

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

Not Restricted

No. S CI 2010 885

POMEROY PACIFIC PTY LTD

Plaintiff

And

PAUL CHIODO

Defendant

ASSOCIATE JUSTICE:

EFTHIM AsJ

WHERE HELD:

Melbourne

DATES OF HEARING:

24 March 2010

DATE OF JUDGMENT:

31 March 2010 amended on 15 April 2010



REASONS FOR DECISION

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr N. Harrington

Tisher Liner & Co

For the Defendant

Mr M. Bromley

Alderuccio Solicitors



HIS HONOUR:

1. The plaintiff, Pomeroy Pacific Pty Ltd, seeks an interlocutory injunction to prevent its former employee, the defendant, Paul Chiodo, from having any involvement in the development of any building and construction project at 201-209 High Street, Prahran, 3-5 St Kilda Road, St Kilda and 87-101 Bay Street, Port Melbourne. In the alternative, it seeks an interlocutory injunction restraining the defendant from using any of the plaintiff's confidential information during his employment concerning the development of any building and construction project at either 201-209 High Street, Prahran, 3-5 St Kilda Road, St Kilda and 87-101 Bay Street, Port Melbourne.
2. In support of its application, the plaintiff relies upon the affidavit of Dug Pomeroy (director of the plaintiff) sworn on 22 February 2010 and the affidavits of Mark Pomeroy (general manager of the plaintiff) sworn on 5 March 2010 and 23 March 2010. The defendant, in opposition to this application relies on the affidavit of Sean Niven (Company Director of Australian Property Group Pte Ltd) sworn on 4 March 2010, the affidavit of John Alderuccio (solicitor on behalf of the defendant) sworn 4 March 2010 and the affidavit of the defendant sworn on 22 March 2010.

### The Facts

3. Mr Dug Pomeroy has sworn that the plaintiff's principal business involves project and development management and the management of the building projects. It is involved in both commercial and residential construction. It undertakes property developments both on its own behalf and with joint venture partners from time to time. The defendant was employed by the plaintiff as a project executive in 2006. He was promoted over the years to the point where he was working as a development manager responsible for overseeing major developments undertaken by the plaintiff. It was the defendant's job to both search for new property development opportunities and to manage projects where the plaintiff was awarded the management or

development rights to a property development project. His salary package at the date of termination in February 2010 was \$170,000 per annum inclusive of superannuation.

### **The High Street Project**

4. In November 2007, the defendant as joint venturer paid a deposit to purchase 201-209 High Street, Prahran. The deposit was in the amount of \$2,512,500 and settlement of \$22,612,500 was due on 28 November 2008. The High Street site was purchased in order that the plaintiff could develop and then build a mixed-use development of 330 apartments and 2,325 square metres of retail space. That contract was cancelled and a new company, High Street Investment Partners, entered into a new contract for the High Street site. Mr Dug Pomeroy and Mr Mark Pomeroy are the beneficial owners of Pacific Higher Pty Ltd which held some of the share capital in that company. Up until November 2009, the plaintiff and the other holder of the issued share capital had invested approximately \$6 million into the development of the High Street site.
5. The defendant was directed to manage the mixed-use development for the High Street site and to assist in all financial modelling and the preparation of presentations to potential investors and joint venture partners. That site was too big to develop without a substantial financial backer. It was costed at approximately \$100 million and required an excess of \$30 million of equity.
6. In early 2009, it was decided that High Street Investment Partners Limited would find a buyer or joint venture partner for the High Street site with the intention of winning the contract to design, construct and manage the development in respect of the project, as High Street Investment Partners could not complete the purchase of the High Street site alone.
7. By late 2009, an Indonesian-based company called The Golden Group was interested in the purchase of the High Street site. During meetings to conduct negotiations, a Singapore-based real estate agent, Sean Niven, was present. He is the founder and

managing director of a company called The Australian Property Group Pte Ltd. Mr Niven was to receive approximately \$260,000 to broker the deal.

