Supreme Court

New South Wales

Case Name:	Dargan Financial Pty Ltd ATF the Dargan Financial Discretionary Trust (trading under “Home Loan Experts”) v Nassif Isaac
Medium Neutral Citation:	[2017] NSWSC 1077
Hearing Date(s):	15 June,16 June, 21 June, 13 July, 2 August 2017
Decision Date:	16 August 2017
Before:	Sackar J
Decision:	See paras [294]-[295]
Catchwords:	CONTRACTS — general contractual principles — construction and interpretation of contracts EQUITY — Breach of confidence — Necessary quality of confidence — Material in public domain TRADE AND COMMERCE — restraints of trade — reasonableness of restraint — cartel provisions
Legislation Cited:	A New Tax System (Goods and Services Tax) Act 1999 (Cth) Australian Securities and Investments Commission Act 2001 (Cth) Competition and Consumer Act 2010 (Cth) Copyright Act 1968
Cases Cited:	Australian Broadcasting Commission v Australasian Performing Right Association Limited (1973) 129 CLR 99 Buckley v Tutty (1971) 125 CLR 353 Cadgroup Australia Pty Ltd v Snowball [2016] NSWSC 22 Clear Wealth Pty Ltd v Kwong (No 2) [2012] NSWSC 1233

	CSR Limited v Adecco (Australia) Pty Limited [2017] NSWCA 121 Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337 Del Casale v Artedomus (Aust) Pty Ltd [2007] NSWCA 172 Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 Lindner v Murdock's Garage (1950) 83 CLR 628 Marshall v Prescott [2015] NSWCA 110 McCrohon v Harith [2010] NSWCA 67 Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited (S99/2015; S102/2015) (2015) 256 CLR 104 Peters (WA) Ltd v Petersville Ltd (2001) 205 CLR 126 Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd [2017] HCA 12 Provida Pty Limited v Sharpe [2012] NSWSC 1041 Sidameneo (No 456) Pty Ltd v Alexander [2011] NSWCA 418 Veda Advantage (Australia) Pty Ltd v De [2016] NSWSC 37
Category:	Principal judgment
Parties:	Dargan Financial Pty Ltd ATF the Dargan Financial Discretionary Trust (trading under "Home Loan Experts") (Plaintiff) Nassif Isaac (Defendant)
Representation:	Counsel: M. Young SC (Plaintiff) T. Brennan (Defendant) Solicitors: Bransgroves Lawyers (Plaintiff) HWL Ebsworth (Defendant)
File Number(s):	2017/66434
Publication Restriction:	n/a

Judgment

Proceedings

JUDGMENT

Proceedings

1 These proceedings concern a restraint of trade and alleged misuse of confidential information in the mortgage broking industry.

2 The Defendant, Mr Nassif (Norman) Isaac, is a mortgage broker who worked as an independent contractor for the Plaintiff from 8 August 2012 to 30 November 2016. The Plaintiff is a trustee of a trading trust that trades under the name “Home Loan Experts,” operating as a mortgage broking service, originating and managing loans with Credit Providers. In December 2016 the Defendant commenced work as a broker at another mortgage broking business, RAMS Financial Group Pty Limited which trades under the name “RAMS Ryde” (**RAMS**).

3 The Plaintiff claims the Defendant is in breach of contract and in breach of his equitable duty of confidence owed to the Plaintiff in relation primarily to the retention and continued use of the Plaintiff’s client list while at RAMS. The Plaintiff also claims the Defendant is in breach of contract for any attempt to approach or accept approaches by the Plaintiff’s clients within 18 months after terminating employment with the Plaintiff.

4 The Plaintiff seeks injunctive relief restraining the Defendant from using or disclosing the Plaintiff's client list, and soliciting, approaching, or accepting approaches from clients of the Plaintiff (SOC Prayers 1 and 2). The Plaintiff also seeks an account of profits, or, in the alternative an award of damages, for loss already incurred from the breaches.

Background facts

5 Mr Otto Dargan is the director of the Plaintiff. According to Mr Dargan, the Plaintiff considers itself a specialist mortgage broker that can help customers in niche markets and difficult or complex situations obtain loans (Affidavit of Mr Dargan dated 11 April 2017 (**OD1**) [19]).

6 The Plaintiff uses the services of Connective Broker Services Pty Ltd (**Connective**) to have access and submit loan applications to Credit Providers. This relationship is governed by an undated agreement between the Plaintiff and Connective (**Connective Agreement**) (Confidential Exhibit P2).

7 Connective's services include providing the Plaintiff with the online platform 'Mercury' which allows brokers to organise loans to be supplied to a panel of Credit Providers, compliance support and professional development courses and networking (see OD1 [6]). The Plaintiff contracts with a number of brokers, hereafter referred to as "Sub-Originators" who, pursuant to the Connective Agreement, are authorised to use Connective's services to submit and manage loan applications to Credit Providers, provided they have been approved by the Credit Providers on Connective's panel as an "Associate Member" (clause 1.1 and 6.3 of the Connective Agreement).

8 On 8 August 2012, the Defendant entered into a "Sub-Origination Agreement" (**SOA**) (CB 166) with the Plaintiff, becoming a "Sub-Originator" for the Plaintiff as "Originator". On 7 September 2012 the Defendant was accredited as an "Associate Member" of Connective (CB 4153).

9 The salient terms of the SOA are as follows.

10 Clause 1 sets out the recitals, and includes the following details regarding the roles of the Plaintiff and Defendant:

1.1 “Dargan Financial Pty Ltd ATF The Dargan Financial Discretionary Trust” is known as the “Originator” in this contract. The Originator carries on the business of providing mortgage broking services to various clients by originating loans with various Credit Providers.

1.2 The “Authorised Credit Representative” is known as the “Sub-Originator” in this contract. The Sub-Originator has requested the Originator to appoint the Sub-Originator to receive Credit Applications from applicants in respect of a mortgage origination program with the Originator and Credit Providers (“The Program”) for mortgage finance and other finance upon the terms and conditions of the agreement.

11 Clause 3 includes the following defined terms:

“**Applicant”** means a person who makes a Credit Application through the Sub-Originator for a participating loan;

“**Borrower**” means the Borrower under a participating loan and includes where appropriate the Mortgagor;

“**Credit Provider**” means a lender for whom the Originator has been or is from time to time appointed to originate Mortgages and includes the Trustee of a Securitised Fund. This also includes any Credit Providers in which the Sub-Originator has a direct accreditation;

“**Intellectual Property”** means the copyright in all software, stationary, websites, documents, manuals and brochures and all know-how used by the Originator in respect of its business.

“Loan” means a transaction which involves the proposed or actual advance or transfer of funds from a Lender to a Borrower, on terms, and may include such arrangements which have a Mortgage as a primary security and includes all rights conferred upon the mortgagee in connection with the Mortgage including without limitation any loan agreements, insurances, guarantees, collateral securities and recourse against advisers and includes a Participating Loan.

“**Participating Loan”** means a Loan introduced to the program by the Sub-Originator and where the contexts so permits shall also include a Mortgage relating to a Participating Loan.

12 Clause 5 broadly sets out the requirements for the introduction of loans:

5. **Introduction of loans**

5.1 The Sub-Originator will introduce to the Originator; Loans that comply with the terms and the Credit Criteria of the Credit Providers for whom the Originator acts. The Sub-Originator will comply with the Originator’s procedures in connection with Participating Loans.

5.2 The Sub-Originator must provide the Credit Provider with all the information which the Credit Provider reasonably requires to enable it to assess the stability of an application for a Participating Loan. The Sub-Originator must take all reasonable and prudent steps to ensure that such information is accurate and complete.

5.3 The Originator is under no obligation to agree that an application for a Participating Loan is to be submitted to a Credit Provider and has the right to deny a loan or credit application to be submitted.

13 Clause 6 contains the duties of the Sub-Originator, including:

> 6.6 **The Sub-Originator agrees with the Originator that it will:**
>
> i. Use its best endeavours to solicit suitable Applicants and submit accurate and complete Credit Applications to the Credit Providers for Approval;
>
> …
>
> iv. Advise the Originator of the preferred Credit Provider with whom each Application should be lodged;
>
> …
>
> vi. Interview each Applicant and, where relevant, each Borrower, mortgagor and guarantor either in person, by 'Skype' or by telephone and make such enquires of each such person as would be made by a prudent Credit Provider and as required by the Credit Provider.
>
> ….
>
> 6.8 Interview each applicant and acknowledge to the Originator that to the best of its knowledge information and belief that the information contained in the Credit Application is true and correct.
>
> ….
>
> 6.13 Lodge the loan application and related documentation with the Credit Provider on behalf of the Originator.
>
> 6.14 Follow up and manage the processing of each loan from initial application through to settlement.
>
> 6.15 Manage the post-settlement client relationship.
>
> …

14 Clause 7 of the SOA contains various prohibitions upon the Defendant dealing with the confidential information of the Plaintiff. Sub-clause 7.2 states:

> Upon the termination of this agreement, the Sub-Originator must return or destroy, at the Originator's discretion, all of the Originator's Intellectual Property that is in the Sub-Originator's possession.

15 Sub-clause 7.4 reads:

> The Sub-Originator shall during the currency of this agreement and for a period of not less than 10 years after the termination of this agreement (howsoever that occurs) keep secret and confidential, all Confidential and Propriety Information and not use, publish, discuss or disclose any Confidential Information regarding the Originator's business, including but not limited to:
>
> i) Marketing, financial, sales, business process, technical, operational and employee data;
>
> ii) Financial information regarding the Originator;
>
> iii) Details regarding Intellectual Property;

iv) Details regarding Credit Providers and other contractors used by the Originator;

v) Details in relation to this sub-origination agreement;

vi) Details of clients (including without limitation, client lists and client details) and past or current negotiations with clients;

16 'Confidential Information' and 'Proprietary Information' are not defined terms in the SOA.

17 Sub-clause 7.5(v) states:

> It is agreed that the customer and lead database, Confidential Information used by Sub-Originator in relation to Originator's business & client contact information is the property of the Originator.

18 The non-compete and non-solicit provisions are set out in clause 8 of the SOA. For a period of 18 months after termination of the SOA, the Defendant is prohibited from doing the following without the consent of the Plaintiff:

> 8.1 Engage or prepare to engage in any business or activity that is the same or similar to that part or parts of the business carried on by the Originator in the area of internet marketing for the finance industry or niche marketing to a niche already targeted by the Originator. Other finance related employment business or activities are acceptable to the Originator.
>
> 8.1.1 If the Sub-Originator was to work for a business or start a business which is involved in internet marketing and either is a Credit Provider or carries on business similar to the Originator then this would be considered a breach of this agreement.
>
> 8.2 Without limiting the application of Clause 7, Use or permit any person employed by, a related body corporate of, or that is in any way contracted with the Sub-Originator, to use any Confidential Information of the Originator.
>
> 8.3 Solicit, canvass, approach or accept any approach from any person who was at any time in the 24 months prior to the termination of this agreement, a client, professional referrer or business partner of the Originator in that part or parts of the business carried on by the Originator with view to obtaining the business or custom of that person in a business that is the same or similar to the business conducted by the Originator.
>
> 8.4 Interfere, or knowingly permit any person to interfere with the relationship between the Originator and its customers, Referrers, Credit Providers, Employees or suppliers.

19 Sub-clause 8.8 and 8.9 state:

> 8.8 If sub-originator breaches Clause 8, sub-originator agrees and declares that it will not object to any proceedings to restrain, enjoin or injunct any conduct which would constitute a breach of this clause, notwithstanding alternative remedies may be available.
>
> 8.9 For the avoidance of doubt, Clause 7 and 8 survive termination of this agreement, however that occurs.

20 In summary, under the SOA the Defendant was obliged to use its best endeavours to submit credit applications to the Credit Providers for approval (clause 6.6(i)). This involved interviewing the applicants and making relevant enquiries to ensure the Credit Provider had the necessary information to assess the suitability of an application (clause 6.6(vi) and 6.8). The Defendant could choose the Credit Provider, type of loan and method of presenting the loan applications (clause 18.1), however the Plaintiff had the right to deny an application being submitted (clause 5.3). Provided the Plaintiff did not veto the loan application, the Defendant was to lodge the loan application and related document with the Credit Provider "on behalf of the Originator" (clause 6.13), and thereafter manage the processing of each loan through to settlement, and the post-settlement client relationship (clause 6.14-6.15).

21 The processing of commission fees worked as follows. Under the Connective Agreement, once a loan was approved, commission became payable by the Credit Provider to Connective, and in turn by Connective to the Plaintiff or in accordance with the Plaintiff's instruction (clause 9 and Schedule B of the Connective Agreement). Under Annexure B of the SOA, the Defendant received the following percentage of commission for the following main types of loans (with the Plaintiff receiving the remaining percentage):

Type of loan	**Up front %**	**Trailer %**
Self-generated business *Loans settled through Connective as a result of the Defendant's personal contacts, referrals from past clients originated by the Defendant, and Defendant's own referral relationships, together with additional loans for all other clients submitted after the settlement of that client's first loan*	60%	40%
Website/marketing generated business	45%	25%

Loans settled as a result of the Plaintiff's own marketing, predominantly leads sourced online		
Referrals from the Plaintiff's director *Loans settled as a result of referrals or repeat business not being self-generated business or that referred to the Defendant by the Plaintiff*	35%	Nil

22 Trail commission was no longer payable to the Defendant after the termination of the SOA (clause 13.1 and 14.1(ii)). While the SOA was on foot, the Defendant was entitled to sell his portfolio of loans (being the loans he was entitled to receive commission for), subject to the Plaintiff approving the sale (clause 14.2).

23 On 30 November 2016, the SOA was terminated by mutual consent over a conversation between the Defendant, Mr Dargan, Ms Ji Hae Parnham, and Ms Maria Bui at the Plaintiff's office (SOC [5]) (**Termination Meeting**). There is some disagreement as to the exact substance of what was said and agreed upon at the Termination Meeting.

24 The Plaintiff pleads the result of the Termination Meeting was the SOA was orally varied so that clause 7.2, 7.4, 7.5(v), 8.2, 8.3, and 8.4 of the SOA did not apply to the Plaintiff's clients who became clients due to being friends and family of the Defendant or through introductions from friends or family of the Defendant (**Defendant's friends and family clients**) (SOC [12]). For all other clients except the Defendant's friends and family clients, the SOA remained applicable.

