IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S CI 2015 1743 (Termination Proceeding)

BETWEEN:

NELSON KEITH ROBERTSON MAIR — Plaintiff

- and -

RHODES & BECKETT PTY LTD (ACN 118 576 304)
(Administrators Appointed) — Defendant

S CI 2015 1745 (Oppression Proceeding)

BETWEEN:

BALNARING HOLDINGS PTY LTD (ACN 118 886 669)
as trustee for the Balnaring Trust — Plaintiff

- and -

VAN LAACK AUSTRALIA HOLDINGS PTY LTD (ACN 159 334 460) & ORS
(according to the attached Schedule of Parties) — Defendants

JUDGE:	Digby J
WHERE HELD:	Melbourne
DATES OF HEARING:	11-14, 18-22, 27-28 April, 26-27 May 2016 and 16 February 2017. Submissions filed 31 May 2016, 2 June 2016, revised final submissions and further application, 20 and 23 June 2016.
DATE OF JUDGMENT:	29 March 2018
CASE MAY BE CITED AS:	Mair v Rhodes & Beckett
MEDIUM NEUTRAL CITATION:	[2018] VSC 132

CONTRACTS – General contractual principles – Construction and interpretation of contracts – Whether ambiguity required for admission of extrinsic materials – Effect of shareholders agreement on employment agreement.

CONTRACTS – Employment agreement – Discharge and breach – Termination of employee or director at common law – Whether termination clause ousts right of termination at common law.

CONTRACTS – Employment agreement – Discharge and breach – Repudiation – Whether dismissal was wrongful – Whether wrongful dismissal is repudiation of employment agreement – Whether acceptance of repudiation is effective.

EQUITY – Fiduciary obligations – Nature of fiduciary relationship – Consistency with employment agreement – Whether prescriptive equitable duties available – Diversion of principal's resources – Whether knowledge of extraneous activities is informed consent.

EMPLOYMENT LAW – Contract of service – Long service leave entitlements – *Long Service Leave Act*

1992 (Vic), s 72.

STATUTORY OPPRESSION – Oppressive, unfairly prejudicial or unfairly discriminatory conduct towards member – Standing of minority shareholder – Manipulation of books and records – Legitimate expectation of involvement in management and operations – Divestment of assets and profit shifting – Adoption of new marketing strategies – Whether claim is defeated by 'unfairness' of the applicants' conduct – *Corporations Act 2001 (Cth)*, s 232.

STATUTORY OPPRESSION – Remedies for oppressive conduct – Order for the purchase of shares – *Corporations Act 2001 (Cth)*, s 233.

CONTRACTS – Remedies – Specific performance – Order enforcing the terms of an option – Damages.

APPEARANCES (in both proceedings):	Counsel	Solicitors
For the Plaintiff	Mr I Upjohn QC with Ms S Kelly	Patron Legal
For: Rhodes & Beckett Group Pty Ltd, van Laack Australia Holdings Pty Ltd and van Laack GMBH	Mr M Wyles QC with Mr B Holmes	Mills Oakley
For the Administrators of: Rhodes & Beckett Pty Ltd (Administrators Appointed) and Herringbone Pty Ltd (Administrators Appointed)	Mr M Galvin QC	Hall & Wilcox

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HIS HONOUR:

Overview of the Proceedings

1 This matter involves two proceedings, a termination proceeding and an oppression proceeding. Each proceeding relates to companies that own and operate shirt, suit and accessory retail and wholesale distribution businesses.

The Termination Proceeding

2 The termination proceeding is brought by Mr Nelson Mair ('Mair') against Rhodes & Beckett Pty Ltd ('R&B'). Mair was employed as the Managing Director of R&B pursuant to an Executive Services Agreement ('ESA').[1] He tendered his resignation on 19 March 2015 to take effect from 31 October 2015.[2]

3 On 27 March 2015, prior to the anticipated conclusion of his engagement, Mair's employment was suspended and terminated by R&B.[3] Mair contends this was a repudiation of the ESA which, at his election, was thereafter brought to an end. He claims a loss of wages, long service leave, and a bonus to which he is entitled from R&B.[4] In addition, Mair claims that the circumstances surrounding termination of his employment deprived him of the benefit of a 'Put Option' to which he was entitled under a Share and Unit Holders Agreement ('SUHA') with R&B.

The Counterclaim - Termination Proceeding

4 A counterclaim in the termination proceeding is brought by five parties: R&B, Herringbone Pty Ltd ('Herringbone'), Rhodes & Beckett Group Pty Ltd ('RBG'), Van Laack Australia Holding Pty Ltd ('vLAH') and van Laack GmbH ('vLG'). The defendants to the counterclaim are Mair, Luxury Retail No 1 Pty Ltd ('LR1'), Luxury Retail Group Pty Ltd ('LRG') and Balnaring Holdings Pty Ltd ('Balnaring'). The latter is the trustee of the Balnaring Trust controlled by Mair.

5 The essence of the counterclaim is that Mair breached statutory, fiduciary and contractual

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1 Termination Proceeding, Amended Statement of Claim, 3 September 2015 (TP-ASOC, 3 September 2015), [1A].
2 Ibid [6].
3 Ibid [7]–[11].
4 Ibid [13], [14A] and [15].

obligations to the plaintiffs by counterclaim with assistance from LR1, LRG and Balnaring. Further allegations of wrongdoing are levied against Mair in his role as Managing Director of R&B. Such wrongdoing is said to justify Mair's termination and entitle the plaintiffs by counterclaim to relief.

The Oppression Proceeding

6 The oppression proceeding is brought by Balnaring against vLAH, R&B and RBG. Balnaring seeks orders including under s 233 of the *Corporations Act 2001 (Cth)* ('the Act') in respect of conduct that is alleged to be oppressive, unfairly prejudicial, or unfairly discriminatory. The alleged acts of oppression include excluding Mair from management of R&B and taking steps to reduce the value of a Put Option held by Balnaring.

7 The defendants deny their conduct was oppressive. The defendants contend the financial circumstances of which Mair complains were, in fact, the result of his own wrongdoing.

Summary of Conclusions

8 The termination proceeding and the oppression proceeding have been heard and determined together. Much of the same evidence has been tendered in each proceeding.[5]

9 In summary, I have ultimately concluded and found the following.

Mair's Termination Claim

(a) The ESA contained the terms of Mair's employment as Managing Director of R&B.

Clause 5.1 of the ESA is an exhaustive code of the circumstances and way in which Mair's employment under the ESA could be terminated.

By cl 5.1 of the ESA the parties' intention was to exclude the right of summary dismissal of the Executive without notice at common law.

(b) On 19 March 2015, Mair gave his employer formal

[5] Order of Sifris J made 11 November 2015, [2].

notice of resignation under cl 5.2 of the ESA, effective at the expiration of six months.

(c) On 27 March 2015, R&B purported to suspend and then summarily terminate Mair without notice in a manner that was not compliant with, and was in substantial breach of, cl 5.1 of the ESA.

The above wrongful actions by R&B brought Mair's employment relationship to an end, but the ESA remained on foot.

(d) By its conduct on 27 March 2015 R&B repudiated the ESA.

(e) By letter dated 31 March 2015, Mair accepted R&B's repudiation and brought the ESA to an end.

(f) As a result of the above I uphold Mair's Termination case and Mair is entitled to damages for breach of the ESA.

(g) The damages for breach of contract to which Mair is entitled include:

(i) Mair's loss of salary entitlements under the ESA;

(ii) Mair's superannuation contributions;

(iii) Mair's long service leave entitlements;

(iv) the sum payable to Mair as the Herringbone Bonus; and

(v) update adjustments to the above entitlements and interest.

(h) By reason of the above findings, the allegations made by R&B in support of terminating Mair's employment on the basis of significant and substantial breach and misconduct at common law are rendered irrelevant.

(i) Further, and in any event, I am not satisfied in all the circumstances that Mair perpetrated any significant and substantial breaches or serious acts and misconduct as alleged by R&B and the counterclaimant van Laack parties in this proceeding.

(j) As a result of my findings, the counterclaims of R&B and the plaintiffs by counterclaim fail.

(k) Further, R&B and the plaintiffs by counterclaim have not established that they have suffered recoverable loss and damage. Nor have R&B and the plaintiffs by counterclaim established that they are entitled to any other form of compensation.

(l) For the above reasons I dismiss the Counterclaims of the R&B and the plaintiffs by counterclaim.

R&B's Oppression Claim

I consider that Balnaring has been oppressed by vLAH, by its conduct including through R&B, in relation to:

(a) R&B's suspension and summary dismissal of Mair without notice as Managing Director of R&B and the R&B Group;

(b) the vLAH decision and plans to divest the Australian assets held by vLAH including R&B and R&B Group without consulting or involving Balnaring and Mair;

(c) the exclusion by vLAH of Balnaring and Mair from the operation of the R&B and R&B Group and vLAH's refusal, including via R&B and R&B Group, to hold Directors' meetings of R&B and R&B Group;

(d) VLAH and vLG refusing to comply with the SUHA in relation to Balnaring and Mair's Put-Option and Dividend entitlements;

(e) the Transfer Pricing regime vLAH imposed on R&B and the R&B Group and vLAH's breaches of that regime;

(f) R&B's wrongful adjustment of books, records and accounts of the R&B Group and R&B, in which Balnaring

and Mair held minority shareholdings;

As a result of the above, I find:

(a) Balnaring is entitled to damages for breach of the SUHA;

(b) but for Balnaring's entitlement to damages for breach of the SUHA, as a result of the above, Balnaring would be entitled to orders for specific performance of the SUHA in relation to its Put-Option and Dividend entitlements;

(c) as a result of vLAH's oppression of Balnaring, Balnaring is entitled to appropriate relief pursuant to s 233 of the Act; and

(d) the damages, alternatively the appropriate relief to which Balnaring is entitled in the oppression proceeding, is most justly and appropriately the amount of an independent expert evaluation of the Minor Party Interest pursuant

to the SUHA, based on the R&B Group EBITDA for the Financial Year 2014 adjusted, including in respect of the effect of the Transfer Pricing and foreign exchange losses.

Background

The Parties

10 The parties and principal entities in the proceeding and their personal and corporate roles and interrelationships are as follows:

(a) Van Laack Australia Holding Pty Ltd ('**vLAH**') is a wholly owned subsidiary of van Laack GmbH ('**vLG**');

(b) VLG is a limited liability company formed in Germany;

(c) Mr Christoph Neizert ('**Neizert**') the Chairman of vLG;

(d) Mr Christian von Daniels ('**von Daniels**') is the Chief Executive Officer, a Managing Director, and majority shareholder of vLG and a director of vLAH;

(e) Dr Sebastian Potyka ('**Potyka**') was the Managing

Director of vLG;

(f) Rhodes & Beckett Pty Ltd ('**R&B**') and the Rhodes & Beckett Group Pty Ltd ('**RBG**') are each 80 percent owned by vLAH. Until about 27 April 2015 R&B was trustee of the Rhodes & Beckett Unit Trust ('**R&B Unit Trust**');

(g) Boston Brothers Pty Ltd ('**Boston Brothers**') and Baubridge & Kay Pty Ltd ('**Baubridge & Kay**') are wholly owned subsidiaries of RBG;

(h) Herringbone Pty Ltd ('**Herringbone**') has been a wholly owned subsidiary of vLAH at all relevant times;

(i) Each of R&B, RBG, the R&B Unit Trust, Boston Brothers and Baubridge & Kay are from time to time collectively referred to as 'the Group';

(j) The businesses known as Baubridge & Kay, Boston Brothers and R&B are from

time to time collectively referred as the 'R&B Business';

(k) The plaintiff, Mr Nelson Mair ('**Mair**'), is the sole director of Balnaring Holdings Pty Ltd ('**Balnaring**') and owns all of the shares in Balnaring;

(l) Balnaring and R&B and RBG are from time to time referred to as 'the RB Group';

(m) Balnaring presently owns 20 percent of the shares in R&B and 20 percent of the shares in RBG.

(n) From 15 November 2013 until 11 February 2015, Luxury Retail No 1 Pty Ltd ('**LR1**') was named Luxury Retail Group Pty Ltd.

(o) In the period from 12 February 2015, LR1 was named Furla Australia Pty Ltd ('**Furla**').

(p) Luxury Retail Group Pty Ltd ('**LRG**') commenced on 12 February 2015.

(q) Mair and Mr Theo Poulakis ('**Poulakis**') were the directors of LR1 and LRG (hereinafter, collectively referred to as LRG), and all of the shares in each of the LRG companies were owned by Mair and Poulakis and/or their associates.

(r) Folli Follie Australia Pty Ltd ('**Folli Follie**') was a wholly owned subsidiary of LRG.

(s) Each of Sneakerboy Retail Pty Ltd, Sneakerboy IP Pty Ltd and Sneakerboy Pty Ltd (referred to herein collectively as '**Sneakerboy**') were wholly owned subsidiaries of LRG.

The Contracts

11 In July 2012, vLAH acquired shares in R&B and RBG from Mair and Balnaring under a Share Purchase Agreement ('SPA') dated 3 July 2012. The parties to that agreement were R&B, RBG, vLAH, vLG, Balnaring and Mair and other parties listed in Schedule 2 of the SPA.[6] The SPA included two conditions precedent.

12 The first required Mair and RB to execute an employment agreement.[7] Mair was appointed Managing Director of R&B from 1 August 2012 pursuant to the ESA entered into on 1

6 TP-Defence, 17 September 2015, [1W]; CB1079.
7 OP-FAPOC, 22 June 2016, [11].

August 2012 between R&B and Mair.[8]

13 Under cl 3.3 of the ESA, Mair may hold 'up to two non-executive board positions that do not directly compete with the group'.

14 Clause 5.1 of the ESA provides, in part, as follows:

> The Company may at its sole discretion immediately terminate the Executive's employment by written notice to the Executive if the Executive at any time:
>
> 5.1.1 commits a significant and substantial breach of any of his obligations to the Company;
>
> 5.1.2 is intentionally or wilfully negligent in the discharge of his duties including observance of the rules and procedures of the Company as published and notified to him from time to time (for the avoidance of doubt, it is agreed that policies and procedures do not enure for the benefit of the Executive or create enforceable rights in the Executive's favour); or
>
> 5.1.3 is bankrupt or commits an act of bankruptcy; or
>
> 5.1.4 is convicted of a criminal offence which in the reasonable opinion of the Board will detrimentally affect the Company.

15 The second condition precedent required vLAH, Mair and Balnaring to execute a shareholders agreement.[9] This was also accomplished on 1 August 2012.[10] The SUHA, entered into on 1 August 2012 between Mair, Balnaring and vLAH and vLG, governed the relationship between four entities (vLAH, vLG, Mair and Balnaring)[11] in the conduct of the boards of R&B and RBG.[12]

16 The SUHA contains a provision for a Put Option that allows Balnaring to require vLAH to purchase its shares in R&B and RBG. The Put Option is 'triggered' by specified events which include where Mair's 'employment as Managing Director is terminated in accordance with the NM Employment Contract…'[13] The purchase price is calculated by reference to the Group earnings before interests, taxes depreciation and amortisation ('EBITDA').[14] 'Group' is defined in the SUHA as R&B, RBG, the R&B Trust, Boston Brothers and Baubridge &

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8 Ibid [12].
9 Ibid [11].
10 Ibid [13].
11 Ibid [13].
12 Ibid [14].
13 SUHA 12(6).
14 Ibid Schedule (1).

Kay both individually and collectively.[15]

Herringbone Bonus

17 Under the ESA, Mair submits that his terms of employment included a base salary and an annual incentive payment subject to satisfaction of certain performance targets.[16] Mair claims that he was directed to perform the duties of Managing Director of Herringbone after the previous Managing Director for whom Mair was providing 'oversight' resigned.[17] He submits his contract of employment was varied in August 2013 by oral agreement which was then reduced to writing.[18] If accepted, this amendment would entitle Mair to twenty percent of the profits of Herringbone during each year of his employment ('the Herringbone bonus').[19]

18 The existence of such an amendment is denied by the defendants.[20] As noted earlier, Mair did not previously have a direct financial stake in the Herringbone business.

Proposed Divestment

19 From early 2015, Mair and Balnaring allege that vLAH planned to divest its Australian assets (including RBG).[21] In support, Mair and Balnaring claim vLAH sent senior representatives to Australia to inspect and audit the books and operations;[22] and met with KPMG, Rothschild & Co., and Hong Kong Bank for the purpose of arranging a sale of RBG and its assets.[23]

20 In response, vLAH claims that no firm decision had been made to divest Australian assets. Potyka and von Daniels met Mair in Germany in February 2015 to discuss various options for the future of the business. Only one such option was divestment.[24] Moreover, vLAH alleges that the meetings did not rely on the results of any internal audit of RBG;[25] and the discussions with merger firms did not require a Board Resolution from the R&B Group and

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15 Ibid 1.1('group').
16 TP-ASOC, 3 September 2015, [2].
17 Termination Proceeding - Reply and Defence to Counterclaim, 10 August 2015, (TP-Reply & Defence to CC, 10 August 2015), [2G].
18 TP-ASOC, 3 September 2015, [3].
19 Ibid [3].
20 TP-Defence, 17 September 2015, [2I].
21 OP-FAPOC, 22 June 2016, [19].
22 Ibid [20].
23 Ibid [20].
24 Oppression Proceeding, Amended Points of Defence, 1 April 2016 (OP-APOD, 1 April 2016), [20].
25 Ibid [20(i)].

were held with Mair's knowledge and agreement.[26]

Resignation

21 On 19 March 2015, Mair gave six months' notice of his resignation from his position as Managing Director of RBG. His resignation would be effective from 31 October 2015.[27]

22 On 23 March 2015, Mair alleges that von Daniels and Neizert (Chairman of vLG) proposed his shares in R&B and RBG be transferred to vLAH for nominal consideration ($1).[28] That is denied by vLAH, R&B and RBG. vLAH claims that this meeting was conducted on 25 March 2015 at which Neizert, Mair and von Daniels discussed the possibility of Mair exchanging his shareholding in R&B for a shareholding in vLAH.[29] In response to this proposal, Mair directed von Daniels and Neizert to the Put Option provision in the SUHA.[30] The price to be paid under this option was twenty percent of five times the EBITDA of RBG.[31]

Diversion of Resources and Dismissal

23 From 2015, vLAH and vLG believed that Mair was diverting financial, personnel and logistical resources from R&B to the LR1 and LRG businesses. They allege that Mair was, in substance, the Managing Director of LR1 (from November 2013) and LRG (after February 2015),[32] which were direct competitors. To work for those businesses was regarded as a violation of Mair's principal obligations to the R&B Business.

24 The shares in LR1 and LRG were owned by Mair, Poulakis and their associates.[33] While admitting that he directed resources to LR1 and LRG, Mair denies that he was in breach of obligations owed to the R&B Business under the ESA or otherwise.[34] On Mair's submission, he was a non-executive director of LR1 and LRG,[35] the businesses are not direct competitors of the R&B Business,[36] and he was entitled to hold the positions under the ESA. He notes

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26 Ibid [21].
27 OP-FAPOC, 22 June 2016, [23].
28 Ibid [24].
29 OP-APOD, 1 April 2016, [24].
30 OP-FAPOC, 22 June 2016, [24].
31 Ibid [12].
32 TP-Defence, 17 September 2015, [2P].
33 Ibid [1Q].
34 Plaintiff's Opening Submissions, 6 April 2016, [16].
35 TP-Reply & Defence to CC, 10 August 2015, [2P], [9D].
36 Plaintiff's Opening Submissions, 6 April 2016, [12].

that Poulakis was also a director of the companies.[37]

25 On 27 March 2015, at around 11:30am, Mair was suspended from his employment by R&B. The terms of the R&B letter of suspension and dated 27 March 2015 are set out in full below.[38]

26 Mair alleges that he was detained by R&B at his office until around 6.00pm. Staff were forbidden to speak to him during this time while solicitors, directors and consultants of R&B 'interrogated' staff about Mair's conduct.[39]

27 On 27 March 2015 at around 7:30pm, by hand delivered letter from R&B, Mair was dismissed from his employment.[40] That dismissal was without notice and of immediate effect.[41]

28 The termination of employment letter to Mair did not refer expressly to cl 5.1 of the ESA. That provision governs the circumstances in which the ESA can be terminated without prior notice.

29 On 31 March 2015 Mair communicated his acceptance of R&B's repudiatory conduct to R&B by email letter to the solicitors for R&B.[42]

Put Option

30 The termination of the ESA was a 'triggering' event which activated Balnaring's Put Option.[43] Balnaring submits the option was exercised on 17 April 2015.[44]

31 On 1 May 2015, Balnaring requested that vLAH convene a Director's meeting in order to give effect to the Put Option.[45] In a further letter dated 11 May 2015, Balnaring requested that vLAH convene a Directors' meeting in order to review the performance of RBG in the preceding financial year and to prepare a business plan for the new Managing Director of

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37 TP-Defence, 17 September 2015, [1Q].
38 MS4355.
39 TP-ASOC, 3 September 2015, [7].
40 OP-FAPOC, 22 June 2016, [26].
41 MS4356.
42 MS4374-4376.
43 OP-FAPOC, 22 June 2016, [29].
44 Ibid [30].
45 Ibid [31].

RBG.[46] Balnaring asserts that the vLAH controlled companies of the R&B Group did not respond to these requests for Directors' meetings. The final correspondence from vLAH's solicitors refers to the Put Option in the SUHA being 'on hold' and the proposed arrangement for the inspection of books being 'unsuitable'.[47]

32 VLAH disputes that Balnaring was entitled to exercise the Put Option in the circumstances.

Accounting Adjustments

33 Up to mid-June 2015, Mair claims that the R&B entities made a number of retrospective accounting adjustments to lower the value of the R&B Business. The cumulative effect of the adjustments was to reduce the EBITDA for FY2015 (ending in March) to a negative sum. In particular, it is suggested that the reduction of the EBITDA to a negative sum was engineered to reduce the value of the Put Option held by Balnaring to nil.

The Parties' Submissions – Termination Proceeding

Mair's Primary Claim

34 In the termination proceeding, Mair's submits the dismissal detailed above and the corresponding severance of the employment relationship was a repudiation of the ESA.[48] He claims to have accepted that repudiation by his lawyers communication of 31 March 2015 thereby bringing the ESA to an end.[49] Absent the wrongful termination, Mair contends his employment would have remained on foot until 31 October 2015.

35 Mair submits that the ESA exhaustively covered the circumstances in which the Managing Director could be dismissed without notice. The ESA allowed Mair to terminate his employment by giving six months' written notice.[50] It follows, on Mair's submission, that R&B was required to give the same notice if it wished to terminate Mair's employment without cause, though a payment could be made in lieu of notice.[51] Mair also alleges that because the contract operated as a code its terms exclude any common law right to summary

46 Ibid [32].
47 MS4579.
48 OP-FAPOC, 22 June 2016, [27].
49 Ibid [28].
50 TP-ASOC, 3 September 2015, [4].
51 Ibid [5].

dismissal which R&B may have otherwise had.[52]

36 In contrast, the defendants submit the suspension of Mair was a 'reasonable direction' with which Mair was required to comply under cl 3.1.3 of the ESA.[53]

37 Moreover, the defendants that Mair could be dismissed summarily at common law in the following circumstances:

(a) there is a radical breach of the employee/employer relationship inconsistent with its continuance;

(b) the conduct of the dismissed employee is such that the employer is entitled to conclude that the employee no longer intends to be bound by the contract of employment;

(c) the conduct of the employee in respect of important matters is incompatible with the fulfilment of the employee's duty, or involves an opposition or conflict between the employee's interest and the employee's duty to the employer, or is destructive of the necessary

52 Plaintiff's Closing Submissions, 17 May 2016, [16].
53 OP-APOD, 1 April 2016, [25].

confidence between employer and employee, there being an actual repugnance between the employee's acts and the employment relationship;

(d) the employee's conduct is of a serious but not exceptional nature, but nevertheless repugnant to the relationship of employer-employee;

(e) the conduct of the employee is of a type inconsistent with his or her employment in such a grave way that it is properly to be regarded as incompatible with proper performance of the contract of employment;

(f) there is wilful disobedience of the lawful and reasonable direction of an employer;

(g) the employee is habitually neglectful in respect of the duties for which that employee was engaged;

(h) the employee acts in a manner which is incompatible with the due or faithful

discharge of the employee's duty to the employer;

(i) the employee does not render faithful and loyal service.

38 Mair also claims that he is also entitled to the payment of long service leave and the Herringbone bonus for the financial years ending 30 April 2014 and 2015, which has not been paid by R&B.[54] Against this, R&B claims to have paid (on or around 13 July 2015) an amount of $15,780.74 in respect of annual leave entitlements and $23,675.93 in respect of superannuation entitlements.[55] It denies Mair's entitlement to any further Herringbone bonus.[56]

39 In summary, in the plaintiff's calculations of loss and damage in the termination proceeding (24 June 2016) Mair claims -

1. Loss of salary and entitlements in the sum of $352,241:

   (a) $163,644 in base salary (calculated as 0.5973 years[57] x $273, 972 base salary per year[58]).

   (b) $15,546 in superannuation contributions (9.5 percent[59] x $163,644[60]).

   (c) $2,590 in long service leave (1/60th[61] x 0.5973[62] x $273,972[63]).

2. Long service leave

   (a) $45 577 being $300 000 annual salary[64] / 52 weeks per year * 7.9

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54 TP-ASOC, 3 September 2015, [14A]–[15B].

55 TP-Defence, 17 September 2015, [13A].

56 Ibid [15].

57 Mair resigned his employment effective 31 October 2015 (MS4276). But for the dismissal Mair's employment would have ended on that date. His employment in fact ended on 27 March 2016 (MS4356). Mair's employment therefore ended 218 days (27 March 2015 – 31 October 2015) early. 218 days is 59.73 percent of 365 days per year (218/365*100). Mair is entitled to 59.73 percent (or 218 days) of his annual salary, representing the 218 days between the date of his wrongful dismissal and the date on which his employment would have come to an end by reason of his resignation.

58 By cl 4 of the Contract (MS1904) Mair's base salary was $300 000, inclusive of superannuation (see cl 4.6: MS1905). The base salary figure has been calculated by deducting 9.5 percent superannuation from the total salary amount, resulting in a base salary figure of $273,972.

59 *Superannuation Guarantee (Administration) Act 1992 (Cth)*, s 19(2).

60 This is the salary Mair would have earned between the date of dismissal and the date on which his employment would have come to an end by reason of his retirement as set out in point 1(a).

61 Section 58 of the *Long Service Leave Act 1992 (Vic)* provides that where an employee's employment stops after 7 years but before 10 years, the employee is entitled to an amount of long service leave equal to 1/60th of the period of his or her continuous employment.

62 This is the period of additional continuous service, expressed as a percentage of one year, that Mair would have served had his employment not ended early by reason of the wrongful dismissal.

63 This is Mair's annual salary exclusive of superannuation.

64 By cl 4 of the Contract (MS1904) Mair's base salary was $300 000, inclusive of superannuation (see cl 4.6:

weeks:[65]

3. Herringbone Bonus 2014 + 2015

   (a) The terms of the Herringbone Bonus are set out in vLAH's letter, 19 August 2013 at [3] at MS2269 (point 3).

   (b) For 2014 Mair is entitled to $113 739.80 calculated as 20 percent of actual net Herringbone profit for 2014 of $568,699.[66]

   (c) For 2015 Mair is entitled to $125 564.60 calculated as 20 percent of projected net Herringbone profit for 2015 of $627,823.[67]

Additional Breach of Contract Claim

40 Balnaring's claim also includes a breach of contract claim said by Balnaring to arise under cl 14 of the SUHA. Balnaring alleges that the contract requires van Laack to pay the purchase price for the transfer of the minority parties' interests.[68] I interpolate that this is, in effect, the contract which arises upon the exercise and execution of the Put Option.

41 The defendants deny that Mair's termination gave rise to repudiation of the ESA,[69] or that it was a 'triggering event' under the SUHA such as to enliven Balnaring's Put Option.[70] The defendants allege that Balnaring and Mair were not entitled to exercise the Put Option[71] referred to in the SUHA, and deny that in the events which occurred the 'transfer contract' which Balnaring asserts arose under the SUHA.[72]

The Counterclaim

42 The counterclaim revolves around the allegation that Mair was using his position with R&B to operate businesses through LR1 and LRG (including 'Furla', 'Folli Follie' and 'Sneakerboy') which were in competition with the R&B business.

MS1905). Mair's service was continuous from 2006 (see 2006 Contract at MS1161-1168 and 2009 Contract at MS1170-1177, particularly cl 4.1 (MS1904).

65 Mair's Witness Statement, [301]-[302].

66 MS153, MS5211; MS2743-2767; refer Plaintiff's Reply to the Amended Defence and Defence to Counterclaim, page 9; refer Defendant's Closing Submissions, [5] and Plaintiff's Closing Submissions, pages 2-4.

67 MS153, MS5211; refer Plaintiff's Reply to the Amended Defence and Defence to Counterclaim, page 9; refer Defendant's Closing Submissions, [5] and Plaintiff's Closing Submissions, pages 2-4; Plaintiff's Calculation of Loss and Damage – Termination Proceedings (Email: 23 June 2016).

68 OP-FAPOC, 22 June 2016, [56A]–[56C].

69 OP-APOD, 1 April 2016, [27].

70 Ibid [29].

71 Ibid [56A]–[56C].

72 Ibid [56A] and [56B].

43 The plaintiffs by counterclaim are R&B, RBG, the R&B Unit Trust, Boston Brothers Pty Ltd and Baubridge & Kay Pty Ltd.[73] The latter two entities, Boston Brothers and Baubridge & Kay, are wholly owned subsidiaries of RBG.[74] The plaintiffs by counterclaim also allege that these obligations were owed also to vLAH and Herringbone.[75]

44 The plaintiffs by counterclaim allege that Mair owed the following fiduciary duties:[76]

(a) to act in the best interests of the Group, vLAH, vLG and Herringbone;

(b) not to act in his (Mair's) own interests or for the advantage of LR1 or LRG at the expense of the Group, Herringbone, vLAH and vLG;

(c) not to misuse the confidential information of the Group and vLAH;

(d) not to cause detriment to the Group, vLAH, vLG or Herringbone;

(e) not to exercise his managerial powers for improper purposes;

(f) to exercise his powers and discharge his duties in good faith and in the best interests of the Group, Herringbone, vLAH and vLG;

(g) not to place himself in a position of conflict between his interests (and those of LR1 or LRG) on the one hand, and those of the Group, Herringbone, vLAH and vLG on the other;

(h) not to make any benefit or gain for himself, LR1 or LRG by reason of his fiduciary position.

45 The plaintiffs by counterclaim also submit that Mair has breached the SUHA and the ESA.[77] Those agreements imposed obligations on Mair to faithfully and diligently perform his duties, to use best endeavours to promote the interests of the business, and not disclose confidential information. Mair was prohibited from doing anything which would, or might, adversely

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73 TP-Defence, 17 September 2015, [2C], [2J].
74 Ibid [1H].
75 Ibid [2J]; Mair's amended his claims in Statement of Claim [MSCB8-9] deleting claims in [13(c)], [13(e)] and all [13A] and [14].
76 Ibid [2O].
77 Ibid [2F] and (iv).

affect the business and from being involved with business competitors.[78]

46 In substance, the nine separate allegations are made by the plaintiffs by counterclaim are as follows:[79]

(a) Mair made available to the LR1 and LRG the financial, personnel, physical and know-how resources of the Group, vLAH and Herringbone. This is alleged to have been done without the approval of the boards of R&B, Herringbone or vLAH, and not on an arms-length basis.

The particulars provided in this respect are extensive.[80] In summary, it is alleged that Mair directed certain employees of the Group to undertake tasks for the benefit of the LR1/LRG business. This included provision of IT support, human resources management (for example, using R&B employment contract templates and arranging recruitment through R&B staff), arranging accounting and banking facilities, undertaking tasks directly related to the LR1 and LRG business (such as paying LR1 invoices and co-ordinating stocktakes) and marketing for LR1. It is also alleged that R&B funds were used to make payments for the LR1 business, and that Mair caused R&B to sponsor an employee on a sub-class 457 visa, when in fact that employee worked for LRG. Furthermore, Mair is alleged to have used credit facilities provided to R&B to obtain bank guarantees in favour of the landlords of Furla and LRG premises.

(b) Mair established and conducted the LR1 and LRG businesses without first obtaining the informed consent of the Group, Herringbone, vLAH and vLG.

(c) Mair used confidential information of vLAH, the Group and Herringbone for the purposes of the LR1 and LRG businesses.

(d) The SUHA allowed for a loan of $600,000 to be made to Mair by the Group. This was to be done by drawing down $50,000 on certain specified dates.[81] The plaintiffs

78 Ibid [2F(i)].
79 Ibid [9A].
80 Ibid Sch 1.
81 Ibid [2C(g)].

by counterclaim allege that amounts in excess of $50,000 were drawn down by Mair on dates other than those authorised by the SUHA. This is said to have been done for the purposes of making those funds available to LR1.

(e) Mair failed to calculate and apply interest to these amounts.

(f) Mair paid himself loan amounts by allocating non-business related expenditure in lieu of cash draw-downs derived from the profit of R&B. While the SUHA allowed for certain personal loans to be made to Mair, these amounts were not in accordance with that agreement.

(g) Mair purported to pay down the loan allegedly made to him by the Group by causing Boston Brothers, Baubridge & Kay, RBG and vLAH to pay him a dividend on 31 March 2014. The plaintiffs by counterclaim allege that the dividend was paid in the absence of any resolution (as required by the companies' constitutions), and in the knowledge that payment of the dividend would require further borrowing by the Group.

(h) Mair directed that the books and accounts of the Group, Herringbone and vLAH be manipulated. This is said to have been done in order to reduce the disparity between the forecast and actual performance of these entities, leading to an inability to prepare true and fair financial statements.

The particulars of the alleged manipulation claim that Mair directed Mr Jay Hewamanna, the Financial Controller of R&B,[82] to change certain line items in the books (whether in value, timing, or designation) by way of four specified emails between October 2012 and March 2015.[83]

(i) Mair failed to ensure that the Group complied with all relevant superannuation and tax legislation. Specifically, Mair failed to ensure that the Group, vLAH and Herringbone paid $463,352 in superannuation contributions, leading to a penalty and interest charges of $249,528. Mair also failed to ensure that a tax liability (of the

82 Ibid Sch 1 at [A].
83 Ibid Sch 2.

Group and Herringbone) in the sum of $2,995,018 was paid. This led to a 24-month payment plan being entered into with the Australian Taxation Office and penalties and interest charges of $239,430.69.

47 Further, the plaintiffs by counterclaim allege that LR1 and LRG knew that Mair was breaching his fiduciary obligations by acting in these ways.[84] They allege that Mair was the directing mind and will of LR1 and LRG.[85] LR1 and LRG are also said to have taken the benefit of Mair's breach of his fiduciary obligations.[86] Similarly, the knowledge of Mair is said to be that of Balnaring.[87]

48 The plaintiffs by counterclaim also allege that Mair told Potyka and von Daniels that his position with LR1 and LRG was of a non-executive nature.[88] They allege that this was not in the best interests of vLG and was done for the purposes of seeking to gain benefit for himself (Mair) and LR1.[89] The plaintiffs by counterclaim allege that if Mair had truthfully told them that he was the directing mind and will of LR1 and LRG, then vLG would have taken steps to ensure that the financial, personnel and physical resources of vLAH, the Group and Herringbone were not available to LR1 and LRG, other than on an arms-length basis.[90]

49 The plaintiffs by counterclaim allege that Mair's conduct constituted a repudiation of the employment agreement.[91] This is a repudiation which they allege was accepted by the termination of Mair's employment on 27 March 2015.[92]

50 The loss said to have been caused by Mair's conduct includes penalty and interest liabilities to the Australian Taxation Office, the cost of consultants to attend to and rectify the tax issues and underpayment of wages, the expenses and payments improperly authorised by Mair, the cost of Mair's salary (and those of R&B staff) while undertaking work for LRG, wrongly paid dividends and the unauthorised loans to Mair (with interest).[93]

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84 Ibid [9B].
85 Ibid [2R].
86 Ibid [9C]; Amended Counterclaim, 17 September 2015, [3].
87 Ibid [9F].
88 Ibid [9D].
89 Ibid [9E].
90 Ibid [9F].
91 Ibid [10C].
92 Ibid [10D].
93 Ibid Sch 4.

51 The plaintiffs by counterclaim also allege that the actions of Mair and Balnaring have caused a diminution in the value of the business.[94]

52 The relief claimed in the counterclaim is equitable compensation, an account of profits from both LR1 and LRG, a declaration that R&B was entitled to terminate Mair's employment and did so validly, damages for breach of contract, interests and costs.

Mair's Response to the Counterclaim

53 Mair alleges that at no time did Balnaring, Sneakerboy, Folli, LR1 or LRG conduct a business which was the same or substantially similar to that of R&B, or compete with R&B (or any part of it).[95]

54 Mair alleges that the following parts of the SUHA are void and of no effect because they are either an unreasonable restraint of trade and/or uncertain:[96]

(a) the prohibition on direct or indirect involvement with a business which competes (or could compete) with that carried on by the Group;[97]

(b) the prohibition on encouraging or attempting to induce any person to terminate his or her employment with the Group;[98]

(c) the prohibition on interfering with the relationship between the Group and any supplier or employee of the Group;[99]

(d) the prohibition on knowingly doing anything which would, or might, adversely affect the business of the Group;[100]

(e) the obligation that Mair and Balnaring keep all Group information confidential except that which becomes known or generally available to the public (unless it becomes known through a breach of an obligation of confidence);[101] and

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94 TP-Amended Counterclaim, 17 September 2015, [5].
95 TP-Reply & Defence to CC, 10 August 2015, [1L], [1N], [1P], [1R], [1T].
96 Ibid [2C(i)], [2C(k)], [2C(l)], [2F(d)], [2F(j)].
97 Ibid [2C(i)].
98 Ibid [2C(i)].
99 Ibid [2C(i)].
100 Ibid [2C(i)].

(f) the extension of this obligation of confidentiality to all financial, operational and technical information, trade secrets, ideas, concepts, know-how, processes and knowledge relating to R&B, RBG, vLAH, Boston Brothers, Baubridge & Kay and the R&B unit trust.[102]

55 Mair similarly alleges that any such obligations arose under the employment agreement.[103]

56 Subject to some exceptions, Mair also denies that he owed the fiduciary duties alleged. He acknowledges that he owed duties in his capacity as director of R&B, RBG, Boston Brothers, Baubridge & Kay and vLAH.[104] He denies that vLG was in a position of vulnerability such as to give rise to fiduciary duties, because it had the capacity to conduct oversight of Mair's activities at all times.[105]

57 The duties which Mair admits are limited to an obligation not to be in a position of conflict between the principal and his personal interest, and not to obtain any unauthorised benefit from his fiduciary position.[106]

58 In any event, Mair alleges that he was entitled to spend time on other projects from July 2012. He alleges that an agreement was reached with R&B at that time, which provided that 'he [Mair] would be at liberty to devote time and attention to other businesses (including but not limited to Herringbone) and to accept remuneration in relation to those outside pursuits'.[107]

59 According to Mair, he sought and received approval from Potyka in relation to taking up a position as non-executive director with Sneakerboy, and from von Daniels in relation to a position as director and shareholder of LR1 (then named LRG).[108] Mair also pleads a number of instances indicating that von Daniels and Potyka were aware of the LR1 and LRG businesses, including visiting Furla premises.[109]

60 Mair acknowledges that there was some sharing of resources between the Group businesses

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101 Ibid [2C(k)].
102 Ibid [2C(l)].
103 Ibid [2F(d)], [2F(j)].
104 Ibid [2J].
105 Ibid [2M].
106 Ibid [2O].
107 Ibid [2II].
108 Ibid [9AA].
109 Ibid [9AA].

and LR1/LRG, but submits this operated to the benefit of both parties and was impliedly or expressly authorised by R&B, RBG, vLAH and vLG.[110]

61 In relation to his employment, Mair denies that there were grounds for his termination. In any event, Mair alleges that R&B had knowledge of his alleged 'misconduct'. Retention of his service in such circumstances was an election and an attendant abandonment of any right of summary dismissal.[111]

The Parties' Submissions - Oppression Proceeding

62 Balnaring claims that it was oppressed by the conduct of vLAH. It puts this contention on seven separate grounds:

(a) Balnaring claims that it ought to have been, but was not, consulted about the proposed divestment by vLAH.[112] Further, it was not provided with information necessary to protect its own commercial interests and its interests were wholly subjugated to those of vLAH.[113]

As noted above, the defendants allege that they made no divestment decision and deny that the meetings involved in the strategic review were held without Mair's knowledge and agreement.[114]

(b) Balnaring claims that Mair was improperly suspended from his employment.

110 Ibid [9AA].
111 TP-Reply & Defence to CC, 10 August 2015, [10AA].
112 OP-FAPOC, 22 June 2016, [33].
113 Ibid [33].
114 OP-APOD, 1 April 2016, [19]–[21], [33].

> Balnaring alleges that the ESA contained no power to suspend Mair.[115] Balnaring also observes that this wrongful suspension was aggravated by the circumstances in which it occurred. It observes, in this respect, that security guards and legal representatives of vLAH, R&B and RBG were present when Mair was suspended. It also observes that employees of the R&B Group were told not to communicate with Mair, and that Mair was given no reasons for his suspension.[116]

Moreover, Balnaring submits that there was no power to dismiss Mair, summarily or otherwise.[117] While RBG alleges that Mair engaged in misconduct, Balnaring denies as much and says Mair was not given an opportunity to answer the allegations put against him.[118]

Balnaring submits that this conduct was oppressive because it deprived RBG of Mair's skill and expertise, resulted in significant financial outlays on an investigation into Mair's conduct, affected staff morale and led to the termination of other senior employees, and caused or contributed to a reduction in the profitability and value of RBG.[119]

The defendants submit that Mair's suspension was a lawful and reasonable direction given to him

115 OP-FAPOC, 22 June 2016, [34].
116 Ibid [35].
117 Ibid [36].
118 Ibid [36].
119 Ibid [37].

under the employment contract.[120] The reasons for the suspension and the allegations against Mair were provided to him in writing, by way of letter delivered on 27 March 2015.[121]

The defendants also allege that this conduct does not amount to oppression.[122] For reasons which are discussed more fully below in relation to the termination proceeding, the defendants allege that RBG was not deprived of Mair's skill and expertise by reason of the termination, because Mair was, in fact, diverting his skill and expertise (along with resources) to work for LR1 and LRG, rather than directing these to RBG.[123] The defendants also allege that staff morale improved after Mair's termination and that senior employees who are no longer employed by RBG are employed with LRG.[124]

The defendants allege that the conduct of Mair was the cause, or at least a contributing factor, to the reduction in the profitability of the business.[125]

(c) Mair was excluded from an active role in the management of RBG as the nominee for Balnaring.[126] RBG has also directed Mair to resign from all directorships within the R&B Group and to return all company documents and electronic records, which Balnaring alleges is contrary to the SUHA.[127]

RBG also failed to hold directors' meetings for the purpose of valuing the price payable under the Put Option, and failed to inform Balnaring of when and where any such meetings would be held.[128]

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120 OP-APOD, 1 April 2016, [34]–[35].
121 Ibid [35].
122 Ibid [37].
123 Ibid [37].
124 Ibid [37].
125 Ibid [38].
126 OP-FAPOC, 22 June 2016, [39].
127 Ibid [40].

Balnaring submits that this conduct was oppressive because it rendered nugatory those rights which it enjoyed under the SUHA and the general law prevented it from exercising those rights.

The defendants allege that they were entitled to terminate Mair's directorships.[129] They also allege that the SUHA does not require a valuer to be appointed in order for the Put Option to be exercised, and that what Mair is really seeking is a higher price than that provided for by the SUHA, making this claim an abuse of process.[130] In any event, the defendants allege that even if proved, this conduct does not amount to oppression.[131]

(d) Balnaring alleges that vLAH, R&B and/or RBG have engaged in marketing strategies 'inimical to the brand and market reputation of the R[&]B Group'.[132] This included a number of particularised sales with heavy discounts on goods, as well as a failure to release a collection of clothing for the new season in line with market expectations and releases in previous seasons.

Balnaring alleges that this reduces the value of the R&B Group. This is said to be oppressive to Balnaring because it reduces, in turn, the value of its Put Option.[133]

The defendants allege that these sales were ordinary sales to clear old stock and to pay suppliers, landlords and employees.[134] This was necessitated by the misconduct alleged against Mair.[135] They

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128 Ibid [39].
129 OP-APOD, 1 April 2016, [39(a)], [40].
130 Ibid [39(b)–(c)], [60].
131 Ibid [40], [41].
132 OP-FAPOC, 22 June 2016, [42].
133 Ibid [43].

also allege that new season lines were not held back. Rather, Mair's misconduct had caused suppliers to delay or cancel orders and new supply agreements had to be struck in many instances.[136]

(e) Balnaring alleges that RBG failed to refer the valuation of the Put Option to an expert within 14 days of its exercise, as required by the SUHA. The shares have not otherwise been purchased, and nor has a dividend for the 2015 financial year been paid to Balnaring, to which it alleges it is entitled.[137]

Balnaring alleges that this is oppressive because it has been unable to take part in the affairs of the company, has been unable to divest itself of its interest in RBG while the value of its holding has been reduced, has been deprived of the value of the SUHA and capital to which it is entitled, and of the use of moneys to which it is entitled.[138]

The defendants allege that Balnaring had no right to exercise the Put Option.[139] Balnaring has been excluded because of the misconduct of Mair, which has also led to an inability to pay the dividend (which is subject to a determination of the board that it can be paid without increased borrowing).[140]

(f) Balnaring alleges that the R&B Group entered into a 'Transfer Pricing Arrangement' in or around

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134 OP-APOD, 1 April 2016, [42].
135 Ibid [42(c)].
136 Ibid [42(h)].
137 OP-FAPOC, 22 June 2016, [44]–[46].
138 Ibid [45], [47].
139 OP-APOD, 1 April 2016, [44(a)].
140 Ibid [45], [46].

