IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1041
[2026] NZHC 2279

BETWEEN	RASCALS INTERNATIONAL LIMITED First Plaintiff
	ZURU INC Second Plaintiff
AND	GRANT BRUCE BYRON TAYLOR First Defendant (Discontinued)
	KEITH ROBERT TAYLOR Second Defendant (Discontinued)
	JJK GROUP LIMITED Third Defendant
	TAONGA IP LIMITED Fourth Defendant

Hearing:	4 – 29 August 2025
Appearances:	C T Walker KC/J W J Graham/T F Cleary/S Patel for the Plaintiffs S M Lowery/M Pitt for the Third Defendant J C Suyker for the Fourth Defendant
Judgment:	5 August 2026

JUDGMENT OF GARDINER J

This judgment was delivered by me on 5 August 2026 at 4.30 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

INTRODUCTION

[1] In June 2020, the Australian owners of the well-known Treasures nappy brand announced that they were closing the Treasures factory and business in New Zealand. Treasures could not compete with low-cost imported nappies. Three friends, Jarrod Armitage, James Collie and Kirk Penney bought the Treasures brand and formed a company named JJK. They negotiated an exclusive supply agreement with

Countdown and placed orders for a redesigned Treasures nappy with a factory in China.[1]

[2] Rascal and Friends is a competing nappy brand, established by Grant Taylor, his father Keith Taylor and his sister Louise Taylor in 2016. The Taylors involved Nick Mowbray, co-founder of the successful ZURU group of companies and Grant Taylor's high school friend. Nick Mowbray helped to accelerate Rascals' growth through an exclusive supply arrangement with Foodstuffs. In early 2020, the Mowbrays initiated ZURU buying out the Taylor family interests in Rascals.

[3] Mr Armitage and Grant Taylor were acquaintances. Before buying Treasures, Messrs Armitage, Collie and Penney sought advice from Grant Taylor, given his experience in the nappy industry. Grant Taylor had by this time ceased any practical involvement with Rascals, but remained a director on the company record, pending receipt of the final payment from ZURU. Grant Taylor provided the JJK directors with information and advice about the nappy industry, establishing a nappy business, pitching to Countdown and nappy design.

[4] Previously, Rascals had considered buying the Treasures brand itself, as a way of accessing Countdown's supermarkets without breaching its exclusivity arrangement with Foodstuffs. When Nick Mowbray learnt in early 2021 that JJK had bought Treasures, he inferred that Grant Taylor had breached his restraint of trade and shared Rascals' confidential company information with JJK. He threatened legal action to Countdown, which caused Countdown to cancel its orders for Treasures nappies. Countdown later reinstated the orders, but on terms that were less favourable to JJK.

[5] In these proceedings, Rascals and ZURU claim that Grant Taylor breached duties he owed to Rascals by sharing confidential information with JJK and diverting the Treasures opportunity from Rascals to JJK. They say that had Grant Taylor not assisted JJK, Rascals would have bought the Treasures brand, relaunched it in

1 Countdown supermarket has since rebranded to Woolworths Supermarkets New Zealand, but this judgment will continue to refer to it by its former name.

Countdown and transformed it into a profitable business. They assess their lost profit and value as being between $7,376,033 and $20,556,159.

[6] The plaintiffs settled their claims against the Taylors before the trial began. The remaining claims are against JJK and Taonga, a holding company which owns the Treasures brand. The plaintiffs say that the JJK directors knew or turned a blind eye to Grant Taylor breaching his duties to Rascals by assisting them, and therefore JJK is liable as an accessory to his wrongdoing. They claim the profit and increase in value they say they were denied by JJK's actions. From Taonga, they claim the Treasures brand.

[7] JJK defends the claim on the basis that the JJK directors acted in good faith. They did not understand Grant Taylor to be doing anything wrong by giving them information and advice. They did not know that he was a still a director of Rascals. The information that he gave them was general and it did not appear to them to be confidential. They say that in any case, the plaintiffs have not proven that their actions prevented Rascals from buying Treasures and launching a nappy brand in Countdown. Rascals had the opportunity to acquire Treasures, but let it pass by.

[8] JJK raises a counterclaim against Rascals in relation to Nick Mowbray's statements to Countdown once he learnt JJK had acquired Treasures. JJK says that his actions caused Countdown to vary its terms of trade which resulted in over $1.6 million of losses. Rascals denies liability, saying that Nick Mowbray's statements were true and made for a proper purpose, that JJK failed to mitigate its losses, and one of the claims is time-barred.

[9] This case turns on the facts. So, after summarising the key events, I will make findings on the key issues of fact. These are:

(a) What information and advice did Grant Taylor give to JJK?

(b) Was the information confidential? This issue has a legal component, because the term "confidential" has a legal meaning.

(c) Did JJK know or close its mind to the information being confidential?

(d) Did Rascals plan to buy Treasures?

(e) Did Grant Taylor tell JJK that Rascals planned to buy Treasures?

[10] I will then consider the legal duties and obligations which Rascals claims Grant Taylor owed to it. The claims against JJK are dependent on Grant Taylor having breached one or more of these duties or obligations.

[11] Next, I will determine the legal causes of action against JJK and Taonga. These are that:

(a) JJK and Taonga breached an obligation of confidence.

(b) JJK dishonestly assisted Grant Taylor to breach duties he owed to Rascals.

(c) JJK knowingly procured Grant Taylor to breach duties he owed to Rascals.

(d) JJK conspired by unlawful means to harm Rascals.

(e) Taonga holds the Treasures trade marks on trust for Rascals.

[12] Finally, I consider JJK's counterclaim against Rascals..

[13] For ease of reading, I will begin by setting out the key conclusions I have reached.

SUMMARY OF CONCLUSIONS

[14] Some of Rascals' claims against JJK and Taonga arise out of the fact that formally, Grant Taylor was still a director of Rascals when he began assisting JJK. I have found that even if Grant Taylor breached directors' duties he owed to Rascals, JJK is not liable to Rascals. That is because the JJK directors did not know and nor

were they wilfully blind to the fact that Grant Taylor was still a director of Rascals. He would not have appeared to the JJK directors to have been a director and there is no evidence that Grant Taylor told them that he was still a director.

[15] I have also found that JJK is not liable to Rascals for encouraging Grant Taylor to breach his duty not to exploit a Rascals corporate opportunity for his own benefit. Grant Taylor did not breach this duty because he did not personally benefit from JJK acquiring Treasures. He was not a director, shareholder, or employee of JJK; he had no beneficial interest in JJK, and he was not paid any fees by JJK. He gave JJK informal information and advice. For the same reasons, he did not breach his restraint of trade.

[16] Relatedly, I have found that there is no evidence that Grant Taylor informed the JJK directors that Rascals was interested in buying the Treasures brand, as Rascals alleges.

[17] The case is really about confidential information. Whether the information that Grant Taylor gave to the JJK directors was confidential information, whether JJK knew or was wilfully blind to the fact that the information was confidential, and whether JJK unconscionably used any confidential information.

[18] I have found that most of the information and advice Grant Taylor gave to JJK was not confidential information. It was either not Rascals' information; or it was not information that was treated by Rascals' directors as confidential information. Rascals' directors disclosed the information to the business community at various business events.

[19] As to the information that Grant Taylor gave to JJK that was confidential, I have found that the JJK directors did not know and nor were they wilfully blind to the fact that it was confidential Rascals information. They may have been reckless and naïve, but they were not aware that the information was confidential.

[20] And JJK did not misuse the confidential information to the detriment of Rascals in the way that Rascals claims – by depriving Rascals of the opportunity to buy the Treasures brand.

[21] For these reasons, I have found that JJK and Taonga are not liable to Rascals under any of the causes of action against them.

[22] I have also found that Rascals' claim fails on causation. Rascals has not proved that it is more likely than not that it would have bought the Treasures brand itself had JJK not been involved. Rascals had an intermittent interest in buying the Treasures brand as a way of accessing the Countdown side of the supermarket duopoly but no firm plan to buy the brand.

[23] In terms of JJK's counterclaim against Rascals, I have found that Rascals, through Nick Mowbray, made misleading and deceptive statements about JJK to Countdown once it discovered that JJK had bought the Treasures brand. These statements caused JJK loss, because Countdown cancelled their purchase orders for the new Treasures nappies and required different terms which were less favourable to JJK. But JJK is barred from bringing this claim against Rascals, because it is out of time. I have found that Nick Mowbray made these statements recklessly, but not maliciously, so Rascals is not liable to JJK for malicious falsehood.

THE PARTIES

Rascals and ZURU

[24] The first plaintiff is Rascals International Limited, a Hong Kong incorporated company which carries on the Rascals nappy business (**Rascals International**). Until 2022, the Rascals nappy business was operated by Rascal and Friends NZ Limited (**Rascals NZ**). On 31 December 2022, Rascals International purchased the assets and assumed the liabilities of Rascals NZ.

[25] In this judgment, when the distinction between Rascals International and Rascals NZ is not relevant, I will simply refer to one or other, or both of these companies, as Rascals.

[26] The second plaintiff is ZURU Inc, incorporated in the British Virgin Islands. ZURU is primarily a product manufacturer, with well-known divisions in toys and consumer goods. ZURU was founded by three siblings: Mat Mowbray, Nick Mowbray and Anna Mowbray.

[27] ZURU bought out the Taylor family interests in Rascals NZ and Rascals International on 30 April 2020.

The Taylors

[28] The first defendant is Grant Taylor. He started the Rascals nappy business with his father Keith and sister Louise. He was formerly an employee, director and shareholder of Rascals NZ, and a director and, through a trust, shareholder of Rascals International.

[29] Keith Taylor was formerly an employee, director and shareholder of Rascals NZ, and, through a trust, a shareholder in Rascals International.

[30] The plaintiffs have settled with Grant Taylor and Keith Taylor.[2] Grant Taylor has filed an admission of the second, third, fourth, fifth, seventh and eighth causes of action against him in the plaintiffs' statement of claim. The plaintiffs have discontinued the remaining two causes of action against Grant Taylor, being the first and sixth causes of action, without prejudice to their claims against JJK.

[31] The plaintiffs have settled with Keith Taylor and discontinued the claim against him without any admissions.

JJK and Taonga

[32] The third defendant is JJK Group Limited (**JJK**). Its directors are currently Jarrod Armitage and James Collie and previously included former New Zealand basketball representative Kirk Penney. JJK was incorporated specifically to buy the Treasures brand, and to manufacture and sell nappy products using that brand.

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2 The claims against Keith Taylor were settled around June 2025. The claims against Grant Taylor were settled on 28 July 2025.

[33] The fourth defendant is Taonga IP Limited (**Taonga**). Taonga was recently added to the proceeding, after the plaintiffs learnt that the intellectual property relating to the Treasures brand had been transferred from JJK to Taonga.

[34] Taonga has common directors with JJK and nearly identical shareholding. Taonga is 100 per cent owned by Taonga International Limited, of which Messrs Armitage and Collie are also directors, and JJK is 85 per cent owned by Taonga International Limited, with the remaining shares owned by Mr Collie.

[35] For convenience, and unless the context requires otherwise, this judgment refers to the plaintiffs as Rascals, the first and second defendants as the Taylors and the third and fourth defendants as JJK. Grant and Keith Taylor are referred to by their full names to avoid confusion, as are Nick and Mat Mowbray.

THE CLAIM, DEFENCE AND COUNTERCLAIM

The claim

[36] Rascals claims that from March 2020, and with the Taylors' knowledge, Rascals developed a "Treasures Business Plan". The "Treasures Business Plan" was to acquire the Treasures brand (but not its plant), develop an exclusive relationship with Countdown to sell Treasures nappies through their supermarkets, and transform Treasures into a highly profitable business by applying the Rascals business model.

[37] Rascals claims that the Taylors had knowledge and confidential information about Rascals and its business model, including its pricing, its factories in China, an agent in China which Rascals had used, its sale and distribution model, its targeted digital marketing approach and the technical specifications of Rascals' nappies.

[38] Rascals claims that all this information, along with the intellectual property and know-how of Rascals, was not generally known to the public and was of significant commercial and proprietary value to Rascals.

[39] Rascals claims that while still a director and knowing of Rascals' Treasures Business Plan, Grant Taylor assisted the directors of what was to become JJK to pursue

the Treasures opportunity, by disclosing to them confidential information and providing advice and assistance. This involved meetings, telephone calls, text messages, travel to the Treasures factory, and the provision of Rascals-branded information and presentations.

[40] Rascals claims that the JJK directors received that information knowing that it was provided in breach of duty and was confidential; and received Grant Taylor's advice and assistance with the Treasures opportunity knowing that this was in breach of his duties, or at the very least were wilfully blind to these facts.

[41] Rascals claims that using information provided by Grant Taylor and applying the Rascals business model, JJK purchased and developed Treasures. As a result, Rascals lost the opportunity to purchase the Treasures brand and implement the Rascals business model to make a profitable company. Rascals claims lost profits and loss of value in the Rascals shares.

[42] There are twelve causes of action. Ten of these are brought by the first plaintiff, Rascals, against the Taylors, and/or JJK and/or Taonga. The second plaintiff, ZURU, brings two causes of action against Grant Taylor for breaching contracts.

[43] With the admissions by Grant Taylor, there are only six operative causes of action brought by Rascals against JJK and/or Taonga:

(a) **Breach of confidence** (fifth and twelfth causes of action): that JJK and Taonga received Rascals' confidential information, knowing or being wilfully blind to Grant Taylor's breach of confidence vis-a-vis Rascals, causing Rascals loss.

(b) **Conspiracy by unlawful means** (sixth cause of action): that Grant Taylor and JJK engaged in a conspiracy with intent to injure Rascals' commercial interests, through misusing its confidential information, causing Rascals loss.

(c) **Knowing procurement of breach of duty** (ninth cause of action): that JJK knowingly procured Grant Taylor to breaches his duties to Rascals (being the directors' duties, duty not to misuse company information, fiduciary duties, and duty of corporate opportunity), causing Rascals loss.

(d) **Dishonest assistance** (tenth cause of action): that JJK dishonestly assisted Grant Taylor to breach his duties to Rascals, profiting from those breaches, and causing loss to Rascals, so that they hold the resulting assets on a constructive trust for Rascals.

(e) **Constructive trust** (eleventh cause of action): that Taonga received and holds assets (the Treasures brand) from JJK knowing that they were subject to a constructive trust in favour of Rascals and therefore holds the assets on a constructive trust for Rascals.

[44] Rascals submits that because JJK has not denied the allegations that Grant Taylor breached his duties in the breach of confidence causes of action (fifth and twelfth causes of action) and the ninth and tenth causes of action (knowing procurement and dishonest assistance), and because Grant Taylor has admitted these breaches, those allegations are deemed to be admitted by JJK.

The defences

[45] JJK and Taonga deny the claims. Their primary defence is that JJK did not know what it was doing was wrong or close its mind to that possibility. JJK did not know or suspect that Grant Taylor remained a director of Rascals, did not think the high-level information and guidance provided by Grant Taylor was confidential, and did not understand that Treasures was an opportunity Rascals wanted to pursue. JJK acted in good faith.

[46] Furthermore, JJK says that:

(a) the information and advice Grant Taylor provided to JJK was not confidential and was in the nature of friendly business advice;

(b) JJK did not use the information Grant Taylor provided to purchase the Treasures brand or in operating the Treasures business;

(c) JJK would have purchased Treasures without Grant Taylor's assistance; and

(d) Rascals did not have a "Treasures Business Plan".

[47] JJK and Taonga reject that their statements of defence amount to an admission that Grant Taylor breached his duties.

[48] I find for JJK and Taonga on this pleadings issue. The relevant paragraphs of their statements of defence say: "It apprehends that [the paragraph of the statement of claim] is not an allegation against it and therefore it is not required to plead to the paragraph." Further, at the time the statements of defence were filed, Grant Taylor denied these allegations. In that context, their pleadings should not be treated as admissions of the allegations.

[49] And Grant Taylor's subsequent admissions do not discharge Rascals' burden of proof against JJK and Taonga. An admission can only be used against the party that makes it.[3]

The counterclaim

[50] JJK counterclaims that when Rascals discovered the matters which gave rise to the proceeding, Nick Mowbray contacted Countdown and claimed that JJK had infringed Rascals' rights. As a result, Countdown cancelled some JJK orders and renegotiated terms, which led JJK to agree that, for a period, it would supply on a free in store (**FIS**) basis rather than free on board (**FOB**). This change is said to have increased costs to JJK.

[51] JJK pleads two causes of action:

3 *Financial Markets Authority v CBL Corporation (in liq)* [2025] NZHC 295 at [30].

(a) breach of the Fair Trading Act 1986 (FTA); and

(b) injurious falsehood.

[52] Rascals says that:

(a) among other things, the FTA claim is time-barred;

(b) the injurious falsehood claim fails because Nick Mowbray believed what he was saying to Countdown; and

(c) JJK failed to mitigate its loss.

KEY EVENTS

Rascals founded

[53] In 2014, the Taylor family explored the idea of starting a nappy business. They thought that there as an opportunity to create a nappy brand that produced high quality nappies with an aesthetic appeal to millennial parents. They identified that the way to build the business was to manufacture in China and import to New Zealand.

[54] The Taylors' preliminary research included contacting Portia Yuan, a commercial agent who acted as a liaison with manufacturers in China. They were introduced to Ms Yuan by friends who imported power tools from China. Over 2015, the Taylors visited China twice and visited multiple factories with Ms Yuan. They used Huggies nappies (bought off the shelf in New Zealand) as the base for working up a new nappy design with the factories. They settled on Yoursun as their chosen manufacturer.

[55] In early 2016, the Rascals nappy business began, when the first orders arrived. The nappies were exclusively sold online and at baby shows. For convenience, the Taylors used an existing company that Keith Taylor had incorporated many years prior as the vehicle for the business.

Nick Mowbray becomes involved in Rascals

[56] In September 2016, Grant Taylor and Nick Mowbray went on a holiday with some friends. Matt Banfield, another school friend, was also present at the trip. Grant Taylor discussed the Rascals business with both of them during this time.

[57] After the trip, in October 2016, Nick Mowbray reached out to Grant Taylor regarding getting involved in the business. Nick Mowbray began working with Rascals from December 2016 by arranging meetings with retailers, such as The Warehouse, Foodstuffs (which operated New World, Pak'nSave and Four Square), and the Baby Factory.

Rascals NZ established

[58] The arrangement between the Taylors and Nick Mowbray was formalised through the incorporation of Rascals NZ on 19 June 2017. Around this point, Mr Banfield also became involved. The share allocation was as follows: 50 per cent to the Taylors, 40 per cent to Nick Mowbray and 10 per cent to Mr Banfield.

[59] There were four directors: Grant Taylor, Nick Mowbray, Keith Taylor and Louise Taylor. The Taylors and Mr Banfield were also employees of the company: Grant Taylor was General Manager, Keith Taylor was Chief Financial Officer, Mr Banfield was Chief Operating Officer and Louise Taylor was involved in product development and marketing.

Launch with Foodstuffs

[60] Rascals first met with Countdown to discuss supplying Rascal and Friends products. However, this discussion did not go any further.

[61] The second meeting was with Foodstuffs, who were interested. On 22 September 2017, Rascals and Foodstuffs signed an exclusive supply agreement, confirming exclusivity between Rascals and Foodstuffs, over the Rascal and Friends branded range of nappies.[4]

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[4] A revised agreement confirming the exclusive arrangement was signed on 2 April 2018.

[62] Rascals' products were launched in Foodstuffs stores in September 2017. Rascals and Foodstuffs agreed on a FOB model, which meant the retailer would send purchase orders to Rascals which would then order the products from the factory. Invoices would be sent to the supermarkets, and it was at this point the factories were paid.

[63] This arrangement was a great success for Rascals. Within a year of launching with Foodstuffs, Rascals achieved over $10 million of sales in New Zealand.

Factory change

[64] Around the time that Rascals entered into the agreement with Foodstuffs, it switched to a new factory called Joylink. Grant Taylor's evidence is that he and Mr Banfield had gone to China with a view to negotiating the factory price down given that volumes had increased significantly and would only increase further. They were unhappy that Yoursun had raised its prices and there were some quality issues. Mr Banfield and Grant Taylor viewed factories suggested by Ms Yuan, including one called Joylink. They gave Joylink samples of Rascals nappies, who took the nappy and quickly reverse engineered it. Joylink offered a price which was considerably cheaper than Yoursun. Grant Taylor and Mr Banfield were impressed. Rascals terminated its arrangement with Yoursun and began using Joylink to manufacture its nappy products.

Rascals International

[65] Given Rascals' success in New Zealand, Rascals International Ltd was incorporated in Hong Kong on 23 May 2018, with a view to selling Rascals' products internationally. Rascals International's shareholders were ZURU (90 per cent), the Taylor interests (eight per cent) and Mr Banfield (two per cent). A shareholders' agreement was finalised on 23 July 2018.

[66] The shareholders' agreement provided for Rascals International to enter into exclusive worldwide license and distribution agreements with ZURU Edge for the sale and distribution of Rascals nappy products (excluding New Zealand and Australia). Rascals Original assigned the intellectual property rights in the nappy product to

Rascals NZ, which in turn assigned the rights (excluding retained intellectual property) to Rascals International. The intellectual property rights were the registered trade marks “Rascal and Friends” and the “kiss” pattern on Rascal and Friends nappies and packaging.

Mowbrays buy out Taylors

[67] On 24 February 2020, Mat Mowbray messaged Grant Taylor saying he wanted to discuss the structure of the nappy business. The next day, Mat Mowbray sent a follow up email, raising options for how the business could move forward:

> 1 we get another office for Rascals NZ/Aus which you run, 2 we keep Rascals where it is now and let Zuru edge run it or 3 we buy you out.

[68] Grant Taylor, Mr Banfield, Louise Taylor and Mat Mowbray met at Mat Mowbray’s home that day. There was another meeting the next day with Grant Taylor and Mr Banfield. Mat Mowbray made it clear that ZURU would not sell Rascals International.

[69] On 5 March 2020, the Taylors (Grant and Keith) and the Mowbrays (Nick and Mat) met at the Mowbrays’ home. It was at this meeting, or shortly afterwards, that the Taylors agreed to be bought out of Rascals NZ and Rascals International. The Taylors’ evidence is that they had no option but to sell; but were devastated to be forced out of the business they had created.

[70] The Taylors’ impression from these early meetings was that the Mowbrays were not going to require a restraint of trade. On 16 March, Mat Mowbray advised the Taylors that Foodstuffs had requested a non-compete element in the Rascals buyout arrangements. The Taylors’ position remained that they did not want a non-compete and that they were a “mirror image” of “Nick [who] didn’t want do one”. The Taylors suggested that they negotiate the non-compete with Foodstuffs, separate from the buyout arrangements.

[71] Mat Mowbray’s position was that the non-compete was“non-negotiable” for the Mowbrays and, without it, the alternative was for the Taylors to buy out the Mowbrays for $25 million.

[72] On or about 21 April 2020, the Taylors entered into the sale and purchase agreement (**SPA**) to sell their Rascals shares (50 per cent in Rascals NZ and eight per cent in Rascals International) to ZURU. The settlement date was 30 April 2020, with a financial wash-up period to 15 May 2020, when financial accounts to 30 April 2020 would be prepared, and final dividends confirmed.[5] The agreement provided for the Taylors to remain as directors until the end of the wash-up period. The SPA included a restraint of trade which prohibited the Taylors from competing with Rascals, in nappies, in Countdown.

[73] On 30 April 2020, the Taylors transferred the website domain names, and executed share transfer documents, to be held in escrow by the Taylors' lawyers until the end of the wash-up period. Grant and Keith Taylor executed notices of resignations as directors of Rascals NZ, stated to have effect from 15 May 2020. Grant Taylor also signed a notice of resignation as a director of Rascals International, with immediate effect, on 30 April 2020. The SPA provided that their salaries as directors-employees ceased on 30 April 2020.

[74] However, the share transfers were delayed, to avoid double taxation and due to delays relating to COVID-19. On 3 August 2020, the Taylors executed further share transfers and new notices resigning as directors of Rascals NZ. The restraint of trade clause in the SPA came into force on this date.[6]

[75] The Taylors ceased to be shareholders of Rascal NZ on 5 August 2020. The shareholders of Rascals NZ became ZURU Inc, Matt Banfield and Nick Mowbray.

The ALDI approach

[76] In mid-May 2020 Grant Taylor was approached by ALDI, an international supermarket chain, for assistance with setting up an "eco" own-brand nappy for ALDI in Australia. He did not consider there to be an issue with his restraint of trade, which was limited to Countdown. Rascals had no relationship with ALDI. He made contact with Joylink on behalf of ALDI.

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5 Agreement for sale and purchase of shares at cl 1.1.

6 Clause 13 of the Agreement for the Sale and Purchase of Shares states that the restraint of trade applies on the date the vendor acknowledges receipt of the final payment.

[77] Nick Mowbray learned of this involvement. He expressed his disappointment to Grant Taylor and said that he felt his trust had been broken. Grant Taylor explained that he thought that his actions were fine as they were not in breach of his restraint, but acknowledged in hindsight that he should have declined ALDI.

JJK acquires Treasures

[78] In late June 2020, Mr Armitage heard that Treasures was closing in New Zealand. Mr Armitage is an entrepreneur with interests in an inflatable playground business, an indoor playground and entertainment venue, a waterpark, a beauty product business and luxury accommodation. At the time, he was looking for opportunities and had cash available from the recent sale of a property.

[79] Mr Armitage contacted an old friend of his, Mr Collie, regarding whether they should acquire Treasures. Mr Collie is a businessman with interests in the beauty and personal care sector. A few days later, Mr Armitage suggested that Mr Penney could be involved in the business if they were able to buy it. Mr Penney had recently moved back to New Zealand as he could not continue his basketball activities in the United States due to COVID-19.

[80] Mr Armitage began a dialogue with Asaleo Care about buying Treasures. On 4 August 2020, JJK (through their counsel) presented offers to buy the Treasures brand: $100,000 for the brand alone or $500,000 for the brand along with assistance with stocking Treasures in Countdown. Ultimately, JJK agreed on or around 7 August 2020 to buy the brand for $300,000. The agreement for the sale and purchase of the brand was executed on 8 September 2020 and the transaction settled on 11 September 2020.

Discussions with Grant Taylor

[81] Mr Armitage and Grant Taylor met in 2019 through a mutual friend. They both lived in Coatsville and attended an informal coffee group hosted at a Coatesville establishment, the Black Cottage Café. They had been going for walks together during the COVID-19 lockdowns. Mr Armitage had been trying to set up a facemask business, and Grant Taylor had given him Ms Yuan's contact details for this reason.

[82] Mr Armitage approached Grant Taylor to provide the JJK directors with information and advice about the nappy business. From 7 July, the JJK directors spoke with Grant Taylor on several occasions. Initially, the JJK directors hoped that Grant Taylor would become involved in the venture, but it became apparent that was not possible due to the restraint of trade in the SPA with ZURU.

[83] During their discussions Grant Taylor informed JJK about the nappy industry, strategies involved in developing a successful nappy business, and the basic features of a nappy. He also introduced them to Ms Yuan.

Treasures in Countdown

[84] While the JJK partners were considering whether to make an offer for Treasures, they sought advice from Foodstuffs executive Paul Blackwell, who was a friend of Mr Penney's. Mr Blackwell advised Messrs Penney and Armitage that they were unlikely to get Treasures into Foodstuffs as it had performed poorly there, while Rascals was performing well. That left Countdown.

[85] From 22 July 2020, JJK engaged with the nappy category manager at Countdown to pitch the new Treasures business and try to negotiate a supply agreement. At their second meeting on 5 August 2020, Countdown indicated that it was open to considering Treasures but wanted a more detailed presentation and more sample nappies.

[86] Ms Yuan connected JJK with the Yoursun factory in China, which produced sample nappies for JJK's next meeting with Countdown. JJK engaged professionals to develop various aspects of the business, such as nappy design and marketing. At a third meeting with Countdown on 10 November 2020, Countdown indicated that if their suggested changes to the nappy were made, JJKwould likely secure a deal.

[87] On 22 December 2020, Countdown agreed in principle to stock the new Treasures nappies, subject to finalisation of terms. Further changes to the nappy were made.

[88] On 28 April 2021, JJK and Countdown agreed the final terms and conditions for the supply arrangement. This was signed by Mr Penney on 2 May.

[89] On 14 May 2021, Countdown issued its first set of purchase orders to JJK. However, on 17 May, Countdown cancelled those orders after Nick Mowbray contacted the supermarket.

[90] On 31 May 2021, the plaintiffs filed this proceeding.

FACTUAL FINDINGS

[91] Before addressing the facts in greater detail, I must address three evidential issues that arose during the trial.

Evidence issues

Grant Taylor settlement affidavit

[92] As noted earlier, Rascals settled with Grant Taylor and Keith Taylor before the trial. Grant Taylor filed an admission of the second, third, fourth, fifth, seventh and eighth causes of action against him in the plaintiffs' statement of claim. He also affirmed an affidavit explaining his involvement with JJK in relation to Treasures. It was a condition of his settlement that he affirm an affidavit in an agreed form.

[93] JJK called Grant Taylor to give evidence. Mr Lowery put the affidavit to him and asked him questions about the process by which he came to affirm the affidavit. Mr Walker cross-examined Grant Taylor on this issue.

[94] It emerged that this affidavit was arrived at by a process of negotiation between Grant Taylor, his lawyers, the plaintiffs and their lawyers. At certain points there were direct negotiations over the content of the affidavit between Grant Taylor, Mat Mowbray and Michael Wilding, Group Chief Operating Officer of the ZURU Group of companies. Grant Taylor's evidence is that while he is comfortable overall with the affidavit, if he "had written it without the pressure of the other side, it wouldn't have read how it read."

[95] This context affects the weight that I put upon this affidavit as a source of evidence. Having said that, aside from some expressions of opinion about the utility of Grant Taylor's advice to JJK inserted at the initiation of the plaintiffs, the affidavit's contents are not controversial. Grant Taylor admits that he deleted messages in May 2021 when Nick Mowbray found out that he had spoken with the JJK directors about Treasures. He admits he sent JJK two presentations and disclosed in general terms Rascals' margins on nappies. Grant Taylor conceded these facts in his evidence at trial.

[96] What is more notable than what the affidavit contains, is what it does not contain. Grant Taylor refused to say that the JJK directors were likely to have known he was a director of Rascals when he was speaking to them about Treasures, because that would be untrue. He refused to say that JJK attempted to coerce him to provide more information, despite knowing he was under a restraint of trade and still a director of Rascals, and that JJK put him in a compromising position. And he resisted efforts to have him affirm that he had deleted a "large number" or a "significant number" of documents, settling on "a number" of documents. In his evidence at trial, he confirmed that the correct position was that he had deleted a "small number" of documents. And while he understood that Mr Armitage and Mr Penney had also deleted documents, he had no reason to believe that Mr Collie had deleted any documents.

Mr Penney's deposition

[97] On 21 July 2025, ZURU deposed Mr Penney in Wisconsin, the United States, where he was living at the time coaching basketball. The deposition took place in a room in a Holiday Inn. The only person present with Mr Penney was a court reporter. Lawyers attended by Zoom videoconference. The examination began at 12:07 pm and concluded eight hours later at 8:08 pm. ZURU's counsel Mr Olavson, examined Mr Penney for seven hours.

[98] Rascals relies on statements Mr Penney made during this deposition, including that:

(a) there was widespread deletion of documents in May 2021; and

(b) he and the other JJK directors understood that Grant Taylor remained a Rascals director when he provided them with information and guidance.

