Turville and Ms Mills. There was evidence that Brisbane was a place of holiday where Wolfgang and Waltraud Bach had an apartment. In October 2008 \$408.00 was spent for travel to the Gold Coast for Petra Turville's two children between 9 April and 19 April. In August 2008 \$712.00 was spent for travel by the four members of the Turville family to Hobart. In August 2008 \$8,356.24 was spent for Ms Mills to travel to Frankfurt. The only other evidence about this travel was that of Ms Mills to the effect that it was a holiday for her. Another trip taken by Ms Mills which she said was not for work was one taken in August 2009 to London at a cost of \$9,412.44.

54 One item of expenditure was revealed in a document that potentially exposed criminal conduct. In December 2008 a reservation was made for travel by the four members of the Turville family to Sydney between 27 December 2008 and 3 January 2009. A version of the invoice tendered in evidence clearly identified the four names of the travellers as each of Brendan and Petra Turville and their two children, Bianca and Marcus. The invoice has a reservation number and a date. Another version of the same document also tendered in evidence, however, had the names of all persons other than Petra Turville removed. The second document was plainly otherwise the same document as the first in every other respect. It was on the second version of the invoice that Dometic reimbursed \$1,888.00 to Petra Turville as part of her claim for reimbursement of her corporate credit card account of \$8,184.36. How the changes came to be made to the invoice or how the altered invoice may innocently be explained was not the subject of any evidence by anyone. It is possible that there may be an innocent explanation for what might otherwise appear to be the falsification of a document for the purposes of seeking reimbursement under false pretences. However, there was no evidence before me upon which I can confidently conclude whether the change to the document was improper in any way or any evidence upon which I can conclude safely who made the change. Otherwise, however, it appears to be an invoice for a family holiday showing no other connection to Dometic or its business and not properly chargeable to Dometic.

55 The next invoice was for \$416.00 for travel by Olaf Bach and Ms Mills between Friday 23 January 2009 and Monday 26 January 2009 (the Australia Day Holiday). Ms Mills was asked about this trip and had no specific recollection about it except that it could have been the trip taken with the owners of Canterbury Caravans. The trip which had been taken with the owners of Canterbury Caravans was, according to Ms Mills, a business trip. It is not uncommon for social occasions to be used by people in business to foster and cement business relations. The CEO of a business enterprise may frequently undertake such trips without them being inappropriate or outside of the business operations of the company. The evidence is not sufficient for me to conclude that the trip to Hobart on this occasion was not for Dometic's

business. The fact that the trip may have occurred during the period of a public holiday is as consistent with a holiday as it is with the convenience of a chief executive officer to use such an occasion to foster business relations.

56 The next item was for \$27,091.42 for a trip between 13 March and 29 March for travel to Italy and London. The details on the invoices revealed the destinations and travellers as Petra Turville and Brendan Turville. There is no evidence that would enable me to conclude this trip to be in any way part of Dometic's business activities or otherwise justified. As against Petra Turville, however, there was the additional evidence of Ms Bennett having been told by Petra Turville that part of her gift to her husband on his 50th birthday was to be a trip to Europe and that the cost of his airfare was to be paid by use of frequent flyer points and the cost of her airfare was to be paid by Dometic because she would be able to attend a business meeting in London and this would justify Dometic paying for the entire trip. Payment records show that Dometic paid for the whole of the trip and there was no evidence of a meeting in London that would enable me to conclude for Petra Turville that part of the travel was within Dometic's business.

57 Another trip taken by the Turville family incurred the cost \$1,298.00 and was taken in October 2009 to the Gold Coast. Mr Phillips gave some evidence that the trip may have been paid for using gift vouchers for all but \$81.00 of the amount paid. The invoice itself showed payment of \$1,217.00 as "credit file" and \$81.00 by Visa. Mr Phillips' evidence was that Dometic frequently purchased gift vouchers to use on flights and was confident that the gift vouchers were more than likely used to pay at least \$1,217.00. There was no evidence establishing that the remaining \$81.00 was paid by Dometic.