2013. Balnaring claims that this arrangement involved the R&B Group paying a surcharge of €2 to van Laack Singapore Pte Ltd ('vLS') for each item manufactured in Vietnam and purchased for sale by RBG. The RBG paid similar surcharges of 20 percent to vLS for each item manufactured from European fabric and 40 percent for those manufactured from Chinese fabric. Balnaring claims that it issued an invoice to vLS for a share of the surcharges (proportionate to Balnaring's shareholding in RBG) for the 2013 and 2014 financial years.[141]

Balnaring alleges that the transfer pricing arrangement continues and is oppressive for two reasons. First, the arrangement artificially reduces the value of the Put Option by reducing the earnings of RBG. Secondly, Balnaring (or its nominee) has been unable to recover the surcharges for the 2015 or 2016 financial years.[142]

The defendants allege that they entered into an agreement with vLS for the supply of products to RBG which took effect on 1 July 2012, and that vLG agreed to pay Balnaring 20 percent of the amounts paid to vLS for financial year 2013.[143] It otherwise denies the allegations and submits that

141 OP-FAPOC, 22 June 2016, [48].
142 Ibid [50].
143 OP-APOD, 1 April 2016, [48].

such conduct could not amount to oppression.[144]

(g) Balnaring claims that the books and records of the R&B Group have been manipulated in a way which is oppressive to Balnaring. Balnaring alleges that a new auditor was appointed by RBG in or around April 2015, without consulting Mair or Balnaring.[145] The books for RBG were prepared by the new auditor in ways different from the 2013 and 2014 financial years. This included a failure to include transfer pricing write backs for Balnaring as described above, and the introduction of line items provisioning for inventory, doubtful debts and unearned lease incentives.[146] Balnaring's claim also particularises a large number of individual errors in the books which, it alleges, resulted from a failure by RBG to make proper

144 Ibid [50].
145 OP-FAPOC, 22 June 2016, [51].
146 Ibid [52].

enquiries.[147]

Balnaring claims that these errors resulted in reduction in the gross profit of RBG, a substantial increase in RBG's expenses and the creation (for the first time in its history) of a negative EBITDA (i.e. earnings before interest, tax, depreciation and amortisation) for RBG.[148] Balnaring alleges that this was conduct which was 'engaged in for the purpose of reducing the EBITDA … and by that means … substantially reducing or destroying the value of the [put] Option'.[149]

In response, the defendants allege that no resolution was required for the appointment of a new auditor, and that any difference in preparation of financial statements arose from the fact that Mair (in breach of his obligations) failed to keep the books of RBG, Herringbone and vLAH in accordance with s 286 of the Act.[150] In any event, the defendants allege that the statements were prepared in accordance with the Australian Accounting Standards and s 286 of the Act.[151] The 2015 statements were also audited in accordance with Australian Accounting Standards and the Act.[152]

The defendants allege that any reduction in the EBITDA was caused by Mair's misconduct.[153] The defendants also allege that Mair's failure or refusal to cause correct entries to be made in the R&B Group's books for the 2015 financial year constituted aiding, abetting, counselling, procuring or inducing a breach of s 286 of the Act by RBG and vLAH, or that Mair was knowingly concerned in or party to such a breach.[154]

Moreover, the defendants allege that the auditing process necessarily means that the financial statements gave a fair and accurate view of the financial position, and that this cannot be oppressive.[155] The defendants dispute the EBITDA figure given by Mair for the 2014 financial year, and allege that the 2015 EBITDA figure is a result of Mair's own misconduct.[156]

63 More generally, the defendants assert that the allegations in relation to Mair can have no

147 Ibid [53], [53A].
148 Ibid [54].
149 Ibid [55].
150 OP-APOD, 1 April 2016, [51], [52].
151 Ibid [52A].
152 Ibid [52B].
153 Ibid [54].
154 Ibid [54A].
155 Ibid [56AA].
156 Ibid [56AA].

bearing on the oppression claim because Mair is not a party to that action.[157] Those allegations are the subject of the termination proceeding, and so ought not be pursued in the oppression proceeding.[158]

64 The defendants also allege that the misconduct of Mair means that the defendant's conduct is 'not unfair' in the relevant sense such that Balnaring is not entitled relief.[159]

Relief Sought for Oppression

65 Balnaring claims that the oppressive conduct of RBG has reduced the value of its shares the Group. It alleges that the purchase price for the option ought to have been paid by (at the latest) 24 July 2015. The value of the EBITDA for RBG has decreased from $3,644,000 to an 'artificial figure' of less than negative $5,000,000.[160]

66 Balnaring also claims the loss of $290,805 for the dividend for the financial year ending 30 April 2015.

67 Balnaring alleges that is entitled to relief from the oppressive conduct under s 233 of the Act. Sub-section (1) of that provision reads as follows:

> **233. Orders the Court can make**
> (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
> (a) that the company be wound up;
> (b) that the company's existing constitution be modified or repealed;
> (c) regulating the conduct of the company's affairs in the future;
> (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
> (e) for the purchase of shares with an appropriate reduction of the company's share capital;
> (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
> (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
> (h) appointing a receiver or a receiver and manager of any or all of the company's property;
> (i) restraining a person from engaging in specified conduct or from doing a specified act;
> (j) requiring a person to do a specified act.

Order that the company be wound up

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157 Ibid [7].
158 Ibid [7].
159 Ibid [60].
160 OP-FAPOC, 22 June 2016, [57]–[58].

(2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:
(a) as if the order were made under section 461; and
(b) with such changes as are necessary.

Order altering constitution

(3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
(a) the order states that the company does have the power to make such a change or repeal; or
(b) the company first obtains the leave of the Court.

68 Balnaring seeks, in summary, the following orders:[161]

(a) vLAH purchase Balnaring's shares in R&B and RBG;

(b) the price of those shares be determined by an independent expert as provided by the SUHA, adjusted to account for the defendant's wrongdoing;

(c) alternatively, orders that R&B and RBG be wound up (whether under s 233 or s 461(1)(k) of the Act);

(d) further or in the alternative to the above, specific performance (as against vLAH and R&B) of the Put Option contained in cl 12 of the SUHA or the contract requiring payment of the purchase price for transfer of the Minority Interests in RBG, with appropriate directions as to the valuation and timing of calculations of the EBITDA, and/or equitable compensation;

(e) further or in the alternative to specific performance, damages for breach of the contract with interest;

(f) further, payment by the defendants of $290,805, being the dividend for the financial year ended 30 April 2015;

(g) such further orders as may be necessary; and

(h) costs.

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161 Ibid [62].

Urgent Hearing on 16 February 2017

69 The Mair parties brought an application for urgent relief on 16 February 2017. In summary, the applications were:[162]

(a) an application, pursuant to liberty to apply, for various orders for relief in both the oppression proceeding and the termination proceeding which, in general terms, were that:

(vi) vLG be joined as a party to the oppression proceeding and that the Further Amended Points of Claim be amended to include the claim set out in Schedule 1 to the Mair parties' Outline of Joinder and Injunction Submissions dated 15 February 2017;

(vii) the van Laack parties be directed to provide specified financial information to the Mair parties;

(viii) R&B be enjoined from selling the R&B Business other than on 72 hours' notice to the Mair parties;

(ix) Herringbone be enjoined from selling the Herringbone business other than on 72 hours' notice to the Mair parties;

(x) vLAH, RBG and R&B be restrained from taking any steps to pay, settle or otherwise compromise debts described in various notices of assignment dated 17 January 2017 and purportedly given in accordance with s 134 of the *Property Law Act 1958* (Vic); and

(xi) vLAH, RBG, R&B and Herringbone be restrained from making payments to

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162 Urgency arises because amongst other very pressing circumstances relevant assets of R&B and Herringbone, now under administration and the subject of injunctions sought by the Mair parties, are being realised by the Administrators with indicative offers from prospective purchasers due to be submitted on 17 February 2017; see paragraph [20] below.

vLG.

(b) an application, by summons filed 14 February 2017, for orders against vLG, vLAH and von Daniels for alleged contempt of Court in both the oppression proceeding and in the termination proceeding.

70 Judgment in respect of the above applications was delivered on 17 February 2017.[163] The following orders were made:

> **Application for Injunctive Relief**
>
> **Proceeding S CI 2015 1745**
>
> 1. Pursuant to rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2015* van Laack GmbH be joined as the fourth defendant in proceeding S CI 2015 1745.
>
> 2. The plaintiff has leave to amend its points of claim to include a claim against van Laack GmbH as guarantor of the first defendant's payment obligations under the Share and Unit Holders Agreement dated 1 August 2012 by filing and serving amended points of claim together with the Originating Process amended to reflect the joinder in paragraph [1] above on or before 4.00pm on 22 February 2017, substantially in the form annexed to the plaintiff's submissions on the application for joinder dated 15 February 2017.
>
> 3. By 4.00pm on 1 March 2017, van Laack GmbH file and serve its Defence to the plaintiff's amended points of claim.
>
> 4. The hearing and determination of the matters the subject matter of the amended and responsive pleadings referred to above be deferred until a date to be fixed by the Court after the delivery of judgment in the Oppression Proceeding.
>
> **Proceedings S CI 2015 1743 and S CI 2015 1745**
>
> 5. Pursuant to s 440D of the *Corporations Act 2001* (Cth) the plaintiff in each proceeding has leave to proceed against Rhodes & Beckett Pty Ltd (Administrators Appointed).
>
> 6. Save subject to further specific leave of the Court, the plaintiff shall not enforce any order made against Rhodes & Beckett Pty Ltd (Administrators Appointed).
>
> **Provision of information**

163 [2017] VSC 54.

7. By 4.00pm on 2 March 2017, van Laack Australia Holding Pty Ltd by its directors serve on the plaintiff an affidavit as to the following matters:

    (a) the current value of the debt owed by the Rhodes & Beckett Group and Herringbone Pty Ltd (Administrators Appointed) to van Laack GmbH;

    (b) the circumstances in which the debt described in (a) above has increased in the period April 2015 to 14 February 2017;

    (c) details of each debt described in the said notices of assignment dated 17 January 2017 to van Laack Australia Holdings Pty Ltd and Rhodes & Beckett Pty Ltd (Administrators Appointed) and to Herringbone Pty Ltd (Administrators Appointed) including:

        (i) the security, if any, held by Toga Beteiligungsegesellschaft mbH prior to the assignment of the debt; and

        (ii) whether the debts were assigned for consideration, and, if so, details of that consideration; and

        (iii) details of all payments made to van Laack GmbH under each of the assignments.

Provision of accounts

8. By 4.00pm on 27 February 2017 van Laack Australia Holdings Pty Ltd give the plaintiff a copy of:

    (a) the end of year accounts for the 2016 financial year, whether audited or not; and

    (b) the management accounts as at 6 February 2017

    for each of:

    (c) van Laack Australia Holdings Pty Ltd

    (d) Rhodes & Beckett Group Pty Ltd;

    (e) Rhodes & Beckett Pty Ltd.

9. The plaintiff pay the Administrators' costs of and associated with the plaintiff's applications, made by way of liberty to apply, on a standard basis such costs to be taxed and paid forthwith.

10. The costs of the plaintiff and the third, fourth and fifth plaintiffs by counterclaim (in proceeding S CI 2015 1743) and the plaintiff and the first, third and fourth defendants (in proceeding S CI 2015 1745) be reserved.

11. The application for the orders in paragraph 8 to 12 of the plaintiffs' proposed orders is adjourned sine die.

12. The parties have liberty to apply.

Contempt Summonses filed 14 February 2017

Until further order, or unless required by law, Christian von Daniels, van Laack GmbH and van Laack Australia Holdings Pty Ltd, each undertake to the Court not to

make or to permit any of their servants or agents to make, any further public statement that, to the effect or carrying the imputation, that Mr Nelson Mair,

(a) engaged in criminal behaviour;

(b) falsified accounts, in particular balance sheets; and

(c) has engaged in tax evasion.

13. By 4.00pm on 17 March 2017, the respondents file and serve any affidavit material upon which they wish to rely.

14. By 4.00pm on 24 March 2017, the plaintiffs file and serve any affidavit material in reply and an outline of submissions.

15. By 4.00pm on 31 March 2017, the respondents file and serve an outline of submissions.

16. The matter be listed for further directions on Friday 7 April 2017 at 10.00am.

17. The parties' costs be reserved.

71 In the oppression proceeding, Balnaring filed a Second Further Amended Points of Claim dated 22 February 2017, and by consent orders made on 15 September 2017, the plaintiff's summons filed 14 February 2017 was dismissed.

TERMINATION CLAIM

Construing the ESA

72 The consideration of Mair's purported termination, and Mair's contention that the mode of purported termination employed by R&B, and the vLAH entities was unlawful and ineffective, must be undertaken in the contractual context agreed by Mair and R&B.

73 The relevant contractual context, in my view, calls into consideration a relevant suite of contracts including the ESA. Those agreements must be construed objectively so as to ascertain the intention of the parties.

74 The objective ascertainment of the parties intention is to be undertaken by reference to the whole of the subject agreement in its context.[164] With a commercial contract such as the ESA, it is necessary to consider what a reasonable business person would have understood the language and terms employed in that contract to mean, bearing in mind the subject matter addressed by the contract, surrounding circumstances, and the commercial purpose and

164 *Toll (FGCR) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [178]-[179].

objects to be achieved by the contract.[165] This may entail examination of related contracts.

75 In *Pacific Carriers Ltd v BNP Paribas*,[166] the High Court of Australia ('the High Court') observed:

> The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction.[167]

76 Those remarks were confirmed in *Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd*:[168]

> This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[169]

Clause 5 of the ESA

77 Clause 5 of the ESA provides as follows:[170]

> Termination
>
> 5.1 The Company may at its sole discretion immediately terminate the Executive's employment by written notice to the Executive if the Executive at any time:
>
> 5.1.1 commits a significant and substantial breach of any of his obligations to the company;
>
> 5.1.2 is intentionally or wilfully negligent in the discharge of his duties including observance of the rules and procedures of the Company as published and notified to him from time to time (for the avoidance of doubt, it is agreed that policies and procedures do not enure for the benefit of the Executive or create enforceable rights in the Executive's favour); or
>
> 5.1.3 is bankrupt or commits an act of bankruptcy; or

165 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116-17 [46]-[52].
166 (2004) 218 CLR 451.
167 Ibid 461-62, [22].
168 (2004) 219 CLR 165.
169 Ibid 179, [40].
170 MS1905.

5.1.4 is convicted of a criminal offence which in the reasonable opinion of the Board will detrimentally affect the Company; or

5.2 The Executive may terminate his employment pursuant to this document at any time without cause by giving the Company six months' written notice provided that such notice cannot be given until after the date that is 2 years after the Effective Date.

5.3 Except in the circumstances provided for in clause 5.1, the Company may terminate the Executive's employment pursuant to this document at any time without cause by giving the Executive six months' written notice provided that such notice cannot be given until after the date that is 2 years after the Effective Date. The Company may at its sole discretion elect to pay the Executive in lieu of the whole or any part of such notice period.

5.4 On termination of his employment the Executive shall immediately deliver to the Company all documents, records, credit cards, materials and other property of the Company's which is in his possession or under his control at such time.

5.5 The Executive shall resign from his office as director on the termination of his employment if directed to do so by the Company.

78 Clause 2 of the ESA provides for Mair's employment by R&B as its Managing Director and cl 3 of that contract stipulates Mair's responsibilities thereunder.[171]

79 In my view, cl 5 of the ESA provides for three scenarios by which Mair's employment could be terminated:

(a) pursuant to cl 5.1, R&B could at its sole discretion and at any time terminate Mair's employment as Managing Director of R&B, by written notice;

(b) pursuant to cl 5.2, Mair could terminate his employment without cause by giving six months' notice to that effect, subject to an initial limitation as to when that notice could

171 MS1904.

be given;

(c) pursuant to cl 5.3, R&B could terminate Mair's employment without cause by giving Mair six months' written notice, subject to an initial limitation as to when that notice could be given.

ESA to be read with SPA and SUHA

80 In my view, the SPA, ESA and SUHA form a suite of contracts creating the framework within which all relevant parties' rights, obligations and affairs would be organised and undertaken. The express cross-referencing of these agreements reflects the parties' intention that the terms and operation of the contracts would be co-extensive.[172]

81 The setting in which the ESA is to be construed includes the acquisition in 2012 by vLAH of 80 percent of the shares in R&B and the R&B Group.[173] Mair was a shareholder in both R&B and RBG in 2012 at the time of vLAH's acquisition of those interests which was effected by the SPA.[174]

82 The SPA and the SUHA both refer to the 'NM Employment Agreement' (the ESA). Mair and R&B and vLAH are parties to the SPA and the SUHA, and Mair and R&B are also parties to the ESA.[175] R&B, Baubridge & Kay and Boston Brothers were the subject of the SUHA.

83 In the acquisition process, the vLAH parties stipulated that Mair was to be engaged as the Managing Director of R&B for at least 2 years.[176]

84 Throughout and after the acquisition by vLAH of R&B and RBG, Mair retained his earlier 20

172 SPA, Schedule 1 [MS1556-1565], SUHA, cl 5.1.
173 MS1496.
174 MS1492-1593.
175 MS1792-1828.
176 MS134.

percent shareholding in each of those companies.

85 Clause 5.1 of the SUHA provides that the R&B Board of Directors may from time to time appoint a Managing Director for the Group, defined therein as R&B, RBG, the Trust, Boston Brothers and Baubridge & Kay collectively and each of R&B, RBG, the Trust, Boston Brothers and Baubridge & Kay individually.

86 Mair was the appointed Managing Director of the Group from the time of execution of the SUHA until the completion of the 'Term' as defined in cl 1.1 of the ESA.

87 In these respects, I accept Mair's contention that the ESA must be read together and construed consistently with the SUHA. This is an assertion which I understand R&B and the vLAH entities also accept.[177]

Relevant Obligations under the SUHA

88 Clause 2.2(a) of the SUHA imposes obligations upon Mair as a shareholder, and to other shareholders including vLAH, to use their best endeavours to foster the development and profitable operation of the business.

89 Clause 2.2(b) obliged Mair as a shareholder in R&B and the R&B Group, together with vLAH, to be just and faithful in all their dealings with the Group and each other shareholder.[178]

90 The SUHA also imposed a number of further obligations on Mair and vLAH including in relation to the matters 'restrained' as defined in cl 19.2 of the SUHA, and obligations of confidentiality as defined in cl 23.

91 Pursuant to cl 5.6 of the SUHA, the directors of R&B assumed disclosure obligations in relation to any relationship which was proposed with any Group or Member. The SUHA defines 'Group' as R&B, RBG, the Trust, Boston Brothers and Baubridge & Kay both individually and collectively.

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177 Plaintiff's Closing Submission, [31]; T42.30-31.
178 SUHA, cl 2.2(b).

'Just and Faithful' Obligation in the SUHA

92 Mair submits that the code in relation to dismissal contained in cl 5.1 of the ESA is 'conditioned' by the obligation to be 'just and faithful' in 'all dealings' under cl 2.2 of the SUHA. I do not accept that submission.

93 Even though the ESA and the SUHA are part of the same suite of contracts, such that the interpretation of one may in some circumstances be conditioned by the other, it must be recalled that SUHA is a separate agreement to the ESA. Pursuant to cl 1.1 of the SUHA, cl 2.2 (containing the obligation to be just and faithful) binds each person who holds R&B shares and/or RBG shares. While VLAH, Balnaring and Mair were at all material times shareholders, R&B itself was not.[179]

94 In this respect, it should also be observed that Mair's suspension and dismissal on 27 March 2015 were effected by a director of vLAH without reference to Mair as the nominee of Balnaring pursuant to the SUHA.[180]

95 For these reasons, principally based on a lack of contractual privity, I do not accept Mair's submission that the agents of vLAH, Potyka and von Daniels, although they may have been the instruments of vLAH as a party to the SUHA, were obliged to be just and faithful in their activities and dealings with Mair when acting through R&B.

96 The allegation made by Mair is that R&B has repudiated the ESA. The SUHA cannot, in my view, be enforced against R&B so as to substantiate this allegation.

97 Viewed in another way, Mair's submission is an invitation to the Court to construe cl 5.1 using extrinsic materials. In *Electricity Generation Corporation v Woodside Energy Ltd*,[181] French CJ, Hayne, Crennan and Kiefel JJ observed:

> The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating. A commercial contract is to be construed so as to avoid it making

179 SUHA, Introduction C.
180 MS431.
181 (2014) 251 CLR 640.

commercial nonsense or working commercial inconvenience.[182]

98 The focus of the enquiry remains the language of the contract. 'Surrounding circumstances are not admissible to contradict the language of the contract when it has a plain meaning'.[183]

99 Clause 5.1 has a plain meaning that is consistent with the purpose of that part of the ESA. It provides for an exhaustive statement of the circumstances in which Mair can be dismissed from his employment by R&B without notice. That provision should also be read in its contractual setting as a whole and in its setting and in light of the other terms, implied by law into employment contracts, relevantly those requiring fidelity and loyalty.

100 To the extent that evidence of surrounding circumstances may be admissible, such evidence should not be permitted to distort this plain meaning derived from the language of the ESA. That is particularly so where the absence of an obligation to be 'just and faithful' in cl 5.1 does not give rise to a 'commercial nonsense' or 'working commercial inconvenience' in the application of the ESA.[184]

101 For the above reasons I do not consider that R&B is under no obligation to be 'just and faithful' in the exercise of its rights under cl 5.1 of the ESA.

102 At all events, I have concluded separately that R&B has wrongfully purported to terminate Mair's employment by means, and on bases, impermissible under the ESA. The consequences of this wrongful action by R&B and the vLAH entities would be, in my view, unaffected by an additional obligation on R&B to act in relation to the termination of Mair's employment in a 'just and faithful' manner.

Clause 5.1 as a Code for Termination

103 I consider that cl 5.1 of the ESA, read as a whole and in its context, is intended by the parties to be a comprehensive and exhaustive code wholly governing R&B and Mair's rights and obligations in relation to the termination of Mair as Managing Director of R&B, including to the exclusion of any right or obligation in that regard at common law. In particular, I

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182 Ibid 656-57 (citations omitted).
183 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352 (Mason J).
184 *Electricity Generation Corporation v Woodside Energy* (2014) 251 CLR 640, 656-57.

consider that the parties' intention is for cl 5.1 of the ESA to comprehensively define the circumstances in which the ESA can be terminated by R&B without a notice period. That is so for the following reasons.

(a) the employer's right to dismiss summarily is expressed broadly to be where the Managing Director commits a 'significant and substantial breach' of is obligations to R&B as provided in cl 5.1.1;

(b) R&B's right to dismiss the Managing Director must be effectuated by written notice;

(c) cl 5.1 defines four circumstances in which termination may be affected;

(d) cl 5.1, and particularly the four circumstances in which termination may be affected, appear to circumscribe all likely potential circumstances which are likely to give rise to termination;

(e) accordingly the breadth of cl 5.1 would in my view catch any breaches by the Managing Director of his or

her fiduciary or statutory obligations.

104 It is also to be noted that cl 5.1 operates only in respect of the Managing Director's obligations to '*the Company*' which is in turn defined as R&B. The significance of this aspect of cl 5.1 is, amongst other things, that the ESA is not intended by the parties to extend to any breach of an obligation which may be owed by the Managing Director, in this case Mair, to RBG, vLAH, vLG or Herringbone. In this way, although the ESA and the SUHA are to be read and construed together, there are provisions of each which have a standalone operation.

105 It is also to be observed that cl 5.1 is not enlivened by all breaches. The breach in question must satisfy the requirements of being 'substantial' and 'significant'.

106 While the two concepts are similar, each is distinct under the terms and in the context of cl 5.1 of the ESA. I consider that considering the ESA as a whole, and in its context:

(a) 'Substantial' means of considerable importance, size or worth.[185] It connotes a breach that is 'large and weighty' as opposed to 'ephemeral or nominal'.[186] In this sense, 'substantial' reflects the parties focus on the *effects* of the breach on the non-defaulting party. In my view, the criterion holds the parties' to their obligations under the ESA and prevents termination

185 *Oxford English Dictionary* 'substantial' adj. I(3) (January 2018).
186 *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, 382.

where the injuries incurred by the breach are minor.

(b) 'Significant' means 'sufficiently great or important to be worthy of attention' or 'noteworthy'.[187] This reflects the parties focus on *importance* of the breach against the ESA as a whole, and I consider is intended to provide a check on the effect of the breach on the non-defaulting party. Where the injury asserted by the non-defaulting party is substantial, but the breach is minor vis-à-vis the entire agreement, the parties intended there would be no right of termination.

107 The adoption of the above criteria reflects the common law rule that trivial breaches of an agreement do not give rise to a right of termination. Such criteria have a practical utility. The High Court has observed that the 'interests of justice are promoted' by limiting the right of a party to discharge the contract to 'serious and substantial breaches'.[188] The Court has also observed that a 'just outcome is facilitated in cases where the breach is of a term which is inessential',[189] in that way limiting the right to termination under cl 5.1 preserves the enduring functionality of the parties' agreement.

187 *Oxford English Dictionary* 'significant' adj.(4) (January 2018).
188 *Koompahtoo Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 139 [52].
189 Ibid.

Exclusion of Common Law Termination

108 In my view, cl 5.1 of the ESA evinces the clear intention of the parties that the termination of the employment of the Managing Director engaged thereunder is to be regulated by the terms of cl 5. Put another way, the parties intended that cl 5 would codify all aspects of termination under the ESA. Accordingly, by clear inference, the common law right of the parties to summarily dismiss the MD is excluded.

109 As a consequence, the basis upon which termination pursuant to the ESA could occur without notice is restricted to the grounds specified in cl 5.1 of the ESA.

110 The broad language of cl 5.1 reflects the parties' intent that the circumstances which would give rise to a right to terminate at common law are accommodated by cl 5.1.1 of the ESA. Common law termination requires breach of a sufficiently serious nature or conduct amounting to a repudiation of that contract.[190] Here, the use of the words 'significant and substantial' in cl 5 is intended to bring within the operation of the ESA the conduct which, in other cases, would support common law termination.

111 The scope of these likely common law bases for termination without notice are caught within the term 'significant and substantial', as utilised in cl 5 of the ESA.

112 The ESA read as a whole, and in its context referred to above, and in particular cl 5.3 provides support for the above construction. By providing for R&B's right to dismiss on notice of six months without cause, cl 5.3 also reflects the parties' intention that cl 5 should codify the way in which termination would be regulated. The scope of regulation stipulated by cl 5.1 and cl 5.3 is comprehensive and supports the construction that the parties did not wish to leave any aspect of their agreement in relation to possible termination to the common law, but rather ensure that the ESA wholly regulated termination of employment and related issues.

113 It is also clear that the parties' intended for the ESA and the SUHA to work in unison to some degree. One conspicuous indicator is the reference in the SUHA to Managing Director who will be engaged pursuant to its terms and the operation of cl 12 of the SUHA which refers to

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190 Ibid 138 [49]; *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, 641-42.

termination in accordance with the Employment Contract to be constituted by the ESA.[191] In this regard the construction of cl 5.1 of the ESA referred to above is consistent with the provisions of cl 12 of the SUHA.

114 Clause 12 of the SUHA refers to aspects of the operation of the ESA, similarly a clause of the SUHA predicates its operation on the occurrence of the termination of the Managing Director in accordance with cl 5.1 of the ESA.

115 In these respects, the SUHA is drawn to provide a clear statement of the parties' rights and entitlements in the event that the contemplated employment occurs in accordance with the terms of the ESA, and equally in the event that either party terminates the contract of employment. That conclusion is supported by the fact that the parties have not included the quite common 'entire agreement' clause in the ESA.

116 Accordingly, R&B was limited to terminating Mair's employment pursuant to the terms of the ESA. The ESA and the SUHA clearly reflected the parties intention that, read together, their terms would provide a complete, exclusive and exhaustive code regulating the parties rights and entitlements in relation to the termination of the Managing Director employed thereunder and their respective shareholdings. Nor, for the reasons outlined below, did R&B invoke or, in any event, have grounds to terminate Mair under cl 5.1.

117 Contrary to vLAH's argument, I do not consider that the relevant clause in *Concut Pty Ltd v Worrell*[192] is on all fours with cl 5.1 of the ESA. In *Concut*, the clause in question appears not to be apt to cover all relevant conduct at common law, for example, conduct separate to serious misconduct.[193]

118 In my view, therefore, R&B was not entitled to summarily dismiss Mair at common law. By purporting to do so, I consider that R&B evinced an intention not to be bound by the ESA and thereby repudiated that agreement.

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191 SUHA, Definitions 1.1 'Managing Director', 'NM Employment Contract', cls 5 and 12 including cl 12(b) and (c).

192 (2000) 176 ALR 693.

193 Ibid 699 [20]-[23].

Suspension and Termination of Employment

119 On 27 March 2015, at around 11:30am, Mair was suspended from his employment. The terms of the letter of suspension were as follows:[194]

> Dear Nelson
>
> **Investigation and suspension from your employment**
>
> I confirm from our discussion today that we are investigating whether you have engaged in serious misconduct.
>
> It appears that you have used the company's employees and premises for the benefit of other unrelated businesses and that you have neglected your duties to the company.
>
> It is imperative that you keep the fact of the investigation, and all details in relation to the investigation, strictly confidential. We will not tolerate any breach of confidentiality in relation to this process, or victimisation of anyone relating to their involvement in this matter.
>
> Given the serious nature of the matter, you are suspended from your employment (on full pay), effective immediately. The suspension will continue until the investigation has concluded and the outcome has been communicated to you. Accordingly, you must not return to the office and you must cease all work. Further, you must not:
>
> a) perform any duties or otherwise make contact with the company's employees, customers or other business partners while you are suspended, except to the extent that you are directed to do so by me; and
>
> b) perform any activities in relation to the company until the investigation has concluded and you have been informed of the outcome.
>
> In addition, you will not have access to the company's IT systems for the duration of your suspension and you are required to immediately return all company property in your possession or under your control, including from your residential premises.
>
> If the suspected misconduct is substantiated, it would constitute a significant and substantial breach of your obligations to the company and your employment will be terminated immediately for serious misconduct.
>
> The suspension in no way indicates that the company has made a final decision about this matter. However, given the serious nature of the suspected misconduct it would be inappropriate for you to attend at work or be involved in work activities during the investigation.
>
> Yours faithfully
>
> Sebastian Potyka

120 Mair alleges that he was detained by R&B at his office until around 6.00pm. Staff were forbidden to speak to him during this time while solicitors, directors and consultants of R&B 'interrogated' staff about Mair's conduct.[195]

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194 MS4355.

195 TP-ASOC, 3 September 2015, [7].

121 On 27 March 2015, at around 7:30pm, Mair was dismissed from his employment.[196] That dismissal was without notice and of immediate effect.[197] The following letter was delivered to Mair's residence:

> STRICTLY CONFIDENTIAL
>
> Dear Nelson
>
> **Termination of employment**
>
> I refer to the letter that I handed to you earlier today suspending you from your employment.
>
> We are now satisfied that you have committed a significant and substantial breach of your obligations to the company, and we have decided to terminate your employment with immediate effect. You will be paid any outstanding salary and for any unused accrued annual leave entitlements.
>
> You also must resign from your office as a director of the company with immediate effect.
>
> You must immediately return to me all company property (including confidential information in both hard copy and electronic form) that is in your possession or under your control, including from your residential premises. You are directed to hand to the lawyer who delivers this letter to you any keys to the company premises, company credit cards and any other company property.
>
> Finally, I remind you of your ongoing:
>
> - confidentiality obligations to the company;
> - restraints in accordance with the Executive Service Deed dated 1 August 2012 between you and the company and the Share and Unit Holders Agreement dated 1 August 2012 to which you are also a party; and
> - obligations under the *Corporations Act 2001 (Cth)* in relation to the use of information obtained by you as an employee and director of the company.
>
> Yours faithfully
>
> Sebastian Potyka

122 It will be observed that the termination of employment letter does not refer expressly to cl 5.1 of the ESA. That provision governs the circumstances in which the ESA can be terminated without prior notice.

123 The Termination Letter above did not terminate the ESA. It did, however, bring to an end the relationship of employer and employee in respect of R&B and Mair. The concepts of

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196 OP-FAPOC, 22 June 2016, [26].
197 MS4356.

termination of an employment relationship and discharge of a contract are different.[198] It does not follow from the fact that a wrongful dismissal is effective to bring the employment relationship to an end that it thereby discharges the contract of employment.

Repudiatory Conduct

124 In *Shevill v Builders Licensing Board*,[199] Gibbs CJ observed:

> We are of course concerned only with a case in which it is admitted that there was a valid and binding contract. Such a contract may be repudiated if one party renounces his liabilities under it - if he evinces an intention no longer to be bound by the contract *(Freeth v. Burr*) or shows that he intends to fufil the contract only in a manner substantially inconsistent with his obligations and not in any other way. In such a case the innocent party is entitled to accept the repudiation, thereby discharging himself from further performance, and sue for damages.[200]

125 In *Koompahtoo Council v Sanpine Pty Ltd*,[201] the plurality observed:

> The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it. Secondly, it may refer to any breach of contract which justifies termination by the other party. There may be cases where a failure to perform, even if not a breach of an essential term (as to which more will be said), manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.[202]

126 I consider that R&B's purported summary dismissal of Mair at common law constituted conduct on the part of R&B which evinced an intention by it not to be bound by the ESA. Principally, this is because, for reasons I have explained above, cl 5 of the ESA does not countenance the termination of the Managing Director engaged thereunder at common law. In light of cl 5, the purported termination of Mair at common law by R&B was a repudiation

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198 *Visscher v Giudice* (2009) 239 CLR 361 at [53].

199 (1982) 149 CLR 620.

200 Ibid 625-26 (citations omitted). See, also, *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 155 CLR 623, 634.

201 (2007) 233 CLR 115.

202 Ibid 135-36 (citations omitted).

of the ESA. Thereafter, the employment relationship between Mair and R&B was severed. However, it was open to Mair to elect to bring the ESA to an end.

Acceptance of Repudiation

127 On 31 March 2015 Mair communicated the following by email letter to the solicitors for R&B:[203]

> We refer to previous communications and confirm that our firm acts on behalf of Mr Nelson Mair.
>
> In particular, we refer to your client's letters to our client dated 27 March 2015 informing him firstly of his suspension, and secondly of your client's decision to summarily terminate Mr Mair from his employment with the company.
>
> We note that, without giving any details thereof, your client makes a very serious allegation that it is '.. satisfied that [Mr Mair] has committed a significant and substantial breach of [his] obligations to the company …'. This is then relied upon as grounds for termination of our client's employment as Managing Director or CEO (both terms are used by your client) with immediate effect.
>
> We would be obliged if your client provided full particulars of what your client alleges is the 'significant and substantial' breach of our client's obligations.
>
> Having regard to your client's decision to take the extraordinary step of summary dismissal of its most senior employee and the matters set out in your client's first letter of 27 March 2015, viz that your client was investigating the use by our client of company employees and premises for the benefit of other unrelated businesses and that he had neglected his duties to the company, we assume that your client is very sure of its ground and will have no trouble in promptly providing a detailed response to this request.
>
> Our client expressly denies any such wrongdoing, whether misuse of company resources or neglect of duties or otherwise. Until your client provides the particulars sought, a more specific response cannot be given by him. Your client's precipitous and high-handed conduct last Friday, despite this office's written request to maintain the status quo until a meeting could be had early this week, tentatively Tuesday 31 March 2015, has meant that the usual procedure of putting the allegations to our client and inviting his response was not and cannot be followed. Our client has been denied natural justice and a 'fair go'.
>
> Our client hereby accepts your client's conduct as a repudiation of the employment agreement at common law and terminates the same. The Executive Services Deed is at an end, but not in accordance with its terms. Our client is entitled to damages for wrongful dismissal, not limited to your client's offer to pay outstanding salary and unused leave. He is entitled to be paid damages for lost salary to the end of his notice period, i.e. 31 October 2015. Your client and our client operate in a small industry and people talk. Due your client's heavy-handed tactics, whereby the company's office was placed in lockdown and staff were allowed to observe our client being humiliated we anticipate that it will now be difficult for our client to obtain equivalent employment, so that the loss of earnings component of his loss and damage will extend well beyond the six and a half months notice he gave. In addition our client

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203 MS4374-4376.

appears to be entitled to aggravated and/or exemplary damages.

In the circumstances described above your clients open letter to all staff dated 30 Mach 2015, despite its generous language in the third paragraph, does nothing to dispel the impression that our client is guilty of very serious misconduct. The reference to his resignation without its lengthy term, suggests that our client chose to resign last Friday and, indeed, he had no choice (i.e. resign or be sacked.). In the interests of minimising further damage to our client's professional reputation, and having regard to some matters below, we respectfully suggest that your client refrain from further comment. Our client may agree to some kind of correction or retraction in due course.

Our client will not resign as director of your client. He is not required to do so by the Executive Services Deed, which is at an end as set out above. Further, our client remains a 20 percent shareholder of the company and is anxious to protect his interests and those of the company as a whole, particularly in the context of the proposed sale of its business. He has grave concerns that:

(a) Your client's actions in summarily dismissing its CEO have seriously compromised the sale process. This sorry tale and its ramifications will have to be disclosed to potential purchasers in any due diligence process;

(b) Your client's actions are likely to destroy shareholder value. The orderly transition of the company's most senior manager contemplated by clause 5 of the Executive Services Deed and our client's notice of resignation of 19 March 2015 is no longer possible;

(c) A purchaser will seek to exploit this situation, which is of your client's making.

Likewise our client will not be resigning as director of any of the other corporate entities, such as Van Laack Australia Holdings ('Van Laack'), Herringbone Pty Ltd, Baubridge & Kay Pty Ltd and Boston Brothers Pty Ltd.

Our client believes that the real reason for his summary dismissal are ulterior motives and oppressive conduct on the part of Van Laack as 80 percent shareholder intended to deprive our client of the advantage of sale of the company's business, which ought to flow to him as a 20 percent shareholder. This is another reason why he will not resign as director. We are confident that in these circumstances a Court would order, if need be on an interlocutory basis, that our client not be removed as a director.

Our client insists on being afforded all of his rights as a director to corporate information and to participate in the management of the company at board level. He is entitled to proper notice of meetings of directors, formal or informal. He expects to be informed about and participate in the sale process. He accepts that he ought not participate in decision-making of the company in the defence of any wrongful dismissal claim he may bring, but that does not apply to any claim for relief from oppression under Part 2F.1 of the *Corporations Act*. The company would be a party to such proceeding, but only formally so.

We inquire whether your firm has instructions to act for Van Laack for the moment. If not, please inform us if you know who its solicitors are.

We note that part 3 of your letter of 30 March 2015 demands an undertaking that our client will deliver up copies of documents and delete permanently from all electronic devices (in particular our client's laptop) all company information. We are instructed that our client has already deleted all company information from his laptop. We are instructed that our client will agree to a properly worded undertaking not to misuse any confidential information and that he will retain and use copies of company

documents only for the purposes of any proceedings and for discharging his continuing obligations as director of the company. We assure your client that he has no intention of competing with your client in the near or medium term. On the contrary, as a shareholder he is concerned to maximise the value of its business.

Your client has committed a grievous wrong to our client and he reserves all of his rights in contract, at common law and under the *Corporations Act*.

With respect to your request for the key and garage pass, we are instructed that our client will be returning these this afternoon.

With respect to the iPhones, we are instructed that these are in 'as new' factory condition, and are not locked with a pass code.

With respect to our client's personal files and personal items remaining in the office, we are instructed that all files contained within the filing cabinets are personal and are clearly labelled as such. We are also instructed that the filing cabinets are our client's property. Further, our client has instructed us that that the building manager is able to collect the files and items from the office and store them on our client's behalf. Please advise us of a suitable time for the files and the personal items to be collected.

In summary, your client's purported summary termination of our client is completely without basis, as is your client's demand that Mr Mair immediately resign as a director of the company. Our client is prepared to vigorously challenge both his termination and any attempt by your client to force him to resign as a director of the company.

If you have any further enquiries, please do not hesitate to contact Ms Tanya Cirkovic of our firm.

Yours faithfully,

TANYA CIRKOVIC & ASSOCIATES

128 In essence, Mair's solicitors' communicated that Mair considered R&B's conduct to be repudiatory of the ESA; and that Mair elected to accept that repudiation and bring the ESA to an end.[204]

129 I accept Mair's submission that R&B, having made its election to purport to terminate the ESA at common law, is fixed with the consequences of that election. Here I have held that R&B's purported termination of the ESA at common law was not contractually lawful and was not effective to bring the ESA to an end. I have also held that Mair's accepted R&B's repudiatory conduct and terminated the ESA pursuant to Mair's solicitor's letter of 31 March 2015. After that date, it was not open to R&B to terminate the ESA pursuant to cl 5.1.1 or otherwise. Mair's effective termination of the ESA on 31 March 2015 leaves no scope for R&B to 'resuscitate' or purport to itself lawfully terminate the ESA thereafter.[205]

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204 MS4374.

205 *Melbourne Stadiums Ltd v Sautmer* [2015] FCR 221 at 246.

130 In my view, because R&B has repudiated the ESA by evincing its intention not to be bound by that agreement as explained above, and because Mair has terminated the employment contract by his acceptance of R&B's repudiatory conduct, Mair has established his wrongful dismissal claim in these proceedings. This makes it unnecessary to consider R&B's many allegations concerning misconduct by Mair that are asserted by R&B have asserted in aid of its justification of Mair's common law summary dismissal.

131 However, in case I am wrong in my above conclusions, for the reasons which follow below I am in any event unpersuaded that R&B and the allegations against Mair are made out.

Decision on Termination of the ESA

132 For the above reasons I find:

(a) the ESA excludes the common law right of summary dismissal;

(b) if Mair was able to be dismissed at common law (which I have decided he was not) Mair was entitled to an opportunity to be heard prior to R&B dismissing him;

(c) because the ESA excluded the common law right of summary dismissal, R&B repudiated the contract when it purported to summarily dismiss Mair at common law on 27 March 2015;

(d) Mair lawfully brought the ESA to an end when on 31 March 2015 he accepted

R&B's repudiation;

(e) subsequent to 31 March 2015 R&B could not rely on any contractual right, or otherwise, to dismiss Mair;

(f) in any event, for reasons which follow, Mair has not perpetrated any significant and substantial breach of his obligations to R&B or any other material breach of his obligations or any duty;

(g) for the reasons which follow, even if Mair could have been summarily dismissed at common law, Mair's conduct did not justify such dismissal at common law.

Allegations against Mair

Fiduciary Duties

133 The fiduciary duties alleged to be owed by Mair to the Group and to vLAH, to Herringbone and to vLG are set out in the defendants and plaintiffs by counterclaim's Defence to Amended Statement of Claim and Amended Counterclaim dated 17 September 2015.[206]

134 As highlighted by Mair in his submissions, the alleged fiduciary obligations are in most instances expressed to be prescriptive. This infringes the rule in *Breen v Williams*.[207] Such obligations are not maintainable at law.[208]

206 MS12.
207 (1996) 186 CLR 71 at 113.

135 In *Singtel Optus v Almad*,[209] to which the plaintiffs refer, the Court observed:

> That the fiduciary obligations pleaded include obligations of a prescriptive nature (for example alleging that Mr Curtis was required to do certain things, or to act in a certain way). That is not consistent with the general nature of fiduciary obligations, which is that they are proscriptive (not prescriptive) in nature.[210]

136 In *Breen v Williams*,[211] Gaudron and McHugh JJ held that:

> Australian courts only recognise proscriptive fiduciary duties…In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.[212]

137 In *Friend v Brooker*,[213] the High Court observed that:

> McColl JA held that Mr Brooker and Mr Friend were subject to a fiduciary obligation 'to be equally and personally liable to each other for losses flowing from personal borrowings' (163). In this Court, the appellant correctly emphasises that such a formulation of fiduciary duty went beyond the imposition of proscriptive obligations, a limitation emphasised in decisions of this Court (164).[214]

138 Further, I accept Mair's submission that those duties are also circumscribed by the duties which Mair owed as a Director of the entities in the Group. This is because the broad terms of the ESA are intended to be comprehensive in relation to Mair's duties and obligations in that regard.

139 Except where execution of an agreement itself is in breach of an antecedent fiduciary duty,[215] the existence and scope of a fiduciary relationship can be circumscribed by the agreement of the parties. In *Hospital Products Ltd v United States Surgical Corporation*,[216] Mason J observed:

> That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has

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208 *Singtel Optus v Almad* [2013] NSWSC 1427, [239]; Defence to Amended Statement of Claim and Counterclaim [20(a)-(g)].
209 [2013] NSWSC 1427.
210 Ibid.
211 (1996) 186 CLR 71.
212 Ibid at 113.
213 (2009) 239 CLR 129.
214 Ibid at 160, [84].
215 *Maguire v Makaronis* (1997) 188 CLR 449, 465.
216 (1984) 156 CLR 41.

> in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.[217]

140 Bearing this principle in mind, the ESA is effective to circumscribe Mair's fiduciary duties to R&B. The broad provisions of the ESA make this clear, for example in the following clauses:

> 3.1.2 faithfully and diligently perform the duties and exercise the powers consistent with his office that may be assigned to him by the Company at any time
>
> 7(b)(iii) Restraint. The Executive must not help or encourage any competitor of the Business in a way which might assist or enable it to conduct a business in the nature of a Restrained Business in the Restraint Area.

141 I consider that in this matter Mair's duties and obligations are circumscribed by the terms of the ESA, read as a whole and in its contractual context as referred to above. I do not accept that the prescriptive duties asserted by R&B and the counterclaimants attach to Mair, save to the extent imposed on him under the Act.

142 Further, insofar as Mair accepts that certain fiduciary duties attach to him as an employee, those duties are, in my view likely limited at law to the implied terms of fidelity and good faith implied into employment contracts which obligations are addressed in the ESA, cl 2.2(b) of the SUHA.

143 In any event, for the reasons outlined below, I am not satisfied on the facts that Mair has breached any contractual obligations or fiduciary duties to R&B or any of the counterclaimant parties.

Mair's Alleged Fiduciary Duty to VLG

144 Mair submits, and I accept, that he owed no fiduciary obligation to vLG.

145 vLG was a guarantor in connection with the SUHA.[218] However, no evidence has been adduced to establish that Mair had any particular relationship with the holding company vLG.

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217 Ibid at 97.

218 SUHA, cl 24.

It is to be noted that vLG is not a shareholder under the SUHA nor a party to the ESA.

146 Mair submits, and I accept on the evidence, that vLAH also had a significant management and oversight at all material times in respect of R&B Business through vLAH, and in particular its Directors, von Daniels, and Potyka.[219] Von Daniels and Potyka were also Directors of R&B and the R&B Group of companies.

147 Accordingly, I can discern no basis upon which Mair owed a fiduciary duty to vLG at any relevant time. The vLAH claim on behalf vLG cannot be sustained.

Summary Dismissal at Common Law – Mair's Alleged Breaches

148 Notwithstanding my conclusion above on cl 5.1 of the ESA, were it held that R&B could lawfully dismiss Mair at common law, R&B needs to establish that it was justified in doing so. In turn, R&B must establish that Mair's breaches of his contract of employment were of so a serious a nature as to amount to the repudiation of his essential obligations under the ESA, or so repugnant to the relationship Mair had as employee to R&B as his employer as to justify Mair's summary termination.[220]

149 R&B must discharge the burden of establishing its justification for summarily terminating Mair and do so in a way which satisfies the propositions referred to in the last preceding paragraph. I note that substantially the same burden would apply to R&B and the counterclaimant parties were they seeking to establish lawful termination pursuant to the terms of the ESA.

150 Subject to an exclusion via contract, statute or award, the employer has the right under common law to summarily dismiss his employee. The right has been recognised since at least the early 1800s as an incident to the doctrine of repudiation.[221] In *Re an Arbitration between Rubel Bronze and Metal Co and Vos*,[222] McCardie J identified the right of a master

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219 MS136-137; MS3031; MS137, Mair [86]; MS138 Mair [90]; T547.27-31; T548.6-11; MS138-139, Mair [92]-[93]; MS139, Mair [94]; MS3031; MS3123-3126; MS3328-333; MS3356; MS3424-3428; MS3429; MS3557-3566; T175.24-26; MS139, Mair [95]; MS140, Mair [98]-[97]; MS141, Mair [100]-[101]; MS141-142, Mair [102]-[109]; MS9155; MS2207-2213; MS2353; MS3042-3409.

220 *Rankin v Marine Power International Pty Ltd* [2001] VSC 150, [250], [264], [267].

221 *Spain v Arnott* (1817) 2 Stark 256; 171 ER 638, 639.

222 [1918] 1 KB 315.

to dismiss his servant for 'misconduct, substantial negligence, dishonesty and the like'.[223] Such conduct was said to 'constitute such a breach of duty by the servant as to preclude the further satisfactory continuance of the relationship to justify the master in electing to treat the contract as repudiated by the servant'.[224]

151 The generic allegations raised against Mair are 'serious misconduct' by siphoning company resources; and 'neglect' in his duties to the company.[225]

152 In essence relevant 'neglect' refers to two situations.[226] The first is where an employee is incompetent, such that he fails to perform his duties in a manner consistent with the skills he claimed to possess. The second is where the employee is 'gravely negligent' in the course of his employment such that he causes 'substantial damage'. Neither are relevant on the present facts.