8. In late 2009/early 2010, the Golden Group purchased the High Street site. The intent was that the defendant would undertake and manage four stages of the project. The fee to the plaintiff was likely to be in the range of \$2 million. It was intended that Mr Niven was to be appointed as the Asian-based selling agent for all or some of the apartments on site.
9. Agreements were finalised by the 6 February 2010 that a sale contract between High Street Investment Partners and the vendor of the property would come to an end. The Golden Group or its nominee would purchase the High Street site. High Street Investment Partners Limited was to receive a \$1,300,000 reimbursement arising out of the agreement. Subject to the successful purchase of the site, the plaintiff would be able to negotiate and to reach agreement of the terms under which it would be engaged as a developer and project manager for the High Street site. If successful, the plaintiff would derive a fee of approximately \$2 million over three years for this arrangement. On 12 February, the Golden Group stated it was unable to execute the agreements at that time.
10. On 18 January 2010, Mr Dug Pomeroy's son, Mark Pomeroy, had reported to Mr Dug Pomeroy that he had seen an email from Sean Niven addressed to the defendant's gmail address as well as the defendant's company email address.
11. On 11 February 2010, Mark Pomeroy showed Dug Pomeroy a USB memory stick and told him that he had obtained it from the defendant's office. He had inserted the USB into the defendant's computer and there were a number of documents contained in the USB. There was a letter dated 25 January 2010 from Pure Development and Project Management Pty Ltd (a company of which the defendant is the sole director and shareholder) to Mr Niven and referring to the High Street site. That letter contained a statement that the defendant had an extensive knowledge of the development and maintained all of the intellectual knowledge of this development.

The letter also contained a fee proposal for project and development services on behalf of Pure Development and Project Management Pty Ltd of \$1,750,000. It is alleged that the terms and conditions attached to the fee proposal were a straight-out copy of the plaintiff's stated terms and conditions. A second identical letter was addressed to Mr Niven but was under the letterhead of Chiodo Property Group.

12. The defendant swears these letters were only draft letters and were not sent to Mr Niven. Mr Niven swears that he never received those letters and that he, nor the Australian Property Group Pte Ltd, of which he is a director, have never had an agreement with the defendant in relation to the project management of the High Street site.
13. There was also a project feasibility summary for the High Street site on the USB memory stick. There were power-point presentations and architectural drawings of the proposed development of the site. There was also a terms and conditions document on the USB memory stick which was a direct copy of terms and conditions used by the plaintiff. It shows in the track changes that all reference to plaintiff had been replaced with Pure Development and Project Management Pty Ltd.
14. On 2 February 2010, the defendant sent an email to Mr Niven (which Mr Niven did not refer to in his affidavit) which stated:

*"Congratulations again on High Street . . .once received, can you please email me the company details on who will be responsible for the project payments . . ."*

15. Mr Mark Pomeroy swears that on 1 February 2010 the defendant emailed from his gmail account to Andrew at The Golden Group and Mr Niven a development feasibility study prepared by the plaintiff for the High Street site. That document contained confidential information compiled by the plaintiff.

## The St Kilda Road Project

16. In relation to the St Kilda Road project, Mr Dug Pomeroy swears that in August 2009, the plaintiff was working on the St Kilda Road proposal and had spent at least \$100,000 on labour and third party reports to develop that proposal. A letter addressed to "Dear Joseph", being Joseph Frank, was found in the USB memory stick concerning the development of the site located at 3-5 St Kilda Road. The contents of that letter replicated the development proposal presented by the plaintiff to Joseph Frank on 5 October 2008. In August 2009, the plaintiff was still working on the proposal and exploring various options. The St Kilda Road proposal never proceeded.
17. The defendant has sworn that the letter referred to is not based on the company's proposal and that it contains a different proposal. Mr Alderuccio, the defendant's solicitor, swears that on 3 March 2010 he had a telephone conversation with Mr Frank who stated that neither he nor any of his related entities have any deal or commercial relationship with the defendant.
18. Produced to the Court are copies of miscellaneous emails from the defendant commencing from 24 August 2009 concerning the project at St Kilda Road. The first email is addressed to Andrew Rice of Walton Constructions. That email attaches a feasibility study based on the development of the St Kilda Road proposal and that this was the proposal the plaintiff sought to develop with Joseph Frank. Mr Dug Pomeroy swears that Walton Constructions is a rival property development firm.
19. There is an email from Mr Andrew Rice dated 28 October 2009 which contains a draft email to an architect firm stating that the defendant has previously reached an in-principle agreement with Mr Frank regarding the proposed joint venture.
20. In a further email dated 2 November 2009, the defendant has written to Mr Rice stating that *"it like we are heading towards their first project together based on Friday's meeting with Joseph Frank"*.