[99] Mr Penney is no longer involved in JJK, having sold his shares to the Mowbray interests in August 2024. He declined to provide a brief of evidence for either Rascals or JJK. He gave evidence at the trial under subpoena from JJK. Mr Penney drew an analogy to "Switzerland", explaining that he did not want to assist either party. He explained, "we're trying to just get to the nugget of truth, like where we're at, so that's all I'm trying to do."

[100] His evidence at trial was that:

(a) he deleted a small number of documents in May 2021; and

(b) it did not occur to him that Grant Taylor was a director of Rascals when he was interacting with Mr Taylor about Treasures in 2020.

[101] I prefer the evidence Mr Penney gave at the trial to the evidence he gave in the deposition, for the following reasons. First, Mr Penney said he did "absolutely nothing" to prepare for his deposition. He said that at the start of the deposition, and he explained it in his evidence in Court:

> Q: Before your deposition, what if anything did you do to prepare for it?
>
> A: Absolutely nothing, you know I was coaching, it was around noon, and rocked up in a hoodie and it was like, I went to this room in this hotel, someone there and sat there for several hours just you know, I really hadn't prepared one thing in years. And it was, the one thing that was good about it, was like, oh man, it's good just to start thinking about this all again and getting some refreshers for being at trial. But certainly at times I was just trying to get through it you know.

[102] When questioned on the inconsistences between his answers in the deposition and at trial, Mr Penney explained:

> . . . you're being led around, and I tried to do the best I could, and certainly once you have more time to focus on the case, and I was over the case, you know, a couple of years ago, I truly was, and then when I exited the company or when I wasn't working in it anymore I wasn't on the case. But it's been good to come back, re-read my affidavit, go through it all, and really, really

> lock in on the case again, and I had not done that. And I, you know, I had not done that, I did not have the time.

[103] Second, when Mr Penney was informed of his right to correct his deposition by way of an errata sheet, he corrected two matters:

(a) "When we were talking to Grant Taylor, it was not on my radar that he was a director of Rascals. I thought he had sold his Rascals shares. I did not think to think that Grant could still have been a director."

(b) "I remember being in the office with someone else when I deleted the documents. It was either James or Jarrod, but I cannot be sure which one."

[104] Third, Mr Penney was a highly credible witness. As he had not provided a brief, his evidence had to be led in the old-fashioned way. It was clear to me that he did the best he could to answer questions from both counsel honestly and accurately. He made reasonable concessions, admitted unhelpful facts, and apologised for inaccuracies in his deposition.

[105] When it was put to Mr Penney that he was trying to walk back his deposition testimony and present untrue evidence, Mr Penney responded:

> I'm not trying to walk anything back. I'm really not. I'm just trying to say like in that first meeting obviously Grant's telling the story of selling his shares, and for me to think is he a shareholder or is he still a director, he never told me he was still a director, he was a shareholder, he didn't tell me anything about the structure of the company. I don't know what percentage – I just wasn't at that level of evaluation when I met Grant, I was just meeting Grant and talking to him and I wasn't trying to evaluate if he was a director or a shareholder or what any of his structure of his companies were.
>
> . . .
>
> I'm not involved in ZURU or JJK, not trying to protect anyone or Grant right now, I'm just trying to explain. Like I've got nothing here than just trying to get through this and for accurate truths to be told.

Deleted records

[106] Rascals claims that the Court is missing key communications between Mr Armitage and Mr Taylor; Mr Penney and Mr Taylor; and Mr Penney, Mr Taylor, and Ms Yuan. Rascals says that it is obvious that the following records have been deleted:

(a) WeChat or text communications between Mr Penney and Mr Taylor.

(b) WhatsApp messages between Grant Taylor and Mr Armitage.

(c) An email from Mr Taylor to Mr Penney sending an Excel spreadsheet with margin calculation formulas in it and a screenshot of Rascals' pricing information.

(d) WeChat messages between JJK and Ms Yuan prior to 15 September 2020.

(e) Mr Penney's Treasures 2.0, 3.0 and 7.0 emails.

(f) Email or other communication from Grant Taylor providing JJK with the Rascals 2020 Eco brand presentation.

[107] Rascals submits that the incomplete record is due to Grant Taylor's and JJK's deliberate conduct to conceal their interactions, and to delete the most relevant documents evidencing their wrongdoing to prevent this Court finding against them. Grant Taylor and Mr Penney have admitted to destroying documents, including messages and emails. Mr Armitage admits he at least gave Mr Penney his phone to delete material from, because JJK was worried about being sued.

[108] Rascals invites the Court to draw adverse inferences about what those deleted documents would have disclosed. Namely that the documents were even more "convicting" of JJK; and would have shown that JJK knew Mr Taylor was a director of Rascals, knew of his restraint of trade, knew that Rascals wanted to acquire Treasures, knew the offers that had been made and the Taylors proposed prices, knew

and recorded some of the information it received as confidential, and knew that what they were doing was wrong and needed to be hidden.

[109] JJK accepts that documents were deleted. JJK has always acknowledged that in May 2021, Kirk Penney deleted documents. Mr Penney disclosed this in his discovery affidavits dated 15 June 2023, 6 July 2023, and 11 August 2023.

[110] However, JJK says that a limited number of documents were deleted. First, JJK says that Mr Collie did not delete any documents. His evidence on this point is clear: "I haven't deleted anything. If it was created, it would have been sent to me, and I haven't deleted anything". He said, "[a]pparently the guys did freak out a bit… I haven't deleted anything, and I haven't – yeah, I don't have deleted messages… I wasn't part of a deleting session." Mr Collie maintained this position in cross-examination. So, JJK submits that almost all the documents Mr Penney deleted have been retrieved because Mr Collie was copied in on most of the communications.

[111] Second, JJK submits that the Court can have confidence about the information Mr Taylor provided JJK, because Mr Penney wrote it down. Mr Penney's evidence is that his 22 July 2020 "brain dump" email contained "everything we learnt, everything we knew" at that time.[7] He later said about the same email "I've just put everything I know into that email".

[112] After 22 July 2020, Mr Penney continued to record the information and guidance provided. To the extent Mr Penney considered he received anything useful, his evidence is that he would write it in an iPad note and send it on to Messrs Collie and Armitage. He said he would send around "things that [he] thought mattered and not things that [he] thought didn't matter". Mr Penney's evidence is that there are unlikely to have ever been Treasures 2.0, 3.0 or 7.0 emails if they cannot be found; he does not recall deleting them.[8]

[113] JJK notes that Mr Penney and Mr Collie were not careful about what they put into writing. Mr Penney's emails record everything Grant Taylor told them.

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[7] This email is addressed later.

[8] The suggested existence of Treasures 2.0, 3.0 and 7.0 emails is drawn from Mr Penney's notes, which are in evidence, marked Treasures 4.0, 5.0 and 8.0. I will address this evidence later.

Mr Collie's 24 July 2020 email refers to advice and discussions with Grant Taylor after the first meeting with Ms Young.

[114] Third, JJK submits that Grant Taylor's settlement affidavit is inconsistent with mass deletions. As discussed, Mr Taylor was unwilling to accept the plaintiffs' request that he attest to large scale deletions, despite their repeated requests. The negotiations about the affidavit record the truthful position that he deleted a "small" number, although he ultimately agreed to say "a number" because he knew Mat Mowbray would "not settle without it".

[115] Fourth, JJK submits that Mr Penney's deposition is unreliable. In his deposition, Mr Penney said that after the Mowbrays raised their allegations, there was "a deletion morning out of panic, not knowing what to do". He said, "we didn't delete that much or one side of it didn't delete it" and described it as "a little deletion session" that was "not long. Maybe 15-20 minutes".

[116] As noted above, Mr Penney later amended his deposition evidence to clarify: "I remember being in the office with someone else when I deleted documents. It was either James or Jarrod but I cannot be sure which one."

[117] In his evidence before this Court, Mr Penney explained the situation in this way:

> Q: Why did you delete things?
>
> A: Just Grant just thought, you know, thought we should. I think, like I said to you, he's incredibly fearful of ZURU and I believe that from Grant's perspective, right or wrong, he just felt like, you know, once Nick had messaged [Grant Taylor] and almost threatened him, he told us about it and he was like – you know, he was filled with a lot of fear and I think I – I didn't delete much, I probably deleted – you know, 99% of it is there, I think we've seen it all. I think even on other – you know, James and other people had things and it's all, I think it's all seen the light of day. There's nothing of note that hasn't seen the light of day I don't believe. But yeah, I think it was a bit of a reactionary thing. I am sorry I did it, I wish I hadn't, but it's just – you know, I heard it, heard the panic, delete and, oh, you know, what have I done. I think, you know, if we really wanted to delete everything, everything would have been deleted, and it wasn't like that.

[118] In cross-examination, Mr Walker put to Mr Penney that he deleted "a whole bunch of stuff which is why it took at least 15 to 20 minutes". Mr Penney responded:

> A: Mr Walker, I didn't, and I'm sorry that the deposition came off like that, but I have not deleted a whole bunch of stuff, I just haven't, like that has not happened.
>
> Q: And the evidence you just gave was that you weren't panicked, correct.
>
> A: Yeah, I was concerned that Grant was very much panicking. There was a moment in time where I did have a kneejerk reaction to delete a couple of things and it was not something where – I didn't understand the fear because I didn't know ZURU, I didn't know Nick or Mat or what this was, so it was hard for me to truly be panicked and truly be fearful in terms of someone that's worked at ZURU.
>
> Q: Were you panicked or not?
>
> A: Grant was panicked, that pushed me to delete a couple of things and that was it and then we moved on.

[119] Finally, JJK submits that a forensic analysis demonstrates that few documents were deleted and most have been recovered:

(a) Mr Penney accepts that he deleted the initial WeChat introduction to Portia Yuan. It has not been recovered.

(b) Mr Penney accepts that he deleted the WeChat thread between Mr Penney, Ms Yuan, Grant Taylor (who was on the thread for at least for two days) and Mr Collie. Mr Collie did not delete this thread.

(c) The message (iMessage, WhatsApp or WeChat) in which Grant Taylor sent Mr Penney the restraint of trade photo on 5 August 2020. Kirk Penney admits that he deleted this chat. The photo has been recovered from Mr Penney's phone but not the message.

(d) The WeChat or iMessage in which Grant Taylor sent Mr Penney the unpopulated margin spreadsheet. The message was deleted or has been lost, but the completed spreadsheet has been recovered in an email from Mr Penney to Grant Taylor on 15 September 2020.

[120] I note further that Grant Taylor and Mr Penney addressed their deletion of records earlier in the proceeding, in affidavits of documents they affirmed for

discovery purposes. In his affidavit of documents dated 17 August 2023, Grant Taylor accepted the following:

> I believe that in late May 2021 I deleted a small number of emails between me and Jarrod Armitage or Kirk Penney. I believe that I also deleted some text messages (or possibly WhatsApp messages) with Mr Armitage. …
>
> …
>
> To the best of my recollection I found a couple of emails to Jarrod Armitage or Kirk Penney that I thought might inflame Nick if he saw them, and so I deleted them. I do not think there were very many. I recall that I also deleted some text messages (or possibly WhatsApp messages) with Jarrod Armitage, not because I was worried about the content of those messages but because I was worried about what Mr Mowbray might wrongly infer from my friendship with him. So far as I can recall, the emails and messages did not include any actually confidential information about Rascals but did include some generic information about Rascals and doing business generally. I believe one email sent a copy of a Rascals' presentation document that we once provided to external people, and another other an unpopulated spreadsheet that I had put together with some basic formulas.
>
> I think that I deleted these documents because I knew Mr Mowbray and, in my anxiety, I thought that they would inflame him if he ever happened to see them. I accept that based on what I know now deleting these documents was the wrong thing to do and I should not have done it.
>
> Separately, I recall that at some point I connected Mr Armitage and Mr Penney to Portia Yuan over WeChat (I had previously given her details to Mr Armitage earlier in the pandemic when he was looking to import a mask machine from China). From memory I did this by joining them all to a group chat on WeChat, and then at some point I left the group and deleted it because I did not need to have any ongoing involvement. I do not remember when that occurred.

[121] In his affidavits dated 15 June 2023 and 6 July 2023, Mr Penney admitted that he had deleted some messages. His evidence in both affidavits was substantively very similar. On 6 July 2023 he said:

> Sometime in May 2021, I deleted a Wechat thread between me, Portia Yuan and Grant Taylor.
>
> I deleted the thread because Nick Mowbray was making allegations that Grant Taylor had an interest in JJK Group Limited in breach of his restraint of trade (which he did not), and that we had stolen IP. We were worried JJK would end up in the middle of a fight between Nick Mowbray and Grant Taylor. Grant said he was deleting things and suggested we should do the same.
>
> I cannot remember the precise content of the deleted messages but they would have included Grant's initial introduction to Portia Yuan and messages between me and Portia about manufacturing and ordering product from China.

> To the best of my memory, the Wechat thread would have started around August 2020. It was around this time that Grant Taylor connected me with Portia Yuan via a WeChat group with Portia, me and Grant as members. Grant stayed in the WeChat group for a few months before removing himself. I am not sure exactly when Grant removed himself from the chat.
>
> I have tried to retrieve the deleted WeChat thread but understand this is not possible.

[122] I draw the following conclusions about the deleted records. First, the following messages and communications existed, were deleted and have not been recovered:

(a) Messages (iMessage and/or WhatsApp) or emails between Grant Taylor and Mr Armitage. According to Grant Taylor, a small number.

(b) WeChat or text messages between Grant Taylor and Mr Penney. According to them, a small number.

(c) Grant Taylor's initial WeChat introduction of Mr Penney to Portia Yuan and WeChat messages prior to 15 September 2020.

(d) Email or other communication from Grant Taylor providing JJK with the Rascals 2020 Eco brand presentation.

(e) The message (iMessage, WhatsApp or WeChat) in which Grant Taylor sent Mr Penney the restraint of trade photo on 5 August 2020.

(f) The WeChat or iMessage in which Grant Taylor sent Mr Penney an unpopulated margin spreadsheet.

[123] Second, there is no evidence to suggest that there were deletions beyond these groups of records. There are no other apparent gaps in the evidential record. Grant Taylor and Mr Penney have been consistent about what they deleted, aside from in the settlement affidavit and deposition, which are unreliable sources of evidence.

[124] Third, I do not make the inferences that Rascals asks me to make from these deletions. I do not consider that it should be inferred that these documents showed that JJK knew Mr Taylor was a director of Rascals, knew that Rascals wanted to

acquire Treasures, knew the offers that had been made and the Taylors' proposed prices, and knew that the information JJK received was confidential.

[125] Rather, I infer that Grant Taylor was nervous about facing litigation from the Mowbray interests. Mr Penney responded to that fear. That they were worried about litigation from the Mowbray interests does not necessarily mean that they considered that they had acted unlawfully. Grant Taylor had given JJK helpful information and advice about nappies and how to set up a competing nappy business to Rascals. JJK had asked Grant Taylor to be involved in the business. Grant Taylor had refused, citing the restraint of trade, but there was some back and forth between JJK and Grant Taylor on this subject. Whether their interactions were unlawful or not, I infer that they were likely to have been fearful that the Mowbray interests would be displeased.

What information and advice did Grant Taylor give to JJK?

Rascals' claim

[126] Rascals claims that Grant Taylor gave JJK the following confidential information:

(a) Rascals NZ's business model, comprising:

(i) Rascals NZ's pricing model, including its margins and offering exclusivity to purchasers with a greater than industry standard margin;

(ii) the location, name, costs and contact details for factories Rascals NZ used for manufacturing the nappies and the relative costs for producing those nappies;

(iii) the name and contact details of Ms Yuan, who had been Rascals NZ's first agent in China and had specific knowledge of Rascals NZ's operations and business in China;

(iv) Rascals NZ's sale and distribution model that used a FOB model. Rather than hold inventory and warehousing stock, which is what Grant Taylor and Keith Taylor did with their former company, this model involved having the retailer purchase products directly from the manufacturer, with Rascals NZ responsible for logistics and shipping; and

(v) Rascals NZ's marketing model, which only used targeted digital marketing;

(b) the technical specifications for manufacturing Rascals NZ's H-shaped nappies and related products; and

(c) its Treasures Business Plan. This is defined as Rascals NZ's intention to acquire the Treasures brand (but not its plant and equipment), to develop an exclusive relationship with Countdown for the sale of Treasures nappies in their supermarkets, and to transform Treasures into a highly profitable business applying the Rascals NZ business model as modified by ZURU's director, Nick Mowbray.

[127] Rascals says that Grant Taylor likely gave more confidential information than this. However, this is not available, because the JJK partners deleted it.

JJK's defence

[128] JJK does not dispute that its directors told Grant Taylor that they were interested in buying Treasures and sought his advice about establishing a nappy business and getting the product into a supermarket.

[129] JJK agrees that Grant Taylor provided them with:

(a) information on the nappy industry, aspects of the Rascals' business, and how to make a sales pitch to Countdown;

(b) some unbranded nappies, which JJK presented to Countdown as initial samples; and

(c) three Rascals' documents:

(i) a 41-page slide deck entitled, "R+F Brand Presentation 2019";

(ii) an 18-page slide deck entitled, "R+F Eco and Brand Presentation Final"; and

(iii) an unpopulated spreadsheet with formulas for calculating pricing.

[130] JJK acknowledges that the information Grant Taylor provided was helpful as its directors learned about the nappy industry. However, they say Grant Taylor's assistance was high level and largely related to public information, much of which Nick Mowbray had disclosed in public presentations and interviews.

[131] I now turn to the evidence of interactions between JJK, Grant Taylor, Ms Yuan and Ms Young at Countdown. It will also set out the evidence of JJK's negotiations with Asaleo Care to acquire Treasures.

Treasures closure announced

[132] As noted earlier, in late June 2020 Asaleo Care announced that it was closing the Treasures factory and business in New Zealand. Mr Armitage heard the report on Newstalk ZB when he was driving with his wife, Julia Armitage. He said to her, "I'm going to buy that business!"

[133] On 27 June 2020, Mr Armitage messaged Grant Taylor, saying he "saw treasures fell over". Grant Taylor replied, "Yeah they have… Just saw there data too and they've declined more. Wish I didn't have that restraint!". Mr Armitage said, "Maybe I should buy the brand", to which Grant Taylor responded, "You should enquire!"

[134] On 29 June 2020, after canvassing the idea with Messrs Collie and Penney, Mr Armitage emailed the general contact email for Treasures on behalf of "some kiwi entrepreneurs who would be interested in the possibility of buying the treasures

brand". Soon after, James Orr from Asaleo Care called Mr Armitage to discuss his interest. On Mr Armitage's recollection, Mr Orr advised him that Asaleo Care wanted to sell the whole business, including the plant and equipment. Mr Orr went on to say that it would cost several million dollars to buy the Treasures business and Mr Armitage should start the process by sending an expression of interest in writing, with an indicative price range.

[135] Following this, on 30 June 2020, Mr Armitage messaged Grant Taylor that he was in dialogue with Treasures and that they were hesitant to sell the brand name. Grant Taylor asked him who he was speaking to, and confirmed they would speak more when he returned from Queenstown.

[136] On 6 July 2020, Mr Orr followed up with Mr Armitage by email and invited him to submit "a confidential expression of interest in purchasing the 'Treasures' brand".

Early discussions with Grant Taylor

[137] On 7 July 2020, Mr Armitage had a coffee with Grant Taylor at Grant Taylor's home. They discussed Mr Armitage's idea of acquiring Treasures, his discussions with Mr Orr and his likelihood of securing the brand.

[138] The next day, on 8 July 2020, Mr Armitage, Mr Collie and Mr Penney met to discuss the possibility of buying Treasures. Mr Penney was interested. Mr Collie was non-committal, worried that he would be over-stretched with his existing businesses and concerned that the business might affect their friendships. They decided to arrange a discussion with Grant Taylor to test their ideas with him, as he knew the nappy industry. This meeting was scheduled for 9 July at the Black Cottage Café.

[139] On 9 July 2020, Messrs Taylor, Armitage, Penney and Collie met at the Black Cottage Café. There are no notes of this roughly hour-long discussion. The JJK directors recall that they asked Grant Taylor if he would be interested in consulting. However, Grant Taylor did not want a formal role which might breach his restraint. Rather, he was willing to assist informally with high level guidance and provide some information that was publicly available.

[140] The JJK directors' recall that Grant Taylor told them:

(a) there are no patents in the industry except for one specific pocket on Huggies nappies;

(b) nappy quality is critical, and Treasures had failed because its nappy had a reputation for leaking due to their equipment being old and inferior;

(c) margins of around 40 per cent are possible, depending on the particulars of any given deal;

(d) Rascals used China-based manufacturing;

(e) the cost of shipping/warehousing was around 12 per cent; and

(f) Rascals used a FOB model (with which Mr Collie was familiar through his other business, Pauling Industries Ltd).

[141] Messrs Collie and Armitage recall that Grant Taylor recommended that JJK keep the Treasures brand the same, if they managed to acquire it.

JJK Treasures plan progresses

[142] In the late morning of 9 July 2020, Mr Penney set up a group chat with Mr Armitage and Mr Collie for the purpose of discussing Treasures. In that chat, Mr Penney said it had been good to chat that morning and the "[i]dea seems very worthy of pursuing". They arranged to meet the following day. Grant Taylor was not part of this group.

[143] On 10 July 2020, the JJK partners met at Mr Armitage's office in Wairau Park to discuss Treasures. Mr Armitage sent Messrs Penney and Collie an email with several attachments with information as to brand share trend value for nappies, manufacturer share trends, an executive summary and ranking report of the performance of the nappy category within New Zealand Countdowns up to 14 June. Mr Armitage's evidence is that Grant Taylor provided him with these documents.

[144] On 12 July 2020, Mr Armitage (with the others copied in) emailed Mr Orr that they were interested in proceeding with an offer for the Treasures brand and requested documentation.

[145] On 15 July 2020, Mr Armitage emailed Mr Orr: “Our syndicate has a price range from $500k to $3m depending on due diligence and a 6 month deal with countdown that you’re team would assist with.”

[146] The next day, Mr Armitage emailed Mr Orr to arrange a viewing of the Treasures factory and requesting a contact at Countdown “to discuss the possibility of the brand continuing”. Mr Orr provided the contact for Lisha Young, the category manager responsible for procuring baby products at Countdown.

[147] On 21 July 2020, Grant Taylor accompanied Messrs Armitage and Penney on their visit to the Treasures factory. Grant Taylor’s and Mr Armitage’s evidence is that this was unplanned. They met at the Black Cottage Café for a coffee that morning and Mr Armitage asked Grant Taylor to accompany them. Grant Taylor agreed, but on the drive to Hamilton he was on a pre-arranged Zoom call regarding an unrelated business opportunity he was investigating with his father. Grant Taylor stayed on the call for the entirety of the car ride and was not finished even when Messrs Armitage and Penney entered the factory. He says that he only had time for a brief look inside the factory. Mr Penney’s evidence is that he and Mr Armitage met with the factory personnel and had a tour around the factory. Mr Penney recalls that Grant Taylor only joined them for “less than five minutes” before they left.

[148] I accept Grant Taylor’s explanation that he decided spontaneously to go to Hamilton. Grant Taylor provided evidence proving that he was scheduled to collect his jet-ski that day, an appointment which he rearranged that morning, after deciding to join the factory visit.

[149] Mr Penney’s evidence is that on the ride back from Hamilton, he spoke with Grant Taylor about Treasures. He cannot recall precisely what they discussed.

[150] On 22 July 2020, Mr Penney contacted Lisha Young to arrange a meeting, and she offered to meet at 3 pm the following day. Unprepared, the JJK partners contacted Grant Taylor to ask for assistance in preparing for the meeting. Grant Taylor sent Mr Armitage and Mr Penney a Rascals presentation, noting that it was a "Bit out of date now but should give you a heap of info for doing a preso". Mr Armitage forwarded the presentation to Mr Collie, but he says he did not read it himself.

[151] That same day, Mr Penney messaged Lisha Young, the nappy category manager at Countdown, on LinkedIn, stating "We have an extensive plan and great team assembled to revive the Treasures brand". They arranged to meet the next day.

[152] On the evening of 22 July 2020, Mr Penney emailed Messrs Collie and Armitage with the subject line "Meeting tomorrow with Lisha". The email made notes on:

> **1. Margin:** "28–35%. Ideally FOB at 30% margin.
>
> Give margins back to Progressive. Treasures currently 5%, increase to 30% with operations in China. Rascal & Friends currently down to 12 – 15%. With market share comes power to negotiate.
>
> 2. **Quality**. Higher quality. We will get the recipe from Grant.
>
> 3. **Marketing.** Putting $1M into marketing. Grant's pitch: Plan to pour first two years back into Treasures (projections indicate we won't need to).
>
> 4. **Exclusivity**. Deal with Countdown…
>
> ***Note on Lisha.** Grant turned her down… We cannot use Grant's name.

[153] Mr Penney also had notes on a conversation with Mr Orr from Asaleo Care, including: "Grant suggested one of James' guys comes to the meeting. Syd (CEO) was going to come to the meeting with Grant."

[154] The email also included a section titled "Conversation with Grant":

> **Giving us Recipe** for nappy (from Grant).
>
> …
>
> Grant will send **Pitch Deck**. **Already has.**
>
> **His changes** to Treasures: (Opinion).

> Softer tabs and waste band/magic tab, 24 gsm top sheet, not 41 gsm, Small dimples. Not big like Huggies due to IP.
>
> Chinese agents name: **Porsche**, was "Tool Shed" agent, takes 3% of deal. Old Rascal factory a possibility in China…

[155] On 23 July 2020, the JJK team met with Ms Young. They sought an indication of whether Countdown would stock Treasures in the future but received no such indication. Ms Young said that they could meet again once JJK had a sample nappy and a presentation. Mr Penney's evidence is that it was not a good meeting, but it started the journey with Countdown.

[156] Immediately following this meeting, the directors called Grant Taylor and told him that the meeting had not gone well, aside from Mr Penney and Ms Young seeming to have a rapport. It was not a long call, merely to update Grant Taylor on the outcome of the meeting.

[157] Following their meeting, Mr Penney emailed Ms Young, noting that they had work to do and asking, "Is there a particular nappy size you'd like to see? We're working on the sample for you".

[158] On 24 July 2020, Mr Collie replied to Mr Penney's email of 22 July 2020, copying in Mr Armitage. Key statements from the email include:

> …we will cherry pick and combine with little rascals
>
> …we will take the advice of lisha [*sic*] and Grant…
>
> Let's hope we have some blank rascal nappies around…

[159] On 24 July, Mr Collie emailed Josh Adams of Exo Ltd the Rascals presentation provided by Grant Taylor. Mr Adams is Mr Collie's brother-in-law and had previously worked with him on pitches and branding for other products. Mr Collie explains that he sent the Rascals presentation for Mr Adams to use as a "loose guideline".

[160] Also on 24 July, Mr Penney messaged Mr Collie and Mr Armitage noting they would be "Exclusive to Foodstuffs. Rascal won't even know. Same branding… Call Grant, can we get that sample? What did Porche say?".

[161] Later the same day, Mr Penney messaged Mr Collie and Mr Armitage: “Fellas, Louise has some ideal nappies to use for Lisha. Should have over the weekend or early next week.” This is a reference to Louise Taylor.

[162] On 29 July 2020, the JJK team arranged to meet with Grant Taylor at the Copper Spot Café in Albany. Mr Armitage recalls discussing how Treasures was coming along, as well as having a general catch up. Mr Penney did not recall Grant Taylor giving any specific information with respect to Treasures, the nappy industry or the Rascals business. Grant Taylor provided an unbranded sample nappy to present as a Treasures sample at their next meeting with Countdown.

[163] Over the next couple of days, Mr Penney sent a series of emails to Messrs Collie and Armitage brainstorming about the nappy they would create if they purchased Treasures. He relied heavily on Grant Taylor’s explanation of the different parts of a nappy. Mr Penney explained that this was his process of “upskilling on the nappy, learning the nappy, understanding the nappy”.

[164] On 29 July 2020, Mr Penney sent them an email with the subject line “Treasures 4.0”:

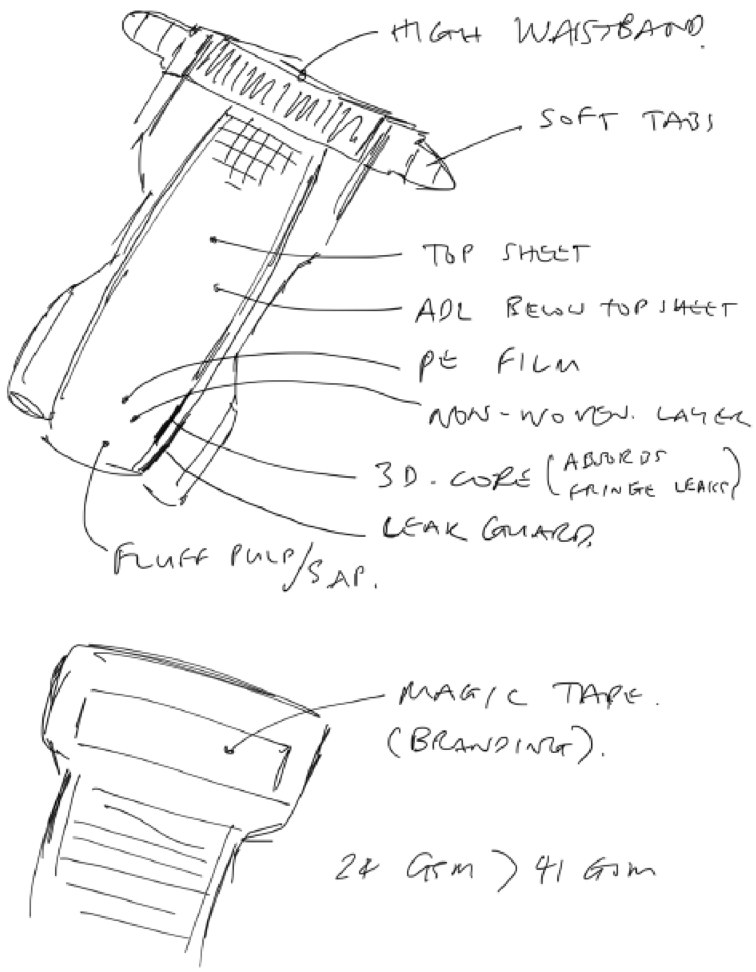
Treasures 4.0

Nappy breakdown: PREMIUM NAPPIES

Top sheet
ADL (Dispersion Layer) below top sheet
PE Film below ADL
Non woven layer
High waste band
3D core
Leg cuff
Leak guards
Fluff pulp
Magic tape

Cold spray (chemist)

[165] These notes were accompanied by a diagram of a nappy and its component parts:



[166] The email also noted “Under Development: “It’s all about SIMPLICITY”. “Tabs. Magic tape (Hard for branding or soft). Plant Based backsheet, topsheet, leakguards, core?” And, later “Terms and Conditions from Rascal & Friends”.