25 The Defendant on the other hand pleads that while a result of the Termination Meeting was that he was entitled to supply mortgage broking services to his friends and family clients, the agreement was the Defendant would not provide mortgage broking services to clients that contacted him as a result of them being clients of the Plaintiff, and would avoid supplying services to the Plaintiff's clients who contacted the Defendant because they were dissatisfied with the services of the Plaintiff and instead would refer those customers back to the Plaintiff (Defence [12]).

26 Mr Dargan's notes of the Termination Meeting were saved in the Plaintiff's Google Drive and included the following (CB 3858-3860):

Reason for leaving

Who has terminated the agreement: Norman

Reason for termination of the agreement: Wants to start own business, personal reasons.

Handover of customers

Who is taking over your existing customer/leads:

- Loans not submitted: Harry (Broker)
- Loans in progress: (Broker)
- Settled loans: Post-settlement team

Where are the reminders to follow up clients saved?: Tasks in Mercury

Where are your tasks saved?: Mercury tasks

Reminder: The customer relationship belongs to the Plaintiff not to the broker who is leaving.

Customers

Where a customer:

- Contacts Norman they are from **Norman's own contacts** (i.e. the chain of referrals / business source does not come from the Plaintiff generated leads or orphan clients and that the customer was a friend, family member or referral from a friend or family member) then the Plaintiff and Norman agree that Norman can handle these clients without any conflict of interest.

- Contacts Norman and they originate from **the Plaintiff's marketing / orphan clients** then the Plaintiff believes these should be referred back to the Plaintiff and Norman believes they should belong to Norman. No agreement is made on these however the previous sub-origination agreement is still in effect.

- Norman agrees to inform Otto if there are any **customers that have refused to deal with the Plaintiff** and allow Otto the chance to handle the complaint and repair the relationship.

Commissions

Do you intend to be in a competing role at any time in the future e.g. bank Lender, mortgage broker or any other position where you receive commission for the referral or sale or mortgage products?

Yes, intend to start a mortgage broking business that would compete with the Plaintiff.

Trail is being cut effective after the commission run in December is paid (November loans trail is paid in December).

Commission splits on loans will be:

- Not submitted: 0% of normal upfront

- Pre-unconditional: 50% of normal upfront
- Post-unconditional: 100% of normal upfront
- Trail on loans in progress will go to the new broker handling these file or the Plaintiff if there is no broker handling them.
- Refer to Spreadsheet of loans in progress for commission splits

Intellectual property

Intellectual property must be returned

- Client files
- Client database / contact information (including facebook friends / phone contacts)
- Training materials
- Manuals
- Data on home computers
- Anything else

Which of these do you currently have?

- Everything is in google drive

- Delete google drive on your computer once we have changed Gmail password

Expectations after leaving the Plaintiff/Contract conditions that survive termination of our agreement

Expectation after leaving	**Possible consequence if breached**
…	
That you do not refinance the Plaintiff customers	Legal action to recover: - Clawback (if applicable) - Commission on the new loan - Damages (e.g. lost trail, cross sell and future business)

	Do not make **contact with customers** If a **customer makes contact** then refer them to the Plaintiff If they **give you a referral** then refer them to the Plaintiff The provision regarding customer relationship survives the termination of our agreement.	Lodge an injunction in court to precent your actions. Potential damages as well.
	…	
	All **the Plaintiff business information** (financial, marketing, customer types, niches, etc) is confidential and remains confidential after the end our agreement.	Legal action depending on the situation. Potential for damages.

27 At the time of his departure, Mr Dargan estimates the Defendant was directly managing customers comprising of almost 25% of the Plaintiff's total loan book (OD1 [217]).

28 In December 2016 the Defendant commenced work at RAMS as a loan writer/credit representative (CB 4106 – 4109). The Plaintiff pleads the Defendant commenced this work on 1 December 2016 (SOC [17]), while the Defendant pleads it was 12 December 2016 (Defence [17]).

29 The parties agree RAMS is a franchise based mortgage broking service which operates a similar business to the business of the Plaintiff as it engages in online marketing, and targets the same or similar niche markets and products as the Plaintiff. Niche markets include bad credit loans, guarantor loans, and unusual or self-employed loans (SOC and Defence [13] – [16]).

30 On 23 December, "Borrowers A" who together had loans with the Plaintiff settled a loan with RAMS, with the Defendant as the loan writer (Confidential Exhibit P1, p 12).

31 The Plaintiff commenced these proceedings by way of summons on 2 March 2017. Upon the first return before the Duty Judge, his Honour Justice Pembroke, interlocutory orders were made by consent. These orders required the Defendant to return or destroy any client list in his possession, and not use or disclose the contents of the client list other than with respect to the clients who had become the Defendant's clients by reason of being friends or family or through introductions from friends or family of the Defendant (CB 49, Orders 1 – 3) (**Interlocutory regime**).

32 On the following dates, the Defendant acted as loan writer at RAMS for the following anonymised borrowers who had loans with the Plaintiff (Confidential Exhibit P1, p 12):

(1) 24 March 2017: "Borrowers B";
(2) 24 March 2017: "Borrowers C";
(3) 3 April 2017: "Borrowers D";
(4) 24 April 2017: "Borrowers E";
(5) 7 April 2017: "Borrowers F";
(6) 22 May 2017: "Borrower G";
(7) 29 May 2017: "Borrowers H"; and
(8) 31 May 2017: "Borrowers I".

33 On 13 June 2017, the Defendant notified the Plaintiff he would consent to a continuation of the Interlocutory regime (CB 4200) – an agreement he reiterated in closing submissions (Defendant's closing submissions dated 20 June 2017 [124]).

Legal principles

Construction of contracts

34 French CJ, Nettle and Gordon JJ reaffirmed the approach to construing commercial contracts in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (S99/2015; S102/2015) (2015) 256 CLR 104 (***Mount Bruce Mining***) at [46] – [52]:

> [46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.

> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.
>
> [51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties ... intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".
>
> [52] These observations are not intended to state any departure from the law as set out in Codelfa Construction Pty Ltd v State Rail Authority of New South Wales and Electricity Generation Corporation v Woodside Energy Ltd. We agree with the observations of Kiefel and Keane JJ with respect to Western Export Services Inc v Jireh International Pty Ltd. (citations omitted)
>
> (See the judgments of Bell and Gageler JJ at [119] – [121] and Kiefel and Keane JJ at [107] – [113] which are of similar effect).

35 *Mount Bruce Mining* was most recently approved by the High Court in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12 (***Ecosse***) at [73] and cited by the New South Wales Court of Appeal in *CSR Limited v Adecco (Australia) Pty Limited* [2017] NSWCA 121 at [154].

36 In *Ecosse,* the High Court (Kiefel, Bell and Gordon JJ) provided further guidance on the construction of commercial contracts at [16], citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640:

> It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract (Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 at 656 [35] and the cases at fn 58; [2014] HCA 7). In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it (Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 at 656-657 [35] and the cases at fn 60).

37 In construing written contracts, it is common ground the Court is to have regard to all the words used "so as to render them all harmonious with one another"; *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99 at 109 per Gibbs J.

Restraint of Trade

Reasonableness of restraint of trade

38 Restraints of trade will only be upheld when they are necessary for the reasonable protection of the legitimate interests of the party imposing the restraint; *Buckley v Tutty* (1971) 125 CLR 353 at 376; *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 344.

39 In the context of restraints of trade in employment contracts, Latham CJ (dissenting) observed in *Lindner v Murdock's Garage* (1950) 83 CLR 628 (***Lindner***) at 633-634:

> Where an employee has access to trade secrets or other confidential information he may be restrained by agreement from communicating those secrets or such information to other persons, and particularly to competitors in trade with his employer. Again, an employee who is brought into personal contact with the customers of his employer may by agreement effectively bind himself to abstain after his term of service has been completed from soliciting the customers of his former employer. In these cases the covenant in restraint of trade is not a covenant against mere competition but is a covenant directed to securing a reasonable protection of the business interest of the employer, and in the circumstances is not unjust to the employee. The interest which can validly be protected is the trade connection, the goodwill of the business of the employer.

40 Rein J collected further authorities on the principles relevant to valid restraints of trade in *Clear Wealth Pty Ltd v Kwong (No 2)* [2012] NSWSC 1233 (***Clear Wealth***) at [39]:

> [39] In *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9 ; [2006] NSWSC 717 at [10]–[14], Brereton J set out the principles in this area and their

relationship to the Restraints of Trade Act 1976 (and I applied those principles in *IceTV Pty Ltd v Ross* [2009] NSWSC 980 and see *Ross v IceTV Pty Ltd* [2010] NSWCA 272). In *Jardin and Jardim Investments Pty Ltd v Metcash Ltd* (2011) 285 ALR 677at [95] and [97] per Meagher JA (Campbell and Young JJA agreeing) said:

> [95] Expressions which describe the necessary relationship as one in which the employee is the "human face" of the employer do so to emphasise that the source of the influence must be the personal relationship which is likely to develop, or has developed, between the employee and customer as a result of dealings between them on behalf of the employer and its business. In *Stenhouse Australia Ltd v Phillips* [1973] 2 NSWLR 691 at 697 ; [1974] AC 391 at 400; [1974] 1 All ER 117 at 122 the privy council emphasised the distinction between the use of the employee's personal skill or experience, against which the employer is not entitled to be protected, and the use of some advantage or asset inherent in the business which can properly be regarded as the employer's property which might legitimately be protected from appropriation by an employee for his or her own purposes. In *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1 ; [2009] NSWCA 25, this court adopted that statement of principle and described the relationship between a senior employee and customers with whom that employee had fostered close and productive relationships as being "to a substantial extent" the property of his employer notwithstanding that the relationship had also developed and been supported at least in part by the employee's own qualities of skill and experience: at [38], [41], [54] and [55].
>
> …
>
> [97] These statements are not, however, to be understood as requiring that the employee be proved to be in a position to control whether the customer remain with or leave the business. The employer is entitled to protection against the use of "personal knowledge of and influence over" its customers, which the employee might acquire in the course of his or her employment, so as to undermine its customer connections: *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 709; *Lindner v Murdock's Garage* (1950) 83 CLR 628 at 635 636 645 and 647 and 654; [1950] ALR 927 at 929–30 930 935–6 and 936–7 and 940–1 (*Lindner*). It is against the "possibility" of its business connection being adversely affected by the use of that "personal knowledge and influence" that the employer is entitled to be protected: *Lindner* at CLR 636, 645 and 654; ALR 930, 935–6 and 940–1. Latham CJ (dissenting) summarised the relevant principle as follows (at CLR 636; ALR 930):
>
> Where an employee is in a position which brings him into close and personal contact with the customers of a business in such a way that he may establish personal relations with them of such a character that if he leaves his employment he may be able to take away from his former employer some of his customers and thereby substantially affect the proprietary interest of that employer in the goodwill of his business, a covenant preventing him from accepting employment in a position in which he would be able to use to his own advantage and to the disadvantage of his former employer the knowledge of and intimacy with the customers which he obtained in the course of his

> employment should, in the absence of some other element which makes it invalid, be held to be valid.

41 Further, in *Provida Pty Limited v Sharpe* [2012] NSWSC 1041 (***Provida***), Pembroke J found at [20] the employer had a legitimate interest in retaining the employer's customers and that interest extended to prevention of the employee in trading in competition:

> It is well accepted that the possibility that a former employee might be in a position to utilise his former employer's confidential information or business methods to the latter's disadvantage, is a proper basis for imposing a post-employment restraint on trade: *Lindner v Murdock's Garage* [1950] HCA 48 ; (1950) 83 CLR 628 at 650 (Fullagar J); *Cactus Imaging* at [13]. The employer cannot be expected to rely solely on its right to restrain the improper use of confidential information. That can be a hit and miss affair and proof of its elements may sometimes be difficult: *Littlewoods Organisation Ltd v Harris*[1977] 1 WLR 1472 at 1479 (Lord Denning MR). The most satisfactory, and the commonly used and accepted, method of protecting the employer's interest is to impose a restraint on trading in competition. I reject the submission that there is no legitimate interest that supports the restraint on trade as distinct from the restraint on solicitation of clients.

Cartel provisions

42 As noted by both parties, principles of competition law and in particular the Competition and Consumer Act 2010 (Cth) (**CCA**) are relevant in determining whether a restraint is justified; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at [33]; *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418 at [106]-[111].

43 Section 44ZRD of the CCA defines and prohibits cartel conduct. Section 51(2)(b) of the CCA provides in determining whether sections including section 44ZRD has been contravened, regard shall not be had:

> (b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after the termination of, the contract.

44 Pembroke J considered the question of whether a restraint of trade in an employment contract contravened the cartel provisions in *Provida* at [24]-[26]:

> 24. An amusing component of the first Defendant's armoury of contentions and arguments was the proposition that the restraint on trade contained in the employment contract contravened the cartel provisions of the Competition and Consumer Act. It was said that the restraint on trade had the purpose of preventing, restricting or limiting the supply of services by the first Defendant.

> 25. I need not decide whether that was its purpose or whether it was merely its effect. The answer lies in the exception set out in Section 51(2)(b) of the Act. It provides:
>
> > (2) In determining whether a contravention of a provision of this Part... has been committed, regard shall not be had:
> >
> > (a) ...
> >
> > (b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person... agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after the termination of, the contract.
>
> 26. The restraint on trading in competition set out in Clause 16(b) of the employment contract is properly characterised as a restriction "as to the work, whether as an employee or otherwise, in which he or she may engage during or after the termination of the contract". The evident statutory purpose of Section 51(2)(b) is to save restraints on trade in employment contracts from the reach and sweep of the cartel provisions of the Act. I do not think that any different characterisation or conclusion is reasonable or likely or appropriate.

45 *Provida* appears to have been cited twice, both times by Black J, though not in relation to the section 51(2)(b) consideration; *Veda Advantage (Australia) Pty Ltd v De* [2016] NSWSC 37 at [71]; *Cadgroup Australia Pty Ltd v Snowball* [2016] NSWSC 22 at [34]. There does not appear to be any additional reported authority on the operation of section 51(2)(b) of the CCA.

