



GRIFFITHS & BEERENS PTY LTD

GB vs. DUGGAN & ORS. COURT CASE FINAL JUDGEMENT

On Wednesday, 11 June 2008, the judgment in the Supreme Court proceeding between GB and Paul Duggan and JAKMax was handed down.

On behalf of GB, I am pleased to announce that the adverse findings made by the Court concerning the conduct of Paul and Adam Duggan vindicated the decision to take this matter to court. It has taken 3 years to show that Paul Duggan didn't honour his agreement, under which he was paid close to \$6M.

The judgment also makes it clear that the behaviour of Paul Duggan was a breach of the normal conduct thought necessary for the proper conduct of commercial life, whilst still a director of GB.

I do recognize that the past three years has been very difficult for GB and many of our employees, customers and suppliers. I trust that this judgment brings these trying times to a close. On a personal note, I sincerely express my gratitude to those who have provided their personal support to me during these challenging times.

The fighting spirit, tenacity and strength of GB's employees stand testament to our ability to forge into the future with pride now that this judgment is concluded. GB now looks forward to the future. In 2009 we will celebrate our 50th anniversary. Leading up to that we will launch a complete new range of product and a complete new look company.

We will begin this process at the Cologne Trade Show in September this year. If you have an opportunity to visit this show, we invite you to join us in celebrating this new chapter in our history with us.

GB is proud of its history and, particularly, its significant role in the development of this industry, both in Australia and overseas. We are now squarely focused on the future and welcome your support to ensure that GB continues to play an important role in the future of the industry.

The Judge's decision is damning of the behavior of Adam and Paul Duggan among others. It is important when viewing the judgment that you read the entire document.

Below are included abbreviated highlights from the Judge's decision.

Tom Beerens
President
Griffiths & Beerens

GRIFFITHS & BEERENS PTY LTD
ABN 23 005 613 525

44-46 Berkshire Road
Sunshine Victoria 3020
Australia
PO Box 211
Sunshine Victoria 3020

Phone +61 3 9300 5555
Fax +61 3 9312 1207
Email sales@gbbar.com.au
www.gbbar.com.au



While the full judgement is lengthy (over 100 pages), it is a public document and can be downloaded from the Australian Government Website.

(URL: <http://www.austlii.edu.au/au/cases/vic/VSC/2008/201.html>)

Following is a summary of a few of the conclusions drawn by the Judge

Direct quotes from the judges decision are in italics.

Paul Duggan had started preparing to set up a business months before he had sold his interests in the business on June 29th 2005.

Court Decision Paragraph : 40.

“It seems to me that either of the two contending readings of Paul Duggan’s email of 25 May 2005 is reasonably open. Which of them is the correct one depends upon a broader context. I do not think the reading contended for by the plaintiffs should be preferred if I were to confine my attention solely to the text of the two emails. Indeed, their contention fundamentally depends upon the hypothesis that there had already been discussions with Dartong about future business involving Paul Duggan. I think that was likely and therefore do not accept the evidence of Paul Duggan that the words “please be patient for the moment” meant nothing more than that everything would be alright for Dartong without reference to some prior knowledge of an intention to secure supply from Dartong for a business other than for that of the plaintiffs.”

Court Decision Paragraph : 50.

“is that by June 2005 the probabilities were that, at the very least, Paul Duggan was taking steps to establish or to assist Adam Duggan to establish a business contrary to the interests of the plaintiffs and contrary to their assertions to the contrary.”

Paul Duggan did not act in a way which is fit and proper for someone running a business.

Court Decision Paragraph : 54.

“Critically what is to be enquired into is whether Paul Duggan’s behaviour breached the norm of conduct thought necessary for the proper conduct of commercial life so that people will have confidence that the running of the marketplace is in safe hands⁷. In my view he has done just that: whilst still director of the companies Paul Duggan was actively involved in assisting in the creation of a business using in that endeavour his position as director of the plaintiffs and information he was obtaining in that capacity.”