58 The total of the improper travel claims which I have found against Olaf Bach and Petra Turville is \$52,500.01. Olaf Bach and Petra Turville occupied senior management positions in the company and were the persons who authorised the use of the funds. In all cases one or the other also obtained personal benefit of the expenditure. The case against Brendan Turville is not so clear. It is possible that he

was well aware of the misuse of the funds and the misuse of the positions of his brother in law and of his wife. Brendan Turville's duties and responsibilities at Dometic were not like those of his wife and brother in law. The claims against him are serious and I am not sufficiently persuaded that the evidence establishes the claims against him.

The Credit Card Claim

59 The last live claim against the defendants was for a credit card advance of \$50,000.00. The plaintiffs pleaded the making of an advance of \$50,000.00 to a credit card account held in the name of Olaf Bach on or about 27 July 2009. The evidence of Mr Phillips was of a regular practise of making advances to Olaf Bach's credit card when he was travelling overseas to ensure that he had sufficient funds available to him whilst abroad. The normal arrangement was to make a \$50,000.00 advance on Olaf Bach's credit card which would subsequently be accounted for by him providing relevant invoices for business related expenditure upon his return. Mr Phillips had a recollection of the \$50,000.00 advance being made and confirmed that Dometic had received no claims for expenses on that advance and had not had refunded any part of the \$50,000.00. Given the proximity of dates between the making of the advance and the suspension of Olaf Bach it is not surprising that the invoices were not provided and that no refund was made. In any event, the only evidence for the plaintiffs is that which establishes the making of the advance and no evidence was tendered on behalf of Olaf Bach to defeat the claim.

60 Accordingly, Dometic is entitled to orders that:

- (a) Olaf Bach, Petra Turville and Finba pay \$357,361.00 in respect of the claims pleaded in paragraphs 26-38 of the Further Amended Statement of Claim (the Finba Claim);
- (b) Olaf Bach and Petra Turville pay:
 - (i) \$10,901.20 in respect of the claims pleaded in paragraphs 39-48 of the Further Amended Statement of Claim (the Property Claims);
 - (ii) \$52,500.01 in respect of the claims pleaded in paragraph

49(a) of the Further Amended Statement of Claim (the Travel Claims).

- (c) Olaf Bach pay \$50,000.00 in respect of the claims pleaded in paragraph 53(c) of the Further Amended Statement of Claim (the Credit Card Claim).

The Counterclaims

61 The counterclaim of Olaf Bach, Petra Turville and Brendan Turville was essentially for statutory entitlements. Finba's counterclaim was for an unpaid invoice of Eberspacher products in the sum of \$105,740.46.

Olaf Bach

62 Olaf Bach's principal claim was for \$308,319.81 unpaid leave. The claim depended upon the correctness of the figures in the employee information for Olaf Bach in Dometic's leave records which showed a statutory entitlement to that amount. The records recorded that over an eight year period he had taken only 57 days annual leave, that is, about seven days per year. The figures in the employment records in Dometic are only prima facie evidence and capable of being displaced.

63 Olaf Bach gave no evidence concerning the period of time he took as leave. Ms Mills gave evidence of Olaf Bach's working habits showing him to be a man dedicated to his work and who worked, in effect, even when on holidays. An example of this may be seen from her evidence of a trip between 8 and 29 August 2008 which began in Frankfurt and ended in London. Between the 9 August and 12 August the two were in Rudesheim which was suggested to Ms Mills as being a holiday. Her response was that it was not entirely a holiday. It was a holiday for her "except [that] Olaf was working throughout that time also". When asked what he was doing during that time the answer she gave was more general:

Consistently during our holidays and this particular holiday he was always on his phone and on his laptop and I believe he was also trying to get in contact with someone in Rudesheim. We also did, I believe, in that area, I'm not very familiar with these areas, we did go and see a factory and get taken out to lunch also by a gentleman that I hadn't met before.

She was asked about each leg of the trip and responded that each was work in the broad sense I have previously described. Some parts she was prepared to describe as holiday, such as the period in Strasbourg from 17 to 22 August. At one point she said that it had been “a bone of contention” between them that he was on his email and computer just about every day “even on a holiday day”.