Equitable duty of confidence

46 The Court of Appeal (Beazley P, with Macfarlan and Emmett JJA agreeing) set out the principles relating to an equitable obligation of confidence in *Marshall v Prescott* [2015] NSWCA 110 at [53]-[55]:

> [53] In Coco v A N Clark (Engineers) Ltd[1969] 65 RPC 41, Megarry J listed three requirements for an action in breach of confidence: the information had to have the necessary quality of confidence about it; the information must have been imparted in circumstances importing an obligation of confidence; and there must be an unauthorised use of the information. This formulation was cited in Commonwealth v John Fairfax [1980] HCA 44 ; 147 CLR 39 at 51 and ABC v Lenah Game Meats Pty Ltd [2001] HCA 63 ; 208 CLR 199 per Gleeson CJ at [30].
>
> [54] In Streetscape Projects (Australia) Pty Ltd v City of Sydney [2013] NSWCA 2, at [158] ff, Barrett JA noted that implicit in the Coco formulation were requirements of specificity and confidentiality, as follows:
>
> > 158 Implicit in the statement of principle are two propositions of particular relevance to this appeal: first, that particular information is specifically identified; and, second, that the confidential nature of the identified information is established.

> 159 The need for specificity in the identification of the information said to be confidential in respect of which relief is sought comes from the fact that the court must make an assessment of the quality of that information, that is, whether it is in truth of a confidential nature. An aspect of that inquiry may turn on whether the whole or some part has become the subject of general disclosure or notoriety. Precise delineation of the subject matter is accordingly essential. The task of a plaintiff, in this respect, is, in the words of Gummow J in Smith Kline & French Laboratories (Australia) Ltd v Department of Community Services and Health … at 87, "to identify with specificity, and not merely in global terms, that which is said to be the information in question".
>
> 160 The confidential quality of information does not depend on its being in the nature of a trade secret. As Campbell JA pointed out in Del Casale v Artedomus (Aust) Pty Ltd at [103], referring to what was said by Megarry J in Coco v A N Clark (Engineers) Ltd… at 47:
>
> "On Megarry J's account, the information is "of a confidential nature" if it is not "public property and public knowledge", or if it is "constructed solely from materials in the public domain", to which "the skill and ingenuity of the human brain" has been applied (47). This is a fairly undemanding test."

[55] Barrett JA also observed, at [162], that confidentiality may be lost if the information enters the public domain:

> The fact that information that was confidential when obtained has later entered the public domain means that its confidential quality is lost. In Attorney-General v Guardian Newspapers Ltd (No 2), Lord Goff explained (at 282) that "public domain", for these purposes, means "no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential".

47 Further, in *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172 (***Del Casale***) - the authority the Defendant primarily relies on for this point - Hodgson JA (with McColl JA agreeing) at [40] set out a list of factors that may assist the Court in determining whether information is confidential:

> 1. The extent to which the information is known outside the business.
>
> 2. The extent to which the trade secret was known by employees and others involved in the Plaintiff's business.
>
> 3. The extent of measures taken to guard the secrecy of the information.
>
> 4. The value of the information to the Plaintiffs and their competitors.
>
> 5. The amount of effort or money expended by the Plaintiffs in developing the information.
>
> 6. The ease or difficulty with which the information could be properly acquired or duplicated by others.
>
> 7. Whether it was plainly made known to the employee that the material was by the employer as confidential.

> 8. The fact that the usages and practices of the industry support the assertions of confidentiality.
>
> 9. The fact that the employee has been permitted to share the information only by reason of his or her seniority or high responsibility.
>
> 10. That the owner believes these things to be true and that belief is reasonable.
>
> 11. The greater the extent to which the "confidential" material is habitually handled by an employee, the greater the obligation of the confidentiality imposed.
>
> 12. That the information can be readily identified.

48 In respect of the confidentiality of client lists, the Plaintiff points to Rein J's observations in *Clear Wealth* at [33]:

> It is clear that customer lists can constitute information that is confidential to an employer and that it is entitled to protection. That is so even under the general law: see Forkserve Pty Ltd v Pacchiarotta (2000) 50 IPR 74 ; [2000] NSWSC 979 at [20] per Young J and Weldon & Co Services Pty Ltd v Harbinson [2000] NSWSC 272 per Bryson J; see also Robb v Green [1895] 2 QB 1; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at 136–138 and NP Generations Pty Ltd v Feneley (2001) 80 SASR 151 at [15].

Assessment of damages

49 The Court of Appeal (McColl JA with Campbell JA and Handley AJA agreeing) collected authorities on the Court's approach to assessment of damages when faced with difficult estimations in *McCrohon v Harith* [2010] NSWCA 67 at [118]–[124]:

> [118] There are cases in which courts will estimate damages despite a dearth of evidence. The basic principle was explained in *Commonwealth v Amann* by Mason and Dawson JJ as follows:
>
> > [M]ere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can … Where precise evidence is not available the court must do the best it can: Biggin & Co Ltd v Permanite Ltd [1951] 1 KB 422, per Devlin J at 438.
>
> [119] Devlin J's complete statement was: "[W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can." After referring to this statement with apparent approval in New South Wales v Moss (2000) 54 NSWLR 536 (at [72]) Heydon JA added:
>
> As McPherson J said in Nilon v Bezzina [1988] 2 Qd R 420 at 424: "The degree of precision with which damages are to be proved is proportionate to the proof reasonably available". The courts on occasion cite in related contexts Bowen LJ's related but stricter observation in Ratcliffe v Evans [1892] 2 QB 524 at 532-3, an injurious falsehood case:

> … As much certainty and particularity must be insisted on … in … proof of damage, as is reasonable, having regard to the circumstances and the nature of the acts themselves by which the damage is done.
>
> …
>
> [120] In JLW (Vic) Pty Ltd v Tsiloglou [1994] 1 VR 237 (a claim for damages for alleged misleading representation inducing entry into a lease) Brooking J reviewed the principles concerning the circumstances in which a court may assess damages notwithstanding a lack of evidence. His Honour [accepted] "the amount of the damage must be proved with certainty, but this only means as much "certainty" as is reasonable in the circumstances". His Honour distinguished cases … where "[t]he nature of the damage may be such that the assessment of damages will really be a matter of [permissible] guesswork" from cases where "precise evidence is obtainable", where guesswork is not permissible…
>
> [122] In Troulis v Vamvoukakis [1998] NSWCA 237 Gleeson CJ (Mason P and Stein JA agreeing) referred to Tsiloglou with approval as setting out the principles governing the approach a court should take when there had been a failure by a party carrying the onus to establish the extent of damage suffered as a result of a breach of contract or tort… Gleeson CJ held that in such circumstances there were "limits to the lengths to which a court may properly go in 'doing the best it can' to assess damages". His Honour observed that the case did not involve damages which were "inherently difficult to quantify, or which involve[d] estimating a risk, or measuring a chance, or predicting future uncertain events." …
>
> [123] Gleeson CJ concluded in substance, that where the damages were susceptible of evidentiary proof, and there was "an absence of the raw material to which good sense may be applied … [j]ustice does not dictate that … a figure should be plucked out of the air."
>
> [124] In Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd [2003] HCA 10 … Hayne J (Gleeson CJ, McHugh, and Kirby JJ agreeing) postulated that there may be a distinction between cases where a Plaintiff cannot adduce precise evidence of what has been lost (in which "estimation, if not guesswork, may be necessary in assessing the damages to be allowed") and cases where, although apparently able to do so, the Plaintiff has not adduced such evidence. His Honour suggested that references to "mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can" might be more apt in the former rather than the latter class of case.

The parties' submissions

Pleaded breaches of the SOA

50 The Plaintiff pleads the Defendant engaged in the following breaches of the SOA:

(1) Used the client information he received from the Plaintiff to refer the Plaintiff's clients to RAMS Ryde, prior to the termination of the SOA (SOC [18]) (**Referral Conduct**). The Referral Conduct was in breach of clause 7.4 and 7.5(v) of the SOA (SOC [19]). The Defendant admits he sent some details concerning the refinancing of a loan by Jovan

Davidovic to the principal of RAMS Ryde on 16 November 2016, but otherwise denies the Plaintiff's allegations in relation to the Referral Conduct (Defence [18]-[19]);

(2) Retained a list of clients (**Retained List**) which included clients who were not the Defendant's friends and family clients (SOC [22]) (**Retention Conduct**), in breach of clause 7.2 and 7.5(v) of the SOA (SOC [23]). The Defendant agrees he engaged in the Retention Conduct (Defence [22]), but denies this was in breach of the SOA (Defence [23]);

(3) Provided the Retained List to RAMS (SOC [24]) (**Provision Conduct**), in breach of clause 7.2, 7.4, 7.5(v), 8.2, and 8.4 of the SOA (SOC [25]). The Defendant denies both allegations (Defence [24]-[25]);

(4) Used the information in the Retained List in the course of providing services to RAMS through using it to facilitate contacts with the Plaintiff's clients other than the Defendant's friends and family clients (SOC [26]) (**Use Conduct**), in breach of clause 7.2, 7.4, 7.5(v), 8.2, 8.3 and 8.4 of the SOA (SOC [27]). The Defendant pleads he has used information in the Retained List relating to those in Annexure A of the Defence (found at CB 221-224) but otherwise denies the allegations (Defence [26]-[27]).

(5) Solicited, canvassed, approached and accepted approaches from persons who were in the 24 months prior to the termination, the Plaintiff's clients (not being the Defendant's friends and family clients) with a view to obtaining business of those persons for RAMS since termination of the SOA (SOC [28]) (**Soliciting Conduct**), in breach of clause 8.3 and 8.4 of the SOA (SOC [29]). The Defendant admits he engaged in the Soliciting Conduct (Defence [28]), but denies this was in breach of the SOA (Defence [29]).

51 The questions of breach turn largely on the construction of the SOA. It is therefore necessary to first address the parties' differing constructions of the relevant clause and terms under the SOA before turning to their submissions on the specific breaches in question.

Construction

Meaning of 'client' under the SOA

52 The Plaintiff submits "clients" under the SOA were considered to be clients of the Plaintiff. The provisions of the SOA make clear the central purpose of the agreement is for the Plaintiff to engage the Defendant to service the Plaintiff's clients both at the initial stage when credit applications are made (clause 1.2), and following applications with the Defendant managing the post-settlement client relationship (clause 6.15) (Plaintiff's closing submissions [17]-[19]).

53 The Plaintiff maintains this is supported by sub-clause 7.4(iv) which makes clear the clients are clients of the Plaintiff since it is the Defendant who is required to keep “details of clients” confidential, for the benefit of the Plaintiff (Plaintiff’s closing submissions [20]). This is fortified by sub-clause 7.5(v) which expressly states the “customer database”, being the Mercury database where client information is stored, belongs to the Plaintiff (Plaintiff’s closing submissions [21]).

54 Further, the Plaintiff submits the “clear intent” of clause 8.3 and 8.4 is to prevent the Defendant dealing with the customers he was servicing while working for the Plaintiff, and not allow for some carve out for clients apparently belonging to the Defendant rather than the Plaintiff (Plaintiff’s closing submissions [22]). The Plaintiff submits the commission arrangements in Annexure B of the SOA are consistent with the clients the Defendant deals with being the Plaintiff’s clients, since the Plaintiff also gains a percentage of the commission no matter how involved the Defendant is in procuring the client (Plaintiff’s closing submissions [26]-[27]).

55 The Plaintiff notes clause 14.2 is referring solely to the Defendant’s rights to future payments of trail commission, and does not in any way attach any rights to the clients themselves (Plaintiff’s closing submissions [30], T199/32-35).

56 The Defendant rejects the Plaintiff’s characterisation of the SOA having the effect that the Plaintiff engaged the Defendant to service the Plaintiff’s clients. Instead, the Defendant submits the engagement between the Plaintiff and Defendant should be understood as the Plaintiff appointing the Defendant to what could be characterised as a franchise entitling the Defendant to utilise the Plaintiff’s systems to receive credit applications and lodge them with Credit Providers (Defendant’s closing submissions [23]).

57 In support of this characterisation, the Defendant points to various clauses showing it conducted its own business with its own clients. For example, under the SOA the introduction of loans is by direct dealing between the Defendant and Credit Providers (clause 5.2), the Defendant is required to endeavour to solicit suitable applicants and submit accurate and complete applications to Credit Providers (clause 6.1(i)), the Defendant is required to obtain and

maintain all necessary licenses etc. for the conduct of his business (clause 6.10), and the Defendant manages the whole of the loan application process through to settlement and the post-settlement client relationship (clause 6.14 and 6.15) (Defendant's closing submissions [23]).

58 Further, the Defendant says for the purposes of clause 8.3, the issue is whether the clients were considered to be clients of the Plaintiff to the exclusion of the Defendant (Defendant's closing submissions [26]). The Defendant points to the clients he engaged or could engage through his own efforts where he received a higher commission, and submits "for the Plaintiff to succeed it must show that the Sub-Origination Agreement operated to confer upon the Plaintiff to the exclusion of the Defendant rights to all information concerning those clients" (Defendant's closing submissions [29]).

59 The Defendant also points to clause 14.2 which refers to a right of the Defendant to sell entitlement to trail commission. The Defendant submits this right requires him to be entitled to a list of loans where trail commission will be payable in the future, and to disclose that list to any purchaser, again supporting the Defendant's contention he had his own clients (Defendant's closing submissions [32]).

Meaning of 'Confidential Information' under the SOA

60 Clause 7.4, 7.5 and 8.3 all relate to prohibited use of "Confidential Information."

61 In the absence of a definition, the Plaintiff submits the effect of sub-clause 7.4(vi) is to expressly designate as Confidential Information the "details of clients (including without limitation, client lists and clients details) and past and current negotiations" (Plaintiff's closing submissions dated 19 June 2017 [20]).

62 The Defendant on the other hand submits the types of information provided in clause 7.4(i)-(vi), including details of clients, do not necessarily amount to "Confidential Information" under the SOA. The Defendant submits it would be a "legal absurdity" if all information which met the descriptions in sub-clause (i)-(vi) amounted to "Confidential Information," giving the example of a mortgage broker not being able to use, publish, discuss or disclose contact details of any of Australia's major banks on a reading of clause 7.4(iv) (Defendant's closing

submissions [47]-[49]). Thus, the meaning of “Confidential Information” in clause 7.4 must be as it is understood at law.

63 The Defendant further submits clause 7.4 must be construed as imposing the same obligations on the Defendant as were imposed during his employment with the Plaintiff. Thus, to give the SOA business efficacy, the “confidential information” the Defendant is obliged not to use, publish or disclose, cannot and does not extend to information disclosed to the Defendant during the term of the SOA for use by the Defendant in his business (Defendant’s closing submissions [40]-[45]).

64 The Plaintiff submits that while clause 7.4 restricts use of Confidential Information during the currency of the SOA (and for 10 years afterwards), that restriction should be read with the implied exception of use by the Defendant for the Plaintiff’s business (Plaintiff’s closing submissions [11]).