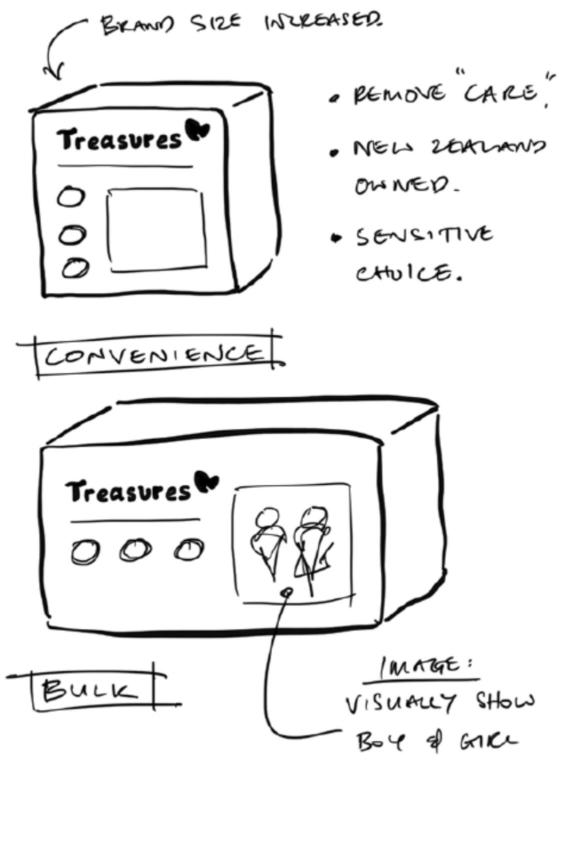
[167] On 30 July 2020, Mr Penney sent an email with the subject line “Treasures 5.0”. The email set out a sizing and launch approach which was “practically copying Rascal & Friends approach” — “[w]hen Rascals launched 80% was Convenience, then fell to 20% convenience once the brand is established”. This also included launching first with eight nappy sizes for “1. Infant, 2. Crawler, 3. Toddler, 4. Walker”. Mr Penney noted “Countdown don’t understand FOB – Margin – Educate them”. Mr Penney also noted that performance is key, which was the way Rascals amassed

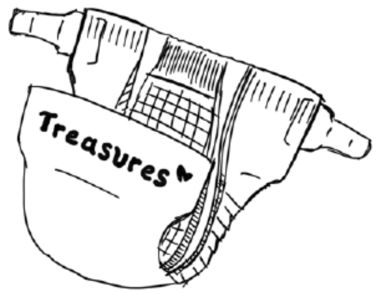
their customer base. Finally, he noted that they "Want to be the Rascal & Friends for Countdown".

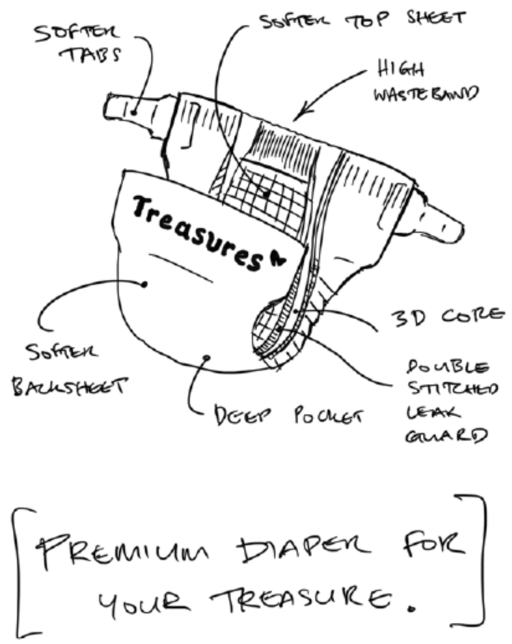
[168] The next day, on 31 July 2020, Mr Penney emailed Mr Collie including a note: "Grant: Why not Convenient nappy pants (14). Nappy Pant/10, Huggies #2."

[169] The same day, Mr Penney emailed Mr Collie again, this time with a draft email to Josh Adams of Exo Ltd, saying, "Just want you to look over this (confidential). James and I are working on the pricing/selling comparison matrix". The email attached an 18-page Rascals NZ's slide pack "2020 Update". Mr Collie then forwarded that email and the presentation on to Mr Adams. His evidence is that he did not look at the presentation.

[170] On 31 July 2020, Mr Penney emailed Messrs Collie and Armitage regarding *"Treasures 8.0 (Drawings)"*. Mr Penney had sketched "Convenience" and "Bulk" boxes, and a premium Treasure nappy, noting "softer tabs", "softer top sheet", "high wasteband", "softer backsheet", "deep pocket", "double stitched leak guard" and "3D core".







[171] As noted under "Deleted records", Mr Penney was cross-examined on why there were only notes on Treasures 4.0, 5.0 and 8.0 now available. It was put to him that the other emails had been deleted as part of Grant Taylor/JJK's "deletion session". Mr Penney's response was that the notes were personal, for his benefit as he upskilled on the nappy — he only sent the notes which he thought were appropriate for the rest of the team.

[172] Meanwhile, on 31 July 2020, Mr Armitage contacted Mr Orr asking for more time to complete their due diligence and plan to purchase Treasures. Mr Orr responded that Asaleo Care had received complying offers and encouraged them to submit their offer "asap".

[173] On 4 August, JJK (through their counsel) presented two term sheets to Asaleo Care for the purchase the Treasures brand: \$100,000 for the brand alone or \$500,000 for the brand along with assistance with stocking Treasures in Countdown.

[174] JJK's second meeting with Countdown took place on 5 August. Mr Penney took a presentation compiled by Mr Adams and the sample nappy from Grant Taylor. Aspects of the Treasures presentation followed the 2019 Rascals presentation. These were:

(a) an opening statement of the Treasures values;

(b) a sketch of features of the nappy design;

(c) an explanation of the online marketing strategy including use of influencers; and

(d) a description of a manufacturing partner.

[175] At the same time, the presentation contained original material. The presentation compared the recommended retail price of each size of nappy between Treasures, Rascals and Cute & Co.

[176] Ms Young was open to considering Treasures but wanted a more detailed presentation and more sample nappies.

[177] At the end of the meeting, Mr Penney texted the Treasures group chat to ask whether he could leave one of the sample nappies. Mr Collie replied, "maybe ask Grant". Mr Penney said that he asked Grant Taylor, who apparently agreed, and he left a sample nappy with Ms Young. Mr Penney explains that he consulted Grant Taylor as this was his first experience meeting with a retailer and he was unsure as to whether it was standard practice to leave a sample.

[178] JJK and Asaleo Care reached a conditional agreement for the sale and purchase of Treasures for \$300,000 on or around 7 August. On around 19 or 20 August, Mr Orr and Mr Lewis exchanged emails regarding clauses in the sale and purchase agreement.

On 25 August, Mr Orr emailed Mr Lewis a marked-up version of the sale and purchase agreement. The agreement was executed on 8 September, with the final price of $300,000.

[179] On 10 September 2020, the JJK Team met at Black Cottage Café to discuss their roles in the Treasures business going forward. Grant Taylor was not at this meeting. Mr Armitage was to become a silent partner, leaving Messrs Penney and Collie to drive matters forward. Mr Penney made notes of the discussion on his iPad, which reference questions for Grant Taylor and a designer contact of his. Mr Penney circulated the notes of the meeting. The document is titled "Meeting 1. JJK GROUP. TITLES & ROLES" and includes the following notes:

> …
>
> Website / Rev (Grant's girl)?
>
> …
>
> 2. Portia (Grant). 50 x nappies 50 x pants to NZ.
>
> – Run numbers from 'Yoursun' through model (with JC/GT)
>
> → Sustainable packaging? Grant
>
> …
>
> → Indicator line? Grant"
>
> 3. Design (Grant's girl)
>
> – Website Design
>
> – Packaging

[180] Mr Penney clarified that "Design (Grant's girl)" referred to Alex Rumsey, the designer that JJK engaged for nappy design.

[181] On 11 September 2020, JJK's purchase of Treasures settled for $300,000.

[182] Throughout September and October, JJK worked on various aspects of the business, such as nappy design and marketing, in preparation for a further Countdown meeting.

[183] Grant Taylor connected Mr Penney with Ms Yuan by starting a WeChat group between them, which also included Mr Collie. The first message in evidence is dated 15 September 2020, but it is accepted by JJK that there was likely an earlier message between Mr Penney and Ms Yuan that was deleted in 2021.

[184] Mr Penney asked whether a nappy pant could be created from the "EU nappy". Ms Yuan advised Messrs Taylor and Penney that the factory needed the "EU nappy pants samples". Grant Taylor replied, "We don't have EU nappy pants Portia. The factory should be able to predict a spec for the pants. Just need to follow softness and performance". Grant Taylor further commented, "Containers could be about 10 per month and grow. But will slowly build like rascals did".

[185] On 16 September 2020, Ms Yuan asked if they had a target price for "nappy pants". Grant Taylor responded:

> Hi Portia. Will try to get some target pricing over the next day or so
>
> At this stage Kirk needs to go see Countdown with all final pricing and samples including pants to get orders
>
> So, all going well it could be for June launch next year having to order 4 months in advance.

[186] That was Grant Taylor's last message on this chat. From then, the communications were between Mr Penney and Ms Yuan. At some point that cannot be identified, Grant Taylor left the chat.

[187] On 15 September 2020, Mr Penney sent Grant Taylor a completed margin worksheet for Treasures nappies in Countdown, including a screenshot of costings and nappy ingredient amounts with a heading "BABY DIAPER QUOTATION" said to be "Based on 'R+F' EU Quality" dated 4 August 2020. Mr Penney's evidence is that this was the completed version of a blank worksheet that Grant Taylor had sent him. The email or message from Grant Taylor attaching the margin worksheet is one of the deleted records. Mr Penney explained that he populated the columns in the spreadsheet and that the screenshot quote came from the Yoursun factory.

[188] On 5 October 2020, Mr Collie emailed Mr Penney to ask whether they should have a catch up with Grant Taylor's designer contact and they should organise a discussion with Grant Taylor regarding this. Mr Penney advised he would call Grant Taylor. The next day, Mr Collie messaged the other JJK directors, confirming they would have a meeting with "Grant's designer to go over all [their] thoughts".

[189] On 8 October 2020, Grant Taylor provided Kirk with contact details for Mr Rumsey of Studio Eighty, a friend of his partner's. Mr Penney contacted Mr Rumsey but ultimately JJK used different designers.

[190] On 14 October 2020, Mr Penney emailed Ms Young to ask for a November 2020 meeting, at which JJK would have nappy samples, a robust marketing plan and the finalised design for Treasures packaging.

[191] On 15 October 2020, in their WeChat thread, Ms Yuan messaged Mr Penney that "R&F are using 100% biodegradable Polybag".

[192] On 20 October 2020, JJK engaged Martha and Olly Van Arts at Skinnies to create a marketing strategy for Treasures, including a presentation for the next meeting with Countdown. Ms Van Arts was an old friend of Mr Collie's, whose company Pauling Industries Ltd manufactures the Skinnies sunscreen product. Ms Van Arts had experience in the fast-moving consumer goods industry (FMCG). On 24 October 2020, Mr Penney emailed Ms Van Arts the two Rascals presentations, as well as the presentation prepared for the 5 August 2020 meeting, as he "just thought they might be useful".

[193] In addition, JJK engaged Megan Sanders, an experienced brand designer, to lead the design work on the presentation and nappies. Ms Sanders was another professional contact of Mr Collies. Ms Sanders designed the rabbits, colours ways, and the other graphics for the new Treasures brand.

[194] On 29 October 2020, Mr Collie sent an email to Ms Van Arts (also copying in Messrs Armitage and Penney) with the subject line "Discussion with friend today". Mr Collie advised that they "had a really good talk with our friend". He first detailed

notes on the margin, including the "friend's" suggestion "to work with Lisha on this and come to a solution". There were also notes on design:

> .. as were looking for exclusively and we 100% need lisha to buy onto the brand look/feel he said we have to include design work… He said it's a very different situation when playing off to chains where you hold things close to your chest, we need her to be on board making suggestions and engaging with us.

[195] Martha replied, "Ok great, good to have the tried and true input and take it on board".

[196] When it was put to Mr Collie that he referred to Grant Taylor as "friend" because he was deliberately concealing Grant Taylor's involvement, Mr Collie's evidence was that he used the term "friend" because he had told Ms Van Arts that he had a friend who used to run a nappy company but not his name.

[197] On 1 or 2 November 2020, Mr Collie asked Mr Penney or Mr Armitage "can we check if this is correct from Grant" in relation to a product lead time and delivery strategy information for the Countdown presentation.

[198] On 2 November 2020, Mr Collie emailed Ms Van Arts and Mr Penney recording the three key pillars of their business case, being exclusivity, trading in USD and the use of FOB. Mr Collie explained the three pillars were "designed to drive Margin recovery to countdown whilst delivering a high-quality product at the target RRP".

[199] On 3 November 2020, Mr Collie sent an email to Ms Van Arts and Mr Penney titled "Our friend's message to add", with a direction to:

> Include in the marketing preso
>
> Geo targeting of customers around the areas where foodstuffs and progressive have stores close together driving traffic in the door (Martha to do)
>
> Exclusivity is conditional on them supplying us with category data and category insights so we can grow it (Martha)
>
> We need to add a 3 tare offering on margin based on terms (Kirk to do spreadsheet)

> Written 3 pillars is now 4 pillars. (James)
>
> Exclusively
> FOB
> Forex
> Terms

[200] On 3 November 2020, Mr Penney emailed Ms Van Arts and Messrs Collie and Armitage with "Countdowns three margin offers" and notes on Treasures' four pillars, including:

> Geo-target: driving traffic to Treasures / Countdown in that location. Doing a deal on the gift vouchers.
>
> Exclusivity is conditional with them supplying 1. data and 2. category insights.

[201] The following day, Mr Penney asked Ms Yuan for a breakdown of the nappy's ingredients. Ms Yuan commented, "But for the length of tabs, we are not sure how long the R&F tabs now".

[202] On 10 November 2020, JJK had their third meeting with Ms Young at Countdown. Messrs Collie and Penney were joined by Ms Van Arts and Ms Sanders. The final presentation was a culmination of the work of Ms Van Arts, Ms Sanders, Mr Collie and Mr Penney. By this stage, JJK had obtained its own sample nappies from Yoursun.

[203] The following day, Ms Young suggested various changes to the nappy. If those changes were made, it would likely secure the deal.

[204] On 12 November 2020, Mr Armitage asked Grant Taylor what he was doing for lunch. Grant Taylor responded that he was busy and asked, "Is it just treasures stuff?". Mr Armitage later said, "Let me know when you have time. We [feel] bad all we talk about is treasures". Grant Taylor replied, "It's all good mate! No worries at all. No problem helping you out". Around this time, Mr Collie also reached out to Grant Taylor about having a "no business talk" catch up with him and Mr Armitage.

[205] On 22 December, Messrs Penney and Collie and Ms Van Arts met with Ms Young again. Ms Young indicated that Countdown agreed in principle to stock the Treasures nappies, subject to finalisation of terms.

[206] On 28 April 2021, JJK and Countdown agreed the final terms and conditions for the supply arrangement. This was signed by Mr Penney on 2 May.

[207] On 14 May 2021, Countdown issued its first set of purchase orders to JJK. However, on 17 May, Countdown cancelled those orders.

Summary of interactions

[208] To summarise, the evidence records three in-person meetings between Grant Taylor and the JJK directors: the initial 9 July 2020 meeting at Black Cottage Café, the trip to the Treasures factory on 21 July 2020 (with Grant Taylor on another call for the trip down) and the meeting at the Copper Spot Café on 29 July 2020.

[209] Additionally, it can be inferred from the emails that Mr Penney spoke with Grant Taylor at least once in late July; and Mr Collie spoke with him in November when JJK was preparing for the third meeting with Countdown.

[210] Grant Taylor provided Mr Penney with two slide packs — the 2019 Rascal + Friends Brand Presentation on 22 July 2020, and the 2020 Update presentation on an unknown date before 31 July 2020.

[211] Grant Taylor also provided a sample nappy to Mr Penney on 29 July 2020, for the meeting with Countdown on 5 August 2020.

[212] I suggest that the information and advice Grant Taylor conveyed to JJK can be categorised in the following way.

Categories of information and advice Grant Taylor gave to JJK

General information

[213] At the initial 9 July coffee meeting, and possibly in later conversations, Grant Taylor gave the JJK directors general information about the nappy industry in New Zealand.

[214] From the records available, I infer that this included information about who the main players in the industry were, that there were virtually no nappy patents, approximate shipping and warehousing costs, and the possible margins achievable (depending on the specific arrangements reached with manufacturers and retailers), including the approximate margins Grant Taylor understood other nappy companies to be making.

Know-how

[215] Grant Taylor gave Mr Penney advice on how to pitch to a retailer, including the kind of information that should be included in a pitch deck, how to calculate target pricing (WeChat on 16 September 2020), and how to complete a margin spreadsheet. He also suggested improvements to the Treasures nappy (discussed further below).

Advice on business model

[216] Grant Taylor advised JJK on how to start and develop a profitable nappy business. From the contemporaneous records, it can be inferred that he told them that they needed to:

(a) focus on quality;

(b) manufacture in China;

(c) contract exclusively with one major retailer and give that retailer higher than industry standard margins;

(d) avoid holding inventory by negotiating FOB terms;

(e) trade in USD; and

(f) deploy targeted digital marketing.

[217] This set of strategies was, and is, the Rascals and ZURU business model.

[218] Grant Taylor also disclosed, via one of the slide decks, that, based on the Foodstuffs' experience, the Rascals' model could create high profits for a supermarket without cannibalising the retailer's private label.

[219] As to when Grant Taylor gave this advice, the JJK directors' evidence is that Grant Taylor told them that they needed to focus on quality, manufacture in China and negotiate FOB terms at the initial 9 July meeting.

[220] Mr Penney's email notes dated 22 July which he prepared for the first meeting with Ms Young refer to exclusivity, FOB, high margins, high quality and a strategy of reinvesting heavily in marketing in the first two years. Mr Penney also notes that Rascals' current margin was 12 to 15 per cent, as compared to Treasures' margin of five per cent. Therefore, it can be inferred that Grant Taylor had discussed these aspects of the Rascals business model with Mr Penney by this date.

[221] Mr Penney's email notes dated 30 July again refer to FOB and the importance of performance which was "where Rascals got their following".

[222] The first Rascals presentation Grant Taylor shared on 22 July contained an explanation of the company's online digital marketing approach, use of influencers and geotargeting. Aspects of this marketing approach were adopted by Mr Adams for the presentation to Ms Young on 4 August 2020.

[223] The discussion between Grant Taylor and Mr Collie about the intended "pillars" of the Treasures business occurred later, in November, before the third meeting with Ms Young. In his 2 November "friend" email to Ms Van Arts and Mr Penney, Mr Collie refers to "three key pillars "of their business case, being exclusivity, trading in USD and the use of FOB. Mr Collie explained the three pillars

were "designed to drive Margin [sic] recovery to Countdown whilst delivering a high-quality product at the target RRP".

[224] Mr Collie's 3 November email to Ms Van Arts and Mr Penney titled "Our friend's message to add" referred to geo targeting, exclusivity conditional on category data and category insights, and the four pillars of "Exclusivity, FOB, Forex and Terms." That same day, Mr Penney emailed Ms Van Arts and Messrs Collie and Armitage with "Countdown's three margin offers" and notes on Treasures' four pillars, including geotargeting and exclusivity dependent on Countdown providing category data.

Business contacts

[225] Grant Taylor gave JJK Ms Yuan's name and introduced Mr Penney to her. It is unclear exactly when the introduction was made. In an email dated 22 July 2020, Mr Penney records that Grant Taylor had told them about "Porsche" and an old factory in China that Rascals used to use. In his 24 July 2020 email, he says "Call Grant, can we get a sample? What did Porche say?" These emails indicate that Mr Penney had not yet been introduced to Ms Yuan. The record of the WeChat message in evidence begins on 15 September, but it is accepted that the chat began before then. Therefore, the introduction must have been made sometime between 24 July and 15 September.

[226] It is unclear whether Grant Taylor or Ms Yuan gave JJK the name of the Yoursun factory. Mr Penney's 22 July email after his conversation with Grant Taylor refers to "Rascals' old factory" but does not identify the factory as Yoursun.

Rascals' company information in pitch decks

[227] The two retailer pitch decks which Grant Taylor gave to JJK contained information about the Rascals' business. I accept that the Rascals presentations were provided to guide JJK on what to include in its presentation to Countdown, rather than for the specific Rascals information contained in the presentations.[9] On 31 July, Mr Penney provided the slide packs to Josh Adams, who drew on the format for JJK's

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[9] When he sent the presentation to Mr Armitage, he said: "Bit out of date now but should give you a heap of info for doing a preso".

presentation to Ms Young on 5 August 2020. Mr Penney later provided the presentations to Ms Van Arts for the next Countdown meeting. The presentation Ms Van Arts created bore no resemblance to the Rascals presentations.

[228] The 2019 pitch deck read as a generic pitch to retailers. It is undated but appears to have been prepared in the first half of 2019 – it describes its expansion plan for Q3 2019. Therefore, the information within it was over a year out of date when Grant Taylor sent it to Mr Penney in July 2020, as Grant Taylor noted to Mr Penney.

[229] The presentation starts with a description of the Taylors' creation of the brand, its company values, global partners and sales trajectory since its inception. It illustrates Rascals' online digital marketing campaign, use of influencers and explains geotargeting (the social media strategy of pushing promotions and using influencers within specific locations to increase foot traffic to particular supermarkets). The pitch deck contained specific business information:

(a) Data since Rascals' exclusive launch in Foodstuffs in September 2017: delivered two to five times the margin over competitors; overtook Treasures as the number two nappy brand within eight weeks; doubled Foodstuffs' market share; accounted for 41 per cent of total gross margin for Foodstuffs in the nappy category; took 27 per cent of total market share within Foodstuffs; and generated over 22 million impressions online through social and digital marketing.

(b) its plan to double manufacturing capacity and expand internationally in Q3 of 2019; and

(c) Rascals' manufacturing partnership with the Joylink factory in China, including footprint and daily production numbers.

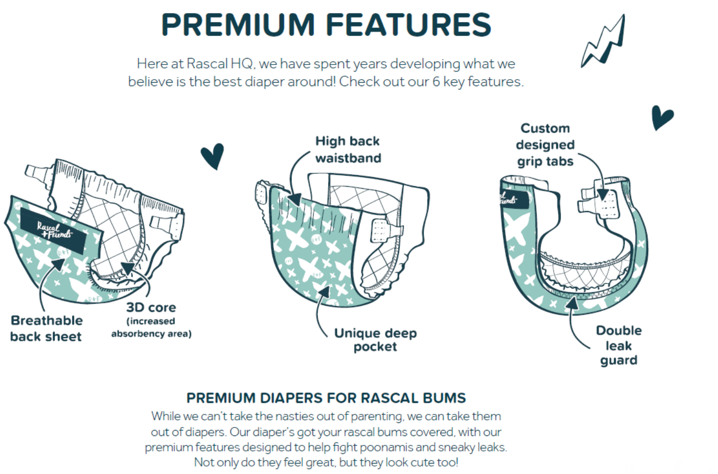
[230] This pitch deck does not contain any pricing information.

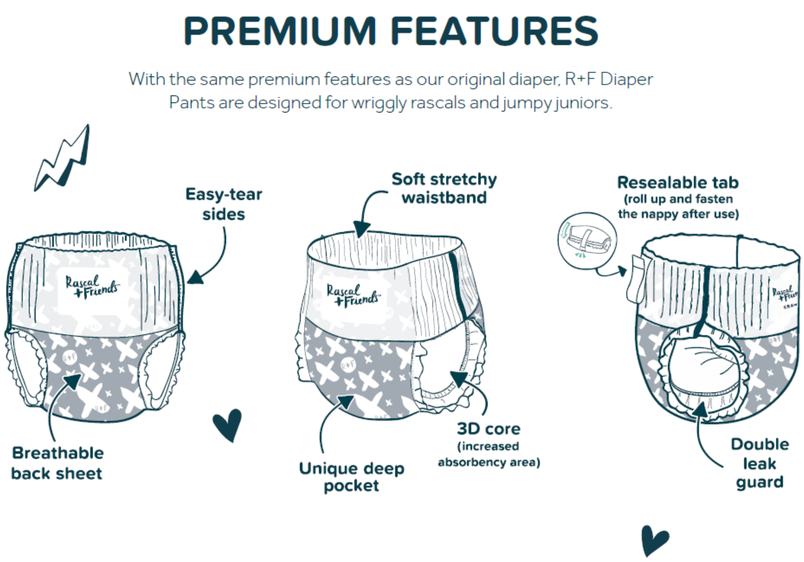
[231] The second pitch deck described "2020 Update" is more specific and appears to have been intended for retailers with whom Rascals already had a relationship.

It first updates retailers on Rascals' new marketing strategies. The balance of the pitch deck is concerned with Rascals' intended launch of R+F Premium, R+F Eco and R+F Reusable nappies. The presentation includes a comparative analysis between the Rascals eco range against two other eco brands on categories such as biodegradability, projected cost and recommended retail price. The pricing table does not contain any information about Rascals' margins or costs, only the projected retailer margins.

Nappy features and components

[232] To recap the evidence, the 2019 Rascals presentation which Grant Taylor shared with JJK depicts the "premium features" of Rascal and Friends nappies and nappy pants, including a breathable back sheet, 3D core for increased absorbency, high back waistband, unique deep pocket, custom designed grip tabs and double leak guard:





[233] And on around 22 July 2020, Grant Taylor appears to have suggested to Mr Penney how the Treasures nappy could be improved: softer tabs and waste band/magic tab, 24 gsm top sheet not 41 gsm, and small dimples.

[234] Then, on 29 July 2020, Grant Taylor provided Mr Penney with a sample nappy for the second Countdown meeting on 5 August 2020. It is not possible, now, to determine what kind of nappy this was. From the contemporaneous records, the nappy seems to have come from Louise Taylor: "Fellas, Louise has some ideal nappies to use for Lisha. Should have over the weekend or early next week."

[235] Grant Taylor did not remember giving a sample nappy to JJK. His evidence is that if he did, it would have come from the surplus nappies he had accumulated in his garage over the years. The majority of these were unbranded versions of other (non-Rascals) brands' nappies that the factories had sent to Rascals, or samples the factories had produced of their own accord. There might have also been a small number of older unbranded Rascals samples that had not been progressed. He explained that they would often take all these types of surplus nappies home and give them away to people because they were nappies that we were not going to use in the business. He is confident that he did not have any Rascals' prototype nappies in his garage because these were tested on focus groups, and kept in the office, labelled, and on shelves for that purpose. In cross-examination, it was put to Grant Taylor that what he had provided to JJK was a Rascals prototype. Grant Taylor responded that they were "often testing lots so we had them kicking around".

[236] JJK appears to have understood that they were receiving an unbranded Rascals nappy. Mr Penney said that Grant Taylor provided them with "some blank Rascals nappies lying around".

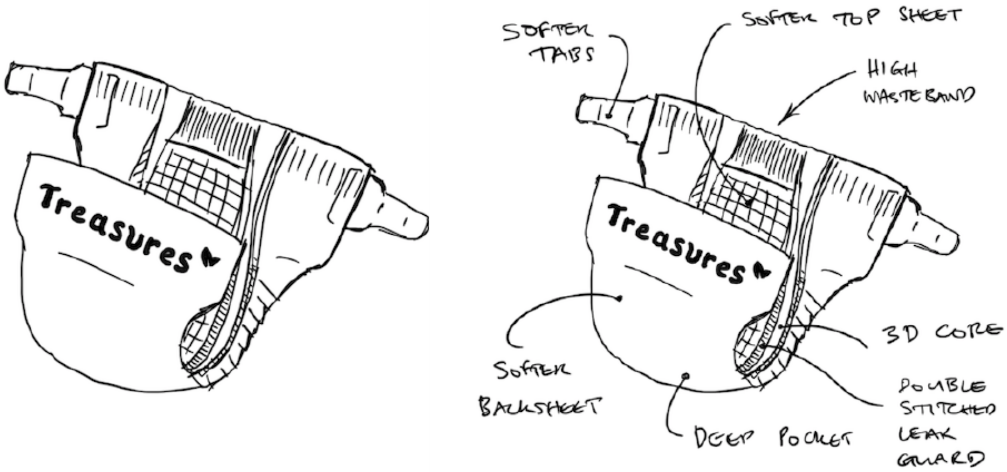
[237] At the same meeting at which Grant Taylor gave JJK the sample, he recalled discussing the features of the nappy which appears to have led to Mr Penney's "Nappy Breakdown" in his "Treasures 4.0" email.

[238] The 2020 Update pitch deck Grant Taylor gave to JJK described Rascals' "learnings" regarding its nappy design, identifying three features: a super soft,

non-woven absorbency layer with liquid dispersion, a new absorbency channel to increase the absorbency area by up to 40 per cent, and a high back waistband to handle on the go movement.

[239] On 31 July 2020, Mr Penney sent Messrs Collie and Armitage his "Treasures 8.0" email with sketches of a redesigned Treasures nappy and packaging. The nappy depicted has some of the premium features of Rascals nappies: a high waistband, 3D core, deep pocket and double stitch leak guard. The design also incorporated Grant Taylor's suggested softer tabs and top sheet.

[240] A sketch of the redesigned Treasures nappy was presented to Countdown at the 5 August 2020 meeting:



[241] The presentation which Ms Van Arts prepared for the 10 November 2020 meeting with Countdown did not contain anything about nappy design.

[242] In summary, Grant Taylor gave JJK information on the basic component parts of nappies and the general features and benefits of Rascals nappies and nappy pants. He also suggested to Mr Penney how the existing Treasures nappy might be improved. And he provided them with a sample nappy of unknown origin.

Yoursun technical specification for Rascals nappy

[243] Whether it was his design or not, by connecting JJK with Ms Yuan, Grant Taylor led JJK to the old Rascals nappy specification which Yoursun still held and used for other customers.

[244] Grant Taylor connected Mr Penney with Ms Yuan. Ms Yuan liaised with Yoursun, the factory that manufactured Rascals nappies until 2017 when they switched to Joylink, to prepare a sample Treasures nappy for JJK.

[245] There is evidence to suggest that JJK hoped to get information from Grant Taylor on nappy design: Mr Penney's email note of 22 July 2020 said: "We will get the recipe from Grant…Chinese agents name: Porsche…Old Rascal factory a possibility in China."

[246] The start of the WeChat between Grant Taylor, Mr Penney and Ms Yuan was deleted as the record starts abruptly in the middle of the chat. Mr Penney accepted that the initial messages in this WeChat were deleted. What is in evidence is Grant Taylor asking Ms Yuan to have Yoursun predict a specification for nappy pants: "The factory should be able to predict a spec for the pants. Just need to follow softness and performance". Ms Yuan responds: "We will supply breakdown of materials…But for length of tabs, we are not sure how long the R&F tabs now".

[247] Ms Yuan's evidence is that Yoursun provided the first sample nappies for JJK based on its generic EU specification nappy with 3D core:

> 16. Eventually, Kirk and I agreed that Treasures would use the Yoursun nappy with a 3D core. It was the generic EU specification nappy. It is a standard product Yoursun manufactures.
>
> 17. Yoursun prepared a quotation to manufacture the nappy Treasures wanted, dated 4 August 2020 and I sent it to Kirk by WeChat.

[248] Under cross-examination, Ms Yuan conceded that this was the Rascals EU specification. Mr Walker KC put the following to Ms Yuan:

> Q: Yes, and you say: "It was the generic EU specification nappy".
>
> A: Yeah.

> Q: But you were specifically referring to the Rascals EU specification, weren't you?
>
> A: No, it's like – yeah, yes.