64 The clear impression from her evidence was a concern by her to emphasise that Olaf Bach worked “even on holiday”. At one point counsel asked about her description of a period as being a holiday to which she replied that even then he was working on his computer:

MR COLLINSON: So when I was asking you questions about the 2008 trip, you said the section in Strasbourg, 17 to 22 August, I don't want to mistake your evidence, but I think you described that as a holiday period of that trip?

MS MILLS: Well, it was a holiday in terms of we got to do a few day trips and things like that, but if you are asking me whether Olaf was not on his computer, that would be a lie.

Ms Mills' re-characterisation of the question explains much of her evidence. The answers she gave may reflect the fact that many of the questions were directed to characterising the nature of events rather than directed more narrowly to elicit details and facts. Taken as a whole, however, the clear impression from her testimony was that substantially more time was taken by Olaf Bach as holiday than was recorded in the employee records. Olaf Bach, as many CEO's, may have worked during what was taken as a holiday but I have no doubt that parts of the trips were taken as holiday but not recorded as such in his employment records with Dometic.

65 From 2 September to 16 September 2007 Olaf Bach and Ms Mills travelled to Italy at the expense of Dometic. Seven days were recorded as leave for Olaf Bach but her evidence established that the whole of the period was essentially a holiday albeit that during visits to Rome, Naples and Positano he may also have had to do some work by phone or on computer. It is not surprising to find that a chief executive officer of a company like Dometic would be actively occupied with work even when on leave. The seven days of recorded leave for that month is, in my view, incorrect and

undermines the reliability of the records in relation to Olaf Bach. The evidence of Ms Mills concerning the European trip between 6 August and 3 September 2008 suggested a greater time of leave than the five days annual leave booked for Olaf Bach for August 2008. For 2009 Olaf Bach had five days of annual leave recorded. The description of the trip and the activities of Olaf Bach as conveyed in the evidence of Ms Mills casts doubt on the accuracy of the number of days taken as annual leave for that year.

66 The claim for accrued annual leave is one which Olaf Bach had the burden of establishing. He relied only upon the statutory accounts and the evidence of Ms Mills. The latter, in my view, undermines the reliability of the recorded information in Dometic's records in relation to his accrued annual leave. There is, therefore, insufficient evidence established upon which to award an amount in his favour.

67 The other claims by Olaf Bach were \$11,416.92 for unpaid salary, \$113,907.34 for long service leave and \$2,854.23 as superannuation contributions to a complying superannuation fund. Each of these claims and amounts were accepted by the plaintiffs and judgment in those amounts should be given in favour of Olaf Bach.

Petra Turville

68 Petra Turville claimed statutory entitlements similar to those of Olaf Bach. She also claimed \$123,600 in lieu of notice upon what she maintained was her wrongful dismissal from employment. Petra Turville was suspended from her duties in August 2009 pending further investigation by Dometic. Her employment was terminated in early September 2009 following Dometic's investigations. Dometic accepted that the termination amounted to a summary dismissal.

69 Dometic maintained that it was justified in summarily dismissing Petra Turville by reason of her misconduct. Dometic did not in terms plead justification for dismissal in its defence to her counterclaim. It contended, however, that it was permitted to maintain that defence, because the counterclaim against Dometic had pleaded that

her employment by Dometic was “wrongfully terminated” and by Dometic’s defence it had denied her claim. Counsel for the plaintiffs also opened the issue of the dismissal of all three defendants for misconduct during his opening of the case.

70 In my view, the pleadings joined issue between the parties about whether the dismissal of Petra Turville was justified. That is not to say that it was for Petra Turville (as employee) to prove that the dismissal was wrongful. The onus of proving that a dismissal was justified fell upon Dometic as employer.¹³ Dometic accepted that it had the burden of proving that the dismissal was not wrongful but I accept that its denial of Petra Turville’s pleading of wrongful dismissal engaged the issue in the proceeding.