Alleged breaches of the SOA

1. The Referral Conduct

65 The Plaintiff alleges the Defendant breached clause 7.4 and 7.5(v) of the SOA by using the Plaintiff’s client information to refer Borrower J and Borrowers B to RAMS (T123/41-T124/8). The Plaintiff relies on the Defendant’s admission regarding the provision of information from the Defendant to RAMS on 16 November 2016 in relation to the refinancing of Borrower J in support of its claim the Defendant is in breach of clause 7.5 of the SOA (Plaintiff’s closing submissions [48]).

66 In relation to the Borrowers B, the Plaintiffs rely on an email dated 25 November from the Defendant to Borrowers B with the subject ‘RAMS Loan Application’ (CB 507-508).

67 In respect of Borrower J, the Defendant submits while he admits to sending some details to RAMS, this is not an admission of a contravention of the SOA.

68 In respect of Borrowers B, the Defendant submits rather than using client information to refer Borrowers B to RAMS, Borrowers B used the Defendant’s contact information to contact him. According to the Defendant, there is nothing

in the SOA which prevented the Defendant from agreeing to the request made of him by Borrowers B (Defendant's closing submissions [56]).

69 In any case, the Defendant maintains the list of names and methods of contacts for clients as shared between the Defendant and Plaintiff do not fall within the "Confidential Information" the Defendant is required to keep secret and not use, publish, discuss or disclose under clause 7.4 and 7.5.

70 On the Defendant's construction, "Confidential Information" under the SOA is as the term is understood at law. Relying on the factors listed in *Del Casale* at [40], the Defendant maintains the list of names and methods of contacts for clients as shared between the Defendant and Plaintiff do not fall within "Confidential Information."

71 The Defendant points to the fact the names and contact details of the Defendant's clients were on his Facebook page and therefore known outside the business, all employees and brokers of the Plaintiff had unrestricted access to all 90,000 customer records contained within Mercury with no attempts to guard the secrecy of the information, the value of existing customer details was limited since the focus of the Plaintiff's business model was the attraction of new customers, there is no evidence of effort or money spent on the Plaintiff's development of its client database, members of the public could easily duplicate the list of the Defendant's client from his Facebook page, and there is no evidence and it was not put to the Defendant in cross examination that the Plaintiff told him the client list was confidential (Defendant's closing submissions [50]).

72 On these grounds, the Defendant submits his referral of Borrower J and the Borrowers B to RAMS is not a breach of clause 7.4 nor 7.5 of the SOA.

2. The Retention Conduct

73 The Plaintiff points to the Defendant's admission of engaging in the Retention Conduct in his Defence, and the admission under cross examination that he retains a copy of at least a substantial part of the Plaintiff's client list (T72/12-15) (Plaintiff's closing submissions [49]).

74 The Plaintiff submits the 'intellectual property' referred to in clause 7.2 is not the intangible copyright itself (as that cannot meaningfully be returned or destroyed) but documents embodying copyrighted material. The Plaintiff submits the Plaintiff's client list falls within 'literary work' protected under the Copyright Act 1968 (Cth), whether such work is published or not; section 32 Copyright Act (Plaintiff's closing submissions [7]-[8]).

75 The Defendant accepts he retains a list of clients, but that is a "list of those customers of the Plaintiff who were also clients of the Defendant" and a list he was entitled to retain pursuant to Pembroke J's Interlocutory regime (Defendant's closing submission [59]).

76 Further, the Defendant submits the Retention Conduct does not fall foul of clause 7.2 nor 7.5 of the SOA. The Defendant submits whatever is meant by "client information" in the SOC (at [18]), the computer generated client list is not Intellectual Property as defined under the SOA as it is not "know how used by the Originator in respect of its business" (Defendant's closing submissions [60]-[66]). Further, the Defendant relies on *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCAFC 149, (2010) 194 FCR 142 (***Telstra***) to submit no copyright can subsist in a computer generated client list (Defendant's closing submissions [46]).

77 The Plaintiff contends *Telstra* says nothing about the subsistence in copyright in all information just because it happens to be stored on a database (T120/15-16).

3. The Provision Conduct

78 The Defendant submits the only evidence of the Provision Conduct is that he provided the RAMS receptionist with a list of 80-100 names of his clients' names and addresses for the sending out of Christmas Cards (Defendant's closing submissions [68]).

79 The Plaintiff characterises the Provision Conduct as "admitted" (T124/20-21) submitting this evidence regarding the list of 80-100 client names, stated by Mr Isaac in cross examination (T68/9-T70/6), is sufficient for showing breach of clause 7.2, 7.4, 7.5(v), 8.2, and 8.4 as pleaded (Plaintiff's closing submissions [50]).

4. The Use Conduct

80 The Plaintiff submits the Defendant admitted the Use Conduct (T124/21) by agreeing he has used the list of clients in Annexure A to the Defence (CB 221-224). The Plaintiff claims the Use Conduct is in breach of clause 7.2, 7.4, 7.5(v), and 8.2 as the client list falls into the meaning of Intellectual Property and Confidential Information. Further, the Plaintiff submits the Defendant has used its client list whilst at RAMS to facilitate contact with the Plaintiff's clients in breach of clause 8.3 and 8.4 (Plaintiff's closing submissions [51]).

81 The Defendant however submits that the clients in Annexure A are the Defendant's clients, and therefore based on his construction of the SOA, he is not in breach of clause 8.2 and 8.3 (Defendant's closing submissions [69]-[70]). Further, the Defendant's construction of the meaning of Confidential Information and Intellectual Property under the SOA means he is not in breach of clause 7.2, 7.4, 7.5(v), and 8.2.

5. The Soliciting Conduct

82 The Plaintiff submits the Defendant has breached clause 8.3 and 8.4 by, at the very least, accepting approaches from the Plaintiff's following former clients (**Lost Borrowers**) and writing loans for the following amounts (Plaintiff's submissions on damages [9]; Exhibit P1):

Lost Borrowers		**Date of RAMS loan**	**Amount**
1.	Borrowers A	23 December 2016	$1,000,000.00
2.	Borrowers B	24 March 2017	$564,000.00
3.	Borrowers C	24 March 2017	$520,000.00
4.	Borrowers D	3 April 2017	$452,000.00

5.	Borrowers E	24 April 2017	$168,000.00
6.	Borrowers F	27 April 2017	$720,977.00
7.	Borrower G	22 May 2017 22 May 2017	$174,200.00 $585,800.00
8.	Borrowers H	29 May 2017	$396,000.00
9.	Borrower I	31 May 2017	$761,333.00

83 The Plaintiff submits that in accordance with clause 8.3 and 8.4, the Defendant was obliged to simply turn down any approach from the Plaintiff's clients.

84 The Defendant concedes he accepted an approach from each of the nine Lost Borrowers (T178/9-15; Defendant's submissions on damages [14]) but maintains such an acceptance is not in breach of clause 8.3 because the Lost Borrowers formed part of his own business, rather than the business of the Plaintiff (T178/20-29). The Defendant also submits that in relation to clients who formed part of the Plaintiff's business, while the Defendant could not accept an approach with a view to obtaining business, he could refer them to any other broker, and this included RAMS Ryde (T179/6-9).

85 The Defendant submits he is not in breach of clause 8.3 by reason of the construction of the terms "business" and "clients" in the clause. The reference to "part or parts of the business carried on by the Originator" shows, according to the Defendant, the SOA contemplates there being "business" greater than "business" of the Plaintiff, and that the "business" in clause 8.3 is therefore referring to business of the Plaintiff combined with business of the Defendant. Further, the application of clause 8.3 to "a client…of the Originator" means the clause only relates to clients who are exclusively clients of the Plaintiff, and not clients who are also or exclusively a part of the Defendant's business

(Defendant's closing submissions [89]-[90]). Thus, according to the Defendant, the issue turns on "whether the Plaintiff has established that the clients whose contact information has been used by the Defendant were clients of the Plaintiff to the exclusion of the Defendant" (emphasis in original) (Defendant's closing submissions [26]). The Defendant submits the Lost Borrowers were not clients of the Plaintiff to the exclusion of the Defendant, and thus the Defendant's soliciting or acceptance of them is not in breach of the SOA.

86 In any case, the Defendant submits clause 8.3 and 8.4 cannot be enforced on two grounds. First, they are cartel provisions, the given effect to which would be a contravention of the CCA. Second, they are unreasonably in restraint of trade and void (Defendant's opening submissions dated 13 June 2017 [66]-[67]).

a) Cartel provisions

87 The Defendant further submits clause 8.3 and 8.4 are cartel provisions under section 44ZRD of the CCA. The Plaintiff and Defendant are presently competitors (section 44ZRD(4)), meaning any provision of the SOA which has the purpose of directly or indirectly preventing, restricting or limiting the supply or likely supply of goods or services to persons or classes of persons by any or all of the parties to the SOA is a cartel provision.

88 The Defendant submits clause 8.3 falls into this category, as it has the purpose of directly preventing the supply or likely supply or services by the Defendant to a class of people, being those who were a client of the Plaintiff at any time in the 24 months prior to the termination of the SOA. Similarly, clause 8.4 is a cartel provision because an operative purpose of it must have been to constrain soliciting customers because they had been the Plaintiff's customers in the 24 months prior to termination of the SOA.

89 The Defendant submits as the Plaintiff is a trading or financial corporation, in enforcing these clause it would commit an offence pursuant to section 44ZZRG and contravene section 44ZZRK (Defendant's opening submissions [70]-[77]).

90 In response to this defence, the Plaintiff submits the provisions fall within the exception contained in section 51(2)(b) of the CCA. Citing *Provida*, the Plaintiff submits the exception was "clearly directed at enabling the restraints just like

this to occur" (T125/41-42). The SOA is a contract for the provision of services and the Defendant (who is not a body corporate) agrees to accept restrictions as to the work in which he can engage after termination of the SOA, meaning the provision are not voided by the CCA and remain fully effective (Plaintiff's closing submissions [56]).

91 The Defendant submits neither clause 8.3 nor 8.4 fall within the exception of section 51(2)(b) as they do not restrict the work in which the Defendant may engage (Defendant's opening submissions [69]). Further, in response to the Plaintiff's reliance on *Provida*, the Defendant submits Pembroke J did not hold section 51(2)(b) operated to allow a provision that a person would not solicit customers (Defendant's closing submissions [96]).

b) Unreasonably in restraint of trade

92 The Defendant submits clause 8.3 and 8.4 are void as unreasonable restraints of trade. The Defendant submits the clause cannot be justified based on the Plaintiff's protection of its trade secrets, confidential information and customer connections.

93 No evidence has been led concerning trade secrets, and, according to the Defendant, the terms of the SOA are only consistent with the Plaintiff not having an interest, to the exclusion of the Defendant, in customer connections. The Defendant submits this is evidenced by clause 14 and 18 of the SOA which show the Defendant's relationship with customers belonging to him. Further, as apparent in the Defendant's approach to confidential information, the Defendant submits clause 8.3 is not reasonably necessary to protect any confidentiality interest of the Plaintiff.

94 In response, the Plaintiff submits the clause are no broader than they need to be to protect the legitimate interest of the Plaintiff in preserving its goodwill by preventing a person who is in a frontline position of contact with the Plaintiff's customers and who will thus have a personal relationship with those customers from taking those customers away from the Plaintiff upon departure. The Plaintiff relies on *Clear Wealth* to support its proposition (Plaintiff's opening submissions dated 13 June 2017 [26]).

95 The Defendant submits the Plaintiff's reliance on *Clear Wealth* is misplaced since Rein J was dealing with an employment relationship, where an employee's duty of fidelity is at the centre of such a relationship (Defendant's closing submissions [106]-[118]).

Equitable duty of confidence

96 The Plaintiff submits the Defendant has breached its equitable duty of confidence owed to the Plaintiff in misusing the client list. The Plaintiff submits the client list has the necessary quality of confidence as it is not something which is common or public knowledge but work the Plaintiff has laboured to produce and is of great commercial value to the Plaintiff. In respect of the clients who are on the Defendant's Facebook page, the Plaintiff submits there are only around 150 names and it is not necessarily possible to get their contact details from the listing of their names (T120/31-T121/7).

97 Further, the list was received by the Defendant in circumstances importing an obligation of confidence, and the Defendant's admitted use of the client list was for the purposes of facilitating contact with the Plaintiff's clients to solicit them from the Plaintiff to its rival, RAMS, causing a detriment to the Plaintiff by costing it both commission and goodwill. Finally, the Defendant's belief he can continue to use the list is further threatened misuse (Plaintiff's opening submissions [30]-[33]; Plaintiff's closing submissions [74]-[75]).

98 In line with the Defendant's submissions on why he has not breached the Confidential Information provisions of the SOA (clause 7.4, 7.5 and 8.2), the Defendant maintains no necessary quality of confidence is attached to the Plaintiff's client list (Defendant's closing submissions [50], see [69]-[71] above).

Remedies

99 The Plaintiff seeks injunctions (Prayers 1 and 2 SOC), and a remedy, preferably in the form of an account of profits, for the Defendant's breaches up to the date of any injunctions ordered.

100 The Defendant on the other hand agrees the Interlocutory regime should be made for the period to 30 November 2016 (10 years after termination of the SOA) as contemplated by clause 7.4, but the proceedings should otherwise be dismissed (Defendant's closing submissions [124]). In the alternative, the

Defendant submits damages rather than an account of profits should be awarded should the Court find in favour of the Plaintiff on the question of liability.

Causation

101 On causation, the Plaintiff submits the Lost Borrowers were all existing clients of the Plaintiff (and not the Defendant's friends and family clients), meaning it is likely that if the Defendant had refused contact with the Lost Borrowers following termination of the SOA (as he was contractually obliged to do), the Lost Borrowers would have obtained finance through the Plaintiff (Plaintiff's submissions on damages [10]). The Plaintiff submits the Defendant was prevented from telling clients who approached him they should go somewhere other than the Plaintiff, by operation of clause 8.4 (T157/1-5, T160/33-T162/2). Instead, the Plaintiff submits that in accordance with the SOA, if one of the Plaintiff's clients called the Defendant and asked anything including whether they could get a better loan than with the Plaintiff, the Defendant was obliged to simply say he could not deal with them (T203/7-12).

102 Further, the Plaintiff submits there was no evidence to suggest the Lost Borrowers were in any way dissatisfied with the Plaintiff, as evident in the fact they were calling the same person they had dealt with in their relationship with the Plaintiff or were happy to deal with him (T158/26-30; T159/21-25).