153 'Misconduct', on the other hand, has been explained by the High Court as follows:

> Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal. But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises.[227]

154 In *Rankin v Marine Power International Pty Ltd*,[228] the Victorian Court of Appeal framed the requirements for summary dismissal in the following terms:

> The authorities do establish that the employee's breach of contract of employment must be of a serious nature, involving a repudiation of the essential obligations under the contract or actual conduct which is repugnant to the relationship of employer-employee, before an employer may terminate the contract summarily. Isolated conduct usually would not suffice. Each case must be considered in the light of its particular circumstances, but nevertheless, the seriousness of the act of termination and the effect of summary dismissal are factors which place a heavy burden on the employer to justify dismissal without notice. The circumstances do not have to be exceptional, but nevertheless, must establish that the breach was of a serious nature.[229]

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223 Ibid 321.
224 Ibid.
225 MS4335.
226 *Rankin v Marine Power International Pty Ltd* [2001] VSC 150, [265]-[267].
227 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81-82.
228 [2001] VSC 150.
229 Ibid [250].

155 The employer has the burden of proving the allegations said to justify the exercise of its right to summary dismissal at common law.[230] To discharge this burden, the authorities indicate that R&B must prove that Mair has breached obligations under his contract of employment and that those obligations are *essential* to that contract or constitute conduct repugnant to the relationship of employer/employee and that the breach was sufficiently *serious* to justify an inference that Mair repudiated the contract.

156 The seriousness of the alleged breaches is assessed in light of the circumstances of the case. In my view this is a particularly apposite observation in this matter, and one which greatly assists Mair.

Allegations against Mair in the Termination Case – Analysis

Significant and Substantial Breaches of Employment as Managing Director

157 I note at this point the following about the way R&B and the plaintiffs by Counterclaim have presented their case in relation to the conduct by which it is alleged Mair breached the SUHA, the ESA and fiduciary duties in paragraph [8] and Schedule B of the van Laack parties' Closing Submissions dated 24 May 2016.

158 I also note that Mair's submissions point up a significant number of instances in which there are deficiencies in the evidence said by R&B and vLAH to support their allegations, including to support allegations of breach by Mair as referred to in Schedule B of the defendants' closing submission dated 24 May 2016.

159 R&B and the van Laack parties' case was advanced on the basis that Mair's employment was summarily terminated on 27 March 2015 at common law, and that termination at common law was justified as a result of the many breaches alleged by R&B and the plaintiffs by counterclaim and facts asserted to be referenced in Schedule B of the defendants' closing submissions and further addressed by the defendants in those closing submissions.[231]

160 However, although the van Laack parties' submissions, in particular Schedule B of their Closing Submissions, make specific reference to the alleged breaches against Mair, which are

230 Ibid [310].
231 Defendants' Closing Submissions, 24 May 2016, [8].

principally referred to in paragraph 9A of the Defence to Amended Statement of Claim and Counterclaim dated 17 September 2016 (including Schedules 1, 2 and 3 referred to therein), I note that the van Laack parties' submissions, after close of evidence, did not in any discrete or identifiable way make reference to each of the individual pleaded allegations of breach by Mair. Rather those submissions largely appeared to roll up a number of pleaded breaches and in that manner address their case more globally.

161 As a result, save as to the defendants' and counterclaimants' general allegations referred to below, I was not assisted by any explanation of how it is asserted that the evidence referenced in Schedule B establishes the breaches alleged in paragraph [9A] of the Defence and Counterclaim and elsewhere in the van Laack parties' pleadings.

162 Further, in relation to the R&B and plaintiffs by counterclaim's case seeking to establish Mair's breaches, I do not consider that R&B and vLAH's references to a large number of materials and items of evidence, the import and probative value of which were unexplained by the defendants, displaces the direct and persuasive evidence of Mair, Poulakis and Hewamanna as to the true extent to which Mair devoted his time and energies to LRG, and its associated activities.

163 As observed, in very many instances, the defendants identify a very large number of documents cross-referenced as 'key evidence' relating to allegations in the proceeding. A cardinal example of this is found in the Defendants' Closing Submission, 24 May 2016 in 'Schedule B – Summary of Evidence – Mr Mair's breach of Shareholders Agreement, the Mair Employment Agreement and his fiduciary duties'.

164 As I have pointed out, the bulk of these references in Schedule B are unexplained either by any specific submission, or otherwise, as to precisely what part or parts of the documents are relied upon and how they are relied up by R&B and the plaintiffs by counterclaim.

165 One consequence is that I have found the van Laack parties closing submissions referencing Schedule B, to be of little ultimate assistance in understanding how the very large number of evidentiary references and vast volumes of documentation referred to are asserted to establish Mair's (and Balnaring) breaches in respect of which they are cross-referenced.

166 Illustratively, as just one example, the submission by R&B and the van Laack parties that a large number of contemporaneous documents assist in establishing that Mair failed to be transparent with von Daniels about his involvement with LRG is not made out, for example, by the particular documents' cross-references in the defendants' Closing Submission.[232]

Mair Refused to Obey a Lawful Direction

167 R&B allege that:

> Wrongfully and in breach of 3.1.3 of the NM Employment Agreement, Mr Mair refused to comply with the Reasonable Direction.[233]

168 R&B assert that the suspension constituted a reasonable direction under cl 3.1.3 of the ESA and by failing to comply with that direction Mair was in breach of that clause.

169 It is clear from the terms of cl 3.1.3 that the power to direct must be exercised reasonably. It is equally clear from the language of the ESA in cl 3.1.3 that that clause does not extend to a direction to suspend from employment but rather to the way in which work is to be performed.

170 I accept the Mair submission that the contractual context in which a direction pursuant to cl 3.1.3 is given is informed by the terms of the ESA and the relationship of the parties to that employment contract. Here, Mair was the Managing Director of R&B, the several companies in the R&B Group, and was also the controlling mind of Balnaring. In the circumstances I accept that it was the reasonable and legitimate expectation, of both Mair and Balnaring, and vLAH and vLG, that Mair would act and continue to act as Managing Director of R&B and his remuneration would be linked to a degree to the performance of his work.[234]

171 Given these matters, I consider that the direction issued by Potyka to Mair on 27 March 2015 was unreasonable, inconsistent with Mair's obligations under the ESA, and of no effect. It was beyond the power to direct in cl 3.1.3, and at common law, and directed Mair in a way obviously inconsistent with Mair's obligations under the ESA and the SUHA by requiring him:

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232 Defendants' Closing Submission, 24 May 2016, paragraph [61], Footnote [185].
233 Defendants' Defence to the Amended Statement of Claim dated 17 September 2015, [8B]; MS20.
234 ESD, cl 4.7; MS1905.

> "*not return to the office*", not "*perform any duties or otherwise make contact with the company's employees, customers or other business partners while [he was] suspended*" and not "*perform any activities in relation to the company until the investigation has concluded and [he had] been informed of the outcome*".

172 I accept Mair's submission that there was no evidence adduced at trial to establish that Mair refused Potyka's direction of 27 March 2015, nor is there an appropriate basis to infer that Mair refused to obey that direction.[235]

173 Furthermore, subsequent to Potyka's instruction to Mair on 27 March 2015, referred to above, not to leave his office, I am satisfied that Mair received no subsequent instruction or direction to leave the R&B Collin Street office.

174 Mair's evidence was that throughout the period between 11.30am and 7.30pm on 27 March 2015 he co-operated with requests made to him by Potyka and that he facilitated access to his computer and that Mair met with Potyka and others. This evidence was not contradicted.

175 I also accept that the decision by the van Laack parties to dismiss Mair had been made before 27 March 2015[236] and had in fact been decided, at the latest, the day before in Sydney.[237]

176 Most significantly, I am also satisfied that the decision to dismiss Mair, made by R&B and vLAH, was based on information received by Potyka from John Mutton ('Mutton') and Nathan Snare ('Snare'). Those persons are said to have informed Potyka that Mair was in fact the CEO of LRG rather than a non-executive director, and that Mair had advantaged and preferred LRG when securing the QvB leases.[238]

177 However ultimately Mair clearly and confidently denied that he was the CEO of LRG or that he had preferred or advantaged LRG in relation to QvB leases[239] and I consider established his position on these matters at trial.

178 Snare gave no evidence at trial about the allegation that Mair had favoured LRG in relation to the QvB lease and no basis was put forward for Mutton's assertion that Mair was the CEO of LRG. On this issue, including because there is no persuasive evidence to the contrary, Mair's

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235 MS182.
236 T699.27-T700.1].
237 T699.7-T700.2.
238 T707.23-31 and T708.1-8.
239 MS282, [45].

evidence is accepted.

179 I also consider that R&B and vLAH, by their representatives Neizert and Potyka, in the company of their several legal representatives, forensic Accountants, IT personnel and security staff sought to intimidate Mair at the R&B Business Offices on 27 March 2015.

180 For the above reasons I reject R&B's allegation that Mair refused to obey a lawful direction on 27 March 2015.

Mair Was An Employee – 'a very senior employee'

181 The defendants to the Termination case submit that Mair was guilty of significant and substantial breaches of his employment obligations and in this regard that Mair was an employee of vLAH. The defendants assert that Mair was the Managing Director of vLAH and the defendants contend that Mair's retention of a 20 percent interest in R&B enabled him to participate in the profits of R&B and Herringbone and that this constituted remuneration for managing vLAH.[240]

182 However, I note that the defendants do not plead that Mair was an 'employee of vLAH'.[241] They plead that Mair was a Director of Balnaring, R&B, RBG, Boston Brothers, Baubridge & Kay, Herringbone and vLG, and that Mair was Managing Director of the Group. The defendants plea in that regard is that Mair was employed by R&B as Managing Director of the Group, pursuant to the ESA.[242]

183 Mair submits that he was not an employee of van Laack and also submits that prior and subsequent to the sale pursuant to the SPA, he was an employee of R&B. Such was the significance of Mair's ongoing employment with R&B to the van Laack parties that his employment agreement was annexed to the SPA.[243] That employment agreement was with R&B.[244] There was no suggestion by van Laack then or now, that Mair was to be employed by vLAH.[245] Further Mair submits, and gave evidence to substantiate that vLAH insisted that

240 Defendants' Closing Submissions, 24 May 2016, [12].
241 The defendants by [1M], [1BB], [1CC] and [1DD] of the TP–ASC.
242 TP-Defence, [2D]-[2F].
243 MS1654.
244 MS1655, Recitals.
245 ASOC [1A]; MS [3]; Defence [2F(a)]; MS17.

Mair retain his shareholding and remain as managing director for a minimum period of two years.[246] The employment terms that were agreed between the parties were central to the bargain being struck.

184 Accordingly, I do not consider on the defendants' pleaded case, nor the evidence, that it has been established that Mair was an employee of vLAH.

Involvement with Luxury Retail Group and Establishment of Furla

185 VLAH criticise Mair in relation to his involvement in LRG and in particular in connection with the distribution of Furla products, alleging that Mair's activities in this regard conflicted with cl 5 of the SUHA, cls 3.1 and 3.2 of the ESA and his fiduciary duties to both vLAH and vLG.

186 In essence, the gist of RBG and the van Laack companies' allegations of misconduct are that Mair wrongfully used the financial, personal and physical resources and knowledge of the Group, vLAH and Herringbone to assist his LRG business, including Furla.

Mair Informed von Daniels about the Furla Distribution Agreement

187 Mair's evidence was that he informed von Daniels on 2 December 2013 that he intended to enter into the Furla distribution agreement. Von Daniels denies that he was so informed, and vLAH submit that it is probable LRG entered into the relevant arrangements with Furla (including the LRG distribution agreement) before December 2013. VLAH submits that von Daniels' evidence that Mair did not raise these planned business plans with him on 2 December 2013 accords with the documented contemporaneous communications and actions in relation to the establishment of the LRG and Furla business relationships. The defendants' refer to the Furla Agreement which is dated 15 November 2013 and 4 December 2012.

188 It is clear that Mair sent von Daniels the 'safe travels' email on 10 December 2013.[247] The flight to which Mair refers in his email of 10 December 2013 mentioning the Furla initiative, occurred earlier than 10 December 2013.[248]

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246 Plaintiff's Closing Submissions, [38].
247 MS2524.
248 MS268, [5].

189 I am satisfied that Mair informed von Daniels of his plans to enter into the Furla Distribution Agreement. This occurred on a flight from Perth to Melbourne on 2 December 2013.

190 I do not accept, as asserted by vLAH, that von Daniels' version of events accords more readily with the documented contemporaneous communications and actions of Mair and von Daniels. As I have elsewhere explained, the circumstances relied on by vLAH to support its case in relation to contemporaneous support for von Daniels' recollection that Mair did not tell him about the Furla Distribution Agreement on about 2 December 2013 are namely the existence of the Furla Agreements dated 15 March 2013 and 4 December 2014, and LRG's possible purchase of stock for Furla in late November 2013.[249]

191 I accept Mair's evidence that in early December 2013, in a conversation he had with von Daniels on a flight from Perth to Melbourne, the following was discussed:[250]

> MR UPJOHN: The actual day? We don't know which day it is.
>
> …
>
> On the flight back did you talk just about Rhodes & Beckett business or did you talk about other business as well?---No, on the flight back we talked about Rhodes & Beckett, we talked about Herringbone but we also talked about an opportunity that I had been presented with. I recall it well because it was something that I was apprehensive about at the time. In late November Mr Poulakis - in late October 2013, Mr Poulakis had approached me with the concept of investing together in the franchise for Furla in Australia. We had spent a little bit of time on that during November 2013 and by the time I met Mr von Daniels we were at a point where we had been offered the franchise, or rather, distribution contract. I was very eager to discuss it with Mr von Daniels because I had no experience in distribution agreements. Mr von Daniels did. He previously was the distribution of the Burberry luxury brand in Germany for some time and Van Laack itself uses distributors around the world where it doesn't wish to open retail stores.
>
> What did you allege about the contract and what did he allege?---I presented it to him. I had a printed version. He didn't read the printed version. I used it to refer to key facts. I put to him the fact that it was an opportunity to invest a relatively nominal sum of money, around $100,000 - - -
>
> HIS HONOUR: It would be much easier, Mr Mair with this and all conversations, rather than alleging "I put it to him" rather than using any euphemism or summary, if you could allege, "I said to Mr von Daniels" and "Mr von Daniels said to me", it will be much easier to understand what's going on?---I will try to do that, your Honour.
>
> MR UPJOHN: If you can allege I said that and he said that.
>
> You physically had the contract?---I physically had the contract. As I said, I had it so I could refer to some areas that were - I was quizzical about. I explained to Mr von

249 Defendants' Closing Submissions, [30]-[32].
250 T64-T67.

> Daniels the structure of the investment and I explained to him or asked him his counsel on two or three key points in the contract.
>
> What did he allege to you about those?---Mr von Daniels - - -
>
> HIS HONOUR: Wouldn't it be more sensible to deal with what the two or three key points were, one by one, and then ask what the response was, Mr Upjohn?---The two or three points related to tenure. It was a long contract. I wasn't sure it was long enough. To margin, we had asked Furla to effectively guarantee a margin based on the set price for the market and around effectively what it was like to work with a master distributor. Mr von Daniels' answers were that he felt the term was very long, he wouldn't give that type of term. The term was seven years plus seven years and he felt five would be sufficient if he were the distributor. He felt the concept of distributor guaranteeing margin again as a business with distributions was very attractive to us as a recipient and he gave me some insight into his dealings with Burberry as a distributor and some forewarning that working with a large corporation isn't necessarily that easy.
>
> MR UPJOHN: Did he make any objections to you at all about doing this at the same time as being the Managing Director of Rhodes & Beckett?---None whatsoever.
>
> Did he allege anything about the interests of Rhodes & Beckett and your interests separately from Rhodes & Beckett?---None whatsoever.
>
> After that flight what did you do with the contract?---After the flight I recall dropping Mr von Daniels back to his hotel and I offend Mr Poulakis and relayed the conversation. I was upbeat because I respected Mr von Daniels and it had allayed my particular concerns in participating in the investment and the contract was subsequently executed some days or weeks later.
>
> The next conversation I want to take you to is during a visit of Dr Potyka to Australia in late July 2014. What was the purpose of Dr Potyka's visit?
>
> ---Dr Potyka's visit was, I think, twofold. One was to finalise the audit for the financial year. We had some residual issues relating to Herringbone inventory that had been problematic and he came to Melbourne to sign those off; and then secondly, to gain an update as to how the business was performing and to understand the development of the business and the development of the new stores.

192 I note that von Daniels agrees that he sat next to Mair on this flight[251] but von Daniels denies that the conversation took place.

193 In my view Mair's record, in effect, of the discussion in his email dated 10 December 2013 headed 'Safe Travels', provides sufficient contemporaneous corroboration to establish Mair's evidence as more probative on this issue.[252]

194 At trial, Mair was only able to produce a PDF copy of the email of 10 December 2013. The defendants sought the metadata relating to that email. Mair was unable to provide that

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251 MS787, [66].

252 MS2524.

metadata. Mair was sought to be discredited on that basis. However in re-examination, Mair explained that his computer only retains six months of sent items and that everything else was retained on the vLAH server. Mair also explained that on 27 March 2015, the date of his dismissal, Mair decided to print to PDF specific emails that he thought might be of importance.[253] The 'safe travels' email of 10 December 2013 was one such email.

195 Under cross-examination, von Daniels agreed that, save for the passage relating to 'Furla', the 'safe travels' email was an accurate reflection of what he and Mair had done and discussed in the days preceding.[254]

196 Mair was not cross-examined about his recollection of the conversation of 2 December 2013. It was not put to Mair that he fabricated the email of 10 December 2013, nor that it was not sent.

197 I am satisfied that on 2 December 2013 Mair discussed the 'Furla' business initiative with von Daniels, as I consider is corroborated by Mair's email of 10 December 2013. I am also satisfied that von Daniels took no exception to and made no complaint about the Furla related enterprise Mair discussed with him. Given that the relevant Perth to Melbourne flight on which von Daniels and Mair travelled appears to have taken place on 2 December 2013, and that Mair's evidence was that his conversation with von Daniels occurred on 10 December 2013, I am also satisfied that Mair was simply confused and I am ultimately satisfied that conversation actually occurred on 2 December 2013.

198 In preferring Mair's version of events in relation to him informing von Daniels of his plans in relation to Furla, and by that conversation in substance the proposed LRG business, I consider the relatively contemporaneous email of 10 December 2013 is of persuasive importance in relation to the substance of Mair's version of events, both because of its timing and also its specific reference to the Furla business, which on the van Lack parties' case, Mair was being clandestine.

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253 T505.21-25.
254 T655.14-16.

Potyka's Visit in July 2014

199 Potyka came to Australia in July 2014. During his visit, Potyka accompanied Mair to the Melbourne Emporium, viewed the Herringbone store, the Rhodes & Beckett store, and the Furla store which was at that time being fitted out.

200 On that same day, Mair and Potyka had lunch together. Mair's evidence was that they talked about Furla and Mair's plans for the future of that business.[255]

201 Poulakis corroborated Mair's evidence that he informed Potyka about the Furla business. Poulakis also gave evidence that Potyka was enthusiastic about the plans which Mair had for Furla.

202 Poulakis also gave evidence that, in the meeting and discussion with Potyka, Potyka said that the location of the Furla business in The Melbourne Emporium was 'wonderful'.[256]

203 Poulakis also gave evidence that, in about July 2014, Potyka and Mair met and discussed, amongst other things, the Furla business and how it was 'coming along'.[257] Poulakis was not challenged in relation to this evidence.

204 Mair also gave evidence that he inspected the Furla store in the Melbourne Emporium shopping centre with von Daniels in about November 2014, and that on this occasion, they talked about the trading performance of Furla.[258]

205 Mair's evidence was that he also accompanied von Daniels at Furla's store in Westfield, Sydney,[259] also in November 2014, and on that occasion he introduced von Daniels to Ms Hogan, Furla's Store Manager.[260]

206 There is no dispute on the evidence that in November 2014 von Daniels was in Australia touring the van Laack Australian operation.[261] Further, Mair was not challenged about the statements he made in evidence in relation to von Daniels' visit to the Melbourne Emporium

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255 T70.18-29.
256 MS260, [16].
257 MS260, [17].
258 T73.18-26 and T73.19-31.
259 T75.15-16.
260 T75.18-20.
261 T73.11-26.

and Westfield, Sydney and the various very specific conversations which Mair detailed in his evidence in relation to discussions with von Daniels on those occasions.[262]

207 Further, I am satisfied that Mair, and von Daniels and Potyka were involved in a telephone conference call which involved a discussion about LRG or Furla in January 2015. I am satisfied, for the reasons I have mentioned below and for the reasons separately expressed about the greater weight I consider should ordinarily be ascribed to Mair's evidence, that Mair's evidence about this call is preferable to von Daniels' evidence.

208 Von Daniels equivocated about whether a relevant email had been sent[263] and that the email of 11 January 2015 was wrongly attributed to an earlier date of receipt.[264]

209 Mair's evidence, by contrast, was unequivocal and clear in the recollection which is conveyed. Mair gave evidence that he recalled the telephone conference which took place in January 2015 because he was upset about the topic which was discussed at that conference, namely the way that LRG was discussed by von Daniels and Potyka. I consider, in these circumstances, Mair's evidence is in this instance likely to be more accurate for this reason alone; that is Mair was particularly invested in this conversation. Accordingly, I am satisfied that the conference call in January 2015, which Mair referred to in his evidence,[265] took place sometime in early January of 2015.

210 I do not accept von Daniels' evidence that he did not participate in a telephone conference about LRG or Furla at about this time.[266] Furthermore, von Daniels' shifted on this issue from evidence that he was involved in a telephone conference in January 2015[267] to his evidence in which he then described a 'conference of emails'.[268]

211 Further, on 11 January 2015 Mair sent an email to von Daniels provoking von Daniels' response that Mair was utilising the vLAH email address[269] referring to himself as "Director"

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262 T74.18-26.
263 Von Daniels, [104].
264 MS786, Von Daniels, [63].
265 T261.30-T262.6; T264.20-23.
266 T667.22-23.
267 T659.5-6.
268 T667.22-23.
269 MS3959-3959A.

of LRG.

212 Mair's email of 12 January 2015, which responded to von Daniels' email of 11 January 2015 referred to above, was in the following terms:

> Apologies, that was a silly mistake due to my tiredness – nothing else intended.
>
> I was working from home on my home computer and didn't delete the signature when I switched and sent the email from our rhodes & beckett email account rather than my personal account.
>
> There are no new developments or news in that regard.
>
> As you are aware I am able to have two non-executive directorships in addition to my work. I have previously had two, being SneakerBoy (not since mid last year thought) and Luxury Retail. Luxury Retail is my vehicle for owning a share of the Furla business in Australia – and both of these involvements is something openly discussed in the past with yourself and Sebastian.
>
> Naturally there is no overlap (whatsoever) with VLAH, my 'job' or my focus on doing what I need to for our group.
>
> I stepped away from Sneakerboy last year as I didn't want the time distraction, and I have not accepted several other very nice directorship offers in recent months – as I cannot afford the time and 'head space' right now. I need to make VLAH much better first.
>
> I hope this clarifies the situation and naturally I am happy to discuss this further at any time.[270]

213 Under cross-examination von Daniels refuted the statements made by Mair in his email of 12 January 2015.[271] However, it is notable that von Daniels did not provide an email response to Mair's above email of 12 January 2015 contemporaneously challenging what Mair had said in Mair's email, including about Mair's earlier discussions with von Daniels about Mair's involvement in both LRG and Furla. This email is a further example of contemporaneous documentation which corroborated Mair's version of events on disputed matters.

214 Mair's evidence was also that, on at least three occasions when he and von Daniels had discussed LRG, von Daniels only 'challenge' was conveyed in von Daniels reply to Mair's email of 12 January 2015. Von Daniels attempted to explain the very limited degree to which he had taken issue with being informed that Mair was involved in the businesses of LRG (Mair's vehicle for the interest he owned in Furla) and Furla was that Mair had 'calmed' his

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270 MS3960.
271 T666.5-9.

concerns by emphasising that he was a 'non-executive' director.[272]

215 I consider, on the basis of the above evidence from Mair and Poulakis, that von Daniels and Potyka were, from about early December 2013, informed of Mair's involvement with Furla and LRG and that von Daniels' only concern or issue in relation to Mair's involvements in these other businesses was communicated by von Daniels as referred to in Mair's email of 12 January 2015.[273]

Informing Potyka and von Daniels that his Position was Non-Executive[274]

216 The plaintiffs' by counterclaims allege that in about mid-2014 Mair wrongly informed Potyka and von Daniels that his position with LR1 was a non-executive position, and in doing so, informing vLG as to that matter which Mair knew, and thereby LR1 knew, amounted to Mair not acting in the best interests of vLG, R&B and the defendants also allege that by this conduct Mair was seeking to gain a benefit for himself and LR1 in breach of Mair's fiduciary duties to the Group, vLAH, Herringbone and vLG.

217 I am satisfied, however, that Mair was in fact a non-executive director of LR1 and LRG. On the evidence Mair was not an employee of LRG and, in my view, it has not been established that Mair had any executive functions in the management and administration of that company.

218 Further, as I have detailed in relation to Mair and Poulakis' roles and relative involvement in LR1 and LRG, the day to day management and administration of LR1 and LRG was undertaken by Poulakis.

Conclusion on van Laack's Knowledge of Mair's Involvement with LRG and Furla

219 Given the extensive number of times on which I accept Mair informed von Daniels, and on occasions Mair and Poulakis informed Potyka, of Mair's involvement with and via LRG with the Furla business in Australia, and the sole instance upon which I accept von Daniels took some limited issue with Mair's role in that regard, I accept Mair and Poulakis' evidence of

272 T668.3-11.
273 MS3959-3960.
274 Defence, [9D] and [9E].

the instances upon which Mair claims he informed von Daniels and Potyka about his involvement in Furla and LRG.

220 I also accept Mair's evidence about the very limited extent to which his involvement in LRG and Furla was 'challenged'. Furthermore, I consider it to be telling against von Daniels' position and the R&B and van Laack's case on this issue, that von Daniels did not take up Mair's invitation to discuss the matter of Mair's involvement with LRG and with the Furla business in Australia.[275]

221 I am satisfied that from about early December 2013 von Daniels and Potyka knew of Mair's investment and his directorship in LRG. I am also satisfied that, upon becoming aware of Mair's involvement via LRG with Furla, it was not until for the first time on 12 January 2015 that von Daniels, R&B or vLAH were concerned to take any action, including interrogating or requiring further details from Mair about such matters.

222 In my view, Mair's involvement with LRG and Furla did not place him in conflict with either cl 5 of the SUHA or cls 3.1 or 3.2 of the ESA, nor in breach of any fiduciary or statutory duties.

223 Similarly, Mair's involvement and efforts in relation to Furla, and his position as non-executive director of LRG were not in breach of his obligation to R&B as its Managing Director, as informed by cls 3.1 and 3.3 of the ESA.[276]

224 Mair was required by cl 3.1 of the ESA to, amongst other things:

> *3.1.2 faithfully and diligently perform his duties and exercise his powers consistent with his office that may be assigned to him by the Company at any time;*
>
> *3.1.5 use his best endeavours to promote the interests of the Company;*
>
> *3.2 unless absent on leave as provided in this document or through illness or involuntary injury the Executive shall devote the whole of his time and attention during normal working hours and at such other times as may be reasonably necessary to the business and affairs of the company;*
>
> *3.3 the Executive may hold up to non-executive board positions that do not directly compete with the group.*[277]

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275 T668.15-22.
276 MS1904.
277 MS1904.

Mair - Notice of Furla – Obligation to Inform

225 R&B's allegations are heavily focused on alleged breaches by Mair of his obligation to R&B which it asserts arise as a result of Mair establishing and conducting the LRG business absent what the defendants assert was prior and fully informed consent to the Group and also to Herringbone, vLAH and vLG.

226 I find as I have earlier outlined that, by early 2013, Mair did inform von Daniels and Potyka of his LRG and Furla related plans.

227 In any event, in my view Mair was neither obliged to obtain prior and fully informed consent in relation to his proposed initiative in relation to Furla or involvement with LRG as alleged by R&B, nor in my view did Mair act in breach of any obligation or duty as a result of his involvement with LRG and Furla.

228 Further, I consider that the evidence establishes:

(a) Poulakis incorporated LR1 ('Furla') on 13 November 2013. Furla was incorporated for the purpose of operating the Furla franchise in Australia,[278] and was first registered on 15 November 2013;

(b) the first Furla stored opened in late 2013;[279]

(c) between August 2014 and March 2015 three more stores were opened;[280]

(d) on 12 February 2015, Mair and Poulakis incorporated LRG so that it could operate as a holding company. LRG also owns the businesses Folli Follie Pty Ltd (Follie Follie), Sneakerboy Pty Ltd, Sneakerboy IP Pty Ltd and Sneakerboy Retail Pty Ltd ('the Sneakerboy businesses');[281]

(e) LRG employed Jessica Dizdarevic in the position of part-time General Manager and from January 2015 and then as LRG's full-time General Manager. From late 2013, Ms Hogan was employed as the full-time Brand Manager of Furla.[282]

278 MS159, Mair. [174], [4], MS256.
279 MS160, Mair. [176], [4], MS256.
280 MS160, Mair. [178], [4], MS256.
281 MS160, Mair. [175] and MS161, Mair, [182].
282 MS163, Mai.r [197]-[198].

(f) In August 2014, LRG opened a second Furla store in Melbourne and two further stores in Sydney.[283] Noelle Sleiman was appointed as LRG's full-time National Operations Manager responsible for the day-to-day management of the four Furla stores and the retail personnel at those stores, and Kenya Moore was appointed as Luxury Retails' Warehouse Manager at Port Melbourne, Victoria from January 2014;[284]

(g) when the third and fourth Furla stores opened in late 2014, LRG added a Visual Merchandising Manager, Mr Cannata, and Retail Co-ordinator, Ms Bouffler, to the team.[285] In addition to the retail staff, these employees, along with Poulakis, were LRG's key employees;

(h) I consider that Mair's involvement in LRG in the period November 2013 to March 2015 to be modest and limited to attendance at Luxury Retail Board meetings, business and retail leasing strategy and occasional related tasks.[286]

(i) Under cross-examination about a Furla store event, Mair's evidence was that he spent "a very little portion of my time backing tasks that Poulakis wasn't equipped to handle. All of the front-end work for this business and day-to-day work was done by Poulakis";[287]

(j) I consider that Mair's evidence as to the extent of his involvement in LRG and the business of which it became the holding company, Follie Folie and Sneakerboy and the Luxury Retail business' Furla, was consistent and convincing including in the face of the email communications asserted to be to the contrary effect put to Mair during cross-examination. Further, I consider that such communications were short and would not have been time consuming to write and were largely concerned with fairly simplistic instructions to LRG employees' operations;

(k) I accept Mair's evidence that he was not responsible for design, product handwriting, creative direction, store appearance, photo shoots, buying, product development,

283 MS160, Mair, [178].
284 MS163-164, Mair, [199]-[202].
285 MS163, Mair, [200]-[201].
286 MS164, Mair, [203].
287 T160.20-23.

overseeing retail operations or human resources.[288]

(l) Further, I accept Mair's evidence that in essence he and Poulakis shared responsibility for the financial aspects of the business and overseeing the supply chain;[289]

(m) In relation to the weekly Furla activity plans which Mair sent to LRG employees,[290] Mair's evidence was that such activity plans were prepared by Ms Sleiman in discussion with Poulakis.[291] I accept that Mair and Poulakis would discuss LRG business issues on a Friday night or over the weekend,[292] and Mair would write required emails often conveying what Poulakis wanted communicated to staff, which for Mair amounted to 'a very short task' and effective for Mair because Mair's 'email skills are a lot clearer' than Poulakis';[293]

(n) Mair's evidence on the above matter was, I am satisfied, typical of what occurred and exemplified by reference to the email of 13 November 2014 from Mair to Ms Dizdarevic. Mair had a conversation the evening before that email with Poulakis about how the week was going, what the updated activity plan created by Ms Sleiman looked like, and the fact that a note to the stores was warranted. Mair observed that 'technology is not Poulakis' friend so Mair quickly wrote the note the night before and sent it in the morning'.[294]

(o) Further, in relation to the timing of the email which was sent at 8.54am, Mair's evidence was that he did not like sending emails to staff outside of hours because 'it's a bit unfair', so he saved the emails he wrote the night before as a draft and pressed send in the morning.[295]

229 In my view it is of significant importance and weight that, in addition to Mair's evidence, the plaintiff also put on evidence in chief from Poulakis and that Poulakis' evidence on these

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288 T532.27-31, T533.1-16.
289 T533.10-15.
290 see, for example, T157, T292.1-4.
291 T534.6-9.
292 T534.13-20.
293 T292.22-27; T534.18-19.
294 T157.5-12.
295 T157.10-12.

operational matters was not challenged in cross-examination.[296]

230 I emphasise again that Poulakis' evidence was corroborative of Mair's evidence and was, as I have detailed elsewhere, to the effect that he fully undertook and ran the Furla and LRG businesses.

231 Accordingly, I reject the defendants and R&B's claims that in breach of the ESA, the SUHA and his fiduciary duties, Mair and Balnaring established and conducted the business LR1 and LRG. I also reject the defendants' allegations that Mair devoted his time and efforts to the LR1 and the LRG businesses in breach of the ESA, the SUHA and other duties, and to the detriment of the R&B business, vLAH and Herringbone.

Operation of LRG vis-à-vis R&B

232 In the setting in which the operation and management of LRG and the R&B Group was undertaken,[297] it was also in my view appropriate and lawful for LRG to engage certain employees of R&B. I am not satisfied in the circumstances established by Poulakis, Mair and Hewamanna's evidence that it was unlawful, inappropriate or in breach of Mair's obligations and duties under the ESA, for the employees of R&B to agree to be engaged independently to work for LRG.

233 I accept in this regard that Mair identified and sought to take advantage of the benefits arising from this arrangement for, both R&B and LRG. Mair's evidence in this regard was as follows:

> 237. During my tenure in the R&B Business, I was able to use my relationship with the Luxury Retail Business as leverage with landlords to secure the following:
>
> (a) At Melbourne's Emporium, Furla Co took up a key tenancy that the landlord required filled. In return, R&B was afforded an annual rent approximately 33% (or $200,000) lower than the comparable nearby Brooks Brothers tenancy, and was paid a fit-out contribution of $550,000 plus GST. The term-of-lease benefit to R&B is around $1,400,000 in reduced rent and $300,000 in extra capital contribution when compared to Brooks Brothers.
>
> (b) At Chadstone Shopping Centre in Melbourne, on the back of the Luxury Retail Business relationship, I was able to secure a prime new

296 MS255-265, MS333-339.
297 MS186-MS191; MS218, [12]-[15] and MS343.

location for R&B at a starting rental (per metre) 15% lower than the ending rental on the old site (in an appreciating market) plus a capital contribution equal to 9 months' rent ($360,000) (compared with a centre-average of only 4 months). The term-of-lease benefit to R&B is in the order of $480,000 in reduced rent and $200,000 in extra capital contribution.

(c) The Luxury Retail Business relationship was also key to securing Herringbone its first lease at Chadstone. When I first approached the landlord, I was told that there was a limited desire for another shirt brand, and especially not for locations in the main premium brand section of the mall. Despite this, I was able to leverage off the Furla Co relationship to secure a lease. Moreover, I was able to achieve a below-market rental and a $160,000 capital contribution. The term-of-lease benefit to Herringbone is in the order of $360,000 in reduced rent.

238. Further, during 2013 and 2014, the Luxury Retail Business, primarily through Theo Poulakis (who at that time had no interest in the R&B Business and never had any interest in Herringbone), re-worked the "brand DNA" of both R&B and Herringbone. "Brand DNA" is a key feeder for store design, merchandise design and marketing. In effect, Luxury Retail Business provided R&B and Herringbone with consulting services which, had they been sourced from the market, would have cost in the range of $70,000 to $100,000. The output of the brand DNA process included clear visual documents outlining the different target customers of each brand, the design cues (signature design handwriting of each brand) and the language and tone of voice for each brand. My understanding is that these documents are still in use today.

239. In August 2012, when van Laack integrated Herringbone into the R&B Business, the Herringbone brand was too similar to the existing R&B brands. This meant that the brands (particularly Herringbone and R&B) needed to be re-positioned. This involved, in 2013 and continuing into 2014, a project was conducted whereby new store design concepts for each brand were developed. Theo Poulakis of the Luxury Retail Business played an integral part in this process as 'lead consultant' and liaised closely with architecture firms and I in conceptualizing, developing and executing the new store designs. Theo's role required him to visit stores locally and interstate, review overseas concepts while travelling and providing reports and feedback on specific projects. The Luxury Retail Business did not charge the R&B Business or Herringbone for Mr Poulakis's time or costs.

240. Relatedly, in 2014 a greater focus was placed on the Herringbone and R&B brands' marketing campaigns. This was done for the purpose of accelerating the separation in positioning the competing brands. The Luxury Retail Business, through Theo Poulakis, provided consulting services in relation to the creative positioning of each of the brands. Among other things, he was directly involved in the styling of photoshoots, the selection of outfits, and acted as lead stylist for the R&B shoot in New York City in December 2014. Again, neither the Luxury Retail Business nor Mr Poulakis charged for his time or the costs involved (including the travel costs).

241. Further, the Luxury Retail Business provided the R&B Business and Herringbone with extensive, free of charge, warehousing during 2014. This was valuable for Herringbone because it carried a large volume of aged merchandise (some 50 pallets for the better part of six months). In addition to storage space, Luxury Retail Business employees provided support to

Herringbone by loading and unloading stock.

242. Further, on 15 August 2014, the Luxury Retail Business provided $100,000 to allow the R&B Business to meet its payroll obligations the following Monday. That amount was eventually repaid (without interest) on 17 September 2014. The transactions were as follows:

(a) On 15 August 2014, LRG lent Herringbone $50,000 to allow Herringbone to process its payroll the following Monday.

(b) On 15 August 2014, LRG leant R&B $50,000 to allow R&B to process its payroll the following Monday.

(c) On the 20th of August 2014 Herringbone repaid its $50,000 loan.

(d) The LRG 'account' remained in credit (of around $25,000) for the following month.

(e) On 16 September 2014 LRG loaned R&B $20,000, as R&B had been unable to process its full payroll the day prior.

(f) R&B repaid the $20,000 a day later (on 17 September 2014).

(g) On 5 November 2014 LRG loaned $75,000 to R&B. This sum was repaid on 13 November 2014.

243. All funds we transferred to and from vLAH via the R&B Business bank account with the CBA, and recorded in the books and records of R&B and LRG.

244. The R&B Business and Herringbone received these benefits from the Luxury Retail Business without charge and without the need to reimburse. The only exception this was, from December 2014, the Luxury Retail Business charged vLAH storage at a market rate for large volumes of Herringbone and Baubridge and Kay business shirts stored at the Luxury Retail Business warehouse.

245. I know that Dr Potyka was aware of these benefits because he visited the warehouse in March 2015 and discussed the volume of merchandise and the overflow held in the Luxury Retail warehouse.

234 Similar evidence was given and is addressed below in relation to LRG's and R&B's contributions and the way these were accounted for.

235 Mair was not in any substantial way challenged on the above evidence.

236 In my view, Mair's implementation of the employment structure to which Mair refers above was within the scope of his authority as overarching Managing Director of R&B and the R&B Group. It was pursuant to cl 3.1 of the ESA, as the parties contemplated in cl 5.1 of the SUHA, and in accordance with the normal role of a Managing Director and did not contradict the terms of the ESA.

237 I accept that the work of the R&B employees who worked from time to time for LRG, namely Hewamanna, Noelle Slieman, Elei Baillieu, Jenny Fang and Ricky Lai, predominantly undertook sporadic work for LRG and did so predominantly outside normal working hours.[298]

238 I also accept that on the occasions where it happened that any of the R&B employees working for LRG did have to undertake work during normal working hours for LRG, they were directed to make up that time for R&B.[299]

239 I am satisfied that ultimately LRG's engagement of the R&B employees Hewamanna, Noelle Slieman, Elei Baillieu, Jenny Fang and Ricky Lai did not materially interfere with the performance of their duties for R&B.

240 Further, I am satisfied that the work culture which Mair and Poulakis and Hewamanna sought to ensure existed, and in fact achieved, was one in which R&B's business and the tasks which needed to be done to serve R&B's interests were prioritised.[300]

241 Further, those employees who could give evidence as to what was really happening at the 'work face' at LRG and R&B, for example Baillieu and Lai, gave evidence which amply confirmed the above matters.[301] Hewamanna was not challenged on his evidence in this regard and Lai was not sought to be called.[302]

242 Furthermore, I wholly accept for the above reasons, and because there is no evidence to the contrary, the Mair submission that any work performed by R&B employees from time to time for LRG did not interfere with or have any negative effect whatsoever on the performance of their duties and obligations for R&B or any other R&B Group company.

The Herringbone Agreement

243 In or about August 2012 von Daniels asked Mair to take over management of the Herringbone business[303] and Mair agreed to do so in exchange for a share of Herringbone's

298 MS186-MS191 (Mair); MS22A [45] (Hewamanna); MS343 [18]-[24] (Lai); MS352 [17]-[20] (Baillieu).
299 MS186-MS191 (Mair); MS22A [45] (Hewamanna).
300 MS187 [313]-[317]; MS343 [18]-[24]; MS353 [27]-[30]; MS218-219 [12]-[15]; MS352.
301 Ibid.
302 MS342-43, [13] to [24].

profits.[304] Thereafter from about August 2012, Mair's responsibilities extended to in effect being the CEO of Herringbone in addition to his existing duties under the ESA. Subsequently, Mair estimated that 60 percent of his time was spent dealing with his Herringbone obligations and issues.[305]

244 It is clear that as a result of the change of arrangements referred to above Mair could not reasonably be expected to, satisfy the requirements of cl 3.2 of ESA.

245 I do not accept the defendants' case that it was agreed from the outset between von Daniels and Mair that Mair would become 'the CEO of everything'.[306] Mair does not accept that this was the position and it is most unlikely to have been so given that an important and substantial component of the 'everything', namely Herringbone, is not even mentioned in the SPA or the SUHA or in the Contract.

246 I consider that the Herringbone agreement, pursuant to which Mair was to take over management of that business from August 2012, represented an agreement between von Daniels (on behalf of R&B) and Mair, that cl 3.2 of the ESA was altered by implied mutual agreement, or waived in relation to its requirement that the 'executive shall devote the whole of his time and attention during normal working hours …' to R&B. In my view, no other sensible intent of the parties and effect can be ascribed to the Herringbone agreement which came into effect from about August 2012.

247 It is also to be observed that the ESA is an agreement between R&B and Mair, while the Herringbone Agreement is between Herringbone and Mair. However vLAH, via von Daniels, contracted Mair to manage the business of Herringbone in a way necessarily inconsistent with cl 3.2 of the ESA. In my view, given the relationship of von Daniels vis-à-vis vLAH and R&B, that was effective to modify and vary the ESA in the way which I conclude occurred in about August 2012.

248 In my view, given the above circumstances, in particular given the van Laack direction to

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303 MS150, [141], [154]; M270A, ([12]-[13]); MS2268-2270 [3]; T769.9-23.
304 MS149, [139]; Defendants' Closing Submissions, [17].
305 MS153A, [152]; Plaintiff's Closing Submissions, [74]-[80].
306 Von Daniels, [21]; T596.1-5.

Mair to devote his time and effort to the Herringbone business, cl 3.2 of the ESA ceased to operate in August 2012 when Mair agreed with vLAH that he would undertake the obligations and duties as a de facto Managing Director of Herringbone.[307] From October 2013, if Mair was in any way in breach of cl 3.2 of the ESA (which I have found he was not), it was the controlling van Laack parties which probably brought about any such breach, of which they therefore cannot in March 2015 rely to terminate Mair's services or to establish that Mair breached the ESA.

Alleged Use of vLAH Employees to Open Furla Sydney

249 VLAH asserts that Mair used its employees to establish the initial Furla store in Sydney. The relevant vLAH employees are said to be Mr Hewamanna, Mr Lai, Mr Axiotis, Ms Slieman, Ms Baillieu, Ms Fang and at least two others.

250 VLAH asserts that, by the end of March 2014, Mr Lai, Ms Slieman and Mr Hewamanna were being paid $1,000 per month by LRG and that the payments were funded using vLAH's money.[308]

251 VLAH submits that Mair 'indiscriminately used the personal resources of vLAH in the development of the LRG business'.[309] VLAH alleges these facts are demonstrated by contemporaneous communications and documents.[310]

252 VLAH points to the apparent expansion in the LRG business from about August 2014 and LRG's acquisition of 'Sneakerboy' in February 2015. It refers to Mair directing Hewamanna to assist him in LRG's work.[311] It also relies upon Mair using vLAH's credit cards for what vLAH were his personal expenses and alleges Mair allowed his employees to do the same.[312]

253 VLAH also refers to Mair arranging for vLAH to pay an amount in respect of Ms Noelle Sleiman's American Express credit card at a time when Ms Sleiman was employed by LRG.[313]

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307 MS150A, [141].
308 T426.8-20 and T413.24-31; R&B and Defendants' Defence to Amended Statement of Claim and Amended Counterclaim; Schedule 1 [MS12-38].
309 Defendants' Closing Submission, 24 May 2016, [34].
310 See for example T406.11-415.24 and numerous other examples are within the evidence.
311 T299.20-T301.3.
312 T430.26-T433.9.
313 T116.18-31; R&B and Defendants' Defence to Amended Statement of Claim and Amended Counterclaim;

254 These vLAH allegations are addressed including in relation to *Schedule 1 of the Defence (paragraph 2)* above, and below under *LRG Contributions and Accounting Procedures* and under *Operation of LRG vis-à-vis R&B* above, and under *Use of vLAH Funds to pay LRG Employee Credit Cards*, below.

Competing with R&B and the R&B Group

255 Although the ESA imposed by cl 6.1 a confidentiality obligation on Mair, and cl 7 of the ESA referred to a number of restraints and restrictions applicable to Mair as the Executive employed under that agreement, cl 3.3 allowed Mair to hold up to two non-executive board positions provided that those positions did not directly compete with the 'Group'.

256 For the reasons I have identified, I consider that Mair was entitled to incorporate LRG and was entitled to hold the shareholding interest in that company as he did.

257 I also consider that Mair was entitled to hold the position of non-executive director of LR1 and LRG.

258 Mair's evidence was that he did not have a great deal to do with the Furla business until about March 2015. Mair's evidence to which I have elsewhere referred was that he spent about an hour a day or five days in total in a working week in relation to his work with LRG, that the time was predominantly outside normal working hours,[314] and that the commercial activities of LRG were not 'the same' or 'substantially similar' to the business of R&B because LRG did not retail clothing but was retailing different accessory products in different markets.[315]

259 In my view, it has not been established by R&B and the van Laack parties that LRG and Furla were in direct competition, or indeed in competition with, RBG.

260 Further, I am satisfied that Mair did not undertake any activities which directly competed with the Group. 'Group' is defined in the SUHA as R&B, RBG, the R&B Trust, Boston Brothers and Baubridge & Kay both individually and collectively.[316]

Schedule 1 [MS12-38].

314 T162.20-23.

315 MS160, [180]; MS129, MS130-133 and MS159-160.

316 SUHA 1.1 ('group').

261 Furthermore, on this additional basis, I do not accept that Mair's involvement in LR1, LRG or with Furla in any way materially conflicted with his contractual obligations and duties to the R&B Group.

Confidential Information[317]

262 Ultimately, R&B did not seek to identify the confidential information which its pleading had alleged offended Mair's confidentiality obligations provided for by the ESA.

263 Accordingly, this breach by Mair was not pressed by R&B and the defendants.

264 I am therefore not satisfied that R&B's allegation that Mair breached his obligations of confidentiality are established.