71 My findings of Petra Turville’s knowledge and involvement of the transactions involving Finba justified her summary dismissal by Dometic. Some of the evidence may not have been known at the time of the dismissal but “an employer can justify a dismissal at common law by reference to facts not known at the time of dismissal”.¹⁴ Accordingly, it becomes unnecessary for me to consider what period of reasonable notice ought to have been given if I had reached a different conclusion. However, it may be desirable for me to express some view about that on the basis of the evidence and submissions. Plainly the reasonable period of notice is a matter that depends upon the facts of each particular case as determined at the time of termination.¹⁵ Petra Turville was not employed under a written contract and no term of notice was established on the facts or by established custom or practice in Dometic’s business. Factors relevant to the period of notice she would have been entitled to receive included the significance of the position she occupied with the employer, the size of her salary and the nature of her employment.¹⁶ Other factors include the length of

¹³ *Sanpine v Koombahtoo Local Aboriginal Land Council* [2005] NSWSC 365, [173] (Campbell J); *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66.

¹⁴ Carolyn Sappideen, Paul O’Grady and Geoff Warburton, *Macken’s Law of Employment* (6th ed, 2009), 297; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312, [27]–[29] (Gleeson CJ, Gaudron and Gummow J), [51] (Kirby J).

¹⁵ Carolyn Sappideen, Paul O’Grady and Geoff Warburton, *Macken’s Law of Employment* (6th ed, 2009), 269; *Edward Keller (Australia) Pty Ltd v Hennelly* (1990) 35 IR 464.

¹⁶ Carolyn Sappideen, Paul O’Grady and Geoff Warburton, *Macken’s Law of Employment* (6th ed, 2009), 270.

her service, her professional standing, her age, her qualifications, her degree of job mobility, the time it would take to obtain alternative employment, how long the employee would have continued in the employment but for the dismissal and what job was given up by her to take up the employment from which she had been terminated.¹⁷ These matters all suggest to me that a period of three months notice would have been reasonable and appropriate in the case of her dismissal.

72 Three of the four claims for statutory entitlements made by Petra Turville were not disputed by Dometic. She claimed, and Dometic accepted, that she was entitled to \$3,803.15 unpaid salary, \$25,815.33 long service leave and \$760.63 by way of superannuation contribution to a compliant superannuation fund. Petra Turville also claimed \$39,620.30 by way of annual leave but that claim was challenged by Dometic. Dometic's challenge to Petra Turville's claim for accrued annual leave depends upon the contention that although she was employed full-time she worked only part-time.

73 Petra Turville was the general manager of Dometic and enjoyed the remuneration and benefits associated with that position, including a substantial salary. The employee leave history report of Dometic for her recorded that she was to be employed for eight hours per day five days pr week. The evidence of Mr Phillips, however, was that she worked approximately from 9.30am until 3.00pm four days a week and had Friday as her day off.

74 There was other evidence that Petra Turville did not work on Fridays. Ms Helme gave evidence that Petra Turville "didn't work Fridays" and expanded her answer by saying:

1, The Fridays I was in there, she wasn't. 2, She told me. 3, We had discussed that on Fridays her children would have swimming lessons at The King Club ... this came up because I used to teach swimming at the King Club, so we would just talk about it. She did not work Fridays.

Similar evidence was given by Ms Bennett. The two had been close friends and

¹⁷ Ibid 271.

frequently spent time together on Fridays. Specifically Ms Bennett recounted that she had been told by Petra Turville that “she was contracted as a part-time employee, and that Fridays were her day off”. She also gave evidence about Petra Turville becoming irritated if she were required to work on a Friday. As against this there is some evidence that from time to time Petra Turville worked on Fridays. Mrs Heinsen gave evidence of Petra Turville’s attendance at the premises of Contemporary Press “usually on a Thursday or Friday or both”.

75 It is clear from the evidence that the conditions upon which Petra Turville was employed provided her with the flexibility of beginning the day at 9.30am, leaving at about mid-afternoon and generally not being required to attend the workplace on a Friday. Notwithstanding those hours and terms it was clear that she was employed as a full-time employee as general manager. The flexibility of those arrangements does not mean that she was not otherwise to be treated as having discharged her obligation as a full-time employee and treated as working eight hours a day and otherwise entitled to the period of annual leave recorded as her statutory entitlement in Dometic’s records.