103 The Plaintiff also notes both itself and RAMS are simply "windows to the Lender" so there is no real reason why the Lost Borrowers would not apply for loans or refinancing through the Plaintiff as opposed to RAMS (T160/21, 29-31).

104 The Defendant submits there is insufficient evidence to establish the Plaintiff's loss of the nine Lost Borrowers was caused by the Defendant's alleged breach of clause 8.3. The Defendant notes that rather than being obliged to refuse any contact, he was simply required to not accept an approach "with a view to obtaining business or custom of that person" pursuant to clause 8.3.

105 The Defendant submits six of the nine Lost Borrowers likely made contact with the Defendant, since they were not on the Defendant's client list (CB 221-224), and the remaining three (Borrowers A, B and E) initiated contact with the

Defendant. Thus, it can be inferred, according to the Defendant, that those clients were “shopping around” and there is no evidence that but for the Defendant responding to their approach, they would have returned to the Plaintiff (Defendant’s submissions on damages [16]-[17]). In oral submissions, the Defendant points to the emails regarding Borrowers A (CB 460) as evidence of her being unhappy with and no longer wanting to deal with the Plaintiff (T182/14-25).

106 Further, the Defendant submits he was able, in accordance with clause 8.3, to reject the approach but then refer any such customer to another mortgage broker/loan writer, whether at RAMS or elsewhere, and there was no evidence what the Defendant would have done on that counterfactual (Defendant’s submissions on damage [18]). The Defendant submits it would be misleading and deceptive and in breach of the Australian Securities and Investments Commission Act 2001 (Cth) if he was to not refer the clients on to a broker he believed was appropriate, which may well not have been the Plaintiff (T182/6-10).

Account of Profits

107 The Plaintiff submits an account of profits is the most appropriate remedy as it will avoid the difficulty of calculating the Plaintiff’s damages flowing from the solicitation of the Plaintiff’s clients to date which has not yet borne the fruit of causing them to leave the Plaintiff (Plaintiff’s closing submissions [80]).

108 The Plaintiff also notes that while breach of the equitable duty of confidence gives rise to the right to obtain an account of profits, and the remedy is not normally available under the Common Law doctrine of breach of contract, there is commentary which supports the granting of an account of profits where both breaches are established; *Town & Country Property Management Services Pty Ltd v Kaltoum* [2002] NSWSC 166 at [78] per Campbell J; *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41 at 83 per Deane J (T127/27-T128/14)

109 The Plaintiff submits an account of profits could be calculated largely by reference to the RAMS commission reports (Confidential Exhibit P1) which show the Defendant’s commission up until May 2017 (with a 5% reduction by

reason of matters set out in Confidential T3/48-T4/7). However, the Plaintiff also submits the profits would need to be also calculated from May 2017 until the date the injunctions are granted, since the Defendant may arrange further loans with the Plaintiff's clients, receive future trail commissions, and profit from past breaches of the SOA such as being belatedly approached by the Plaintiff's clients (Plaintiff's closing submissions [80]-[81]).

110 The Defendant submits the Plaintiff has not identified a juridical basis for an account of profits, and the evidence it relies on does not distinguish between clients, and information about which has been used by the Defendant and clients of the Plaintiff (Defendant's closing submissions [121]-[122]). Further, the Defendant submits the Plaintiff fails to address the evidence of RAMS customers who fall within the classes of customers the parties agreed the Defendant could provide services to at the Termination Meeting (Defendant's closing submissions [123]).

Damages

111 The Plaintiff submits that if the Court declines to grant an account of profits, damages should be awarded for the Plaintiff's nine Lost Borrowers. The Plaintiff has made clear it does not seek damages for loans of the Plaintiff's clients who now have loans with RAMS through someone other than the Defendant (Plaintiff's submissions on damages [8]; T176/49-T177/9).

112 Following closing submissions on liability, the parties provided written submissions on damages (Plaintiff's submissions on damages dated 30 June 2017, Defendant's submissions on damages dated 7 July 2017), before returning for oral submissions on damages on 13 July 2017. By email dated 17 July 2017, the Plaintiff also provided the Court with a calculation of the Plaintiff's damages at different points in time depending on when (and assuming) the injunctions are granted.

113 On 2 August 2017 the matter was relisted before me so the parties could respond to several outstanding questions I had on damages. The parties provided written submissions in response to these questions (Plaintiff's further submissions on damages dated 4 August 2017, Defendant's further submissions on damages dated 4 August 2017), and submissions in reply

(Plaintiff's further submissions on damages in reply dated 7 August 2017, Defendant's further submissions on damages in reply dated 8 August 2017). The Plaintiff's further submissions on damages contained amendments to the calculations it provided the Court on 17 July 2017.

114 From these six sets of written submissions accompanied by oral submissions, the parties' respective positions on damages can be summarised as follows.

115 Both parties agree the calculation for damages should comprise of four components, namely:

(1) the upfront commission from December 2016 – 31 May 2017 (**past upfront commission**);

(2) the estimated upfront commission for June 2017 – date of injunction (**estimated future upfront commission**);

(3) the trail commission from December 2016 – 31 May 2017 (**past trail commission**); and

(4) the future trail commission following May 2017 (**estimated future trail commission**).

116 Further, in calculating these commissions, the parties agree:

(1) The percentage paid by the Lenders to the Plaintiff in commission is 0.65% for upfront commission, and 0.13% for trail commission; and

(2) GST is payable to upfront commission (T148/42-44; Plaintiff's further submissions on damages dated 4 August 2017 [4]).

117 However, the parties differ on a number of other key elements which affect both the methodologies applied and final calculations. While I will propose to set out these differences in more detail, the table below provides an overview of the parties' approaches in assessing the loss of commission based on the four components.

(1) Past upfront commission		
Relevant factors	**Plaintiff's approach**	**Defendant's approach**
% paid by Lender to	0.65%	0.65%

Plaintiff		
Type of loan	Director Referral	Self-generated business
% to Plaintiff	65%	40%
CALCULATION	Multiply total amount of Lost Borrower loans from December 2016 – May 2017 by amount payable by Lenders to the Plaintiff, and by the amount the Plaintiff would have received based on the category of the loan.	
(2) Estimated future upfront commission per month		
	Plaintiff's approach	**Defendant's approach**
CALCULATION	Apply the amount of upfront commission received for May 2017, assuming the Defendant would have continued to receive this amount per month.	Apply the average upfront commission from December 2016 – May 2017.
(3) Past trail commission		
Relevant factors	**Plaintiff's approach**	**Defendant's approach**
% paid by Lender to Plaintiff	0.13%	0.13%
% to Plaintiff	100%	60%

GST payable	Yes	No
CALCULATION	Multiply the total loan balance for each month by amount payable by Lenders to the Plaintiff, and then divide by 12 to get to the total trailer amount for that month. Divide that figure by the number of days in the month and then multiply by the number of days from the date the loan settled to the end of the month to reflect the fact trail commission was calculated on a pro rata basis in the month in which the loan was settled. Plaintiff maintains GST is also payable, Defendant rejects this.	

(4) Estimated future trail commission

Relevant factors	**Plaintiff's approach**	**Defendant's approach**
% paid by Lender to Plaintiff	0.13%	0.13%
Type of loan	Director Referral	Self-generated business
% to Plaintiff	100%	60%
Period	10 years	1 year (up to May 2018)
Runoff rate	1.5% per month	Rate reflecting loans will be discharged within 2.5 yrs.

GST payable	Yes	No
(4)(i) Future trail commission until injunction granted		
CALCULATION	Multiply the total loan balance for the loans settled by the Defendant in May 2017 by 0.13%, divide by 12, to determine monthly future trailer commission for June 2017. Do the same for July but applying the total loan balance for the loans settled by the Defendant in June 2017, applying the run-off rate. GST payable.	Multiply the trail commission on all Lost Borrower loans for May 2017 by 0.13% and by 60% to determine monthly future trail commission rate. GST not payable.
(4)(ii) Future trail commission following injunction		
CALCULATION	Multiply the total of the Defendant's loan book as at May 2017 by 0.13% and divide that figure by 12, to determine total trail commission for the month of June, then apply the run-off rate for a period of 120 months (10 years).	Multiply the monthly future trail commission rate by 12 months (1 year). GST not payable.

	GST payable.	

118 Further details on the points of differences are set out below.

1. Nature of the Lost Borrower loans

119 The Plaintiff submits the Lost Borrower loans should be categorised as "referrals from the Director of the Originator" per Annexure B of the SOA. This means the Plaintiff would have received 65% of the upfront commission (Plaintiff's submissions on damages [18]), and 100% of the trail commission (Plaintiff's submissions on damages [27]) for each Lost Borrower from December 2016 - May 2017.

120 The Defendant submits the loans should be categorised as "self-generated business" per Annexure B of the SOA. This means the Plaintiff would have only received 40% of the upfront commission (Defendant's submissions on damages [23]), and 60% of the trail commission (Defendant's submissions on damages [29]) for each Lost Borrower from December 2016 - May 2017;

2. Rate per month of estimated future upfront commission

121 The Plaintiff submits the upfront commission for May 2017 ($8,100.73) is a fair reflection of the loans the Defendant writes per month, and so should be used to calculate future upfront commission. According to the Plaintiff, there is no reason to believe the Defendant will be recruiting customers at a slower or faster rate than he was in May (T189/46-50, T190/18-20; Plaintiff's submissions on damages [21]).

122 The Defendant submits the safer inference is to average out the upfront commission from December 2016 – May 2017 ($2,315) to determine the likely future upfront commission on the loans the Defendant writes per month (T186/41-49; Defendant's submissions on damages [27]).

3. Monthly figure for future lost trail commissions

123 The Plaintiff uses the trail commission on all Lost Borrower loans for June 2017 as part of the calculation the monthly loss of future trail commission on those loans. The Plaintiff reaches this monthly figure by multiplying the total of the Defendant's loan book as at May 2017 by 0.13%, and then dividing by 12 (Plaintiff's submissions on damages [31]).

124 The Defendant uses the trail commission on all Lost Borrower loans for May 2017 as part of the calculation the monthly loss of future trail commission on those loans (Defendant's submissions on damages [33]).

4. Use and amount of a run-off rate

125 The Plaintiff applies a run-off rate of 1.5% per month (and thus 18% per year) in calculating the future trail commission on the Lost Borrower's loans. The Plaintiff notes that while Mr Dargan's evidence on the 1.5% rate being the industry standard was restricted as evidence of his belief, Mr Isaac confirmed this figure in cross examination (T100/40-45) (Plaintiff's submissions on damages [32]-[33]; Plaintiff's further submissions on damages [11]).

126 The Defendant submits first no run-off rate is necessary given the future loss of trail commission should be for no more than 12 months (Defendant's submissions on damages [38]; T192/40-46). However, if a run-off rate is to be applied, the Defendant submits on the evidence, the least favourable position to the Defendant is that the loans written today could not still be in place in more than two and a half years' time and that the run-off rate should reflect this (T193/6-10; Defendant's further submissions on damages [33]).

127 The Defendant bases this submission on evidence showing only 58% of the Plaintiff's active loans as at May 2017 have been written since 2015 (CB 600-684) (Defendant's submissions on damages [39]). In reply, the Plaintiff submits the 58% gives little indication of the rate of discharge of these loans, as a high percentage of recent loans may simply be a reflection of the increasing number of loans being written as the Plaintiff builds over time (T202/30-35; Plaintiff's further submissions on damages [13]).

128 The Defendant also points to the Plaintiff's loan book comprising 4,171 loans as at February 2017 (CB 600-684), and the Plaintiff's evidence it has written "some 90,000 loans for clients" since 2007-2008 (T39/47-T40/45). The Defendant submits these numbers reflect a "very high rate of churn," with the Plaintiff's loans being discharged, on average, within a year at most (Defendant's further submissions on damages [8]-[10]). The Defendant also submits these numbers are inconsistent with the current loan book having

increased in recent years (Defendant's further submissions on damages [8]-[10]).

129 Further, the Defendant submits that had the Plaintiff written 90,000 loans in 2008, then the 1.5% run-off rate should leave the Plaintiff nine years on with 78,554 current loans, when on the evidence the Plaintiff only has 4,171 loans. The only way the Plaintiff can end up with approximately 4,200 loans in 2017 would be to apply an average run-off rate of 30% to the Plaintiff's loan book of 90,000 loans in 2008. Thus, the Defendant maintains that at the highest, the run-off rate should reflect loans being discharged within two and a half years (Defendant's further submissions on damages [31]-[33]).

130 In reply, the Plaintiff submits that while there might be approximately 90,000 loans in the Mercury database, there is no reason to believe this figure is a reference to settled loans, as opposed to both settled loans and loans that were never settled (Plaintiff's further submissions on damages in reply [2]). The Plaintiff points to evidence all "leads" (being potential loans) were entered into Mercury (T33035-T34/26; OD1 [10(d)], [11], [39]) to support its contention that only some of the 90,000 loans would be settled loans. The Plaintiff also submits this is consistent with Mr Dargan's evidence that around 25% of the Plaintiff's loan book was around 4,000 loans (OD1 [217]), meaning the Plaintiff's total loan book was more likely closer to around 16,000 settled loans. On these grounds, the Plaintiff submits the 90,000 figure carries little weight and cannot be used as a basis for calculating any run-off rate (Plaintiff's further submissions on damages in reply [1]-[6]).

5. Period of calculation of future trail commission

131 The Plaintiff calculates the future trail commission for a period of 10 years, submitting it has limited it to this period "merely for convenience of calculation" (Plaintiff's further submissions on damages [6]). The Plaintiff notes a more mathematically accurate approach would be continuing to determine future trail until the run-off rate diminishes the amounts to effectively nil. However, for convenience the Plaintiff has limited the calculation to 10 years, noting there is no need for any additional cap to be placed on the calculation of trail as the

run-off rate already reflects the diminishing trail commission from month to month over time (Plaintiff's further submissions on damages [7]).

132 The Defendant calculates the future trail commission for a period of one year up to May 2018. The Defendant submits the Plaintiff cannot show the Defendant would not have secured each of the nine Lost Borrowers immediately after the restraint in clause 8 ceased to operate, being May 2018 (Defendant's submissions on damages [38]). The Defendant notes this would not breach any confidentiality clause as the Defendant would rely on his phone, not a client list, to accept approaches from former clients of the Plaintiff (Defendant's further submissions on damages [28]).