Use of Director's Loan to Fund LRG – Use of vLAH and Herringbone Funds to Pay LRG Employee Credit Card

265 VLAH asserts that Mair drew down on his director's loan in the sum of $100,000 to provide cash to LRG.

266 VLAH however makes it clear enough in its submissions that the issue is not whether Mair was entitled to drawdown on the loan facility and that vLAH concedes that Mair was entitled to do so in the sum of $100,000.[318]

267 VLAH, however, criticises Mair because it alleges Mair did not tell von Daniels that $100,000 was going to be withdrawn from vLAH and applied to Mair's business interests in LRG. VLAH submits that 'It is the failure to make frank and full disclosure of this fact and of the use to which the cash was to be put which was destructive of the necessary confidence between vLAH and Mair. That failure is to be viewed against the objective background that Mr Mair knew that it was critical for vLG's financing that van Laack show at least AU$2 million profit per year to justify the purchase price'.[319]

268 Further, vLAH submits that at the time of Mair's drawdown he had missed sales targets for May and October 2014 by 4 percent and had missed the projected EBIT by 38 percent.

317 Defence [9A(c)].
318 Defendants' Closing Submission, 24 May 2016, [36].
319 T387.16-T388.11.

VLAH submits, against Mair, that this was not an appropriate time for Mair to be drawing down cash which should have been utilised to pay outstanding creditors of vLAH.

269 Mair submits, and I accept, that he was entitled to drawdown the director's loan in question in the sum of $100,000 as a term of Mair's contract with vLAH. In my view, there is nothing to support the proposition that Mair was in any way constrained to utilise the director's loans funds which he withdrew in a particular way.[320]

270 Further, I am not satisfied that any evidence identified by vLAH establishes that the $100,000 drawn by Mair was used to fund LRG.

271 Provision for a Managing Director's loan is set out in cl 5.5 of the SUHA.[321] Pursuant to that provision Mair was entitled to draw $50,000 on the date of commencement of each quarter during the specified three year period.

272 As I have highlighted above, the defendants do not assert that Mair was not permitted to make Directors' Loan drawings which he did.

273 Further, Mair's evidence was that there was no agreement, arrangement or protocol for him to inform vLAH, including von Daniels, of his intention to drawdown on the director's loan.[322] In any event, Mair has established, to my satisfaction, that vLAH were aware that he was drawing down his entitlement in relation to director's loans. Specifically, vLAH was aware because the loan drawdowns were recorded in the vLAH Monthly Accounts.[323] Further, Potyka was well aware of the director's drawdowns by Mair and indeed expressly referred to them to Mair.[324]

274 The drawings on the director's loan account are set out at MS5173.

275 Mair's evidence, which I accept, was that he believed that he was entitled to drawdown his director's loan in the way he did. In my view, the terms of cl 5.5(a) of the SUHA do not so clearly contradict Mair's view in that regard. Further no evidence or cross-examination was

320 SUHA, 5.5(a) and MS1881.
321 MS1809.
322 T382.7-13.
323 See 'Shareholders Loan Account', T381.24.
324 MS2268-2270.

called or undertaken to displace Mair's evidence that he held a genuine and reasonable believe about his entitlement which was consistent with the way he drew down the director loan moneys from time to time.[325]

Use of R&B Financial Resources

276 Mair does not dispute that R&B from time to time incurred expenses on behalf of LRG. However this was not in any way secreted.

277 Hewamanna ensured that the R&B books of account recorded the expenses incurred by R&B for LRG.[326]

278 I am persuaded that LRG's access to the financial resources of R&B from time to time was undertaken lawfully, and in a transparent and meticulous manner by Mair and Hewamanna. In essence, it was a process of operating a clearing account. Mair's evidence on this aspect was that:

> To answer your question, yes, that's correct. I didn't regard it as a loan. It was a transaction clearing account. The only loans made were by Luxury Retail Group to Van Laack to assist with Van Laack's cash flow problems.[327]

279 Mair, in my view, as Managing Director of R&B and the R&B Group of companies, was entitled to manage the financial resources of R&B in the way he did and is now complained about by the defendants.

280 Consistently with the Managing Director's power, referred to in the last preceding paragraph, vLAH raised no complaint in relation to these matters.

LRG Contributions and Accounting Procedures

281 As had also been the case with Herringbone and vLAH, Mair's evidence-in-chief included a detailed description of the many ways in which, from December 2013, there was a sharing of resources between the R&B Business and LRG. In summary, Mair's earlier evidence on this issue included examples of the extensive sharing of resources and synergies generated between the two businesses and the way Mair and Poulakis and Hewamanna were scrupulous

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325 T416.8-17.

326 MS221A, [32]-[37]; MS4421-MS4423; MS4445-MS4459; MS27776, MS4354; T153.1-6; MS4448-MS4493.

327 T152.5-10; see also MS170-171, [230]-[233].

to ensure that LRG accounted for and refunded any financial benefits. This included:[328]

(a) Mair used his relationship with the Luxury Retail Business as leverage with landlords to secure benefits for the R&B Business and Herringbone by arranging a significantly lower renta at the Melbourne Emporium for R&B together with a substantial fit out contribution of $550,000 plus GST. This was possible because Furla Co, which was a sort after key tenancy, was able to work in conjunction with R&B in relation to their arrangements with the Melbourne Emporium;

(b) similarly, at the Chadstone Shopping Centre as a result of the Luxury Retail Business relationship, Mair was able to secure a prime location for R&B at a significantly lower starting rent, plus a capital contribution of approximately $360,000, which on Mair's

328 MS170-175, [237]-[245].

evidence was approximately twice the amount of the average provided by similar centres in respect of such leases;

(c) the Luxury Retail Business relationship also secured Herringbone its first lease at Chadstone because Mair was able to leverage off the Furla Co relationship to secure a lease which he was told was not otherwise desired by the landlord. In addition, Mair negotiated a lower than market rental and a capital contribution of $160,000 for Herringbone in the same way;

(d) during 2013 and 2014, Luxury Retail Business worked with R&B Business to re-work its brand in relation to both R&B and Herringbone. Mair estimates this contribution, provided principally by Poulakis, saved the R&B Business approximately $70,000 to $100,000 which, otherwise, it

would have needed to spend on similar consulting input from a third party;

(e) in 2013 and 2014, Mair and Poulakis played a major role, in substance as lead consultant liaising with architectural firms, in developing new store design concepts for each brand of Herringbone and R&B. This work extended to Poulakis travelling interstate. Luxury Retail Business did not charge R&B or Herringbone for Poulakis' time or cost;

(f) in 2014, Luxury Retail Business, principally through Poulakis, provided free consulting services in relation to the work undertaken to position the Herringbone and R&B brands via their marketing campaigns. This involved Poulakis working on photo shoots, selecting out-fits, providing stylist services for R&B (including a New York City in December

2014). None of these contributions by Luxury Retail Business or Poulakis personally were charged to R&B or Herringbone, nor were costs involved including Poulakis' travel costs;

(g) Luxury Retail Business provided R&B Business and Herringbone with extensive warehousing during 2014 without charge. This warehousing involved the free accommodation of approximately 50 pallets of goods for more than six months at no charge. Luxury Retail Business employees also provided assistance to Herringbone to load and unload stock without any charge to Herringbone. Mair gave evidence that there was one exception to the free storage provided by Luxury Retail Business: when, in December 2014, Luxury Retail Business charged vLAH storage for a higher rate of large volume shirts

stored at the Luxury Retail Business warehouse. Mair also records Potyka was aware of the storage facilities being provided by Luxury Retail Business from visiting the warehouse in March 2015 and discussing the volume of merchandise and the overflow held at Luxury Retail Business' warehouse;

(h) I note that, in about March 2015, Mair's evidence was that Potyka thanked Poulakis for his work on the brand of both R&B and Herringbone and for his work on store design for those brands, as well as for his support during the R&B photo shoot in New York;

(i) on 15 August 2014, Luxury Retail Business provided $100,000 to assist R&B to meet its payroll obligations. That sum was repaid by R&B on 17 August 2014. No interest was paid on the sum provided by Luxury Retail

Business. The details of this financial assistance are set out in Mair's Statement at [242];[329]

(j) all the funds referred to in that part of Mair's Statement which were transferred to and from vLAH via R&B are recorded in the books of account and records of R&B and LRG;

282 Further to the above, Mair's evidence was that Luxury Retail Business was scrupulous to ensure that, if R&B resources were used in any way for a Luxury Retail Business, R&B was reimbursed and that any such instance was recorded and transparent. Specifically, Mair's evidence in this regard was:[330]

(a) in and from December 2013 from time to time, as had been the case with Herringbone and vLAH, there was a sharing of resources between R&B and the Luxury Retail Business;

(b) from time to time, some R&B resources were used for the benefit of the Luxury Retail Business. This was done sparingly and predominantly involved R&B employees assisting on their own time and remunerated separately (either by way of money or Luxury Retail Group goods);

329 MS173.
330 MS170-171, [230]-[233].

(c) Mair was careful to seek to ensure that, if an R&B resource was used for the purposes of the Luxury Retail Business, R&B was reimbursed. He did this primarily by way of requesting that the finance team adhere to some strict, but very straight forward, processes:

(xii) first and foremost, he communicated that the Luxury Retail Business was a separate entity with different shareholders;

(xiii) as such, the Luxury Retail Business should have its own accounts with suppliers. In instances where common suppliers were used by both R&B and Luxury Retail Business, it was important that the suppliers were notified of the separation and accounts were not co-joined;

(xiv) in circumstances where expenses were incurred by R&B on behalf of the Luxury Retail Business, such expenses were to be recorded to a 'loan account' specifically created for this purpose. A loan account was recommended to him by the finance team as it would avoid the need to invoice very small amounts, would provide transparency (as it did during the year-end audit in 2014), and was to be cleared each month as a minimum;

(xv) the loan account was administered by the R&B Chief Financial Officer, Hewamanna, and accessible by the broader finance team;

(xvi) the loan account was transparent to both the local auditors, and in the accounts regularly provided to vLAH's German finance team.

(d) Mair communicated these directions to the team at the Melbourne Head Office in various emails in November 2013, and throughout 2014, as the need arose to ensure the above processes were being followed.

283 I again observe that Mair was not substantially challenged in cross-examination in relation to the extensive free assistance, facilities and assistance provided by LRG its management and staff to the R&B Business and Herringbone.

284 Nor was Mair challenged in cross-examination about his evidence that LRG was scrupulous to both transparently record any expense incurred by R&B Business on behalf of LRG and to ensure reimbursement to R&B.

285 I am also satisfied in connection with the R&B and vLAH allegations in relation to Mair and LRG's lack of financial transparency that the relevant financial transactions were appropriately recorded contemporaneously, that each R&B balance sheet showed the Executive loan account, and that every Monthly Report and Annual Report informed every relevant LRG transaction and accounted for the sums utilised and then reimbursed by LRG.[331]

286 In light of the context of the co-operative operations of the businesses involved and the complex setting in which Mair and Hewamanna's evidence establishes the R&B Group's operations were being conducted, and appreciating Mair's overarching role as Managing Director of the R&B Group of companies, I am not persuaded that Mair's conduct gave rise to any significant and substantial breaches by Mair of the ESA, or the SUHA, or any of Mair's duties.

331 MS2954-2956; MS4964-4965.

Involvement in LRG's Monthly Management Account

287 I am satisfied that Mair finalised the Monthly Management Accounts for LRG. Hewamanna prepared the draft of the LRG management accounts for Mair to finalise. Upon receipt of the draft accounts, Mair would review the accounts and, in certain instances, give instructions to Hewamanna as to how certain specific entries should be addressed.

288 In addition, Mair's evidence was that he checked the Furla stock management system in relation to the LRG Furla stores.[332]

289 VLAH contends that the preparation and production of the LRG Monthly Management Accounts reflects Mair's intrinsic and central involvement in the LRG business. VLAH submits that Mair's involvement with LRG in this respect shows the way in which Mair diverted vLAH resources, in particular Hewamanna, to LRG.

290 VLAH argues that Hewamanna's production of the draft LRG Management Accounts for Mair makes it clear that Hewamanna's work for LRG was not limited to after-hours work and also renders it unlikely that R&B business was 'prioritised'. VLAH submits that Hewamanna was, in fact, immersed in the LRG business with Mair.

291 As a specific instance, vLAH cites Mair and Hewamanna prioritising the LRG December 2014 Management Accounts over work producing forecasts for vLAH.[333]

292 VLAH also assert that Mair monitored all overseas deliveries for Furla, and did so via a vLAH employee; and that Mair kept a close eye on every 'Packing List' for Furla.

293 In my view, for the following reasons, a consideration of all the evidence concerning Mair's position, responsibilities and involvement with LRG's accounts presents a picture considerably short of Mair being centrally or intrinsically involved in LRG's monthly management accounts. Mair gave detailed and uncontradicted evidence of the many LRG functions and duties for which he was not responsible.[334]

294 Furthermore, Poulakis' evidence in chief which corroborated Mair's evidence on these

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332 T256.22-29.
333 T261.26-T268.21.
334 T532-533.

matters was not challenged.[335] Poulakis' evidence was to the effect that:[336]

(a) he did most of the negotiating for the purchase of the Furla business and that he also did the marketing and running of the Sydney store; [337]

(b) Mair not do any of these and his assistance was on the financial and strategic side of things;[338]

(c) he and Mair occasionally had brief discussions on the phone or over coffee during business hours, but any major discussions were conducted after business hours;[339]

(d) he performed the duties of the executive or Managing Director for LRG up to the date of Mair's dismissal;

(e) Mair was not required much for management duties; and

(f) Furla had its own managers as well as in-store sales staff, and their numbers were added to over time.

295 Poulakis' and Mair's evidence was that Mair devoted approximately five hours a week to the LRG business.[340]

296 Mair's evidence remained firm and consistent that it was Poulakis who bore the great bulk of the burden of running LRG and was that Mair only undertook 'small back-end tasks that for me were pretty straight forward'.[341]

297 Mair does, however, concede that from time to time he attended to LRG tasks during normal working hours. But his evidence was that he also worked regularly late at night, on weekends and on public holidays, on the R&B Business and the Herringbone business.[342]

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335 MS255-265, MS333-339.
336 Plaintiff's Amended Closing Submissions, 17 May 2016, [96].
337 MS258, [11].
338 MS258., [11].
339 MS258, [11].
340 MS258, [13] to MS259.
341 T184.
342 MS150 [141]-[145].

298 Mair was cross-examined about the amount of time he devoted to the management of LRG and how, during a working day, he devoted hours to the LRG Business. He was unshaken in relation to this evidence.[343]

299 I consider that likewise Hewamanna's evidence, which was unchallenged in cross examination, established that his work for LRG from time to time amounted to a small number of hours per month undertaken at home and after hours. Hewamanna's evidence was also that, on the occasion when he did attend to LRG work at the R&B office, he made up that time by working longer hours at R&B.[344]

300 Accordingly, I also reject R&B and vLAH's submission that Hewamanna was diverted by Mair from R&B to LRG and that Mair took the benefit of Hewamanna's employment by vLAH at R&B and utilised him for LRG's benefit.

LRG Weekly Activity Plans

301 VLAH and R&B point to what are said to be Mair's detailed emails accompanying LRG's activity plans which were circulated on a weekly basis. VLAH point to an example email of 27 January 2015[345] and to the text of Mair's emails which, by reference to 27 January 2015, vLAH assert it was clear that Mair was familiar with many aspects of the detail of LRG's business on a weekly basis.[346]

302 VLAH and R&B submit that Mair's emails accompanying the regular LRG weekly activity plans demonstrate that his involvement was that of a person in charge, if not *the* person in charge of LRG.

303 Mair submits that the picture presented by vLAH's submissions reflects only part of the true picture. He points out that the LRG weekly activities plans which he circulated had been prepared by another, namely Ms Sleiman.[347] Mair's evidence was that Poulakis provided him with the key points for the weekly activity plans and that he, Mair, reduced them to writing.

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343 T162.24-28; T170.24-T171.5.
344 MS220A-223A; Hewamanna, [26]-[52].
345 MS3987-3989. See also [MS4008-4012].
346 Defendants' Closing Submission, 24 May 2016, [51]-[52].
347 T534.3-5.

This process which took him only a matter of a few minutes.[348] I have earlier referred to Mair and Poulakis' evidence in relation to these matters.

304 I accept Mair's evidence, and that of Poulakis, that Ms Sleiman and Poulakis produced the LRG weekly activity plans. I also accept that it was not Mair, but others in LRG, who contributed the detail and undertook the vast majority of the work involved with producing the LRG weekly activity plans.

305 I do not accept that an involvement by Mair in respect of the weekly activity plans of LRG provide direct evidence which establishes a breach or breaches by Mair of his obligations to R&B and vLAH pursuant to the ESA or the SUHA, or pursuant to any fiduciary duties. Nor in my view do those plans provide any sound basis for an inference that Mair perpetrated such breaches.

306 Ultimately, I am not persuaded that any time or effort which Mair did devote to the LRG business was in any way materially prejudicial or disadvantageous to vLAH or R&B. Nor am I persuaded that any time or effort Mair devoted to LRG business was other than insignificant and insubstantial. For these reasons I am not persuaded that Mair breached either his contractual or his fiduciary duties as a result of attending, mainly out of ordinary working hours, to tasks in relation to LRG, including the LRG weekly activity plans. Nor am I persuaded for the above reasons that Mair's conduct, in the circumstances which the evidence highlighted established, was such that it justified, or could reasonably be seen as giving rise to, a lack of the confidence essential to the relationship of employer and employee on the part of R&B or vLAH.

307 Further, I do not accept the vLAH related assertion that Mair either did not understand the importance of R&B's obligations to pay income tax, superannuation contributions, GST, pay roll tax and FBT, or that the attention Mair gave to the business of LRG resulted in R&B incurring certain penalties in September 2011 and March 2012.

308 In my view, the evidence establishes that the cash repatriation requirements of vLAH and vLG, together with the costs and expenses associated with the expansion of the R&B

348 T534.9-19.

business and the directed diversion of Mair's attention and R&B Business resources to the Herringbone business, were the likely cause of these cash flow and compliance issues experienced by the R&B Businesses.

309 I have also, in relation to the counterclaim, separately addressed the van Laack parties' allegations in relation to non-payment of taxes, superannuation and other statutory imposts. These allegations were raised in the van Laack parties' Counterclaims and also referenced in the defence to Mair's Termination claims.

310 Finally, I accept Mair's submission that there is no evidence the R&B financial issues, in particular of late 2011 and early 2012, were caused by Mair failing to focus on and devote sufficient attention to his obligations to R&B and R&B Businesses.

311 I also note that the R&B Business tax penalty assessments referred to at [48] of the Defendants' Closing Submission, 24 May 2016 were ultimately reversed and did not create any final impost for R&B.

Diversion to LRG and Lack of Devotion

312 VLAH also refers to the 'key metrics forecast FY2014'[349] which took Mair six weeks to get to draft stage, and Mair's uncertainty about whether he had captured the required key data.[350] VLAH alleges this was exacerbated by Mair providing a revised forecast and revised scorecard in January 2015.[351]

313 VLAH also relies upon what it alleges are 'contemporaneous communications and transactions' revealing the extensive involvement of Mair in LRG affairs from November 2013. References in Schedule B of the defendants' Defence referred to by vLAH alleges that Mair took the benefit of Hewamanna's employment by vLAH and utilised him and his skills for the benefit of LRG. VLAH submits that, in doing so, Mair placed himself in fundamental breach of his duty of fidelity. The defendants' allege that this diversion of Hewamanna by Mair should give rise to a conclusion that the confidence essential to the relationship of

349 MS3935 and MS3936-3940.
350 MS3955-3958 at MS3957.
351 T271.31-T272.14.

employer and employee had been destroyed.[352]

314 VLAH alleges that Mair himself was placed under significant demand by LRG, work he undertook for his own benefit and to the detriment of R&B and vLAH.[353]

315 VLAH alleges that Mair was prioritising LRG over vLAH and assert that Mair confirmed this when he directed Hewamanna to follow up the on-line facility for LRG during a vLAH working day[354] and directed Hewamanna to prioritise an LRG task.[355]

316 VLAH contends that such matters reflect Mair's failure to appreciate his duty to explain in detail to von Daniels the approach he was taking, and moreover, to allow von Daniels to make a decision about such matters.

317 Further, vLAH submit that Mair pursued his own private interests ahead of the interests of vLAH. This is relied on by R&B and the van Laack parties as further evidence of vLAH's entitlement at common law to terminate Mair's employment without making any payment to him in lieu of notice. VLAH submits that these breaches arose from the moment Mair became incapable of understanding that Hewamanna's duty to vLAH, and the performance of work for LRB, were mutually exclusive obligations.

VLAH submits that the above matters are persuasive examples of Mair's breaches in this regard and are destructive of the necessary confidence between a Managing Director and the owners of the company.

318 In my view, for the reasons I have highlighted in relation to the evidence and the finding I have made, the R&B and defendants to counterclaim's allegations that Mair, Balnarring and LRG's wrongfully used and diverted resources, human and financial, from R&B and the R&B Group of companies and Herringbone to LRG and Furla are not established.

319 Furthermore, I consider that those allegations which include occasional instances on which LRG or Furla employee's credit cards used for business related purposes, which were debited

352 Defendants' Closing Submission, 24 May 2016, [46].
353 T293.26-T294.4.
354 T331.4-25.
355 T331.17.

to R&B, and the day to day business operational allegation of breach referred to in Schedule 1 of the amended Defence, are all unsustainable given the nature of the business operation of R&B Group that Mair was managing and overseeing and the degree to which LRG and Furla and the R&B Group worked in concert, and contributed to each others operation in many respects, the way in which LRG and Furla transparently accounted and reported to the R&B Group and vLAH, and, finally, given that Mair, Poulakis and Hewamanna ensured the R&B Group's interests came first, all as outlined in more detail elsewhere in these reasons.

Overdrawing Director's Loan Account[356]

320 R&B and the plaintiffs by counterclaim allege that Mair and Balnaring were in breach of the ESA and SUHA and Mair's fiduciary duties by drawing down amounts in excess of $50,000 otherwise than on the dates alleged to be specified in relation to Mair's Director's Loan Account.[357]

321 In relation to this issue, I accept Mair's submission that the evidence establishes that Mair notified R&B's auditor, PFF, that his loan account was overdrawn.[358]

322 R&B's auditor PFK was informed and the relevant financial entry was reflected in the audited financial accounts for R&B for financial year ending 30 April 2013.[359]

323 From the lack of evidence that R&B took any action in relation to Mair's overdrawn loan account, I also infer that R&B was unconcerned to either address that issue or to sanction Mair in relation to it occurring. Neither R&B, nor vLAH, sought to escalate and act upon these matters.

324 In my view, no breach is established in relation to the allegation that Mair overdrew his Director's loan account.

Unauthorised Establishment of a Loan Facility from vLAH to LRG

325 VLAH asserts that Mair arranged for LRG to have the benefit of vLAH's funds on an interest

356 Defence, [9A(f)].
357 Counterclaim, Schedule 4N(a); Defence [9A(f)].
358 MS199, [374]–[378].
359 MS2281-MS2321.

free basis with the principal payable at will.[360] VLAH's case is that Mair made these arrangements for his own benefit without informing von Daniels or Potyka.

326 In relation to this alleged breach by Mair, I note at the outset that in my view for the reasons which follow, a 'loan facility' from vLAH to LRG[361] as asserted and relied on by vLAH is not, in my view, an accurate description of the subject transaction.

327 Mair's evidence on this issue included:

> You see that there is a related party loan of $75,961, was the liability. Do you see that?---Yes.
>
> Was that from Van Laack Australia?---I believe so, yes. I could check that against the - - -
>
> Where is the documentation for that loan?---The documentation for that loan is in the court book. There is a schedule of all loan entries back and forth.
>
> Where is the loan agreement?---There is no loan agreement.
>
> What rate of interest was being paid by LRG?---None and there was no rate of interest being paid by Van Laack either when it was the other way around.
>
> Prior to September 2014 when did you tell Mr von Daniels that Van Laack Australia was going to lend $35,764 to your company, Luxury Retail Group?---I didn't have that conversation.
>
> Can I take it from your answer that you never told Mr von Daniels that you were going to facilitate Luxury Retail Group obtaining a loan from Van Laack Australia?---To answer your question, yes, that's correct. I didn't regard it as a loan. It was a transaction clearing account. The only loans made were by Luxury Retail Group to Van Laack to assist with Van Laack's cash flow problems.
>
> You understand that a current liability is something that's immediately payable?---By what definition?
>
> Currently liability. Do you understand what a currently liability is?---Yes. It's not necessarily immediately payable. A current liability records trade creditors that could be on different terms. For example, Furla, which could be on 90 day terms.
>
> What was - - -?---So it doesn't mean payable at a point in time.
>
> The Van Laack loan was immediately repayable, wasn't it?---It was cleared - it was supposed to be cleared every two weeks and I think Mr Hewamanna struggled to keep up with that but it was cleared periodically. Again, the schedule is in the court book.
>
> When you set up Luxury Retail Group you gave instructions to Mr Hewamanna that he could use moneys belonging to Van Laack Australia for the purposes of Luxury Retail Group - - -?---No, absolutely not - - -

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360 Defendants' Closing Submissions, [38].

361 T117.3-8; T151.19-31-T153.30.

> Listen to my question, Mr Mair. Provided they were repaid every two weeks?---No. Absolutely not. The instructions I gave to Mr Hewamanna is that Luxury Retail Group was a separate business and should be treated separately. If expenses were incurred by a Van Laack entity that were as a result of Luxury Retail Group, they should be charged to Luxury Retail Group and vice versa; if Luxury Retail Group incurred expenses for Van Laack, they should be set off the same way and that account should be cleared at least every two weeks.
>
> I will just come back to this document which you saw in November 2014. In November 2014 you understood that as at 31 October 2014 Luxury Retail Group had used $75,961 of Van Laack Australia's money for the benefit of Luxury Retail Group, didn't you?---Yes. At that point in time, yes.
>
> You understood that you had not told Mr von Daniels about that?---No, I had not.
>
> You didn't have Mr von Daniels' permission to do that?---No. I had not discussed it with him.
>
> Luxury Retail Group paid no interest to Van Laack Australia on those moneys?---No and neither did Van Laack back to Luxury Retail Group.
>
> Can you just go over, please, to page 2716. This is a printout of a general ledger kept in MYOB, that's correct?---Yes. Printed by your team.
>
> You will see that there's a debit column in the general ledger and a credit column; yes?---Yes.
>
> The debit column records all receipts received by Luxury Retail Group, doesn't it?---Yes, it does.
>
> The credit column records payments made by Luxury Retail Group?---That's correct.[362]

328 I consider the drawings on the 'loan facility' as asserted by vLAH above, on the evidence, were in reality drawings on a running account. Both van Laack entities and LRG paid business expenses and also credited that account to repay the other entity, and did so promptly, to endeavour to clear any indebtedness as between LRG and van Laack or van Lack and LRG. Mair explains these matters at [232], [323] in particular [323(c)] of his Witness Statement.[363] Mair's evidence on this aspect of the LRG and vLH's mode of operation was, I consider, unshaken in cross-examination.

329 Accordingly, in my view, the subject moneys from vLAH were accessed appropriately by Mair as part of a standing arrangement with vLAH.

330 I reject the vLAH position that the MD Loan moneys were in effect offered on a 'use it or lose it' basis whereby, if Mair did not draw down $50,000 at the beginning of each quarter,

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362 T151.19-31-T153.30.

363 MS170-171.

his entitlement to those moneys was lost. I can see no justification for such a construction of cl 5.5 of the SUHA or any evidence to support such an arrangement beyond the terms of the SUHA.

331 VLAH, including Potyka, were aware of Mair's drawings on the MD Loan account pursuant to the SUHA.[364] Neither the company nor Potyka took issue with such drawings.

332 In my view, for the reasons which I have outlined above, Mair was entitled to make the drawings on the MD Loan pursuant to the SUHA arrangements, and was entitled to utilise and deploy such funds as he saw fit. I consider that Mair was not obliged to inform vLAH, von Daniels or any other person of his intention to draw down in respect of, or as to the utilisation of, funds which he drew from the MD Loan. No contractual term or other arrangement obliged Mair to do so.

333 Finally, I see no basis for the defendants' assertion that Mair was in breach, or can be criticised, for accessing his contractual entitlement to drawdown his Director's loan when company sales targets had been missed and trading results were down.

LRG involvement by vLAH Managing Director

334 R&B and vLAH submit that Mair's 'involvement in LRG evinced by the contemporaneous documents is inconsistent with Mair's employment as Managing Director of vLAH in such a way as to amount to it being conduct which establishes a lack of proper performance of his contract of employment with vLAH'.

335 VLAH contend that contemporaneous evidence establishing the high degree of Mair's involvement evinces he was intrinsically involved in the LRG business, its development of the Furla brand, and later, both Folli Follie and Sneakerboy. R&B and vLAH also assert that Mair directed so much of his attention to the LRG business and its development that he neglected the vLAH business as a consequence. The R&B and vLAH submission is that Mair was 'intrinsically' involved in LRG and further that Mair did not reveal this involvement to von Daniels.[365]

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364 MS5173; MS2268-2270; T381.24; MS199 [376]-[378].

365 Defendants' Closing Submission, 24 May 2016, [53]-[54].

336 Although I accept that Mair was involved in the LG1 Furla business, for the reasons I have already outlined above, I am not satisfied that Mair's said involvement amounted to a breach or breaches of Mair's obligations under the ESA, SUHA or any fiduciary duties. Nor am I satisfied, for reasons I have expressed above, that Mair's conduct had a materially-detrimental effect on R&B or vLAH.

337 Finally, for the reasons I have earlier explained, I find that Mair did reveal his involvement in LRG and Furla to von Daniels and Potyka.

Growing LRG

338 R&B and vLAH complain that by early February 2015 Mair was planning to expand LRG's activities. By about that time, LRG had between 20-30 employees and was running four stores, had established its own warehouse facility and was planning to pay Mair approximately $150,000 per annum.

339 R&B and vLAH also complain that Mair did not inform vLAH of the level of remuneration and likely future of remuneration which Mair was to receive from the LRG business.

Failure to Make Sufficient Disclosure to Keep vLAH's Confidence

340 R&B and vLAH also claim that Mair's above conduct in particular his failure to properly disclose his involvement with LRG gave rise to a justifiable lack of confidence of Mair from vLAH's perspective.

341 R&B and vLAH assert that Mair '… had facilitated LRG having bills paid by vLAH in the first instance',[366] and that Mair had not informed von Daniels as to this arrangement. R&B and vLAH submit that Mair accessed vLAH's finances for LRG and R&B. VLAH contend that this was itself a sufficient ground for Mair to be immediately dismissed without any payment in lieu of notice.

342 Similarly, R&B and vLAH submit that Mair failed to explain to von Daniels that employees of vLAH were doing work for LRG at Mair's request.[367]

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366 T291.10-14.
367 T291.15-19.

343 VLAH and R&B criticise Mair for what they submit was an inappropriate use of vLAH employees (such as Hewamanna and Lai) to complete LRG work during their working day for vLAH, and for devoting substantial time in Mair's own working day for LRG matters in the role of the person giving the directions in respect of the running of the LRG business.[368]

344 R&B and vLAH's submission is that Mair's use of vLAH's funds and other resources to further his own interests (even in circumstances where those funds are repaid), without first obtaining Mair's employers fully informed and specific consent, constitutes gross misconduct and is indefensible, justifying immediate dismissal without notice.[369]

Disclosure Requirement – Confidence Obligation

345 In my view, on the evidence referred to from Mair, Poulakis and Hewamanna on the above issues complained of by R&B and the vLAH parties, I am satisfied that Mair has not perpetrated breaches of his disclosure requirement or confidence obligation sufficient to constitute grounds necessary for him to be immediately dismissed without any payment in lieu of notice, pursuant to the ESA, the SUHA nor any breach of Mair's fiduciary duties as alleged by vLAH and R&B including pursuant to [9A(a)], [9A(b], [9A(c)], and [2J] and [2O] of the Defence. I am not satisfied that Mair in any way breached any disclosure requirement or confidence obligation as alleged by R&B and the van Laack parties.

No Mere Employee

346 I also accept Mair's submission that he was no 'mere employee'. Mair owned 20 percent of the R&B business.

347 It is also to be noted as earlier mentioned that Mair was not an employee of LRG.[370] I am satisfied that Mair did not have, and did not perform, executive functions in the management and administration of LRG.[371]

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368 Defendants' Closing Submission, 24 May 2016, footnote [192] and contemporaneous documents relied upon by vLAH Defendants' Closing Submission, 24 May 2016, footnote [191]. The communications outside normal business hours are MS3485; MS3492-3543; MS3555-3556; MS3580; MS3604-3605; MS3606-3607; MS3619-3676; MS3690-3691; MS3700-3709; MS3721; MS3798; MS3799-3800; MS3965-3966; MS4006; MS4032-4093; MS4148; MS4149-4150; MS4154-4155; MS4156-4160; MS4164; MS4173-4174; MS4175-4178; MS4179.

369 *Sinclair v Neighbour* [1967] 2 QB 279.

370 T301.4-12.

371 T533; Mair [195].

348 I also consider it to be inherently unlikely that Mair would neglect the R&B business as alleged against him, given his own financial best interests were directly linked to the trading success of R&B, including pursuant to cl 12(c) of the SUHA.[372]

349 It was Poulakis who undertook the day to day management and administration of the LRG business. I have separately outlined some of the evidence upon which I am satisfied that this was the position.

350 Further, given the agreed express licence extended to Mair in cl 3.3 of the ESA to undertake the roles of 'two non-executive board positions that do not directly compete with the 'group',[373] and the evidence to which I have referred of the disclosures by Mair to von Daniels of his involvement with LRG, I am not satisfied that Mair failed to make sufficient disclosure thereby justifying the asserted lack of vLAH's confidence alleged by R&B and vLAH and any breach by Mair in that regard.

Unauthorised Dividends[374]

351 R&B alleges:

> Further, Mr Mair and Balnaring breached clauses 2.2(a), 2.2(b), 19.2(a), (d), (e) and (f) and clause 23.1 of the Shareholders' Agreement and Mr Mair also breached clauses 5.1(c), 5.4, 5.5 and 5.6 of the Shareholders' Agreement, clauses 3.1.2, 3.1.5, 3.2, 3.1.6, 6.1, 7(b)(i), 7(b)(v) and 7(b)(vi) of the NM Employment Agreement, and contravened his fiduciary duties to the Group, vLAH, Herringbone and vLGmbH as set out in paragraph 20 above by:
>
> …
>
> (e) Purporting to pay down the loan allegedly made to him by the Group, by causing each of Boston Brothers, Baubridge & Kay, RBG and vLAH to pay him a dividend on 31 March 2014 in the absence of a resolution declaring such dividend in accordance with the constitution of each said company, and further in the knowledge that such dividend could not be funded without any increase to the total borrowings of the Group.[375]

352 Mair denies any conduct which brought about a dividend being paid to him on 31 March 2014, in circumstances where no Board resolution declaring and authorising such a dividend to be paid. Mair's position is that the distribution in question was made pursuant to cl 5.4 of

372 MS1812; SUHA cl 12(c).
373 ESD cl 3.3.
374 Defence, [9A(e)].
375 Defence and Amended Statement of Claim and Counterclaim, 17 September 2015, [9A(e)].

the SUHA. Mair also points to the communication dated 19 August 2013 from Potyka, on behalf of vLAH and on behalf of vLG, in which Potyka communicated to Mair, amongst other things:

> 3. Herringbone
>
> As agreed during the takeover talks and stipulated in the term sheet you are granted a remuneration for the management of R&B Group as well as for the assumption of the administration and responsibility of Herringbone Ltd.
>
> … We therefore agreed that you are granted a profit-share bonus in the amount of 20% of the Herringbone profit …
>
> 6. Profit Distribution R&B for the financial year 2013/2104 (sic)
>
> Upon deduction of the company income tax the R&B Group shows a result in the amount of around 581,000 A$.
>
> As contractually agreed 60% of the result will be distributed. Your portion of 20% should be settled against your private loan. Kindly arrange this settlement of profit distribution after getting the tax statements and show it in the accounts accordingly.[376]

353 At point 6 of the Potyka letter of 19 August 2013 on behalf of the vLAH holding company, Potyka requested Mair to 'Kindly arrange for this settlement of profit distribution after getting the tax statements and show it in the accounts accordingly'.

354 Mair did so and the distribution which Potyka suggested and authorised was reflected in the R&B accounts for the financial year.[377]

355 The above vLAH direction from Potyka in relation to the distribution in issue and the administration and acceptance of that distribution reflected in the books of account was not approved at a 'board meeting' as such. However, in my view, given the circumstances of the authorisation and the above specified transparent reflection of the transaction and the contemporaneous acceptance and administration of that dividend including by vLG's Financial Controller, Franz Kalinowski, vLG was clearly cognisant of and helped implement the relevant distribution.

356 Ultimately, I am satisfied that it is clear that Potyka on behalf of vLG and R&B, in substance approved Mair's dividend, which on the evidence effectively also carried the approval of von

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376 MS2269-MS2270.
377 MS3413-3414.

Daniels.[378]

357 For the above reasons I am not satisfied that R&B or vLAH have established the breaches alleged in [9A(e)] of the R&B Defence and Amended Statement of Claim and Counterclaim dated 17 September 2015 in relation to the dividend paid to Mair on 31 March 2014.

Miscalculation of Interest on Director's Loan[379]

358 I am satisfied that Mair did not have control of the calculation of interest in relation to Director's loans including his own Director's loan.[380] It was Hewamanna who undertook this task. I also accept on the evidence that Mair was unaware interest payments in respect of the Director's loan account had not been calculated properly. Specifically, Mair's evidence was that he was not aware of any failure to calculate or apply interest in respect of the Director's loan account until June 2015.[381]

359 This anomaly was identified by vLG.

360 Mair had delegated to Hewamanna the task of controlling the calculation of interest in relation to the Director's loan account.[382] He did not know of any failure to correctly calculate and pay interest in respect of the Director's loan account until late June 2015.[383]

361 Accordingly, in my view there is no basis established by R&B or vLAH upon which Mair has breached the ESA, the SUHA, or the other obligations and duties alleged by the defendants in relation to the miscalculation of interest on Mair's Director's Loan.

Incorrect Accounting[384]

362 The R&B plaintiffs to counterclaims' allegation in [9A(h)] of the Defence is in substance that Mair and Balnaring breached the specified clauses of the SUHA and Mair breached various clauses of the Shareholder's Agreement and the ESA, and his fiduciary duties to the Group, vLAH, Herringbone and vLG, by directing that in contravention of s 286 of the Act the books

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378 T587.14-17 and T582.7-9; MS3411-MS3414.
379 Defence, [9A(g)].
380 MS350.
381 MS200, [380]-[381].
382 MS200, [380].
383 MS200, [381].
384 Defence, [9A(h)].

of account of the Group, Herringbone and vLAH be manipulated as particularised in Schedule 2 to the Defence.

Defendants' Schedule 1 (Amended Defence and Amended Statement of Claim and Counterclaim 17 September 2015)

363 Further, for the reasons I have separately outlined above, I accept Mair's explanation as to the matters in Schedule 1, FF, H, Z, AA, DD and EE and I am not persuaded that those matters have been shown to constitute breaches by Mair as alleged by the defendants and counterclaimants.

364 For the additional reasons which follow, I am also not persuaded that the allegations in Schedule 1 establish the breaches alleged by R&B and the plaintiffs by counterclaim against Mair.

365 R&B and the plaintiffs by counterclaim allege that, in breach of Mair's obligation and duties referred to above, Mair incurred liabilities on behalf of LRG in respect of Furla, and did so well before Mair made any mention of the Furla distribution agreement to von Daniels. The defendants detail the alleged instances of the matters in Schedule 1, referred to in paragraph 9A of the Defence to Amended Statement of Claim and Counterclaim dated 17 September 2015 as 'Particulars of wrongful use of the financial personnel, physical and know-how resources of the Group, vLAH and Herringbone'.

366 Mair's position is in relation to the defendants' list of instances of Mair's allegedly wrongful use of the resources of the Group, vLAH and Herringbone at Schedule 1 of the Defence to Amended Statement of Claim and Counterclaim dated 17 September 2015 is that he directed the use of various corporate resources.[385] However, Mair denies that by making available for the use of the LRG companies any financial, personnel, physical and know-how or resources of the Group, vLAH and Herringbone, as particularised in Schedule 1 of the Defence and Counterclaim, he breached the SUHA, the ESA or any fiduciary duty he owed. Furthermore, Mair takes specific issue with these allegations against him, as set out in Annexure 2, of Mair's Closing Submissions dated 17 May 2016.

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385 Plaintiff's Amended Closing Submissions, [118].

367 As to paragraph FF, the defendants allege that Mair caused R&B to sponsor the 457 visa of Ms Christine Hogan, whom it is alleged at all relevant times worked for LRG. As to paragraph FF, Mair denies any knowledge of these matters.[386] Mair's evidence was that Ms Hogan initially worked for R&B as store manager for Myer Sydney women's wear.[387] R&B obtained a 457 visa for Ms Hogan.[388] Mair was unaware of that. Mair's evidence was that in or about September 2013 he requested that Mr Hewamanna arrange for Ms Hogan to be employed by LRG as the manager of Furla's Melbourne store. He did not, at that time or at any time during the process, know that Ms Hogan would be sponsored by R&B for immigration purposes. Mair asked Mr Hewamanna to arrange for her to work, and left him to it.[389] Mair did not sign Ms Hogan's visa application.[390] He explains the presence of his signature by Mr Hewamanna applying his electronic signature,[391] as the practice of Hewamanna.[392]

368 As to paragraph H, Mair's evidence was that he does not know why LRG's Telstra lines were added to the existing R&B Business Telstra account.[393] That task was delegated to Mr Hewamanna.[394] The invoices were charged to, and paid by, LRG.[395]

369 As to paragraph Z it is alleged against Mair that he allowed Hewamanna to charge travel expenses incurred by Ms Natasha Neisci, Ms Dizdarevic and Ms Sleiman, who were LR1 employees at the time and were undertaking LR1 work, to Hewamanna's corporate American Express card payable by Herringbone, and allowing other employees to charge expenses to LR1 in inappropriate circumstances including where Herringbone would pay all such charges.

370 Mair's evidence was that at all relevant times there were in circulation various credit cards used for business expenses, with accounts owned by the R&B Business, by the Luxury Retail

386 Mair [322]-[323].
387 T206.13-15.
388 Ibid.
389 Mair [322].
390 Mair [323].
391 Ibid.
392 see e.g., MS3798, MS3799.
393 Mair [326].
394 Ibid.
395 Ibid.

Business, and by Mair personally. Mair's evidence was that from time to time cards were used for the purposes of other account holders, which account-holders were promptly reimbursed; for example, Mair's personal card was frequently used for R&B and Herringbone expenses, and on many occasions such charges would run to tens of thousands of dollars each month; from time to time charges would be charged to the wrong credit card account; where this occurred, the imbalance was rectified as soon as practicable. Mair's evidence was also that this was tracked and resolved through the normal month-end process whereby each employee with a company credit card (or cards as the case may be) would be required to account for each transaction. Transactions were then allocated to the appropriate entity and, in the case of LRG, the appropriate reimbursement made. Mair says that Ms Sleiman and Ms Dizdarevic continued to hold R&B Business credit cards after they left that business and joined the Luxury Retail Business. This was inadvertent and a mistake, which was rectified once it was discovered in early 2015.[396]

371 Mair denies that he allowed LRG expenses to be charged to R&B or Herringbone accounts.[397]

372 As to paragraph AA it is alleged that Mair allowed the Group to continue to make remuneration payments to Ms Sleiman until August 2014 despite her effectively being an LR1 employee from around May 2014.

373 Mair's evidence was that if Sleiman was paid by the R&B Business for a period of time, which he does not admit, but does not deny, it was a mistake.[398]

374 In relation to paragraph DD, R&B and the van Laack parties allege that Mair used and continued to use the credit facilities provided by R&B to HSBC to obtain a bank guarantee in favour of landlords of two Furla stores and one LGB store.

375 As to paragraph DD, Mair's evidence was that the use of the bank guarantees was inadvertent and a mistake, and that such use was rectified immediately upon being discovered in early 2015. Mair's evidence was that he was not aware that Hewamanna had used the van Laack facilities for this purpose. Mair's evidence was also that knew that Luxury Retail Group bank

396 Mair [345]-[347], and see MS4339.
397 Mair [348].
398 Mair [349]-[350].

guarantees were issued correctly from Luxury Retail facilities, and assumed that they had been used throughout the business' operations.[399]

376 As to paragraph EE, the van Laack parties allege that between about January 2013 and March 2015 it is alleged that Mair caused R&B to pay for bespoke suits for his own personal use and the use of Poulakis to a value of at least €15,000 approximately.

377 Mair's evidence was that the purchase of suits referred to in 2013 was a part of his seasonal wardrobe allowance and undertaken because he was cognisant of the fact that neither the R&B nor Herringbone suits fitted him. Mair's evidence also was that Poulakis ordered several items at the same time, and he reimbursed the R&B Business at the time. The second instance in early 2015 was a purchase made by Poulakis and Mair and requested to be invoiced to the Luxury Retail Business. These garments arrived in late April 2015 and were delivered to R&B in error. Crawford made these garments available to Poulakis shortly after they arrived, and at the time Poulakis requested the invoice so he could settle the account.[400]

378 Further, in relation to the defendants' Defence, Schedule 1, I also observe that the terms of the SUHA, including pursuant to cls 5.1(c), 5.5 and 5.6 of that agreement, are more general and, in my view, significantly less rigorous in relation to Mair's obligations and duties and relevantly frame those obligations and duties by reference to the Managing Director's employment contract. Given that I have found that Mair has not breached his obligations and duties under the ESA, or if it were determinative at common law, it follows that Mair has breached no duties or obligations under the SUHA in respect of the mattes alleged in the Defence by the plaintiffs by counterclaim including by R&B and vLAH.

Defence – Schedule 2

379 Schedule 2 to the Defence alleges examples of Mair directing Hewamanna to manipulate the books of R&B and Herringbone on the occasions as specified.

380 Mair's evidence in relation to the allegations referred to in the last preceding paragraph are detailed in his Statement of 9 February 2016.[401]

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399 Mair [354].

400 Plaintiff's Amended Closing Submissions [7]; Mair [355].

381 In my view, each of the directions as to how to treat the accounts which are alleged against Mair in Schedule 2 (A-D) of the Defence are insufficiently explained by R&B and the plaintiffs by counterclaim. This position was not relieved by any explanation or submission by the R&B or the van Laack parties.

382 VLAH, vLG, R&B, RBG and Herringbone assert that Mair directed Hewamanna to manipulate the books of R&B and Herringbone by:

(a) Schedule 2 – Paragraph A

Mair emailing Hewamanna on 5 October 2012 directing him to code Aaron Love's ('Love') accommodation in August and September 2012 as 'rent' in R&B's August 2012 file;

I accept Mair's evidence that at the time of the email of 5 October 2012, Love was being stationed in Sydney to work in R&B at the Myer Store. I accept Mair's view, which I consider to be reasonable in the circumstances, that the cost of Love's visits to that retail outlet should be reflected in R&B's accounts as a cost incurred in respect of the R&B Sydney Myer's store.

Mair's evidence was that because specific store locations did not have travel budgets he considered it appropriate to record the costs associated with Love's visits as an occupancy cost. Mair believed that would be seen and approved by the Auditors, or if the Auditor took issue with that allocation, raised for review.

The defendants have not challenged Mair's position on this issue in cross-examination or by their submissions.

(b) Schedule 2 – Paragraph B

Mair emailing Hewamanna on 11 September 2013 directing him to add $50,000 of sales to R&B's management report for August 2013 and to deduct this in September and/or October 2013.