76 Dometic’s claim in this proceeding was that each Friday should not have been counted as a work day but ought to have been deducted as a leave day and thereby reducing her period of accrued annual leave. I do not accept that the arrangements under which she was employed to be as contended by Dometic. Rather, she was entitled to accrue annual leave upon the assumption that her full-time work permitted the flexibility which she enjoyed during the week and on the Fridays.

77 The arrangements between Dometic and Petra Turville were put in place with the sanction and to the knowledge of the chief executive officer. There was no suggestion of any secrecy or concealment about the arrangements and it was the kind of arrangement which comes within the role and scope of the chief executive officer to authorise. Sir Wilfred Green MR said in *Shirlaw v Southern Foundries (1926) Ltd*¹⁸ that the position of chief executive officer or managing director, is of a “very

¹⁸ [1939] 2 All ER 113.

special kind” and that the description of the position in such terms refers to the sheer degree of discretion that the law permits the board to delegate to such a person.¹⁹ In *Randall v Aristocrat Leisure Limited*²⁰ Einstein J said:

Unique amongst other corporate offices, the chief executive officer stands at the apex of the operational and managerial structures of the company, and who’s authority is qualified only by any residual power left in the Board.

No case was made by Dometic that the arrangement sanctioned by Olaf Bach in relation to the general manager, and enjoyed by Petra Turville as general manager, was in any way beyond his power.

78 I have already observed that the prima facie evidence provided by the employee records is undermined in some respect. It is also undermined to some extent in relation to the leave history recorded for Petra Turville. However I do not have the same reservations about the leave entitlements recorded for her that I had about the leave entitlements recorded for Olaf Bach. The records for Olaf Bach’s annual leave took no account of the leave enjoyed in his travels with his companion Ms Mills which the evidence established to be taken as leave notwithstanding his commitment to work even when on holiday. In the case of Petra Turville, however, treating the Friday “off” as part of her annual leave was not the arrangement she had with her employer. Dometic treated her as a full time employee whose attendance in the workplace each Friday was not usually required. Her conditions also entitled her to leave with no expectation that the permitted leave was to be consumed by the Friday absences from the employer’s place of business. In those circumstances the prima facie evidence established an entitlement to \$39,620.30 in respect of Petra Turville.

Brendan Turville

79 The counterclaim by Brendan Turville was similar to that of his wife. He claimed \$6,153.84 payment in lieu of proper notice terminating his employment, \$10,398.51 unpaid annual leave, \$2,461.59 unpaid salary and \$221.54 superannuation contribution to a complying superannuation fund. The latter three amounts were

¹⁹ *Randall v Aristocrat Leisure Limited* [2004] NSWSC 411, [384] (Einstein J).

²⁰ *Ibid.*

agreed and accepted by Dometic and, accordingly, he is entitled to judgment for those amounts.

80 The claim for payment in lieu of notice depends upon Dometic's right to terminate his employment on the grounds of improper conduct. He also claimed that the termination was wrongful which Dometic defended by denial of that claim. I consider the issue of whether the dismissal to have been wrongful was enlivened for the same reasons as set out above in relation to the pleading between Petra Turville and Dometic.

81 In the case of Brendan Turville, in contrast to the position in relation to his wife, there was a written employment agreement governing the employment. Clause 2(a) recorded his employment as a warehouse manager effective 1 December 2003. Clause 6 provided that Dometic could terminate his employment by providing notice in accordance with what was set out in a table. The table provided that four weeks notice was required if he had more than five years continuing service. That condition was satisfied in his case, and accordingly, he was entitled to four weeks notice unless Dometic was justified in terminating the employment for such improper conduct as would permit summary dismissal notwithstanding the terms of the employment contract. I have not found the evidence against him sufficiently reliably established for that conclusion and, therefore, consider that he was entitled to four weeks notice for termination of his contract and is entitled to payment in lieu of that notice in the sum of \$6,153.84.