133 To supplement this, the Defendant again relies on the alleged "high churn rate" of the Plaintiff's loan book showing the likelihood the Lost Borrowers would have discharged their loans with the Plaintiff over a short period (Defendants further submissions on damages [10]-[25]).

134 In reply, the Plaintiff again disputes the reliability of the 90,000 figure relied on by the Defendant (Plaintiff's further submissions on damages in reply [1]-[6]). Further, the Plaintiff submits it would be "extremely unlikely" the Lost Borrowers would refinance with the Defendant once the 18 month restraint period passed, and the trail commission of the Lost Borrowers would continue for the entire duration of the loan "which could be years or decades" (T203/15-25). The Plaintiff bases this submission on a number of factors, including the fact the Defendant would still be restrained from using Confidential Information to contact clients, and there would be no commercial reason why the Lost Borrowers would revert to using the Defendant in 2018 with no evidence showing RAMS could offer a better loan deal (Plaintiff's further submissions on damages [9]).

6. GST for trail commission

135 The Plaintiff submits GST should be applied to trail commission, based on the Plaintiff's Trail Commission Report (CB 600-684) which includes a final column on each page setting out the GST for each of the trail commission amounts (Plaintiff's further submissions on damages [3]).

136 The Defendant submits an inference cannot be drawn from the Plaintiff's Trail Commission Report that GST was being paid on its trail commissions since the column on the right hand side does not constitute 10% of the figure in the column headed "Comm" (Defendant's further submissions on damages [2]-[5]).

The witnesses

137 The Plaintiff called Mr Dargan who swore two affidavits dated 11 April 2017 (**OD1**) and 6 June 2017 (**OD2**)).

138 The affidavit of Miss Ji Hae Parnham dated 12 April 2017 (**JP**) was also read. Only Mr Dargan was cross examined. A further affidavit of Ms Erin Couper dated 16 June 2017 (**EC**) was read by the Plaintiff. She also was not cross examined.

139 The Defendant swore an affidavit dated 26 May 2017 (**NI**) and he was cross examined.

140 In light of the admissions, there was very little in issue between any of the witnesses as to any relevant events.

141 The Termination Meeting save for a few matters is basically not in issue.

142 Further, in my view, no issue of credit, at least of any substance, arose in this case. I am satisfied both Mr Dargan and Mr Isaac were witnesses of truth. Each gave their evidence in an entirely forthright and appropriate manner.

143 Notwithstanding the lack of conflict I propose to record, albeit briefly, some factual matters each of the respective witnesses gave evidence on.

Mr Otto Dargan

144 Mr Dargan is a director of the Plaintiff. In his first affidavit (11 April 2017) he set out in quite some detail the structure of the industry and the manner in which various participants perform their respective roles (OD1 [3] – [15]).

145 He explained Connective was an aggregator, being a company in the mortgage broking industry responsible for a group of brokers that has built relationships with Lenders, collects and distributes commissions and manages compliance for broker training/accreditations. It is able to negotiate favourable commission

rates with Lenders by reason of the volume of the mortgage work it is able to offer the Lender (OD1 [3]).

146 Connective provides services to mortgage broking companies including software in the form of an online platform known as Mercury, access to Lenders under the SOA it has with Lenders, compliance support and the provision of professional development courses (OD1 [6]).

147 Mortgage brokers can attain accreditations through Connective which permit them to use Mercury to select a suitable loan for a customer and then submit loan applications to Lenders. The Plaintiff is a sub-aggregator through Connective. It can likewise accredit its brokers. The broker or Sub-Originator as a result of the accreditation is able to access Credit Providers from the Connective Lender panel. The Sub-Originator is provided with a password that allows them to log onto Mercury to access the Plaintiff's records (OD1 [7]-[9]).

148 When a loan is approved and settlement takes place, the Lender or Credit Provider pays an upfront commission to Connective which is then split between the Plaintiff and the relevant Sub-Originator. Thereafter monthly trail commissions are paid to Connective whilst a loan remains with that particular Lender or Credit Provider. The trailing commission is likewise split as agreed (OD1 [12]-[13]).

149 Mr Dargan said that in about April 2008 he decided he wanted to build up a brand for the Plaintiff and he started investing significantly in the brand's online presence. As a result he asserted that the Plaintiff's position in the market was one of a specialised mortgage broker that could help customers obtain loans in niche markets and difficult or complex situations (OD1 [16] – [19]).

150 His staff was subjected to an extensive training programme on the Plaintiff's top eight niches, which are set out in his affidavit (OD1 [20]) and include persons with low deposits but high LVRs, hobby farms and other special categories (OD1 [20] – [24]).

151 Mr Dargan asserted the Plaintiff's website was launched on 20 April 2008 and in his view is one of the largest mortgage websites in Australia. He highlighted

that his business had been the subject of extensive media publicity. In addition the business heavily exploits social media (OD1 [25] – [38]).

152 Mr Dargan expressed a number of views about the desirability of maintaining an ongoing relationship with borrowers in order to enhance the prospects of future business. He also set out the various marketing campaigns and initiatives adopted by his company and Sub-Originators (OD1 [44]-[47]).

153 Mr Dargan explained Mr Isaac had entered into the SOA with his company, the Plaintiff, on 8 August 2012 (OD1 [60]). He also explained Mr Isaac took over the clients of a Ms Tina Wodecki after she left the Plaintiff (OD1 [62]).

154 Between [89] and [91] Mr Dargan gave an extremely detailed account of a conversation he had with Mr Isaac at the Termination Meeting.

155 During the Meeting, Mr Dargan downloaded a meeting template and started to complete it. He made detailed notes as recorded in the background facts (OD1 [93]).

156 Mr Dargan asserted the Termination Meeting led to a number of key points being clarified and/or agreed. First Mr Isaac indicated he wished to terminate the SOA and he was going to start a new mortgage broking business. Mr Dargan made the point during the meeting that Mr Isaac in his view could not continue after termination to deal with the Plaintiff's clients. Mr Isaac disagreed saying that he was free to deal with any such clients who contacted him. Mr Dargan accepted that Mr Isaac could deal with clients who were introduced to the Plaintiff as a result of them being the genuine friends or family or Mr Isaac or in consequence of referrals from those friends or family but not otherwise (OD1 [95]).

157 Mr Isaac did not agree with Mr Dargan's position as to what Plaintiff's clients he could deal with or not. Mr Dargan explained to Mr Isaac what he needed to do to avoid future legal action which included not refinancing the Plaintiff's customers and preserving the confidential information of the Plaintiff (OD1 [95).

158 Mr Dargan gave extensive evidence about the client list held by Mr Isaac and even more detail about particular clients (OD1 [109] – [207]).

159 Mr Dargan also gave evidence about Mr Isaac sending Christmas cards to a number of clients (OD1 [208]).

160 He then addressed questions of damage including lost commissions and the like (OD1 [213] – [238]).

161 In his second affidavit (6 June 2017) (**OD2**) he gave more detailed information about accreditation with Connective and in particular the number of Lenders with which relationships exist.

162 Mr Dargan was cross examined. Mr Dargan asserted he had provided significant training to Mr Isaac and that he was personally involved in the training (T27/35-40).

163 Mr Dargan agreed Mr Isaac was responsible for maintaining a relationship with Bank West, Bank West Commercial and ANZ Commercial (T29/15-20).

164 Mr Dargan agreed one of the lead mechanisms used by the Plaintiff from 2012 to November 2016 was the use of Facebook (T30/19-21).

165 Mr Dargan agreed the brokers were encouraged to link the customers to whom they had supplied a loan by friending them on Facebook. He said that was only a small part of their strategy (T30/40-45). He also agreed that no instructions were given to brokers as to whether they should choose privacy settings which would have those friends when linked being public or private (T31/1-6).

166 Mr Dargan agreed that when a comment from a customer was made the customer's identity was published on the Plaintiff's Facebook to the "world". Mr Dargan asserted that although this was correct the vast majority of people on Facebook are potential customers, not customers (T31/25-30).

167 Mr Dargan did not accept that via Facebook full details of a person's name, address and email address could be acquired (T32/15-30). He agreed however that persons could be invited to communicate via Facebook and could take up that invitation (T32/45-50).

168 Mr Dargan was then asked about how leads were entered into Mercury and he indicated that some were entered manually (T34/2-15).

169 Mr Dargan asserted that even where the broker identifies and introduces the applicant, the support team at the Plaintiff still has some connections with such a person, for example where there are missing documents, where the broker is away, where applications for the First Home Owners Grant are made and perhaps where a previous Lender is discharged (T35/30-45).

170 Mr Dargan agreed that until October/November 2016 the Plaintiff's business model was that the primary contact would have been the broker (T38/20-25).

171 Mr Dargan agreed that Mr Isaac did raise a number of complaints about the possible change in strategy with the Plaintiff's support staff wanting to have greater contact with customers (T39/1-5).

172 Mr Dargan was aware that brokers including Mr Isaac had access to Mr Dargan's accreditation details with Connective and occasionally used that accreditation to Mr Dargan's knowledge in order to expedite loan applications through Connective (T43/20-45).

173 Mr Dargan was then asked about the Termination Meeting. He agreed the Plaintiff agreed to pay trail commission to the Defendant for December (T44/35-40).

174 Mr Dargan did not agree that he had consented to Mr Isaac conducting a mortgage broker business in competition with the Plaintiff (T44/40-45).

175 Mr Dargan agreed there was another meeting in which Mr Isaac wanted a better deal on commission because he asserted he was generating 100% of his own business (T51/1-9). Mr Dargan agreed he did change arrangements in March 2016 so Mr Isaac would be entitled to some trail commission for loans which had already settled for customers who had been referred by Mr Dargan to him (T52/1-5).

Ms Ji Hae Parnham

176 Ms Parnham was employed by the Plaintiff as a broker team manager (JP [1]).

177 She attended the Termination Meeting with Mr Dargan and Mr Isaac on 30 November 2016. She recalled Mr Dargan taking notes using a meeting template. Ms Parham set out a small portion of the conversation which she heard take place between Mr Dargan and Mr Isaac. Mr Isaac did not agree that

a referral from the Plaintiff who in turn refers a friend or family member needed to come back to the Plaintiff (JP [2]-[9]).

178 Ms Parnham did not take any notes herself of the meeting. She was not required for cross examination.

Ms Erin Couper

179 Ms Couper is a solicitor employed by the solicitor for the Plaintiff (EC [1]).

180 Her evidence was the subject of a Confidentiality Order.

181 I will not set out the details here however there is no controversy about what she undertook by way of analysis or her conclusions. She accessed certain documents produced by RAMS and identified certain transactions involving the Plaintiff's clients and the Defendant.

182 Ms Couper was not cross examined.

Mr Nassif (Norman) Isaac

183 Mr Isaac identified the types of offerings appearing on the Plaintiff's website (NI [8]). He explained that in order to access Credit Providers the Plaintiff has a contract with Connective and its related entities. He stated that Connective is an aggregator of loan products. He accepted that he operated as a mortgage broker/Sub-Originator for the Plaintiff pursuant to the contractual arrangements (NI [9]).

184 He registered the name Isaac Financial Pty Ltd (**Isaac Financial**) on 11 November 2014. From early 2015 he asserted he informed Mr Dargan he wanted all future invoices issued to Isaac Financial (NI [11]).

185 During the time he was under contract he was an authorised credit representative for the Plaintiff. He was also directly accredited with Connective as an Associate Member, and able to originate loan products from numerous Lenders including those listed at [15(c)] (NI [15]).

186 Mr Isaac asserted he operated a business which was separate and distinct from the Plaintiff and he was permitted and did decide which Credit Providers he would submit loans to (NI [17]). He did agree however that he submitted all loans via Connective, because it was Connective's panel of Lenders with

whom he had direct accreditation (NI [18]). He agreed that upon a successful loan application it would be Connective who would directly distribute a portion of the commission to himself and to the Plaintiff (NI [19]).

187 He then provided in his affidavit a number of specific responses to matters raised by Mr Dargan. In particular, in relation to Mercury, he asserted that it was the computerised interface that mortgage brokers at the Plaintiff generally used as the central repository of client and prospective client information. It was also used as a tool to manage client pipeline, broker statistics and client leads (NI [40]).

188 He also asserted all the Plaintiff's support staff, marketing personnel and mortgage brokers had access to all information in Mercury relating to the Plaintiff's experts, its brokers, and its customers including user names, passwords, login details and digital signatures and each of those persons with access could edit, delete, download and connect immediately to that information (NI [41]).

189 In response to the Termination Meeting, Mr Isaac added only a modest amount of detail (NI [53]-[56]).

190 Mr Isaac asserted Mr Dargan actively encouraged the Plaintiff's mortgage brokers to connect with clients and referrals through social media as a means of keeping the Plaintiff at the front of mind of clients. By doing so Mr Isaac was and remains able to directly contact and be directly contacted by current and former clients via Facebook's private, instant messenger service, Facebook Messenger (NI [60]-[62]).

191 Mr Isaac asserted that by using Facebook as the tool its competitors could be browse his Facebook page to readily identify customers of his which he had "friended" on Facebook and, depending on the privacy settings of the individual, could use Facebook Messenger to contact them (NI [64]).

192 Mr Isaac then provided specific responses in relation to Borrowers A (NI [69]), Mr Davidovic (NI [70]) and others (NI [71]-[75]). He denied any dealings with Mr Davidovic as a client (NI [70]).

193 He asserted that Borrowers B approached him about a new loan after he had left the Plaintiff. Borrowers B became customers of RAMS in relation to their new facility (NI [71]-[72]).

194 In relation to Mr Corlet and Ms Hannon he asserted that he contacted Mr Hannon to inform him he was leaving and that he would need to hand their file over to another associate to the Plaintiff. Mr Isaac asserted that Mr Hannon indicated she wanted Mr Isaac to continue looking after them (NI [73]-[74]).

195 Mr Isaac denied Mr and Ms Thompson were current clients of his (NI [75]).

196 Mr Isaac also dealt quite specifically with a number of claims for damage (NI [79]).

197 Mr Isaac agreed in cross examination that he was writing loans for Lenders using the Plaintiff's platform (T56/10-15).

198 Mr Isaac agreed he became accredited with certain Lenders because he needed to do that for the purpose of working with the Plaintiff (T56/40-45).

199 Mr Isaac agreed he was the 'front man" in his dealing with customers (T59/45-50).

200 Mr Isaac agreed he knew that while doing work for the Plaintiff, the Plaintiff wanted to keep all of its customers (T61/25-30).

