

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT

Not Restricted

S ECI 2018 00064

MCH AUSTRALIA PTY LTD (ACN 111 674 992)

Plaintiff

v

KEE DOERY AND OTHERS  
(ACCORDING TO THE ATTACHED SCHEDULE)

Defendants

JUDGE: KENNEDY J  
WHERE HELD: Melbourne  
DATE OF HEARING: 12 June 2019  
DATE OF JUDGMENT: 26 July 2019  
CASE MAY BE CITED AS: MCH Australia Pty Ltd v Kee Doery & Ors  
MEDIUM NEUTRAL CITATION: [2019] VSC 412

PRACTICE & PROCEDURE - Application by third defendant to strike out parts of statement of claim pursuant to rule 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* - Leave to amend appropriate - Application for summary judgment - Application refused given failure to establish that no real prospects of success under section 63 of the *Civil Procedure Act 2010* (Vic) - Discretion exercised as alternative under section 64 of the *Civil Procedure Act 2010* (Vic).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Dr A Hanak SC	Arnold Bloch Liebler
For the Third Defendant	Mr P Noonan	Earl & Associates

HER HONOUR:

- 1 This application arises in a proceeding wherein the plaintiff, MCH Australia Pty Ltd (MCH), seeks various relief against two former directors/employees, Mr Kee Doery and Mr Ari Luo (and their associated companies), for conduct involving the diversion of customers and the setting up of a competitor business engaged in selling home brewing products.
- 2 In particular, the application arises in the context of claims that Mr Doery was involved in the incorporation of the third defendant, Kegland Distribution Pty Ltd (Kegland), and that Kegland knew, and was involved in, two particular contraventions of s 183 of the *Corporations Act* (**the Act**) by Mr Doery as follows:
  - that Mr Doery improperly used an 'MCH Price List' to gain an advantage for Kegland, or to cause a detriment to MCH, in breach of s 183 of the Act (**Price List Claim**); and
  - that Mr Doery improperly used 'MCH Customer Information' to gain an advantage for Kegland, or to cause a detriment to MCH, in breach of s 183 of the Act (**Customer List Claim**).
- 3 The issue before the court is, first, whether it should strike out all/part of the Price List Claim contained in the Further Amended Statement of Claim<sup>1</sup> pursuant to rule 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (**the Rules**). Alternatively, whether summary judgment is appropriate on that claim.
- 4 Secondly, the issue is whether summary judgment ought be granted in relation to the Customer List Claim.<sup>2</sup>

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<sup>1</sup> Further Amended Statement of Claim dated 14 June 2019; Leave was given to file this document at the hearing on 12 June 2019 with the third defendant preserving their rights to make the application herein.

<sup>2</sup> Although the Amended Summons sought to strike out part of this claim, this was not pursued at the hearing; See Transcript of Proceedings (*MCH Australia Pty Ltd v Kee Doery & Ors*, S ECI 2018 0064, Kennedy J, 12 June 2019) 36.

5 The application was brought by Kegland alone. Thus, Mr Doery did not make his own  
application, nor did he appear to support Kegland's application or file any affidavit  
in support.<sup>3</sup>

**Nature of claims made**

6 It is alleged that MCH was carrying on the business of manufacturing and selling  
home brewery kits under brands which included 'Keg King.'

7 Mr Doery was a director and officer of MCH until he was suspended on 4 October  
2017 for persistent and wilful misconduct, and subsequently terminated on 12 October  
2017.

8 The application before the court is concerned with Mr Doery's actions in relation to  
Kegland. However, these are made in the context of a number of very serious 'non-  
Kegland' claims whereby Mr Doery is alleged to have breached his duties by reason  
of, inter alia, the following conduct:

- conduct relating to a competitor to MCH, Oxebars Pty Ltd (**Oxebars**), including causing Oxebars to manufacture, market and sell competitive home brewing kits; using MCH equipment to assist the running of the Oxebars business; and causing MCH to employ Oxebars staff (at [9] – [20B]);
- diverting customers to a Chinese company, Amco Co Pty Ltd (**Amco**) a company associated with a Ms Lidia Jiang, a family friend of Mr Luo; and falsely representing that Amco is an MCH distribution centre in China (at [21] – [27]);
- wrongfully using various trademarks and domain names (at [28] – [33]);
- making false statutory declarations to obtain funding from the Victorian

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<sup>3</sup> Affidavits in Support of Kegland's Application: Affidavit of Jiang Li sworn 30 October 2018; Affidavit of Toby Lee Masterson sworn 13 March 2019; Affidavit of Hong Rui Liu sworn 31 January 2019; Affidavit of Hong Rui Liu sworn 26 February 2019; Affidavit of Hong Rui Liu sworn 3 April 2019. Affidavits in opposition to Kegland's Application: Affidavit of Simon John Dollard sworn 12 October 2018; Affidavit of Simon John Dollard sworn 5 December 2018; Affidavit of Simon John Dollard sworn 18 December 2018; Affidavit of Maggie Hu sworn 7 May 2019; Affidavit of Daizhuo Wu sworn 8 May 2019.

Department of State Development, Business and Innovation (at [34]- [40]);

- making false statements in causing MCH to enter a loan which was not required (at [41] - [47]); and
- causing MCH to pay Mr Doery's personal expenses using MCH company funds (at [48] - [50]).