[249] However, under re-examination Ms Yuan clarified that she and Mr Penney agreed that Treasures would use "the Yoursun nappy with a 3D core. It is the generic EU specification nappy. It's a standard product Yoursun manufactures". She said that "both Rascals and the Treasures nappy are using this development, is first developed in Yoursun. Yoursun is the first one, in Fujian province, which is famous for nappy and the pants in China, they are the first factory to produce the 3D core. So, it was the generic EU specification nappy."

[250] However, Nick Mowbray's evidence was that the 3D core was a unique feature to Rascals nappies. In November 2015, Ms Yuan told Keith Taylor "Rascal & Friends nappy is special design for [Yoursun]. They did not produce for any other customer before".

[251] Mr Paling's expert evidence is helpful here. Mr Paling explains that in his experience, it is usual for factories in China to produce similar products for numerous customers. On any given day, you might see the factory floor organised into three or four separate production lines and assigned to the respective customers. He explains that it is relatively uncommon for factories to agree to exclusivity or confidentiality terms preventing it from using a specification for different customers, unless they are producing a substantial volume or are a wholly owned subsidiary of a Western multi-national. It is undisputed that there was no exclusivity or confidentiality arrangement between Rascals and Yoursun. Further, Mr Paling confirmed that the Yoursun factory is currently advertising a "Rascals + Friends" nappy online, which can be found through a simple Google search.

[252] Drawing these threads together, I infer that the Yoursun generic EU specification nappy with 3D core that Ms Yuan describes is based on the nappy which Yoursun originally manufactured for Rascals before Rascals switched to Joylink in 2017. Yoursun currently promotes and sells this nappy to customers as the "Rascals + Friends" nappy.

[253] Further, I infer that Yoursun's original quote to JJK on 4 August 2020 for "R+F EU Quality" was based on this nappy specification; and the original samples provided to JJK in October 2020 were based on this design.

[254] Therefore, by connecting JJK to Yoursun through Ms Yuan, Grant Taylor led JJK to the Rascals' nappy specification pre-2017, although he did not give JJK the specification as such. That specification was held by the factory, Yoursun.

Information that Grant Taylor did not provide to JJK

Rascals' pricing model or specific margins

[255] There is no evidence to show that Grant Taylor told Mr Penney or any of the JJK directors what Rascals' pricing model was, other than inadvertently in relation to the proposed eco nappy range, in the 2020 Update pitch deck.

[256] Grant Taylor appears to have discussed with Mr Penney general supermarket margins of 28 to 35 per cent. The evidence as to whether Grant Taylor disclosed Rascals' general margin is inconsistent: Mr Armitage recalled that Grant Taylor told them that this was around 40 per cent at the first 9 July 2020 coffee meeting. Mr Collie did not recall this figure as relating to Rascals. Mr Penney's later email refers to a Rascal and Friends margin of 12 to 15 per cent, as compared to Treasures' margin of 5 per cent.

[257] There is no evidence to suggest that Grant Taylor disclosed the specific margins Rascals made on specific products.

[258] Dr Starr opined that the margin spreadsheet contained confidential Rascals information in the form of a quotation from a factory. It has been established that this quotation did not relate to Rascals. Rather, it was a quotation from Yoursun for JJK, based on Yoursun's base nappy design it named "R+F EU Quality".

Current technical specification for Rascals' nappies

[259] There is no evidence to support the allegation that Grant Taylor gave JJK the Joylink technical specification for Rascals nappies.

[260] Rascals and Yoursun's relationship terminated in October 2017, due to price and quality issues. Therefore, Yoursun's nappy specification for Rascals nappies dated back to 2017. It is unknown how different the current Rascals nappy is to this 2017 version. I infer that Rascals continued to improve its nappy design after 2017. In his evidence, Nick Mowbray talks about the importance of ongoing development.

Was the information which Grant Taylor gave to JJK confidential?

[261] Before determining whether the information Grant Taylor gave to JJK was confidential it is necessary to identify what is meant by the term "confidential information". That is a legal question, informed by Rascals' causes of action.

[262] Rascals claims that by providing JJK with information, Grant Taylor breached three distinct obligations: under s 145 of the Companies Act 1993, which governs directors' use of company information; a fiduciary duty not to misuse confidential information; and a discrete obligation of confidence in relation to confidential information.

[263] I will briefly discuss each of these legal concepts in turn.

Company information

[264] Section 145 of the Companies Act provides that a director who has information in his or her capacity as a director or employee, being information that would not otherwise be available to him or her, must not use or disclose that information to any person, except other than for the purposes of the company, subject to limited exceptions including as required by law.

[265] A director may disclose, use or act on company information if: they are first authorised by the board; the disclosure, use or act in question will not or will not be likely to prejudice the company; and the particulars are entered in the interest register.[10]

[10] Companies Act 1993, s 145(3).

[266] Peter Watts KC observes that s 145 operates on a concept of information that is available to the director by virtue of their position that would not otherwise be available to them — suggesting a concept of inside (that is, non-public) information rather than confidential information.[11] It follows that if the company information held by the director is publicly available, and the director did not breach any duty in the information becoming publicly available, the provision is not engaged.

[267] I agree with that framing of the concept as inside, non-public company information.

[268] The present tense of the language used in s 145 — referring to "[a] director of a company who *has* information in his or her capacity as a director or employee" — conveys that the duty applies only while the director is a director.

[269] That is not to say that a director is not restricted from using inside company information after their resignation. Directors who profit from inside information after they resign may be liable to account under the common law doctrine of corporate opportunity (discussed further below).[12] Furthermore, former directors may remain accountable under the common law obligation of confidence. They may also be subject to contractual obligations prohibiting them from using inside company information after their role ends.

[270] So, until 3 August 2020 when his resignation as director took effect, s 145 prohibited Grant Taylor from disclosing to JJK Rascals' non-public company information, being information which he acquired because of his role as director and general manager of Rascals.

Fiduciary duty

[271] Rascals claims that additionally, as a director and former director, Grant Taylor owed Rascals a fiduciary duty to ensure that he did not misuse the company's confidential information obtained during his position as director.

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11 Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis Ltd, Wellington, 2016) at 436.

12 At 435 and 450.

[272] Whether directors in New Zealand are subject to a fiduciary duty of confidence distinct from the statutory duty under s 145 is unclear. This Court has stated:[13]

> Prior to the Companies Act 1993, directors were subject to fiduciary duties at common law. Directors' duties that were previously recognised by the common law were incorporated into the Act, without it being a codification. For that reason the fiduciary duties owed by a director at common law can exist alongside the duties prescribed by the Act. However, the application of fiduciary principles is limited to guiding the application of the statutory duties and addressing circumstances not dealt with specifically in the Act, where the circumstances of the case require an equitable remedy.

[273] I did not receive any submissions on whether directors in New Zealand are subject to a fiduciary duty of confidence distinct from s 145, or whether s 145 does not provide an adequate remedy in this case. At this stage, I do not consider it necessary to analyse Grant Taylor's disclosure of information to JJK through the lens of breach of a fiduciary duty of confidence, in addition to breach of s 145 and the common law obligation of confidence (discussed next). If such a fiduciary duty is owed, it would concern the same company information addressed by s 145. The distinction might be important when it comes to remedy. If required, I will revisit the question then.

Obligation of confidence

[274] In certain circumstances, the common law imposes an obligation of confidence on people who receive confidential information. The information must be confidential and imparted to the recipient in circumstances importing an obligation of confidence.[14] If they misuse the confidential information, they may be liable for "breach of confidence".

[275] A common law duty of confidence arises because of the circumstances in which the confidential information is conveyed. A fiduciary duty of confidence arises because there is a relationship of trust and confidence. The two duties are distinct,

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13 *Gillies Bakery Ltd v Gillespie* [2013] NZHC 1608 at [78] (emphasis added), citing *Benton v Priore* [2003] 1 NZLR 564 (HC) at [46]; *Baroni v Crotty* (2006) 3 NZCCLR 261 (HC); and *Sojourner v Robb* [2008] 1 NZLR 751 (CA).

14 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (Ch) at 47, adopted by *A B Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515 (CA) at 520–521.

but not mutually exclusive, as many cases have recognised.[15] While a fiduciary duty lasts only as long as the relationship out of which it arises, obligations of confidentiality last as long as the information remains confidential.

[276] Confidential information has been described as information that has "the necessary quality of confidence".[16] The information need not be novel, such as that required for a patent application; nor need all parts of it be confidential for the whole process to be protected, if effort, time and skill have gone into that process.[17]

[277] The Court of Appeal has said that it would be "unwise, and in any event extremely difficult, to achieve an intrinsic and all-encompassing definition of confidential information".[18] It is necessarily a fact-specific exercise.

[278] In *Hunt v A*, the leading case in New Zealand on the doctrine of breach of confidence, the Court of Appeal described confidential information simply as information that is not publicly known.[19]

[279] In a recent Court of Appeal case, *Crown Finance Ltd v Crown Asia Pacific Group Ltd*, the Court considered that materials provided for due diligence on acquisition of a property was "commercially valuable and, when taken as a whole, conferred a significant advantage on any potential purchaser".[20] It went on to say:[21]

> Despite some elements of this information being potentially inferable from public sources, the overall package (and many of the individual documents within it) possessed the necessary quality of confidence.

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15 *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 (PC) at 6. See also Matthew Conaglen "Fiduciaries" in Steven Elliot (ed) *Snell's Equity* (35th ed, London, Sweet & Maxwell, 2025 at [7-083], citing *Attorney-General v Black* [1998] Ch 439 at 454; Michael Bryan, Vicki J Vann and Susan Barkehall Thomas *Equity & Trusts in Australia* (3rd ed, Cambridge University Press, Cambridge, 2022) at 195; Ian M Ramsay *Company Directors Principles of Law and Corporate Governance* (2nd ed, LexisNexis, Chatswood, 2023) at [8.60]; *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at [37].

16 *Coco v AN Clark (Engineers) Ltd,* above n 14, at 47, adopted by *A B Consolidated Ltd v Europe Strength Food Co Pty Ltd,* above n 14, at 520–521.

17 *A B Consolidated Ltd v Europe Strength Food Co Pty Ltd,* above n 14, at 521.

18 *R v X (CA553/09)* [2009] NZCA 531, [2010] 2 NZLR 181 at [37].

19 *Hunt v A* [2008] 1 NZLR 368 (CA) at [65].

20 *Crown Finance Ltd v Crown Asia Pacific Group Ltd* [2024] NZCA 614, [2024] NZCCLR 487 at [81].

21 At [81].

[280] Information that is "trivial, public or widely known", is not confidential.[22]

[281] In the case of a director or employee, the information must be something more than generalised know-how.[23] The English Court of Appeal has said that:[24]

> After ceasing the relationship by resignation or otherwise a director is in general (and subject of course to any terms of the contract of employment) not prohibited from using his general fund of skill and knowledge, the 'stock in trade' of the knowledge he has acquired while a director, even including such things as business contacts and personal connections made as a result of his directorship.

[282] So, Grant Taylor was obliged not to misuse Rascals' company information which had a quality of confidence to it and which he acquired because of his role as a director and/or employee of Rascals NZ (being circumstances importing an obligation of confidence). This obligation did not apply to public or widely known information, or to his "general fund of skill and knowledge". This obligation of confidentiality persisted beyond the end of his directorship on 3 August 2020, to the extent that the information retained its confidential character.

Rascals' position

[283] Rascals submits that the information Grant Taylor gave to JJK had the necessary quality of confidence. It was detailed and commercially valuable information that had taken Rascals significant time, skill and effort to acquire, develop and refine.

[284] Rascals further says that the following information is inherently the type of information that is capable of having the necessary quality of confidence:

(a) Business methods and plans are generally confidential information, as are plans to acquire, develop and improve a business.

(b) The names of overseas buying agents, information as to prices paid by both the company and its customers, and the names and locations of a

22 At [77(a)]; *A B Consolidated Ltd v Europe Strength Food Co Pty Ltd,* above n 14, at 521.
23 *Drylandcarbon CP One v Leckie* [2025] NZHC 2915.
24 *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200, [2007] 2 BCLC 239 at [8].

company's manufacturers have all been identified as, at the very least, individually capable of protection, and often all at once.

(c) Technical specifications are also generally confidential, even if they can be reverse engineered to an extent with some expenditure of time, effort, money or experimentation.

[285] Rascals submits that not only was this information inherently the type that is confidential, but there is also evidence from Nick Mowbray, Keith Taylor, and Grant Taylor confirming that this detailed information was confidential to the plaintiffs. Dr Starr similarly agreed.

JJK's position

[286] JJK's position is that none of the information Mr Taylor provided to it is confidential. In sum:

(a) Generalised margin information is widely known by participants in the FMCG industry. Generalised margin information cannot be confidential, nor is it helpful.

(b) That Rascals used an FOB model and offered exclusivity to retailers with higher than industry standard margins is not confidential information, as the experts agreed.

(c) The experts agree that Rascals' use of targeted marketing is not confidential.

(d) The experts agree that general specifications as to nappy features and benefits are not confidential.

(e) Neither Yoursun nor Ms Yuan's details can be confidential:

(i) Rascals terminated both and took no steps to agree restraints or other contractual arrangements that would prevent them from working with others; and

(ii) the fact Yoursun manufactured for Rascals is available online and is information a quick Google search could reveal.

[287] I will now turn to the categories of information Grant Taylor gave to JJK that I set out at [213] to [254], to determine whether it was inside company or confidential information.

General information

[288] The general information about the nappy industry which Grant Taylor discussed with JJK is not Rascals' company information. Information on who the main players are, and the absence of nappy patents, is not information about the Rascals business. Nor is it information with a quality of confidence to it. It is information that is widely known by those operating in the sector.

[289] Approximate shipping and warehousing costs is general information which would be widely known to those manufacturing and shipping goods from China to New Zealand or can be readily ascertained.

[290] General margin information is widely known by participants in the FMCG industry. General margins that other nappy companies are achieving is not information about Rascals.

Know-how

[291] Grant Taylor's "stock in trade" of knowledge he acquired while a director and general manager of Rascals is not Rascals' company information, or confidential information. This includes his knowledge of how to pitch to a retailer, what to include in a pitch deck, how to calculate target pricing, and how to complete a margin spreadsheet.

[292] Grant Taylor's general knowledge about nappies, and their component parts and features, is his personal "know-how" developed over years of working in the nappy business.

[293] Design features of Rascals' nappies not made public, and technical specifications for Rascals' nappies, is inside company and confidential information. But Grant Taylor did not provide JJK with this information, aside from leading JJK to the old Rascals nappy specification with Yoursun. I discuss this separately.

Advice on business model

[294] Some of the individual elements of the Rascals business model which Grant Taylor described to JJK are widely known and deployed by many other manufacturers: manufacturing in China, differentiating the product based on quality, using targeted digital and social marketing, and negotiating FOB terms to avoid carrying inventory.

[295] Rascals argues that the combination of elements, the "recipe", is inside company and confidential information. I accept that Rascals' combination of strategies, used to such great success by Rascals and ZURU, could be considered inside company and confidential information, despite some of the individual elements being well known.

[296] Yet Rascals' own directors did not treat this combination of strategies as inside company information or confidential information. Nick Mowbray, and sometimes Grant Taylor, spoke openly and expansively about the Rascals and ZURU business model at public business fora over 2018 and 2019, when the Rascals brand was rising from a family business to a multimillion-dollar company. Specifically, Nick Mowbray presented at Better by Design (BBD) Summits, gatherings of hundreds of representatives from a range of New Zealand businesses which have been ongoing since 2005, organised by New Zealand Trade and Enterprise.[25]

[297] Rascals accepts that Nick Mowbray talked publicly about Rascals and its success and disclosed at a high level that Rascals offered exclusivity to Foodstuffs, greater than industry margins, and uses targeted social media marketing, including influencers and geotargeting. Rascals also accepts that he has talked about the innovations in the nappies and used five slides from the 59 slides in evidence during

[25] Beehive "Better by Design celebrates 10 years" (11 March 2015) <beehive.govt.nz>.

those presentations. But Rascals says that this "high-level disclosure" is the extent of the public disclosure by Nick Mowbray. He did not disclose the substance of the Rascals' business plan, or the technical specifications of Rascals' nappies, nor did he talk about Rascals' interest in Treasures or its Treasures Business Plan.

[298] Rascals also argues that these were not presentations JJK studied at the time. Two of the speeches were discovered in these proceedings in 2023 by the Taylors, not by JJK. JJK discovered the remaining two, one in May 2025 and the other only the week before the hearing began. Rascals says that JJK compiled these speeches after the fact to give the appearance of substance to that aspect of their defence. That may be so, but the public speeches are relevant to whether Rascals itself treated its business model as inside company information, or confidential information, which its directors and senior employees were expected to hold in confidence.

[299] I have reviewed the presentations and interviews in evidence, to determine the degree to which Nick Mowbray spoke publicly about Rascals' business model.[26] Nick Mowbray's talks addressed the following themes.

A great product with an edge

[300] He explained that his strategy was to focus on how brands could find a way to break into established categories where consumers were already active. He terms this "creating new age, disruptive brands in stodgy categories". He identified a need in that category that a brand could respond to. In other words, he found a brand's "edge" which would make it relevant and stand out within that category.

[301] He discussed the application of this model to Rascals. First, he asked how he could make nappies relevant to younger audiences – in this case, millennial mothers. Rascals realised young mothers did not want the traditional aesthetics of nappies (which used cartoon characters) and it asked how to make the nappy "trendy and something they would want to photograph their kids in and share on social media". This would be the brand's edge.

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[26] BBD Summits in April 2018, March 2019, and April 2019; "Raw and Real" interview with the National Business Review (NBR); Nick Mowbray and Grant Taylor interview with the NBR on 22 August 2018.

[302] Nick Mowbray acknowledged that the Taylors had developed a really great product that appealed to new millennial audiences, through its modern, edgy and fashionable design, with “no nasties” and sustainable materials. He spoke about the need to keep the brand relevant going forward and the rise of the socially conscious consumer. He referenced observations across industries that younger generations are willing to pay more for products which have positive social and environmental impacts. Accordingly, Rascals was investigating a biodegradable diaper which maintained its function.

[303] Nick Mowbray spoke about the core innovations to the product, developed by Grant Taylor and Louise Taylor, which, although small changes, cumulatively made it stand out from the other nappies on the shelves. In his April 2019 talk, he depicted how Rascals had innovated the nappy design and the core characteristics of what made the nappy a great product:

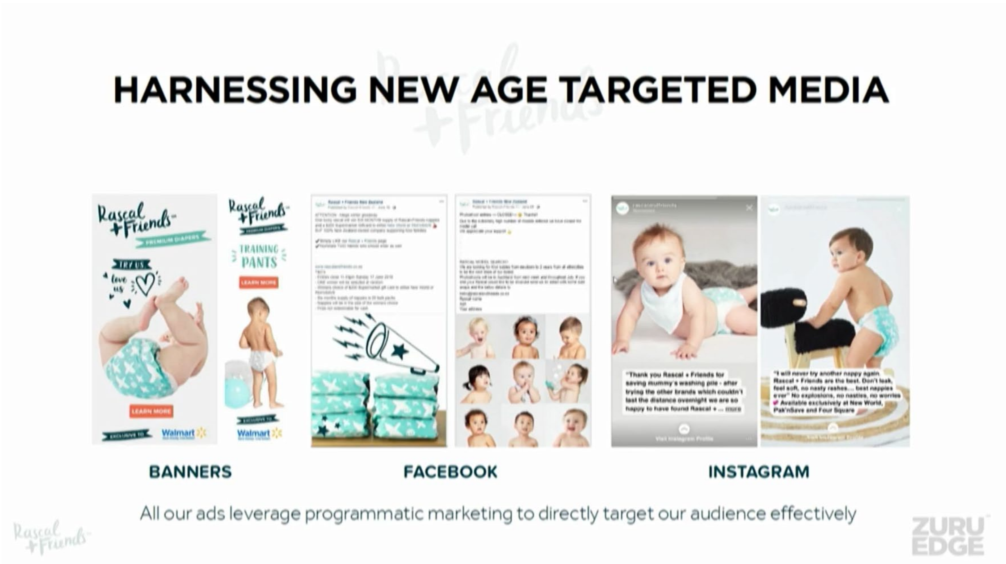
[304] In the NBR interview with Grant Taylor, and his April 2019 BBD Summit speech, Nick Mowbray explained that design and development was done in New Zealand by the Taylors, with the nappies made in a factory in China from components sourced internationally. He listed the materials which Rascals used in its product: 3M tape, the elastics from Heikel in Germany, pulp from sustainable forests in the United States, superabsorbent polymer materials from Japan — which he described as all the best components from across the globe for “the best parts of the recipe to make the best product”.

Targeted social and digital marketing

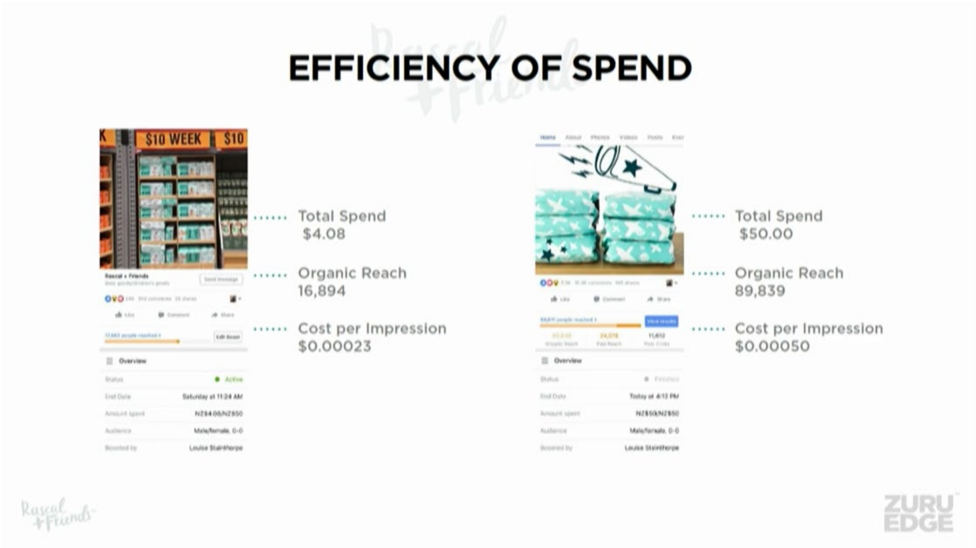
[305] Nick Mowbray spoke extensively about Rascals' innovative use of targeted social and digital marketing. He said that the reason Rascals had taken so much market share was due to the intensive use of social and digital marketing. He emphasised the power of digital and social media to connect directly with the audience more effectively and efficiently than traditional, advertisement-based marketing. He emphasised how targeted digital and social media marketing had changed the landscape in FMCG, enabling digital challenger brands to challenge stodgy established brands.

[306] He gave the example of a competition Rascals put up on Facebook which attracted thousands of comments within hours. He observed the success of a commercial model which capitalised on reviews from consumers, rather than reliance on brand loyalty, and achieved exponential profit. He emphasised the importance of good reviews.

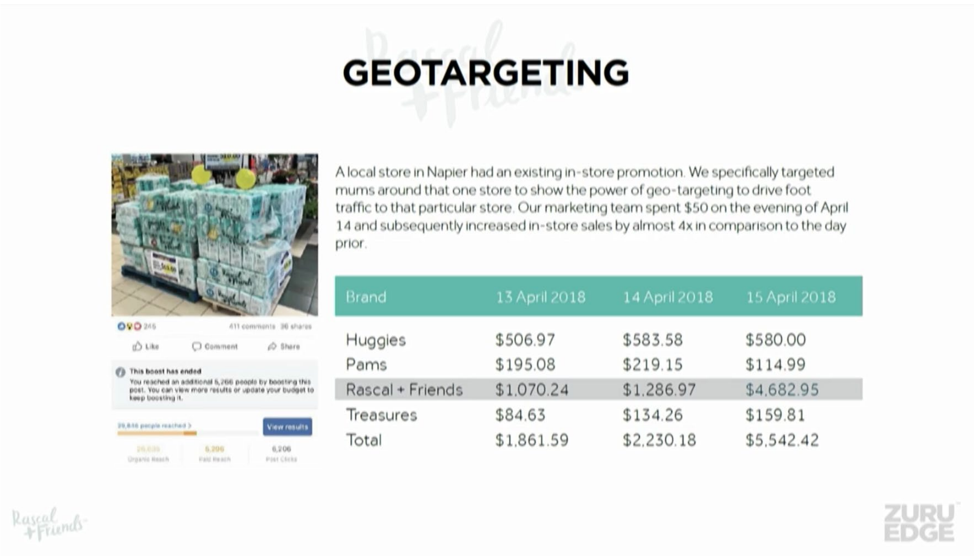
[307] He presented on harnessing social media:



[308] He explained that targeted advertising is very efficient as it can reach a wider audience for a higher margin, with a fraction of the marketing costs:



[309] He said that another way to make this strategy more efficient is geotargeting:



Partner with a retailer and give higher margin

[310] Nick Mowbray said that another important prong of his strategy was about "solving commercial problems for retailers". Nick Mowbray observed that all the retailers had the same brands and had to compete heavily, resulting in smaller margins. His solution was:

> "How about we work exclusively, we give it to you as a fancy brand, we give this product to you, just to you. And how about we drive all this social and digital media, so we drive all these people to your store. Oh, and how about we give you a whole lot of extra margin that you're making right now and guess what? You don't have to compete with Amazon, you don't have to compete with the supermarket down the road because you're gonna be the

> only ones that have it. Oh, and by the way we have made it relevant for new consumers as well."

[311] Nick Mowbray called it "layering": "we're not selling a product; we're solving a problem for that retailer". He further expanded on how to go about breaking into a market:

> Think about the commercial model. Think about those six or seven things that you can layer in to break in… it's working out what are the problems that, in our case, that particular retailer faces in that category and how do I solve all of those in a really layered and structured way? If you can go in, and deliver that, it is so compelling and you can win almost every time.

[312] He repeated this message in the 2018 NBR interview:

> We had to formulate a commercial strategy that made sense. And so I often say that we're not necessarily selling nappies, we're solving problems for our retail partners. So we're going in and trying to solve a set of commercial problems that they face in the category and then we've combined that with making a brand relevant to new consumers… how do we make this relevant, trendy, something that mums want to picture their kids on social media?

[313] And in his April 2019 talk, Nick Mowbray spoke of the "macro-shift" of margin erosion for major retailers. He said retailers need brand differentiation to protect their margin. He advised: if you are trying to launch with a retailer, do not just go in with a blanket approach, think about your commercial model, think about the pain points for the retailer.

[314] He spoke about his strategy of selling through a large retailer with scale rather than direct to the customer. In response to a question about how selective he is with retailers, he said he thinks about the commercial model, which is to form a partnership with a particular retailer to solve their problems, and drive foot traffic and margin to the retailer. He also referenced the disruptive ZURU model, which works with every major retailer in the world by a model of manufacturing to order, rather than holding any inventory.

Manufacture in China, FOB terms, no inventory

[315] Nick Mowbray said that a key aspect of his model was to operate in the leanest way possible. This entails holding zero inventory. Instead, he lets large-scale retail focus on the logistics and putting stuff on shelves. He disclosed that over the prior six

weeks Rascal and Friends had shipped around 40 million nappies to New Zealand and had not carried any inventory. The company "had not touched a nappy". He disclosed that the business was run lean, by two people full time and was doing $150,000 to $160,000 per week and without holding inventory.

[316] He expanded on this strategy in his speech at the BBD Summit March 2019. He described how one of ZURU's significant strategic advantages has been operating out of China. He went on to discuss the importance of the FOB model. He said that he considers the word "inventory" to be a "dirty word".

[317] In the NBR "Raw and Real" interview, Nick Mowbray once again discussed the "disruptive" model he had developed and employed to make his businesses successful. One aspect of this was "doing everything out of China — design, development, finance, engineering, automation". This meant that ZURU could keep its operating costs at a fraction of their competitors. ZURU was building its own factories in China and a lot of production is automated.

[318] This also applied to shipping. ZURU businesses did not have any wholesale distribution setup. Rather, it goes direct to major retailers and the businesses themselves do not hold any inventory. The whole model "globally is zero inventory". Nick Mowbray describes this as a "lean front-end model" — it is "all FOB [out of] China". He again described "inventory" as a "dirty word".

[319] Nick Mowbray acknowledged that the model was simple, but it was very difficult for competitors to compete. There is a "moat" around the business which ensures this: ZURU has an incredibly low-cost operating structure, competitors do not have the operating cost structure allowing them to work in tight margins, they do not own their own factories, and they do not have the same level of automation as ZURU. These layers mean companies cannot compete with ZURU.

The business model overall

[320] Nick Mowbray said that the question for Rascals was:

> So how do we create a nappy brand that's more transparent (no chlorine, no formaldehyde, no bleaching, no [inaudible], no latex), it's made with

> sustainable pulp from sustainable forests, it's a trendy design that mums want to share their kids on social and digital media… we looked at how we could deliver more margins to retail partners to help solve the commercial problems around it… so we built this unbelievable game plan.

[321] Nick Mowbray concluded:

> If you build something that resonates within your audience, if you make it relevant to that new audience, if you reinvigorate the category, if you look at your marketing in terms of creating and using new age efficient marketing, if you look at how millennials and Gen Z are consuming brands and consuming advertising and you move with that, and if you create commercial models that are disruptive and different to solve your partners' commercial problems, then you can build brands really fast.

Rascals' success story

[322] Nick Mowbray was open about Rascals' success. In the first BBD speech, he said within 17 weeks of launching the brand at Foodstuffs, they had achieved a 25 per cent market share.

[323] In the NBR interview, he discussed the company's expansion plans, disclosing that they were launching with Tesco in the UK and Thailand, Carrefour in France and Brazil, Walmart in Canada and Mexico, and Coles in Australia, and other major retailers throughout Asia. He and Grant Taylor explained that they were partnering exclusively with the largest supermarket in each country.

[324] In the NBR "Raw and Real" interview, he said that the Rascals strategies had resulted in up to 23 per cent market share with Foodstuffs. He disclosed again the major retailers around the world Rascals was launching with and said that in New Zealand they were selling 600,000 or 700,000 nappies a week.

[325] In his April 2019 talk, Nick Mowbray emphasised the success of the Rascals business model which had harnessed the four macro-shifts — in just over a year, Rascals achieved 30 per cent market share in Foodstuffs, over established brands like Huggies and Treasures. He said that since Rascals' launch in September 2017, it was doing around $700,000 of sales per week in Australia and New Zealand.

[326] Having reviewed these presentations, I will now determine whether the information about Rascals' business model that Grant Taylor described to JJK, was inside company or confidential information.

High margin and exclusivity

[327] I find that ZURU and Rascals' strategy of reaching exclusive arrangements with major retailers in return for higher than usual margins was not inside or confidential information.

[328] The experts agreed that Rascals' model of offering exclusivity to purchasers with greater than industry standard margin, is not confidential information.

[329] Rascals' 2019 pitch deck for retailers explicitly refers to Rascals' exclusive retail partnership with Foodstuffs and includes sales data shared with Rascals by Foodstuffs. This indicates that Rascals shared this strategy widely within the retail sector.

[330] Nick Mowbray spoke about this strategy publicly on several occasions, as described above. Even if, in principle, a business strategy of this kind might be regarded as inside or confidential information, Rascals itself did not treat it as such, sharing it with the business community.

FOB model

[331] I also find that Rascals' use of FOB to avoid carrying inventory was not inside company or confidential information.

[332] The experts agree that the bare fact that a company uses an FOB model is not "proprietary". I note that Dr Starr's opinion is that use of FOB in the New Zealand grocery trade is "somewhat unusual". Yet Mr Collie's evidence is that FOB is a common term for supply agreements, and one that his manufacturing company uses regularly for packaging, machinery and raw materials.