201 Mr Isaac agreed that apart from receiving a trail commission, brokers also received a one off payment when the loan was first put in place (T62/1-7).

202 Mr Isaac agreed the Plaintiff was spending money on advertising and marketing (T63/10-20).

203 Mr Isaac agreed he was currently an employee of RAMS, though not a sub-contractor (T64/40-50). The franchise at RAMS is owned by Tina Wodecki solely, although he does receive a commission from RAMS whenever a new loan is written and a trail commission paid monthly (T65/5-30).

204 Mr Isaac agreed there were a large number of customers which he dealt with at the Plaintiff whom he asserted belonged exclusively to him and he has proceeded to service a number of those customers (T65/45-50, T66/1-10).

205 Mr Isaac asserted he had only had dealings with about five or six the Plaintiff's customers since joining RAMS (T66/22-35).

206 He agreed RAMS and himself had collectively sent out Christmas cards to a number of the Plaintiff's customers around Christmas 2016 (T66/37-42). He thought he may have sent out somewhere between 80 to 100 (T66/44-50).

207 He agreed he gave a list of customers who he dealt with at the Plaintiff to the receptionist at RAMS for the purposes of addressing the Christmas cards to various people (T68/30-45).

208 Prior to leaving the Plaintiff, Mr Isaac agreed he downloaded the client content list directly to his computer (T72/5-10).

209 He also agreed he emailed some accreditations, Lender updates, and email content for customers to himself (T72/35-40).

210 Mr Isaac denied downloading the Plaintiff's broker manual – he received this from a former broker of the Plaintiff (T73/5-20).

211 Mr Isaac denied he encouraged Borrowers A to refinance a loan other than through the Plaintiff (T74/25-30).

212 Mr Isaac denied prior to termination of his contract with the Plaintiff he had dealings with customers in which he had sought to encourage them to refinance their loans other than through the Plaintiff (T74/45-50).

213 Mr Isaac agreed on 16 November 2016 he sent some details concerning the refinance of a loan by Mr Davidovic to Ms Wodecki at RAMS. He denied that he did so in order to encourage Mr Davidovic to refinance his loan through RAMS (T76/25-35).

214 He also agreed that prior to 30 November he had a conversation with Borrowers B and Mr Corlet and Ms Hannon (T76/45-50).

215 He also agreed that by the end of November 2016 he had a conversation with Borrowers B in which he advised him that he would likely be resigning from the Plaintiff and that the loans would be handed to another broker. Mr Isaac asserted Borrowers B indicated he wanted to meet with Mr Isaac (T77/10-25).

216 Mr Isaac agreed that he did email Borrowers B on or before 25 November 2016 about a RAMS loan application (T79/40-45).

217 Mr Isaac said he realised that he was still under contract with the Plaintiff but Borrowers B were in fact his customer (T80/35-45).

218 In relation to Ms Hannon, prior to the Termination Meeting Mr Isaac said he did make a recommendation for RAMS because as a Credit Provider on their serviceability calculator, it was one of the most generous for them in order to borrow what they needed to purchase an investment property (T81/30-45).

219 Mr Isaac however denied he was attempting to encourage Ms Hannon to refinance other than through the Plaintiff (T81/40-50).

220 Mr Isaac denied ever introducing Matthew and Sally Thompson to RAMS (T84/40-45).

221 Mr Isaac also denied attempting to move Ms Wodecki's previous customers at the Plaintiff over to her at RAMS (T85/15-17).

222 Mr Isaac agreed that Mr Dargan's first affidavit at [91] which dealt with the Termination Meeting was set out in some considerable detail. Mr Isaac agreed he read over the details (T86/40-50).

223 Mr Isaac denied he was trying to fool Mr Dargan into thinking he was going to think up some brand new business rather than going to one of the existing competitors (T88/10-15). Mr Isaac denied that on the basis that RAMS was not a broker but a loan provider (T88/15-20).

224 Mr Isaac agreed that while doing work for the Plaintiff, although he used Facebook as a means of advertising, he never paid any money for advertising or marketing himself (T91/20-25).

225 Mr Isaac was then cross examined in closed session.

226 Much of the material cross examined upon involved confidential material obtained from RAMS. Mr Isaac substantially clarified the situation in relation to the number of former clients of the Plaintiff he dealt with after terminating the SOA. This had the effect of limiting the Plaintiff's claim.

Consideration

The issues

227 The issues in this case became more refined as the proceedings progressed. Damages are no longer sought for several pleaded breaches, previously disputed conduct has been admitted, and certain defences have fallen away.

228 In my view, the outstanding issues in these proceedings are the following:

(1) Construction of the SOA

(a) Does 'client' under the SOA exclude certain clients of the Defendant that he provided services for while working for the Plaintiff (excluding the Defendant's friends and family clients)?

(b) Is information concerning the clients, including the client list, confidential and caught by the various restrictions in the SOA?

(2) Liability

(a) Has the Defendant misused the client list and information?

(b) Did the Defendant, at the very least, accept approaches from the Plaintiff's clients?

(3) Remedies

(a) Has causation been established?

(b) Are damages or an account of profits appropriate?

(c) How should damages be calculated?

229 I will deal with each of these issues in turn.

(1) Construction of the SOA

230 It seems to me the answers to both questions of construction are relatively straight forward.

231 For reasons I will come to, in my view it can fairly be said a person who borrows money via the SOA is properly the client of the Originator, Sub-Originator and Lender. That client has ongoing relations with each of the persons concerned, with each person benefiting from those relations. Apart from the payment to the Originator and Sub-Originator of upfront commission, there is thereafter a sharing between those two of the trailing commission. Further, the Lender of course is repaid either interest on the borrowed funds, or a payment of principal and interest on a monthly basis (or such other term as may be agreed).

232 It is also in my view plain from the wording of the SOA that information concerning the clients, including the client list, falls within Confidential Information as contemplated by the SOA. I will now elaborate on these findings below.

1. Meaning of 'clients' under the SOA

233 To construe the meaning of 'clients' under the SOA, and in particular as the term applies in the restraint in clause 8.3, it is necessary to understand the nature of the relationship and responsibilities between the parties as set out in the SOA.

234 The process anticipated by the SOA is for the Sub-Originator to introduce business to the Originator in the form of loans which comply with the terms of the credit criteria of a Credit Provider for whom the Originator acts (clause 5.1). However, as evident in the forms of commission available, business may be introduced either through the Sub-Originator's own efforts, direct referrals from the Plaintiff, or the Plaintiff's marketing efforts (Annexure B of the SOA).

235 The Sub-Originator must provide all relevant information to the Credit Provider (clause 5.2), and has the right to choose the Credit Provider and loan product (clause 18). However, the Originator is under no obligation to agree an application for a participating loan is to be submitted to a Credit Provider, and has the right to deny the Sub-Originator making a loan credit application on behalf of the applicant (clause 5.3).

236 The Sub-Originator may operate under its own trading name (clause 18.2), advertise at its own expense (clause 18.3), and may indeed develop a personal relationship with many clients. However, no matter how minimal the Plaintiff's visibility is in that relationship, the client's information is created, acquired, maintained and monitored for the joint commercial interest of each of the Originator, Sub-Originator and Lender. Not only does the Sub-Originator have an obligation to make all such information available to the Originator and Lender, ongoing surveillance and reporting is expected of the Sub-Originator, especially if the credit worthiness of the client changes adversely. The information would, as a matter of common sense, not just include the names and contact details, but private financial information such as to enable a

comprehensive assessment to be made as to the individual's ability to service and maintain the particular borrowing.

237 Thus, the confidentiality and non-compete clause are not an assignment of the Defendant's goodwill, but rather an acknowledgement he is not going to conduct his own private practice, engaging clients exclusively of his own. Theoretically, the Sub-Originator could conduct the entirety of its business activities in its own name, in which case the Plaintiff may have little or any profile. Notwithstanding this, there will always be a sharing in commission between the Sub-Originator and Originator. Indeed, once a loan is approved and settled, the Originator, Sub-Originator and Lender all benefit. Under Annexure B of the SOA, the Originator will always receive a cut of the upfront and trail commission of the client, regardless of how the client is obtained.

238 A Sub-Originator can sell their portfolio, or implicitly part of their portfolio while the SOA is on foot (clause 14.2), meaning the sale of the whole or part of the portfolio does not inexorably lead to a termination of the SOA. The commercial purpose of the sale is presumably to enable the Sub-Originator to raise cash. The purchaser may be a third party, or it may be the Originator (clause 14.2(ii) – (iii)). In all cases, however, the purchaser must be approved by the Originator (clause 14.2(ii)).

239 In the event the SOA is terminated, the Sub-Originator will no longer receive trail commission (clause 13.1(iv)). It follows that upon termination, the client ceases to be the shared client of the Sub-Originator and Originator, and for that matter the Lender, and becomes the client of the Originator and the Lender (at least while the loan facility is in place).

240 Clause 8 operates "after the termination of this agreement". It therefore appears tolerably clear to me that consistent with the above considerations, the "clients of the Originator" referred to in clause 8.3 include all the clients the Sub-Originator worked for in the 24 months prior to the termination of the SOA. In other words, upon termination of the SOA, the trail commission of the Sub-Originator's clients goes entirely to the Originator, meaning the Sub-Originator no longer has any commercial interest in those clients it wrote loans for. In no

sense therefore does the client continue to be a client of the Sub-Originator following termination of the SOA.

241 For these reasons, I do not accept the Defendant's construction of 'clients' in clause 8.3 as somehow carving out clients who the Defendant as Sub-Originator had worked for. Notwithstanding the Sub-Originator's status as an independent contractor, its obligations in essentially managing the entire client relationship, and the work it may do in introducing new clients to the Plaintiff, the Originator always maintains a commercial interest in the clients (as reflected in the commission payable), and always maintains an overriding level of control over the client relationship (as seen in its power to veto loan applications and sale of portfolio). Thus, the Sub-Originator's clients under the SOA will always be, properly construed, shared clients of the Sub-Originator, Originator and Lender. Further, and critical to clause 8.3, once the SOA is terminated, the Sub-Originator no longer has any clients, making it appropriate to refer to those former clients as clients of the Originator and, implicitly, the Lender, but critically, not the Sub-Originator.

2. Meaning of 'Confidential Information' under the SOA

242 Despite its italicised form, 'Confidential Information' in the SOA is not a defined term. However, I am satisfied clause 7.4 contains a non-exhaustive list of information that does fall within its definition as contemplated under the SOA, and that importantly, this expressly includes "details of clients (including without limitation, client lists and clients details) and past and current negotiations" (clause 7.4(vi)). In light of this inclusion, there does not seem to me any real argument against the proposition that client details etc. is regarded by the parties to be so as falling within the definition of "Confidential Information". It seems to me tolerably clear that it is intended to include all of the information generated by the Sub-Originator pursuant to the activities referred to in detail in clause 6.

243 Even if the term was to be applied as understood at law (the position propounded by the Defendant), I am satisfied details about clients, including a client list, would constitute confidential information in these circumstances. Plainly, as I have said, details of clients include not only the identity and

contact details of the client but more intimate information concerning their assets and liabilities and their ability to service loans. The latter information in particular is of great commercial value because it serves to distinguish the capacity of various borrowers and their ability to either take on additional indebtedness or manage their commercial portfolio by buying and selling assets. Clearly a client who has unspent capacity to borrow or alternatively an appetite for rearranging their portfolio on a reasonably regular basis is a desirable client to have. Therefore the profile of the client and hence the notion of client "details" as referenced in clause 7.4 is not a mere reference to, but obviously includes, address and contact numbers.

244 It seems to me, such information plainly has the necessary quality of confidence and is imparted in circumstances importing an obligation of confidence given its commercial value and degree of detail and intimacy concerning the financial profile of its clients.

245 I do not accept the information loses its necessary quality of confidence by reason of certain clients being identified on the Plaintiff or Defendant's Facebook page as clients of the Plaintiff. First, the clients that have posted publicly do not account for all the clients the Defendant acted for (including the Lost Borrowers). Further, details beyond the names of the clients cannot necessarily be derived from a mere Facebook post. As explained by Mr Dargan, the privacy settings of the clients may prevent viewers from accessing any further information beyond their Facebook name, and also from making direct contact with them through Facebook. On these grounds, I am satisfied details of the clients, including the client list, have not entered the public domain so as to be stripped of the necessary quality of confidence that would otherwise attach to such information.

246 I also accept the Plaintiff's submissions in response to the Defendant's submissions that while clause 7.4 restricts use of Confidential Information during the currency of the SOA (and for 10 years afterwards), to give the SOA any commercial efficacy that restriction should be read with the implied exception of use by the Defendant for the Plaintiff's business.

(2) Liability

247 The Plaintiff pleads various forms of misconduct in the Statement of Claim, which both parties have continued to address in their submissions. However, in my view it is unnecessary and unhelpful to deal with each separate type of misconduct pleaded. In light of the relief sought and admissions made, the issues to be resolved are, as I have said, first whether the Defendant misused the client list or information, and secondly whether the Defendant, at the very least, accepted approaches from the Plaintiff's clients.

1. Use of client list

248 The Defendant admits he retained in his possession after termination of the SOA a list or lists of customers of the Plaintiff (Defence [20]). This list is provided at CB 221-224 and includes well over one hundred names of clients the Defendant accepts he used while at RAMS (Defence [26]). Some of these clients were the Defendant's family and friends clients, but some were not (T136/20-30). Further, the Defendant agrees he downloaded the client content list from Mercury directly to his computer (T72/5-10) and that he emailed some accreditations, Lender updates, and email content for customers to himself (T72/35-40).

249 The Defendant also accepts he provided the RAMS receptionist with a list of 80-100 names of his clients' names and addresses from his time with the Plaintiff for the sending out of Christmas Cards (T68/30-45) (Defendant's closing submissions [68]).

250 As I have said, I am satisfied the Plaintiff's client list clearly falls within the meaning of Confidential Information under the SOA. Thus, in my view, this evidence is more than sufficient to show the Defendant breached clause 7.4, 7.5 and 8.2 of the SOA relating to the misuse of Confidential Information.

251 I acknowledge, as the Defendant submits, there is some vagueness surrounding the meaning of Client List or Retained List referred to in the Statement of Claim, with the Plaintiff never identifying a particular list or content in that list (T135/1-T136/26). However, in my view the admissions by the Defendant that the lists he did retain and use were lists of clients he had while

working for the Plaintiff make plain that such lists clearly form part of the Plaintiff's client list.