21. In response to that affidavit, the defendant swears that he has never had any agreement with Joseph Frank or anyone else or any entity regarding the development of this property. No explanation is given regarding the emails.

### **The Bay Street Project**

22. Mr Dug Pomeroy swears that the plaintiff is involved in a joint venture with the Valad Property Group to develop a mixed-use development comprising 312 apartments and retail at 87-101 Bay Street, Port Melbourne. The property is owned by the joint venture partners. Valad Property Group has a major interest in the joint venture. Whilst employed by the plaintiff, the defendant worked on the design and financing development phase of the Port Melbourne project. Valad can appoint any person to represent its interests and to conduct the development management services it is required to provide under the joint venture agreement. Mr Dug Pomeroy is of the belief that there is an opportunity that Valad Property Group may appoint the plaintiff as the full developer/manager of the project given an imminent employee departure from the Valad Property Group.
23. The defendant has sworn that the property was purchased in about 2008 and a planning permit was issued in about November 2009. Construction has not commenced and as he understands the project is currently on hold.
24. Mr Mark Pomeroy swears that he expects the project to proceed within the next four to six weeks and confirms that the profit split is 70/30 and the project fees are split 50/50. The equity break-up is 90/10.

### **The Conduct of the Defendant**

25. Mr Dug Pomeroy swears that in February 2010, the plaintiff was monitoring the defendant's movements but only gained access to the defendant's gmail account on the morning of 12 February 2010. It was apparent that the defendant had been using his gmail to conduct discussions and negotiations without the knowledge of the plaintiff.

26. On 11 February 2010, Mr Dug Pomeroy was informed that the defendant had booked a flight to Singapore and Jakarta on Monday, 15 February 2010. The defendant had not requested any leave from the plaintiff as at 11 February 2010. Mr Dug Pomeroy believes the defendant was intending to go and meet with Mr Niven in Singapore and thereafter members of the Golden Group Company in Jakarta to formalise his involvement with the Golden Group in relation to the High Street site.
27. On 12 February 2010, Mr Dug Pomeroy attended a meeting with the defendant. Also present at that meeting was his solicitor, Simon Abraham, Mark Pomeroy, David Marshall and Mark Knapp. The defendant was presented with a letter which terminated his employment for serious misconduct. On reading the letter, the defendant stated, "*The Indonesians have made me a proposal to manage [the High Street project] for them.*" The defendant was asked whether he was going to Indonesia. He stated that he was not going to Indonesia any more although he had received a phone call from Mr Niven saying that he could still go.
28. As to the St Kilda Road project, in response the defendant said, "*Frank did not want to deal with you guys. I brought him along to you on a plate.*" The plaintiff denied using the company's intellectual property. He also said that Mr Frank had an issue with the plaintiff and had offered the defendant the opportunity to invest through "sweat equity" which would later be converted to property. Mr Dug Pomeroy understood sweat equity to mean that the defendant would perform services and be rewarded with equity or title to the apartments on completion of the project.
29. The defendant was questioned about his intentions and asked how could he do all of this when he was an employee at Pomeroy? He responded by saying, "*I work long hours and am paid only market value*".
30. The defendant did agree that he had incorporated the company known as Pure Development and Project Management Pty Ltd but he did that for tax reasons.

31. The defendant was asked if he had given out information to clients and competitors. He admitted that he had an understanding with Mr Andrew Rice and he also said that Craig Walton from Walton Constructions knew what was going on.
32. The defendant, at his request, continued the meeting with only Mr Dug Pomeroy and Mr Pomeroy's solicitor, Simon Abraham present. During that meeting he admitted that he had communicated with Mr Niven and that he provided Mr Niven with feasibility documents and an understanding of various information in relation to the High Street site. He agreed that he leaked tender information to HACER (a construction company) in relation to a site in Burwood East because "*they were the best choice*" in a tender process.
33. He also said that the only projects that he worked on behind the company's back were 3-5 St Kilda Road, St Kilda, the High Street site project, Russell Street and a project in Waverley. He said that "*I have done things clandestinely and I put his career in jeopardy*". He stated that he had to get out of the financial position that he was in and he was over his head in debt to the Commonwealth Bank of Australia. He also agreed that he prepared a proposal for the High Street site that he verbalised to Sean Niven.
34. After the meeting, Mr Mark Pomeroy removed a DVD and a bag from the defendant's office. That DVD contains an entire copy of the file directory related to the High Street site and the development the company was working in Bay Street. In total, it contains 3,720 files. Mr Dug Pomeroy assumed that the defendant had copied the files on the High Street site project as he intended to fly to Singapore and Indonesia to discuss his interest in the project.
35. In his affidavit in opposition to interlocutory relief, the defendant has not responded to any of these allegations.