9 In relation to the Kegland claims, it is alleged that Kegland was incorporated on 8 December 2017, some weeks after Mr Doery's employment was terminated on 12 October 2017, and that it has marketed or sold home brewing products which compete with the MCH products by reference to the 'KegKing' name (at [56]). It is further alleged that Mr Doery was involved in the incorporation of Kegland; has entered into some arrangement to benefit financially from the operations of that company; alternatively, is an employee or consultant of that company (at [57]).

10 There are then three groups of allegations made against Kegland: the Price List Claim; the Customer List Claim, and a further claim under the *Australian Consumer Law (ACL Claim)* that Kegland has engaged in misleading and deceptive conduct in the use of the name 'Keg King' or the 'Keg King' logo (at [62A]).

11 As indicated above, Kegland only sought relief in relation to the first two claims. However, it sought to reserve its rights in relation to the third claim on the basis that this claim had only been recently added.<sup>4</sup>

### Legal Principles

#### *Striking out pleadings*

12 The strike out application was made under rule 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* on the basis that the claim did not disclose a cause of action ((a)). Further, that to the extent there was vagueness, that this would prejudice the

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<sup>4</sup> Transcript of Proceedings (*MCH Australia Pty Ltd v Kee Doery & Ors*, S ECI 2018 0064, Kennedy J, 12 June 2019) 6-7.

hearing of the trial ((c)).

- 13 The legal principles that apply to strike out applications are without controversy and were recently set out by Elliott J in *BFJ Capital Pty Ltd v Financial Ombudsman Service Limited (In Liq)* as follows:<sup>5</sup>

33. The court may order that the whole or part of a pleading be struck out if, relevantly, a statement of claim: does not disclose a cause of action; is scandalous, frivolous or vexatious; may prejudice, embarrass or delay the fair trial of the proceeding; or is otherwise an abuse of the process of the court. Unlike an application under r 23.01, an application under r 23.02 seeks no more than a striking out or an amendment, rather than judgment ordered summarily.
34. The elements of an adequate pleading are straightforward. A pleading must comprise a coherent narrative of material facts which set out and frame the elements of a cause of action. It must be pleaded with sufficient clarity, must not be unintelligible, ambiguous or vague and must not raise allegations that are offensive. Where particulars are relied upon, they ought not be used to “fill material gaps” or “cure a bad statement of claim.” Ultimately, the purpose of a proper pleading is to allow, in the interests of fairness, the opposite party to know what is alleged. Where a pleading is deficient in any of these respects, an application striking out the pleading may be warranted.
35. A strike out application, therefore, is distinct from an application for summary judgment in that it is an objection to the manner of expression of the pleading, as opposed to the prospects of the cause of action or defence itself. Again, care must be exercised when ordering that a pleading be struck out. (Citations omitted)

- 14 Although evidence may not be generally adduced on a strike out application, the court is entitled to look at any documents referred to in the pleadings.<sup>6</sup>

#### *Summary judgment*

- 15 The application for summary judgment was based on s 63(1) of the *Civil Procedure Act 2010* (Vic) (CPA) which provides that, subject to s 64, a court may give summary judgment in any civil proceeding if satisfied that a claim has ‘no real prospect of

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<sup>5</sup> [2019] VSC 71 [33]-[35].

<sup>6</sup> *Day v William Hill (Park Lane) Ltd* [1949] 1 KB 632 cited in *Rowson v Alpass* (2017) 53 VR 196, 205 [33] and *Wheelahan v City of Casey (No 12)* [2013] VSC 316.

success'.<sup>7</sup>

16 In *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd*<sup>8</sup> Warren CJ and Nettle JA provided the following guidance on applications under s 63:

- (a) the test for summary judgment under s 63 of the Civil Procedure Act 2010 is whether the respondent to the application for summary judgment has a "real" as opposed to a "fanciful" chance of success;
- (b) the test is to be applied by reference to its own language and without paraphrase or comparison with the "hopeless" or "bound to fail test" essayed in *General Steel*;
- (c) it should be understood, however, that the test is to some degree a more liberal test than the "hopeless" or "bound to fail" test essayed in *General Steel* and, therefore, permits of the possibility that there might be cases, yet to be identified, in which it appears that, although the respondent's case is not hopeless or bound to fail, it does not have a real prospect of success;
- (d) at the same time, it must be borne in mind that the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried; and that is so regardless of whether the application for summary judgment is made on the basis that the pleadings fail to disclose a reasonable cause of action (and the defect cannot be cured by amendment) or on the basis that the action is frivolous or vexatious or an abuse of process or where the application is supported by evidence.

17 The above remarks have been frequently cited, including in the Court of Appeal decision of *Feldman v Frontlink Pty Ltd*.<sup>9</sup>

18 In that case their Honours also relied on s 64. This provides that, if the court is satisfied that, despite there being no real prospect of success, the civil proceeding should not be disposed of summarily because it is not in the interests of justice to do so or the dispute is of such a nature that only a full hearing on the merits is appropriate.<sup>10</sup>

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<sup>7</sup> An earlier claim under r 23.01 was abandoned at the hearing; See Transcript of Proceedings (*MCH Australia Pty Ltd v Kee Doery & Ors*, S ECI 2018 0064, Kennedy J, 12 June 2019) 99.

<sup>8</sup> (2013) 42 VR 27 [35].

<sup>9</sup> [2014] VSCA 27 [24] (*'Feldman'*). See also *Mandie v Memart Nominees Pty Ltd* [2016] VSCA 4 [44]-[48].

<sup>10</sup> *Feldman* (n9) [54]-[59].