252 I am also satisfied the client list falls within the definition of Intellectual Property as the Plaintiff's copyright material, meaning the Defendant's retention of the client list is also in breach of clause 7.2. In my view the Plaintiff is correct in submitting *Telstra* cannot be applied in this case to render the computer generated client list in the online database Mercury void of copyright. I am satisfied human authorship has gone into the development of this information, and the fact it exists and is stored in an online database does not alter this. On these grounds the Defendant's retention of at least part of the client list is also a breach of clause 7.2 of the SOA.

2. Soliciting, canvassing, approaching or accepting approaches from the Plaintiff's clients

253 In my view, and critical to the question of damages, it is equally clear the Defendant has breached clause 8.3 and 8.4 by, at the very least, accepting approaches from the nine Lost Borrowers.

254 The Defendant accepted in final oral submissions that were I to find the nine Lost Borrowers were clients of the Plaintiff as construed under the SOA, then he would be in breach of clause 8.3 and 8.4 (T176/25-32). Based on my findings on construction, it is therefore clear the only conclusion to be drawn is that the Defendant was in breach of the SOA by either approaching or accepting approaches from the Lost Borrowers.

255 These Borrowers were, and are, existing clients of the Plaintiff. They were not the Defendant's family and friend clients, and the Defendant was no longer receiving any trail commission in respect of their loans. It makes no difference whether the Defendant solicited or approached them, or accepted an approach by them. Nor does it make any difference whether the Defendant dealt with them in relation to new facilities (that is, not refinancing of old facilities) or refinancing new facilities. The fact these Lost Borrowers were, properly construed under the SOA, clients of the Plaintiff, and the Defendant was writing loans for them well within 18 months following the termination of the SOA without the written consent of the Plaintiff, is more than sufficient to establish breach of clause 8.3 and 8.4 of the SOA.

256 Further, I am not satisfied clause 8.3 and 8.4 are cartel provisions under the CCA, nor unreasonable. I am satisfied the circumstances of this case fall squarely within the clear language of section 51(2)(b) of the CCA. The application of the section to any "provision of a contract of service or of a contract for the provision of services" captures and is intended to capture employees and independent contractors. The SOA is a contract for the provision of services, the Defendant is not a body corporate, and agrees to accept restrictions as to the work in which he can engage after termination of the SOA. On these grounds, section 51(2)(b) is clearly enlivened in this case. In my view, any opposing construction is untenable.

257 I am also not satisfied clause 8.3 and 8.4 are void on the grounds of being unreasonable. In my view, clause 8.3 and 8.4 go no further than necessary for the reasonable protection of the legitimate interests of the Plaintiff. As recognised by Latham CJ in *Lindner* at 633-634, it is well established provisions that preserve confidential information and/or seek that a person who has had personal contact not solicit those customers are reasonable restraints and not void. In light of the Defendant's substantial involvement with the client, both before, during and after a loan has been approved, I am satisfied clause 8.3 and 8.4 reasonably protect the goodwill of the business of the Plaintiff.

(3) Remedies

Injunctive relief

258 Due to my findings on liability, in my view it is appropriate to order the injunctive relief sought in prayers 1 and 2 of the Statement of Claim to stem the Plaintiff's damage.

Causation

259 In my view, if the Defendant had refused to accept an approach or refrain from soliciting the Lost Borrowers, the overwhelming likelihood is that they would have continued to obtain finance through the Plaintiff, with the exception of Borrowers A.

260 I accept the Plaintiff's position that the Defendant was contractually obliged pursuant to clause 8.4 to not interfere in the Plaintiff's business by advising the Lost Borrowers to go somewhere other than the Plaintiff. Further, I accept there

was no evidence of RAMS providing more competitive loan facilities, and thus no real financial incentive for the Lost Borrowers to migrate from the Plaintiff to RAMS. I am satisfied the only reason the Lost Borrowers chose to refinance through RAMS was because that was who the Defendant happened to be working for. They approached or accepted an approach from the Defendant because he was the same person they had dealt with in their relationship with the Plaintiff, and from this I can infer they were not dissatisfied with the services of the Plaintiff.

261 The exception to this is Borrowers A. I accept the Defendant's submission (T182/14-25) the evidence shows the Borrowers A were not happy with the Plaintiff's business (CB 460-463) and it was on those grounds they decided to move to RAMS.

262 On these grounds, I am satisfied causation has been established for all the Lost Borrowers except for Borrowers A.

Account of profits or damages

263 In addition to injunctive relief, I am satisfied a remedy by way of damages is more appropriate than an account of profits.

264 There are several reasons for this. First, the damage suffered by the Plaintiff is largely quantifiable, with the Lost Borrowers identified, in addition to the date and amount of their loans, and the past upfront and trail commission on those loans up to May 2017. Secondly, as an injunction will be granted, the assessment of damages need only be done for the months of June and July 2017. Further, there is no real suggestion that consistent with the underlying policy of an account of profits, the Defendant has cynically taken the view he will be ahead of the game even if he does not succeed on the question of breach. In addition, an account of profits will lead to a further delay of proceedings with the possibility for further argument and cross examination.

265 On balance, I am therefore satisfied it is appropriate to award a remedy by way of damages.

Calculation of damages

266 I propose to set out what, in my view, are the appropriate methodologies for calculating the four components the parties agree make up the damages. However, as the figures will differ from those the parties have provided me with, particularly in light of my findings on causation, I will invite the parties to apply these methodologies and agree on their own final figures.

267 However, before turning to the methodologies for calculating the various components, it is necessary I address three outstanding issues which traverse several of the components.

Number of Lost Borrowers

268 Based on my findings on causation [see [259] above], I am satisfied the Lost Borrowers comprise of the agreed list, except Borrowers A. Thus, any reference to the Lost Borrowers hereafter is a reference to the eight Lost Borrowers. It follows that any calculations either party has done or will do must reflect the amended list of Lost Borrowers.

Nature of the Lost Borrower loans

269 I am satisfied for the purposes of calculating damages, the Lost Borrower loans should be categorised as 'Referrals from the Originator's director' (**Director Referral Loans**) rather than 'Self-Generated Business.'

270 As I have found, based on a proper construction of the SOA, upon termination all clients in the Sub-Originator's loan book become the exclusive clients of the Originator, as reflected in the Sub-Originator's loss of entitlement to trail commission following termination (clause 13.1(iv)). Thus, just as the Plaintiff received 100% trail commission for Ms Wodecki's portfolio upon her termination, the Plaintiff would have received 100% trail commission for the Lost Borrowers had the Defendant not solicited, approached or accepted approaches from them once he had commenced work at RAMS. On these grounds, damages should be calculated on the basis of the Lost Borrower's loans being Director Referral Loans.

GST

271 The parties' submissions on whether GST is payable on trail commission are unsatisfactory. The Plaintiff relies on the Plaintiff's Trail Commission Report

(CB 600-684), while the Defendant simply maintains this Report contains no evidence of GST being payable on trail commission. No attempt has been made to form any submissions on the legal basis on which this Court should determine whether GST is payable, with no reference, for example, to the A New Tax System (Goods and Services Tax) Act 1999 (Cth), or authorities relevant to that Act.

272 On that basis, but for the agreed position on upfront commission, the parties should approach the Australian Tax Office for a ruling on whether GST is payable on trail commission.

273 I now turn to the methodologies which, in my view, are appropriate in assessing loss of commission for the four components.

(1) Past upfront commission

274 Taking into account my findings on the nature of the Lost Borrower loans, I am satisfied the correct methodology for calculating the past upfront commission is the total amount of the eight Lost Borrower loans from December 2016 – 31 May 2017 multiplied by 0.65% (the amount payable by Lenders to the Plaintiff as upfront commission) multiplied by 65% (the amount the Plaintiff would have received from the loan as a Director Referral Loan).

(2) Estimated future upfront commission

275 I accept there is a lead time between the loan applications and settlement, and it would have taken several months for the Defendant to have his new business up and running. In my view I am therefore satisfied the appropriate months to look at are March 2017 – 31 May 2017 to accommodate for the lead time from December 2016 – 28 February 2017.

276 However, I do not accept the Plaintiff's contention the upfront commission the Defendant received in May 2017 should be a reflection of the upfront commission he is likely to receive in the months following. While the Plaintiff asserts from the bar table there is no reason to believe the Defendant will not be recruiting customers at a slower or faster rate than in May 2017 (T189/46-50, T190/18-20), similarly, there is no evidence to show the Defendant will be recruiting customers at the same rate as in May 2017.

277 Taking these considerations into account, I am satisfied the most appropriate methodology is to take the average of the upfront commission received by the Defendant from March 2017 – 31 May 2017, and multiply this average by the amount of months until this injunction is granted. I accept applying an average is a blunt instrument and, in many ways, unsatisfactory, however in these circumstances I believe it is the most appropriate methodology in estimating the future upfront commission.

(3) Past trail commission

278 As I am satisfied the loans are appropriately categorised as Director Referral Loans, the Plaintiff would have been entitled to 100% of the trail commission per Annexure B of the SOA, and not 60% as submitted by the Defendant.

279 The Defendant accepted in oral submissions beyond the 100% versus 60% issue, he agrees with the Plaintiff's methodology (T192/30-35). I am similarly in agreement.

280 In my view, the appropriate calculation for past trail commission is therefore to take the loan balance amount from Confidential Exhibit P1 for each month for the eight Lost Borrowers, multiply that amount by 0.13% and then divide by 12, resulting in the total trail amount for that month. This amount should then be divided by the number of days in the month and then multiplied by the number of days from the date the loan settled to the end of the month to reflect the fact trail commission was calculated on a pro rata basis in the month in which the loan was settled.

(4) Future trail commission

281 The question of run-off rate is relevant to future trail commission calculated both until the proposed injunction is granted, and after the injunction is granted.

282 In my view, it is appropriate to apply a run-off rate of 1.5%. While I restricted Mr Dargan's evidence on this industry standard rate as evidence of his belief, the Defendant's confirmation of this figure in cross examination (T100/40-45) satisfies me, in the absence of any compelling evidence to the contrary, that such a rate is the appropriate rate to apply.

283 The Defendant's contention the 1.5% run-off rate does not properly reflect the Plaintiff's loan book is, in my view, based on flawed assumptions regarding the alleged short lifespan of the Plaintiff's loans. First, there is no evidence as to the exact nature of the 90,000 loan entries Mr Dargan made reference to being on the Mercury database. One cannot rely on the figure as the amount of settled loans the Plaintiff wrote over the last nine years.

284 Secondly, it does not follow, in my view, that the fact 58% of the Plaintiff's loans may have been written since 2015 means the Plaintiff's loans will more likely than not be discharged within 2.5 years. As the Plaintiff submits, this increase may simply reflect a growth in the Plaintiff's loan books over the past few years.

285 In light of these findings, I am satisfied a 1.5% run-off rate is the appropriate rate to apply to future trail commission.

(4)(i) Future trail commission until injunction granted

286 As this injunction is being granted in August, it is necessary to determine and then add together the future trail commission in June 2017 and July 2017.

287 I am satisfied the appropriate methodology for determining the future trail commission for these months is to multiply the total loan balance for the loans settled by the Defendant in the month prior to the month in question (applying the 1.5% run-off rate to that figure) by 0.13%, then divide by 12.

288 By way of example, to determine the future trail commission for July 2017, the methodology would be as follows:

> (Loan book balance for end of June 2017) +
>
> (Loan book balance for end of June 2017 x 98.5% (applying run-off rate))
>
> = Loan book balance for end of July 2017
>
> Loan book balance for end of July 2017 x 0.13%
>
> /12
>
> = future trail commission for month of July 2017

(4)(ii) Future trail commission following injunction

289 In my view the Plaintiff's approach to the calculation of future trail commission for the Lost Borrower loans is the more appropriate approach. First, it is more

appropriate to begin with the total trail commission for the month of June, rather than May 2017 since the latter month is factored into the past trail commission. To reach this sum for the total trail commission for June, the appropriate methodology is therefore to multiply the total of the Defendant's loan book as at May 2017 by 0.13% and divide that figure by 12. The 1.5% run-off rate should then be applied to each month.

290 On the question of the period in which this future trail commission should be estimated, neither side has engaged in any forensic efforts to support their submissions on this issue. The Defendant was in a position to disclose the precise length of the Lost Borrowers' loans under the cloak of a closed court. Equally, the Plaintiff could have subpoenaed RAMS to determine the length of the Lost Borrower's loans.

291 While imperfect, in my view the more appropriate period to calculate loss of future trail commission is 10 years. Some loans may be discharged within a much shorter period, however, as the Plaintiff submits, the 1.5% run-off rate allows for the diminution of the loan book.

292 Further, I am not satisfied the evidence shows the expiry of the 18-month restriction under clause 8 would have resulted in the Lost Borrowers turning to the Defendant to refinance. With no evidence of RAMS offering a better loan deal, in my view it is unlikely the Lost Borrowers would, after 18 months of having no contact with Defendant, decide to incur financial cost and effort of refinancing with the Defendant at RAMS. On these grounds I am not satisfied a one year period should be the cap on the future trail commission.

293 In the absence of any evidence showing the Lost Borrowers would likely return to the Plaintiff, I accept the most appropriate period to calculate the future trail commission is 10 years, that is, until August 2027.

Summary

294 In conclusion, I am satisfied the Defendant has breached clause 7.2, 7.4, 7.5, 8.2, 8.3 and 8.4 of the SOA, in addition to an equitable duty of confidence, by using and retaining the Plaintiff's client list, and, at the very least accepting approaches from the nine Lost Borrowers. Further, I am satisfied the injunctive

relief sought in prayers 1 and 2 of the Statement of Claim is appropriate to restrain the Defendant from continuing to engage in these breaches.

295 In my view, the evidence also shows that but for the Defendant's conduct, all of the Lost Borrowers except Borrowers A would have obtained their loans through the Plaintiff. On these grounds I am satisfied an award of damages is appropriate to account for the loss of opportunity, based on the methodologies provided above.

296 I invite the parties to agree on the appropriate figures for damages, applying the methodologies I have approved, and prepare short minutes accordingly. Further, I will hear the parties on costs if an agreement cannot be reached.

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Amendments

17 August 2017 - Judgment has been amended to de-identify the Lost Borrowers. Paragraphs amended:

• [30], [32], [65], [66], [67], [68], [72], [82], [105], [192], [193], [211], [214], [215], [216], [217], [259], [261], [262], [268], [295]