#### **The Interests of the plaintiff**

36. Mr Dug Pomeroy believes that unless the defendant is restrained, the defendant will approach the successful purchaser of the High Street site to carry out the work in

precisely the same manner as which he approached the Indonesians. In relation to the St Kilda Road proposal, he assumes that Mr Frank and his supporters had shelved the project. However, given what the defendant said to him on 12 February 2010 about the St Kilda Road site, it now seems that Mr Frank remained interested in the project during 2009 and is interested now. The company has therefore seemingly lost the opportunity to secure the deal with Mr Frank to develop 3-5 St Kilda Road. He does not know why Mr Chiodo was seeking to remove and possibly use non-public information concerning Bay Street, Port Melbourne. He has been advised by Mr Andrew Leoncelli that the Valad Group was about to lose the services of its development manager. Now that the defendant is looking for employment he may approach that group and seek a role in the Port Melbourne project. Should he commence employment with the Valad Group, this could cause potential harm to the company's interests with the joint venture arrangement. The Valad Group could choose to increase its involvement in the development of the project or sell the right to an entity with which Mr Chiodo is associated.

37. The defendant has sworn that he does not have any copies of information contained on the CDROM or any information at all belonging to the plaintiff. He will not use and does not need to use the confidential information belonging to the plaintiff in relation to any development projects. As to the planning permit information for High Street, it is publicly available and there is no particular advantage to be gained by the plaintiff compared with any other developers. As to 201-209 High Street, Prahran, the assessment in determining the potential and height of the project has already been confirmed and approved as the development has undertaken a full town planning and VCAT process in determining this planning outcome. He also states that the plaintiff is free to approach Joseph Frank and do a deal in relation to the St Kilda Road property.

## The Serious Question to be Tried

38. The onus is on the plaintiff on the balance of probabilities to demonstrate a serious question must be tried. In *Bradto v State of Victoria*,<sup>1</sup> Maxwell P and Charles JA stated<sup>2</sup>

*“Once again, we see no necessity for the recognition of a special “rule” for this – different – sub-category of interlocutory injunctions. On the contrary, we think that it must be relevant on every application for an interlocutory injunction to consider the likelihood of the plaintiff succeeding at trial. Not only is such consideration a necessary part of deciding whether there is a serious question to be tried, but the plaintiff’s prospects of success will almost always be a factor in the evaluation of the balance of convenience.”*

39. The contract of employment between the plaintiff and the defendant has been produced to the Court.<sup>3</sup> Page 4 of that agreement under the heading “Confidential Information” contains the following clause:

*“You agree at all times during the term of employment and thereafter, to hold in the strictest confidence, and not to use except for the benefit of Pomeroy Pacific Pty Ltd, or to disclose to any person, firm or corporation without written authorisation of Pomeroy Pacific Pty Ltd, the confidential information of Pomeroy Pacific Pty Ltd.”*

40. On the evidence before the Court, which has not been denied by the defendant, the defendant admitted that he had leaked tender information, worked on projects behind the company’s back, had done things clandestinely and put his career into jeopardy. The fact that he was prevented from taking out a DVD from the premises with confidential information demonstrates that he was attempting to take confidential information dishonestly from the company. The defendant has not responded to these allegations and there would appear on the present evidence there is a strong likelihood that the plaintiff will succeed at trial.