- 19 The court allowed the applicant's ground of appeal that the trial judge erred in failing to give adequate consideration to s 64 and found that, in all circumstances of the case, the proceeding should be referred to trial. In particular, Warren CJ, Tate JA and Sifris AJA found that it was not desirable to fragment the claims where there were two or more claims arising out of similar contracts in circumstances where the balance of claims were to continue and that all matters should have proceeded to trial.<sup>11</sup>
- 20 In this case MCH also relies on s 64 in opposing the application for summary judgment.

### Price List Claim

#### **Strike out claim**

- 21 The key components of the Price List Claim as alleged were as follows:
- That Mr Doery acquired information in the form of the MCH Price List at the time he was a director, officer and employee of MCH and because of his position as a director, officer and employee of MCH ([ 58(a)] and [59]);
  - Mr Doery improperly used the MCH Price List to gain an advantage for Kegland or cause a detriment to MCH in breach of s 183 of the Act ([60]);
  - That at all material times since 8 December 2017 Kegland had knowledge that Mr Doery was a director, officer, and senior employee; that he owed the relevant duties; and that he would be in breach if he engaged in the relevant conduct ([61]);
  - In the premises Kegland was relevantly involved in a contravention of s 183 ([62]);
  - MCH has suffered damage by reason of the wrongful use of MCH information ([63]) for which it seeks damages/compensation under the Act.
- 22 In submissions, Kegland made no complaint about most of the components of this claim. In particular, it made no complaint that it had knowledge of, and was relevantly

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<sup>11</sup> Ibid [59].  
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involved in, the alleged contravention. Rather, consistent with the Amended Summons, its focus was on the matters alleged at [58(a)] and [60] above which focus on the conduct of Mr Doery himself.<sup>12</sup>

23 It is accordingly necessary to set out the relevant parts of these paragraphs as follows:

58. During the time that Doery was a director, officer and employee of MCH:

(a) Doery acquired information in the form of the MCH product price list (**MCH Price List**):

#### Particulars

The information in the MCH Price List was contained in an electronic spreadsheet maintained by MCH which was available to Doery at all material times that he was a director, officer and employee of MCH. The MCH Price List identified each home brewing product sold by MCH by reference to a part number and specified the dimensions and weight for that product together with the price at which each product was acquired by MCH from a given supplier. Doery (and Luo) emailed the MCH Price List to Ms Lidia Jiang and instructed Ms Jiang as to how to use it (email from Luo to Ms Jiang dated 9 September 2016 at 3:36pm, email from Doery to Ms Jiang dated 9 December 2016 at 9:46 am). Ms Jiang did not have the permission of MCH to disclose the MCH Price List to third parties (such as Kegland). Doery was the primary sales contact at MCH and knew the price at which MCH acquired the products which it supplied to key customers such as Ambar Technology and ZIP Heaters and the profit margin applied by MCH on such sales....

59. Doery acquired the MCH Price List ... because of his position as a director, officer and employee of MCH.

#### Particulars

Doery's acquisition of the MCH Price List ... is to be inferred from the particulars to paragraph 60.

60. Doery has improperly used the MCH Price List to gain an advantage for Kegland or cause a detriment to MCH, in breach of the duty pleaded in

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<sup>12</sup> Paragraph 2(a) of the Amended Summons sought that [58(a)] and [60] be struck out under r 23.02 of the Rules.



paragraph 5(d) above [which was a breach of s183].

### Particulars

MCH refers to and repeats the particulars to paragraph 58 above. Doery has caused the list to be distributed to MCH customers in an attempt to obtain orders for Kegland products. For example, in an email sent on 26 February 2018, Doery instructed Jiang to forward an amended MCH Price List (in which Kegland individual part numbers for each product had been added to the list and the MCH part number was described as the "old part number") to a customer located in New Zealand. The price list was forwarded by Jiang on 26 February 2018 from the email address "lidia@kegking.cn".

Kegland has gained advantages including by:

- i. having access to a comprehensive parts and price list for a home brewery business in the form of the MCH Price List, without having to use its own efforts to create such a list;
- ii. having access to the price at which its competitor, MCH, acquires products from its suppliers;
- iii. using the MCH Price List to encourage MCH customers to place orders with Kegland instead, by facilitating their change in ordering practices; and
- iv. relying on the goodwill of Keg King to attract MCH customers, by representing that Keg King part numbers are "old part numbers" of Kegland when this is inaccurate.

MCH has suffered a detriment as a result of loss of customers and revenue to Kegland. Further particulars will be provided prior to trial.  
(marked up amendments omitted)

### *Kegland's submissions*

24 Kegland made two fundamental attacks on the above pleading, namely, that:

- (a) the MCH Price List was not properly defined; and
- (b) there was a disconnect between the alleged wrongdoing and the acquiring of the MCH Price List during the course of employment.

25 In relation to the second point, it was allegedly not clear that MCH Price List 'improperly used' was the same document acquired during the course of employment particularly since Ms Jiang appeared to have the (amended) Price List (not Mr Doery).

SC:

Further it was not a document which would attract s 183 given, on the matters particularised at [58] and [60], the document had been given to Ms Jiang anyway and was in the public domain.

- 26 It was also highlighted that particulars should not fill gaps in circumstances where material facts were not properly pleaded.

*Resolution*

- 27 The allegation is that there is improper use of a document in breach of s 183 of the Act.