Mair's evidence was that the normal end of the month accounting process involved discussions and decisions as to the most accurate manner in which to account for a business' performance for that month. Mair also explained that 'accrual accounting' involved the consideration of pre-payments

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401 MS194A, [356]-[365].

which would include payments for services either not received or yet to accrue to the business, and accruals where expenses had been budgeted for, and the subject of such expenses undertaken, however in relation to which no invoice had yet been received, and also for what he referred to as 'revenue recognition'.

Month end adjustments were made for such payment and alike. Mair pointed out that monthly end adjustments were required to either balance or otherwise be brought to account by end of the relevant financial year and were also always scrutinised by the company Auditor.

The defendants have not challenged Mair's position on this issue in cross-examination or by their submissions.

I accept Mair's evidence that the adjustment which Mair directed Hewamanna to make on 11 September 2013 is not insidious and was in the nature of a normal end of month adjustment.

(c) Schedule 2 – Paragraph C

It is alleged that Mair emailed Hewamanna on 17 February 2015 directing him to record a pop-up sale in February as having been made in January 2015 so as to alter the figure for 'margin' and to move $20,000 out of 'alterations' for the Herringbone Management Report for January 2015.

Mair's evidence is that the 'pop-up' sales referred to occurred across the months of January and February 2015 but an appropriate proportion of those sales had not been allocated to the period January 2015.

Mair also explained that the 'margin' in question would always have been derived from the merchandising system and would be the subject of the year-end audit.

Mair's evidence was that the 'alterations' referred to by the counterclaimants were made to better reflect the month in which they were budgeted.

I also accept Mair's evidence on this matter.

The defendants have not challenged Mair's position on this issue in cross-examination or by their submissions.

(d) Schedule 2 – Paragraph D

It is alleged that Mair emailed Hewamanna on 20 March 2015 directing him to remove amounts from the 'rental' and/or 'wagers' items in R&B's books of account, for the purpose of changing the EBITDA from $65,000 short of forecast and to bring it within the $20,000 to $30,000 forecast for R&B Management accounts for February 2015.

Mair's evidence in relation to this allegation was that the Herringbone stores were not operating at about 20 March 2015 and therefore expenses could be capitalised. That is why he had Hewamanna enter into the books of accounts of R&B that certain rental and wages costs for February 2015 were able to be reduced.

The defendants have not challenged Mair's position on this issue in cross-examination or by their submissions.

383 Further I accept that, in addition to each of the adjustments criticised above being subject to audit, each adjustment was conspicuous in the books of account of R&B. Those transactions were in no way secreted by Mair or Balnaring.

384 Accordingly, I am not satisfied that any of the above adjustments or accounting treatments alleged against Mair by R&B and the vLAH parties amounted to a breach of the ESA or the SUHA or of any fiduciary duty owed by Mair to R&B or any other person or entity. I add that the allegations made by the plaintiffs by counterclaim in paragraph [9A(h)] in their Defence to Amended Statement of Claim and Counterclaim, are serious in nature.[402]

385 Given the serious nature of the defendants' allegation in relation to these particular matters, I consider they require establishment to a high level of satisfaction. On the above evidence, and for the above reasons, I am not satisfied on the balance of probabilities the allegations in Schedule 2 are established and I am far from so satisfied to the necessary higher level of satisfaction.

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402 MS21.

Amended Counterclaim – Schedule 3[403]

386 Failing to conduct the affairs of the Group to ensure that all relevant superannuation and tax legislation was complied with.

Superannuation – Breaches Alleged against Mair

387 R&B and the plaintiffs by counterclaim allege against Mair and Balnaring both in the Defence to the Mair termination claim and by way of counterclaim based on Mair and Balnaring's alleged breaches that Mair failed to cause superannuation contributions to be paid by the Group, vLAH and Herringbone in the sum of $463,352 and thereby caused the Group, vLAH and Herringbone to incur liability for penalty and interest charges in the sum of $249,528.

388 Mair's evidence was that the payments referred to were not made on time because of the working in capital pressures faced by the relevant business at the time. Mair's evidence was that from the time of acquisition by vLAH of the R&B Business, that business was potentially under resourced in relation to working capital, something which Mair informed both von Daniels and Potyka about via conference calls.

389 Mair's evidence in chief was that:

> 363. During the acquisition process, van Laack agreed to inject AUD $2 million into the R&B Business to replace facilities the business had with the National Australia Bank. Much to my disappointment, shortly after the acquisition was completed, Dr Potyka explained that van Laack wanted the loan repaid quickly. As a result, the local management team were under constant pressure to balance the demands of van Laack to repatriate cash to Germany (inclusive of the transfer pricing charges), while still investing in and growing the business (which required capital investment) and meeting the business' local obligations.
>
> 364. By February 2015 a plan was put in place to ensure that the R&B Business caught up on all outstanding payments quickly. Dr Potyka was aware of this as it was contained within the accounts provided to the German finance team at each month-end, and I understand from discussions with Mr Hewamanna that he and Dr Potyka discussed the payment plan at the time of the internal audit in March 2015.
>
> 365. Moreover, all superannuation, tax and payroll matters were, in and from January 2015, within Mr Crawford's remit. I refer to a copy of an email dated 11 February 2015 from Mr Crawford relating to the superannuation issue.[404]

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403 Paragraph [9A(i)]: Mair and Balnaring's breaches of the Shareholders Agreement, ESA, and fiduciary duties; Directions in place of that allegation including failure to pay superannuation and tax.

404 CB3028-3029 (MOL.501.001.2240).

> Mr Crawford was a senior and experienced General Manager and my assumption in early 2015 that he was appropriately in control of this area of the business. Mr Crawford did not express any concerns to me regarding the superannuation and tax situation. [405]

390 Mair's evidence also was that:

(a) Herringbone entered into an arrangement with the ATO to pay off its debt. Mair explained that that situation was caused by a shortage of working capital in turn resulting from the number of repayments which were required by the van Laack parties to be made to Germany. Mair explained that the cash/liquidity shortage caused by the requirements for inter-company transfers of cash from the R&B Business to vLAH resulted in both defaults in payments of superannuation and defaults in the Group making tax and superannuation payments;

(b) the exigencies which existed for the R&B Business at the time, and leading up to the dates on which superannuation and tax payments were not made and were ultimately paid late,[406] were caused by the working capital pressures under which the business was placed by vLAH.

Mair gave evidence that those working capital pressures were caused by vLAH and vLG directing R&B to repay vLAH moneys which vLAH had earlier advanced for the purpose of refinancing R&B's facilities with the National Australia Bank, and was unexpectedly required to be repaid to vLAH;[407]

(c) Mair explained that the result of these matters was that the Group was short of working capital as a result of the number of payments that he had been obliged to make to vLG throughout the 2014 financial year;

(d) that had resulted in both superannuation and tax obligations of the Group falling into arrears;[408]

(e) Herringbone was forced to enter into an agreement with the Australian Taxation

405 MS196, [363], [364] and [365].
406 MS195-197.
407 MS196.
408 T117.21-27.

Office to pay off its tax debt on 14 November 2014;[409]

(f) he informed Potyka of vLAH that the Group did not have sufficient cash to repay vLG pursuant to the arrangement made during the mid-2012 acquisition by vLAH of 80% of the shareholding of the R&B business; and

(g) he regularly informed Potyka and von Daniels about the problems which the R&B Business was experiencing in relation to cash pressures.[410]

391 Mair's evidence described the imposition of an unexpected loan repayment regime upon the R&B Business by vLAH after the 2012 acquisition of R&B business by vLAH. Mair's evidence also described the efforts he made to manage the parlous liquidity of R&B during the period up to Crawford taking over as General Manager of R&B from January 2015.[411]

392 Mair's evidence also explained the super added financial pressure placed on the R&B business by the transfer-pricing arrangements directed by vLAH, pursuant to which in the net result, the R&B Business, in which Balnaring had only a 20% interest, transferred money to the Singaporean vLAH subsidiary, in which Balnaring had no interest.

393 This arrangement, in short, was that the R&B Business was required to pay a Singaporean vLAH subsidiary a specified amount for each Vietnamese manufactured retail item it produced ('the Singapore Surcharge').

394 Further, the R&B business was required to pay a Fabric Surcharge (Fabric Surcharge) to the Singaporean vLAH subsidiary, levied at 20 per cent of the cost of the fabric for each item manufactured from European fabric and 40 per cent of the cost of the fabric for each item manufactured from Chinese fabric.

395 Although annually vLAH and vLG arranged for the Singaporean vLAH subsidiary to pay Balnaring a 20 per cent of annual Singapore Surcharge and Fabric Surcharge, that arrangement was only applied in the financial years 2013 and 2014, and only partly relieved the financial burden which the Singapore Surcharge and the Fabric Surcharge impose upon

409 T117.21.
410 T117.28-T118-5; MS196 [362]; T124.1-4; T124.12-24; T189.17-T190.9; T506.4-T507.1.
411 MS196 [362]-[365].

the struggling R&B Business.[412]

396 I am satisfied in all the circumstances that the combination of vLAH's imposition of a loan repayment repatriation of capital to vLG, Germany, including the way it increased the R&B Business loan account, that loan to the R&B Business in respect of the supply of goods by vLAH to the R&B Business on credit,[413] combined with R&B's difficult liquidity position in 2012 to 2014 resulted in the R&B Business being unable to meet superannuation and tax payments from time to time as alleged by vLAH. Notwithstanding those events, I am also satisfied Mair and Hewamanna used their best endeavours to avoid that situation.

397 I am also persuaded that the loan repayment regime vLAH and vLG imposed upon the R&B Business was well understood by Potyka and von Daniels. I am satisfied that vLAH and vLG, via conversations between Mair, Potyka and von Daniels, were well aware of these matters and the extreme pressure vLAH's and vLG's requirement for the repatriation of cash was placing on the R&B business.[414]

398 I am also satisfied that the above matters caused liquidity pressure for the R&B Business and that as a result that business struggled to meet the cash repatriation requirements of vLAH imposed upon the R&B Business, which was from the outset short of working capital in the result brought about a situation in 2014 in which the R&B Business was unable to meet its various statutory obligations, including the payment of superannuation and tax and other revenue imposts on time.

399 I am also satisfied that the relevant R&B Business liquidity issues were affecting the R&B Business before Mair became involved with LRG in mid-November 2013.

400 Further, I am satisfied that by about February 2015 a payment plan was in place to meet the Group's superannuation and taxation obligations.[415]

401 I am also satisfied, as I have alluded to, that vLAH was fully aware as was vLG of both R&B Business' continual struggle to pay its debtors including in 2014 its tax and superannuation

412 MS144-MS145, [110]-[118]; MS196-197 [362]-[367].
413 T774.25-31.
414 MS3141-3143. T506; MS5235-5237; MS2924, MS2954-2956; MS3955-3958.
415 MS196 [364], MS197 [367]; MS3975-3977; T117.21-23.

obligations and I am also satisfied that vLAH, and vLG were also aware of the plans that R&B Business had developed to ensure that the Group's tax and superannuation obligations were brought into compliance.[416]

402 I consider that the way in which vLG required the R&B Business and Herringbone to be resources and managed also had a material negative financial effect on the R&B Business. That material negative effect was caused in my view by the significant diversion of resources of the R&B Business to support Herringbone, including to allow it to refurbish outlets.

403 Mair's evidence details that he was directed to do what he could to turn around the Herringbone business, which was 100 percent owned by vLG initially and then vLAH, including using the assets of R&B, including himself, to that end.

404 I am satisfied that R&B Business design team and business buying team and production team, including R&B's Retail Director Ricky Lai, in a way that was not compensated for by either Herringbone or vLAH, devoted significant resources, management talent to endeavouring to turn around the ailing Herringbone operation.

405 I am also satisfied that both Potyka and von Daniels were aware of these diversions of resources by R&B, and directed this diversion and cost thereby forcing it on both Mair and the R&B Business.[417]

406 Further I am unpersuaded that there is any evidentiary basis upon which to conclude that the R&B liquidity problems and its failure to meet its superannuation tax obligations and other revenue imposts from time to time were in any way caused by Mair or Balnaring's involvement in LR1 or LRG.

407 Furthermore, in my view, Mair was not himself personally liable for the performance of the R&B Business. It is to be noted that both von Daniels and Potyka were also Directors of the R&B Business at all material times and the evidence establishes that von Daniels and Potyka were provided with regular summaries which reflected the non-payment of superannuation and tax at certain points in time.[418] However, von Daniels and Potyka did not express or raise

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416 MS196 [364]-[367].
417 MS155 [160]-[169].

any concern about outstanding superannuation and tax and other revenue obligations on the part of the Group and neither did they take any action to remediate the default they now, via R&B and the van Laack companies, complain about.

408 Further, the tax penalties to which the vLAH parties refer in Schedule 3 to the Defence and alleged against Mair, were, it appears, ultimately reversed by the tax authorities.

409 For the above reasons I am not satisfied that Mair has failed to conduct the affairs of the Group so as to ensure that all relevant superannuation and tax legislation was complied with as alleged in Schedule 3 of the Defence.

410 I do not consider that the defaults which occurred in relation to the payment of superannuation and tax and other revenue were caused by defaults for which Mair was responsible in all the circumstances. On the contrary I am persuaded that Mair kept the vLAH and vLG interests, including von Daniels and Potyka, appropriately informed in relation to these non-payments and the reasons for them, and I consider that Mair did all he could reasonably do in the circumstances to manage R&B Businesses, including the payment of R&B Businesses and Herringbone's creditors.

411 Accordingly, and for the same above reasons I do not consider Mair to be liable for any penalties or interest in relation to the Australian Taxation Office or in relation to the non-payment of PAYG or GST obligations or penalties or liable in respect of any interest payable to the Australian Taxation Office in relation to non-payment of income tax or Victorian State Revenue, New South Wales State Revenue or payroll tax to the revenue offices of those States.

412 Finally, I am satisfied that not only did Mair do his best to meet the R&B Business superannuation and tax obligations, but that in relation to defaults, Mair and Hewamanna sought to make appropriate arrangements with the Australian Taxation Office for the payment of outstanding tax.

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418 T124.12-22.

Mair's Evidence Generally to be Preferred

413 Further, I prefer Mair's evidence on this and in relation to the other instances where his evidence is at odds with that of von Daniels or Potyka, and where no document exists to contemporaneously support or confirm the facts in issue. This is because, in addition to my observation that Mair was a direct, candid witness with a good recollection of the events in issue, his version of events, as in the above instance, was often backed up by the contemporaneous documents which I have noted below in certain instances.

414 Further Mair's version of events and recollection of relevant details, although he made appropriate concessions from time to time, was unshaken under sustained cross-examination.

415 Mair's evidence was further bolstered in my view because in many important respects it was corroborated by Poulakis. Poulakis, who was an important witness with a day to day at the coal face knowledge of what was happening in LRG, and who confirmed Mair's evidence on many significant issues, was not cross-examined by the defendants.

416 Von Daniels, by contrast was understandably less persuasive. On many aspects of what was in issue he was not, or had not been, contemporaneously and directly involved. Von Daniels' evidence was also I consider negatively affected by him not being willing to make appropriate concessions. If his evidence was candid and accurate and given so as to be reliable and complete as to the matters in issue, he should have made appropriate concessions.[419]

Conclusion on Allegations in the Termination Proceeding

417 For the reasons I have outlined above, R&B and the plaintiffs by counterclaims allegations of breach by Mair of the ESA, SUHA and alleged fiduciary duties are not made out. I am not satisfied that Mair (or Balnaring) perpetrated any significant or substantial breach of the said contracts or duties as alleged by R&B and the plaintiffs by counterclaim.

418 I am also satisfied R&B and the plaintiffs by counterclaim were not, at any material time, entitled, contractually or otherwise, to bring Mair's employment under the ESA to an end without notice.

[419] T549.5; T550.15; T568.4; T654.11-15; T658-659; T707-711.

419 The allegations of breach by Mair, being the basis on which R&B purported to summarily dismiss on 27 March 2015 without notice, are unsubstantiated and appear to have been insufficiently interrogated and considered by R&B at the time. I consider further that Mair was not given a reasonable or proper opportunity to respond to the allegations referred to in the R&B letters to Mair of 27 March 2015 before he was summarily dismissed.

420 As explained above, in purporting to terminate Mair's engagement as Managing Director, as R&B did on 27 March 2015, R&B repudiated the ESA by evincing an intention not to be bound by its terms. I consider that by lawyer's letter of 31 March 2015 Mair accepted R&B's repudiation of the ESA and bought that contract to an end.

421 As a result of the above finding, I consider Mair to be entitled to damages for R&B's wrongful repudiation of the ESA.

422 Had R&B not wrongfully summarily purported to dismiss Mair, and thereby repudiated the ESA, I am satisfied that the ESA and Mair's employment thereunder would have remained on foot until 31 October 2015.

423 I am also satisfied that in breach of the ESA, R&B has failed to pay Mair any long service leave or the 'Herringbone Bonus' to which Mair was entitled.[420]

Plaintiff's Calculation of Loss and Damage – Termination Proceeding

424 The plaintiff claims loss and damage pursuant to paragraph [13] and [15] of the plaintiff's Amended Statement of Claim dated 3 September 2015.

425 The plaintiff's calculation of its entitlement to loss and damage as a result of the wrongful termination of Mair's contract of employment is as follows:[421]

> PLAINTIFF'S CALCULATIONS OF LOSS AND DAMAGE – TERMINATION PROCEEDING
>
> 1. Loss of salary and entitlements in the sum of $352,241:
>
> (a) $163,644 in base salary (calculated as 0.5973 years[422] x $273,972

420 Plaintiff's Closing Submissions, [154]-[156]; MS2271, [3]; MS149, [140]; MS270A, [12]-[13].

421 Plaintiff's Calculation of Loss and Damage – Termination Proceedings (Email: 23 June 2016).

422 Mair resigned his employment effective 31 October 2015 (MS4276). But for the dismissal Mair's employment would have ended on that date. His employment in fact ended on 27 March 2016 (MS4356). Mair's employment

base salary per year[423]).

(b) $15,546 in superannuation contributions (9.5 percent[424] x $163,644[425]).

(c) $2,590 in long service leave (1/60th[426] x 0.5973[427] x $273,972[428]).

2. Long service leave

(a) $45,577 being $300,000 annual salary[429] / 52 weeks per year * 7.9 weeks: see PCS at [154]-[156].

3. Herringbone Bonus 2014 + 2015

(a) The terms of the Herringbone Bonus are set out at MS2269 (point 3).

(b) For 2014 Mair is entitled to $113,739.80 calculated as 20 percent of actual net Herringbone profit for 2014 of $568,699.[430]

(c) For 2015 Mair is entitled to $125,564.60 calculated as 20 percent of projected net Herringbone profit for 2015 of $627,823.[431]

426 In relation to the above entitlements Mair submits that he is entitled to Long Service Leave in the sum of $41,725.95.

427 In this regard I am satisfied as to the continuity of Mair's employment by R&B from the ESA effective date of 1 March 2006 to 31 March 2015.[432]

428 Given the established duration of Mair's employment by R&B s 58 of the *Long Service Leave Act 1992* (Vic) entitles an employee who has completed at least seven, but less than

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therefore ended 218 days (27 March 2015 – 31 October 2015) early. 218 days is 59.73 percent of 365 days per year (218/365*100). Mair is entitled to 59.73 percent (or 218 days) of his annual salary, representing the 218 days between the date of his wrongful dismissal and the date on which his employment would have come to an end by reason of his resignation.

423 By cl 4 of the Contract (MS1904) Mair's base salary was $300 000, inclusive of superannuation (see cl 4.6: MS1905). The base salary figure has been calculated by deducting 9.5 percent superannuation from the total salary amount, resulting in a base salary figure of $273,972.

424 *Superannuation Guarantee (Administration) Act 1992* (Cth), s 19(2).

425 This is the salary Mair would have earned between the date of dismissal and the date on which his employment would have come to an end by reason of his retirement as set out in point 1(a).

426 Section 58 of the Long Service Leave Act 1992 (Vic) provides that where an employee's employment stops after 7 years but before 10 years, the employee is entitled to an amount of long service leave equal to 1/60th of the period of his or her continuous employment.

427 This is the period of additional continuous service, expressed as a percentage of one year, that Mair would have served had his employment not ended early by reason of the wrongful dismissal, as calculated in footnote 1.

428 This is Mair's annual salary exclusive of superannuation, calculated in accordance with footnote 2 above.

429 By cl 4 of the Contract (MS1904) Mair's base salary was $300 000, inclusive of superannuation (see cl 4.6: MS1905). Mair's service was continuous from 2006 (see 2006 Contract at MS1161-1168 and 2009 Contract at MS1170-1177, particularly cl 4.1 (MS1904).

430 M [149]; MS153; MS5211; MS2743-2767.

431 M [151]; MS153, MS5211.

432 MS21161-1168; MS1170-1177; MS1901-1910 and MS4701-4725.

ten, years of continuous employment by the one employer is entitled to be paid long service leave equal to 1/60th of the period of continuous service.

429 On the evidence, by the end of March 2015 Mair had completed just over nine years employment.

430 Section 58 of the *Long Service Leave Act 1992* (Vic) is in the following terms:

> **Entitlement to long service leave if employment stops after 7 years**
>
> (1) This section only applies if an employee's employment is ended and the employee has completed at least 7, but less than 15, years of continuous employment with one employer.
>
> (2) The employee is entitled to an amount of long service leave equal to 1/60th of the period of his or her continuous employment.

431 Further, I accept the ShineWing Australia Accountants and Advisors' calculation in relation to Mair's long service entitlement, set out at MS813(8) and Appendix 12,[433] in the sum of $41,725.95 calculated between 1 March 2006 and 27 March 2015.

~~432~~ Mair's evidence of that entitlement is at MS301.

~~433~~ Mair's evidence was that he did not take any long service leave (nor has he been paid an amount in that respect) 'since commencement of my employment'.[434]

434 Mair's entitlement to the sum I have referred to in relation to long service leave is provide for by s 72 of the *Long Service Leave Ac 1992* (Vic) as follows:

> **What is to happen if employment ends before leave taken**
>
> (1) If the employment of an employee ends before he or she has taken all the long service leave to which he or she is entitled, the employee is to be regarded as having started to take his or her leave on the day the employment ended.
>
> (2) On that day the employee's employer must pay the employee the full amount of the employee's long service leave entitlement as at that day.
>
> Penalty: 20 penalty units.
>
> (3) An employee's long service leave entitlement under this section includes any entitlement that accrued as a result of the ending of the employee's employment.

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433 MS857.
434 M [301], [302].

435 For the above reasons I find that Mair is entitled, as a component of his damages for R&B's repudiation of the ESA, to $41,725.95, subject to any update adjustments, in relation to his long service leave entitlement.

436 Notably, save in respect of their denial in relation to Mair's claim that he was wrongfully dismissed, R&B and the van Laack parties do not point to any evidence or submit against Mair's claims for loss and damage flowing from R&B's repudiation of the ESA, and the articulation of those claims.

437 I consider that Mair has established each of the components of loss and damage referred to above and is therefore in my view entitled to recover the sums claimed by Mair in his Termination proceeding subject to adjustments to those entitlements, including in respect of interest, at the date final orders are made in this matter.

438 I shall await any further submissions, if necessary, in relation to the finalisation of the sum sought to be ordered in Mair's favour on the above Termination claim.

Calculation of Loss and Damage in Counterclaim – Termination Proceeding

439 In the termination proceeding, the plaintiffs by counterclaim seek to recover what they contend is the loss and damage suffered as a result of Mair and Balnaring's breaches of the alleged obligations and duties owed to the Group and to vLAH, vLG and Herringbone.

440 The counterclaimants' loss and damage asserted to arise from the alleged breaches by Mair referred in the counterclaimants' Defence to the Amended Statement of Claim and Counterclaim, dated 17 September 2015, particularises their alleged loss and damage, as set out in Schedule 4 of the said Defence and Counterclaim.

441 I note that, to the extent the counterclaimants made any specific submission in justification of the counterclaimant parties' financial counterclaim, they submit:[435]

> 65. As a result of the conduct of Mr Mair described in details above, and Laack has suffered significant loss and damage which is seeks recovery of. The loss has been suffered by reason of:
>
> (a) Mr Mair's breaches of fiduciary duty owed to the Group, vLAH,

435 Defendants' Closing Submissions, 24 May 2016, [65]-[69].

vLG and Herringbone (by his conduct established by the evidence referred to in Schedule B);

(b) Balnaring and Mr Mair breaching their obligations under the Shareholders' Agreement; and

(c) Mr Mair breaching his obligations under the NM Employment contract.

66. The details as to the losses suffered by van Laack are contained in the Defendants' Particulars of Loss. The evidence substantiating van Laack's loss and damage is referred to at Schedule C to these submissions.

67. The evidence plainly demonstrates that LRG and LR1 took the benefit of the breaches of fiduciary duty engaged in by Mr Mair. Van Laack refers to the matters submitted above and the evidence referred to in Schedule B with respect to:

(a) Mr Mair establishing a loan facility for van Laack to lend money to LRG on an interest free, repayable at will basis;

(b) the deployment of van Laack staff for the benefit of LRG; and

(c) Mr Mair causing van Laack to pay of credit card invoices of him and other van Laack employees in relation to expenses attributable to LRG.

68. Van Laack seeks orders for the taking of an account of LRG and LR1, and equitable compensation for the losses identified in Schedule C.

442 Further, the counterclaimant parties assert that the evidence referred to in Schedule C, of the Defendants' Closing Submission, 24 May 2016, [66]-[67], is relied upon to establish vLAH's loss and damage as referred to in Schedule C of those Closing Submissions.

443 VLAH ultimately submits that the Court should make orders for the taking of an account of LRG and LR1 and equitable compensation to vLAH for the losses identified in Schedule C the Defendants' Closing Submission.

444 For the reasons I have elsewhere addressed, I have however found there to be no material breach by Mair and Balnaring of their obligations and fiduciary duties referred to above including any material breach of the other obligations under the ESA, SUHA or at common law by Mair as alleged by the counterclaimant vLAH parties.

445 Accordingly, it is unnecessary for me to deal further with the very extensive assertions as to causation and quantification made in Schedule C to the Defendants' Closing Submission and the counterclaimants' submissions as to the calculation of these sums sought to be recovered

pursuant to the Counterclaim.

446 Therefore I consider that the counterclaims fail. For the same reasons, the counterclaimants' claim for taking an account of LRG and LR1 and for equitable compensation also fail.

447 I also consider that, in any event, as alleged by Mair and the other defendants to the counterclaim's Defence to the counterclaimants,[436] Mair and the other defendants plead that the allegations made by vLAH, vLG, R&B, RBG and Herringbone ought be struck out because those allegations are 'rolled up' as a plea which contains many allegations of material fact in an obscured manner that precludes any appropriate responsive pleadings.

448 Under cover of that objection, Mair, LR1, LRG and Balnaring deny the allegations made by the counterclaimants.

449 In my view, the plaintiffs by counterclaim, and the plaintiffs by counterclaim's particularisation of their loss and damage, including diminution in value of the R&B business particularised in Schedule 4 to the counterclaimants' pleaded counterclaim,[437] fail to identify the conduct by Mair which those parties allege gives rise to the breaches pleaded and the specific fiduciary obligations said to be owed and also breached. Put another way, there is no discernible connection pleaded or particularised between the loss and damages sought by the counterclaimants and the unspecified breaches which are said to give rise to such damage.

450 These inadequacies are compounded because the counterclaim does not assist, nor do the counterclaimants submissions assist, in identifying what loss and damage claimed in Schedule 4 has arisen as a result of which specific conduct. Nor have the counterclaimants identified which particular breaches of obligations are relevant.

451 Further, in my view, save as addressed below, there are no detailed or adequate submissions by the plaintiffs to counterclaim explaining these aspects of the counterclaimants' case, including what evidence is relied upon to support the counterclaimants' damages claims. Nor is there any substantial or adequate detail of the make-up of the calculations of the many

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436 Plaintiff and Defendants to Counterclaim's Reply to Amended Defence and Defence to Amended Counterclaim, 10 August 2015, [2]-[8].

437 MS24-25; MS36-37.

components of loss and damage asserted in Schedule 4 to the Counterclaim.

452 To the degree there are aspects of the counterclaim quantum which it is possible to address or partly address, I conclude and find the following.

Assayable elements of the vLAH Counterclaim

453 Insofar as there are exceptions, or partial exceptions, to the above, in that vLAH provided some explanation in Schedule C and related Amended Further and Better Particulars dated 17 May 2016, together with an Aide Memoire in the form of a Schedule like set of figures asserted as the consequences for R&B of reversing the entries impugned in [53A] (the Transactions), the counterclaimants assert in Schedule C to their closing submissions dated 24 May 2016:

(a) **Losses and deficits in net assets**

The counterclaimants' claim certain gross figures without any explanation of the breaches which have given rise to the whole or any part of the global figures referred to and without identification or explanation of the components of the sum which it is asserted the breaches have caused, in whole or in part, and which are in many instances claimed as global losses.

Furthermore, as pointed out by Mair, the 2014 audited accounts[438] and the Paolacci Report for the financial year 2015 do not support, indeed refute that there were 'increasing losses' as asserted by the counterclaimants.

Further, as Mair's evidence explains, Herringbone and the vLAH imposed inter-company loan structures and other adjustments which he details, which I consider cannot be laid at Mair's feet and which I am satisfied impacted the R&B Group performance, profits and value;

(b) **Loss and value of the Group**

The counterclaimants' asserting a substantial decrease in the EBITDA of the Group in the period 1 July 2012 to 31 March 2015 without identifying the breaches which have caused the whole or any part of such loss.

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438 MS4513-4527.

The value of the Group as asserted by the counterclaimants is, in my view, unreliable and inaccurate because I have found that as a result of the twenty-three impugned Transactions alone, the EBITDA for the Financial Year 2015 is substantially incorrect. Therefore the counterclaimants Schedule C assertions about the position with the Group's value must be rejected;

(c) **Penalties and interest payable to the ATO**

The counterclaimants' make a claim in relation to the payment of superannuation guarantee entitlements, non-payment of PAYG and GTS taxation obligations, and income tax non-payment and Victorian and New South Wales' State Revenue defaults in relation to non-payment of pay-roll tax. Mair's evidence referred to above addressed these defaults. I have also elsewhere addressed these issues and accepted that, because of the particular circumstances, the inter-relationship of the relevant corporate parties and the impact of how the van Laack entities imposed cash repatriation inter-company business loan and other burdens upon the R&B Business, in my view, combined with the circumstance that both von Daniels and Potyka were also directors of R&B and the R&B Group, result in these elements of the counterclaim being unmeritorious. This is because, in the circumstances, Mair and Balnaring have perpetrated no material breach and also because von Daniels and Potyka, being directors of the relevant companies should also have addressed any necessary statutory payment obligations, but did not do so, nor did they raise with, or complain to, Mair about these matters. Those Directors at the least acquiesced in relation to any events of revenue or superannuation non-compliance, and they and R&B and vLAH which they effectively controlled cannot be heard to criticise Mair in relation to these matters.

Further, the evidence which I have earlier addressed includes evidence that R&B Group under Mair was, at all material times, endeavouring to address issues and demands in relation to defaults of unpaid tax imposts and the like referred to in the counterclaim submissions [10]-[18].

(d) **Costs of consultants to assess and rectify the underpayment of wages, individual employee complaints and issues to the Fair Work Commission**

As pointed out by Mair, in my view the counterclaimants have adduced no evidence as to precisely what the various alleged underpayments were, nor have the counterclaimants tendered any primary documentation to prove and particularise these default assertions in the Counterclaim.

Neither was Mair cross-examined about the alleged underpayment of wages, or individual employee complaints and issues to the Fair Work Commission.

Further, the counterclaimants do not identify the cause of the matters complained of in relation to the unspecified underpayments referred to in the counterclaim.

For these reasons, in my view, this further element of the counterclaim is not made out.

(e) **Unauthorised dividends**

This element of the defendants' counterclaim has been addressed elsewhere.

(f) **Mair's outstanding loan account**

The alleged interest payable pursuant to the SUHA in the sum of $157,483.71 is also in my view an unsustainable counterclaim because, pursuant to cl 5.5 of that Agreement, Mair was not required to repay this loan account until August 2016 and therefore was not in default in that regard at 30 April 2016 as alleged by the counterclaimants.

Further, the SUHA makes no provision for the repayment of the loan on termination of employment, or otherwise.

Further, in this regard no basis for recovery is pleaded by the counterclaimants.

(g) **Extraordinary costs of the audit for the financial year 2015 – Costs of IT consultants to remedy IT and telecommunications issues arising from Mair's conduct and costs to the Group, vLAH and Herringbone of engaging consultants to rectify the Group's sponsorship status with the Department of Immigration and Border Protection**

I consider that the extraordinary audit costs which were incurred voluntarily by the counterclaimants cannot be attributable to Mair given my earlier findings in relation to Mair's conduct. Mair and Balnaring have been found not to have perpetrated any material breaches as alleged by R&B and the plaintiffs by counterclaim and have therefore not given rise to the claimed Audit and IT and Consultants' costs.

Further, because the counterclaimants dismissed Hewamanna, the R&B Chief Financial Officer, they have also thereby, in my view, largely caused much of the Audit cost claimed. There is no evidence

of any effort made to access Hewamanna's knowledge of the accounts and to obviate the costs that were incurred by individuals unfamiliar with the R&B Group's financial affairs endeavouring to assay such financial records in the second quarter of 2015.

In this respect, I also accept Mair's submissions in reply at [65] that the 'contract labour' type additional costs imposed upon the business by the counterclaimants was in relation to work which would ordinarily have been done by the in-house finance team.[439]

Further, the counterclaimants adduced no evidence in relation to the costs of IT consultants to remedy the IT and telecommunications issues which are referred to in an unparticularised way in the Counterclaim.

I am not satisfied that there is any basis to the counterclaimants' claim in respect of the claimed IT and telecommunications related costs nor the counterclaimants' asserted costs of engaging consultants to rectify the Group's sponsorship status with the Department of Immigration and Border Protection. Further, R&B and the plaintiffs by counterclaim have not adduced evidence that Mair was responsible for the generation or the incurring of these claimed costs.

454 For the above reasons, I am not satisfied as to the above asserted heads of damage claimed by R&B and the plaintiffs by counterclaim.

Counterclaimants' Aide Memoir

455 Finally in relation to the counterclaimants' Aide Memoir referred to above, and Mair's amendments to that presentation of figures, I accept that Paolacci's expert opinion as to the EBITDA for the period April 2014-March 2015[440] establishes the correct sum for that period.

456 I reject the counterclaimants' unamended Aide Memoir which appears to cover a different period, namely May 2014-April 2015 and appears to reflect the profit and loss figures for that incorrect period, rather than all of the integers calculated as part of the EBITDA.

457 Further, the counterclaimants' Aide Memoir also appears to include only figures for R&B, rather than the R&B Group, which should include Boston Brothers and Baubridge & Kay.

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439 T914.11-T915.1.
440 MS840-841.

458 The counterclaimants' Aide Memoire also purports to make adjustments in relation to the Transfers (addressed below) which I have rejected, and does so without allowing for the fact that not all of the Transactions relate to R&B; some of the adjustments that the counterclaimants have taken into account in their Aide Memoir calculation relate to Boston Brothers and Baubridge & Kay. These Transactions are identified below in relation to the Balnaring Oppression Claim pleading in paragraph [53A].

459 Additionally the effects of transfer pricing have not been taken into account in the Aide Memoir and the Aide Memoir also inappropriately reflects 'forex adjustments'.

460 Further, the counterclaimants' Aide Memoir in my view inappropriately adjusts by reference to Trivett's Section C adjustments which are referrable to April 2015 and not to the period within which the EBITDA is calculated, namely the period April 2014-March 2015.

461 For the above reasons, I reject as accurate or of assistance the R&B Group and van Laack parties' Aide Memoir and confirm again that I accept the Paolacci Report calculations[441] which include:

(a) the EBITDA for the 12 month period 1 March 2014 to 28 April 2015 equals $3,602,051; and

(b) the EBITDA for the financial year ended 30 April 2014 equals $3,567,587.

462 I also note that in passing Paolacci's calculation of the EBITDA for 2014 produces a sum very similar to the EBITDA calculated for 2015. I shall return to this observation below in relation to what I consider to be a suitable remedy in all the circumstances in relation to Balnaring's oppression claim.

463 I note that in 5.8.4 and 5.8.5 of Paolacci's Report he states that he considers that the 'fabric surcharge' should be disregarded for the purpose of calculating the EBITDA as should the 'foreign exchange losses', neither of which have been adjusted against the Paolacci EBITDA's for 2014 and 2015 referred to above. Those yet to be precisely quantified adjustments are also relevant to the appropriate remedy in relation to Balnaring's oppression

441 MS807-815.

claim.

Conclusion – R&B and van Laack parties' Counterclaims

464 Accordingly, the R&B counterclaimant parties fail in their counterclaims, primarily because I am not persuaded that the breaches of contractual obligations and fiduciary duties upon which the counterclaims are based are made out for the reasons that I have elsewhere explained in relation to R&B and the counterclaimant parties' case in those respects against Mair and Balnaring.

465 Further, for the reasons I have referred to above, I am not satisfied as to the establishment of breach, or the connection of asserted breaches to particular contractual and fiduciary obligations, nor in turn the connection between such breaches and the asserted loss and damage in Schedule 4 to the counterclaim. Nor am I satisfied as to the make-up of, and the underpinning evidence for, the extensive losses claimed in the counterclaim.

466 For these above further reasons the van Laack parties' counterclaim will be dismissed.

467 Finally, I observe that in addition to the defendants to the Termination case and the plaintiffs by counterclaim relying on parts of the allegations in the defence to Mair's claims as bases for the counterclaim and parts of the counterclaim allegations as bases for the defence to Mair's Termination case, there are also elements of the items of asserted loss and damage in Schedule C which overlap with matters raised by R&B in relation to Mair's Termination case. These include the loss of value of the Group, penalties and interest payable in relation to the alleged non-payment of Superannuation and Income Tax and PAYG, other State revenue non-payments, unauthorised dividends, Mair's loan account, extraordinary audit costs, and the cost of consultants which are addressed elsewhere in these reasons.

468 Because of the above, and the way R&B and the counterclaimants put their case, I note that my findings in relation to the Counterclaims in respect of the R&B and plaintiffs to counterclaim parties' allegations in their Counterclaim case upon which they also rely as breaches by Mair in response to his Termination Case, are also findings on the same issues as they arise in the Termination Case brought by Mair and in particular as they arise in the defences to Mair's Termination case claims and vice versa.

OPPRESSION PROCEEDING

469 In a separate proceeding (S CI 2015 1745), Balnaring brings an oppression case against vLAH, R&B and R&B Group.

Oppression Claim

470 The *Corporations Act 2001* (Cth) ('the Act') provides:

> **232. Grounds for Court order**
> The Court may make an order under section 233 if:
> (a) the conduct of a company's affairs; or
> (b) an actual or proposed act or omission by or on behalf of a company; or
> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
> is either:
> (d) contrary to the interests of the members as a whole; or
> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.
> For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.
>
> **233. Orders the Court can make**
> (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
> (a) that the company be wound up;
> (b) that the company's existing constitution be modified or repealed;
> (c) regulating the conduct of the company's affairs in the future;
> (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
> (e) for the purchase of shares with an appropriate reduction of the company's share capital;
> (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
> (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
> (h) appointing a receiver or a receiver and manager of any or all of the company's property;
> (i) restraining a person from engaging in specified conduct or from doing a specified act;
> (j) requiring a person to do a specified act.
> *Order that the company be wound up*
> (2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:
> (a) as if the order were made under section 461; and
> (b) with such changes as are necessary.
> *Order altering constitution*
> (3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
> (a) the order states that the company does have the power to make such a change or repeal; or
> (b) the company first obtains the leave of the Court.

234. Who can apply for order

An application for an order under section 233 in relation to a company may be made by:

(a) a member of the company, even if the application relates to an act or omission that is against:
  (i) the member in a capacity other than as a member; or
  (ii) another member in their capacity as a member; or

(b) a person who has been removed from the register of members because of a selective reduction; or

(c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or

(d) a person to whom a share in the company has been transmitted by will or by operation of law; or

(e) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
  (i) the company's affairs; or
  (ii) matters connected with the company's affairs.

The Plaintiff's Submissions

471 The plaintiff frames its claim for relief from oppression under s 232(a) and (e) of the Act. In so doing, the plaintiff points to eight alleged acts of oppression by vLAH, R&B and RBG against Balnaring and Mair that were perpetrated by the defendants.

472 The plaintiff alleges that, from on or around 27 March 2015, each of vLAH, R&B and RBG has conducted the affairs of the R&B Group contrary to the interests of the members as a whole and in a manner oppressive to, unfairly prejudicial to or unfairly discriminatory against Balnaring. That was done by:

(a) vLAH taking steps to sell or otherwise divest all of the shares in or the assets of the R&B Group without consulting with Balnaring;

(b) wrongfully excluding Balnaring and Mair from the operation and management of the R&B Group;

(c) wrongfully dismissing Mair from his employment with R&B;

(d) refusing to convene Director's Meetings of companies in the R&B Group;

(e) dismissing the R&B Group auditor and appointing a new auditor to the R&B Group without informing or consulting Balnaring;

(f) re-writing the books of account of the R&B Group in order to minimise its apparent profitability;

(g) failing to complete the annual external audit of the R&B Group's books and records in accordance with the timetable established for the completion of that audit;

(h) interfering with, and improperly adjusting, the guidelines pursuant to which the annual audit of R&B Group was to be conducted; and

(i) engaging in transfer pricing that artificially reduced the EBITDA.

473 Balnaring argues that, in the relevant circumstances, the following acts of oppression have occurred:

(a) **Mair was dismissed unlawfully**

The plaintiff points to the SUHA's express contemplation that Balnaring would participate in the R&B Business. In addition to the dismissal of Mair being a breach and a repudiation of the ESA, the plaintiff also submits that this conduct deprived Balnaring of its legitimate expectation of participation in the management and profits of the R&B;

(b) **VLAH did not consult prior to making a decision to divest Australian assets**

Specifically, the plaintiff asks the Court to find, on the evidence, that vLAH had decided to divest the whole of its interests, including Balnaring's assets, and to hold that their failure to consult Mair before doing so was oppressive;

(c) **Balnaring was excluded from the operations of the group**

The plaintiff points to the dismissal of Mair depriving R&G Group of his knowledge and skill which, on the plaintiff's submission, caused a corresponding decline in profitability. Balnaring also submits that vLAH refused to hold directors' meetings and board meetings that would facilitate participation in the affairs of the R&G Group.

(d) **Marketing strategies adopted at the insistence of vLAH adversely affected the profitability of the R&B Business.**

Mair described such strategies as 'inimical to the affordable luxury status of the brand'. Balnaring submits that such marketing strategies caused a reduction in the value of Balnaring's 20 percent shareholding.

(e) **RB and RBG did not comply with the SUHA in relation to Mair's Put Option entitlements and dividend entitlement respectively.**

With regard to the Put Option, Balnaring submits that vLAH did not calculate nor transfer the purchase price for the minority shareholdings in accordance with cl 13 of the SUHA. That submission rests on Balnaring's antecedent submission that the Put Option was exercised validly, after the occurrence of a Triggering Event, under cl 12 of the SUHA.

With regard to the dividends, Balnaring notes that it has not been paid the dividend it was entitled to pursuant to cl 5.4 of the SUHA for Financial Year ending 30 April 2015.

(f) **Two transfer pricing arrangements artificially lowered the R&B Group EBITDA of the Group**

The substance of this allegation is that after the SPA, the ESA and the SUHA were in place, at the fiat of the van Laack parties, the R&B Group earnings and profits were relocated from an entity in which Balnaring had a 20 percent interest to an offshore van Laack entity in which Balnaring had no interest. Balnaring acknowledges in this regard that a 'gentleman's agreement' was reached whereby the relevant offshore entity would compensate Balnaring. However, Balnaring submits that vLAH resisted efforts to formalise that agreement and no compensation under that agreement has been paid since May 2014.

(g) **The books and records of the R&B Group were manipulated by vLAH, R&B and RBG**

The book of account adjustments made in June 2015 Audit resulted in incorrect and backdated adjustments to R&B Group's 2015 Financial Accounts which Balnaring impugns and alleges have had the net effect of substantially reducing the value of Balnaring's Put Option to zero. Specifically, the plaintiff points to the evidence that:

(xvii) many of the entries effecting the incorrect adjustments were made one day before Balnaring was granted access to the books and records of the Group pursuant to a Court Order;

(xviii) many of the adjustments were backdated without a proper accounting basis; and

(xix) the R&B book of account had been subject to three audits, and an internal review, within 20 months of the June 2015 'adjustment', which had the effect of a new management team rewriting the R&B Group financial accounts for 2015.

474 As a component of the material errors in the books and records of R&B Group, Balnaring relies on 23 erroneous 'adjustments' ('the Transactions') effected on 13 to 16 June 2015 by Mr Franco Ranieri ('Ranieri'), an accountant from Sconia Australia Pty Ltd who was engaged by R&B to assist in preparing the R&B Group Accounts for the 2015 financial year.

475 In general terms, the Balnaring oppression submissions can be summarised as follows:

(a) the systematic exclusion of Mair, culminating in his wrongful dismissal, deprived Balnaring of a legitimate expectation that it would have a role in the management and profits of the R&B Business;

(b) without Balnaring, the R&B Business engaged in various strategies and schemes, whether intentionally or otherwise, with the effect of substantially reducing the value of the minority shareholding in R&B held by Balnaring; and

(c) there is impropriety in the maintenance of the books and records of the Group.

476 The plaintiff submits that the above impugned conduct, whether taken together or viewed in

relation to each of the eight separate allegations, was oppressive, unfairly prejudicial or unfairly discriminatory.

The Defendants' Submissions

477 The defendants do not respond to the plaintiff's specific allegations of oppression. Rather, the defendants raise two broad arguments that Balnaring and Mair are categorically disentitled from relief for oppression under the Act.

(a) The substance of the oppression allegations 'ignores the terms of the contractual arrangements between the parties'.

The defendants submit that should the Court find that Potyka and von Daniels' conduct is not a breach of the Shareholders Agreement, it is, on the defendants' submission, 'difficult to see how such conduct could amount to statutory oppression'.

(b) The conduct of Mair and Balnaring renders any allegedly oppressive conduct 'not unfair' in the circumstances. This submission by the defendants to the oppression claim is contingent on their antecedent submission that Mair and Balnaring engaged in misconduct. Specifically, the defendants point to Balnaring's alleged breach of cl 2.2 of the SUHA which the

defendants' submit imposed an obligation to maximise profits and be 'just and faithful' in 'all activities and dealings'. The defendants' argue that Balnaring and Mair are disentitled from statutory relief because of their wrongful conduct including in breach of cl 2.2 of the SUHA..

478 In the alternative, the defendants to the oppression claim submit that the purchase price of the shares calculated pursuant to cl 12 to the SUHA is nil. On their submission, that calculation applies irrespective of whether the Transfer Contract is enforced via a decree for specific performance or via a remedy in the nature of specific performance as redress for oppression under s 233 of the Act.

479 The defendants to the Balnaring and Mair oppression claim also contend that the substance of the allegations of oppression made by Balnaring are to the effect that the majority shareholder (vLAH) preferred the interests of vLG in conducting the affairs of R&B and RBG over the interests of Balnaring.

480 The defendants to the oppression claims submit that the Balnaring and Mair oppression case fails to take into account the terms of the contractual arrangements between the relevant parties. Specifically, the defendant parties point to cl 7 of the SUHA which provides that, subject to applicable laws, a Director who, in the exercise of that Director's powers or functions, has regard to the interests of the Shareholder who appointed that Director, does not, for that reason alone, act contrary to the Director's duties or exercise those powers or functions for an improper purpose.