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<sup>1</sup> [2006] VSCA 89

<sup>2</sup> At para 39

<sup>3</sup> Exhibit “DP-3” to the affidavit sworn on 22 February 2010 by Mr Dug Pomeroy

41. There is a serious question to be tried as to whether he has breached his employment contract and whether he has breached a fiduciary duty to protect and not misuse information in relation to the plaintiff's business opportunities.
42. In *Co-ordinated Industries Pty Ltd v Elliott*,<sup>4</sup> Hodgson CJ in Equity considered a claim by a plaintiff for damages or an account of profits where an ex-employee was alleged to be in breach of his duty of fidelity by endeavouring to take over a job from his former employer. It was alleged that after the termination of the employment that employee had made use of trade secrets.
43. His Honour stated<sup>5</sup>:

*"In my opinion, where through working on a particular job for a particular customer, an employee has gained knowledge of that degree of particularity about the particular job, and where the employee has been paid for that work by the employer whereas the employer would not in the ordinary course receive payment from the customer unless the job is taken to a conclusion by the employer, the particular knowledge about the particular job which the employee has obtained should be treated in the same way as a trade secret; so that it is not open to the employee, upon leaving the employment to make use of that knowledge so as to perform that particular job for that particular customer, and thereby to prevent or make problematic the receipt by the employer of payment for the work which the employer had done (partly or wholly through the employee) for that particular customer on that particular job.*

44. His Honour further stated:<sup>6</sup>

*In my opinion, the chance of obtaining that contract is fairly regarded as an asset of the plaintiff as to which Mr Elliott continued to have a fiduciary obligation after termination of his employment, because he had contributed substantially to that asset and had been paid by the plaintiff for this contribution. I do not think this*

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<sup>4</sup> (1998) 43 NSWLR 282

<sup>5</sup> At p.287

<sup>6</sup> At p.288

*consideration is defeated by Mr Elliott's legitimate interest in being free to use his knowledge and skill, because the duty I am finding relates only to the particular job, and not to the customer generally or to any other use which Mr Elliott might wish to make of his knowledge or skill."*

45. The information obtained by the defendant during the course of his employment should also be regarded as a trade secret. The defendant continues to have a fiduciary obligation to the plaintiff after the termination of his contract. An obligation on the current evidence that he has breached.
46. The plaintiff submits that this is not an application for interlocutory relief where the defendant can claim that he is simply seeking to utilise know-how information. The plaintiff asked the Court to take into account two factors. First, that there was dishonesty during and at the conclusion of the employment relationship. Second, the dishonesty was concerned with an attempted springboard through the use of information in respect of maturing business opportunities. Employees have been prevented from using know-how or information if that information and the advantages that flow from it has been obtained through dishonesty.<sup>7</sup>
47. Here the plaintiff has demonstrated that the information obtained by the defendant was done so in the course of his employment and is information which is confidential. There is also a threatened misuse of that information to the detriment of the plaintiff. In those circumstances, the plaintiff has demonstrated that there is a serious question to be tried.

### **Balance of Convenience**

48. On the evidence before me, it is likely that a court would find that the defendant has engaged in serious misconduct during the term of his employment relationship. The plaintiff has submitted that it does not know what other activities the defendant has engaged in or what information he has removed. It fears that the defendant will cause

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<sup>7</sup> See *Orminoid Roofing Asphalts Pty Ltd v Bitumenoids Ltd* (1930) 31 SR NSW 347 and *Prebble v Reeves* [1910] VLR 88 at 104

harm to its business. The orders sought by the plaintiff are confined to three building projects. The plaintiff does not seek to restrain the defendant from all work in his chosen field. The conduct of the defendant is such that on the balance of convenience an injunction should be granted.

49. The plaintiff does proffer to the Court an undertaking as to damages. If the plaintiff is unsuccessful then the defendant will be able to pursue its remedy in damages. The conduct of the defendant makes it necessary for the legitimate interests of the plaintiff to be protected. Damages may be unlikely to be an adequate remedy for the plaintiff if its business is damaged through the future conduct of the defendant in breach of his fiduciary duty.