- 28 In order to establish involvement in such a breach of duty, MCH will hence need to establish the following components:

- (a) Mr Doery obtained certain information;
- (b) that Mr Doery obtained that information because he has been a director or officer or employee of MCH;
- (c) there was improper use of that information either to gain an advantage for Kegland or cause detriment to MCH; and
- (d) relevant involvement in the contravention under s 79 of the Act.

- 29 Kegland's complaints, above, direct attention to (a) and (c) only.

*Definition of information (paragraph 58)*

- 30 Paragraph 58 makes clear that the allegation is that the *information* in the form of the MCH Price List which was acquired before Mr Doery ceased to be a director and officer of MCH. The particulars at [58] further describe the information in the MCH Price List as that contained in an electronic spreadsheet which was available to Mr Doery at all material times that he was a director, officer and employee of MCH. The MCH Price List is further defined as identifying 'each home brewing product sold by MCH by reference to a part number and specified the dimensions and weight for the product, together with the price at which each product was acquired by MCH from a

given supplier’.

31 There is therefore adequate definition of the relevant information and the MCH Price List.

*Improper use (paragraph 60)*

32 In terms of the allegation of ‘improper use’ it is true that [60] is conclusory. It would hence be better if the material facts for this allegation are properly pleaded (which appear to be that Mr Doery has ‘caused the list to be distributed to MCH customers in an attempt to obtain orders for Kegland products’).

33 The same can be said for the allegation that the improper use caused detriment or gained advantage which appears in particulars to [60] (though no complaint was made about this).

34 Returning, then, to the primary complaint, that the pleading was bad given an alleged ‘disconnect.’

35 First, although the example given refers to an ‘Amended Price List’ this is clearly intended to incorporate the information in the original MCH Price List given the reference to Kegland parts being ‘added’ to the list and the reference to ‘old part numbers’ of MCH.

36 In relation to the complaint that the Price List was in the public domain, and was already with Ms Jiang, no allegation of confidentiality is necessary for a claim under s 183. Rather the focus is on the actions of Mr Doery (not Ms Jiang) who has ‘caused’ the list to be distributed in an attempt to obtain orders for Kegland. The example given also refers to Mr Doery having ‘instructed’ Ms Jiang to forward the information to a customer in 2018.

37 In any event, the particulars at [58(a)] allege that the MCH Price List was initially provided to Ms Jiang in 2016 by Mr Doery who instructed her how to use it in

SC:

circumstances where she did not have the permission of MCH to disclose it to third parties.

38 Kegland is thereby on notice as to what is alleged. Whether the alleged distribution will be 'improper' (together with the quantum of any loss) is otherwise a question for trial (subject to the matters below).

39 The Price List Claim will not be struck out. Rather, there will be leave to further amend to clearly distinguish between material facts and particulars. Any further particulars (beyond the February 2018 example) should also be provided.

#### **Summary judgment application**

40 No written submissions were made in support of this aspect of the summary judgment claim. Rather Kegland merely pressed for the Price List Claim to be struck out (at paragraph 4).

41 However, in oral submissions, the focus was again on the 'improper' allegation. Thus Counsel suggested that the distribution of the list would not be improper given it was in the public domain and that the prices contained in the document were Ms Jiang's own prices. Thus, there was no reason why she could not say the price she supplied products at.

#### *Resolution*

42 The first answer to Kegland's complaints is again that there may still be 'improper' use of information *by Mr Doery* even if the document is, or has become widely circulated (though there may be an issue of loss). Thus the focus is on Mr Doery and not whether Ms Jiang was entitled to also use the document.

43 In any event, there was a direct conflict in the evidence as to whether Ms Jiang was entitled to circulate the document and whether the prices contained therein were those of Ms Jiang or MCH.

SC:

44 Thus, there was an affidavit of Ms Jiang sworn 30 October 2018, who was the general manager for Honyi International Co. Ltd, a Chinese company which manufactured beer brewing equipment for both Kegland and, previously, MCH, and also a salesperson at Amco (the subject of other allegations in this case).

45 She claimed that Mr Luo first emailed her the Price List and told her she could use it for all her customers. She further claims that she has continued to use it, as updated, and that she circulates it to other customers. She claims that she is the owner of the Price List.

46 This is contradicted by evidence from MCH who also claim that Ms Jiang is not an independent witness.

47 Thus, Ms Maggie Hu (director of MCH) states that the product codes and prices are set by MCH and that there was no permission given to Mr Luo to disclose the information in those price lists to third parties. Further, that she was not aware that Ms Jiang was disclosing the list to third parties and would have asked her to stop if she had been aware.

48 Such a conflict can only be resolved at trial and I am not satisfied that there are no real prospects of success.

#### *Summary on Price List Claim*

49 It is not appropriate to strike out or dismiss the Price List Claim.

50 Rather, MCH will be given leave to further amend the Price List Claim, consistent with these Reasons, and so as to more clearly plead relevant material facts.

#### **Customer List Claim**

51 The key components of this claim as pleaded were:

- Mr Doery acquired information in the form of an MCH Customer List and customer email database (MCH Customer Information) during the time he was

a director, officer and employee of MCH and because of his position as a director, officer and employee of MCH ([58(b)]<sup>13</sup> and [59]);

- Mr Doery improperly used the MCH Customer Information to gain an advantage for Kegland or cause a detriment to MCH in breach of s183 of the Act ([60A]);
- that at all material times since 8 December 2017 Kegland had knowledge that Mr Doery was a director, officer, and senior employee; that he owed the relevant duties; and that he would be in breach if he engaged in the relevant conduct ([61]);
- in the premises Kegland was relevantly involved in a contravention of s 183 of the Act ([62]);
- MCH has suffered damage by reason of the wrongful use of MCH information ([63]).