[333] Rascals did not treat its use of FOB terms as inside company or confidential information. As described, in his speeches and interviews Nick Mowbray explained that the Rascals/ZURU model involved having China-based operations for all aspects of the business, from design to development to manufacturing. He explained that Rascals (and ZURU) ran a lean shipping model which entailed zero inventory, with all products going direct to the retailer (also known as FOB).

[334] The experts are broadly aligned that the exact details of the FOB model, including margin, transfer of title and payment terms might be "proprietary". However, Mr Paling notes that these aspects are negotiated and agreed between the brand and the retailer. There is no guarantee that JJK could agree their preferred terms.

[335] In any case, there is no evidence that Grant Taylor disclosed Rascals' specific FOB terms to JJK. Grant Taylor's evidence is that he did not. Keith Taylor's evidence is that Rascals' terms involved payment within seven days of sight of the bill of lading. In contrast, JJK asked Countdown for 14 days payment terms, which Countdown rejected.

Targeted digital marketing

[336] Again, I find that this feature of the Rascals business model was not inside or confidential information.

[337] The experts agree that targeted digital marketing is commonly used and would not have been considered proprietary. Mr Paling's view is that use of tactics such as influencer marketing, Facebook or Google advertising and retargeting, search engine optimisation and search engine marketing are a generic playbook that any digital marketer would use.

[338] Dr Starr considers that specific details related to geotargeting, exact Google Adwords and other information is proprietary. However, there is no evidence that Grant Taylor provided JJK with specific Google Adwords.

[339] Again, Nick Mowbray spoke expansively and openly about the ZURU/Rascals digital and social media marketing approach, including using targeted social media

rather than traditional forms of marketing, use of influencers and geotargeting. This strategy cannot be regarded as confidential or even inside information if Nick Mowbray was willing to discuss the concept at length in these public fora.

Conclusion

[340] I conclude that the specific strategies for developing a successful nappy business in New Zealand that Grant Taylor gave to JJK, the so-called "Rascals' business model", was not inside company information or confidential information. The strategies were manufacturing in China, contracting exclusively with one major retailer and giving that retailer higher than usual margins, avoiding holding inventory by negotiating FOB terms, and using digital and social media marketing. The individual strategies were nothing unique. The package of strategies was publicly promoted by Nick Mowbray, typically with Grant Taylor present and sometimes contributing, indicating that he did not consider the information to be of a character that it should be held in confidence within the company.

Business contacts

[341] The experts disagree on whether the business contacts Grant Taylor gave to JJK (Ms Yuan and the Yoursun factory) were confidential to Rascals. Mr Paling, for JJK, considers that the name and contact details of Ms Yuan are not confidential information, as the Taylors' relationship with her predated Rascals, she is an independent agent, she was no longer engaged by Rascals, and she was not under any confidentiality terms with Rascals.

[342] Similarly, Mr Paling does not consider the name of Rascals' former factory in China to be confidential information. Like agents, factories are independent businesses, and they obtain work through introductions and word of mouth. Rascals had not used Yoursun since around 2017, when it terminated its relationship because Rascals considered Yoursun to be too expensive and poor quality.

[343] Mr Paling does not consider there to be anything confidential about the fact that a particular factory had previously been engaged by Rascals. He states that if Rascals had wanted to restrain the factory in some way, then it would have needed to

agree exclusivity or confidentiality terms. Further, he is of the view that for a product like a nappy, which can be easily reverse engineered, it is difficult to see any advantage in using this factory other than a basic level of familiarity in dealing with New Zealand people and any publicly mandated market requirements, which is not commercially sensitive.

[344] Dr Starr Jr disagrees. In his opinion, Ms Yuan's name and contact details were confidential information, because she had extensive insider knowledge about how Rascals conducted its business, and knowing the identity of a reputable and knowledgeable manufacturers agent is specialised knowledge. Dr Starr also considers that the name and contact details of Yoursun was confidential information because it is highly valuable, as it is the result of extensive due diligence and would be closely guarded.

[345] In my assessment, Grant Taylor did not disclose Rascals' inside information or confidential information by referring JJK to Ms Yuan. Ms Yuan is a freelance contractor who acts for many organisations. The records indicate that Grant Taylor initially referred JJK to Ms Yuan as the former "Tool Shed" agent. Mr Penney recorded "Chinese agents name: **Porsche**, was "Tool Shed" agent, takes 3% of deal." Before the Treasures discussions, Grant Taylor referred Mr Armitage to Ms Yuan for the purpose of seeking assistance with finding a manufacturer in China of N95 facemasks.

[346] If Grant Taylor told JJK that Ms Yuan had previously acted for Rascals, that was not confidential Rascals information. Rascals stopped using Ms Yuan in November 2017 and formally terminated their arrangement in February 2019. No confidentiality provisions or restraint of trade was agreed when Ms Yuan was engaged or terminated. There is nothing preventing Ms Yuan from disclosing her former relationship with Rascals to anyone who asks. This was historical information which did not have a quality of confidence to it.

[347] I accept that being introduced to Ms Yuan by Grant Taylor saved JJK the time of identifying a suitable agent themselves. But that alone does not render the

information confidential or inside Rascals information, especially when Rascals had no current relationship with her.

[348] The position of Yoursun is more nuanced. Grant Taylor appears to have said that he could not tell JJK the name of Rascals' current factory, but the "Old Rascal's factory [was] a possibility". As discussed, the relationship between Rascals and Yoursun was historical, having come to an end in 2017. As with Ms Yuan, there were no exclusivity or confidentiality agreements between Rascals and Yoursun, preventing the factory from disclosing that it used to manufacture nappies for Rascals until 2017. Mr Paling says that it would be unusual for a manufacturer in China to enter such an arrangement. Mr Paling confirmed that Yoursun factory is still advertising a "Rascals + Friends" nappy online which can be found through a simple Google search. These factors indicate that Yoursun's identity as Rascal's former manufacturer does not have a quality of confidence to it.

[349] Again, the mere fact that the introduction to Yoursun saved JJK time does not mean that the information is Rascals' inside information or confidential. That is the usual consequence of a business introduction.

[350] Yet there is more to it than that. By connecting JJK to Yoursun through Ms Yuan, and facilitating the early negotiations with Yoursun, Grant Taylor led JJK to Rascals' original, pre-2017 nappy specification held by Yoursun.

[351] Arguably, this nappy specification had lost its confidential character, if it ever had any, because it is now used by Yoursun for other customers. That specification is now used by Yoursun as its generic EU nappy with 3D core design. I infer that this specification is what is marketed as the "Rascals + Friends" nappy.

[352] Yet the fact that this nappy specification is the original Rascals specification, developed specifically for Rascals, before Rascals moved production to Joylink, is not information that is widely known. The information has obvious commercial value given the popularity of Rascal and Friends nappies, albeit the specification held by Yoursun was out of date. On balance, I consider that this information was Rascals' company and confidential information.

[353] I conclude that Grant Taylor did not disclose Rascals' inside company or confidential information by providing JJK with the names of the "Toolshed agent" (Ms Yuan) or the "Old Rascals' factory" (Yoursun). But Grant Taylor did, indirectly, disclose confidential information in the form of the 2017 technical specification for Rascals nappies.

Business information in pitch decks

[354] The experts agree that initial pitch decks to retailers are less proprietary in nature and that "later negotiations are more sensitive in nature". They disagree as to the status of the two pitch decks at issue. Mr Paling's opinion is that they are not confidential, as they are not marked confidential, they would be shared with retailers without any confidentiality agreement and generally contain information that is publicly available or could be otherwise deduced.

[355] Dr Starr is of the view that the pitch decks are private conversations between Rascals and grocers and include specific knowledge and proprietary insights not known outside Rascals' management. Dr Starr undertook searches of the internet and commissioned a search of the dark web. He was unable to locate any record of the pitch decks (or their content) in the public domain.

[356] Nick Mowbray gave evidence that the slide decks were made available to retailers with a confidentiality footer on the emails and in the context of existing retailer relationships. He explained that there is a general understanding in the industry that these types of approaches would be treated confidentially.

[357] Yet the pitch decks were not marked as confidential and there is evidence that they were often sent to retailers on an unsolicited basis, without any confidentiality agreement or undertakings. This indicates that Rascals did not treat the information in the pitch decks as inside company or confidential information.

[358] The information in the 2019 pitch deck is predominantly general, publicly available, or was, by 2020, out of date. In theory, the exceptions might be:

(a) Rascals' global weekly sales figures to 2019;

(b) its international expansion plans;

(c) graphs showing the growth in Foodstuffs' share of the nappy market compared to Progressive Enterprise's and Rascals' growth within Foodstuffs compared to Foodstuffs' private label, Pams;

(d) analysis of the efficiency of its marketing spend; and

(e) plans to double manufacturing in 2019.

[359] However, Nick Mowbray openly discussed these aspects of the business in his public presentations. For example, in his presentation to the BBD summit in April 2018, he disclosed that the business was making $150,000 to $160,000 per week (without holding any inventory). In his presentation in April 2019, he disclosed that Rascals had grown sales to an expected $100 million by the end of 2019. In his NBR interview, he disclosed that Rascals was selling 600,000 or 700,000 nappies a week in New Zealand.

[360] Nick Mowbray also discussed Rascals' capture of market share. In his April 2018 speech, he shared that within 17 weeks of launching the brand at Foodstuffs (Pak'nSave and New World), Rascals had achieved a 25 per cent market share. In his interview with the NBR, he said that the Rascals business model had resulted in up to 23 per cent market share with Foodstuffs.

[361] The page describing the efficiency of Rascals' marketing spend in the pitch deck was displayed in Nick Mowbray's April 2019 talk.

[362] Rascals' plans to double its manufacturing in 2019 were out of date by the time Grant Taylor provided Mr Penney with this presentation in July 2020. In any case, Nick Mowbray spoke openly about the company's growth plans at his public presentations. For example, in the NBR interviews he detailed all the countries Rascals was launching in and the specific retailers they were partnering with.

[363] Overall, the 2019 pitch deck does not contain any information which Nick Mowbray had not discussed publicly or was not otherwise publicly available or easily ascertained from public sources.

[364] The exception is the description of Rascals' partnership with the Joylink factory. There is no evidence of Nick Mowbray or anyone at Rascals discussing this partnership publicly. I note that the slides deck includes photos of prominent ZURU signage in entrances to the three Joylink factories. Nevertheless, there is no evidence that Rascals' partnership with the Joylink was widely known. By a fine margin, I conclude the fact that Rascals manufactured its nappies at Joylink factories is inside company and confidential information.

[365] The information about Rascals' intended launch of an eco nappy is more specific and potentially sensitive. The presentation includes a pricing table for the eco nappy being pitched to New World and Pak'nSave. It does not contain any information about Rascals' margins or costs.

[366] I consider that this 2020 pitch deck contained inside and confidential information about an intended expansion to Rascals' range, which Rascals would not have wanted shared beyond the intended retailer recipients.

[367] In summary, most of the information in the 2019 pitch deck was not inside company or confidential information. The exception was the partnership with Joylink and associated information. The 2020 Update pitch deck was confidential information.

Nappy features and components

[368] Dr Starr and Mr Paling concur that general specifications relating to nappy features and benefits that are presented to the consumer are not confidential. Dr Starr opines that specific technical details including specific materials, designs and manufacturing processes are likely to be confidential.

[369] I agree with that assessment. The premium features of the Rascals nappy described in the 2019 slide deck Grant Taylor provided to Mr Penney was not

confidential information. Besides being included in the retailer pitch decks, the key features and benefits of Rascals' nappies are extensively set out on the nappy packaging and on Rascals' website.

[370] Additionally, Nick Mowbray's presentation in April 2019 set all six core innovations of the nappy out in considerable detail:

[371] Plainly therefore, information about nappy features and benefits was not considered to be confidential information by Rascals. To the contrary, it was treated as promotional information.

[372] Additionally, Grant Taylor educated Mr Penney about the basic component parts of nappies and suggested changes to the Treasures nappy. I do not consider a description of the basic component parts of a nappy to be inside company or confidential information. These are not Rascals' technical specifications. As I have said, Grant Taylor's knowledge of nappies was his "stock in trade" developed over his five years' of experience in the industry. Nick Mowbray acknowledged in his speeches that Grant and Louise Taylor were responsible for developing the Rascals nappy. Provided Grant did not disclose the technical specifications for Rascals nappies, or the materials Rascals used, this was not inside or confidential information. His opinion on what constitutes a good nappy is his personal "know-how" which he was free to share with JJK.

[373] I note here that Nick Mowbray was open about discussing the materials that Rascals used in its nappies. For example, in his BBD Summit April 2019 speech, he described 3M tape, elastics from Germany, pulp from sustainable forests in the United States, SAP absorbency material from Japan as "the best parts of the recipe to make the best product".

[374] That leaves the sample nappy. While confidential information can take many forms, including physical form, the sample nappy did not embody confidential information. Rascals does not have any patent in its nappies. Its technical specifications were not embodied in the physical nappy. The physical nappy sample did not give any more information about technical specifications than any Rascals nappy bought off the shelf.

[375] To conclude, the information that Grant Taylor gave to JJK directly and indirectly about nappy component parts and features, but not technical specifications, was not inside company or confidential information.

Summary of confidential information

[376] The information which Grant Taylor gave to JJK which was inside company and confidential information was:

(a) the 2020 Update pitch deck which contained sensitive information about the new eco nappy;

(b) the pre-2017 technical specification for Rascal and Friends nappies held by Yoursun; and

(c) the identity of Rascals' currently nappy manufacturer: Joylink.

[377] The remaining information said by Rascals to be confidential information was not inside company information or information to which an obligation of confidence attached.

Did JJK know or close their mind to the fact that the information was confidential?

[378] It was Grant Taylor who owed Rascals a duty of confidence in relation to the confidential information he received as director and general manager of Rascals. JJK was a third party to that primary duty of confidence. For JJK to be liable for receiving the confidential information in breach of confidence, they must have acted unconscionably.[27] They must have been aware that the information was confidential, or willingly turned a blind eye.[28] It is not enough that they were careless, naïve, or stupid.

[379] It can be inferred that the JJK directors understood that any information Grant Taylor gave them about the Rascals business was information that he had acquired through his roles as founder, general manager and director of Rascals. It was because of his experience at Rascals that they sought his advice.

[380] The question is whether JJK was aware or wilfully blind to the fact that the information was confidential information, that Grant Taylor was expected to hold in confidence, even after his role with Rascals ended.

[381] Rascals says that JJK's directors knew that the information was not publicly available and was confidential. It is self-evident that Grant Taylor only had access to the Rascals' presentations and nappy sample by virtue of his position as a director of Rascals. Mr Collie and Mr Armitage were experienced company directors, and each held multiple directorships in unrelated businesses at the time.

[382] The JJK directors' evidence is that they did not consider or suspect that the information Grant Taylor gave them was confidential Rascals information.

[383] Their evidence is that Grant Taylor told them at the outset that he could provide high level advice and publicly available information but could not provide commercially sensitive information. They say they understood that he would not give

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27 *Hunt v A,* above n 19, at [92].

28 *Thomas v Pearce* [2000] FSR 718 at 721 cited in *Hunt v A*, above n 19, at [82]. Whether constructive knowledge will suffice is unsettled in New Zealand: *Hunt v A* at [94]. The plaintiffs advanced their case based on actual knowledge or wilful blindness.

them any information they should not have, and they relied on his judgment to determine what that was. He said he could not connect JJK with Rascals' current factory, but an old Rascals factory might be an option. When they asked Grant Taylor if he was interested in consulting to them, he said he could not because he had a restraint of trade with Rascals.

[384] Mr Armitage's evidence is that Grant Taylor said, "Mate, I won't give you any confidential information but I'm happy to help you through it" and "he made it really clear several times that he'll give us whatever is out there already".

[385] Mr Collie did "not remember [Grant Taylor] providing us with any real detailed information. It was always high level as far as I was aware." Mr Collie said that Grant Taylor was "very guarded about what he could and couldn't give us" and that he said, "he could give us old information, generalised thoughts".

[386] Mr Penney's evidence was that "Grant had already also said to us that he wouldn't give us anything that he couldn't. He had said that to us in conversation." He said he "didn't think Grant would send us through anything that would jeopardise himself" and he "expected him to know what he can and cannot give". He added that he understood that Grant Taylor would be "limited in his advice, limited in everything."

[387] Rascals challenges this, pointing to the fact that Mr Penney marked his email to Mr Adams attaching the Rascals' second pitch deck as "confidential". He said: "Just want you to look over this (confidential). James and I are working on the pricing/selling comparison matrix." Also, JJK marked its own presentation as "confidential".

[388] Mr Penney was cross-examined extensively on this issue. As to why he agreed in his deposition that JJK's sales pitch decks were confidential, he said:

> You can tell I'm rambling here in this deposition…I have wrestled with it if it is or if it isn't, but I don't think it is because they're sent out to the public domain. But yeah, I mean in answering this I can tell I'm rambling and agreeable but I don't believe that – I think pitch decks are built to be external, they're built to be sent out. So I think the confidentiality is questionable.

[389] As to why he mentioned confidentiality in the email containing the Rascals pitch deck, he said:

> I mean I don't know, did I write confidential, because it's not to be shared with anyone else, or did I write confidential 'cos it was confidential. I think 1 that I may have written 'cos I didn't want anyone else to see it you know. So I think we're looking back at this and it's such a time when we didn't even own the brand, didn't own anything and we were just and we tried to determine why I wrote confidential. And I don't, I don't know why actually if it's confidential 'cos the information's confidential or if it's confidential because I don't want anyone else to know about it. Because we're trying to buy the brand and we don't want any – some to see it either and say: "Oh is it available, maybe we can buy it." So I don't really know the – I don't know why it's written or the reasoning for it.

[390] Standing back, I need to consider whether it is credible that the JJK directors would not have thought that some of the information, such as Rascals' business strategies, the retailer pitch decks, and the original nappy specification held by Yoursun was confidential.

[391] Mr Penney was inexperienced in business. He was "moving fast" and not stopping to second guess whether Grant Taylor should have been sharing the information with him. I found him credible in his explanation that he did not turn his mind to whether there was any legal issue with Grant Taylor providing the information until buying Treasures became a reality. At that point, he insisted that JJK obtain full legal advice. He identified for Mr Collie the matters that he was concerned about: Ms Yuan's details and the Yoursun factory.

[392] Mr Armitage and Mr Collie were experienced businessmen and one would expect them to appreciate the concept of confidential company information. One might have expected them to turn their minds to whether Rascals branded retailer pitch decks and technical specifications from the factory that previously manufactured Rascals nappies might be confidential information. At the same time, their involvement was more high level, particularly Mr Armitage who confessed that he is dyslexic, and that he did not read many of the emails. It was Mr Penney who was dealing most closely with Grant Taylor to prepare for the Countdown meetings and who dealt directly with Ms Yuan about the nappy specification.

[393] In August 2020, JJK sought legal advice about Grant Taylor's restraint of trade and legal risk arising out of the information and assistance they had received from him. This request for legal advice provides guidance as to the JJK directors' state of mind at the time. I turn to it now.

Legal advice obtained on risk

[394] On 5 August 2020, Grant Taylor sent Mr Penney a photo of his restraint of trade. Mr Penney emailed the photo to David Lewis of Dentons and asked whether the person subject to the restraint could work with JJK in any capacity on the Treasures/Countdown project. Mr Lewis provided preliminary advice that the restraint was poorly drafted, the person subject to the restraint should get their own advice, and that JJK should not encourage the person to breach the restraint because JJK could be liable for the breach. He said if there was "any doubt", JJK should not "go there", because the purchaser was likely to vigorously enforce the restraint to protect the goodwill for which they had made a substantial payment.

[395] On 18 August 2020, Mr Penney and his wife requested that JJK seek further advice on whether JJK could use the information Grant Taylor had provided, including the connection with Portia Yuan and the Yoursun factory. The messages between Messrs Penney, Armitage and Collie are:

Jarrod Armitage
Yip

Kirk Penny
Perfect

18/08/2020 1:38:03 pm

Kirk Penny
Guys - Audra's wishes... her hurdle if you will. Can we get the professional advice from David before Thursday's catchup? On if the general information we have received from Grant prior to purchasing the company can be used?

Kirk Penny
Manufacturer, agent, general ideas.

Kirk Penny
To be fair it's just manufacturer and agent (former R+F)

Is it the same agent

Kirk Penny
Yes, the first agent, then they switched. They also switched manufacturers

So it's just old information.... I doubt it will be an issue, they are redundant in regards to R+F

Kirk Penny
Can we get David's approval on that?

19/08/2020 5:32:57 pm

Kirk Penny
Attachment not found: 61950796142__15838481-A862-4F34-9085-6EC8E50395A0.jpeg (Image)

Kirk Penny
Little Ones launched today! 👎

Jarrod Armitage
Similar to the old treasures

😷

Nasty

🤢

[396] Mr Collie called Mr Lewis and instructed him to prepare that advice. Mr Collie then reported back to the directors (and Mr Lewis) in an email:

> Had a great talk with Dave tonight looking specifically at our exposure regarding who we get advice from and their possible exposure.
>
> As we found out recently there is an agreement in place stopping Grant from being involved in a competing business in the nappy industry, obviously he is not involved with us at all but has helped us, without showing us. I.e we have no idea who R&F supplier is or anything along those lines. But there is a line that he will not be able to cross and we need to know where that line is.
>
> Obviously we valued Grants general direction he has pointed us in when we asked about our possible purchase of treasures and buying it. I.e. who is the

> buyer for Countdown and what do you think about design, possible global manufacturers we should look at and so on.
>
> The last thing we want is for him to be in any kind of situation where he was to breach this agreement.
>
> Dave suggested that he seek advice on this from his own lawyers As he believes that Grant could consult on these basic views, but in the mean while Dave can advise us on what he believes the position is for Grant and us and how we should conduct business going forward to ensure we don't cross a line and breach Grants agreement.
>
> Dave will send an email explaining what the situation is regarding the basic conversations we have had with Grant giving us guidance.

[397] At 12.36 pm on 19 August 2020, Mr Lewis emailed JJK's directors saying he had spoken to Mr Orr. At 1.04 pm, Mr Collie responded, requesting Mr Lewis' advice regarding Grant Taylor, so they knew what they could and could not do:

> All we need is advise [sic] on the Grant situation and we can move forward. We need to know where the line in the sand is for us. We don't want Grant or us to be dragged into litigation so please advise on all we spoke about last night.

[398] At 5.21 pm, on 19 August, Mr Lewis sent his advice by email. It opens:

> **Advice sought**
>
> You have asked for some advice regarding the application of a restraint entered into by a person (Grant) in connection with the sale of a business by that person (or a related party). As I understand it:
>
> 1. Grant approached you to offer limited advice regarding a nappy business. You did not approach Grant and solicit that advice.
>
> 2. The advice was in the nature of telling his story in relation to the successful business he sold, what worked, what to avoid and he gave you "tips".
>
> 3. You have not paid for the advice, and Grant has no economic interest in your proposed purchase of the Treasures brands.
>
> 4. At some point in the conversations you were advised by Grant that he was subject to a restraint of trade, and a copy of that restraint was supplied to you.
>
> 5. Grant told you that notwithstanding that restraint, he thought he was free to consult.
>
> Can you please let me know if any of this is incorrect.

[399] The advice discussed the terms of the restraint, which Mr Penney had earlier provided and explained the tort of inducement of breach of contract. The advice concluded:

> So the starting point is to ask whether Grant is in breach of his restraint. If he is not, there can be no inducement to breach. It seems that Grant is of the view that he is not in breach and he is free to offer gratuitous advice.
>
> Even if Grant was in breach a liability for inducement only arises if you intentionally caused or encouraged that breach. It appears Grant offered advice, you did not seek it. Initially you were unaware of the existence of the restraint. In fact, you are anxious to ensure there is no breach by Grant, and that he fully complies with his obligations. The last thing you are wanting to do is intentionally procure or cause a breach by Grant.
>
> **Conclusion**
>
> Grant should receive appropriate advice to confirm his view that he can consult. That is his call.
>
> Based on the facts above it would be extremely unlikely that you would have a liability for inducing a breach of the restraint of trade.
>
> Going forward if Grant is to assist further then it would be wise for Grant to seek comfort on his own obligations. You have our thoughts on the restraint above.

[400] Messrs Penney, Armitage and Collie gave evidence that Mr Lewis also provided them with oral advice that Grant Taylor could share his “know-how” with them.

[401] The fact that JJK sought the legal advice indicates that they were aware that there were potentially legal issues. But it is telling that the focus of their instruction was the restraint of trade. I infer that JJK thought that the restraint of trade was the legal issue they needed to be concerned about. In fact, the restraint of trade did not come into play until 3 August 2020, when Grant Taylor’s resignation as a director came into effect.

[402] Mr Penney was also worried about Ms Yuan and Yoursun. Mr Collie was not. Mr Collie appears not to have appreciated that Mr Penney was talking to Rascals’ old agent. But in any event, he brushed Mr Penney’s concern off: “So its just old information… I doubt it will be an issue, they are redundant in regards R&F”. Mr Collie appears not to have passed on Mr Penney’s concern about Ms Yuan and

Yoursun's details to Mr Lewis, or at least it is not specifically addressed in the legal advice.

[403] No one was concerned enough about the other information JJK had received from Grant Taylor to seek legal advice on whether they should have received the information and could lawfully use it. Mr Penney did not raise with Mr Collie the retailer pitch decks, the sample nappy or anything else.

[404] Rascals suggests that JJK deliberately 'downplayed' matters in their instruction to Mr Lewis to steer the advice to the answer they wanted. Rascals notes that JJK appears not to have told Mr Lewis that Grant Taylor had been a director of Rascals when he gave them information. Rascals says that JJK's request for advice was inaccurate: JJK did solicit advice from Grant Taylor, they offered him equity, and the advice was more than his "story" and "tips". Further, JJK appears not to have told Mr Lewis that Grant Taylor had given them the details of Ms Yuan's and the former factory Rascals had used, Rascals' presentations, a sample nappy, margin formulae and the Rascals business model. Rascals argues that JJK could take no comfort from the advice when they must have known that the assumptions on which it was based were false.

[405] I consider that suggestion to be far-fetched. The contemporaneous documents show that JJK sought advice because acquiring Treasures had become a reality and the directors wanted to know what they could and could not do, within the bounds of the law. The request and the advice reflected the issues as JJK perceived them to be. It is not credible that JJK would deliberately manufacture legal advice which it knew to be based on wrong assumptions, knowingly risking legal liability to Rascals/ZURU.

[406] The more likely explanation for the omissions in the request for advice and the advice itself is that JJK was ignorant of what the real legal issues were. JJK thought that the issue was the restraint of trade. That is what Grant Taylor had told them about. They did not ask about the implications of Grant Taylor being a director while they had been speaking to him because they were unaware of that fact. The request for legal advice accurately informed Mr Lewis that Grant Taylor had informed JJK about the business strategies that had worked at Rascals. This is reasonably described as the

Rascals "story, what worked and what to avoid and "tips"". But JJK appears not to have been concerned that the information it had received might be confidential information, aside from Ms Yuan and Yoursun, which only Mr Penney appears to have been troubled by.

[407] In my view, JJK's request for legal advice is compelling evidence that the JJK directors were not aware and were not wilfully blind to the fact that some of the information they received from Grant Taylor was confidential information. At most, the JJK directors were naïve or reckless. However, in mid-August when the acquisition became a reality, they sought legal advice to ensure they were on solid legal ground. Unfortunately, their request for advice focused on the wrong thing – the restraint of trade – and omitted facts including that Grant Taylor was a director and that they intended to base their nappy on the old Rascals specification held by Yoursun. But rather than indicating anything sinister, these omissions only confirm, in my view, that the JJK directors were naïve and/or careless, but not wilfully blind.

[408] Rascals submits that actual knowledge can be inferred from JJK's deliberate attempts to conceal Grant Taylor's involvement. Rascals refers to three sets of emails. First, Mr Collie's 13 July 2020 text message: "we also need to be really careful that it doesn't come out that grant is involved or Zuru will literally go all out war against us".

[409] Messrs Collie, Armitage and Penney explained the context of this message in evidence. Mr Penney said there was "a lot of worry about Zuru in general and their aggressiveness" and that there was "a lot of fear" which had been communicated by Grant. He emphasised that Grant Taylor was "incredibly fearful of Zuru".

[410] Second, Mr Collie's 29 October and 3 November 2020 "our friend" emails to Martha Van Arts. Mr Collie accepted that the friend was Grant Taylor. He denied that he was trying to conceal Grant Taylor's identity from Ms Van Arts. His evidence was that the "friend" reference reflects that Ms Van Arts knew JJK's directors had a friend in the nappy industry but had never met Grant Taylor.

[411] Third, Mr Armitage's 7 February 2021 email to Nick Mowbray, which explained that Grant Taylor was not involved with JJK. However, Mr Armitage explained that JJK had discussions with Grant Taylor:

> Not sure what you mean about Grant as he isn't involved, we did ask him to be, but he made it really clear that he can't and doesn't want to be involved.

[412] Other evidence contradicts the notion that the JJK directors were trying to conceal Grant Taylor's involvement:

(a) At the end of October 2020, Mr Collie referred to Grant Taylor by name in a message he sent on a Treasures marketing group chat, which included Ms Van Arts.

(b) JJK's directors met with Grant Taylor at the Black Cottage Café, which Nick Mowbray also frequents.

(c) JJK's directors wrote down what Grant Taylor told them and emailed it between themselves, with regular references to Grant Taylor.

(d) When Nick Mowbray raised his allegations in February 2021, JJK's directors told Nick Mowbray they asked Grant Taylor to be involved, and he said he could not.

[413] Undoubtedly some of JJK's correspondence indicates a nervousness about the Mowbray interests becoming aware that Grant Taylor was helping JJK. But as I said earlier, that does not necessarily mean that JJK knew or was wilfully blind to the fact that they were acting unlawfully, including by receiving confidential information. JJK's evidence is that Grant Taylor appeared to be fearful of antagonising the Mowbray interests. They were aware that Rascals had insisted on the restraint of trade to prevent the Taylors competing in Countdown. The Mowbray interests were unlikely to react well if they became aware that Grant Taylor had helped JJK, even if he had done so lawfully.

[414] I find that the JJK directors did not know and nor were they wilfully blind to the fact that some of the information they received from Grant Taylor (the 2020 Update

pitch deck, the pre-2017 nappy specification from Yoursun, and the identity of Rascals' current factory) was confidential information.

Did JJK know or close their mind to the fact that Grant Taylor was a director?

[415] As noted earlier, the SPA for the Taylors' shares in Rascals NZ and Rascals International provided for a financial wash-up period to 15 May 2020 and for the Taylors to remain as directors until the end of that period. They each executed notices of resignations as directors of Rascals NZ, stated to have effect from 15 May 2020. Grant Taylor also signed a notice of resignation as a director of Rascals International, with immediate effect, on 30 April 2020. The SPA provided that their salaries as directors-employees ceased on 30 April 2020.

[416] The wash-up was delayed, so the Taylors remained directors until 3 August 2020. The Taylors ceased to be shareholders on 5 August 2020.

[417] Practically, the Taylors were out of the business by 1 May 2020, except on paper to complete the wash up. Keith Taylor's evidence is that the Taylors ceased to have any role in the day-to-day management of the company from March 2020 when it became clear to them that they were exiting the business. His evidence is that he occasionally dealt with financial matters during the wash up period at the request of Mr Banfield.