### **The Extent of the Injunction**

50. The defendant submits that if an injunction is granted in relation to the three sites, there should be no injunction regarding the St Kilda Road property because nothing is happening in relation to that property and nothing has happened for two years. I cannot accept that as, on the evidence, there have been discussions with Mr Frank and the defendant's conduct may have caused the project to fail. The evidence put before the Court leads to a conclusion that the project may recommence.
51. The defendant submits that the injunction should be only for a short period of up to 3 months. The defendant relies on *RBM Plastic Extrusions Pty Ltd v Dias*<sup>8</sup> where Brereton J stated:<sup>9</sup>

*[40] To my mind, the cases of Robb v Green and Roger Bullivant v Ellis make clear that injunctive relief is available to prevent abuse after termination of employment of a breach of fidelity committed during employment, but that the Court has to be careful to mould that relief to ensure it is not, in other respects, unduly onerous.*

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<sup>8</sup> [2006] NSWSC 1332

<sup>9</sup> At para 40

[41] Instructively, none of these cases have applied, in the context of an employee's duty of fidelity, the strict prophylactic approach that equity imposes on fiduciaries such as company directors, solicitors and trustees. This is consistent with the employee's obligation being sourced in an implied contractual term, rather than being imposed by equity.

[42] In *Roger Bullivant v Ellis*, the interlocutory injunction was expressed to extend until the final determination of the proceedings. In the Court of Appeal, though not at first instance, it was argued that that was excessive, and that the injunction should not have extended beyond a period of twelve months. That argument succeeded in the Court of Appeal. Nourse LJ said the purpose of the injunction was to prevent the defendants from taking unfair advantage of the 'springboard' which they must have built up by the employee's use of the information in the card index. His Lordship said:

'Granted, first, that such an advantage cannot last forever, secondly, that the law does not restrain law competition and, thirdly, that in restraining unlawful competition it seeks to protect the injured and not to punish the guilty, I cannot see that it is right for the term of the injunction to extend beyond the period for which the advantage may reasonably be expected to continue.'

...

[50] Consistently with what I have said about the confidential information aspect, the evidence does not much assist in identifying just how long a benefit or head start Mr Diaz's employment with RBM would have given him. In particular, the evidence does not show that the specific information which McWilliam has identified in his affidavit material — in particular 'customer lists, price lists, product descriptions, previous sales history and previous customers orders history' — would be of continuing benefit to someone in the position of Mr Diaz. Even on an interlocutory application it is still for a plaintiff to produce evidence that this information will be of ongoing benefit and for how long, and it seems to me that the evidence does not reach that level. The best I can

*do is that, drawing every inference in favour of plaintiff in this respect, assuming that Mr Diaz effectively used the whole of his service with the plaintiff to pre-position him to compete with RBM, it is not apparent that three months and a bit service with the plaintiff, could have given him more than three months and a bit head start."*

52. In *Harrison v Project & Design Co (Redcar Ltd)*,<sup>10</sup> Graham J, referring to the duration of an injunction, stated:<sup>11</sup>

*"It may be that in some cases one can fix precisely the date upon which it is clear that something which was once confidential ceased to be so. In other cases there may be no evidence which leads to a precise date. Such date must, however, in my judgment, always be a question of fact to be inferred by the court from all the circumstances of this case."*

53. I accept the period of the injunction must depend on the facts inferred from the circumstances that are before the Court. I am required to ensure that the relief is not onerous. In my view, the injunction should not be for a period of three months but should be until the date upon which the trial is to commence. The injunction relates only to three projects. The defendant will be able to continue in his chosen field but not be able to work on these projects. This is a proceeding before the Commercial Court which should be on for trial relatively quickly. There is no reason to limit the length of the injunction particularly when the seriousness of the alleged conduct is to be taken into account.

54. The defendant did not oppose the alternative remedy sought by the plaintiff. (An interlocutory injunction restraining the defendant from using any of the plaintiff's confidential information during his employment concerning the development of any building and construction project at either 201-209 High Street, Prahran, 3-5 St Kilda Road, St Kilda and 87-101 Bay Street, Port Melbourne.). In my view an injunction in those terms is not appropriate in the circumstances before me and would also be

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<sup>10</sup> [1978] FSR 81

<sup>11</sup> At p.80

difficult to enforce. Issues commonly arise regarding the definition of confidential information or the content of what constitutes confidential information.

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CERTIFICATE

I certify that this and the 15 preceding pages are a true copy of the reasons for judgment of Associate Justice Eftim of the Supreme Court of Victoria delivered on 15 April 2010.

DATED this 15th day of April 2010.