52 No complaint was pursued about the pleading.<sup>14</sup> Rather, the focus of attack was directed to the allegation at [60A] wherein it is alleged that '*Doery has provided the MCH Customer Information to Kegland and Kegland has used that information to solicit MCH customers.*' Again, this allegation appears in the particulars. Though no point was made about this, this ought be remedied as part of any amendment of the pleadings.

53 More significantly, the allegation is said to be inferred from a number of matters as follows:

- (i) in April 2018 Kegland sent an email communication to MCH customers who had not previously purchased products from Kegland or provided Kegland with their email addresses (citing several posts on the website [aussiehomebrewer.com](http://aussiehomebrewer.com));
- (ii) & (iii) Kegland has destroyed, disposed of, or lost the copy of the email communication which had been kept in 'MailChimp' software (which otherwise would retain a copy of the email communication and details of recipients);

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<sup>13</sup> In the particulars to [58(b)] to the Further Amended Statemetn of Claim dated 14 June 2019, it is said that 'The MCH Customer information was contained on MCH'S electronic database, (including in its Magento and YouERP software), which was accessible by Mr Doery during his employment at MCH. The Magento software stored the email addresses of customers who had placed online orders with MCH and those email addresses could be exported to a spreadsheet using the Magento software.'

<sup>14</sup> Transcript of Proceedings (*MCH Australia Pty Ltd v Kee Doery & Ors*, S ECI 2018 0064, Kennedy J, 12 June 2019) 36.

- (iv) in an online message of May 2018 from an MCH retail customer to MCH, Ms Gail Lidden (a MCH retail customer) reported that she had suddenly been put on a Kegland mailing list;
- (v) Kegland has failed to discover any customer records from Magento which would record, inter alia, the date on which a customer first became a customer of Kegland.

54 In written submissions, Kegland submitted that, even if the matters contained in the particulars were established, that they could not establish the inference alleged (which needed to be the more probable conclusion to be drawn).<sup>15</sup>

55 Two further submissions were also made.

56 First, it was submitted that it was not logical to accept that, unless a person had previously purchased a product from that organisation, the organisation must have obtained the person's email address by taking it from a competitor's confidential email database (at [28]). This was particularly so given the evidence as to the sources of Kegland's email contacts at [9(a)] of the affidavit of Hong Rui Liu of 3 April 2019.

57 Second, it was submitted that a court could not find that the MCH Customer List was copied in circumstances where the evidence of a project analyst, Mr Toby Masterson, was that 80% of the MCH email contacts were not even contained in the Kegland list. Further that 95% of Kegland customers were not those of MCH. There would be no reason to copy such a small portion in circumstances where the allegation was that the whole document was copied. Kegland also clearly had multiple sources of customers.

58 In order to examine these complaints it is necessary to consider the relevant evidence.

*Evidence on the application*

59 In oral submission, Counsel for MCH summarised the evidence relied upon as follows:

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<sup>15</sup> Citing *Southern Colour (Vic) Pty Ltd v Michael Parr & Anor* [2017] VSCA 301 [77].

- (a) First, that five individuals posted that they had received the email communication by Kegland, who had not previously made a purchase from Kegland or provided Kegland with their email address;
- (b) Second, there was the evidence of Mr Masterson about the overlap in customers;
- (c) Third, that there was a failure to discover any customer records from Magento software; and
- (d) Fourth, that Kegland had destroyed, disposed of, or lost the copy of the email communication that had been kept in MailChimp software which would identify who was sent the mailouts in April 2018.

60 There was also reference to two other matters of significance. First, there was reference to the position of Mr Doery. It was suggested that he would generally be subject to a substantial credit attack at trial and it was also highlighted that he had not given evidence as to these allegations on this application, even through a solicitor.<sup>16</sup> Second, there was a substantial challenge to the explanations of Mr Liu as to the origins of Kegland's customer list.

*April 2018 email communications*

61 The evidence of Mr Simon Dollard, solicitor, was that MCH customers have been contacted by Kegland whose contact details do not appear on the MCH website (which contained details of some customers) and have not otherwise provided their contact details to Kegland. Further, that the MCH website did not contain the names and details of all customers, in particular, that it did not contain names and details of customers on the Retail Customer List.

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<sup>16</sup> See Transcript of Proceedings (*MCH Australia Pty Ltd v Kee Doery & Ors*, S ECI 2018 0064, Kennedy J, 12 June 2019) 140.



62 There was evidence to support this claim. Thus, Mr Dollard annexed various posts from the website aussiehomebrewer.com which recorded that email communications were sent by Kegland to email addresses of MCH customers who had not made a purchase from Kegland or previously provided that particular email address to Kegland.

63 For example, 2 posts from 27 April 2018 read as follows:

#4

Posted Friday at 2.14 pm

I have a question about the email newsletter sent out yesterday, which I *received at an address that has never made a Kegland purchase*. I have, however, bought from Keg King [MCH's product] previously using this email, What's going on here?

#5

Posted Friday at 3.24 pm

I wondered the same.

After reading the email I jumped at the \$89 new 19L kegs. Didn't think I created a KegLand account but had purchased from KegKing [MCH's product] previously. Went to log into KL and *my addy which received the email wasn't registered*.

So it seems Kee and KL have kept KK addys and are using them at KL. Not very good practice IMO but in saying that I was happy with the prices and made a purchase.