[418] Grant Taylor says that he was gone from Rascals from around mid-March. After the 5 March meeting with the Mowbrays. He went back to the Rascals office for a few days, but it was difficult. He recalls that on around 9 March 2020, he packed up his belongings and walked out of the office. He says that he was no longer carrying out the day-to-day running of the business by this stage.

[419] Grant Taylor appeared to consider that he was "free to do what we wanted from after the deal". Despite his directorship, on paper, continuing, he said that Rascals "made it very aware from the 5th of March, that's the date, that we were free to do anything we wanted, we were now competitors to that covers, in my view, everything." He said this was made "very clear".

[420] Mr Armitage's evidence was that Grant Taylor told him during one of their lockdown walks that the Mowbrays had "pushed him and his family out of the business". Under cross-examination, he maintained that he understood from Grant Taylor that he had settled with Rascals and was "out of Rascals" and "all done".

[421] Mr Collie's evidence was consistent that he understood that Grant Taylor had exited or was exiting Rascals and that he did not think he was a director. He maintained this position under cross-examination.

[422] Mr Penney's evidence is that he did not even "think to think" that Grant Taylor might be a director of Rascals. Asked the questions repeatedly, Mr Penney continually returned to the same position — he was interested in hearing what Grant Taylor had to say because Grant Taylor had earned $30 million from selling his business, and having sold it, he must be out.

[423] Grant Taylor consistently maintained that he did not tell JJK that he was a director. His 29 July 2025 affidavit does not say that he told or led the JJK directors to believe that he remained a Rascals director. The omission is telling because the proposition was included in an initial draft of the affidavit on 18 July 2025,[29] but was removed after Grant Taylor raised concerns that the statement was untrue. Rather, Grant Taylor deposes that he informed the JJK directors of his restraint of trade early in their communications and showed them the restraint of trade to demonstrate that he could not be involved in their venture.

[424] Grant Taylor's status as a director does not appear to have been a matter Nick Mowbray was conscious of either. When Nick Mowbray discovered that Grant Taylor had assisted JJK and sent various communications to the JJK directors and to Countdown, he did not refer to Grant Taylor breaching directors' duties. He claimed that Grant Taylor had breached his restraint of trade and disclosed Rascals' intellectual property. That Grant Taylor was still a director and had breached directors' duties by speaking to JJK is first mentioned in the statement of claim filed in July 2021.

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[29] The affidavit said: "Mr Armitage at the very least was aware that I was a director of Rascals at the same time".

[425] I accept the evidence of Messrs Penney, Armitage and Collie that they were unaware that Grant Taylor was a director when they were talking to him about Treasures. Objectively, there was nothing to indicate to them that Grant Taylor was still a director of Rascals when they interacted with him. Grant Taylor had told Mr Armitage that the Mowbrays had forced him out of Rascals and insisted on a restraint in the deal at the last minute. It is not disputed that, on 1 May 2020, Grant Taylor ceased involvement with the Rascals business in a practical sense. That is how it would have presented to outsiders like the JJK directors. He was plainly not working in the Rascals business and the only reason he was a director was for tax purposes, which were private to the parties involved.

[426] Rascals submits that it was publicly available information that Grant Taylor was still a director. There is no evidence that Messrs Penney, Armitage and Collie searched the Companies Register for Rascals, and why would they?

[427] Further, as discussed, it is telling that, when the JJK directors sought legal advice about Grant Taylor's involvement on 5 August 2020, there is no mention of the fact that Grant Taylor was a director of Rascals over the period they were speaking to him. Mr Lewis does not refer to this fact in his advice to JJK and does not advise on the legal implications. It is logical to infer that JJK did not mention that Grant Taylor was a director when he provided them with information and did not seek advice on the legal implications of him being a director because they were unaware that he was a director.

[428] I find that the JJK directors did not know and nor were they wilfully blind to the fact that Grant Taylor remained a director of Rascals when he gave them information and advice up to 3 August 2020. I base this finding on the evidence of Messrs Penney, Armitage and Collie, which I accept as true; their request for legal advice and the discussions around it; and the fact that objectively Grant Taylor would not have appeared to them or anyone else to be a director at that time.

Did Rascals have a Treasures Business Plan?

[429] Rascals claims that it had a confidential "Treasures Business Plan". This plan was to acquire the Treasures brand as a means of accessing the other side of the

supermarket duopoly, without infringing its exclusive arrangements with Foodstuffs. The plan was to negotiate an exclusive supply agreement with Countdown for the sale of Treasures nappies in their supermarkets and transform Treasures into a highly profitable business by applying the Rascals business model as modified by Nick Mowbray. Rascals says that this was its consistent plan throughout 2019 and 2020, until Nick Mowbray discovered in early 2021 that JJK had purchased the brand.

[430] JJK disputes that there was a consistent "Treasures Business Plan". JJK suggests that there was merely a "Treasures debate" within Rascals; but that ultimately, Rascals let the opportunity pass it by.

[431] I will now set out the key evidence relevant to this issue.

From 2018: considering ways to sell through Countdown

[432] While Rascals was doing well selling through Foodstuffs, it was interested in capitalising on the other half of the New Zealand market, represented by Countdown. This had to be done through an alternative product to Rascal and Friends, as Rascals' exclusivity arrangements with Foodstuffs prevented Rascals branded nappy products from being sold anywhere in New Zealand other than Foodstuffs.[30]

[433] In mid-2018, Rascals engaged with Countdown about making an offer for their homebrand private label. These discussions did not lead anywhere.

[434] There were further discussions within Rascals from February 2019, with several options being discussed, including whether to develop a new brand or purchase an existing brand.

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30 The exclusive use agreement was first signed on 22 September 2017. A revised version as signed on 2 April 2018, which confirmed that Foodstuffs' exclusive use and supply relates to Rascal and Friends branded range of nappy products. Nick Mowbray's evidence is that this version remains in effect to this day. The exclusive use agreement was novated to Rascals International in December 2022.

March to May 2019: internal discussions

[435] Nick Mowbray, Grant Taylor and Mr Banfield began discussing the possibility of Rascals buying the Treasures brand in early 2019. Based on market share data, Rascals was aware that the Treasures business was struggling, with Rascals and Huggies depleting its market share. Buying Treasures would get Rascals into Countdown because, at the time, Treasures was sold in Countdown stores (it was also sold via Foodstuffs). Rascals was not interested in purchasing Treasures' physical assets in New Zealand, as the intention was to have the nappies made in China, as Rascals' nappies were.

[436] In March 2019, Mr Banfield suggested to Grant Taylor and Nick Mowbray that they reach out to Asaleo Care and indicate their interest in Rascals buying the Treasures brand in New Zealand. Grant Taylor agreed that they should start the conversation but then "hold them at arm's length till the times [sic] right."

[437] From April to May 2019, Rascals was in conversation with Asaleo Care. This was between Grant Taylor for Rascals, and Asaleo Care's general counsel, James Orr.

[438] On 15 April 2019, Rascals appointed a law firm to act as their undisclosed agents to progress discussions about the purchase. The law firm signed a confidentiality agreement with the Asaleo Care, on behalf of Rascals.

[439] On 17 April 2019, Grant Taylor set up an internal Rascals chat group "Treasures/Asaleo" for the purpose of facilitating discussions about purchasing the brand. Grant Taylor, Keith Taylor, Louise Taylor, Matt Banfield and Nick Mowbray were in the chat group. Mr Banfield let the group know that revenues for Treasures had dropped from $15 million in the previous year to $10 million. He said that the business would not be profitable, and that the CEO had told shareholders that it would cost them up to $5 million to unwind the company. He gave his view that at that time they might accept a purchase price of $5 to $10 million. Nick Mowbray commented "Yeah I think we can get it way cheaper" and said that Asaleo Care wanted out, but there were few if any others who could purchase it and make it work like they could. Grant Taylor agreed, saying, "Yeah not many other companies with a lean model like

ours as world wide the volume they do is low" and that he thought it "Could be a great way to control 30% of the market".

[440] Nick Mowbray's evidence is that "[he] was confident that no one else would have the know-how, means and ability to make the business profitable".

[441] On 18 April 2019, Grant Taylor reported that he had informed Mr Orr that Rascals was only interested in purchasing the brand and did not want to get into production in New Zealand. Mr Orr advised that Treasures wanted to sell the whole business, as the assets would be difficult to deal with without the brand, but they would consider selling only the brand and he would get back to Rascals.

[442] On 2 May 2019, Grant Taylor advised the group that he had asked Mr Orr for Treasures' topline sales information, a client list, an assets schedule and a price indication. Mr Orr requested that Rascals provide an indicative sales price before providing that information. Mr Orr confirmed their preference was to sell the business, but that they would consider selling the brand depending on the price offered. Grant Taylor relayed that Asaleo Care had acknowledged the brand had not been going well, but that they had a new strategy for it and funds to make that happen, so this was not a fire sale.

[443] Nick Mowbray expressed the view that they would be far apart on the numbers. He thought Asaleo Care would want $10 million. Grant Taylor agreed, noting that they thought they could revive the business, but commenting that it "won't hurt to throw a number at it even if they say no".

[444] On 20 May 2019, Grant Taylor advised the group that Mr Orr had asked whether they had any thoughts on an offer price. Grant Taylor asked: "do we actually want to do this?" He said: "the more I think about it the more I think we should leave it…at least till after their rebrand came out." He commented that Asaleo Care was still bullish on the brand at that time, thinking it was worth more than it was. He commented, "I mean theres no way they will sell for 1 million and I dont think we want to offer anything more than that considering we can build one ourselves forgetting about the exclusive side of things".

[445] Mr Banfield said to the group that he thought that they should maybe leave it, so as not to lose focus on Rascals. He commented that he thought Treasures was worth "$3mill*"* max and suggested buying it if 1) Foodstuffs dropped the brand and 2) sales at Countdown remained the same, then Rascals could try to improve the product and the margin.

[446] Grant Taylor asked the group: "Ok so for now just say we can't make an offer at this stage? All agree?" Louise Taylor agreed. Keith Taylor agreed that Rascals should wait to let Foodstuffs drop Treasures, as it seemed they would, and then perhaps talk about purchasing it again.

[447] The discussion about Treasures ended there, and the name of the chat was changed to "R+F NZ".

February 2020: cheap offer made

[448] In December 2019, Asaleo Care contacted Rascals to see if it was interested in acquiring Treasures. Rascals signed a non-disclosure agreement and obtained Treasures' financial data and an overview of the Treasures business including market share on 21 January 2020. Grant Taylor forwarded it to Nick Mowbray on 28 January 2020.

[449] Nick Mowbray told Grant Taylor he had taken a "quick look" at the data and thought it was "prob a [sic] ok but for 2.5 mil . . . Maybe 3". Grant Taylor replied, "We just need to decide if we're interested. Foodies have said they're def delisting them . . . So really it's just a woolies move". Nick Mowbray replied that it "Could be decent for other markets…As well" and "Could be a bargain", and they agreed to discuss it further.

[450] On 4 February 2020, Grant Taylor and Nick Mowbray agreed to make an expression of interest for Treasures at $2 million, subject to further due diligence. Grant Taylor said to Nick Mowbray " Going to respond to asaleo. Have talked in length with banfield and think we should respond with 'in the facility of 2 million' pre proper due diligence .. it would be so cheap at that but worth a try .. obviously can pull out at any stage". Nick Mowbray responded "Yeah…throw a cheap offer there [sic] way".

[451] Grant Taylor emailed Mr Orr and indicated that Rascals was looking at a figure of $2 million, subject to due diligence. He said Rascals would be happy to proceed with further discussions if that was in the ballpark. Asaleo Care did not engage at that price point.

[452] On 18 February 2020, Nick Mowbray messaged Grant Taylor to say "We should buy treasures for 5 mil . . . No brainer almost". Grant Taylor replied that he was meeting with Asaleo Care's CEO (Sid Takla) in a couple of weeks. He said "not sure how they're going stack up when this comp takes off…they are tanking in foodies, they're deleting…only going ok in CD because they have no private label…but now they are launching…but maybe we could turn it". Nick Mowbray said "Mayeb [sic] we offer less. Talk it over with him."

[453] On 24 February 2020, Mr Orr contacted Grant Taylor to inform him that Asaleo Care had appointed Three Sixty Capital Partners to "conduct a process regarding the Treasure's business". He said that Three Sixty Capital Partners would be in touch with Rascals shortly so it could participate in the process. Asaleo Care suggested that Grant Taylor attend a meeting on 11 or 12 March with Asaleo Care's CEO. Grant Taylor screenshotted this message and sent it to the Rascals management WhatsApp chat.

Taylors attempt to buy Treasures

[454] The Mowbrays' ultimatum to the Taylors' intervened. On 25 February 2020, Mat Mowbray informed the Taylors that the Mowbrays no longer wanted to do business with them. The 5 March 2020 meeting at the Mowbray residence followed.

[455] On 11 or 12 March 2020, Grant Taylor met Asaleo Care's CEO and managing director, Sid Takla, who was visiting New Zealand. The meeting had been arranged earlier by Grant Taylor to discuss Rascals' potential purchase of Treasures. Grant Taylor asked Asaleo Care to consider the Taylor family acquiring Treasures instead. The Taylors' evidence is that they thought from their discussions with the Mowbrays that they had no issue with them competing with Rascals after they left the company.

[456] The Taylors presented an indicative offer to Mr Orr for Treasures of $5 million including GST, on 7 April 2020. This offer was formalised on 9 April 2020. However, on 14 April 2020, Grant Taylor advised Mr Takla that a non-compete had been added to the Rascals SPA at the last minute, which meant that they could not proceed with their offer.

April 2020: Rascals re-engages with Asaleo then declines

[457] On 12 April 2020, Nick Mowbray messaged Matt Banfield, "Hey can we look at treasures as well again. Might be worth us buying this as well if proce [sic] is right". Mr Banfield replied that he would reach out to them and said, "I guess need to think why do we want to buy it and what the plan would be". Nick Mowbray said that they should see what Asaleo Care wanted for Treasures because that would leave the door open for them to decide. He said that the purchase could help them dominate nappies internationally, as they could position Treasures at the very low end, Rascals in the mid spec and Millie Moon as high spec. However, Nick Mowbray ended the discussion by saying, "Also treasures don't reach out yet".

[458] On 17 April 2020, Grant Taylor connected Mr Orr of Asaleo Care with Mr Banfield in relation to Treasures: "Introducing you two to see if there is any interest. I'll let you guys take it from here." The same day, Mr Banfield emailed Mr Orr to say he was "[h]appy to pick conversations back up again.".

[459] That afternoon, Three Sixty Capital Partners (the advisory firm conducting the Treasures sale process), emailed Mr Banfield, introducing themselves, providing the Treasures Information Memorandum and suggesting a Zoom chat. The contemporaneous documents record a call between Three Sixty Capital Partners and Mr Banfield on 23 April 2020 in relation to Treasures. There is no evidence as to what was said on the call.

[460] On 7 May 2020, Three Sixty Capital Partners emailed Mr Banfield to ask, "how is your thinking re Treasures coming along?"

[461] On 14 May 2020, Mr Banfield replied to Three Sixty Capital Partners as follows:

> At the moment we are not in a position to take on another project like this one. I am not closing the door on it however we for the next few months we will need to focus our resources elsewhere.
>
> If anything changes we will let you know

[462] Nick Mowbray's evidence is that this reflected that he "remained interested" in acquiring the brand, but not at the price Asaleo Care had in mind. His evidence is that he was expecting the price to drop, and Rascals could buy it cheaper, especially as no one else was interested. He says that he saw this discussion as part of a "protracted negotiation", and his tactic was to say they were not interested, so Asaleo Care would come under more pressure to drop the price.

[463] On 15 May 2020, Sid Takla emailed Mr Banfield:

> I don't want to go through the usual dance involved in a transaction and would rather cut to the chase and have a discussion directly if you are genuinely interested. I wanted to inform you we have received a non-binding offer with a request for exclusivity. If you are interested, we will need to receive your non-binding offer by the close of business tomorrow.

[464] The documents indicate that a call between Messrs Banfield and Takla went ahead on 15 May 2020. Mr Banfield did not give evidence for Rascals and there are no notes of this call in evidence. Subsequent emails indicate, however, that the discussion was about whether Rascals might be interested in buying the Tooshies nappy brand, rather than Treasures. Those talks on Tooshies continued but did not lead to anything.

Closure of Treasures announced

[465] On 25 June 2020, Asaleo Care publicly announced that it was closing the Treasures factory and business in New Zealand. Treasures explained that the closure was due to Treasures' inability to compete with low-cost imported nappies.

[466] On the day the closure was announced, Grant Taylor messaged Mr Banfield asking if Rascals "end[ed] up buying treasures". Mr Banfield replied, "na didnt go after it in the end, said thanks but no thanks". He commented that he thought a company called Zeta had bought it. Zeta is a New Zealand owned and operated personal care brand.

[467] The following day, 26 June 2020, Grant Taylor sent Mr Banfield a screenshot of the Treasures Instagram post which said that it was withdrawing from the New Zealand market with its products remaining in supermarkets for the next couple of months and that they were closing their New Zealand factory. Mr Banfield responded that was interesting and "probably could have bid 500k". Grant Taylor said that they must not have got any bids, and that he thought the business was dead because the data was so bad.

[468] On 29 June 2020, Stuff ran an article on Treasures' closure, which included a statement of regret from ZURU, and a statement from Nick Mowbray that "Rascal + Friends was focusing on employing Kiwis to grow the brand at home and overseas."

Rascals interest in July/August 2020

[469] On 14 July 2020, Mr Banfield emailed Mr Orr, "Do you know who is taking care of winding down the Treasures brand in NZ? So that I can have a conversation with them." Mr Orr replied the next day, saying he was the contact person and Mr Banfield should "feel free to call when it suits."

[470] Nick Mowbray's evidence is that Mr Banfield's approach was part of his plan to start a purchase discussion as he thought the timing might work for Rascals, given the Treasures wind down. Mr Banfield spoke to Mr Orr about Treasures, although there is no evidence about what was said.

[471] On 6 August 2020, Paul Kirsopp, who was a Project Manager at Asaleo Care in Kawerau, where the Treasures factory was located, contacted Harry Mowbray, Nick Mowbray's father with whom he was acquainted, to ask if Rascals was interested in Treasures. Harry Mowbray passed this on to his son. Nick Mowbray says he "immediately emailed to confirm that Rascals NZ was keen to purchase the brand and that I would send an offer through". That email cannot be found.

[472] Nick Mowbray's evidence is that although the Treasures business had closed, it had only been a few weeks, and he was confident that he would be able to work with Countdown to quickly get the brand back up and running under Rascals' ownership.

[473] Nick Mowbray's evidence is that he "thought it was strange" when he did not hear back from Mr Kirsopp.

[474] A few weeks later, Mr Kirsopp followed up with Nick Mowbray's father and said he had not received Nick Mowbray's offer. On 21 August 2020, Nick Mowbray sent Mr Kirsopp an email testing whether Mr Kirsopp was receiving his emails. Mr Kirsopp responded that this was the first email he had received, and that he had received no offer for the brand.

[475] On 24 August 2020, Nick Mowbray emailed Mr Kirsopp with an expression of interest as follows: "Hi Paul, Can we offer 200,000 for the brand, we would not want anything else, Thanks!"

[476] Nick Mowbray' evidence is that by this time, the value of Treasures had plummeted, to the extent that he understood this was a fire sale, as Asaleo Care wanted it sold as soon as they could, especially because Treasures was no longer actually operating. He says that believed that Rascals, with the support of ZURU, was the only operation that had the skills, know-how, resources and ability to make a success of purchasing the Treasures brand. Those two circumstances gave him confidence to make a low offer, knowing that if this was not accepted, he could increase the offer.

[477] Mr Kirsopp and Asaleo Care did not respond.

February 2021 inquiry

[478] There is no evidence of any further discussions within Rascals or between Rascals and Asaleo Care about the Treasures brand until February 2021.

[479] Nick Mowbray's evidence is that he became "increasingly concerned" that he had not heard back from Asaleo Care.

[480] On 4 February 2021, Nick Mowbray sent ZURU's in-house counsel a message: "Can we see if we can buy the treasure trade mark in NZ?...Not sure what's happened to it?" He said he wanted to "see what happened to it…and see if we can get it super super cheap…also if trade mark can be had in other countries". ZURU's in-house

counsel looked into it and responded that Treasures had been bought by JJK in October 2020.

[481] On 16 June 2021, Mr Banfield told Keith Taylor in a phone call that "Rascals had had the chance to buy Treasures and they didn't want it."[31]

ZURU strategic partnership with Foodstuffs

[482] Nick Mowbray's evidence is that a ZURU/Foodstuffs strategic partnership that was being negotiated through 2020 is relevant to the Treasures Business Plan.

[483] Discussions that led to this agreement appear to have commenced between Rascals and Foodstuffs in August/September 2019. Countdown approached Rascals to develop an exclusive brand for the supermarket like the Rascal and Friends nappy range. Rascals consulted with Foodstuffs, which indicated that it wanted an exclusive partnership relationship with Rascals, to grow Rascals within Foodstuffs and work together on an improved competitive offer for Foodstuffs' home brand. Foodstuffs indicated that it would prepare a Memorandum of Understanding. Rascals declined the offer from Countdown on that basis.

[484] The email from Foodstuffs recording this discussion also records that since then, Cotton Soft (a "great quality, great priced nappy") had decided to work with Countdown to go "head-to-head" with Rascals and Friends. And, Noopii had launched an eco nappy into the market, which some Foodstuffs stores were stocking. The email records that Rascals was questioning Foodstuffs' commitment to the intent stated in August, when it was selling Noopii nappies, having put the idea of a Rascal and Friends eco nappy on hold earlier because it thought the market was not ready. Foodstuffs confirmed that the memorandum of understanding between Foodstuffs and Rascals was being drafted by the lawyers; Foodstuffs would work with Rascals to bring the eco nappy to market as soon as possible; Foodstuffs would not sell Cotton Soft; Foodstuffs North Island would not stock Noopii; Noopii would only be sold in

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31 Rascals objected to Keith Taylor's evidence of Mr Banfield's statement because it is hearsay. I find that the hearsay rule is not engaged because s 34(1) of the Evidence Act 2006 applies. The evidence is of an admission made by Mr Banfield, Chief Operating Officer of Rascals, given orally by Keith Taylor who heard the admission.

some South Island stores; and Foodstuffs and Rascals would work together on the Pams range.

[485] It is not entirely clear, but the foreshadowed memorandum of understanding appears to have evolved to a wider strategic partnership between ZURU and Foodstuffs. Nick Mowbray says that as part of those discussions, Foodstuffs made it clear that it expected the opportunity to be the exclusive New Zealand retailer of ZURU's consumer goods brands, particularly any new product development. This would include any new products that Rascals developed in the baby category. Nick Mowbray emphasises that the Foodstuffs relationship was very important, particularly as the Rascals brand was new to supermarkets and ZURU Edge was just starting to ramp up on other consumer brands. Nick Mowbray says that he really wanted to cement the relationship to help "us" launch into other markets around the world.

[486] Discussions culminated in ZURU New Zealand Limited and Foodstuffs entered into a formal Strategic Partnership Agreement on 1 December 2020. Under the agreement, Foodstuffs had a right to exclusively market and sell ZURU-branded products in New Zealand. After being presented with a formal ZURU proposal for a brand, Foodstuffs had a right of first refusal and exclusive period for 120 days. If ZURU acquired an existing brand that was already sold outside Foodstuffs, or somewhere as well as Foodstuffs, then there were not exclusivity rights or rights of first refusal. This carve-out was initiated by ZURU, who raised it with Foodstuffs in an email on 26 August 2020. The wording of the eventual carve out was proposed on 9 September 2020.

[487] In addition to this Strategic Partnership, the original exclusive supply agreement with Foodstuffs for Rascal and Friends branded products remained in effect.

Millie Moon

[488] In September 2019, Grant Taylor and Nick Mowbray considered using friends to front a new nappy brand to avoid damaging the Foodstuffs relationship. In October 2019, Nick Mowbray messaged Grant Taylor, "Possible to do another brand if we want . . . Think we can do another brand for sure".

[489] It was agreed Grant Taylor would "start getting the ball rolling" to develop a new nappy brand, which Nick Mowbray described as a "game changer", "low hanging fruit", and a "no brainer". The brand came to be called Millie Moon, after Grant Taylor's daughter.

[490] There is competing evidence about whether this new brand was for launch in New Zealand to block Noopii as a competitor in the high-end range or for launch overseas, or both. Grant Taylor says that Rascals decided to progress developing Millie Moon so they had a brand ready to launch in Countdown if they decided they could do so without risking the Foodstuffs relationship. Grant Taylor says that this was at Nick Mowbray's insistence. Grant Taylor explained, "Treasures was not our main focus. Our focus was getting Millie Moon up and running."

[491] Nick Mowbray says that Millie Moon was always intended to be a premium nappy to be sold in retail outlets outside the mainstream retailers.

[492] Ultimately, Millie Moon launched in the United States in Target in 2021 and in Loblaws in Canada in 2023. It quickly became one of the best performing brands across the ZURU Edge division.

[493] Nick Mowbray explains that it was not an option to introduce Millie Moon to Countdown, because as a ZURU brand, Foodstuffs would consider Millie Moon to be part of the exclusivity and right of first refusal. Rascals would need to first offer Foodstuffs the brand, and there was a risk Foodstuffs would accept, meaning the Countdown opportunity would be lost. He says that for this reason, he was focused on acquiring Treasures, as it was an existing brand with strong market awareness in New Zealand which would not trigger the Foodstuffs right of first refusal.

[494] Under cross-examination, Nick Mowbray insisted that he wanted to buy Treasures, that he was in the best position to do so, and that it was a matter of patience.

[495] During 2022, Rascals began discussions about Millie Moon with the Countdown category manager. These discussions continued into the 2023 nappy review and into more serious discussions in 2024, after the Strategic Partnership

Agreement with Foodstuffs was updated in December 2023 to remove the right for first refusal. Ultimately, this led to Millie Moon launching in Countdown in March 2025.

Conclusion

[496] Rascals had an interest in acquiring the Treasures brand. The brand represented a way for Rascals to sell nappies through Countdown without infringing its original exclusivity agreement with Foodstuffs.

[497] The evidence does not support the claim that Rascals had a firm "Treasures Business Plan". The evidence shows that Rascals discussed the option periodically and kept the possibility on its radar. Rascals also showed interest in other nappy brands: Tooshies in May 2020 and Noopii 2021, albeit Treasures is the brand it seemed to contemplate most seriously.

[498] Rascals never made a serious formal offer for the brand, despite being approached repeatedly by Asaleo Care and their brokers. Rascals declined to make an offer when Treasures was being formally marketed for sale in May 2020, even when informed that there was another buyer interested. It appears that Nick Mowbray did not expect anyone else to be interested in buying Treasures: "I mean we just thought at the time that there would be no – I guess no other company that would be able to buy Treasures…" But Nick Mowbray and Mr Banfield must have known that there was a risk that someone else might buy the business and/or brand.

[499] Certainly, it appears that at some point before Asaleo Care announced the closure of Treasures, a decision had been made within Rascals not to buy the brand. Mr Banfield's message to Grant Taylor was: "*na didnt go after it in the end, said thanks but no thanks*". Having passed on the opportunity, Rascals assumed that someone else had bought the brand "*assume Zeta bought it…*".

[500] After the closure announcement, Nick Mowbray's interest was momentarily revived, but again, Rascals did not take it any further with Asaleo Care. Nick Mowbray's informal offer to his father's acquaintance was not capable of acceptance and he did not follow it up.

[501] Rascals chose not to call Mr Banfield to give evidence. He was at the centre of these discussions, and I would have expected Rascals to call him as a witness. Evidence was before the Court of him conveying to Grant and Keith Taylor that Rascals had decided not to pursue purchasing Treasures. If, for whatever reason, these messages lacked context and, in fact, Rascals had not decided to pass on the Treasures opportunity, he could have given evidence to explain his comments. His absence as a witness is not explained. I infer from this that his evidence would not have been helpful to Rascals' case.[32]

[502] The conclusion I reach is that buying the Treasures brand was an idea that Rascals considered intermittently, but it was far from a firm business plan.

Did Grant Taylor tell JJK about Rascals' Treasures Business Plan?

[503] Rascals' original claim was that, over the course of Grant Taylor's interactions with the JJK directors, he told them about Rascals' confidential Treasures Business Plan.

[504] Rascals reframed their claim in their closing submissions to allege that Grant Taylor disclosed *aspects* of the Treasures Business Plan, including:

(a) the fact that the Treasures opportunity was highly valuable;

(b) that the value was in the brand;

(c) the likely purchase prices that Asaleo Care might consider; and

(d) that JJK should use the Rascals model in seeking to offer the nappies exclusively to Countdown (along with all the other features of the Rascals model).

[32] *Perry Corporate v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 (CA) at [153].

The evidence

[505] Grant Taylor's evidence was that during the COVID-19 lockdown, he became acquainted with Mr Armitage while walking around the Coatesville neighbourhood. He said that when they walked together, Mr Armitage would talk business the whole time, and often wanted to pick Grant Taylor's brain about his success at Rascals. Grant Taylor talked to him about his life and business success.

[506] Grant Taylor does not recall discussing Treasures with Mr Armitage during these lockdown walks, but he acknowledges that it is possible that he did. He says, "It's possible that I had told Jarrod that I had a restraint that had stopped me and my family from buying Treasures, but I do not recall, this was something I did mention to people". He has provided a text message to an unrelated third party where he commented that he was close to buying Treasures for $5 million but was prevented from doing so by the restraint of trade concerning Countdown. He acknowledged that Mr Armitage's 27 June 2020 text message to him suggests that he had spoken to Mr Armitage about the restraint of trade before then.

[507] Under cross-examination, Grant Taylor admitted he "*probably*" told JJK that Rascals wanted the Treasures brand to get into Countdown. He could not recall, but did not think he would have told JJK that Rascals had offered $2 million for Treasures or that the Taylors had offered $5 million.

[508] But in re-examination, Grant Taylor clarified that he *did not* remember telling JJK that Rascals wanted the Treasures brand to get into Countdown. He confirmed that when he received the message from Mr Banfield on 25 June 2020, he understood that Rascals "weren't interested in proceeding further with Treasures".

[509] Mr Armitage recalled that during their lock down walks Grant Taylor said that he had been working on a new opportunity in the FMCG sector, but that he had been stymied by a restraint of trade when the Mowbrays had pushed the Taylors out of Rascals. Mr Armitage did not recall Grant Taylor mentioning Treasures specifically. He recalls Grant Taylor being annoyed. He says that Grant Taylor told him the price the Taylors were willing to pay for the Treasures brand. His evidence is that Grant Taylor never told him that Rascals had considered buying Treasures.

[510] Mr Collie's evidence is that Grant Taylor never told the JJK directors that Rascals had considered buying Treasures. He said that Grant Taylor did tell them that he had had considered buying Treasures for himself when he was pushed out of Rascals, but he was unable to proceed because of his restraint. Mr Collie could not remember exactly when this discussion happened, other than it was sometime before JJK purchased the Treasures brand in September 2020.

[511] Mr Collie said under cross-examination "We had no idea that Rascals wanted to buy Treasures in any way whatsoever." But later said "At some point [Grant Taylor] had said that they don't want to buy Treasures. I don't remember exactly when, but he mentioned that. And I'm sure it came from myself saying: "Why didn't Rascals buy it," and he said that they didn't want to."