481 The defendant parties argue that, even accepting that von Daniels and Potyka preferred the

interests of vLG over those of Balnaring and Mair, von Daniels and Potyka would not be acting for an improper purpose given the effect of cl 7 of the SUHA and therefore their actions could not amount to a statutory oppression.

482 The defendant parties also rely upon the establishment of the allegations of what they assert to be 'serious' misconduct levied against Mair. This includes what is alleged at Paragraph [9A] of the Defence and Amended Statement of Claim and Counterclaim dated 7 September 2015, and allegation Part 'L' to Schedule B to the Defendants' Closing Submissions dated 24 May 2016.

483 Given the alleged serious misconduct perpetrated by Balnaring and Mair, it is submitted that Balnaring is not in the position to allege that the affairs of R&B and RBG have been conducted in an oppressive manner.

484 The defendants argue that as a result of Mair's serious misconduct, which also constitutes the acts, knowledge and state of mind of Balnaring, Balnaring was at all material times in breach of its best endeavours obligations pursuant to cl 2.2 of the SUHA.[442] As a result of this misconduct, it is submitted that Balnaring repudiated the SUHA.

485 The defendants also submit that, as a result of the relevant contractual framework and Mair and Balnaring's serious misconduct and repudiation, Balnaring is not entitled to any remedy for oppression, nor is Balnaring entitled to an order for specific performance as claimed by Balnaring and Mair.

486 The defendants also assert that Balnaring has failed to prove that it is 'ready willing and able' to perform the essential terms of the SUHA. On that basis alone, Balnaring is not entitled to an order for specific performance.

487 Moreover, the defendants submit that any order for specific performance in favour of Balnaring under the SUHA would result in the price of the shares which Balnaring was entitled to under its Put Option being nil. On the defendant parties' case, that is because the SUHA's valuation mechanism provides for a buy out of the minority shareholders' shares at

442 Defendants' Closing Submissions, 24 May 2016, [83]-[84].

5 x EBITDA for the twelve calendar months preceding the date upon which the Option Notice pursuant to the SUHA is served.

488 The defendants identify the Relevant Period in relation to the exercise of the Balnaring Put Option is the twelve months from 1 April 2014 to 31 March 2015.[443]

489 The defendants submit that expert evidence of Mr Brendan Halligan ('Halligan'), on the basis of the audited vLAH accounts, was that the EBITDA for the Group for the Relevant Period was a negative ($6.45) million.[444] On that basis, Halligan's evidence was that the purchase price for the minority shareholders interest pursuant to the SUHA is nil.[445]

490 The defendants point out that Halligan's evidence was based upon the audited consolidated financial statements for the vLAH group. That comprised the financial accounts of R&B, RBG, Baubridge & Kay, Boston Brothers, vLAH and Herringbone.

491 The defendants also submit that Halligan's evidence as to the loss of ($6.45) million referred to above was unchallenged by Balnaring.

492 The defendants reject Balnaring's attack on the Grant Thornton audit of the 2015 financial statements[446] conducted by Grant Thornton with Trivett as audit leader. R&B and RBG note that Balnaring argue a lack of independence on the part of the auditor and that the auditor failed to complete the 2015 Financial Year Audit in accordance with applicable accounting and auditing standards. R&B and RBG submit that, effectively, Balnaring pursues an auditor's negligence case against Grant Thornton.

493 The defendants assert that the allegation made against the auditor are allegations of a 'most serious' nature and must be established to the *Briginshaw*[447] standard.[448]

494 The defendants submit that Balnaring has failed to adduce any evidence upon which it could be established that Trivett was not independent or otherwise breached the applicable

443 Ibid [91].
444 MS931, NS9201131.
445 MS933.
446 MS4983-5007.
447 *Briginshaw v Briginshaw* (1938) 60 CLR 338.
448 Defendants' Closing Submissions, 24 May 2016, [94] and [96].

accounting and audit standards. Accordingly, R&B and RBG submit that there is no evidence upon which a finding of negligence could be made, or a finding of non-compliance with ss 307, 307A and 307C of the Act could be made against Trivett.

495 In this regard, R&B and RBG submit that Hewamanna's evidence cannot establish the sorts of allegations referred to above in relation to Trivett. On their submission, it would be unsafe to rely in this way upon Hewamanna's evidence given that he was employed by LRG and he displayed a lack of familiarity with accounting standards.

496 The defendants also submit that 'having amended to pursue an auditor's negligence case, Balnaring called no evidence which could found such a case and did not even challenge Ranieri who completed the trial balances'.

497 Further, the defendants submit that the Court could only be in a position to assess the conduct of the audit undertaken by that company and the efficacy of the auditor's opinion that the 'impugned entries' were sufficiently substantiated, for the purpose of the audit opinion, if it had access to the Grant Thornton audit file.

498 Finally, on this aspect, the defendants in substance submit that, were the Transactions complained about by the plaintiff in fact inappropriate or not sufficiently supported, Trivett's audit would have identified such matters. The van Laack parties submit that in the absence of any cogent objective evidence supporting a finding that Trivett failed to perform his duties as an auditor, the Court 'has to accept his evidence' and conclude that the purchase price for the majority interests is nil using the SUHA formula.[449]

499 I note that I have elsewhere addressed the competing evidence on the Transactions, including the parties' expert evidence, and in addition addressed the individual Transactions. For the reasons which follow I reject the R&B and vLAH case in relation to the Transactions and accept Balnaring's case on these issues.

Disentitling Conduct - Analysis

500 I have elsewhere, for the reasons I have outlined, found that Mair has not breached his duties

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449 Defendants' Closing Submissions, 24 May 2016, [100].

and obligations under the ESA and the SUHA or at common law, nor has Mair breached any duty owed in equity or pursuant to the Act. Neither has Mair been guilty of any disentitling conduct.

501 Even if it had been the case that Mair had in some respects breached obligations and duties as asserted by R&B, R&B Group and the vLAH parties, that would not, in my view in the circumstances, necessarily preclude Balnaring from bringing and succeeding in his oppression claim.[450] Such a breach or breaches by Mair, if they exist, would be a relevant factor in considering whether oppressive conduct had occurred in the circumstances, but would not be determinative in the negative or positive case.[451]

502 Nor do I consider that the Balnaring oppression claim is misconceived because of the effect of cl 7 of the SUHA. That clause permits the vLAH directors to act solely in the interests of the shareholder who appointed them. I do not consider that cl 7 of the SUHA has the effect of permitting the vLAH directors to commit acts of oppression with impunity.

503 In my view, cl 7 of the SUHA, read with the SUHA as a whole, is not intended to displace or relegate Mair's rights and entitlements as the Managing Director or displace or relegate his duties and obligations in relation thereto. Similarly, nor does it affect Balnaring's right and entitlement to participate in the management of the company.

504 Clause 7 is intended to obviate problems arising in equity and pursuant to provisions of the Act imposing certain director's duties,[452] in circumstances where the vLAH directors wish to have latitude to act in the interests of vLAH. This in my view is unlikely to be inconsistent with the vLAH director's obligation to act in a way which is commercially fair and which is not unfair and prejudicial to other relevant shareholders or parties. I add, such commercial unfairness and acts of unfair prejudice to a minority party may be oppressive even though they do not amount to a breach of contract. Conversely, director's actions taken in accordance with the letter of a company's constitution can still in certain circumstances be of an oppressive character.[453]

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450 *Hunter v Organic & Natural Enterprise Group Pty Ltd* [2012] 92 ACSR 183 at [185].
451 *Grace v Biagioli* [2006] BCC 85.
452 *Corporations Act 2001* (Cth), ss 180-182.
453 *Sutherland v NRMA Limited* [2003] 47 ACSR 428; *Re Tivoli Freeholds Ltd* [1972] VR 445, 468.

505 In *Re Westborne Galleries Ltd*[454] Lord Wilberforce stated:

> …there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.[455]
>
> Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases.[456]

506 I also observe that cl 7 of the is not an agreement absolving the conduct of R&B and the R&B Group which I have found to be oppressive and unfairly prejudicial and discriminatory of Balnaring's interest. In particular, I refer to wrongfully dismissing Mair as overarching Managing Director, excluding Mair from Board meetings and other critical management decisions, planning to and partly actioning the divestment of the relevant vLAH assets without consulting Mair and initiating many substantial erroneous adjustments to the R&B Group Financial Accounts for the year ending August 2015. I consider that the acts of oppressive conduct which I have found perpetrated by the defendants are well beyond the parties intended scope of cl 7 of the SUHA.

The *Corporations Act 2001 (Cth)* Affairs of the Company

507 Under the Act, the meaning of the phrase 'affairs of the company' is extensive and is informed by a non-exhaustive list of factors listed in s 53 of the Act. Such affairs include the 'promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other person or persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body'.

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454 [1973] AC 360 at 379.
455 Ibid 379.
456 Ibid 378.

Oppressive, Unfairly Prejudicial or Unfairly Discriminatory

508 The criteria from s 232(e) are to be evaluated objectively from the perspective of a commercial bystander.[457] There is no requirement for a dishonest motive, purpose or intention.[458] The question is whether a commercial bystander, having regard to the apparent effect of the impugned conduct on the applicant, would identify a substantive commercial unfairness. In *Morgan v 45 Flers Ave Pty Ltd*,[459] Young JA explained:

> … one no longer looks at the word 'oppressive' in isolation but rather asks whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair…In my view a court now looks at [the phrase oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member] as a composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely commercial unfairness.[460]

509 If the impugned conduct is that of the directors, the bystander is taken to be a director possessing the same skills and knowledge. In *Wayde v New South Wales Rugby League Ltd*,[461] Brennan J observed:

> The test of unfairness is objective and it is necessary, though difficult, to postulate a standard of reasonable directors possessed of any special skill, knowledge or acumen possessed by the directors. The test assumes (whether it be the fact or not) that reasonable directors weigh the furthering of the corporate object against the disadvantage, disability or burden which their decision will impose, and address their minds to the question whether a proposed decision is unfair. The court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision.[462]

510 The content of 'fairness' will also depend on the context. This includes the nature of the company in question and the relationship between the members and the parties to the proceeding. In *Patterson v Humfrey*,[463] Le Miere J held:

> Where, as here, the court is called upon to decide an allegation of oppression in the context of a closely held company, the court should consider the dealings between the members.[464]

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457 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, 472.
458 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 [176].
459 (1986) 10 ACLR 692.
460 Ibid 704.
461 (1985) 180 CLR 459.
462 Ibid 472-73.
463 (2014) 291 FLR 246.
464 Ibid [51].

511 In *Catalano v Managing Australia Destionations Pty Ltd*,[465] Siopis, Rares and Davies JJ synthesised the different components to the test. Their Honours explanation was as follows:

> The test of unfairness requires an objective assessment of the conduct in question with regard to the particular context in which the conduct occurs. The question is whether objectively in the eyes of the commercial bystander there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the conduct or decision fair. As the test is objective, whether or not the conduct is oppressive will not depend upon the motives for what was done. It is the effect of the acts that is material.[466]

512 There have also been suggestions that the protection of 'legitimate expectations' is a means of assessing whether conduct is substantively unfair.[467] In *O'Neill v Phillips,*[468] Lord Hoffman observed:

> …there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law.[469]

513 Even so, His Lordship went on to recognise:

> The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application.[470]

514 In Australia, the term 'legitimate expectation' has been described as unhelpful[471] and as distorting the objective assessment of fairness in the context of oppression proceeding.[472] To the extent that 'legitimate expectation' is a component to the test for unfairness, this phrase refers to an understanding or apprehension of a member which, because of equitable considerations, would make it appear unfair, to a commercial bystander, to permit the strict assertion of legal rights.

515 That approach is consistent with further observations made by Lord Hoffman concerning the

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465 (2014) 314 ALR 62.
466 Ibid at [9].
467 *O'Neill v Phillips* [1999] WLR 1092, 1102; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672, 745 (Priestley JA); *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 (adopting a concept of 'reasonable expectations').
468 [1999] WLR 1092.
469 Ibid 1101.
470 Ibid 1102.
471 *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672, [649].
472 *Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd* (2014) 101 ACSR 643, [201].

jurisprudential origin of the English shareholder oppression scheme:

> Firstly…the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.[473]

516 Accordingly, under s 232(e), the Court should grant relief from oppression where the Court is satisfied that the conduct of the defendants is oppressive to, unfairly prejudicial to, or unfairly discriminatory against the plaintiff. Further, the authorities indicate that ground is assessed *objectively* such that the motives or intentions of the defendants are irrelevant. The question is whether, having regard to the *effect* of the impugned conduct, a commercial bystander would view the defendants' conduct as substantively unfair. If the particular allegation impugns the conduct of a particular director, the bystander is taken to be a director appraised of the same knowledge and skills.

517 The content of 'fairness' is also informed by two additional considerations. The first is the context of the claim. That may include the relationship between the parties, the nature of the companies, and the shareholding in question. The second is established equitable principles. In particular, the Court can look to an understanding or apprehension of a member which makes it unfair to enforce legal rights.

Factors Militating Against Relief

518 As outlined above, the defendants point to the two factors referred to above which, on their submission, militate against entertaining an application for relief from shareholder oppression. The applicable principles are set out below.

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473 *O'Neill v Phillips* [1999] WLR 1092, 1098-99.

Conduct of the Applicant

519 The relevance of the applicant's conduct, in addition to that of the defendants, was noted in *Re London School of Electronics Ltd*:[474]

> The conduct of the petitioner may be material in a number of ways, of which the two most obvious are these. First, it may render the conduct on the other side, even if it is prejudicial, not unfair…Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant…[475]

520 The defendants refer to the statement of Dalton J in *Hunter v Organic Natural Enterprise Group Pty Ltd*:[476]

> In assessing whether or not the statutory criterion of unfairness has been met, it is appropriate to take into account the behaviour of the person making the allegation of oppression.[477]

521 The defendants also refer to the statement of Spigelman CJ in *Fexuto Pty Ltd v Bosnjac Holdings Pty Ltd*:[478]

> There will be circumstances in which the emergence of irreconcilable differences will cause the court to conclude that an understanding or expectation as to participation in management should be taken to have ceased, in a manner not entitling the person excluded from such participation to relief under the statutory provisions. That would be so where the Court decides that it is the person excluded who is responsible for the breakdown in the relationship.[479]

522 The defendants direct the Court to Balnaring and Mair's conduct in the lead-up to their application for relief from oppression. They contend that if the Court is satisfied that the defendants' conduct is 'not unfair' in the circumstances after doing so, the Court should dismiss the application.

Primacy of the Contract

523 The authorities do not preclude relief from oppression under statute in respect of conduct that is also in breach of an agreement. In *Campbell v Backoffice Investments Pty Ltd*,[480] the High Court held:

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474 [1985] 3 WLR 474.
475 Ibid 482.
476 (2012) 92 ACSR 183.
477 Ibid [105].
478 [2001] NSWCA 97.
479 Ibid [90].
480 (2009) 238 CLR 304.

> The fact that Mr Campbell's conduct was said to constitute breach of his or Sentinel's contractual obligations under the shareholders agreement, or the procuring of a breach by Healthy Water of its obligations under the services agreement with Backoffice, does not preclude engagement of the oppression provisions.[481]

524 In *Re a company (No. 00314 of 1989), ex parte Estate Acquisition and Development*,[482] Mummery J held, in relation to the English equivalents of Part 2F.1:

> …the court is not … faced with a death sentence decision dependent on establishing just and equitable grounds for such a decision. The court is more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company.[483]

525 In any event, Balnaring submits that vLAH has breached the terms of the SUHA by failing to comply with cl 12 of that agreement.

526 Clauses 12 and 13 of the SUHA provide as follows:[484]

> SELL AND PURCHASE ON TRIGGERING EVENTS
>
> (a) Upon the occurrence of a Triggering Event, NM and Balnaring grant to van Laack a Call Option and Van Laack grants to NM and Balnaring a Put Option with respect to all of the Minor Party interests.
>
> (b) The following events are the Triggering Events:
>
> (1) the death or permanent incapacity of NM;
>
> …
>
> (3) the date that is 5 years after the Commencement Date;
>
> (4) a Deadlock Notice has been served on the Directors in accordance with clause 6(a) and the Deadlock Issue has not been resolved in accordance with, and by the time contemplated by, clause 6(c);
>
> (5) an Insolvency Event occurs in relation to NM or Balnaring;
>
> (6) NM's employment as Managing Director is terminated in accordance with the NM Employment Contract, other than in accordance with clause 12 (c);
>
> …
>
> (c) In the event NM resigns as the Managing Director in accordance with the terms of the NM Employment Contract and successfully transfers management of the Business and the Group to a new Managing Director, then NM and Balnaring grant to van Laack Call Options and Van Laack grants to NM and Balnaring Put Options with respect to the proportions of the Minor

481 Ibid [176].
482 [1991] BCLC 154.
483 Ibid at 161.
484 MS1811-MS1813 and MS1826.

Party Interests set out in the below table which are granted on and from the corresponding dates set out in that table:

Timing the date of termination of NM's Employment Contract	Date that Put/Call Option is Granted	Proportion of Minor Party Interests subject to Put-Call Option
Within 3 years of the Commencement Date	3 year anniversary of the Commencement Date	One Third
	4 year anniversary of the Commencement Date	One Third
	5 year anniversary of the Commencement Date	One Third

(d) A Put Option or a Call Option may be exercised at any time within 40 days after a the occurrence of Triggering Event or within 60 days after the date that the Put Option and Call Option is granted in accordance with the table in clause 2(c) by the exercising party providing written notice to that effect (Option Exercise Notice) to the other parties.

(e) Where, the table in clause 12(c) specifies that a particular proportion of the Minor Party Interests is subject to the Call Option and Put Option, each component part of the Minor Party Interests is subject to that proportion (e.g. if such proportion is one third, one third of each of Balnaring's and/or NM's R&B Shares, RBG Share and R&B Units are subject to the Call Option and Put Option).

13. DETERMINATION OF PURCHASE PRICE

The purchase price for the Minor Party Interests that are required to be transferred to van Laack in the exercise of the rights under clause 12 shall be determined in accordance with the mechanism contained in the schedule.

527 Schedule 1 of the SUHA also provides:

SCHEDULE

Determination of Purchase Price

1. Subject to paragraph 4 of this Schedule, the purchase price for the Minor Party Interest to be transferred to van Laack in accordance with clauses 12, 13 and 14 (Purchase Price) shall be determined by applying the following formula:

P = (5 x E) x MP

Where:

P is the Purchase Price.

E is the earnings before interest, tax, depreciation and amortisation (EBITDA) of the Group for 12 completed calendar months immediately preceding the date that the relevant Option Exercise Notice is given.

MP is the proportion that the relevant Minor Party Interest bears to the total interest constituted by the R&B Company Shares and R&B Units on issue as at the date that the Option Exercise Notice is given.

2. Within 14 days of the date that the Option Exercise Notice is given, the R&B Board must refer the determination of the Purchase Price to an expert appointed by the Institute of Arbitrators and Mediators in Australia at the request of either party (Expert). The Expert shall be instructed to determine the Purchase Price based on the formula contained in clause 1 of this Schedule and to calculate the relevant EBITDA in the same manner as the EBITDA under clause 4.4 of the agreement entered between van Laack, NM and Balnaring in or around July 2012 and various other parties on 3 July 2012 for the purchase by van Laack of its Interests in the Group having regard to the manner in which "EBITDA" is defined in schedule 1 of that agreement.

528 Balnaring also asserts that vLAH failed to comply with the contractual arrangements which came into effect when Balnaring lawfully exercised its Put Option pursuant to the SUHA.

Analysis

529 As earlier outlined, Balnaring asserts that it has been oppressed by the conduct of vLAH and vLG and seeks orders, including:

(a) for specific performance of cl 12 of the SUHA and Contract, together with,

(b) an order pursuant to s 233 of the Act; and

that the price for Balnaring's shares in R&B and RBG be calculated using the EBITDA derived from the 2014 audit of accounts.[485]

The EBITDA

530 Balnaring's submissions, at [212] of the Plaintiff's Closing Submission, are that in the circumstances, the fairest remedy is for the Court to direct that the independent valuer use the audited accounts from 2014 to determine the EBITDA, and then apply the formula prescribed by the SUHA, handing back the transferred price items identified in the Mair submissions.

531 Further, Balnaring submits that the appropriate EBITDA derived from the 2014 audit of accounts should be adjusted to take into account and add back the effects of the transferred

485 PKF Lawler Audit Accounts (MS2853-MS2877) see MS4512 and following.

pricing. This is in contrast to utilising the EBITDA for the period April 2014 to March 2015. Balnaring argues has this has been rendered inaccurate by the re-construction of the R&B Group Financial Audit by Ranieri in about April to June 2015, in a way Balnaring argues is unable to be effectively rectified.

532 Balnaring submits that it should be the beneficiary of such an order because:

(a) either it is the appropriate remedy for vLAH's breach of the SUHA and Transfer Contract; and /or

(b) it is otherwise the appropriate remedy for the oppression of Balnaring in the circumstances.

533 Clause 12(c) of the SUHA[486] provides that the Option may be exercised at any time within 60 days after the occurrence of a Triggering Event by the exercising party providing written notice to that effect to the other parties.

534 By cl 13 of the SUHA:[487]

> The purchase price for the Minor Party Interests that are required to be transferred to van Laack in the exercise of the rights under clause 12 shall be determined in accordance with the mechanism contained in the schedule.

535 By cl 1 of the Schedule,[488] the purchase price for the Minor Party Interests to be transferred to van Laack in accordance with cls 12, 13 and 14 (Purchase Price) shall be determined by applying the following formula:

> P = (5xE) x MP
>
> Where: P is the Purchase Price.
>
> E is the earnings before interest, tax, depreciation and amortisation (EBITDA) of the

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486 MS1811.
487 MS1813.
488 MS1826.

> Group for 12 completed calendar months immediately preceding the date that the relevant Option Exercise Notice is given.
>
> MP is the proportion that the relevant Minor Party Interest bears to the total interest constituted by the R&B Company Shares and R&B Units on issue as at the date that the Option Exercise Notice is given.

536 Clause 2 of the Schedule[489] provides that:

> The Expert shall be instructed to determine the Purchase Price based on the formula contained in clause 1 of this Schedule and to calculate the relevant EBITDA in the same manner as the EBITDA under clause 4.4 of the agreement entered between van Laack, NM and Balnaring in or around July 2012 and various other parties on 3 July 2012 for the purchase by van Laack of its interests in the Group, having regard to the manner in which "EBITDA" is defined in schedule 1 of that agreement.

537 The agreement entered into between vLAH, Mair and Balnaring in or around July 2012 is the Sale and Purchase Agreement (the SPA).[490]

538 Clause 4.4 of the SPA[491] sets out the 2012 EBITDA adjustment provision. EBITDA is defined in Schedule 1[492] of the SPA as:

> …the earnings before interest, tax, depreciation and amortisation of the Group for a Financial Year determined in accordance with the accounting standards, procedures and methodology adopted by the Group at the time of execution of this Agreement, to the extent permitted by the Accounting Standards. The Parties agree that all Transaction Costs incurred and paid for by the Group and identified in the Group's financial statements as "extraordinary expenses" will be excluded in the calculation of EBITDA.

539 Thus, determining EBITDA for purpose of determining the purchase price for the Minor Party Interests requires that the independent expert appointed under cl 2 of the Schedule:

(a) determine the manner in which EBITDA was calculated for the purposes of the SPA;

(b) determine the accounting standards, practices and methodology adopted by the

489 MS1826.
490 MS1492–MS1523.
491 MS1500.
492 MS1556.

Group at the time of the execution of the Sale and Purchase Agreement (June 2012);

(c) determine whether the accounting standards, practices and methodology was permitted by the Australian Standards at the time; and

(d) to the extent that the accounting standards, practices and methodology were permitted by the Australian Standards at the time, apply the same accounting standards, practices and methodology to the calculation of EBITDA for the 12 completed calendar months immediately preceding the date that the relevant Option Exercise Notice was given (in this case April 2014 to March 2015 (the Relevant Period).[493]

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493 Mair also relies on a consistent statement by Potyka, to the effect that there should be no change to the principles applied to relevant accounting between one year and another and that were accounting principles or approaches to be changed the valuation by reference to audited accounts cannot be used for the valuation of Mair's shares under the SUHA (MS4853), Plaintiff's Amended Closing Submissions, 17 May 2016, [168].

Specific Performance of Clause 12 of the SUHA

540 Mair resigned from his employment pursuant to the ESA cl 5.2 on 19 March 2015.[494] His resignation constituted a step which I consider could have led to the occurrence of a 'Triggering Event' pursuant to cl 12(b) of the SUHA. However, on 31 March 2015 Mair accepted R&B's repudiation of the ESA.

541 Balnaring's submits that Mair's resignation from his employment, in respect of which he provided six months' notice pursuant to cl 5.2 of the ESA, was a 'Triggering Event' within the meaning of cl 12(b) of the SUHA.

542 I accept this submission. The effect of the abovementioned events, in the contractual setting of cl 5 of the ESA and cl 12 of the SUHA, is that the SUHA remains on foot. That is so for the following reasons:

(a) Mair's lawful conduct in attempting to commence the process of his resignation on 19 March 2015, pursuant to cl 5.2 of the ESA, was interdicted by R&B's repudiatory conduct on 27 March 2015 when it brought its employment relationship with Mair to an end and prevented Mair from fulfilling his role as Executive under the ESA.

(b) In the above circumstances, it was not neither practically possible or reasonable for Mair to endeavour to await the expiration of his notice of resignation and perfect that contractual process.

(c) By his notice of resignation on 19 March 2015, Mair, as he was entitled to do, instituted the process provided for in cl 12(c) of the SUHA. In turn, this entitled Mair to the benefits of his Put-Option, in effect, a contract with van Laack, for the transfer of Mair's Minority Shares in R&B, pursuant to cls 12(c), (d) and (e) and 13 of the SUHA.

(d) Mair by Notice of Option on 17 April 2015 also sought to effect his rights under cl 12 of the SUHA.

(e) In the events which occurred, R&B, in concert with van Laack, repudiated the ESA

494 MS1905.

and prevented Mair from successfully transferring management of the business and the Group to a new Managing Director, which would otherwise have entitled Mair and Balnaring to their defined Call-Option pursuant to cl 12 of the SUHA and in particular cl 12(g).

543 If the Court were to find that Mair was terminated for serious misconduct at common law, Balnaring observes that there was no 'Triggering Event' within the meaning of cl 12(b).[495] The corollary of such a finding, which the plaintiff does not articulate in its submissions, is that the Put Option is not enlivened and the Transfer Contract was not formed. The claims for specific performance would fail.

544 On the other hand, if Mair was terminated for cause pursuant to cl 5.1, Balnaring submits that on 17 April 2015 it served vLAH with written notice of its exercise the Notice of Option[496] provided for in cl 12(d) of the SUHA. Since Balnaring exercised its rights under cl 13 of the SUHA, the vLAH parties were required to provide the purchase price for the defined 'Minor Party Interests' which they were thereafter required to transfer pursuant to cls 13 and 14 of the SUHA.

545 But these two alternatives are of no consequence. It is sufficient to find, as I have, that cl 12 of the SUHA was operative in the situation where Mair lawfully resigned from his employment, but R&B repudiated the ESA during the notice period. The SUHA remained on foot in my view and R&B's repudiation should not emasculate the suite of contracts according to which the parties' have organised their affairs.

546 Proceeding on the basis that cl 12 of the SUHA was engaged, Balnaring submits that vLAH breached the SUHA by failing to calculate the purchase price as required by cl 13; and by failing to pay Balnaring within 30 days after the date of determination of the purchase price fixed by the Transfer Contract, pursuant to the Balnaring Notice of Option in cl 13 of the SUHA. Balnaring seeks specific performance of the Transfer Contract on the basis that the wrongful termination of his employment constituted a Triggering Event pursuant to cl 12 of the SUHA.

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495 Plaintiff's Closing Submissions, [207].

496 MS4430.

547 In addition, Balnaring advances this situation as one ground of oppression that would attract relief under s 233 of the Act.

548 For the reasons I have outlined above I consider, subject to any conclusions below as to the effect of Balnaring's entitlement to damages in relation to the SUHA, that Mair and Balnaring are entitled to specific performance of their Put Option pursuant to cl 12(f) to (e), 13 and 14 of the SUHA, and to have the purchase price of their Minority Shares valued pursuant to the terms and the Schedule to the SUHA.

549 Further, for the reasons I outline below, I also consider that Balnaring is entitled to appropriate relief under s 233 of the Act and to damages at common law. In my view, in the circumstances of this matter, such relief should be awarded on terms analogous to the effect of cls 12, 13 and 14 of the SUHA, subject to conditions and orders appropriate to alleviate the incorrect adjustments made to the R&B Group's Financial Audit for the 2015 Financial Year.

Relief Pursuant to s 233 of the Act

550 Mair submits that, even if the Court was to uphold R&B's right to terminate his employment summarily and at common law, the seven remaining grounds of oppression justify relief pursuant to s 232 and 233 of the Act. Such relief it is asserted should include an order that the vLAH parties purchase Mair's shareholding in R&B.

551 Section 232 of the Act states:

> **232. Grounds for Court order**
> The Court may make an order under section 233 if:
> (a) the conduct of a company's affairs; or
> (b) an actual or proposed act or omission by or on behalf of a company; or
> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
> is either:
> (d) contrary to the interests of the members as a whole; or
> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.
> For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

552 Mair relies upon the provisions of s 232 of the Act which provides for the Court to make any order under s 233 of the Act if the conduct of the company's affairs is oppressive to, unfairly prejudicial to or unfairly discriminatory against a member or members whether in that

capacity or in any other capacity.

553 It will be recalled, as set out above, that the question of whether conduct falls within the ambit of s 232(e) of the Act is determined by the standard which the High Court defined in *Wayde v New South Wales Rugby League Ltd*,[497] of 'reasonable directors possessed of any skill, knowledge or acumen possessed by the directors':

> The test of unfairness is objective and it is necessary, though difficult, to postulate a standard of reasonable directors possessed of any special skill, knowledge or acumen possessed by the directors. The test assumes (whether it be the fact or not) that reasonable directors weigh the furthering of the corporate object against the disadvantage, disability or burden which their decision will impose, and address their minds to the question whether a proposed decision is unfair. The court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which their decision will impose on a member on the other would have decided that it was unfair to make that decision.[498]

554 Mair also asserts that the relevant circumstances to be considered in the context of s 232(e) of the Act here include –

(a) the contractual framework, including the SPA[499], the ESA, the Contract[500] and the SUHA;[501]

(b) the parties' legitimate expectation that Mair would have an ongoing role in the management of the company;

(c) the background to the purchase, particularly vLAH's requirement that Mair

497 (1985) 180 CLR 459.
498 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, at 472-3.
499 MS1492–MS1523.
500 MS1901–MS1910.
501 MS1792-MS1828.

continue to hold a financial interest in the company after the acquisition, and

(d) the Put Option.[502]

Alleged Acts of Oppression

555 Balnaring identifies the abovementioned grounds of oppression in its Further Amended Points of Claim. However, Balnaring does not specifically press [53] of its Points of Claim. As clarified by Mair, this is now subsumed by [53A] of the Balnaring Further Amended Points of Claim dated 22 June 2016.

556 Paragraph [53A] of Balnaring's Further Amended Points of Claim alleges twenty-four instances in which the R&B Group prepared the books and records for the 2015 financial year without making full and proper enquiries and thereby improperly recorded financial matters.[503]

557 Balnaring presses twenty-three of those twenty-four above Transactions as components of its grounds of oppression. Transaction 53A(j) was not pressed.

558 Taking into account the Further Amended Points of Claim and the oral submissions the conduct alleged as oppressive is as follows.

Unlawful Dismissal

559 Mair relies upon his unlawful dismissal as a matter supporting the Balnaring oppression claim.

560 Balnaring submits that the SUHA clearly contemplated that Balnaring and vLAH would participate in the management of the R&B business with Mair taking on the role of Managing Director. It is submitted that cls 5.1(b) and (c) of the SUHA make that clear.

561 Accordingly, Balnaring submits that Mair's dismissal was a clear breach of the SUHA as

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502 Plaintiff's Amended Closing Submissions, 17 May 2016, [175].
503 MS79-MS80.

well as the ESA, and created what Balnaring submits was 'a fundamental departure from the sub-stratum of the contractual framework'.

562 Further, Balnaring contends that it is clear on the basis of the circumstances referred to above that the Balnaring shareholders had a legitimate expectation of participating in the management of the Group and a legitimate expectation of participating, through Mair, in the management and also in the profits of the R&B business.

Conclusion

563 Given my earlier finding that Mair's employment contract was repudiated by R&B and that vLAH and vLG have breached the SUHA, and accepting as I have found the evidence as to the effect of the actions of R&B and vLAH and vLG, and accepting as clearly obvious that R&B's repudiation of the ESA and Mair's excision from the management of the R&B Businesses unfairly in fact emasculated the legitimate expectations of Balnaring to participate and have its share of influence and control over the management and profits of the R&B Business, I consider Mair's unlawful dismissal to be oppressive and prejudicial to Balnaring.

Proposed Divestment

564 Balnaring alleges that, in early 2015, vLAH decided to divest its Australian interests and assets, including the R&B Group which comprised R&B. It pursued that planned divestment without obtaining a relevant resolution from the R&B Board or consulting with Mair and Balnaring. Balnaring complains it was not provided with the information in relation to this plan that was necessary to protect its own commercial interests.

565 VLAH's evidence, given principally via von Daniels, was that meetings between vLG's Chairman Neizert, von Daniels, and a number of consulting and investment firms in Australia occurred in about March 2015 were not related to vLAH selling its Australian operation in whole or in part. von Daniels' evidence was that such meetings were conducted with a view to getting a good picture of the value of the van Laack companies.[504]

566 However, Balnaring points to contemporaneous documentary evidence to the contrary, for

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504 T640.6-30.

example von Daniels' response to Mair's resignation[505] dated 19 March 2015 (12:09), in which von Daniels' states:

> We fully respect your decision and knowing you it is not really surprising especially in connection with our decision to start a process of disinvestment of our Australian activities.

567 Balnaring also submits that a presentation document referred to as a 'flip-book' strongly supports a finding that vLAH had decided to divest the whole of its interests by about March 2015. Balnaring submits this is so because the 'flip-book' can be readily understood to be a sales marketing tool and was utilised as such.

568 The 'flip-book' dated March 2015[506] which was presented by Neizert at the March meetings with consultants and investors presents a favourable positive EBITDA.[507]

569 Balnaring also points out that the 'flip book', which presented an EBITDA Summary for R&B and Herringbone of $A6,000,000, utilised and presented accounts which the vLAH parties now eschew and seek to reduce by an adjustment in the Transactions in the sum of about $10 million.

570 I note however the 'flip book' does not expressly refer to the vLAH assets being on the market.

571 By reason of cls 15 and 16 of the SUHA, Balnaring points out that such divestment would have had the effect of selling Balnaring's interest.

572 Balnaring also submits that the failure of Neizert to give evidence, and the defendants' decision both not to call him and nor to explain why Neizert was not called to give evidence, in particular given that he joined von Daniels in Australia in March 2015 and had participated in discussions with him and with advisors and investors at that time,[508] provides a basis for the Court to draw an inference that Neizert's evidence would not have assisted the defendants' case.

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505 MS4274.
506 MS4289-MS4327.
507 MS4326.
508 T640; MS176A-179A, [259]-[274].

573 Balnaring further submits that vLAH's failure to consult Mair in relation to the planned divestment of the vLAH businesses in Australia was oppressive because it was the vLAH parties which had insisted Mair retain a shareholding in the R&B business and that he serve a minimum two year term as Managing Director.

574 Accordingly, any divestment of vLAH's interest would probably have had a significant impact on Mair and Balnaring. Balnaring submits that, by failing to inform Mair and provide him with information in relation to planned divestment or consult him about such plans and initiatives, vLAH in substance treated the R&B Group as its exclusive property, denying to Balnaring the value of its 20 percent interest and denying Mair the opportunity to take steps to protect his interests.

575 vLAH does not directly engage in its submissions with this issue. Instead, it argues and focuses on Balnarings's oppression ground based on the Transactions and also submits that Mair and Balnaring's conduct has disentitled Balnaring's entitlement to an order pursuant to s 232 of the Act, or otherwise.

Conclusion

576 I find that vLG and vLAH, in about March 2015, decided to divest their Australian assets, including the R&B Group. I am also of the view that vLG and vLAH, at about the same time, commenced the task of implementing their decision to divest/sell the R&B Group and other similar assets in Australia.

577 Further, I find that the R&B Group and the controlling vLAH interests did not foreshadow or consult in any way with Balnaring as the minority shareholder.

578 In my view, this was oppressive conduct by vLAH vis-à-vis to Balnaring as a minority shareholder and interest holder.

579 I consider that the combination of the vLAH interest's exclusion of Mair and thereby Balnaring from the operation of the R&B Group and R&B, as I have found established below, and the telling von Daniels' response referred to above of 19 March 2015, less than 10 days before Mair's sacking, and the 'flip book' and meetings by the van Laack executives

with consultants and investors, establishes, in the circumstances, that the van Laack parties had decided and were planning, if possible, to sell vLAH and its assets.

580 Such conduct unfairly deprived Balnaring and Mair of a say and influence in relation to the commercial conduct and likely future ramifications or changes which were, or potentially were, of great significance, including as to the future viability and profitability of R&B and the R&B Group. Those actions in my view oppressed Balnaring's Minority Interest in R&B would be so regarded by any reasonable director.

Exclusion of Balnaring from the Operations of RBG

581 Balnaring submits that the oppressive effect of Mair's wrongful dismissal was compounded by the subsequent exclusion of Mair from the operations of RBG. This occurred as a result of vLAH preventing the RBG Board Meetings which Balnaring requested. VLAH did not respond to such requests[509] or to correspondence sent on behalf of Balnaring to the solicitors for vLAH, on 26 May 2015.

582 Balnaring submits that correspondence from Balnaring, which specifically warned vLAH that its wrongful conduct in effectively preventing necessary directors' meetings from occurring, and to which it contends there was no co-operative response, is a further instance of oppressive conduct by vLAH.

583 Balnaring points out that the terms of the SUHA, and in particular cls 3.2 and 5.1, entitled Balnaring to participate in the affairs of RBG via its nominee Mair.

584 Balnaring submits that the dismissal of Mair, his exclusion from the operations of RBG, and the failure on the part of the vLAH interests to communicate with Mair or Balnaring about the management of the R&B business, unfairly denied Balnaring the opportunity to influence the conduct and management of RBG. This includes the deprivation of Mair's skill, knowledge and experience.

585 Balnaring submits that the effect of the matters referred to above was a serious decline in the profitability of RBG caused by dramatically declining revenue in the period up to the end of

509 MS4578.

January 2015.

Conclusion

586 I consider that by dismissing Mair and excluding him from the operations of RBG, including because Mair was contracted to be involved in the R&B Business as Managing Director, vLAH unfairly conducted the affairs of RBG as if Balnaring and Mair had no interest in their operations. It was, in any event, clear that Mair's exclusion was contrary to the interests of R&B and RBG as a whole, including because it deprived the businesses of Mair's great experience and familiarity in the industry. In my view, this wrongful conduct by vLAH was likely to have the effect of reducing the value of Balnaring's minority shareholding for these same reasons.

587 Accordingly for the above reasons, the exclusion of Mair was oppressive, unfairly prejudicial, and unfairly discriminatory against Balnaring and would be so viewed by any reasonable director.

Marketing Strategies

588 Balnaring asserts that, after Mair's dismissal in early 2015, vLAH implemented marketing strategies which were destructive of the status of the R&B business brand. Mair contends that those unsuitable and destructive marketing strategies adversely affected the profitability of the R&B business and reduced its EBITDA.

589 Both Mair and Poulakis explained these matters in their evidence at trial.[510]

590 Balnaring's submission is that the destructive marketing strategies adopted by vLAH, after Mair was wrongfully dismissed in early 2015, were oppressive to Balnaring because they diminished the value of its 20 percent shareholding in R&B. The marketing strategies were, Balnaring submits, particularly oppressive in effect because of the exclusion of Mair from the affairs of the R&B business.

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510 M397-411; MS202-210 and Poulakis [21]-[26]; MS261-262.

Conclusion

591 I am not satisfied as to Balnaring's assertions that marketing strategies oppressed Balnaring by diminishing the value of its shares. As with the financial consequences related issues addressed in connection with the Mair exclusion and new incompetent management based alleged financial ramifications, there is a lack of necessary comprehensive operational, financial and marketing evidence including in respect of the causation asserted by Balnaring.

592 Save in respect of my conclusions and findings in relation to Mair and Balnaring's exclusion from the operation of RBG referred to above, I am not persuaded that the way in which those who governed R&B after Mair's departure was in itself oppressive, or oppressive when taken together with Balnaring and Mair's exclusion from the management of R&B and the R&B Group.

To reach a positive conclusion in relation to the proposition asserted by Balnaring in the last preceding paragraph would, I consider, also require comprehensive operational, financial and marketing evidence and causal evidence as to the new management's treatment of the brand and the undertaking of related strategies implemented after Mair's departure in 2015 to establish they were inappropriate and were the cause of reduced profitability and a reduced EBITDA. I am not so satisfied.

Non-Compliance with the SUHA, Put Option and the Dividends

593 I have found that the suspension and termination of Mair on 27 March 2015 was a breach of contract.

Put Option

594 I consider that the conduct of vLAH not to take steps to fulfil its obligation under the SUHA in relation to the Put Option, amounts to oppressive conduct. This conduct is in my view also constituted by vLAH, which is the controlling entity in relation to R&B, deciding with R&B to wrongfully summarily dismiss Mair thereby preventing Mair from being able to perfect his resignation and exercise the Put Option under cls 12, 13 and 14 of the SUHA according to that contract's terms.

595 On Mair's own case, the ESA has not been followed by R&B because R&B did not

determine Mair's employment in accordance with its terms and repudiated the ESA. The ESA has now been brought to an end at Mair's election through acceptance of R&B's repudiation.

596 A common law dismissal of Mair and a scenario whereby Mair brings the ESA to an end on the basis of R&B's repudiation is not a Triggering Event because it does not come within the terms of cl 12 of the SUHA. It is however, in my view, R&B's repudiating conduct which has prevented Balnaring from carrying through to completion the parties' agreement under cls 12 and 13 of the SUHA.

597 I consider, for the above reasons that vLAH and R&B have acted wrongfully and oppressively in preventing the fulfilment of the process of effecting Balnaring's Put Option under the SUHA.

Dividends

598 Although Balnaring was paid a dividend by RBG in the financial years 2013 and 2014, Balnaring has not been paid a dividend for the financial year ending 30 April 2015 pursuant to cl 5.4 of the SUHA.

599 Shareholders and unitholders are entitled to be paid proportionately, having regard to their shareholding and unitholding, a total annual dividend equal to 20 percent of the net profit of the Group subject to certain provisos.

600 The expert witness, Mr John Paolacci (Paolacci), gave evidence that he estimates the EBITDA of the R&B Group for the calculation of the dividend entitlement pursuant to cl 5.4 of the SUHA for the financial year ending 31 March 2015,[511] to be$174,168.[512] This figure is Paolacci's estimate of entitlement, taking into account the unjustified transactions to the books and records of the R&B Group addressed below.

601 Paolacci's evidence is also that the EBITDA for the R&B Group Financial Year 2014, is $3.567 million (approximately), adjusting for transfer pricing and foreign exchange losses.[513]

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511 MS202A, Mair [396] and MS821-813, Paolacci [7.1-7.5]; MS83A, Points of Claim [62(j)].
512 MS812, [7] and at MS813, [7.3].
513 MS807 and following including MS810 (5.8.4 and 5.8.5) and MS811.

602 I note that the EBITDA for R&B Group for the financial year 2014 ($3.567m) and 2015,[514] ($3.602m) are similar results.

603 I also note that the R&B Group EBITDA for 2014 has been verified by a van Laack engaged Auditor in Australia and in Germany, although the Australian Auditor did not formerly sign off because it was not paid by the van Laack contracted company engaging it.[515]

604 Balnaring submits that RBG's failure to pay the dividend, agreed pursuant to cl 5.4 of the SUHA, has deprived Balnaring of a substantial part of the value of its shares in the R&B Group and of its contractual right to its share of 60 percent of each year's profits. Conversely, in breach of the SUHA, vLAH has procured to itself the whole of the benefit of the profits of the R&B Group in a way which is oppressive to Balnaring's interests.

Conclusion

605 VLAH has breached the SUHA by not paying Balnaring the Dividend to which it is entitled pursuant to cl 5.4 of the SUHA. In my view in the circumstance described above, vLAH also acted in an oppressive and unfair manner in this regard.

Transfer Pricing

606 Balnaring complains of two transfer pricing arrangements implemented by vLAH and vLG which have had the effect of artificially depressing the EBITDA of RBG. Balnaring asserts that, unless an order ameliorating the negative effects of these transfer pricing arrangements is made, Balnaring will continue to be oppressed.

607 In and from late 2012, after the execution of the SPA, ESA and the SUHA, Potyka directed that the R&B Business take part in two transfer-pricing arrangements. Each arrangement required the R&B Business to pay a surcharge to a Singaporean van Laack company.[516] The first surcharge required R&B to pay €2 to vLS for each Vietnamese manufactured retail items it purchased (the Singapore Surcharge).[517] The second surcharge required the R&B Business

514 1 March 2014 to 28 February 2015: the most proximate 12 month period immediately prior to when the adjustments/Transactions were introduced.
515 MS2853 and MS2877.
516 MS144A, [110]-[118]; MS275A-276A, Mair [26]-[29]; MS454A, Potyka [132]-[137].
517 MS144A, [112]; MS1966-MS1972.

to pay a fabric surcharge levied at 20 percent of the cost of the fabric for each item manufactured from European fabric, and 40 percent of the cost of the fabric for each item manufactured from Chinese fabric (the Fabric Surcharge).[518]

608 These transfer pricing arrangements had the effect of transferring money from the R&B Business, in which Balnaring had a 20 percent interest, to vLS, in which Balnaring had no interest.[519]

609 To ameliorate some of the effects of the above transfer pricing regime, which the van Laack companies placed on the R&B Business each year, vLAH or vLG caused the Singaporean subsidiary to pay Balnaring 20 percent of the surcharges.[520] That amelioration arrangement was set out in a letter from Potyka to Mair dated 19 August 2013.[521] Potyka described this as 'neutralising' the effects of the surcharges when directing the payment of the 2014 dividend.[522] The neutralization is partly reflected in the invoices issued by Mair's company Sonoma Investment Holdings Pty Ltd to vLS.[523]

610 Mair sought to formalise both the surcharges and the off-set compensation mechanism referred to above.[524] Draft documents were created to bring this about but were not executed.[525] Mair's evidence, which I accept, was that these draft documents accurately describe the arrangements and are consistent with the practice actually followed.[526]

611 While denying that the arrangement was transfer pricing, Potyka described the 'neutralising arrangement' described above as a 'gentlemen's agreement'.[527] In my view, it is clear that their effect was a partial neutralization of the above transfer pricing arrangements to benefit Mair's interests in the R&B Business. The 'gentlemen's agreement' was recorded in writing[528] and reflected in the actual practices of the parties.[529]

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518 MS144A, [113]; MS1966-MS1972; MS4206-4207.
519 MS4888, (first email, point 3); MS4206-4207; MS5234; MS5086; MS4288; T704.
520 MS144A, [115]; MS2620–2624.
521 MS2274.
522 MS3361.
523 MS2620-2624; MS2625-2626; MS2724; see also MS2618, email of 6 March 2014 at 08:45.
524 Mair [117].
525 Mair [117]. Draft deed of variation (MS1961–1965) and the draft supply agreement (MS1966–1972).
526 Mair, [115]-[117].
527 T782.24-27.
528 MS2274.
529 MS3361, MS2620-2624, MS2625-2626, MS2724.