Finba

82 The last claim to consider is that of Finba for non-payment of an invoice. Finba's claim was based upon the accounts of Dometic tendered in evidence. A supplier aged trial balance of Dometic recorded Finba as a creditor in the sum claimed in this proceeding upon two invoices dated 21 December 2006. There was no evidence that Eberspacher ever supplied goods directly to Dometic prior to September 2009 when Olaf Bach, Petra Turville and Brendan Turville were first suspended and then

dismissed. It may therefore be assumed that product acquired by Dometic from Eberspacher was supplied through Finba pursuant to the arrangement and that Finba was paid for the goods supplied. That portion of the Finba invoice representing a mark up from Eberspacher's price may or may not have been taken into account by the plaintiff in its claim against the defendants but on the face of the trial balance it would seem that the amount has not yet been paid.

83 Mr Phillips gave some evidence concerning the Finba invoice. It was to the effect that he did not know whether the amount due was a Finba invoice or an Eberspacher invoice. He said that he had previously raised the question with Olaf Bach on a number of occasions and had simply been told "just leave it there" and that Olaf Bach would sort it out. He also explained that the reason the amount appeared as against Finba was because that was the account it was put against because they did not know whether it was Finba or Eberspacher to whom the money was owed. In the end he said that Dometic simply did not know who the debt was really owed to.

84 The position, therefore, is that there is money owing in respect of unpaid goods on invoices dated 21 December 2006. Such invoices related to a period when Dometic's dealings with Eberspacher goods were through Finba. The clear inference is that the money was due to Finba and not to Eberspacher. There has been no evidence of Eberspacher making a claim against Dometic for goods supplied in December 2006. Accordingly, Finba is entitled to judgment for \$105,740.46 on its counterclaim.

85 The orders in the counterclaim will be that Dometic:

- (a) Pay to Olaf Bach or on his behalf to an appropriate entity or regulatory authority as may be required \$11,416.92 for unpaid salary, \$113,907.34 for long service leave and \$2,854.23 by way of superannuation contributions.
- (b) Pay to Petra Turville or on her behalf to an appropriate entity or regulatory authority as may be required \$3,803.15 for unpaid salary, \$25,815.33 for long service leave, \$760.63 by way of superannuation contribution and \$39,620.30 for unpaid annual leave.
- (c) Pay to Brendan Turville or on his behalf to an appropriate entity or regulatory authority as may be required \$6153.84 for 4 weeks

notice of termination of employment, \$2,461.59 for unpaid salary, \$221.54 by way of superannuation contribution and \$10,398.51 for unpaid annual leave.

(d) Pay to Finba \$105,740.46 for outstanding invoices.

86 It may be necessary for me to hear arguments about costs and the various amounts upon which the respective parties have been successful will in some cases carry an entitlement to interest requiring detailed calculation. In those circumstances I will hear argument on costs and invite the parties to submit a form of order giving effect to my decision and reasons.

SCHEDULE OF PARTIES

LIST A
SCI 10717 of 2009

BETWEEN:

DOMETIC PTY LTD (ACN 004 947 488) Firstnamed Plaintiff

DOMETIC NEW ZEALAND LIMITED Secondnamed Plaintiff
(Company Number 2084564)

- and -

OLAF WOLFGANG BACH Firstnamed Defendant

PETRA JUDITH TURVILLE Secondnamed Defendant

BRENDAN TURVILLE Thirdnamed Defendant

FINBA PTY LTD (ACN 117 789 849) Fourthnamed Defendant

AND

OLAF WOLFGANG BACH Firstnamed Plaintiff by Counterclaim

PETRA JUDITH TURVILLE Secondnamed Plaintiff by Counterclaim

BRENDAN TURVILLE Thirdnamed Plaintiff by Counterclaim

FINBA PTY LTD (ACN 117 789 849) Fourthnamed Plaintiff by Counterclaim

- and -

DOMETIC PTY LTD (ACN 004 947 488) Defendant by Counterclaim