[512] Mr Penney said Grant Taylor told JJK early on in their dealings about the restraint, when he explained he could not be involved in the company. He accepted that Grant Taylor told them he could not buy Treasures because of a restraint of trade. Under cross-examination he was asked when he learnt that Grant Taylor had offered $5 million for Treasures; he could not recall whether he knew that at the time or learnt it through the litigation.

[513] Mr Penney said that Grant Taylor did not tell JJK that he had tried to buy Treasures for Rascals. Mr Penney said that he "thought about" whether Rascals might want Treasures, but he thought that if they wanted it, they would have bought it.

Discussion

[514] I consider that it is more likely than not that Grant Taylor told Mr Armitage about the restraint of trade during their lockdown walks. Mr Armitage's text to Grant Taylor suggests that they had discussed the restraint of trade before then. Further, Mr Armitage appeared to have a clear recollection of Grant Taylor expressing annoyance during one of their walks about being stymied from pursuing an FMCG opportunity by a restraint of trade required by the Mowbrays.

[515] It is unclear whether Grant Taylor told Mr Armitage that the FMCG opportunity was Treasures. Mr Armitage maintained under cross-examination that

Grant Taylor did not tell him that the Taylors had tried to buy Treasures during these walks; Grant Taylor could not recall, but thought it was possible.

[516] It could be inferred from Mr Armitage contacting Grant Taylor about Treasures after he heard the radio announcement that they had spoken about Treasures before. On the other hand, it is possible that Mr Armitage contacted Grant Taylor about his idea of acquiring Treasures because they were in the habit of discussing business with each other and because Grant Taylor was an expert in the nappy business.

[517] The evidence of Grant Taylor and the JJK directors is broadly consistent that Grant Taylor told all the JJK directors about the restraint of trade early on in their discussions. It is logical that Grant Taylor would tell them about the restraint of trade if that was his reason for declining to be involved in their venture in a formal capacity.

[518] It is unclear whether Grant Taylor told the JJK directors that the Taylors had attempted to buy Treasures. Grant Taylor could not recall. Mr Armitage and Mr Collie recall that they were aware of this but unclear on when they found out. Mr Collie said that it was before JJK bought Treasures. Mr Penney said he was unaware of this fact. Yet Mr Penney's 22 July email records that Grant Taylor had told him that his plan had been to take Asaleo Care to a meeting with Countdown to help secure the relationship with the retailer, suggesting that Mr Penney was aware.

[519] Even if Grant Taylor told the directors that the Taylors had tried to buy Treasures but were prevented by the restraint, it does not necessarily follow that he told them, or they inferred, that Rascals had been and was interested in buying Treasures itself. The natural inference from the Mowbrays' insistence on the restraint was that they wanted to prevent the Taylors from competing with Rascals in Countdown. Grant Taylor appears to have appreciated that the restraint was about Treasures. Mr Banfield had told Grant Taylor on 16 March, "they don't want you to buy treasures is my best guess". Grant Taylor replied, "Well we will find out won't we". Grant Taylor later told Asaleo "Our original deal was that we would have no non-compete but I guess they got nervous knowing that Treasures was on the market". But it does not necessarily follow from Rascals wanting to block the Taylors from buying Treasures, that Rascals wanted to buy Treasures itself.

[520] Overall, there is no evidential basis to infer that Grant Taylor informed the JJK directors that Rascals was interested in Treasures; and the directors are consistent that they were unaware of this fact.

[521] Grant Taylor had been out of the loop for several months by the time he was speaking to JJK. His involvement with the business ended when he left Rascals in March. His final act was to connect Asaleo Care with Mr Banfield, so Mr Banfield could continue negotiations on behalf of Rascals. Mr Banfield told Grant Taylor that Rascals had passed on the opportunity after he left when he messaged him: "na didnt go after it in the end, said thanks but no thanks". So, at most (and there is no evidence of this) Grant Taylor might have told JJK that Rascals *had been* interested in Treasures at one stage. But it would have appeared to Grant Taylor that Rascals had decided not to buy the brand.

[522] There is no basis to infer that Grant Taylor understood Rascals to still be in the market for the brand. Mr Banfield also commented that he thought another company, Zeta had bought the brand, indicating that Rascals was not pursuing it. I accept Grant Taylor's evidence that he understood from Mr Banfield's message that Rascals did not want it. There is nothing in this exchange to indicate to Grant Taylor that Rascals had any residual interest in Treasures.

[523] The media reports about Treasures closing quoted Nick Mowbray saying that it was a shame and that ZURU was focusing on growing the Rascal & Friends brand. Mr Armitage's evidence is that he saw those reports and understood that Rascals/ZURU was not interested in Treasures.

[524] Rascals' reframed claim, advanced in submissions, is that Grant Taylor disclosed *aspects* of the Treasures Business Plan to JJK.

[525] First, that the Treasures opportunity was "highly valuable" and that the value was in the brand. If Grant Taylor offered these views to the JJK directors, he was not disclosing confidential Rascals' information, unless he also revealed that this was Rascals' assessment of the Treasures opportunity. Of course, the "Treasures opportunity" had its own value to Rascals because it represented a way to get into

Countdown supermarkets without breaching its exclusive agreement with Foodstuffs. The "Treasures opportunity" did not have the same value to JJK. But there is no evidence that Grant Taylor told the JJK directors of Rascals' prior interest in Treasures, as already discussed. He might have told them of the Taylors' interest, but that was not confidential Rascals' information.

[526] Further, it is unlikely that Grant Taylor will have told the JJK directors that Rascals considered the Treasures brand to be "highly valuable". Nick Mowbray and Rascals considered the value of the Treasures brand to have declined to the point that they were only prepared to make "cheap offers" in February and August 2020.

[527] As to the value being in the brand, that was obvious. Asaleo Care had announced that the brand could not compete with nappies being manufactured cheaply overseas. Anyone with knowledge of manufacturing (as both Mr Armitage and Mr Collie had) would know that manufacturing could not continue in New Zealand if the brand was to become competitive. Hence, it was obvious that the only aspect of the business with any value was the brand.

[528] Second, the likely purchase prices that Asaleo Care might consider. Grant Taylor rejects that he had any input into the offers JJK made to Asaleo Care. Mr Armitage denied that he spoke to Grant Taylor about JJK's offers.

[529] Rascals points to the "coincidence" that the amounts that JJK initially approached Asaleo Care with ($500,000 to $3 million) were the same as what Mr Banfield had identified Rascals could have purchased the brand for and the amount that Mr Mowbray had considered offering. It is true that Mr Banbury mentioned the figure of $500,000 in his text to Grant Taylor. But that was simply Mr Banbury's casual assessment of what Rascals might have been able to buy the brand for. It was his opinion, and not confidential Rascals information communicated to Grant Taylor in his capacity as a director or in circumstances importing an obligation of confidence. As to the $3 million figure, this was one of a number of potential offers suggested by Nick Mowbray to Grant Taylor in February 2020. Within weeks of suggesting offering "2.5 mil… maybe 3", he suggested offering $5 million. The Taylors later offered $5

million for Treasures. For this reason, I do not consider any perceived similarities to be of any significance.

[530] Third, that JJK should use the Rascals' model in seeking to offer the nappies exclusively to Countdown (along with all the other features of the Rascals' model). JJK accepts that Grant Taylor told them that they should try to negotiate an exclusive supply agreement with one of the two supermarket chains. The contemporaneous records confirm that. JJK made inquiries with Foodstuffs but was told by a source that it was unlikely. It would have been obvious that with Rascals in Foodstuffs but not Countdown, the more realistic option for an exclusive arrangement was with Countdown.

[531] It is accepted that Grant Taylor also advised the JJK directors on other aspects of starting and running a successful nappy business that aligned with the Rascals business model.

[532] I conclude that Grant Taylor did not disclose Rascals' so-called "Treasures Business Plan", meaning its plan to buy Treasures to access Countdown supermarkets, to JJK.

GRANT TAYLOR'S DUTIES AND OBLIGATIONS

[533] Before discussing each of the causes of action against JJK, it is helpful to review Rascals' claims against Grant Taylor. That is because the claims against JJK are dependent first on Grant Taylor having committed a legal wrong.

Rascals' claims

[534] Rascals claims that Grant Taylor owed it various duties which he breached by assisting JJK to acquire and develop the Treasures brand: statutory and fiduciary duties, a common law obligation of confidence, and contractual obligations.

[535] Specifically, Rascals claims that as a director, Grant Taylor owed Rascals duties under the Companies Act to:

(a) act in good faith and in what he believed to be in Rascals' best interests (s 131);

(b) exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances (s 137); and

(c) not to disclose information he received in his capacity as a director or employee of Rascals, or use the information, except for the purposes of the company (s 145).

[536] Additionally, Rascals claims that as a director Grant Taylor owed fiduciary duties to Rascals to:

(a) act in the company's best interests;

(b) avoid undisclosed conflicts between his duties as a director and other interests, including other businesses;

(c) not misuse any confidential information of Rascals obtained in the course of his position as a director of Rascals; and

(d) not exploit or take personal advantage of Rascals' business opportunities, at the expense of Rascals and without its consent.

[537] Rascals says that as a director, Grant Taylor owed these stutaory and fidcuary duties until 3 August 2020, when the wash-up period under the SPA ended and his resignation as a director of Rascals took effect.

[538] Additionally, Rascals claims that Grant Taylor owed Rascals a common law obligation of confidence in relation to the confidential information communicated to him while he was a director and employee of Rascals.

[539] Furthermore, ZURU claims that Grant Taylor was obliged:

(a) by the Rascals International shareholders agreement not to disclose any confidential information concerning the business, affairs, customers, clients or suppliers of ZURU or any member of the ZURU group, which includes Rascals NZ and Rascals International; and

(b) by the SPA not to directly or indirectly design, produce and/or sell disposable nappies through Countdown for five years (the restraint of trade). The restraint was triggered on 3 August 2020 when the Taylors received final payment from ZURU.

[540] The claims under these agreements were brought by ZURU against Grant Taylor and are not directly relevant to Rascals'' claims against JJK.[33]

JJK's position

[541] JJK says that although Grant Taylor formally remained a director until the end of the wash-up period on 3 August 2020, he stopped owing directors' duties to Rascals from 1 May 2020, when he stopped taking an active role in the company. JJK makes two main arguments.

[542] First, when a director has been excluded from a company and therefore has ceased to act as a director in all but name, the law can put "substance over form" and treat them as released from their obligations. JJK likens the present circumstances to an English case, *In Plus Group Ltd v Pyke*, where a director who was excluded from the company was held not to have breached his fiduciary obligations.[34]

[543] Second, JJK submits that Rascals released the Taylors from their directors' duties when the Mowbrays told the Taylors at the 5 March 2020 meeting that they would be "free to do whatever they like" if they sold them their shares in Rascals. JJK

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33 On 25 August 2025, I refused Rascals leave to amend their pleadings to include a claim that JJK knowingly and intentionally procured Grant Taylor's breach of the restraint of trade provision in the SPA: *Rascals International Ltd v Taylor* [2025] NZHC 2413.

34 *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370, [2002] 2 BCLC 201. JJK also refers to the discussion in Peter Watts *Directors' Powers and Duties* (3rd ed, LexisNexis, Wellington, 2022) at 256.

argues that the Mowbrays gave the Taylors permission to do as they wished after the sale settled on 30 April 2020, except as specifically restrained by the SPA.

Rascals' response

[544] Rascals rejects that a person registered as a company director does not need to perform the obligations of a director because that person is soon to resign. Rascals submits that just because a director steps back, it does not follow that they are entitled to breach their statutory and fiduciary duties.

[545] Rascals distinguishes this situation from *In Plus Group Ltd*, where the director was excluded against his wishes, including to the extent that he was not permitted to visit the company's offices or access the computers.[35] Here, Grant and Keith Taylor voluntarily agreed to continue to be shareholders and directors of Rascals until the end of the wash-up period. Further, the Taylors continued to have access to Rascals' systems, including the accounting systems on Xero and their email addresses (with the last use by Keith Taylor being on 16 August 2020, where he held himself out as a director and Chief Financial Officer of Rascals).

[546] Rascals also denies that Mat Mowbray said in the initial discussions about the Taylors' exit that there would be no restrictions on them. Even if Mat Mowbray did say that the Taylors would be free to do as they wished, he did so in the early stages of negotiations. The final agreement to which the Taylors were subject included the restraint of trade. This early statement did not excuse the Taylors from their legal obligations. Furthermore, Mat Mowbray was not a director of Rascals and not capable of consenting on behalf of that company.

Discussion

[547] I accept Rascals' case that Grant Taylor owed Rascals statutory and fiduciary directors' duties until 3 August 2020 when his resignation as a director took effect. I am not persuaded by JJK's submission that Grant Taylor was not subject to these duties

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35 At [28].

because he was not taking an active role in the company after 1 May 2020 and/or the Mowbrays released him from these duties.

Companies Act duties

[548] I do not agree that a director is released from their Companies Act duties if they cease taking an active role as a director in the company. Under s 126 of the Companies Act, a director is "a person occupying the position of director of the company by whatever name called". If an individual is registered as a director of a company on the Companies Office register, they are a person occupying the position of director of the company and they are subject to the duties in the Act.

Fiduciary duties

[549] Whether Grant Taylor continued to owe Rascals fiduciary duties as a director once he ceased playing an active role as a director, or having any involvement with the company, is more nuanced.

[550] The law of fiduciary obligations is concerned with trusting relationships, where the fiduciary is expected to act in the interests of the beneficiary.[36] Because the trust reposed by one in another provides the latter with the opportunity to advantage themself (or another), the law imposes duties of loyalty, designed to discourage behaviour inconsistent with the nature of the relationship.[37]

[551] The obligations of a fiduciary are wide-reaching, but helpfully summarised in *Bristol and West Building Society v Mothew*:[38]

> The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the

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36 Andrew S Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) at [2.4.2].

37 At [2.4.2].

38 *Bristol and West Building Society v Mothew* [1988] Ch 1 at 18. This definition has been accepted by the New Zealand Supreme Court: *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433; and *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 384.

nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

[552] This obligation of loyalty can be distilled into two fundamental themes:[39]

(a) A fiduciary is prohibited from acting in a situation where there is or could be a conflict between their duty and their personal interests (no conflict rule).

(b) A fiduciary is prohibited from misusing their position to gain a personal advantage or profit (no profit rule).

[553] The law recognises certain categories of relationship as being inherently fiduciary because of the potential for abuse of trust that exists.[40] The director-company relationship is an established category of fiduciary relationship. Generally, a director is subject to the core duties imposed by fiduciary law,[41] which exist alongside the duties prescribed by the Companies Act.[42] Arguably, also, a director owes a fiduciary duty to exercise their powers for the best interests of the company, although this is in doubt.[43]

[554] Yet while certain relationships are recognised as inherently fiduciary, the relationship is not defined by a label, but by the expectations imposed on a fiduciary by their principal.[44] A close factual analysis is required to determine first, whether an individual is subject to these obligations and second, whether they have breached these obligations.[45] The authors of *Snell's Equity* comment that "[f]iduciary duties are dependent upon the continued existence of an underlying relationship of duty".[46]

[555] So, does a director owe a fiduciary duty to a company when their relationship with the company has come to an end? In these circumstances, there is not the same

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39 Elliot, above n 15, at [7-010].
40 Butler, above n 36, at [17.2.7].
41 At [17.3.3].
42 Watts, above n 34, at 163.
43 At 163.
44 *Arklow Investments Ltd v Maclean,* above n 15, at 6.
45 This was the approach taken in *Arklow Investments Ltd v Maclean*, above n 15.
46 Elliot, above n 15, at [7-016].

potential for the director to take advantage of the company's trust in them for their own purposes, which is what the duties of loyalty are designed to prevent.

[556] An example is the English case relied on by JJK, *In Plus Group Ltd v Pyke*. The plaintiff claimed that Mr Pyke, a former director of the company, breached his fiduciary duties by, while still a director, setting up a new company and carrying on business with the plaintiff's most important customer. The plaintiff sought an account for profits. Mr Pyke had been incapacitated by a stroke and was excluded from the plaintiff companies more than six months before these events occurred.

[557] In those circumstances, where the defendant was a director "in name only", the English Court of Appeal upheld the finding that the defendant had committed no breach of fiduciary duty.[47] The director's role as a director throughout the relevant period was nominal "in a concrete sense" — he had no influence over the company having been entirely excluded from all decision-making and all participation in the company's affairs.[48] His duty to the company "had been reduced to a vanishing point" by the acts of his fellow director and shareholder. The Court said that these facts eliminated "the duality of interest or duty which the law seeks to guard against".[49]

[558] In *Foster Bryant Surveying Ltd v Bryant*, the English Court of Appeal reviewed English authorities concerning the nature of a director's fiduciary duties to a company after their retirement.[50] The case concerned a director who agreed to be retained in his own right by a significant customer of the company during the notice period after he resigned, but before the resignation took effect. The Court referred to the following summary of the law as accurate and useful:[51]

> 1. A director, while acting as such, has a fiduciary relationship with his Company. That is he has an obligation to deal towards it with loyalty, good faith and avoidance of the conflict of duty and self-interest.
>
> 2. A requirement to avoid a conflict of duty and self-interest means that a director is precluded from obtaining for himself, either secretly or without the informed approval of the Company, any property or business advantage either belonging to the Company or for which it

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47 *In Plus Group Ltd v Pyke,* above n 34, at [77]. See also [90].
48 At [90].
49 At [90].
50 *Foster Bryant Surveying Ltd v Bryant,* above n 24.
51 At [76], referring to a summary at [8].

has been negotiating, especially where the director or officer is a participant in the negotiations.

…

4. A fiduciary relationship does not continue after the determination of the relationship which gives rise to it. After the relationship is determined the director is in general not under the continuing obligations which are the feature of the fiduciary relationship.

5. Acts done by the directors while the contract of employment subsists but which are preparatory to competition after it terminates are not necessarily in themselves a breach of the implied term as to loyalty and fidelity.

6. Directors, no less than employees, acquire a general fund of skill, knowledge and expertise in the course of their work, which is plainly in the public interest that they should be free to exploit it in a new position. After ceasing the relationship by resignation or otherwise a director is in general (and subject of course to any terms of the contract of employment) not prohibited from using his general fund of skill and knowledge, the 'stock in trade' of the knowledge he has acquired while a director, even including such things as business contacts and personal connections made as a result of his directorship.

7. A director is however precluded from acting in breach of the requirement at 2 above, even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunities sought by the Company and where it was his position with the Company rather than a fresh initiative that led him to the opportunity which he later acquired.

8. In considering whether an act of a director breaches the preceding principle the factors to take into account will include the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or indeed even private, the factor of time in the continuation of the fiduciary duty where the alleged breach occurs after termination of the relationship with the Company and the circumstances under which the breach was terminated, that is whether by retirement or resignation or discharge.

9. The underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity 'of the Company is that the opportunity is to be treated as if it were the property of the Company in relation to which the director had fiduciary duties. By seeking the exploit the opportunity after resignation, he is appropriating to himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property.

10. It follows that a director will not be in breach of the principle set out as point 7 above where either the Company's hope of obtaining the contract was not a 'maturing business opportunity' and it was not

> pursuing further business orders nor where the director's resignation was not itself prompted or influenced by a wish to acquire the business for himself.
>
> 11. As regards breach of confidence, although while the contract of employment subsists a director or other employee may not use confidential information to the detriment of his employer, after it ceases the director/employee may compete and may use know-how acquired in the course of his employment (as distinct from trade secrets – although the distinction is sometimes difficult to apply in practice).
>
> (footnotes omitted)

[559] The Court considered though, that "it is difficult accurately to encapsulate the circumstances in which a retiring director may or may not be found to have breached his fiduciary duty. As has been frequently stated, the problem is highly fact sensitive."[52] The Court observed that application of the above principles in different circumstances "requires care and sensitivity both to the facts and to other principles, such as that of personal freedom to compete, where that does not intrude on the misuse of the company's property whether in the form of business opportunities or trade secrets". Therefore, "there is some flexibility, both in the reach and extent of the duties imposed and in the findings of liability or non-liability".

[560] In *Foster Bryant Surveying Ltd,* the Court held that the director, by simply agreeing to be retained by a customer after his resignation became effective, had not breached his fiduciary duty to the company. The Court considered that his fiduciary duty after resignation did not extend beyond being honest and not exploiting company property.[53]

[561] This case shares some similarities to these English cases. Grant Taylor was a director in name only from May 2020 when he resigned as a director and employee of Rascals and left the office. He was not exercising any powers or performing any functions as a director from that date. Arguably, he was no longer in a position of trust and influence, such that Rascals had a legitimate expectation of loyalty from him. On the other hand, while he was still formally a director, he retained certain powers which he could have exercised should he have chosen to. Fiduciary duties provide the

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52 At [76].
53 At [93].

counterbalance to those powers. On balance, and following the approach of the two English cases discussed, I consider the correct view to be that Grant Taylor continued to owe Rascals fiduciary duties so long as he retained his formal status as a director. But the peculiarities of the situation must affect the nature of those duties and whether he breached any fiduciary duties he owed. I return to this question under the "dishonest assistance" cause of action.

No release

[562] I do not accept JJK's submission that Rascals, through the actions of the Mowbrays, released Grant Taylor from his director's duties.

[563] Keith Taylor's evidence was that, during the 5 March 2020 meeting, Mat and Nick Mowbray gave them three options as to how the Rascals business was to proceed:

> (a) First, our family could sell our shares to Nick, and this would be on the basis that there would be no restrictions on competition and we would be free to do what we wanted from whenever we liked.
>
> (b) Second, our family could purchase Nick's shares in Rascals NZ, but ZURU and the Mowbrays would not sell their shares in Rascals International and ZURU and Nick would not agree to any restriction on competition in New Zealand or Australia.
>
> (c) Third, Rascals could be advertised for sale, but again this would be on the basis again that ZURU would not sell their shares in Rascals International and would not agree to any restriction on competition in New Zealand or Australia.

[564] Keith Taylor maintained this position under cross-examination:

> Q: Right, so just to be very clear, you understood you were free to disclose confidential information?
>
> A: No, no, we were free to do whatever – from the Mowbrays, they said: "You can do whatever you like." So that's a specific thing that we could do whatever we liked. So it's not crossing into a different boundary, we had an instruction from them: "You can do whatever you like."

[565] When it was put to Keith Taylor that he still had a duty to account for corporate opportunities, he said: "No, that's incorrect, we were told as part of that we were free to go and do whatever we want… they made it very clear, abundantly clear" that the Taylors were free from that point on.

[566] Keith Taylor took a file note of the discussion on this day, which noted "no restrictions". He explained that that meant "no restrictions of any sorts, no KPI's, and no restraints of trade, nothing – just pay the money and go". He said the Mowbrays told them that "they loved competition and that they may even try 'disrupting' themselves". In an email to his solicitor on 18 March 2020, Keith Taylor said:

> On the plus side nothing was required from us, no undertakings, back ups, ongoing support – nil. $30M – walk away.
>
> They also threatened to start another brand and compete, even though in the RI shareholders agreement the Zuru / Mowbray group can't…

[567] Grant Taylor's evidence was that "Mat and Nick said that we were free to do want [sic] we wanted including in the same categories as they sold products". Grant Taylor reiterated this under cross-examination, in the context of questions on the conversations he had with Asaleo Care regarding the Taylors buying Treasures:

> Q: And I put it to you that what had happened was that with the prospect of an exit on the cards, your family had decided to convert a Rascals' opportunity into a Taylors' opportunity?
>
> A: No.
>
> Q: And you had agreed that you would do that by you going to what was supposed to be a Rascals' meeting and turning it into a Taylors' meeting?
>
> A: No, for many reasons.
>
> …
>
> A: No. I — we were free to do what we wanted.
>
> Q: And you knew that in doing that, you were not acting in Rascals' best interests?
>
> A: Well we were free to do what we wanted.

[568] The only evidence contrary to the Taylors' version of events, is the Mowbrays' bare denials. Under cross-examination, Nick Mowbray said that Mat Mowbray and Keith Taylor handled the negotiations. He did not say anything conclusive about what Mat Mowbray said at the 5 March meeting. The plaintiffs elected not to call Mat Mowbray.

[569] I accept Grant and Keith Taylor's evidence about what the Mowbrays said at the 5 March 2020 meeting. Their evidence is supported by the contemporaneous record: Keith Taylor's file note and his subsequent email to his solicitor. The Taylors were told that they would be free to do whatever they wanted, without restriction, if they sold their shares in Rascals to the Mowbray interests.

[570] However, I do not accept that the Taylors were released from their statutory or fiduciary duties as directors because of these statements.

[571] First, it is doubtful that the Companies Act directors' duties, which are fixed by statute, can be contracted out of.[54]

[572] Second, Mat Mowbray, who was not a director of Rascals NZ, did not have the authority to release the Taylors from these duties. By analogy, the Companies Act provides that a director may be authorised to disclose or make use of company information for purposes other than the company's, if first authorised by the company's board.[55]

[573] Third, these early statements preceded negotiations that led to the structuring of the Taylors' exit and the inclusion of a restraint of trade in the SPA. If the Mowbrays were unconcerned about the Taylors competing with Rascals at the March 2020 meeting, their position later changed.

[574] Fourth, and critically, these early statements cannot reasonably be interpreted as releasing the Taylors from their legal obligations while they remained directors of the company. The statements are directed at the position once the Taylors exited the company, not their obligations as directors of the company.

Common law obligation of confidence

[575] I accept Rascals' claim that Grant Taylor owed Rascals a common law obligation of confidence. Grant Taylor was obliged not to misuse Rascals' confidential information acquired because of his role as a director and/or employee of Rascals

54 Watts, above n 34, at 164.
55 Companies Act, s 145(3).

(being circumstances importing an obligation of confidence). That obligation of confidence was not dependent on him being a director, persisting even after his resignation took effect, provided the information remained confidential.

Duty of corporate opportunity

[576] Grant Taylor also owed Rascals a duty not to exploit a Rascals' business opportunity for his own gain. I set out the scope of this duty below.

[577] The nature of this duty has been helpfully summarised by Peter Watts:[56]

> Directors must not pursue for themselves business opportunities that would connect with the company's business, unless the company consents. This duty, called the "corporate opportunity" duty, operates whether or not the director has used his or her position, including use of confidential information, to pursue the opportunity. It is, hence, a discrete head of claim.

[578] The duty is frequently invoked where a director, after leaving the company, exploits a business opportunity that became known to them in their capacity as a director.[57] The recent High Court decision of *Drylandcarbon GP One Ltd v Leckie* said of the duty's role:[58]

> The duty is imposed as a guard against the risk that a fiduciary may enter into a position where their personal interests conflict with those of the principal. A strict approach, as a matter of policy, will be taken in upholding the duty incumbent on fiduciaries not to wrongfully profit by diverting opportunities to themselves that they should have brought to the attention of the principal. This strict approach means the duty can be engaged in the absence of dishonesty, actual disloyalty or conflict, or damage to the company.
>
> (footnotes omitted.)

[579] The duty is drawn from the fiduciary obligation of loyalty that a director owes to the company of which they are a director. The duty is best understood as an application of a combination of the fiduciary conflict rule and the fiduciary profit rule (see [552] above).[59] These underlying fiduciary principles are preventative and link to the purpose of the rule: a director allowed to take up an opportunity personally

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56 Watts, Campbell and Hare, above n 11, at 435, cited, for example, in *He v Chen* [2014] NZCA 153 at [35].

57 Watts, above n 34, at 253 and 257.

58 *Drylandcarbon GP One Ltd v Leckie*, above n 23, at [306(a)] (footnotes omitted).

59 Elliot, above n 15, at [7-056] (see also citations).

might be tempted to reduce or downplay the company's ability.[60] If the director has nothing to gain, they will be less tempted to deviate from the company's interests.[61]

[580] A director is prohibited from pursuing an opportunity that it was in the interests of the company to pursue. It does not matter whether or not the director could have acquired the opportunity for the company,[62] whether the company would or should have succeeded in securing the opportunity for itself,[63] or that the opportunity was one that the director found out about from public sources.[64]

[581] The corporate opportunity doctrine covers specific opportunities the company is already considering.[65] It also covers opportunities in which the company has no present interest, but which it might reasonably be expected to be interested in given its present line of business.[66] Deferment of a company's plans does not entitle a director to usurp business opportunities flowing from them.[67] Where it is claimed the company had ceased to be interested in the opportunity, equity will always be suspicious that the director had somehow managed to get his colleagues to pass it up.[68] That might particularly be so where the company had been pursuing the opportunity for years, and the director was able to capture it within a short period of time.[69]

[582] *Regal (Hastings) Ltd v Gulliver* is one of the eminent authorities on the doctrine of corporate opportunity.[70] In that case, the directors of a cinema business purchased shares in a subsidiary to allow it to acquire the leases for two more cinemas the company could not afford to buy itself. The directors acted in good faith and the company stood to benefit from the purchase due to the lack of funds. Regardless, the House of Lords required the directors to account for their profits which were acquired

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60 *Kawhia Offshore Services Ltd v Rutherford* HC Hamilton CP61-99, 24 April 2002 at [25]. See also *Burton v Thompson* [2012] NZHC 1330 at [61].
61 Watts, Campbell and Hare, above n 11, at 433.
62 *G E Smith Ltd v Smith* [1952] NZLR 470 (SC) at 476; *Cook v Deeks* [1916] 1 AC 554 (HL).
63 *Pacifica Shipping Co Ltd v Andersen* [1986] 2 NZLR 328 (HC) at 335.
64 At 335, citing *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 (PC).
65 At 334.
66 At 334.
67 At 334.
68 Watts, Campbell and Hare, above n 11, at 453.
69 *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592 at [7].
70 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL).

"only by reason of the fact that they were directors of Regal and in the course of the execution of that office".[71]

[583] *Boardman v Phipps* is another.[72] Mr Boardman was a solicitor acting for a family trust. The trust had shares in a company which Mr Boardman learned was underperforming. Mr Boardman and the beneficiary purchased a majority shareholding in the company then sold parts of the business, generating a substantial profit. Although they acted honesty and improved the trust's position, the House of Lords required Mr Boardman to account for these profits (less his expenditure and an allowance for his work and skill) as he had not acted with the binding consent of his principals.

[584] The prevailing principle is that a fiduciary who has gained profit because of their position is accountable for it to the principal. And, as stated in *Boardman*, the only defence to a fiduciary in those circumstances is "that he made the profits with the knowledge and assent of the trustees".[73] In the case of a director, they will be liable for exploiting a business opportunity unless they fully disclose the opportunity to the board of directors and the board declares that it will not pursue the opportunity and consents to the director doing so for their own gain.[74]

[585] The United Kingdom Supreme Court was recently asked to reconsider these two cases in *Recovery Partners GP Ltd v Rukhadze*.[75] The majority found that the strict enforcement as handed down by the earlier cases must be maintained due to the "essential purpose of the rule":[76]

> … to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation.
>
> …

71 At 147.

72 *Boardman v Phipps* [1967] 2 AC 46 (HL).

73 At 117.

74 Butler, above n 36, at [17.3.3(4)], citing *Queensland Mines Ltd v Hudson*, above n 64; *Peso Silver Mines Ltd (NPL) v Cropper* (1966) 58 DLR (2nd) 1 (SCC).

75 *Recovery Partners GP Ltd v Rukhadze* [2025] UKSC 10.

76 At [16]. Lord Briggs refers to Lord Upjohn's reference to the "inflexible rule" in *Boardman v Phipps,* above n 72, at [18].

> …the risks of relaxing the profit rule and conflict rule are the same, namely that human frailty will lead the fiduciary to prefer his own interest to that of the beneficiary or principal.