It is really intriguing to see the fallout and price war between the two companies now.

64 In a later affidavit, Mr Dollard also annexes an online message from Ms Gail Lidden posted online to MCH in May 2018 which asks:

Did your records get hacked? I ask because I was suddenly put on a KEGLAND mailing list... just after my last order with you. I asked them how they got my contact details but no reply. I'm not upset, these things happen but just wondering if it was a hack... pretty cheeky... or if an employee stole the records and started a new business called Kegland?

65 There were 2 other posts of a similar nature.

*Mr Masterson's evidence*

- 66 As indicated above, Mr Masterson, project analyst and developer, compared the customer data from both MCH and Kegland to determine how much customer information was shared.
- 67 He found that of the 10,552 email addresses from Kegland and 2,693 email addresses from MCH, there were 588 email addresses in common. Of those in common, 383 related to the Retail Customer List.
- 68 There are, however, some issues with this evidence that were not clarified at the hearing of the application.
- 69 First, it was unclear that the data was directly comparable given the relevant dates do not appear to coincide. Thus, the court was informed (without objection) that Mr Masterson used the 'Kegland list' as at 31 January 2019. This was compared with the MCH list – which was comprised of a Retail Customer List at 5 December 2018 and a Wholesale Customer List as at December 2017.<sup>17</sup>
- 70 Second, it was unclear whether the subject matter was directly comparable. Thus, while, according to Mr Liu, (in evidence cited below) the Kegland list was derived from business and personal '*contacts*', the MCH Customer List is defined by reference to the information contained on an electronic database (including in its Magento and YouERP software) which stored the email addresses of customer *who had placed online orders with MCH*.<sup>18</sup> This, then, would not include customers who placed orders over the telephone.<sup>19</sup> Nor would it appear to cover '*contacts*' who had not placed orders.

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<sup>17</sup> Transcript of Proceedings (*MCH Australia Pty Ltd v Kee Doery & Ors*, S ECI 2018 0064, Kennedy J, 12 June 2019) 132.

<sup>18</sup> Particulars to [58(b)] of the Further Amended Statement of Claim dated 14 June 2019.

<sup>19</sup> Affidavit of Daizhuo Wu sworn 8 May 2019 [18].

71 In terms of records relating to the identity of customers who were sent the April 2018 mailout, there was some unsatisfactory aspects to Kegland's affidavits. In his first affidavit relating to discovery, Mr Liu (director) claimed that the customer list for the April 2018 mailout contained customer information which was commercial-in-confidence.<sup>20</sup> However, in his second affidavit of documents, he stated that the April 2018 mailout list was no longer in existence.<sup>21</sup> In his final affidavit, he confirmed that Kegland was unable to ascertain its customer list as at April 2018.<sup>22</sup> He further stated:

13. Kegland engaged MailChimp, a third party marketing services provider, to distribute the April 2018 Mailout. Kegland conducted the April 2018 Mailout for about two weeks using the MailChimp service. MailChimp calculates its costs on a monthly basis by reference to the number of recipients of a mailout and length of time the mailout is conducted. To minimise the costs of April 2018 Mailout, Kegland terminated the campaign about two weeks after it commenced. To terminate the April 2018 Mailout, it was necessary remove both the recipients of the April 2018 Mailout and the April 2018 Mailout Campaign Document from the MailChimp platform.
14. Kegland did not save a copy of the April 2018 Mailout Campaign on any of its data storage services as defined in the 27 March 2019 Orders.

72 This evidence is challenged by MCH's witness, Mr Daizhou Wu, who disputes that it is necessary to delete a list of recipients since a campaign can be paused.<sup>23</sup> He also disputes the pricing alleged claiming that the cost per month depends on the total subscribers stored rather than the length of the campaign.<sup>24</sup>

73 The events surrounding the destruction of the MailChimp records may be the subject of a credit attack at trial. However, as fairly conceded by MCH, the evidence is now

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<sup>20</sup> Affidavit of Hong Rui Liu sworn 31 January 2019 [2(b)].

<sup>21</sup> Affidavit of Hong Rui Liu sworn 26 February 2019 [2(b)].

<sup>22</sup> Affidavit of Hong Rui Liu sworn 3 April 2019 [10(a)].

<sup>23</sup> Affidavit of Daizhuo Wu sworn 8 May 2019 [32].

<sup>24</sup> Ibid [33].

gone<sup>25</sup> and cannot be retrieved.

74 There was also reference to MCH seeking orders pursuant to s 89B of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) given the unavailability of this document. This enables a court to make a range of orders if it appears to the court that a document is unavailable; no reproduction is available; and the unavailability is likely to cause unfairness to MCH. Such orders include wide ranging orders beyond simply drawing adverse inferences.<sup>26</sup>

75 However, no such order was sought on the hearing of this application (even presuming the threshold is met). It follows that I am simply unable to find that the non-availability of the MailChimp material assists MCH on this application as at this stage of the proceeding.

*Evidence of Mr Liu*

76 Mr Liu (director of Kegland) states that the document entitled 'Kegland Mail List.xlxs,' being Kegland's customer list as at 31 January 2019, is closest to that used in the April 2018 mailout. He says that the document was originally named 'Email list from ebay and magento export.csv' (prior to delivery to Kegland's solicitors) and was maintained on a shared folder on its office network and periodically amended.