612 No payment has been made in respect of any neutralization or reduction of the surcharge to be paid by the R&B Business to Balnaring or Mair on or after 1 May 2014.

Conclusion

613 I consider for the above reasons that the imposition of the Singapore Surcharge and the Fabric Surcharge, exacerbated by vLAH and vLG's failures to honour the neutralising offset arrangements after May 2014, constitute acts of oppression by vLAH and vLG and would be so viewed by any reasonable director. As I have found, the said surcharges unfairly imposed on R&B Group have reduced the R&B Group EBITDA and profits and thereby the value of Balnaring's monetary interest in R&B Group shares including the value of Balnaring's Minority Shareholding. The same wrongful action on the part of vLAH has, and probably continues to, reduce the EBITDA and profits of the R&B Group. Consequently, unless relieved by an order of the Court, the transfer pricing arrangements lower value of Balnaring and Mair's Put-Options pursuant to cl 12 of the SUHA.

Improperly Recorded Adjustments (The Transactions)

614 At paragraph [53A] of the oppression pleading contained in the plaintiff's Further Amended Points of Claim dated 22 June 2016, Balnaring alleges twenty-three adjustments to the R&B Group books of account and records for the Financial Year ending 30 April 2015. These transactions are alleged to result in erroneously recorded financial entries which reduced the EBITDA of RBG for that period. That had the effect of significantly reducing the value of Balnaring and Mair's Put-Option under cl 12 of the SUHA.

615 The cumulative effect of the twenty-three transactions is to reduce the value of Balnaring and Mair's Put-Option to zero.

616 In relation to the transactions, Balnaring and Mair emphasise the following three matters:

(a) Many of the improperly recorded transactions referred to in paragraph [53A] of Balnaring's oppression

proceeding (the Transactions) were entered into RBG's financial record on the weekend of 13 and 14 June 2015.

Balnaring submits that it is no coincidence that these dates in mid-June 2015 were approximately 1 day prior to the date on which Balnaring was granted Court ordered access to the books and records of RBG. Balnaring points out in its submissions that R&B and the van Laack companies have not explained, or even sought to explain, the coincidence in relation to these dates;

(b) Many of the improperly recorded transactions were *backdated* to 31 March 2015. Balnaring submits there was no proper accounting basis for such backdating. Further, as with item (a) above, the vLAH parties provide no explanation as to why this large number of the Transactions were backdated.

(c) Balnaring submits that many of the transactions were made effective at the end of March 2015, rather than the end of the relevant financial year which was 30 April 2015.

617 Balnaring also submits that were an innocent explanation available for the Transactions it would have been forthcoming from the vLAH parties. That has not occurred.

618 In response, the vLAH parties as defendants to the oppression claim, at [52] of their Points of Defence dated 6 April 2016, alleged that:

(a) Mair failed to properly keep the books and records of the R&B Group, Herringbone and vLAH in the 2013 and 2014 financial years in accordance with s 286 of the Act.

(b) vLAH and its controlled entities, with the assistance of Grant Thornton Privately Held Business Division, properly and correctly prepared the R&B Group 2015 Financial Statements, including in accordance with the relevant provisions of the Act, including s 286.

(c) Grant Thornton Audit Pty Ltd ('Grant Thornton Audit') audited the 2015 Financial Statements, under the Audit Leader Simon Trivett ('Trivett'), including in accordance with the provisions of ss 307, 307A and 336 of the Act and the Audit and Assurance

Standards Board.

(d) Grant Thornton Audit, as auditor, concluded that the 2015 Financial Statement gave a true and fair view of the Group's financial position and was free from material misstatement and in accordance with the Act's requirements.

(e) Each entry in the books and records of the R&B Group was required to be made in accordance with s 286 of the Act.

(f) To the extent Mair failed or refused to cause the appropriate entries to be made in the R&B Group books and records for the financial year 2015, Mair aided, abetted, counselled or procured, induced, or was directly or indirectly knowingly concerned in, or a party to, contravention of s 286 of the Act and thereby, as a result of his alleged breaches of the ESA and the SUHA,

breached those contracts and his fiduciary duties to the R&B Group, vLAH, Herringbone and vLG.

(g) By reason of the above matters, Mair evinced an intention not to be bound by the terms of the ESA and so conducted himself as to justify immediate dismissal.

Expert Evidence on the [53A] Transactions

619 The vLAH parties sought to justify the controversial Transactions principally by reference to the Grant Thornton Audit Report dated 27 November 2015,[530] contained in the Expert statements of Mr Trivett of 12 February 2016 and by a report from an expert finance accountant, Mr Halligan of 23 February 2016 and also through the evidence of Mr Ranieri.[531]

620 Ranieri is an accountant from Sconia Australia Pty Ltd who was engaged by R&B from about April 2015, soon after Mair's departure, to assist in preparing the R&B Group Accounts for the 2015 Financial Year.

621 By their approach seeking to prove the validity of the Transaction in issue, R&B and the defendants to the oppression claim assumed the stance of a party taking on the burden of establishing the validity of the Transaction and attempting to explain those extensive alterations to the R&B Business books of account soon after Mair's departure.

622 In my view, however Ranieri's evidence was scant and unpersuasive and it was undermined by Ranieri not being provided with the primary documents, and instead trying to rely on secondary records.

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530 MS970-995; Defendant's Closing Submission (24 May 2016) schedule C, [5].
531 MS549-660.

623 I find Ranieri's evidence unpersuasive. This evaluation of Ranieri is also in part based on the circumstances of his engagement, that is by Potyka and Crawford in April 2015, to review the vLAH including the R&B Group accounts. Further, as elsewhere alluded to, Ranieri was not provided with the primary documentation necessary to verify the adjustments which constituted the transactions.

624 Further, in my view, Ranieri and his review of the R&B Group's 2015 Accounts appeared to be driven by an agenda to find fault in the business' Trust Balances which were already in existence at April 2015.

625 Ranieri's evidence, in my view, also reflected that there was little by way of a tight documented team processes put in place to ensure his review, and that of his reviewteam, was disciplined, transparent and in relation to any adjustments which they made reasoned and backed up the justification for any adjustment with primary documentation and a process analogous to an audit trail.

626 Ranieri was also unfamiliar with the R&B Group Accounts when he took on the review task and he had no substantial familiarity with or understanding of the R&B businesses. In my view, these further factors rendered his evidence less persuasive. Exacerbating this in my view was the new and unstable accounts team at R&B Group which worked under Ranieri on the Transactions.[532]

627 I ascribe significantly more weight to the evidence of Hewamanna and Mair in relation to this Transactions, because of their great familiarity with the R&B Group accounts, business operations and accounting practices and also because, for the reasons I have outlined in relation to each Transaction, those witnesses, and Mr Matthew Pringle ('Pringle'), Balnaring and Mair's expert Auditor, have demonstrated by reference to the primary accounts of the R&B Group that the adjustments in issue are unjustified and in error.

628 Balnaring and the plaintiff did not cross-examine Ranieri. Balnaring and the plaintiff submitted, for the above reasons, that his evidence is so clearly of little weight and that Hewamanna's evidence is, on the accuracy of the Transactions, to be clearly preferred to

532 MS550A, [8], [11] and [14].

Ranieri's in any event. In this regard I note that, although not cross-examined, Ranieri's evidence was directly contradicted by Hewamanna's evidence on the Transactions.

629 Balnaring and Mair submit that Hewamanna's evidence was detailed and persuasive about the Transactions and that Hewamanna was directly conversant with the relevant facts and had substantial involvement in the financial and broader management of the R&B Group's businesses.[533]

630 I consider that Hewamanna's financial and related evidence in respect of the Transaction in issue to be highly persuasive. I do not consider that his evidence was at all diminished in probity and persuasiveness by reason of his being an LRG employee. Further, much of Hewamanna's financial evidence was supported by primary related documentation from R&B Group.

631 Hewamanna was able to consider and address the Transactions with the benefit of his detailed knowledge of the R&B businesses and their financial accounts and with the benefit of his personal understanding and recollection of the Transactions in issue, and relevant associated matters.

632 In my view, Hewamanna's supplementary witness statements[534] and oral evidence, for the above reasons and for the particular reasons I have identified below in relation to individual Transactions, sufficiently impugned each of the Transactions in issue and established a lack of supporting fact sufficient to justify those adjustments to the R&B Accounts. Moreover, the evidence showed the accounting treatment of most Transactions was deficient.

633 I am also separately doubtful about the Transactions because they were identified by Ranieri at a most convenient time for R&B and the van Laack parties and yet were not in existence in the R&B Group's accounts which had undergone three audits since about mid-2012, namely an Interim Audit in 2013, a Final Audit for the 2013 Financial Year, and the Audit for the 2014 Financial Year.[535] Potyka had himself undertaken an internal review of those same accounts in March 2015.

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533 MS238-264.
534 MS231A; M238A.
535 T1150.6-15.

634 Balnaring and Mair submit, and I accept, that the heavily adjusted financial books of account of RBG in mid-2015 was also undertaken at a time of unstable and unfamiliar management by the very new Managing Director, Mr Crawford, the newly engaged Chief Financial Officer Ranieri and by Trivett, who was also unfamiliar with the R&B accounts.

635 I also ascribe less weight to Pringle's Audit conclusion because I consider that they were rendered less persuasive by the fact that his verification work was undertaken by an Audit team whose work has been shown to be untraceable and unidentifiable in in respect of which those persons undertook which review and verified which specific Transaction and on what basis and documentation.

636 Furthermore, in important instances, including in relation to very substantial adjustments like the Stocktake adjustment 'write off' for 'Store 2001', the Trivett Audit team's paper trail and reasons for adjustments could not be identified. Accordingly there was I consider a lack of both audit rigor and identifiable justification for the verification of such adjustments.

637 Further, Trivett did not in fact himself investigate the twenty-four Transactions.

638 I also ascribe less weight to Halligan's expert evidence than Mair's expert Pringle and the evidence of Hewamanna and Mair. Halligan's evidence about the EBITDA for the Group (R&B, RBG, Boston Brothers and Baubridge and Kay) for the twelve months to 31 March 2015 is qualified. Halligan qualifies his report because he is unable to verify, or assume, the opening balances which are the necessary starting point of his evaluation.

639 It is also of significance that Halligan's material and focus was the Trivett adjustments and journal entries which were rendered significantly less persuasive for the reasons I have ealier referred to and which had in turn considered the information, produced by Ranieri including Ranieri and his team's adjustments which I have also concluded were unjustified and incorrect. Halligan was also provided with incomplete profit and loss statements for the relevant businesses.[536]

640 Halligan was not however provided with the profit and loss Statements for the relevant

536 Halligan Report Appendix, 11 and 12.

businesses in April 2014 because he was instructed that those accounts were unreliable. As a consequence, as well as reserving his position as he did with the opening balances quantification referred to above, Halligan based the first month of the evaluation of the relevant period on his assumptions about similar trading conditions and performance, which assumptions are asserted but not explained or supported by further evidence or a separate acceptable opinion.

641 Finally, Halligan in my view simply undertook a high level review of the adjustments which have been made initially by Ranieri and his team and then accepted by the Grant Thornton Audit.

642 Further, Halligan in my view ultimately opines little more than indicating in relation to the Transactions that he concludes that items were 'overstated' or 'understated'.

643 I ascribe little weight to these conclusions in respect of the Transactions because they do not appear to be supported by Halligan's analysis of primary accounting documents nor are those conclusions meaningfully explained by Halligan. Examples of such matters are to be found in paragraphs [54], [59], [63], [74] and [78] of Halligan's Report.

644 Furthermore, Halligan makes it clear that in respect of a number of the Transactions, the Audit outcome needs clarification or are unclear to him, for example those items referred to in his Report in paragraphs [58], [63] and [85].

645 For the reasons I have referred to above I am ultimately of the view that Halligan's report is qualified in important respects, uncertain as to a number of items for theother reasons outlined and, in any event, provides only a superficial review of an audit which I have also found addressed and accepted a series of transactions made by Ranieri which I have concluded are themselves inappropriate and incorrect.

646 The Halligan Report is therefore in my view of little weight and does not substantially advance the R&B and vLAH case on the disputed Transactions and reject R&B and vLAH's attempted justification of the twenty-three adjustments. As employees and Auditor and Experts sought to support.

647 For these, and the reasons I outline below, I accept Mair and Hewamanna and Pringle's evidence in relation to the Transactions.

The Transactions

648 Balnaring pleads the following in relation to the alleged Transactions, effecting the R&B Group books of account, for the Financial Year 2015:[537]

> Further, the RB Group prepared the books and records for the 2015 financial year without making full or proper enquiries such that it improperly recorded:
>
> (a) journal entry 4-1600, which records an adjustment of $374,634.52 in reversal of sales in March 2015 in circumstances where the sales related to March 2014;
>
> (b) journal entry 4-8000, in the sum of $323,045.48, being an entry regarding the accounting treatment of a lease incentive;
>
> (c) journal entry 5-1040, being a provision for stock diminution in the amount of $1,000,000.00;
>
> (d) journal entry 5-1060, being an adjustment recording a writedown for damaged stock in the amount of $2,360,326.00 in the month of March 2015;
>
> (e) journal entry 6-1100, being an adjustment to provision for doubtful debts in the amount of $112,083.12 in the month of March 2015;
>
> (f) journal entry 6-1200, which retrospectively assigns bank charges in the amount of $17,335.38 to the month of March 2015;
>
> (g) journal entry 6-1240, which records the transfer by van Laack Australia Holding Pty Ltd of $45,009.00 in expenses, representing payment of four PKF invoices, as recorded in its accounts in February 2015, to its subsidiary Rhodes & Beckett Pty Ltd;
>
> (h) alterations and tailoring costs of approximately 6.5 percent of sales in March 2015, an amount of $64,334.88;
>
> (i) journal entry 6-1290, which records an entry of $29,000.00 for wrapping and packaging in the month of March 2015;
>
> (j) journal entry 6-2120, which records $17,130.00 for electricity costs for one site for the month of March 2015;[538]
>
> (k) a purchase entry in the amount of $28,580.20 for telephone expenses, recorded on 31 March 2015, in circumstances where an invoice for telephone expenses has also been recorded on 10 March 2015;
>
> (l) journal entry 6-2650, which records an adjustment of $341,416.04 accounting for fixed asset disposal in March 2015;
>
> (m) journal entry 6-2730, which records a computer expenses figure of

537 OP-FAPOC, 22 June 2016, [53A].

538 Balnaring and Mair do not press this Transaction; Plaintiff's Closing Submission, [200]; Footnote, [81].

$20.292.13 in March 2015;

(n) journal entry 6-3100, which records a charge of $668,833.57 in prepayments for advertising costs in March 2015;

(o) journal entry 6-3115, which records a charge for postage of $26,456.24 in March 2015;

(p) journal entry 6-3120, which records an adjustment of $140,449.26 for artwork and signage in March 2015;

(q) journal entry 6-5111, which records superannuation charges of $25,760.00 in the month of March 2015;

(r) journal entry 6-6300, which records $17,500.00 for couriers and freight in the month of March 2015;

(s) journal entry 5-1230, which records a provision of $777,672.67 for diminution in stock in the month of March 2015;

(t) journal entry 6-1110, which records an adjustment of $242,646.01 for doubtful debts in the month of March 2015;

(u) the recording of $37,301.92 (GJ000308) in year-end unrealized foreign exchange adjustments in March 2015;

(v) journal entry 5-1230 which records an adjustment of $96,742.47 for diminution in stock in March 2015;

(w) journal entry 6-1100, which makes a provision for $186,682.59 for doubtful debts in March 2015; and

(x) the recording of $29,900.33 in year end unrealized foreign exchange adjustments in March 2015.

649 In relation to the Transactions in dispute, I find the following:

(a) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(a)

Adjustment 53A(a) – Sales reversal of $374,634.52 – March 2015[539]

(xx) The adjustments comprise three entries.

(xxi) Two credit memoranda in the sum of $120,000 to OzSale (invoice 20150233)[540] and $110,000 (invoice 20150236).[541]

(xxii) The third adjustment is GJ002576[542] effecting a $165,543.61 reversal of sales

539 MS4392.
540 MS4271.
541 MS4272.
542 MS4379.

to OzSale. GJ002576[543] refers to sales for March 2014.

(xxiii) That adjustment was processed by user 'Franco' on 14 June 2015 and backdated to 31 March 2015.[544]

(xxiv) In my view the defendants have failed to identify any proper accounting reason for backdating this adjustment to 31 March 2015.[545]

(xxv) In this regard I note and accept Pringle's expert opinion that if the sale related to March 2014, it should not have been recorded in the 2015 financial year.[546] The defendants to the oppression claim did not seek to address or submit any explanation to the contrary.

(b) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(b)

Adjustment 53A(b) – adjustment to R&B other income - $323,045.48 - March 2015

(i) R&B ledger 4-8000 (other income) records an adjustment of $323,045.48 in March 2015.[547]

(ii) GJ0002577[548] records a debit of $323.045.28 to other income, and a credit of that amount to 2-1206 (unearned lease incentive).

(iii) The notation in the last subparagraph refers to a lease incentive from Novion for the R&B Emporium store. Mair's evidence was that the adjustment records an 'unearned lease incentive'.[549]

(iv) Mair's evidence was that no lease incentives were ever disputed or not received.[550]

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543 MS4379.
544 MS4379.
545 MS240; Hewamanna [7] and [8].
546 MS878; Pringle, p2.
547 MS4734; MS211; Mair [415].
548 MS4380.
549 MS212, Mair [417].
550 MS212, Mair [417].

(v) Ranieri's evidence was that the deduction from income arose because the incentive was to be apportioned over the life of the lease.[551]

(vi) Hewamanna's evidence is also that Ranieri has inconsistently and, I infer therefore incorrectly, accounted for the lease incentive.[552]

(vii) Hewamanna's evidence was that the accounting treatment by Ranieri was not consistent with the accepted practice of the business between 2010 and the date he left the business. Hewamanna pointed out that the accounting treatment applied in each of those years was accepted and approved in the annual audits.[553] Hewamanna also stated that Ranieri's journal entries reversed the entire fitout contribution resulting in no benefit for the 2015 year.[554]

(viii) Mair submits that, whatever accounting standard is to be applied, it is not a proper accounting treatment to apply no part of the lease to the 2015 financial year.

(ix) Moreover, Hewamanna observes that, on the face of the documents, the journal entry was processed by user 'Franco' and backdated to March 2015.[555] The transaction does not relate to the month of March 2015.

(x) In my view, there was no proper accounting reason for the income adjustment to 31 March 2015.

(xi) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(xii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

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551 MS553, Ranieri, [22].
552 MS240; Hewamanna, [9].
553 MS240–41, Hewamanna, [12].
554 MS240, Hewamanna, [12].
555 MS241, Hewamanna, [13].

(c) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(c)

Adjustment 53A(c) – adjustment to R&B stock quantities - $1,000,000 - March 2015

(i) R&B ledger 5-1040 records an amendment of over $1,000,000 in provision for stock diminution.[556] This amendment was booked to 31 March 2015, and is reflected in General Journal GJ002594.[557]

(ii) This amendment reflects the only stock diminution entry for the period May 2014 through April 2015.

(iii) Ranieri's evidence was that he reconciled stock on hand to MYOB and found a large discrepancy.[558]

(iv) This discrepancy was not identified by the defendants, nor is it supported by documentation. Ranieri refers to a document asserted to reflect a stock write down.[559]

(v) The defendants however provide no evidence or submitted no explanation in relation to that document.

(vi) Significantly, no stocktake reports or reconciliation or Futura report, no voucher, journal or source document is identified or put forward by the defendants in support of this adjustment.

(vii) Hewamanna's evidence was that this amendment was also entered on 15 June 2015 and backdated to 31 March 2015,[560] without any proper accounting justification for the amendment said to be referrable to March 2015.

(viii) Ordinarily, stock adjustments are recorded at the end of the financial year.[561] Hewamanna's evidence was that if an adjustment was required for some

556 MS4734.
557 MS4381.
558 MS553–54, Ranieri, [24].
559 MS4445.
560 MS242, Hewamanna, [18]-[19].
561 MS242, Hewamanna, [19].

legitimate accounting reason, that adjustment would ordinarily be effected in the relevant financial year.

(ix) The defendants have not addressed or explained why this amendment was recorded in March 2015.

(x) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(xi) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(d) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(d)

Adjustment 53A(d) – provision of $2,360,326 – damaged stock - March 2015

(i) R&B ledger 5-1060 records a provision for damaged stock.[562] The amendment is reflected in General Journal entry GJ002593.[563]

(ii) Mair's evidence was that, as of 27 March 2015, there was no substantial damaged stock.[564] Hewamanna's evidence was that store 2001 (which served as the 'returns warehouse' code) was the subject of a stocktake in February 2015 and that stock was spot checked in March 2015[565] because of a pending warehouse sale.[566] The February 2015 stocktake reconciled substantial stock.

(iii) Ranieri's evidence was that this adjustment in the sum of approximately $2.3 million, were made by Grant Thornton Audit.[567]

(iv) Trivett gave evidence that during the audit Grant Thornton Audit staff sighted

562 MS4734.
563 MS4382.
564 MS213, Mair [421].
565 MS241–42, Hewamanna, [16].
566 Ibid.
567 MS554, Ranieri, [26].

a report provided to them by the temporary Chief Financial Officer, Ranieri, which identified the value of non-existent damaged stock listed at a 'notional' 'store 2001' valued at $2.3 million.[568] Trivett identified that document, that is the report, as being "similar to" the document annexed to Ranieri's statement.[569]

(v) Trivett's evidence was that the amendment was made to the Company's accounts prior to the trial balances being provided to GTA for the audit.

(vi) Pringle's evidence was that, while Trivett indicated it was drawn to his attention that his staff neither audited or verified this item, it had been processed prior to the audit commencing.[570]

(vii) Trivett and Ranieri directly contradict each other on this issue.

(viii) Trivett's evidence was that the stock did not exist and that this was confirmed by a stocktake conducted during the course of the audit.[571]

(ix) At trial Mair called for the Stocktake Report for 2001.[572] It was not produced by the defendants.[573]

(x) Mair and Hewamanna's evidence, supported by the Stock on Hand Report produced by Hewamanna, strongly supports the existence of the subject stock at 30 April 2015.[574]

(xi) This amendment was also entered by the defendants on 15 June 2015 and backdated to 15 March 2015,[575] without any proper accounting justification for that amendment. Hewamanna's evidence was that ordinarily stock adjustments are recorded at the end of the financial year.[576] Accordingly, if an adjustment was required, it should have been recorded in April 2015. The

568 MS522-23, Trivett, [254](c)(vi).
569 MS4445.
570 MS878, Pringle, p3.
571 MS522–23, Trivett, [254].
572 T967.5-31.
573 T1017.2-8; T1113-10-31; T1115.10-17; T1135.1-15.
574 MS4446-47.
575 MS242, Hewamanna, [18].
576 MS242, Hewamanna, [19].

defendants have not sought to explain why this substantial amendment was backdated to 31 March 2015.

(xii) I also observe that the defendants make no submissions either to explain the reason for this adjustment, or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(xiii) For the above reasons I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(xiv) I am ultimately not satisfied that the subject stock did not exist or was damaged to an extent, or in sufficient quantities, to justify the $2,360,326 stock damage adjustment in the R&B books.

(e) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(e)

Adjustment 53A(e) – amendment of $112,083.12 – provision for doubtful debts - March 2015

(i) R&B ledger 6-1100 records an amendment of $112,083.12 to provide for a doubtful debts in the month of March 2015.[577] The amendment is reflected in General Journal GJ002587.[578]

(ii) No provision was made for doubtful debts in the General Journal in any other month in the period from May 2014 to April 2015.

(iii) Hewamanna's evidence is that no provision for doubtful debts was made in the whole of the 2014 financial year.[579]

(iv) Hewamanna's evidence is that the sum of $112.083.12 is the balance of the accounts receivable ledger in the MYOB file.[580]

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577 MS4734.
578 MS4383; MS3242.
579 MS4734–39, Hewamanna, [22]-[23].
580 MS4734-39, Hewamanna, [13], [22]-[23]; MS4240.

(v) Trivett gave evidence explaining how the doubtful debts were verified during audit.[581] Trivett stated that Ranieri, R&B Group's Chief Financial Officer, decided which debts over 90 days were unlikely to be recovered and provision was made for these debts.[582] Trivett also determined that a number of debts which had been outstanding for less than 90 days were unlikely to be paid.[583]

(vi) Hewamanna did not agree with the assessment of bad debts made by Ranieri.[584] In my view, Hewamanna, who had a long familiarity with the company accounts and those entities with which R&B Group traded, was more likely to be able to accurately evaluate which outstanding debts from which organisations were likely to remain unpaid. For this reason, I prefer Hewamanna's evidence.

(vii) Pringle observed that there is no requirement under AASB 137 to make a provision for doubtful debts.[585] Pringle also observed in his evidence that Trivett relied on information from management and that Trivett did not identify any external corroborative evidence relied on by the Grant Thornton Audit to support the 2015 R&B Group's management assertions.[586]

(viii) This amendment was also processed by user 'Franco' on 14 June 2015 and back dated to 31 March 2015.[587] There is no proper justification provided or asserted by the defendants for backdating this adjustment to 31 March 2015.

(ix) Hewamanna's evidence was that there are only two proper accounting treatments in relation to such bad debts and neither applied in this instance.[588]

(x) The defendants have not explained why on 14 June 2015 Ranieri backdated this amendment to March 2015.

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581 MS524–25, Trivett, [257].
582 MS525, Trivett, 257(d).
583 MS525, Trivett, 257(e).
584 MS318–19, Ranieri, [79].
585 MS884, Pringle p8.
586 MS884, Pringle p8.
587 MS243, Hewamanna, [22].
588 MS243 (as set out at Hewamanna, [23]).

(xi) I also observe that the defendants make no submissions either to explain the reason for this adjustment, or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(xii) For the above reasons I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(f) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(f)

Adjustment 53A(f) – required adjustment Bank Charges

(i) R&B ledger 6-1200 records $17,335.38 in March 2015 for bank charges. The amount is derived from two cheques. Cheque 39 is for the sum of $6,719.91.[589] Cheque 40 is for the sum of $10,615.47.[590] The average monthly bank charges for the Group in the period from May 2014 to February 2015 were $1,500.[591]

(ii) The total amount assigned to ledger 6-1200 for the 2014 financial year was $22,184.82.[592]

(iii) The total amount assigned to ledger 6-1200 for the 2015 year was $32,536.30.[593]

(iv) The parties agree that this is an improper entry.[594] Despite that agreement, no amendment has been made to the R&B Accounts for the financial years 2014 and 2015 correcting this error.

(g) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(g)

Adjustment 53A(g) – inappropriately entered invoices - $45,009 – March 2015

(i) R&B ledger 6-1240 records a transfer from vLAH to R&B of $45,009 in

589 MS4333, NEL.0001.0001.1078.
590 MS4334, NEL.0001.0001.1079.
591 MS4734.
592 MS4234-39, NEL.0001.0001.1045.
593 MS4734.
594 MS4234-39, NEL.0001.0001.1045; MS243, Hewamanna, [24].

accounting expenses.[595] The amount is comprised of four invoices from PKF Lawler ('PKF').[596]

(ii) The payment has been recorded in February 2015.[597]

(iii) Hewamanna's evidence is that invoices comprising the amount of $45,009 in R&B ledger 6-1240 relate to four PKF invoices for professional services.[598]

(iv) Ranieri's evidence was that invoices for RBUT were allocated to R&B because RBUT had ceased to exist.[599]

(v) Hewamanna's evidence is that the expenses (for the restructure of the RBUT) are unrelated to R&B's trading operation and those costs have in the past been charged to vLAH.[600] Hewamanna also stated these invoices do not relate to March 2015.[601]

(vi) The relevant invoices were entered on 29 May 2015 and backdated to 31 March 2015. The defendants have put forward no explanation for those entries being backdated.

(vii) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(viii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(h) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(h)

595 MS4734.
596 MS4368-71.
597 MS4734.
598 MS4368–71.
599 MS555, Ranieri [32].
600 MS243–44, Hewamanna [26].
601 Ibid.

Adjustment 53A(h) – charges for alterations and tailoring - $94,334.88

(i) R&B ledger 6-1280 records $94,334.88 for alterations and tailoring.[602] The figure is made up of 93 separate invoices. The plaintiff requested that the defendants provide those invoices. They were not provided by the defendants.

(ii) In the period March 2014 to February 2015, the average cost of alterations and tailoring was approximately 2 percent of sales.[603] However, the March 2015 entry represents 6.5 percent of sales.[604]

(iii) Hewamanna's evidence was that it is standard accounting practice to query a variation of that magnitude.[605]

(iv) Ranieri gave evidence about this transaction, but did not refer to any source documentation to verify the adjustment

(v) I am not satisfied that any proper justification exists for the defendants making this $94,334.88 for alterations and tailoring. I am also satisfied that if this adjustment was able to be substantiated by invoices, such invoices would probably have been referred to at trial and tendered in evidence.

(vi) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(vii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(i) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(i)

Adjustment 53A(i) – wrapping and packaging expenses - $29,000 – March 2015

602 MS4734.
603 MS244, Hewamanna, [28].
604 Ibid.
605 Ibid.

(i) R&B ledger 6-1290 records an amendment for wrapping and packaging in March 2015.[606] This figure derives from General Journal GJ002543[607] which records a debt of $29,000 to 6-1290 (wrapping and packing) and a credit of that amount to 1-1180 (prepaid expense).

(ii) Mair gave evidence as to the practice of auditing the prepayments ledger at the end of each financial year.[608]

(iii) Ranieri was not able to comment on this adjustment/Transaction.[609]

(iv) The adjustment was made on 1 April 2015 and backdated to March 2015. R&B has failed to provide any documentation to justify this amendment.

(v) I am satisfied that were there to be justifiable expenditure for wrapping and packaging, then verifying documentation would be very likely to exist.

(vi) I am not, however, satisfied in relation to this and similar submissions made by Mair in respect of other Transactions, that the absence of the source documentation is sufficient to found an inference that the documentation in question would not have assisted the defendants' case.

(vii) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(viii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(j) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(j)

Adjustment 53A(j) – electricity costs - $24,409.91 – March 2015

606 MS4734.
607 MS4202.
608 MS212, Mair, [419].
609 MS555–56, Ranieri, [36].

This transaction is not pressed by Mair

(k) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(k)

Adjustment 53A(k) – telephone expenses - $40,534.39 – March 2015

(i) R&B ledger 6-2200 records $40,534.39 in telephone expenses.[610]

(ii) The figure is substantially higher than each other month in the period from May 2014 to April 2015,[611] and substantially higher than March 2014.[612]

(iii) Hewamanna's evidence is that the entry on 10 March 2016,[613] and an amount of $31,438.22 recorded on 31 March 2015,[614] (Purchase Number 20150331), refer to the same as the date of entry and allocate the whole of the amount to job number 0-001. Hewamanna's evidence was that the usual practice is to allocate the costs to the relevant job number.[615]

(iv) The defendants have not provided source documentation to refute the Mair case that these Transactions are in error. Hewamanna's evidence was that the relevant source documentation would be the supporting invoice.[616]

(v) I am satisfied that, if there had been justifiable expenditure in the sum of $40,534.39 in relation to R&B's telephone expenses, such expenses would be supported by invoices.

(vi) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(vii) For the above reasons, I am satisfied that the adjustment to the books of

610 MS4734.
611 Ibid.
612 MS4235.
613 Ibid.
614 Ibid.
615 MS235, Hewamanna [15].
616 MS244, Hewamanna, [32].

account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(l) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(l)

Adjustment 53A(l) – fixed asset disposal - $341,416.04 – March 2015

(i) An adjustment of $341,416.04 is made in the R&B accounts for fixed asset disposal in March 2015. The entry appears in the R&B profit and loss statement for 2015 financial year.[617]

(ii) No amount is specified[618] in the R&B Profit and Loss Statement provided to Mair at the time of inspection of records in June 2015.

(iii) Ranieri's evidence was that this amendment was necessary because there were three store closures in 2015 and the previous Financial Controller, Hewamanna, had not 'written them off'.[619]

(iv) Hewamanna disputes Ranieri's evidence.[620] Hewamanna's evidence was that two of the stores closed in 2014[621] and that the assets from the store which was closed in 2015 were not written off but stored at Port Melbourne for use in the upcoming Chatswood and South Wharf stores.[622]

(v) Trivett's evidence on the issue does not mention the item or the manner in which the audit of fixed assets was undertaken.[623] In my view, on the evidence, it is probable that this item was not interrogated in the Grant Thornton Audit 2015 audit process, despite it being significantly above the materiality threshold.

(vi) Hewamanna noted that no source documentation has been provided by the

617 MS962–64, Appendix 6 Halligan Report.
618 MS4734.
619 MS556–57, Ranieri, [42].
620 MS244–45, Hewamanna, [33]-[36].
621 MS245, Hewamanna, [34].
622 Ibid.
623 MS881, Pringle, p5.

defendants and that such documentation would include a Register of Assets, Costs and Depreciation.[624]

(vii) Further, I consider that Hewamanna is more likely to understand and know what happened in fact with the subject store closures and the assets from such stores as a result of the long hands-on general and financial management role he undertook in the R&B Business.

(viii) This adjustment was made on 30 June 2015 and backdated to 31 March 2015.

(ix) Hewamanna's evidence was that adjustments of this kind are made at the end of the financial year.[625]

(x) The defendants adduced no evidence or submission to identify any proper accounting basis for making this adjustment applicable at March 2015.

(xi) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(xii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(xiii) For the above reasons I am satisfied that no adjustment of $341,416.04 was warranted on account of fixed asset disposal in March 2015.

(m) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(m)

Adjustment 53A(m) – computer expenses - $32,292.13 – March 2015

(i) R&B ledger 6-2730 records computer expenses for $32,292.13 for March 2015.[626] The subject expenses figure is comprised of 37 separate invoices.[627]

624 MS245, Hewamanna, [35].
625 MS245, Hewamanna, [36].
626 MS4734.

(ii) The figure is substantially higher than for any other month in the period from May 2014 to April 2015.[628] The figure is substantially higher than for any month in the 2014 financial year.[629]

(iii) A number of these thirty-seven entries were created in April and May 2015 and backdated to March 2015.[630]

(iv) Hewamanna's evidence observes that Ranieri has not provided the invoices in question nor any documentation to support these charges.[631] [This is the extent of his evidence on the issue].

(v) No supporting documentation, or invoices for these computer expenses were relied on by the defendants.

(vi) I am satisfied that the $32,292.13 recorded in the R&B Ledger in relation to computer expenses, backdated to March 2015, were not justified adjustments to the R&B accounts.

(vii) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(viii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(n) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(n)

Adjustment 53A(n) – advertising expenses - $684,319.50 – March 2015

(i) R&B ledger 6-3100 records advertising expenses in the sum of $684,319.50

627 Summarised in NEL.0001.0001.1395.
628 MS4734.
629 MS4234–39.
630 MS245, Hewamanna, [37].
631 Ibid.

for March 2015.[632] Total advertising expenses for the period May 2014 to April 2015 were $903,184.65.[633] General ledger GJ002561[634] records a transaction for $668,833.57, which is recorded as a debit to advertising expenses and a credit to prepaid expenses.

(ii) Ranieri explains that all prepayments save for those relating to the marketing campaign for AW season were expensed in full.[635] Ranieri states that this was because they had been carried for some time.[636] Ranieri gives no explanation of why the amounts were expensed in full except in the case of the marketing campaign costs. Ranieri's explanation does not accord with the detailed explanation given by Mair as to the operation of prepayments in the business.[637]

(iii) This item was queried by the auditors.[638] However, the response to that query was not produced by the defendants.

(iv) The adjustment was made on 13 June 2015 and backdated to 31 March 2015. The defendants have not explained why the amounts in issue were backdated to 31 March 2015.

(v) The amount was apparently not subject to interrogation in the audit despite being substantially above the materiality threshold. Trivett's evidence is that he was made aware that in preparation for the audit, there were some amendments made to R&B's accounts regarding marketing and advertising expenses to clean up errors in the accounts, such as potential prepaid marketing expenses that were written off.[639] Trivett states that he is not aware of amendments to the accounts resulting in an increase in marketing and advertising expenses to the value in issue.[640]

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632 MS962–64, Halligan, A6.
633 Ibid.
634 MS4386.
635 MS557, Ranieri [46].
636 Ibid.
637 MS212–13, Mair, [419]–[419A].
638 MS5458.
639 MS520, Trivett, 249(a).
640 MS520, Trivett, 249(b).

(vi) Hewamanna's evidence is that there is no proper accounting basis for either the 'zeroing' of the accounts or the backdating of the full amount to March 2015.[641]

(vii) I also observe that the defendants make no submissions either to explain the reason for this adjustment, respond to or traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(viii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(o) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(o)

Adjustment 53A(o) – postage - $26,456.24 – March 2015

(i) R&B ledger 6-3115 records an amount of $26,456.24 for postage.[642] The entry originates from GJ002543[643] which identifies a transaction debiting 6-3115 (postage) and crediting 1-1180 (prepaid expense). There is no other entry in that ledger for the period from May 2014 to April 2015.[644]

(ii) A postage charge for March 2015 is recorded in R&B ledger 6-1330 (postage) in the sum of $4,696.68.[645] The total postage allocated to 6-1330 for the year is $157,6554.11.

(iii) Ranieri's evidence does not explain this adjustment,[646] and the defendants have not produced source documentation justifying the adjustment.

(iv) I also observe that the defendants make no submissions either to explain the reason for this adjustment, respond to or traverse Mair's explanation and

641 Hewamanna, [39].
642 MS4734.
643 MS4203.
644 MS4734.
645 MS4734.
646 MS557–58, Ranieri, [48].

submissions as to why this Transaction was unjustified and in error.

(v) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(p) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(p)

Adjustment 53A(p) – artwork and signage - $140,449.26 – March 2015

(i) R&B ledger 6-3120 records $140,449.26 of artwork and signage in March 2015.[647] The average monthly spend on artwork and signage is $9,416.00.[648] The sum of $140,449.26 relates to 46 separate invoices, extracted from the R&B MYOB database.[649]

(ii) Ranieri's evidence is that this adjustment was made to recognise an outstanding debt with 'Studio Woo' for invoices not previously recognised.[650]

(iii) Hewamanna's evidence was that the prepayments ledger referred to by Ranieri in the Pre-payments Ledger records the 'Studio Woo' invoices, and was expensed as Ranieri describes in paragraph [38] of his statement.

(iv) Expensing was inappropriate and operated to artificially reduce the EBITDA of the business. Moreover, Hewamanna states that 'Studio Woo' did not perform any work for the month of March 2015.[651] The defendants have given no reason why the entries were recorded to March.[652] The defendant has wholly failed to explain why these amounts were expensed to March 2015 – a period to which they did not relate.

(v) I also observe that the defendants make no submission either to explain the

647 MS4734.
648 Ibid.
649 NEL.0001.0001.1395.
650 MS558, Ranieri, [50].
651 MS246A, Hewamanna, [42].
652 Ibid.

reason for this adjustment, to respond to or traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(vi) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(q) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(q)

Adjustment 53A(q) – superannuation charge - $25,760.00 – March 2015

(i) R&B ledger 6-5111 records a superannuation charge of $25,760.00 for the month of March 2015.[653] The total for that ledger for the 2015 year is $25,760.00.[654] A superannuation amount for March 2015 has also been recorded in R&B ledger 6-5110 (superannuation) in the sum of $30,242.27.[655]

(ii) Mair's evidence is that this expense was not incurred.[656]

(iii) Further, Mair's evidence was also that:[657]

> 418. Further, the records disclose that the R&B Business's accounts account for expenses that I know from my involvement in the R&B Business that the business has not in fact incurred, as follows:
>
> a. cost of sales to the value of $1,732,000;
>
> b. marketing and advertising expenses to the value of $829,723;
>
> c. rental expenses to the value of $244,778;
>
> d. employment-related expenses to the value of $209,423; and
>
> e. other general expenses to the value of $387,327.
>
> 419. I believe that a number of the expenses have been 'generated' by eliminating (writing back) pre-payments as the prepayments balance on the R&B balance sheet is stated as only $206,068 compared to $538,009 in the audited accounts of FY2014. This is inconsistent with the R&B Business accounting practice in place prior to 27 March 2016. The practice was to give a fair and true view of the actual expenses for each month. Expenses incurred that related to expenditure that would be

653 MS4734.
654 Ibid.
655 Ibid.
656 MS212-213, Mair, [418]-[419A].
657 Ibid.

made across more than one month were booked to pre-payments. The pre-payments were booked to the relevant expense ledger to reflect the actual monthly expenditure. It would then be booked to the appropriate month. For example, the R&B Business ordered packaging in bulk and would expend a large sum on it. This amount would be booked to pre-payments. As the packaging was used, the actual monthly amount would be transferred from pre-payments and booked to the appropriate expense ledger.

419A. Where an amount remained in pre-payments at the end of the financial year, it was subject to audit. Based on my involvement in the audit process, the auditors paid particular attention to pre-payments. The auditors reviewed the initial expenditure and any adjustment was made at year's end, in April. This practice was in place for the whole of my tenure at R&B.

(iv) Ranieri gave evidence that the amount is the late payment of SCG and penalties incurred as a result.[658] The adjustment was made on 13 June 2015 and backdated to 31 March 2015. No explanation has been provided by the defendants as to why this backdating occurred. The amounts incurred do not appear to relate to March 2015.

(v) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(vi) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(r) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(r)

Adjustment 53A(r) – couriers and freight - $31,292.49 – March 2015

(i) R&B ledger 6-6300 records the amount of $31,292.49 for couriers and freight for the March 2015.[659] The March 2014 amount is $13,806.86.[660] The figure includes an amount of $17,500, comprised of a $10,000 figure in General Journal GJ002543[661] showing a debit to 6-6300 and a credit of that amount to

658 MS558, Ranieri, [52].
659 MS962–64, Halligan, A6.
660 MS4234–39, NEL.0001.0001.1045.
661 MS4202, NEL.0001.0001.1084.

1-1180 (prepaid expense), and a General Journal sum of $7,500 in GJ0002534[662] showing a debit to 6-6300 and a credit of that amount to 1-1180 (as pre-paid expense).

(ii) Mair's evidence is that these expenses were not incurred.[663] Mair's evidence was that a number of such expenses have been 'generated' by eliminating (writing back) prepayments.[664]

(iii) The defendants have not sought to explain or justify this Transaction.

(iv) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(v) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

Boston Brothers

(s) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(s)

Adjustment 53A(s) – diminution in stock - $777,673.00 – March 2015

(i) Boston Brothers' ledger 5-1230 records a provision of $777,672.67 for diminution in stock in March 2015.[665]

(ii) Ranieri's evidence was that a reconciliation of stock on hand resulted in a MYOB balance disclosing a large discrepancy which was addressed by a write down in stock.[666] Ranieri cites no source documentation, such as warehouse records field notes or stocktake records, that would support the claim.

662 MS4205, NEL.0001.0001.1090.
663 Mair, [418].
664 MS211-12, Mair, [416]-[417] and [419]-[419A].
665 MS4372-73.
666 MS558–59, Ranieri, [56].

(iii) Mair's evidence is that the stock to which that item relates was transferred to Herringbone and sold at a 'pop-up' store that operated in Sydney from March 2015 until approximately June 2015.[667]

(iv) Trivett's evidence is that he is not aware of a write down of stock in the 2015 financial year accounts.[668] Trivett's evidence is that the pop-up stores used cash registers at the point of sale which were not linked to the inventory system. The corresponding inventory was not recorded as sold in the profit and loss account.[669] Trivett states that he anticipates that the write down in stock is related to this issue.[670] Further, I note that Trivett's evidence is ultimately equivocal on this adjustment.[671]

(v) Hewamanna's evidence is that Trivett is incorrect.[672] Hewamanna states that pop-up sales were properly recorded[673] and gives a comprehensive explanation.[674]

(vi) Pringle observes that Trivett's statement makes it clear that he, Trivett, was not fully aware of, and had not fully considered this issue, during the audit.[675] That is despite the amendment being well above the materiality threshold.

(vii) The inventory reconciliation did not occur until 15 June 2015. There it should not bear on what the stock as at 30 April 2015. However, on about 15 June 2015, the amendment was made and recorded at 31 March 2015.[676] The defendants identify no proper basis for booking the amendment to March 2015.

(viii) Mair's evidence I note is based on his own personal involvement in the

667 MS213A, Mair, 422.
668 MS524, Trivett, [255(d)].
669 MS523–24, Trivett, [255(c)].
670 MS524, Trivett, [255(d)].
671 Ibid.
672 Ranieri, [80].
673 Ranieri, [78].
674 MS246–47, Hewamanna, [46]-[47].
675 MS882, Pringle, p6.
676 MS247, Hewamanna, [48].

management of Boston Brothers and R&B business and his own direct recollection. By contrast, Ranieri and the Grant Thornton Audit audit team's understanding of what the actual facts and transactions involve, as with this example, is at best paperwork-based, second-hand and hypothetical. For these and the other reasons I have referred to elsewhere, I consider the evidence of Mair and Hewamanna, preferable to Ranieri and Trivett on these matters, save when there exists a contemporaneous document, or other similarly persuasive evidence which contradicts their evidence.

(ix) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(x) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(t) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(t)

Adjustment 53A(t) – doubtful debts - $242,646.01 – March 2015

(i) The Boston Brothers' ledger 6-1110 records an adjustment of $242,646.01 for doubtful debts in March 2015.[677] General Journal GJ000319[678] identifies that $132,646.01 of this amount relates to a provision for Myer invoices pre-dating June 2014.

(ii) Trivett gave evidence about the manner in which the doubtful debts were verified during audit.[679] That evidence was that Ranieri determined that debts over 90 days were unlikely to be recovered and provision was made for these debts accordingly.[680]

677 MS967-69, Halligan, A8.
678 MS4388.
679 MS524–25, Trivett, [257].
680 MS525, Trivett, [257(d)].

(iii) Ranieri's evidence was that efforts were made to contact debtors, however several, were either not contactable or denied owing anything.[681] In my view, it is notable that Ranieri produced no notes, records of contracts, or records of discussions with, or assessment of relevant debtors, nor a list of relevant debtors and recovery conclusions.

(iv) Hewamanna's evidence is that Ranieri's assessment of debtors is in error.[682] Hewamanna gave evidence that Myer paid every invoice every year without any difficulties and that, accordingly, there was no basis to conclude that invoices issued to Myer overdue by more 90 days would not be paid.[683]

(v) I refer again to my earlier reasons of preferring Hewamanna's evidence on such issues, including my earlier specific reasons for preferring his evidence on the evaluation of bad debts.

(vi) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(vii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(u) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(u)

Adjustment 53A(u) – foreign exchange losses - $37,841.76 – March 2015

(i) Boston Brothers ledger 9-1010 records an amount of $37,841.76 for foreign exchange losses for March 2015.[684]

(ii) Hewamanna's evidence is that his practice was to make this adjustment at the

681 Ranieri, [58], MS559.
682 Ranieri, [81].
683 Ranieri, [79]; T1155.22-T1156.5; T1156.27-29; T1156-T1157.30.
684 MS4457, NEL.0001.0001.0994.

end of the financial year to adjust for foreign exchange fluctuations.[685] Hewamanna stated that PKF made the necessary foreign exchange adjustments for both Herringbone and R&B in each of the 2013 and 2014 financial years to ensure that the value of the inventory was correct as at the balance date.[686]

(iii) I consider that the defendants have put on no evidence or submission which justifies the accuracy or appropriateness of a foreign exchange adjustment as at March 2015.