Paul Duggan has been intimately involved in JakMax from the very beginning, including providing significant financial support.

Court Decision Paragraph : 82.

“A great deal of evidence was presented directed to show that Paul Duggan had no involvement whatsoever in the creation of Jak Max which I am unable to accept. Whether there has been a breach of the restraint is something which I think can be concluded by looking at the totality of Paul Duggan’s conduct in light of the evidence as a whole²⁵, or, in this case, by looking at two principal areas of activity, namely, the provision of financial assistance to those connected with Jak Max and the contacts and the suppliers and customers of the plaintiffs²⁶.”

Court Decision Paragraph : 94.

Jak Max was incorporated on 7 September 2005 by Nick Loschiavo with Adam Duggan, John Duggan and Kylie Duggan as the directors and equal shareholders. The name “Jak” was chosen to incorporate the first letters of the three names of Paul Duggan’s children: John, Adam and Kyle. The word “Max” happens to be an abbreviation of the middle name of Paul Duggan (Maxwell). Two days previously Paul Duggan had paid the outstanding balance owing on the mortgage of Kylie Duggan’s unit in Moonee Ponds. Jak Max had applied to the Commonwealth Bank for a \$500,000 overdraft account; an application which was made through Mike Howell who had been Paul Duggan’s personal banker for many years

Court Decision Paragraph : 98.

“[. T]he application was referred to this office by Mike Howell of Private Bank who looks after the affairs of Mr Paul Duggan who is the father of the directors of the applicant company. Whilst we are relying on a cash flow to demonstrate servicing, we can gain some comfort from both the strong security position and the background of the clients. The initial referral was based around Mr Duggan (Snr) providing cash cover for the overdraft however as he signed a non competition clause when he left his last place of employment he is unable to assist the business in any way. Instead he decided to help his children and repaid their Home Loans as a measure of assistance. (My emphasis)

The note is telling in many respects and demonstrates that Paul Duggan, in providing properties to his children, had an intimate involvement in the Jak Max business, contrary to his testimony. It is clear from the note that Paul

Duggan's initial intention had been to provide cash cover and that the reason told to the bank for not doing so was his perception of an impediment created by the non-competition clause."

Court Decision Paragraph : 139

"After that meeting Chris Fehn received an email from Adam Duggan on 28 September 2005 attaching a quote for the generator. On 30 September 2005 he sent an email to Paul Duggan, Adam Duggan and Dean Stubbs stating "I am going to further distance myself from GB with a new e-mail address ... This will protect a bit more than the other." In the context in which this email was created, it provides evidence that Paul Duggan was known to be involved in the Jak Max business and that it was known that secrecy was needed."

Paul Duggan deliberately breached the terms of his agreement with Tom Beerens and that the terms were reasonable.

Court Decision Paragraph : 103

"I also find that Paul Duggan was involved in the Jak Max business contrary to the restraint clause by reason of his contacts with customers and suppliers of Jak Max"

Court Decision Paragraph : 108.

"I find that commercial activities with a view to profit had been undertaken as early as April 2005 and certainly by July 2005. Those activities were taken over by Jak Max from September 2005 upon its incorporation."

Court Decision Paragraph : 109.

"I also find that by then, and within the restraint period, Paul Duggan had been involved in that business through contacts with customers and suppliers"

Court Decision Paragraph : 135.

"I find it difficult to accept that Nick Loschiavo would take instructions from Adam Duggan, John Duggan or Kylie Duggan or any combination of them if Paul Duggan had no involvement in the business. Nick Loschiavo's experience in the industry spans twenty-two years whilst that of Adam Duggan only five. Nick Loschiavo accepted in evidence that Adam Duggan was at times irresponsible with money and I do not accept that Nick Loschiavo would put his financial security in the hands of the Duggan children alone."

Court Decision Paragraph : 136.