77 At [9] of his third affidavit, Mr Liu further states:

I started the Kegland Customer List in or about January 2018 and it was comprised of many of my business and personal contacts. The results of

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<sup>25</sup> Transcript of Proceedings (*MCH Australia Pty Ltd v Kee Doery & Ors*, S ECI 2018 0064, Kennedy J, 12 June 2019) 135.

<sup>26</sup> Section 89B(2) states:

Without limiting subsection (1), a ruling or order may be-

- (a) that an adverse inference will be drawn from the unavailability of the document;
- (b) that a fact in issue between the parties be presumed to be true in the absence of evidence to the contrary;
- (c) that certain evidence not be adduced;
- (d) that all or part of a defence or statement of claim be struck out;
- (e) that the evidential burden of proof be reversed in relation to a fact in issue.

Kegland's enquiries as to the use and maintenance of the Kegland Customer List are:

(a) I *understand and believe* the Kegland Customer List is a cumulation of the following ...<sup>27</sup>

- (i) contacts of an employee, Oliver Permezel;
- (ii) information published by third parties, using an 'Advanced Email Extractor';
- (iii) emails found in Mr Kang Shou Gao's eBay account;
- (iv) email addresses through the 'sign up to our newsletter' option on the Kegland website, or other communications between Kegland staff and third parties;
- (v) additional email addresses from customers who place orders on the Kegland website.

78 A broad ranging attack was made on this evidence.

79 Thus, MCH first submitted that if the file was updated, it should have been converted to .xls format. It was further suggested that the title (being email list from eBay and Magento) suggested that there were two sources only.

80 Criticism was also made of the fact that the list of sources was provided on the basis of what Mr Liu 'understood and believed.'

81 There was some evidence of Mr Wu which suggested that the evidence of Mr Liu was incorrect to the extent he suggested that the excel file was manually updated. However, Counsel did not take the court to any evidence to otherwise support his criticisms. In such circumstances, I am unable to be satisfied as to whether the first set of criticisms are well founded in the absence of consideration of appropriate expert evidence.

82 There is however a fair basis for the second criticism. Thus the statement made is a vague and generalised statement as to Mr Liu's 'understanding and belief' without particularisation as to precise inquiries made and with whom. It is also telling that no

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<sup>27</sup> A summary of the affidavit of Hong Rui Liu sworn 3 April 2019 [9] only follows and it is not a direct quote from the same.

inquiry is explicitly made of Mr Doery (against whom the allegation is made).

- 83 I am therefore not satisfied that Mr Liu's explanation as to the origins of Kegland's list is satisfactory.

*Magento*

- 84 The evidence of Mr Liu included that Kegland had 'conducted a search of its data storage services' and that Kegland was 'unable to ascertain its customer list as at April 2018.'<sup>28</sup>

- 85 The evidence of Mr Wu was that Kegland uses the software called 'Magento' which will store information about the date on which a customer first placed an order through the website. Further, that Kegland would be able to derive a list of its customers as at April 2018, which had not been provided.

- 86 The criticism of MCH was therefore that Kegland had not complied with its discovery obligations in relation to Magento. It was further suggested that such evidence would make a comparison more precise in circumstances where MCH intends to construct its own list as at April 2018.

- 87 There may be some doubt whether Kegland has complied with its discovery obligations in circumstances where order 3 of the orders made 27 March 2019 merely provided that Kegland file an affidavit which identified 'all inquiries undertaken, including the outcome of the inquiries, into whether the form of the customer list in April 2018 can be ascertained.' Thus, although I have found parts of Mr Liu's affidavit to be unsatisfactory, he has identified that the April 2018 list does not exist after a search of a database. The complaint also appears to be that some reconstruction ought to occur - rather than that a document actually in existence ought be provided.

- 88 However, even presuming there has been a breach, I am unable to 'fill gaps' to

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<sup>28</sup> Affidavit of Hong Rui Liu sworn 3 April 2019 [5].

ascertain what, if anything further, such a list would contain. Thus, the complaint does not appear to assist MCH on this application even if discovery obligations have been breached.

89 It was then said the court would be asked to make appropriate orders under s 89B of the *Evidence (Miscellaneous Provisions) Act 1958* as a result. This was apparently a reference to orders that might be sought at trial. Moreover, it was unclear in any event what orders would be appropriate.

90 At one stage it was suggested that the absence would be 'unlikely to assist' Kegland.<sup>29</sup> This, however, would not advance MCH's case on this application. It was also suggested that MCH might also ask for a ruling at trial that the Masterson evidence not be adduced.<sup>30</sup> However, it was not identified as to whether this was appropriate, nor does this appear to assist MCH at all (since this was part of the evidence it relied on).

91 Overall, then, I do not consider the evidence about Magento advanced MCH's case on this application.

*Mr Doery*

92 As to the position of Mr Doery generally it was uncontested that Mr Doery had access to the Customer List during the course of his employment.<sup>31</sup> There was also evidence that he left MCH after being terminated in difficult circumstances in October 2017.<sup>32</sup>

93 There was further evidence that Mr Doery was involved in the incorporation of

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<sup>29</sup> Transcript of Proceedings (*MCH Australia Pty Ltd v Kee Doery & Ors*, S ECI 2018 0064, Kennedy J, 12 June 2019) 126.

<sup>30</sup> Ibid 134.

<sup>31</sup> Ibid 45.

<sup>32</sup> Affidavit of Simon John Dollard sworn 12 October 2018 [8].