(iv) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(v) For the above reasons I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

Baubridge and Kay

(v) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(v)

Adjustment 53A(v) – diminution of stock - $96,742.47 – March 2015

(i) Baubridge and Kay ledger 5-1230 records an adjustment of $96,742.47 making provision for a diminution of stock in March 2015. It is the only entry for the period from May 2014 to March 2015.

(ii) Mair's evidence is that this write-off relates to stock stored in a Luxury Retail Business warehouse. Mair's evidence is that this stock remained in storage in the Luxury Retail warehouse, and that the storage fees in question remain unpaid by vLAH.[687]

685 MS315, Ranieri, [61].
686 MS315, Ranieri, [61].
687 MS213A, Mair [420].

(iii) Further, these materials were the subject of a call[688] during the course of the hearing. In response to the call, the plaintiff produced the pallets for inspection. That inspection took place. The defendants were therefore aware that the stock was in the LRG warehouse and was available for collection. The defendants failed to collect that stock.

(iv) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(v) For the above reasons I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(w) Balnaring's Further Amended Points of Claim dated 22 June 2016, paragraph 53A(w)

Adjustment 53A(w) – doubtful debts - $186,682.59 – March 2015

(i) Baubridge and Kay ledger 6-1100 records a doubtful debts provision of $186.682.59.[689] The general journal entry is at MS4390.

(ii) Trivett gave evidence as to the manner in which the doubtful debts were verified during audit.[690] Trivett's evidence was to the effect that Ranieri determined that debts over 90 days were unlikely to be recovered, and provision was made for these debts accordingly.[691]

(iii) Ranieri stated in his evidence that he tried to contact all debtors and that several were not contactable or denied owing anything.[692] However, Ranieri produced no notes or records of contacts, the results of such contacts, any assessments of debtors, nor any list of relevant debtors with reasons for his

688 T959.2-22.
689 MS4454.
690 MS524–25, Trivett, [257].
691 MS525, Trivett, [257(d)].
692 MS559, Ranieri, [58].

negative assessment of recovery.

(iv) Hewamanna's evidence was that he rejected Ranieri's assessment.[693] Hewamanna gave evidence, to which I have referred earlier, that Myer, for example, paid every invoice every year without any difficulties and that there was no basis to conclude that invoices issued to Myer that were overdue by more 90 days would not be paid.[694]

(v) Pringle observes in his evidence that there is no requirement under AASB 137 to make a provision for doubtful debts.[695] Pringle observed that Trivett relies on what he was told by management and makes no reference to any external corroborative evidence used by the auditors to verify or support management's assertions.[696]

(vi) I refer again to my earlier reasons of preferring Hewamanna's evidence on such issues, including my earlier specific reasons for preferring his evidence on the evaluation of bad debts.

(vii) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(viii) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

(ix) I am satisfied that no adequate assessment of the recoverability of the relevant bad debts was made by the defendants and I am satisfied that there was no proper or justifiable basis to adjust Baubridge & Kay's account by $186,682.59 in 2015, on account of doubtful debts.

(x) Balnaring's Further amended

693 Ranieri, [81].
694 MS318–19, Ranieri, [79]; T1155.22-T1156.5, T1156.27-29, T1156-T1157.30.
695 MS884, Pringle, p8.
696 Ibid.

Adjustment 53A(x) – foreign exchange losses - $29,900.33 – March 2015

(i) Baubridge and Kay ledger 9-1000 records an amount of $29,900.33 for foreign exchange losses.[697]

(ii) Hewamanna's evidence was that company's practice was for this adjustment to be made at the end of the financial year.[698] His evidence was that PKF made the necessary adjustment for both Herringbone and R&B in each of the 2013 and 2014 financial years and that this was done during the course of the end of year audit.

(iii) I am not satisfied given the evidence from the plaintiff to the contrary that this adjustment was accurate or appropriate at March 2015.

(iv) I also observe that the defendants make no submissions either to explain the reason for this adjustment or to respond to and traverse Mair's explanation and submissions as to why this Transaction was unjustified and in error.

(v) For the above reasons, I am satisfied that the adjustment to the books of account of R&B Group in the 2015 Financial Year in relation to this Transaction is unjustifiable and in error.

650 Furthermore, as I have earlier touched upon, it is also troubling that many of the impugned transactions were entered into the books and records of the Group on the weekend of 13-14 June 2015. That was the day before Balnaring was granted access to the relevant books and records of the Group pursuant to Court Orders. Moreover, the adjustments were made effective not at the end of the relevant financial year, namely 30 April 2015, but at the end of March. This had the potential to effect of reduction of the EBITDA to be used to value Balnaring's Minority Interest under cl 12 of the SUHA. This is also in my view troubling.

651 As also earlier observed, R&B and RBG and the vLAH parties said nothing in their evidence

697 MS4454.
698 MS315, Ranieri, [61].

about these dates.

652 Furthermore, I note that the defendants to the Oppression Proceeding did not, either in their written or their oral submissions, address specifically whether the above transactions were likely to be correctly adjusted. The defendants instead made general submissions attempting to impugn the plaintiff's submissions criticising the reliability of the defendants' experts.

653 I also consider that the detailed and specific evidence outlined above in relation to the twenty-three Transactions refutes and displaces any prima facie effect of the Trivett audit conclusions in respect of the transactions pursuant to s 1305(2) of the Act.

654 For these reasons, Mair and Hewamanna's evidence on the transactions addressed in evidence, as well as Pringle's expert evidence, is to be preferred to Ranieri, Trivett and Halligan's evidence.

General Conclusion in relation to the Financial Expert Evidence

655 I am not satisfied that Trivett or Grant Thornton have failed to comply with ss 307, 307A, and 307C of the Act including the independence requirements and the applicable code of professional conduct required by that Act. I do not find a lack of independence in the strict sense on the part of Grant Thornton Audit, its associated companies, or Trivett. Nor do I consider that Grant Thornton was in any way negligent in undertaking the Audit. I also observe that at no point did counsel for Mair and Balnaring impugn the findings of Trivett on any bases other than a suggested lack of reliability.[699]

656 Even so, the manner in which the audit was conducted, compared to the contemporaneous workface, operationally and managerially based evidence of Hewamanna and Mair and their intimate micro and macro knowledge of the R&B Business' finances, renders the evidence of Trivett far less probative than that for these reasons, and for the other reasons I have addressed in more detail elsewhere.

657 Further, although I have found the Transactions of Mair and Hewamanna to be unjustifiable and to effect erroneous adjustments to the R&B Group accounts, I do not consider that the

699 T43.12-17 (1 April 2016); T1351.27-31; T1352.1-9.

evidence establishes a sufficient basis, particularly considering the seriousness of these allegations and criticisms by Balnaring and Mair and the commensurately higher standard of proof necessary in respect of those matters,[700] to found the inference which is alleged at paragraph [55] of Balnaring's Points of Claim, namely that the Transactions represented adjustments undertaken by R&B and the van Laack parties for the purpose of reducing the EBITDA of RBG and by that means substantially reducing or destroying the value of Mair and Balnaring's Put-Option.

Conclusions on the [53A] Transactions

658 For the reasons outlined in relation to each of the above the transactions, and because I give substantially more weight to the evidence of Pringle, Mair and Hewamanna than to Ranieri, Trivett and Halligan in relation to facts and operational details concerning the accounts of RBG. I accept the plaintiff's submission that the twenty-three adjustments in issue, of the adjustments identified by the plaintiff in its Further Amended Points of Claim [53A], were incorrectly and inappropriately made, by Ranieri and his team and should be reversed.

659 I am also satisfied that such reversals will on the van Laack case result in the EBITDA for the Relevant Period, namely the 2015 Financial Year, defined by the SUHA being in the sum of at least negative ($5) $2.5 million approximately.

660 Further, I am not persuaded by the submissions of the oppression case defendants which contradict or marginalise Balnaring's case in relation to the Transactions.

661 In addition to my above reasons for my conclusions in relation to the Transaction issues, I am also of the view that the R&B and vLAH case in relation to those Transactions exhibited the following deficiencies, which rendered the Balnaring case more persuasive, for the following reasons.

662 Balnaring and Mair have addressed in detail the reasons why they allege that the transactions referred to in [53A] of Balnaring's Further Amended Points of Claim[701] give rise to inappropriate and erroneous adjustments to the EBITDA for the financial year 2015.

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700 OP-FAPOC, 22 June 2016, [55].
701 MS64-83.

663 In contrast, insofar as the defendants have adduced expert evidence to address the relevant accounts, the defendants have provided no specific detail or responses to the Balnaring and Mair submissions on the Transactions affecting the books of accounts referred to in [53A] of the Balnaring and Mair Further Amended Points of Claim. Only general submissions, which have not assisted me in this regard, have been made in the Defendant's Closing Submissions dated 24 May 2016: [72]-[76], [90]-[93] and [100]-[101]. Save for the general points made by the defendants referred to above in relation to the Transactions, the defendants' submissions simply referred to Halligan's evidence and Trivett's report and statement.

664 In essence, the defendants failed to explain how the adjustments impugned in the plaintiff's earlier filed and exchanged submissions dated 17 May 2016 were appropriate and supportable. This was the position which evolved in the face of Balnaring and Mair's evidence and detailed submissions on those financial issues, in particular the Transactions.

665 Ultimately, for the reasons I have outlined in respect of each of the twenty-three Transactions in issue elsewhere in these reasons, as well as my reasons as to which of the evidence in respect of the contested financial matters I have found to be most persuasive, Balnaring and Mair and Pringle have satisfied me that the 'adjustments' effected by Ranieri and his team, and audited by Grant Thornton Audit, are inappropriate and unsupportable and should not have been adjusted against the R&B Group books and records for the financial year 2015.

666 Nor am I persuaded that the vLAH parties' contention in relation to Mair's alleged 'improper conduct', alleged breaches of duties and alleged wrongful conduct, disentitles Balnaring from bringing and succeeding in its oppression claim.

Remedy in the Oppression Proceeding

667 Balnaring seeks orders under s 233 that:[702]

(a) pursuant to s 233 of the Act that vLAH purchase Balnaring's shares in RB;

(b) pursuant to s 233 of the Act that vLAH purchase Balnaring's shares in RBG;

(c) further to give effect to Orders (a) and (b) above, an order pursuant to s 233 of the Act that the price of the shares to be transferred pursuant to Order (a) and Order (b) be determined by an independent expert as provided in the

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702 OP - FAPOC, 22 June 2016, [62]; MS83-MS84.

parties Share and Unit Holder Agreement dated 1 December 2012 and adjusted for the defendants' wrongdoing;

(d) alternatively to order (a), an order pursuant to s 233 of the Act that RB be wound up;

(e) alternatively to order (b), an order pursuant to s 233 of the Act that RBG be wound up;

(f) further or in the alternative to orders (a)-(e) above, specific performance as against vLAH and RB of the option contained in clause 12 of the SUHA with appropriate directions to the independent valuer as to the manner and timing of calculations of EBITDA and/or equitable compensation;

(g) further or in the alternative to orders (a)-(f) above, specific performance of the pleaded Transfer Contract as pleaded with appropriate directions to the independent valuer as to the manner and timing of calculations of EBITDA;

(h) further or in the alternative to order (g) above, damages for breach of the Transfer Contract, along with interest;

(i) further or in the alternative to orders(a)-(hf) above, orders for winding up of RB and RBG under s 461(1)(k) of the Act;

(j) further, an order that the defendants pay the sum of $290,805 (being the Dividend for the financial year ended 30 April 2015, properly calculated);

(k) such further or other orders as may be just and necessary; and

(l) the defendants pay the plaintiff's costs of this proceeding.

668 In substance, Balnaring and Mair seek four forms of relief from the effects of the defendants' oppression:

(a) Statutory relief under s 233 of the Act to relieve from the effects of shareholder oppression.

The statutory relief is analogous to the relief below for the oppression and related claims.

(b) The appointment of an independent valuer to determine the value of the Minority Interests in R&B and R&B, as derived from the contractual formula in the SUHA, by reference to the R&B Group 2014 Audited Accounts.

(c) Specific performance of the Transfer Contract in the form of an order requiring vLAH to purchase its Minority Interests in R&B and RBG for a purchase price.

(d) Damages for:

(vi) breach of the Transfer Contract, pursuant to cl 12(c) of the SUHA, calculated as the purchase price of the Minority Interests in R&B and RBG as above; and

(vii) a debt accrued from vLAH's failure to pay a Dividend pursuant to the SUHA.

669 In response, the defendants submit:

(a) That any order for the purchase the value of the plaintiff's shareholding is nil. This is submitted to be because the purchase price for the shares is five times the EBITDA for the 12 calendar months preceding the date the Option Notice was given. On the defendants' submission, which presumes the impeachability of the audited accounts those defendants present as determinative, the EBITA for the relevant period is negative ($6.45) million meaning the purchase price of the shares is nil.

(b) That the claim for statutory relief as sought by the plaintiff is impermissible because, in particular, Balnaring and Mair submit that it is appropriate to calculate the plaintiffs' recoverable quantum on a basis using the R&B Group EBITDA for the Financial Year 2014, with appropriate adjustments ordered by the Court. The defendants submit this amounts to an attempt to re-write the terms of the parties' contracts.

(c) That specific performance should not be granted because:

(viii) the plaintiff has not shown that it is 'ready, willing and able to perform the essential terms of the contract';

(ix) Balnaring has repudiated the SUHA; and

(x) Mair and Balnaring's conduct has otherwise disentitled them to the relief sought.

Valuing the Minority Interests

670 I consider that in the application of a formula pursuant to the SUHA requiring utilisation of the EBITDA for the Financial Year 2015, any independent valuer will be confronted by the problem that the true EBITDA of the business for the Relevant Period cannot now be

established reliably. In essence, this is for the following reasons:

(a) The audited accounts have been rendered unreliable because they are distorted, including by reason of the Transactions detailed above.

It is probably impossible to reconstruct the books and records in a way which would permit a fair and accurate determination of the R&B Group EBITDA for the Relevant Period.[703] Balnaring complains, for example, of an amendment to the books and records which unjustifiably wrote off $3.2 million of stock. Despite several requests for it at trial, the document which is said to support that "write off", namely the stocktake record for 'Store 2001', was not produced and available as proof or for scrutiny or challenge.

(b) The ascertainment of the true RBG position at 31 March 2015 is complicated by the fact that the twenty-three adjustments representing the Transactions were performed by what Balnaring alleges was a 'revolving door account staff using other employees log ons'. Additional flaws in the 2015 Audit have in my view compromised the integrity of that process and displaced its prima facie validation of the adjustments generated by Ranieri, who was engaged by the R&B Group after Mair's departure.[704]

Trivett's evidence as the audit team leader does not assist because he was unable to comment on various aspects and in many instances had not personally verified the soundness of the adjustments audited. This is because he was unaware of the relevant items personally or did not investigate because he lacked necessary information.[705]

The expert evidence of Halligan (for the van Laack parties) and Paolacci (for Balnaring and Mair) was to the effect that they could not agree on the appropriate approach to the relevant books of account and records, even in respect of the specific transactions.

671 Accordingly, I consider that directing a process of attempted reconciliation and necessary reconstruction in relation to the R&B Group 2015 Financial Year accounts by an independent

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703 MS867, Paolacci, 385(8).
704 T1158.8-14.
705 MS519-526; see, e.g., Trivett, [248], [249], [250], [253], [254], [255] and [258].

valuer would be very time consuming and expensive for the parties to these proceedings and at risk of failing to ever produce a sufficiently accurate outcome in relation to the 2015 Financial Year EBITDA.[706]

672 For these reasons, I consider that the fairest remedy is for the Court to direct an independent valuer use the audited financial accounts of from Financial Year 2014 to determine the correct EBITDA, taking into account appropriate adjustments, for that year for the R&B Group. This is closely analogous to the valuation process agreed by the parties under the terms of the SUHA for shares required to be purchased as a result of Balnaring and Mair exercising their Put Option and the EBITDA for the Financial Year 2014 and for the year March 2014 to 28 February 2015 (prior to the adjustment/Transaction) and similar amounts.[707]

673 The Court may then apply the contractual formula in cl 12, 13 and the Schedule of the SUHA to determine the purchase price of the Minority Interests under the SUHA.

Specific Performance

674 I have also concluded that Balnaring and probably Mair (although no claim appears to be asserted in this regard by Mair) are entitled to enforce the Transfer Contract provided for under cl 14 of the SUHA, notwithstanding that the ESA has been brought to an end. On the basis of the independent valuation sought, Balnaring seeks specific performance of the Transfer Contract against vLAH pursuant to which vLAH will be required to pay the purchase price for the relevant Minority Party Interest.

675 In such circumstances, an order for specific performance will 'compel the execution *in specie* of a contract which requires some definite thing to be done before the transaction is complete and the parties' rights are settled and defined in the manner intended'.[708]

Availability of Specific Performance

676 It is a requirement for specific performance that damages for breach of contract are inadequate. This requirement flows from the supplementary role of equitable remedies.

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706 MS867, Paolacci 385(8).
707 MS811, Paolacci, 6.3.3 and 6.2.4.
708 *J C Williamson Ltd v Lukey* (1931) 45 CLR 282. 297 (Dixon J).

Historically, the jurisdiction of Chancery was engaged only where a legal remedy would not do justice in the circumstances.[709] In *Co-operative Insurance Society Ltd v Argyll Stores*[710] Hoffman LJ stated:

> Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. There may have been some element of later rationalisation of an untidier history, but by the 19th century it was orthodox doctrine that the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy…[711]

677 In *Wilson v Northampton and Banbury Junction Railway Co*,[712] Lord Selborne LC observed:

> …the Court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice. An agreement, which is not so specific in its terms or in its nature as to make it certain that better justice will be done by attempting specifically to perform it than by leaving the parties to their remedy in damages, is not one which the Court will specifically perform.[713]

678 Whether damages are inadequate will depend largely on the subject matter of the contract. Specific performance will often be appropriate, for example, in respect of contracts which effect a transfer of an interest in land. Equitable relief has also been granted in the case of contracts involving unique personal property[714] such as shares not obtainable on the open market.[715]

679 In *Dougan v Ley*,[716] Dixon J (as his Honour then was) held:

> In the present case I think that we should have no difficulty in concluding that, because of the limited number of vehicles registered and licensed as taxi-cabs, because of the extent to which the price represents the value of the license, and because of the essentiality to the purchasers' calling of the chattel and the license annexed there to, we should treat the contract as within the scope of the remedy of specific performance.[717]

680 Put simply, Balnaring seeks to specifically enforce an obligation arising by reason of its Put

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709 Snell's Equity [17-002]; Hutton v Watling [1948] Ch 26, 36.
710 [1998] AC 1.
711 Ibid 10.
712 (1874) LR 9 Ch App 279.
713 Ibid 284.
714 *Pusey v Pusey* (1684) 1 Vern. 273; *Dougan v Ley* (1946) 71 CLR 142, 151.
715 *ANZ Executors and Trustees Ltd v Humes Ltd* [1990] VR 615, 629; *Assìnagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2013] 1 All ER 495, 514-15.
716 (1946) 71 CLR 142.
717 Ibid 151.

Option and the resultant Transfer Contract, that the defendants pay it money.

681 Obligations to pay money are, in general, redressed adequately by damages. But there are, as mentioned above, exceptions. One is in respect of contracts that require the payment of money to a third party. Since the third party cannot sue on the contract, and the plaintiff vis-à-vis the defendant may only be entitled to nominal damages, Australian and English Courts have suggested that specific performance may be appropriate.[718] Another similar situation is where specific performance avoids the multiple damages claims which would be required to enforce an ongoing obligation to make periodic payments.[719]

682 In other cases, there has been a suggestion that the inadequacy of damages for one party may enable the other to seek specific performance. In *Turner v Bladin*,[720] Williams, Fullagar and Kitto JJ stated:

> …where the contract is of such a kind that the purchaser can sue for specific performance, the vendor can also sue for specific performance, although the claim is merely to recover a sum of money and that he can do so although at the date of the writ the contract has been fully performed except for the payment of the purchase money or some part thereof.[721]

683 The learned authors in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* state:

> One thing is clear. If for a purchaser damages are not an adequate remedy, the vendor equally is entitled to specific performance although the vendor's only right is to receive a payment of money, and the purchaser's only outstanding obligation is to pay it.[722]

684 Such an approach by the court has been justified on the basis of mutuality.[723] Just as the purchaser has a right to receive the benefit of the contract, the vendor has a corresponding right to divest himself of it.[724] Both parties should be entitled to enforce the contract *in specie*.[725]

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718 *Coulls v. Bagot's Executor and Trustee Co. Ltd* (1967) 119 CLR 460, 478 (Barwick CJ); 499 (Windeyer J); *Beswick v Beswick* [1968] AC 58, 81 (Lord Hodson).

719 *Beswick v Beswick* [1968] AC 58, 81 (Lord Hodson).

720 (1951) 82 CLR 463.

721 Ibid 473.

722 JD Heydon, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 2015) [20-045].

723 Ibid.

724 *Dougan v Ley* (1946) 71 CLR 142, 150 (Dixon J).

725 John McGhee (ed) *Snell's Equity* (33rd ed, Sweet & Maxwell, 2015) [17-011].

685 In this case, the subject matter of the oppression remedy sought by Balnaring is the purchase price of the transfer of shares which cannot be obtained on the open market. This may arguably render damages an inadequate remedy, although I am ultimately not of that view as outlined below. I also add, that the party claiming specific performance is the vendor as opposed to the purchaser, is on the authorities referred to above beside the point.

Appropriateness of the Order

686 An order for specific performance must not be 'futile'. Where, for example, performance of the contract is impossible, or the defendant has a right to terminate the contract and discharge their obligation to perform, the remedy will not be granted.[726]

687 Nor should an order for specific performance distort the equilibrium of the parties' contractual obligations. In *JC Williamson Ltd v Lukey & Mulholland*,[727] Starke J observed:

> If parts of an agreement are separable and distinct from the rest, I can understand that a Court of equity might in a proper case enforce those parts and leave the parties to their remedies at law as to the rest of the agreement, especially where those remedies would be adequate and just. But it is contrary to all equitable principles to enforce part of an agreement and leave the parties without any remedy whatever as to all other obligations of that agreement. It would result substantially in very different legal obligations, and great injustice to both parties.[728]

Discretionary Factors

688 The defendants have also raised two factors that they submit militate against granting equitable or discretionary relief in this case. Whether the order sought is granted or withheld pursuant to these factors falls within the discretion of the Court.

689 The first objection raised by the defendants is that Balnaring was not ready and willing to perform the essential terms of the Transfer Contract. In *Bahr v Nicolay (No. 2),*[729] to which the defendants refer, Mason CJ and Dawson J observed that 'a plaintiff who is in breach of an interdependent obligation cannot obtain specific performance' that 'it is for the plaintiff to aver and prove readiness and willingness'.[730]

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726 *Heppingstone v Stewart* (1910) 12 CLR 126, 129.
727 (1931) 45 CLR 282.
728 Ibid 294.
729 (1988) 164 CLR 604.
730 Ibid 620.

690 It is also implicit, on the defendants' case, that they rely on what they allege to be Mair, and thereby Balnaring's, breaches and wrongful conduct as a further disentitling factor.

691 As to the first of the defendants' arguments, it is important to recognise that, save as for the threshold requirement that damages are inadequate, the decision to order specific performance is exercised at the Court's discretion. In *Mehmet v Benson*,[731] Barwick CJ pointed out:

> The question as to whether or not the plaintiff has been and is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind what is the substantial thing for which the parties contract and what on the part of the plaintiff in a suit for specific performance are his essential obligations.[732]

692 To resolve the first objection against relief raised by the defendants, the Court should examine:

(a) whether the plaintiff is in breach of an obligation under the Transfer Contract, and had done all it was reasonable to do to complete the contract, and has shown readiness, willingness and the ability to complete; and

(b) whether the circumstances, viewed as a whole, necessitate against granting equitable relief.

693 The defendants also raise the objection that Mair and Balnaring have perpetrated 'equitable fraud'. The relevant part of the defendants' written submission provides:

> And of course Balnaring can properly be understood to have engaged (via Mr Mair) in equitable fraud in the performance of the Shareholders' Agreement, such as to be denied specific performance.[733]

694 The defendants' footnote states that equitable fraud '... includes such concepts as material non-disclosure and even innocent representation [sic]'.[734]

695 The defendants' fail to particularise the 'equitable fraud' said to preclude equitable relief. Further, in these circumstances, the defendants' explanation of 'equitable fraud' as extending

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731 (1965) 113 CLR 295.
732 Ibid 307.
733 Defendants' Closing Submissions, [89].
734 Ibid.

to misrepresentations is unsound. It conflates conduct pre-formation of the agreement that would vitiate the Transfer Contract with conduct in performance of the agreement. While there is an overlap between specific relief and equitable vitiating factors, such that a proven misrepresentation may lead to a denial of specific relief,[735] the defendants' precise allegation is that Mair has been fraudulent in his *performance* of the SUHA.[736]

696 If the defendants assert the Transfer Contract is not amenable to specific performance because it is voidable for a misrepresentation, that claim has not been raised. Otherwise, the principles used to evaluate improper conduct in performance and formation are distinct.

697 The broader concept of Mair and Balnaring requiring 'clean hands', which I infer is intended to be caught by the defendants allegation of 'equitable fraud', does extends to conduct in performance of the agreement. However, it requires the impropriety to have 'an immediate and necessary relation to the equity sued for'.[737]

698 One such example that resembles the allegations made by the defendants is *Ocular Sciences Ltd v Aspect Vision Care Ltd*.[738] In that case, an application for an injunction was denied where that aspect of the plaintiff's case was found to be an attempt to destroy a trade rival. Laddie J held:

> Mr. Fruth was not prepared to honour either the letter or the spirit of the September 1992 agreements. He wanted to ensure that AVCL failed to survive. An injunction to restrain use of the plaintiffs' confidential information must be seen as a part of that plan. It would offend all notions of justice were the court to serve up to the plaintiffs the destruction of the AVCL business secured by way of an injunction, and thereby give to the plaintiffs by court order the unfair outcome which the plaintiffs tried but failed to achieve by breaching their contractual obligations.[739]

Conclusion on Discretionary Factors

699 I have rejected the submission that Balnaring and Mair have repudiated the SUHA and I have rejected the many allegations of breach or materially wrongful conduct by Balnaring and Mair in performance of the SUHA as alleged by the defendants. I have also held, for the reasons I have outlined above, that neither Mair nor Balnaring have breached any material

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735 See, e.g., *Walker v Boyle* [1982] 1 WLR 495, 506.
736 Defendants' Closing Submissions, [89].
737 *Dewhirst v Edwards* [1983] 1 NSWLR 34, 51.
738 [1997] RPC 289.
739 Ibid 407-8.

obligation or duty under the ESA, or of a fiduciary nature, nor corporate duties pursuant to the Act. I have necessarily thereby made findings that I do not consider Mair or Balnaring have perpetrated any conduct disentitling them from relief, equitable or otherwise.

700 As to Mair, or Balnaring not being 'ready willing and able' to perform the obligations under the SUHA in relation to the Put Option and the Transfer Contract, Balnaring and Mair indicate that 'Balnaring will provide a transfer of shares in return for the transfer of the purchase price, *which is all that remains to be done*'.[740] The point of difference between the parties lies in their understanding of the relationship between the various contracts. On the defendants' submission, the Transfer Contract is part of the SUHA, such that a breach of the obligation to be just and faithful or to maximise profits in the SUHA precludes enforcement of the Option. By contrast, the corollary of the plaintiff's submission is that the Transfer Contract is self-contained.

701 At all events, my finding rejecting the defendants and the plaintiffs by counterclaim's allegations referred to in the last two preceding paragraphs results in the defendants in the Termination Proceeding and the plaintiffs by counterclaim failing to establish any relevant breach of the SUHA, the ESA or the other alleged duties relied upon.

702 That Balnaring is prepared to transfer the shares for the purchase price is in itself, in my view, sufficient to meet the readiness and willingness requirement. Further, I am satisfied that Balnaring is in a position to and will perform the very limited further actions required under the SUHA to provide a transfer of shares in return for transfer of the purchase price to which it is entitled.[741] Balnaring quite clearly delineated its claims for specific performance of the Transfer Contract and shareholder oppression, and Balnaring and Mair have taken all the steps they can to fulfil the Transfer Contract but have been prevented from doing so by vLAH and vLG's repudiatory conduct in relation to the SUHA and the ESA.

703 I consider that this form of relief sought by Balnaring is far from an attempt to re-write the SUHA contract. It is as close to the scenario for which the agreed terms of the contract provided, save in respect of aspects of that contractual scenario which the defendants to the

740 Plaintiff's Reply Closing Submissions, [82] (emphasis added).
741 Plaintiff's Reply Submission, 26 May 2016, [82].

oppression claim have themselves, by their actions, prevented, including reliance on the EBITDAs for the Financial Year 2015.

704 Finally, I have rejected the defendants argument that applying the SUHA Minority Share valuation process would end in a 'nil' result.

705 This will not be the ultimate outcome given that the R&B Group 2014 EBITDA ($3,567 million approximately) was in a sum similar to the 'unadjusted' 2015 EBITDA, namely $3,602 million approximately (with transfer pricing costs and foreign exchange losses added back).[742] This 2014 EBITDA was, I note, audited by vLAH's auditors, which verified the 2014 R&B Group EBITDA but the vLAH auditors did not provide final sign-off because they had not been paid by the van Laack parties. Furthermore, the van Laack German auditors also verified the R&B Group 2014 Financial Year accounts.

706 Ultimately, only the availability of damages impedes the granting specific performance as claimed by Balnaring.

707 If Balnaring were not to have succeeded in establishing an entitlement to damages at common law, which for the reason I note below, are to be finally assessed in connection with the breaches of the SUHA and its embedded Transfer Contract, I would grant Balnaring specific performance of that agreement.

Damages

708 Balnaring however also presses its claim for damages at common law for breach of the SUHA and the Transfer Contract as an alternative to specific performance. Failure to perform that contract according to its terms will engage a secondary obligation to pay damages.[743]

709 Senior Counsel for Mair submitted that the measure of damages in this context is the price of the Minority Party Interest shares.[744]

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742 MS811; Paolocacci (6.3.3) and (6.2.4).
743 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848-50.
744 T1348.21-24.

710 That submission can be accepted. The principal objective of an award of damages for breach of contract is to place the injured party in the position he would have occupied had the contract been performed.[745] In this case, if the defendants had complied with the SUHA and Transfer Contract, Balnaring would have received the purchase price of itsshares from vLAH and R&B.

711 I consider that Balnaring is entitled to damages from vLAH in respect of its breaches of the SUHA, in particular cls 12, 13 and 14 and embedded Transfer Contract.

712 Further, in my view, those damages are most justly and appropriately in a sum to be valued in the same manner I have identified above in relation to Balnaring's claim for specific performance.

713 Balnaring is also entitled, pursuant to its claim for breach of cl 5.4 of the SUHA, to damages in respect of the non-payment of that Dividend entitlement which was agreed to be calculated as 20% of 60% of the net profit for the R&B Group, B&K and BB. This Dividend entitlement has been calculated by Paolacci in his Report of 17 March 2016.[746]

Statutory Relief

714 If the Court finds oppression within the meaning of s 232 of the Act, an order can be made under s 233. Section 233 provides in part:

> (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
>
> (a) that the company be wound up;
>
> (b) that the company's existing constitution be modified or repealed;
>
> (c) regulating the conduct of the company's affairs in the future;
>
> (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
>
> (e) for the purchase of shares with an appropriate reduction of the company's share capital;
>
> (f) for the company to institute, prosecute, defend or discontinue specified proceedings;

745 *Robinson v Harman* (1848) 1 Ex 850, 855.
746 MS807; MS812-813 (7.3) and Appendix 9.

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

(j) requiring a person to do a specified act.

715 The possible orders outlined in subparagraphs (a) to (j) above are not exhaustive of those which might be appropriately made in the exercise of the court's powers pursuant to s 233 of the Act. The court can make any order it deems appropriate in the circumstances of each case.[747]

716 The principal form of relief sought under s 233 is an order requiring vLAH to purchase their shares in R&B and R&B Group pursuant to the independent valuation detailed above. That has been described as 'the most usual order' in circumstances where the applicant seeks to leave the oppressed company.[748] Such an order can be made against the company itself and its members.[749]

717 In *Scottish Co-operative Wholesale Society Ltd v Meyer,*[750] Lord Denning observed:

> One of the most useful orders mentioned in the section — which will enable the court to do justice to the injured shareholders — is to order the oppressor to buy their shares at a fair price… It is, no doubt, true that an order of this kind gives to the oppressed shareholders what is in effect money compensation for the injury done to them: but I see no objection to this. The section gives a large discretion to the court and it is well exercised in making an oppressor make compensation to those who have suffered at his hands.[751]

718 In *Rankine v Rankine*,[752] Thomas J of the Supreme Court of Queensland approached the issue in similar terms:

> In granting a remedy in favour of an oppressed shareholder…by ordering the compulsory purchase of the applicant's shares at a stated price, the court is in effect awarding compensation for the respondents' breach of duty. The nature of the duty is both subtle and complex, and not capable of exhaustive definition…[753]

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747 RP Austin, *Ford Austin & Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 2015) [10.475].
748 Ibid [10.475.12].
749 *Corporations Act 2001* (Cth), s 233(1)(d)(e).
750 [1959] AC 324.
751 Ibid 369.
752 (1995) 18 ACSR 725.

719 If the Court does not grant such an order, Balnaring submits the appropriate remedy is for the companies to be wound up pursuant to s 233 of the Act.

720 In *Cumberland Holdings Ltd v Washington H Sould Pattinson & Co Ltd,*[754] Lord Wilberforce, delivering the judgment of the Privy Council on appeal from the Supreme Court of New South Wales, observed:

> …the statutory provisions are widely expressed and effect should be given to them in accordance with their terms whenever the court comes to the conclusion that there has been a lack of fairness, or oppression, or lack of probity on the part of the majority, or of the directors representing the majority. But to wind up a successful and prosperous company and one which is properly managed must clearly be an extreme step and must require a strong case to be made.[755]

721 The authorities indicate that engaging in oppressive conduct exposes the wrongdoer to potential liability to pay compensation for loss.[756]

722 In crafting a remedy under s 233 of the Act, the Court will have regard to the need to bring the oppressive conduct to an end and to place the injured party in the position it would have occupied, to the extent that this is possible, had the oppressive conduct not occurred.

723 Where the injured party seeks to leave the company in question, it may be appropriate to order the person guilty of oppression to purchase the injured parties' shares at a fair price. Winding up the subject company as a response to shareholder oppression is a remedy of last resort, including for the reasons identified above by Lord Wilberforce in *Cumberland Holdings*.[757]

Winding up on Just and Equitable Grounds

724 If the Court does not find that there has been statutory oppression within the meaning of s 232 of the Act, Balnaring seeks winding up on just and equitable grounds.

725 Section 461 of the Act provides in part:

> (1) The Court may order the winding up of a company if:

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753 Ibid 730-31.
754 (1977) 13 ALR 561.
755 Ibid 566.
756 *Re Hollen Australia Pty Ltd* [2009] VSC 95, [89] (Robson J).
757 *French v Smith* [2004] VSCA 207, [122]; *Re Hollen Australia Pty Ltd* [2009] VSC 95, [79].

…

> (k) the Court is of opinion that it is just and equitable that the company be wound up.

726 In *Re Westbourne Galleries Ltd,*[758] Lord Wilberforce explained the jurisprudential basis for a 'just and equitable' winding up provision as analogous to equitable constraints on the assertion of legal rights. His Lordship observed:

> The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.[759]

727 In *Australian Securities and Investments Commission v Letten (No. 11)*,[760] Gordon J summarised some of the circumstances in which companies have been wound up under s 461(1)(k) of the Act:

> The categories of circumstances that satisfy the just and equitable ground are not closed or rigid. In the past, orders under s 461(1)(k) of the Act have included cases:
>
> 1. Where, on application by a public authority, it is in the public interest that a company be wound up because there is a justifiable lack of confidence in the conduct and management of the affairs of the company
>
> 2. Where the winding up will serve to protect investors
>
> 3. The affairs of the company have been conducted in a way which demonstrates a lack of probity productive of a justifiable lack of confidence in the administration of the company, or where there has been misconduct or illegality in the conduct of the affairs such as it is in the public interest in the protection of investors that the company be wound up.[761]

728 Balnaring points to the disintegration of the parties' working relationship as the basis for a winding up order on just and equitable grounds.[762] That has been recognised as a sound basis for such an order. In *Kokotovich Constructions Pty Ltd v Wallington*,[763] Kirby ACJ held:

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758 [1973] AC 360.
759 Ibid 379 (citations omitted).
760 [2010] FCA 468.
761 Ibid [12]-[14] (citations omitted).
762 T1350.1-9.
763 (1995) ACSR 478.

> True, winding up the company was an extreme step. However, Young J realised and stated this. Given the continuing animosity which exists between the two shareholders, the real risk, as I would judge, of further oppression, and the very limited nature of the company's present activities, the order would seem to be soundly based.[764]

729 In *Nassar v Innovative Precasters Group*,[765] three companies, each of whom had the same three directors, were wound up after a series of events culminated in a physical altercation. Notwithstanding the applicant's failure to show statutory oppression, Barrett J observed:

> …this is a classic case for the making of a winding up order on the ground that irretrievable breakdown of the relationship between the members makes winding up just and equitable.[766]

730 Even so, a similar concern to ensure that winding up is a remedy of last resort conditions the exercise of the Court's power under s 461(1)(k) of the Act. Section 467 provides in part:

> (4) Where the application is made by members as contributories on the ground that it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members, the Court, if it is of the opinion that:
>
> (a) the applicants are entitled to relief either by winding up the company or by some other means; and
>
> (b) in the absence of any other remedy it would be just and equitable that the company should be wound up;
>
> must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy

731 This provision directs the Court to alternatives which are less coercive remedies. Such remedies include orders facilitating the acquisition of the oppressed party's shares and non-statutory remedies.[767] In *Host-Plus Pty Ltd v Australian Hotels Association*,[768] Hansen J noted:

> In so far as the matter of power is concerned, I am of the view that 'other remedy' in s467(4) is not restricted to a legal remedy in the sense of a cause of action but is to be understood in the wider sense of a course of action otherwise open to the party. This interpretation accords, in my view, with the nature of the ground, the flexibility desirable in the resolution of such cases, and is consistent with the dictionary meaning of the word 'remedy'. In the particular circumstances of this case 'other remedy' would, in principle, extend to acquisition of the AHA shares, and constitutional change.[769]

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764 Ibid 494.
765 (2009) 71 ACSR 343.
766 Ibid 366.
767 *Re Bluechip Development Corporation (Cairns) Pty Ltd* [2011] QSC 368, [217]-[220].
768 [2003] VSC 145.

732 Although the disintegration of the relevant parties' working relationship may necessitate winding up the subject companies on just and equitable grounds, such a coercive measure should not be ordered where less drastic relief, such as an order requiring the purchase of the plaintiff's shares, is available and would be effective in the circumstances.

Decision on Remedy in the Oppression Proceeding

733 In respect of the relief for oppression sought, I consider that the most appropriate, fair and just remedy likely to have the least severe commercial ramifications on, and in relation to the R&B and R&B Businesses, is to order that vLAH purchase Mair's Minor Interests, including as canvassed above in relation to specific performance, shares in R&B and in RBG.

734 As to the question of the purchase price, Mair urges for an independent valuer to be appointed using the R&B Financial Accounts from the Financial Year 2014, to determine the EBITDA for the purposes of the contractual formula in the SUHA for the valuation of the Put Option and Balnaring and Mair's share value in respect of their Minor Party Interests, and Balnaring's entitlements in the circumstances pursuant to the SUHA..

735 This is because the oppressor, vLAH and the R&B Group, has rendered the 2015 Accounts (which if the contract terms were working as intended would be used as the base for the sale price calculation), inaccurate, unsafe and reflecting a large operating deficit.

736 The oppressive conduct has therefore also created the situation where it would likely be very costly, and time consuming and doubtful of a sufficiently certain result, for an independent valuer to attempt to reconstruct the 2015 Financial Accounts.

737 The defendants submit that application of SUHA formula to value the Put Option using the accounts from the 2014 Financial Year to determine the EBITDA is not contractual and that this would be re-writing the parties' agreement.

738 In my view, in the above circumstances, Balnaring is entitled to orders pursuant to s 233 of the Act, which provide for very flexible remedies and if called for I should resolve the above by ordering that Balnaring's Minority Interest Put Option be valued using the financial

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769 Ibid [67].

accounts of the R&B Group in Financial Year 2014.

739 These accounts have been verified, in substance, by both an Australian and a German auditor engaged by the van Laack parties, as I have earlier alluded. Nor is it established that these accounts have been tainted or are unreliable or unsafe by reason of any adjustment, like the Transfers infecting the 2015 Financial Year Accounts of the R&B Group.

740 Prominent amongst my reasons for upholding Balnaring's entitlement to relief under s 233 are the following considerations:

741 I have found oppression pursuant to s 232 of the Act in relation to a number of Balnaring's grounds:

(a) one successful ground of oppression is that R&B, controlled by the van Laack parties, summarily dismissed Mair and emasculated his ability to manage the R&B Business while also wrongfully excluding him from the management of the R&B Business;

(b) another successful ground of oppression is that the R&B Group effected many and substantial incorrect and inappropriate adjustments (the Transactions) to the books of account of R&B Group in the 2015 Financial Year, via unjustified adjustments made in error byRanieri. This also effected, unless somehow rectified, a reduction in the R&B Group EBITDA for the 2015 Financial Year in Balnaring and Mair's share value in respect of their Minority Party Interests and Balnaring's entitlements, in the circumstances pursuant to the SUHA;

(c) yet another successful ground is founded on the imposition of surcharges by vLAH on the R&B and the R&B Group which adversely affected the EBITDA for the Financial Year 2015 and thereby Balnaring's Minority Party Interest in the R&B Group.

742 I accept that the accounting evidence indicating the adjustments represented by the Transfers in respect of the R&B Group's 2015 Financial Accounts has resulted in it being a herculean, slow and likely very costly exercise to try and undo the adjustments wrongfully made, identified and yet to be identified, and reconstitute those accounts. I am also of the view that there is a very real risk that the outcome of that task will be unacceptable uncertainty in

relation to the EBITDA for the 2015 Financial Year.

743 Further, pursuant to the SUHA:

(a) upon the Triggering Event of the Managing Director's termination in accordance with the terms of his ESA , he and Balnaring would be entitled to exercise a Put Option pursuant to Cl 12 of that SUHA in relation to the Minor Parties' Interest, including their shareholding.

The ESA provides that upon exercise of the Put Option the Majority Shareholders shall acquire the Minor Parties interests by paying 5 x EBITDA for the 12 calendar months preceding the date the Put Option Notice is given ('the Relevant Period');

(b) the notice by which Mair exercised the SUHA Put Option was given by him to the R&B Group on 17 April 2015 pursuant to cl 12(d)(b) of the SUHA;

If Mair had been dismissed as Managing Director pursuant to the terms of the ESA, then the Relevant Period for the purpose of the exercise of his Put Option would have been the 12 months from 1 April 2014 to 31 March 2015, under the terms of cl 12 of the SUHA.

744 In addition the independent valuation of the purchase price should be adjusted for the imposition of the surcharges identified and complained of by Balnaring and foreign exchange losses.[770]

745 Accordingly, the payment for the relevant Minority Interest under the SUHA might be effected on two bases.

746 The first could be via an order for specific performance of the Transfer Contract. In this regard, however I again refer to my above conclusion about this potential remedy given the availability of damages for breach of the SUHA. As detailed above, I am of the view that the Put Option entitlement was enlivened by Mair's resignation, but although the SUHA remains on foot the subsequent repudiation of the ESA and the SUHA by R&B and vLAH has disrupted the contractual scheme provided for in cls 12, 13 and 14 of the SUHA.

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770 MS810-811; Paolacci (5.8.5), (6.2.4) and (6.3.3).

747 The second is via appropriate equivalent relief ordered pursuant to s 233 of the Act. To the extent that it is not possible or practical to invoke the SUHA in this regard, Balnaring is entitled to be granted relief analogous to specific performance under s 233 of the Act ordering the purchase by vLAH of Balnaring's shares in R&B and RBG, at a price to be assessed by reference to the R&B Group EBITDA for the Financial Year 2014 adjusted for Fabric and Item Surcharge and foreign exchange losses. Such an order is appropriate, just and would obviate great expense and delay for reasons I have touched on in relation to the adjustments/Transactions to the R&B Group EBITDA for the Financial Year 2015.

748 Balnaring is also quite separately entitled to damages at common law for breach of the SUHA Put-Option entitlements pursuant to cls 12, 13 and 14 includng via the Transfer Contract mechanisms in cl 14 and in relation to non-payment of the Dividend to which it is entitled hereunder. I have earlier identified the way in which those damages are quantified, including by means of the R&B Group's EBITDA for 2014 adjusted for transfer pricing of surcharges and foreign exchange losses.

749 I shall provide the parties an opportunity consider and propose the precise term of orders suitable to effectuate the above decisions. I observe that in the circumstances Balnaring is in a position, subject to hearing from the defendant parties to the claims, to elect as to the precise relief it now seeks to have ordered.

Decision

750 For the above reasons I:

(a) uphold the Mair Termination claims;

(b) dismiss the Counterclaim brought by the plaintiffs' to counterclaim;

(c) uphold the Balnaring Oppression claims;

(d) uphold Balnaring's claim for damages, including in relation to a Dividend, for breaches of the SUHA;

(e) uphold Balnaring's alternative claim for the purchase by vLAH and transfer by vLAH

of Balnaring's shares in R&B and RBG pursuant to s 233 of the Act.

751 I shall await the parties' submissions, if necessary, in relation to the Orders and the relief on the plaintiff's claims referred to above.

SCHEDULE OF PARTIES TO THE TERMINATION PROCEEDING

S CI 2015 1743

BETWEEN	
NELSON KEITH ROBERTSON MAIR	Plaintiff
- and -	
RHODES & BECKETT PTY LTD (ACN 118 576 364) (Administrators Appointed)	Defendant
AND BETWEEN:	
RHODES & BECKETT PTY LTD (ACN 118 576 364) (Administrators Appointed)	First Plaintiff by Counterclaim
HERRINGBONE PTY LTD (ACN 135 481 953) (Administrators Appointed)	Second Plaintiff by Counterclaim
RHODES & BECKETT GROUP PTY LTD (ACN 135 008 801)	Third Plaintiff by Counterclaim
VAN LAACK AUSTRALIA HOLDINGS PTY LTD (ACN 159 334 460)	Fourth Plaintiff by Counterclaim
VAN LAACK GMBH	Fifth Plaintiff by Counterclaim
- and -	
NELSON KEITH ROBERTSON MAIR	First Defendant by Counterclaim
LUXURY RETAIL NO 1 PTY LTD (ACN 166 798 723)	Second Defendant by Counterclaim
LUXURY RETAIL GROUP PTY LTD (ACN 604 195 717)	Third Defendant by Counterclaim
BALNARING HOLDINGS PTY LTD (ACN 118 886 669)	Fourth Defendant by Counterclaim

SCHEDULE OF PARTIES TO THE OPPRESSION PROCEEDING

S CI 2015 1745

BETWEEN

BALNARING HOLDINGS PTY LTD (ACN 118 886 669) as trustee for the Balnaring Trust	Plaintiff
- and -	
VAN LAACK AUSTRALIA HOLDINGS PTY LTD (ACN 159 334 460)	First Defendant
RHODES & BECKETT PTY LTD (ACN 118 576 364) (Administrators Appointed)	Second Defendant
RHODES & BECKETT GROUP PTY LTD (ACN 135 008 801)	Third Defendant
VAN LAACK GMBH	Fourth Defendant