"This email, both as to its tenor and its contents, provides clear indication that Paul Duggan was actively directing the activities of Adam Duggan from August and September 2005 in relation to the latter's activities for Jak Max."

Court Decision Paragraph : 83.

"However, the evidence taken as a whole, in the context in which they all occurred, and in the light of the views that I reached about a number of witnesses, lead me to conclude that Paul Duggan was involved in the prohibited sense."

As an employee of GB Adam Duggan acted against GB.

Court Decision Paragraph : 156

"These dealings between Adam Duggan and Horst Braun are not, as contended on his behalf, "legitimate preparation for his leaving employment". I find there to have been, during the course of his employment, active steps taken by him against the interests of his employer at the time."

Paul Duggan and Adam Duggan lied to the judge and to the court.

Court Decision Paragraph : 115.

"Paul Duggan said that he had no knowledge that in the middle of July 2005 there had been any discussions between Kua Si Lin, Adam Duggan and Dean Stubbs proposing a business. He also said that had they been discussing a business at that stage he would have known about it. I agree and find that discussions did occur and that he did know"

Court Decision Paragraph : 137.

"Adam Duggan denied that he and his father had planned to travel together to Paris in September 2005, however, an email chain between Adam Duggan and Suzanne Legrand between 31 August 2005 and 1 September 2005 indicates clearly that there was such a plan. I reject Adam Duggan's denials as knowingly false. "

Court Decision Paragraph : 167.

I am not able to accept Adam Duggan's denials and indeed, found his evidence to be generally unreliable

Paul Duggan has had other people lie on his behalf, including other prominent business figures.

Court Decision Paragraph : 142”

“That is, that the conduct of Paul Duggan showed deliberate steps being taken with the intention of adversely affecting the plaintiffs’ relationship with its employees. I will not repeat the evidence concerning the resignation of Nick Loschiavo and my rejection both of the evidence he gave and that which Paul Duggan gave, to the contrary. It will be sufficient for me to note that I conclude that Paul Duggan induced Nick Loschiavo to leave his employment with the plaintiffs so that he would be available to work for the business that became that of Jak Max.”

Court Decision Paragraph : 160.

Kua Si Lin gave evidence corroborating Adam Duggan’s version of events. I am not able to accept as truthful the evidence of either of them in this respect

Paul Duggan induced people to leave GB and provided the opportunity and incentive to do so.

Court Decision Paragraph : 145.

“I also find that the Duggan children left the plaintiffs’ employment because they were given the opportunity and incentive to do so by their father’s direction, support and involvement in the proposed business”

Business was deliberately diverted from GB.

Court Decision Paragraph : 158

“about the correspondence between Adam Duggan and Kua Si Lin in August 2005 in relation to the supply of Shindaiwai products. I accept that this correspondence was at a time when Adam Duggan was not putting the opportunity forward as being for the benefit of GB and that Kua Si Lin was of the belief that any business carried out by Adam Duggan would not be for the benefit of GB but for the benefit of the Duggans and Adam Duggan’s private interest.”

Adam and Paul Duggan tried to sue GB for “distress, vexation and humiliation”. This was thrown out. The judge found that the police “invasion” of their homes was legal and justified. He further adds that even if it had not been legal he would only have awarded them \$1 in damages on account of the very low opinion he had of their behaviour.

Court Decision Paragraph : 201

“The defendants’ counterclaim was for an amount of \$91,104.18 due to Paul Duggan under the share sale deed and for damages for physical inconvenience, distress, vexation and humiliation arising from what they describe in their submissions as the execution of an Anton Piller order on the premises of Paul Duggan in a “high-handed and unwarranted intrusion of a private home”

Court Decision Paragraph : 204

“In the circumstances I do not find that the execution of the Anton Piller order was improperly sought, improperly obtained or improperly executed. I therefore dismiss the claim for damages. If, contrary to the view I reached on this matter, I had found that the claim had been made out, I would award only nominal damages of \$1 in view of the conclusions I have reached more generally about the conduct and evidence of the defendants.”