Kegland – a competitor of MCH<sup>33</sup>- very shortly thereafter in December 2017.<sup>34</sup> He has further admitted that he is an employee of Kegland.<sup>35</sup> There is also an email from Mr Doery of 23 February 2018 wherein he states that he had started a ‘much more efficient and better business called www.KegLand.com.au’, which email also describes Mr Doery as responsible for ‘Product Development’ at Kegland.<sup>36</sup>

- 94 It can also be expected that MCH will attack Mr Doery’s credit at trial. However, what is also significant for the purposes of this application, is that Mr Doery has not denied copying or passing the information contained in either list (even through a solicitor) to Kegland on facts which he could have spoken to. For the purposes of this application I am able to, and do, draw an inference that his uncalled evidence would therefore not assist Kegland. Further, I may readily draw any inference available from the other evidence.<sup>37</sup>

*Resolution on s 63*

- 95 In relation to the suggestion that the overlap is small, this is no doubt true though it must be borne in mind that the precise ambit of Mr Masterson’s evidence remains to be tested. The fact of an overlap is itself evidence in favour of MCH (albeit not decisive evidence). It was also not alleged that Kegland necessarily copied 100% of the MCH Customer Information. Indeed what may be more important is whether information concerning pivotal customers was taken.<sup>38</sup> This however is a matter for trial.
- 96 In relation to approaches to MCH’s clients it may be that this occurred independently of copying as Kegland suggests. However, this needs to be considered in the context

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<sup>33</sup> Affidavit of Simon John Dollard sworn 12 October 2018 [13]-[14]; See also [56] of Defence and Counterclaim dated 4 July 2018.

<sup>34</sup> Exhibit SJD-42 to affidavit of Simon John Dollard sworn 5 December 2018.

<sup>35</sup> Defence and Counterclaim dated 4 July 2018 [57].

<sup>36</sup> Exhibit SJD-17 to affidavit of Simon John Dollard sworn 12 October 2018.

<sup>37</sup> *Jones v Dunkel* (1959) 101 CLR 298; See also John Heydon, *Cross on Evidence*, (Lexis Nexis Butterworths, 11<sup>th</sup> ed, 2017) pp. 38-40.

<sup>38</sup> See affidavit of Mr Daizhuo Wu sworn 8 May 2019 [34]-[35] where Mr Wu deposes that the top 10 Wholesale customers of Keg King accounted for 32% of total wholesale sales and that there has been a decrease in purchases of Keg King’s top wholesale customer of regulators and gas cylinders.



of all the evidence where the approaches are only one of a range of relevant matters available to be relied upon.

97 Overall, then I consider that there are a number of pieces of evidence which, if accepted, and taken cumulatively, could give rise to an inference that Mr Doery has improperly used the MCH Customer Information as alleged. Critically, these matters include that Mr Doery had access to the Customer List; that he left MCH after being terminated in difficult circumstances in October 2017; that he was involved in the incorporation of a competitor, Kegland, very shortly thereafter in December 2017. Further, that, within a further few months (in April 2018), a number of approaches were made to former MCH clients who had not previously given their email details to Kegland; and evidence of an overlap of some 588 email addresses in common to both Kegland and MCH.

98 Against this evidence there has only been an unsatisfactory explanation from Kegland's director, Mr Liu, as to how the Kegland Customer List was created.

99 These matters, in my view, could give rise to the inference alleged. That inference is also fortified on this application in circumstances where Mr Doery has not given evidence.

100 This is not to say that MCH will not face some serious challenges at trial. Mr Doery (who is separately represented) may also ultimately provide appropriate denials/ explanations. However, having regard to the caution I am to apply, I am simply not satisfied, on the basis of the evidence on this application, that MCH has 'no real prospect of success' with its MCH Customer Information claim.

*Resolution on s64 - Discretion*

101 It is unnecessary to consider the question of discretion. However, I will briefly summarise my views for the sake of completeness.

102 Senior Counsel for MCH relied on five points in support of the exercise of the court's

SC:

discretion:

- Firstly, that there was no challenge to the legal foundation of the case;
- Second, that the underlying facts were complex where there was a challenge to Mr Doery at large in the context of very serious allegations against him;
- Third, that the evidence of Kegland before the court was selective with no evidence from either Mr Doery (or Mr Luo) and no evidence even through information and belief;
- Fourth, that a number of claims would already proceed to trial. In particular, that the underlying Customer List Claim would proceed against Mr Doery by reason that no application had been brought by him to strike it out; and
- Finally, that there was no utility in fragmentation.

103 In response to this, Kegland challenged the suggestion that it would necessarily be present at trial and highlighted that there was more extensive work with the extra Customer Claim.

104 Notwithstanding any prejudice to Kegland, I am of the view that, having regard to the first, fourth and fifth matters cited above, this matter ought not be determined summarily if I was wrong as to the real prospect of success.

105 It is significant that both the Price List Claim and the ACL claim remain extant. The Customer List Claim is also to proceed against Mr Doery. In those circumstances, it is appropriate to exercise the discretion given the need to avoid fragmentation of a fact intensive case which is to proceed to trial in any event.

### Conclusion

106 The plaintiff will be given leave to file and serve a Second Further Amended Statement of Claim consistent with these Reasons.

107 The third defendant's Amended Summons dated 15 April 2019 is otherwise dismissed.

**Certificate**

I certify that this and the 25 preceding pages are the true copy of the Reasons for the Judgment of Justice Kennedy of the Supreme Court of Victoria delivered on 26 July 2019.

Dated: 26 July 2019



*MAO*

Associate