[586] The director must account to the company for profits which they obtain in contravention of the duty.[77] A declaration that the defendant holds an asset on constructive trust for the claimant, or an order for equitable compensation for loss caused to the claimant, is also available.[78]

[587] In my view it is important not to conflate the duty of corporate opportunity with the duty not to misuse confidential company information. The two duties are distinct, although both duties may be engaged in some circumstances. If a director exploits for their own benefit a non-public company opportunity, they may be liable to account to the company for their personal gain and for breaching their statutory duty not to misuse company information. If the director exploits a public opportunity for their own gain which they should have referred to the company, they will be liable to account for their profits, but they will not have misused non-public company information.

[588] I will now analyse each of the causes of action against JJK and Taonga, in view of the factual findings I have already made, to determine if they are liable to Rascals.

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77 In *Recovery Partners CP Ltd v Rukhadze*, above n 75, Lord Briggs expressed the fiduciary duty to account for profits as a duty in itself, distinct from the equitable remedy of account of profits. See the discussion at [20]: "A fiduciary may come to generate a profit out of his role as such without committing any breach of trust… But he must then account for that profit if it has been made from or out of his fiduciary position, not to keep it for himself. The wrong which may lead to a court order for an account of profits is, in such a case, no more or less than the failure to account itself…" Lord Leggatt disagreed with this formulation, considering that the duty is to not use property, information or an opportunity of the principal for the fiduciary's own benefit, and liability to account flows from breach of that duty ([94] and [95]). Radich J in *Drylandcarbon GP One Ltd v Leckie*, above n 23, appeared to concur that an account for profit is a duty and not a remedy per se (at [244]). The New Zealand Supreme Court also regarded the UK Supreme Court's decision in *Recovery Partners* as concerning the scope of the duty to account rather than the account for profits remedy: *Viscount Investment Corporation Ltd v Matvin Group Ltd* [2025] NZSC 57 at [10].

78 *Recovery Partners CP Ltd v Rukhadze*, above n 75, at [212].

BREACH OF CONFIDENCE

Rascals' claim

[589] Rascals claims that the confidential information was communicated to Grant Taylor in circumstances importing an obligation of confidence; and disclosed to JJK by Grant Taylor, without Rascals' knowledge or authorisation, in circumstances where it was clear that it was Rascals' confidential information.

[590] Rascals says that JJK knew that Grant Taylor was a director of Rascals and so owed duties to Rascals, including not to misuse confidential or company information. JJK knew that Grant Taylor was subject to a restraint of trade. And the JJK directors knew that the information was not publicly available and was confidential. It is self-evident that Grant Taylor only had access to the Rascals' presentations and nappy sample by virtue of his position as a director of Rascals.

[591] Rascals points out that Mr Collie and Mr Armitage were experienced company directors, and each held multiple directorships in unrelated businesses at the time. Rascals says that they were aware of the nature of the fiduciary obligations Grant Taylor owed to Rascals. They say that Grant Taylor understood his own obligations, but even if he was mistaken about those, that does not provide JJK with an excuse.

[592] Rascals claims that JJK misused its confidential information to approach Asaleo Care and get in the door with a targeted offer, engage Ms Yuan, get the Rascals nappy specification and discuss costings with Yoursun when they could not travel to China due to COVID-19 restrictions, approach Countdown and pitch with credibility, including by presenting an interesting model in the first meeting, and a pitch deck with enough information and a sample nappy in the second meeting to progress to the third meeting, and a detailed model in the third meeting which had come from Grant Taylor. The confidential information enabled JJK to start manufacturing and shipping nappies to New Zealand, again without going to China.

[593] Rascals emphasises the time factor: JJK was able to present a credible front with Asaleo Care and Countdown within the space of a few weeks because of the

information Grant Taylor gave it. Mr Wilding's evidence is that it would typically take two years to launch a new brand.

[594] Rascals rejects that JJK did not use Mr Taylor's information because of Ms Van Arts' involvement. Rascals says that JJK only got to the point where Ms Van Arts became involved because JJK had used Mr Taylor's inside information, and continued to use Mr Taylor's information around the business model and technical specifications. JJK instructed Ms Van Arts to include a range of fine tuning points from Mr Taylor for the final presentation.

[595] In terms of Taonga, Rascals says that the Treasures brand, which Taonga now owns, was only secured using the confidential information. So, Taonga's continual use of the brand constitutes an unauthorised use of Rascals' confidential information.

[596] In terms of relief, Rascals seeks both a permanent injunction restraining JJK from using the confidential information, and damages.

JJK's defence

[597] JJK does not dispute that Grant Taylor provided it with information that assisted it to develop Treasures. However, it denies that any of that information was confidential. JJK says that Grant Taylor's assistance was high level and largely related to public information.

[598] JJK's core defence is that, even if the Court were to find that the information was confidential, JJK did not act unconscionably. The JJK directors say that they understood that Grant Taylor had left Rascals. They followed Grant Taylor's ground rules: he could provide high level advice and publicly available information but could not provide commercially sensitive information. They did not understand the information Grant Taylor gave them to be confidential. The did not know that he was breaching duties he owed to Rascals. They took legal advice to confirm the position. JJK says it acted in good faith.

Legal principles

[599] Breach of confidence is an equitable doctrine based on a broad principle of good faith.[79] It is a *sui generis* cause of action — it does not depend upon the existence of a contract or a fiduciary relationship between the parties, or that there is property in the subject matter of the confidence; and nor is it a tort.[80]

[600] The obligation of confidence is not a fiduciary duty. The obligation may arise in a fiduciary relationship, but it does not exist *because of* that relationship.

[601] An action in breach of confidence has three elements:[81]

(a) That the relevant information is in fact confidential, that is: "having the necessary quality of confidence".

(b) That the information was imparted to the recipient in circumstances importing an obligation of confidence.

(c) That the recipient breached the obligation by misusing information which is confidential. In commercial cases, this is sometimes identified as detriment to the confider.[82]

[602] In this case, the primary action for breach of confidence is between Rascals and Grant Taylor. The JJK directors are third parties to any obligation of confidence that Grant Taylor owed to Rascals.

[603] In *Hunt v A*, the Court of Appeal confirmed the availability of an action for breach of confidence against a third party. The Court held that a third party will be liable if they "acted unconscionably in relation to the acquisition of the information or in the way it has been employed".[83]

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79 *Hunt v A,* above n 19, at [64].
80 At [64] and [75].
81 *Coco v AN Clark (Engineers) Ltd,* above n 14, at 47-48, adopted by *A B Consolidated Ltd v Europe Strength Food Co Pty Ltd,* above n 14, at 520–521.
82 *Karum Group LLC v Fisher & Paykel Financial Services Ltd* [2014] NZCA 389 [2014] 3 NZLR 421 at [193].
83 *Hunt v A,* above n 19, at [92].

[604] Whether or not a third party has acted unconscionably involves assessing:[84]

(a) the nature of the information;

(b) the state of knowledge of the third party;

(c) the extent of the breach;

(d) what kind of detriment the disclosure has caused the plaintiffs; and

(e) the degree of culpability of the third party.

[605] The critical factor is the third party's knowledge that the information was confidential, so that it would be just that they should be precluded from disclosing the information to others.[85] If a third party has actual knowledge or is wilfully blind to the information being confidential, they will face "almost insuperable difficulties" to avoid owing a duty of confidence.[86] If a third party receives information innocently, but later finds out it was given in confidence, they are bound.[87] Whether a third party who has constructive knowledge owes a duty of confidence is unresolved in New Zealand.[88]

[606] Where the receipt of the information by a third party was through a knowing breach of confidence, any further use whatsoever will be prohibited to prevent any gain from the unlawful act.[89]

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84 At [93].

85 *Attorney-General v Guardian Newspapers Ltd (No 2) (Spycatcher)* [1990] 1 AC 109 (HL) at 281 per Lord Goff. His Lordship noted that knowledge included circumstances where the confidante had deliberately closed his eyes to the obvious.

86 *Hunt v A*, above n 19, at [94]. See also Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [13.5.2(2)(b)]; and *Attorney-General v Guardian Newspapers (No 2)*, above n 85, at 281. Rascals explicitly advanced their case against JJK based on actual knowledge; not constructive knowledge.

87 *Earthquake Commission v Krieger* [2013] NZHC 3140, [2014] 2 NZLR 547 at [54] citing *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142 at [19].

88 *Hunt v A*, above n 19, at [94].

89 X *v Y* [1988] 2 All ER 648 (QB) at 661; James Every-Palmer "Breach of Confidence" in Andrew S Butler (ed) *Equity and Trusts in New* Zealand (Thomson Reuters, Wellington, 2009) 641 at 652.

Discussion

[607] This cause of action against JJK and Taonga fails for four main reasons.

[608] First, most of the information which Grant Taylor shared with JJK was not confidential Rascals information. The only confidential information Grant Taylor gave to JJK was:

(a) the 2020 Update pitch deck which contained sensitive information about the new eco nappy;

(b) the identity of Rascals' current nappy manufacturer, Joylink; and

(c) the pre-2017 technical specification for Rascal and Friends held by Yoursun.

[609] Second, the JJK directors did not know and were not wilfully blind to the fact that this information was confidential Rascals information. They may have been reckless and naïve, but they did not unconscionably receive or use the information knowing it to be confidential or turn a blind eye to that fact.

[610] Third, the only confidential information which JJK used was the Rascals pre-2017 nappy specification. JJK did not use the confidential information in the 2020 Update pitch deck or its knowledge that Rascals manufactured its nappies at Joylink, either to buy the Treasures brand or in its discussions with Countdown.

[611] Regarding the 2020 Update pitch deck, Grant Taylor provided JJK with the deck, and JJK received it, for the purpose of guiding JJK about what a good retailer pitch deck should look like. JJK did not receive the pitch deck to use the information it contained about Rascals' new eco nappy. There is no evidence that JJK used or even paid any attention to the sensitive content of the presentation. JJK made no reference to an eco nappy in its presentation to Countdown. JJK was not itself developing an eco nappy. Treasures has never had an eco nappy range.

[612] Similarly, Grant Taylor accidentally revealed to JJK that Rascals manufactured its nappies at Joylink by sending the 2019 retailer pitch deck. Again, Grant Taylor provided this pitch deck as a guide to how to prepare a presentation to a retailer, and Mr Penney received it on that basis. There is no evidence that JJK noticed the page indicating where Rascals, at that time, manufactured its nappies. In evidence, Messrs Collie, Armitage and Penney were unaware the pitch deck mentioned Joylink. JJK made no use of the knowledge that Rascals manufactured its nappies at the Joylink factory. JJK did not approach or engage Joylink.

[613] Fourth, JJK did not use the Rascals pre-2017 nappy specification to the detriment of Rascals. Here, it is important to be clear on the detriment that Rascals claims to have suffered by JJK's misuse of its confidential information. Rascals does not claim damages for loss of profits due to JJK copying Rascals' old nappy specification and taking some of its market share. Rascals claims that JJK's misuse of this information denied Rascal the opportunity to buy the Treasures brand, use the brand to enter the other half of the supermarket duopoly and develop a successful business. The losses it claims are the profits it says it would have made, and consequent increase in share value, had it acquired the Treasures brand itself.

[614] This claim depends on the theory that JJK would not have bought the Treasures brand had it not misused Rascals' confidential information. In my assessment, this theory is not borne out by the facts.

[615] The JJK directors and Grant Taylor had their first coffee discussion on 9 July 2020 at the Black Cottage Café. As noted earlier, Grant Taylor appears to have told the JJK directors that there were no patents in the nappy industry and that margins of 40 per cent were possible. He seems to have advised them that if they acquired Treasures, they would need to focus on quality, manufacture in China and negotiate FOB terms, as the Rascals business did.

[616] On 12 July 2020, Mr Armitage emailed Mr Orr that they were interested in proceeding with an offer for the Treasures brand and requested documentation. Three days later, on 15 July, Mr Armitage emailed Mr Orr indicating a price range of

$500,000 to $3 million depending on due diligence and a six-month deal with Countdown which the vendors would assist with.

[617] On 13 July 2020, Mr Armitage emailed Mr Orr to arrange a viewing of the Treasures factory and requesting a contact at Countdown "to discuss the possibility of the brand continuing". On 21 July, Grant Taylor accompanied Messrs Armitage and Penney on their visit to the Treasures factory.

[618] On 23 July 2020, Messrs Penney, Collie and Armitage had their first meeting with Ms Young. Grant Taylor sent Mr Penney the first Rascals retailer presentation to help him prepare. Mr Penney's email notes dated 22 July, which he prepared for the meeting with Ms Young, refer to exclusivity, FOB, high margins, high quality and a strategy of reinvesting heavily in marketing in the first two years. I infer from this email that Mr Penney spoke to Grant around this time.

[619] Ms Young's evidence was that she liked the JJK directors but was not impressed with their pitch: "They did not have a sample nappy, a presentation or a business plan and had not purchased the brand. I told them they would have to do a lot of work if they wanted Woolworths to stock Treasures nappies. I said I was open to meeting with them again once they had a sample nappy and a solid plan."

[620] Subsequently, on 29 July 2020, the JJK team had the further discussion with Grant Taylor at the Copper Spot Café. It was at this meeting that Grant Taylor provided JJK with an unbranded sample nappy to present at their next meeting with Countdown. Around this time Grant Taylor appears to have explained the different component parts of a nappy to Mr Penney and suggested how he would improve the Treasures nappy. Mr Penney's email notes dated 30 July again refer to FOB and the importance of performance, which was "where Rascal and Friends got their following".

[621] Grant Taylor connected Mr Penney with Ms Yuan. Ms Yuan liaised with Yoursun to develop samples for JJK based on Rascals' pre-2017 specification. Yoursun prepared a quote to manufacture these nappies and Ms Yuan sent it to Mr

Penney. The quote bears the date 4 August, so I infer that Mr Penney and Ms Yuan were in contact by that date.

[622] Separately, on 4 August 2020, JJK's solicitors sent Asaleo Care two alternative terms sheets for the sale and purchase of the Treasures brand. One was for $500,000 with the condition that the price would be payable within ten working days of Treasures nappies being stocked in 50 per cent of Countdown supermarkets in New Zealand. The second term sheet did not contain this condition and offered a price of $100,000. The terms were stated to be binding on acceptance by the vendor, conditional on a formal sale and purchase agreement being executed by 1 September and JJK's solicitor's confirming that no other consents were required for the transaction.

[623] JJK's second meeting with Countdown took place the following day, on 5 August 2020. Mr Penney met with Ms Young, with the sample nappy from Grant Taylor and a presentation prepared by Mr Adams. The JJK presentation Mr Adams prepared adopted the format of the Rascals 2019 pitch deck but did not include any specific information from it.

[624] Ms Young's evidence is that the presentation was "pretty light weight" and the sample nappy "needed work" but she was interested in exploring the opportunity. She said Mr Penney mentioned that the contract manufacturer in China was the factory Rascal and Friends used to use. She saw this as a positive point because their nappy sold well in the competing supermarkets. Her evidence is that she suggested changes to the sample, including to the back-sheet, tabs and dimples ("pearls").

[625] On 7 August 2020, JJK's solicitor Mr Lewis had a phone call to discuss offers. Mr Lewis sent another term sheet for $300,000. A signed term sheet is not in evidence, but I infer that Asaleo Care agreed to that price on or around 7 August. On 20 August, Mr Orr and Mr Lewis exchanged emails regarding clauses in the purchase agreement. On 25 August, Mr Orr emailed Mr Lewis a marked-up version of the sale and purchase agreement for Treasures between JJK and Asaleo Care. The agreement between Asaleo Care and JJK was executed on 8 September.

[626] Mr Collie's evidence is that once JJK acquired Treasures in September, it was clear that they needed to involve someone with time and expertise to support Mr Penney to secure a deal with Countdown. Mr Collie engaged Ms Van Arts to prepare a marketing strategy, including a presentation for the next meeting with Countdown, and Ms Sanders to redesign the brand image.

[627] Ms Van Arts prepared the presentation with input from Ms Sanders, Mr Collie and Mr Penney. Mr Collie's evidence is that Ms Van Arts created the pricing spreadsheet to calculate the Treasures margin, Countdown margin and recommended retail price based on the cost of goods sold. Ms Van Arts' evidence is that she did not rely on the Rascals pitch decks to prepare the JJK presentation. The JJK presentation does not bear any resemblance to the Rascals' pitch decks.

[628] Mr Penney liaised with Ms Yuan about nappy specifications, with the samples finalised and shipped from the Yoursun factory on or around 28 October.

[629] In November 2020, it appears that Mr Collie and Grant Taylor discussed the intended "pillars" of the Treasures business. This conversation took place in preparation for the third meeting with Ms Young.

[630] JJK had their third meeting with Countdown on 10 November. The final presentation was a culmination of the work of Ms Van Arts, Ms Sanders, Mr Collie and Mr Penney, who attended the meeting. They showed Ms Young the sample nappies received from the Yoursun factory. In her evidence, Ms Young said that it was clear that JJK had done a lot of work since the last meeting. She observed that the sample had many changes from the original sample Mr Penney had brought to the second meeting. She requested further changes, more defined pearls and a softer top sheet. JJK made the changes and ordered new samples from Yoursun incorporating them.

[631] Ms Young requested a copy of the presentation which Mr Penney emailed to her on 10 November. On 11 November, Ms Young emailed Mr Penney a target retail price, some follow-up questions and a "supplier deal proposal" template. Mr Collie explains that this template aims to calculate Countdown's margins and was a far more

detailed margin worksheet than the one presented by JJK. There was some back and forth between Ms Young, Mr Penney and Ms Van Arts about the supplier deal proposal over December. Ultimately, JJK was able to work out its margin using this template as a basis for a far more detailed margin worksheet.

[632] On 22 December 2020, Messrs Penney and Collie and Ms Van Arts attended a final meeting with Ms Young. They presented the amended samples from Yoursun. Ms Young confirmed that she was happy with the product, and they agreed terms in principle.

[633] Ms Yuan addressed the process of designing the nappy in her evidence:

> Yoursun manufactured samples for JJK and sent them directly to New Zealand in October 2020. JJK reviewed the samples and, through me, gave feedback about what they wanted to change. This included things like softening the tabs. I provided this feedback to Yoursun, which made the changes.
>
> Yoursun sent JJK further samples in December 2020. There were further rounds of changes, including making the topsheet and backsheet softer and making the dimples on the topsheet more pronounced. We went through several rounds of change before JJK settled on the nappy it wanted. Some of the changes came from the category manager at the retailer JJK was working with. The category manager had specific ideas about what they wanted.

[634] On 28 April 2021, JJK and Countdown agreed the final terms and conditions for the supply arrangement. This was signed by Mr Penney on 2 May.

[635] I make the following observations about this timeline.

[636] First, Mr Armitage initiated discussions with Asaleo Care about buying Treasures *before* the first coffee discussion between the JJK directors and Grant Taylor. Mr Armitage contacted Treasures about buying the brand on 29 June after hearing the public announcement. Mr Orr followed up with Mr Armitage by email on 6 July and invited him to submit “a confidential expression of interest in purchasing the ‘Treasures’ brand”. The JJK directors and Grant Taylor met subsequently, on 9 July.

[637] Mr Armitage’s evidence is that he had decided to give Treasures a go before he spoke to Grant about it. He said: “Naturally, I wanted to bounce ideas off Grant and learn what I could from him since he had experience in the nappy industry. Grant’s

guidance was helpful, and we appreciated it. I would have given Treasures a go without Grant's input, though."

[638] Second, JJK made an indicative offer for Treasures before the trip to the Treasures factory on 21 July, the meeting at the Copper Spot Café on 29 July, before they received the Rascals pitch decks and the sample nappy, and before the introduction to Ms Yuan and the first meeting with Countdown. They made their indicative offer on 15 July, after a roughly one-hour coffee discussion between the JJK directors and Grant Taylor at the Black Cottage Café.

[639] Third, JJK bought Treasures well before they had any assurance of reaching an arrangement with Countdown. JJK made its binding offer of $300,000 (subject to terms) for Treasures on 7 August, after one meeting with Countdown on 23 July that had not gone well and a more encouraging meeting on 5 August. But there was no assurance of a supply deal – the door was left open by Ms Young but nothing more. It was not until September, after they had acquired Treasures, that JJK began work in earnest with their own contractors; and they did not have any assurance from Countdown until the third meeting, in November.

[640] Fourth, JJK did not use the Rascals pre-2017 nappy specification until after it had acquired Treasures. JJK used the nappy specification as the base for the first set of sample nappies it ordered from Yoursun to present to Ms Young at the third meeting in November. The sample nappies, which arrived on 28 October, contributed to JJK moving to the next stage with Countdown, with further changes made before the final design was agreed.

[641] I acknowledge that it seems that Mr Penney told Ms Young at the second, 5 August meeting, that JJK's manufacturer was Rascals' former factory in China and that Ms Young recalls being encouraged by this. But merely referring to Rascals' former factory was not a misuse of Rascals' confidential information.

[642] I conclude that JJK did not misuse the Rascals pre-2017 nappy specification to deprive Rascals of the opportunity to buy Treasures. JJK used sample nappies derived

from this specification to get from the third meeting to the fourth meeting with Countdown. But by then JJK had already acquired Treasures.

[643] It is also clear that the Treasures nappy evolved further from these first samples, with at least two further rounds of changes requested by Ms Young.

[644] For the reasons I have outlined, Rascals has not proved that JJK unconscionably misused its confidential information to Rascals' detriment. Most of the information that Grant Taylor gave to JJK was not confidential information. The JJK directors did not know and were not wilfully blind to the fact that a small proportion of the information was confidential Rascals information. The only confidential information that JJK used was the Rascals pre-2017 nappy specification, but that use did not deprive Rascals of the opportunity to buy the Treasures brand.

DISHONEST ASSISTANCE

Rascals' claim

[645] Rascals claims that JJK dishonestly assisted Grant Taylor to breach his fiduciary duties to Rascals. Namely, his fiduciary duty to act in the best interests of Rascals; not to profit from or divert Rascals' corporate opportunities; and not to profit from or misuse Rascals' confidential information.

[646] Rascals says that the JJK directors knew that Grant Taylor owed these fiduciary duties to Rascals; and that they induced and procured Grant Taylor to breach the duties for their and JJK's benefit.

[647] Rascals claims that JJK profited from Grant Taylor's breaches by acquiring the Treasures brand and developing a successful business.

[648] Rascals says that it suffered losses as a result of this dishonest assistance, being loss of value in the Rascals shares, and the lost opportunity to purchase the Treasures brand and implement the strategy developed by Nick Mowbray to make it a profitable company. So, Rascals claims an account of the profits made by JJK; and damages to compensate Rascals for its losses.

[649] Rascals also claims that JJK held and holds the assets in connection with the Treasures brand or business on constructive trust for Rascals.

JJK's defence

[650] JJK says that Grant Taylor did not owe Rascals any fiduciary duties when JJK and Grant Taylor were communicating with each other. That is because the Mowbrays released the Taylors from all duties, and Grant Taylor was not acting as a director of Rascals when he was talking to the JJK directors.

[651] Second, if Grant Taylor did owe Rascals fiduciary duties, Rascals has not proven that JJK knew or was wilfully blind to that fact.

[652] Third, the claim fails on loss causation.

[653] JJK also raises an affirmative defence of "unclean hands". JJK alleges that Nick Mowbray's intervention with Countdown after he discovered that JJK had acquired the Treasures brand amounts to acting with unclean hands, so equitable relief should be declined. This intervention also forms the basis for JJK's counterclaim against Rascals.

Legal principles

[654] Dishonest assistance is an equitable cause of action. The cause of action has four components:[90]

(a) the existence of a trust or fiduciary duty;

(b) a breach of that trust or fiduciary duty by a trustee or fiduciary that results in loss;

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90 *McKay v Sandman* [2018] NZCA 103, [2018] NZAR 707 at [22]. On appeal, the Supreme Court questioned whether this cause of action extended to breaches of fiduciary duty (beyond breach of trust as the test was initially configured by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC)): *Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519 at [128]-[131].

(c) participation by a defendant third party (a stranger to the trust) by assisting in the breach of trust or fiduciary duty; and

(d) dishonesty on the part of the defendant.

[655] There is some doubt about whether dishonest assistance extends to participation by a third party in a breach of a fiduciary duty or whether it is confined to claims by beneficiaries where trust property has been disposed of in breach of trust.[91] For present purposes, and without giving detailed consideration to the issue because it is not determinative, I accept that the cause of action extends to accessory liability for breach of fiduciary duties. I note that this is consistent with the current approach in England.[92]

[656] The "key ingredient" for dishonest assistance is the "dishonest state of mind on the part of the person who assists in the breach of trust".[93] To be liable, the third party must have actual knowledge that the dealing is one in which they cannot honestly participate,[94] or a "sufficiently strong suspicion of a breach of trust, coupled with a deliberate decision not to make an inquiry lest the inquiry result in actual knowledge" (in other words, wilful blindness).[95] This involves "shutting one's eyes to the obvious and can thus can fairly be equated with the dishonesty involved when there is actual knowledge".[96]

[657] The test for dishonesty is an objective one, judged against the background of what the defendant subjectively knew. Putting another way:[97]

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91 *Sandman v McKay*, above n 90, at [128]-[131]. Radich J in *Drylandcarbon GP One Ltd v Leckie,* above n 23, at [372], n 203 commented that it seemed to him "plain that dishonest assistance is the basis on which equity will accept that a third party should be liable for equitable wrongs by the primary party, including for both breach of trust and fiduciary duty", referring to *Gillies Bakery v Gillespie* [2015] NZCA 93 at [87], *Kawhia Offshore Services v Rutherford HC Hamilton*, above n 60, at [69] and *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 (CA) at [91].

92 Butler, above n 36, at [18.5].

93 *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 at [27].

94 At [27].

95 At [27]; and *Sandman v McKay*, above n 90, at [78].

96 At [27].

97 *Westpac New Zealand Ltd v MAP & Associates Ltd*, above n 93, at [26], citing *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476 at [10]–[12].

> If by ordinary standards a defendant's mental state would be described as dishonest, it is irrelevant that the defendant has different standards and does not appreciate that his conduct, by ordinary standards would be regarded as dishonest.

[658] The Court of Appeal has held that, in determining whether the defendant acted dishonestly, the court should consider all circumstances known to the defendant at the time, the defendant's personal attributes, and the reasons they acted as they did.[98]

Discussion

[659] The first requirement for liability is met: Grant Taylor owed Rascals fiduciary duties, including a duty not to profit from Rascals' corporate opportunities, until 3 August 2020 when his resignation took effect.

[660] In terms of the second requirement, I consider it likely that Grant Taylor breached his general duty of loyalty to Rascals by providing JJK with information and advice while he was still a director of the company. If a fiduciary duty to not misuse confidential company information continues to exist alongside s 145 of the Companies Act, Grant Taylor breached that duty to the extent that he provided JJK with confidential information.

[661] The issue of breach is finely balanced because of the peculiarities of the situation. There is force to the argument that, like the director in *In Plus*, Grant Taylor's duty of loyalty to the company "had been reduced to a vanishing point" by his practical exit from the company and the circumstances that led to that exit. He was not exercising any powers or performing any functions as a director. He was, in a practical sense, outside the company. On the other hand, the Taylors agreed to the arrangement that involved them remaining as directors until the end of the wash-up period, unlike in *In Plus* where the director's exclusion from the company's affairs was involuntary. It seems that Keith Taylor at least still had access to Rascals' accounting systems. I can conceive of policy reasons why directors who have resigned must nevertheless continue to owe obligations of loyalty to the company until their

98 *McKay v Sandman*, above n 90, at [67], citing *Royal Brunei Airlines Sdn Bhd v Tan*, above n 90, at 391.

resignation takes effect, to prevent any abuse of their statutory powers and ongoing access to company information and opportunities.

[662] By a fine margin, I find that by assisting JJK to establish itself in competition to Rascals (by providing general information and advice, referring JJK to Ms Yuan, providing Mr Penney with practical advice such as how to use a margin spreadsheet and what to include in a pitch to a retailer, and by giving JJK a sample nappy to take to the first meeting with Countdown), while he was still a director of Rascals, Grant Taylor breached his general fiduciary duty of loyalty to the company. And, by providing JJK with three items of confidential information, he breached a fiduciary duty to not misuse company information, should such a fiduciary duty continue to exist.

[663] But the claim against JJK in relation to Grant Taylor's duty not to personally profit from Rascals' business opportunities and to account for any profits so made fails on the second requirement. Grant Taylor did not breach this duty because he did not personally profit or otherwise benefit from JJK's acquisition of the Treasures brand. He was not a director, shareholder or employee of JJK, and he had no beneficial interest in the company. He was not engaged as a consultant and JJK did not pay him for his advice. He cannot account for any profits as he has not made any.

[664] Rascals seems to assert that this duty extends to the "diversion" of opportunities to a third party. In my view that misconstrues the nature of the duty. The duty of corporate opportunity prohibits a director from exploiting a business opportunity of the company of which they are a director, for their own benefit. As noted, the rule is sometimes framed as a duty to account (in other cases the duty to account is described as the remedy for the director's breach of duty not to profit).

[665] While I have considered the authorities that I have been referred to by Rascals, I have not been referred to nor have I found any cases in which a director (or former director) has been held liable for breach of this duty where they did not exploit the company opportunity in question for their own gain. That is the situation here.

[666] Rascals relies on the Canadian Supreme Court statement in *Canadian Aero Services Ltd v O'Malley* that the "strict ethic" of a director's fiduciary duties "disqualifies a director or senior officer from usurping for himself or diverting *to another person or company with whom or with which he is associated* a maturing business opportunity which his company is actively pursuing".[99] But in *Canadian Aero Services*, the directors (who were tasked with investigating a contract for service for their company) subsequently resigned and incorporated their own company which obtained the contract. So, they exploited the opportunity for their own gain. The Judge held that the plaintiff was "entitled to compel the faithless fiduciaries for their default according to their gain.".[100]

[667] Returning to the test, as Grant Taylor breached his general duty of loyalty by assisting JJK while he as a director, and his duty to not misuse company information, the third requirement is also met. JJK participated in Grant Taylor breaching these duties by receiving the information, assistance and advice.

[668] But the fourth criteria is not met. JJK did not *dishonestly* assist Grant Taylor to breach his directors' duties. The JJK directors did not have actual knowledge, or a strong suspicion, coupled with a deliberate decision not to inquire, that Grant Taylor was still a director when they were speaking with him in July and early August 2020.

[669] For these reasons, this cause of action fails. Grant Taylor made no profit or personal benefit from JJK's acquisition of the Treasures brand so there was no breach of corporate opportunity. The JJK directors did not have a dishonest state of mind when they received Grant Taylor's information, assistance and advice, in breach of his directors' duties.

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99 *Canadian Aero Service Ltd v O'Malley,* above n 69 (emphasis added). It was also held that: "he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired."

100 At 622.

KNOWING PROCUREMENT OF BREACH OF DUTY

Rascals' claim

[670] In this cause of action, Rascals claims that JJK knowingly and intentionally procured Grant Taylor to breach his statutory and fiduciary duties. Specifically, his:

(a) directors' duties under ss 131(1) and 137 of the Companies Act;

(b) duty not to disclose or use information received as a director or employee of Rascals except for company purposes (s 145); and

(c) fiduciary duties.

[671] Rascals submits that there is a general principle of liability for procuring actionable wrongs. Rascals submits that this includes knowingly and intentionally inducing commission of a tort, breach of statutory duty, breach of contract and breach of equitable duties.[101]

[672] Rascals relies on the seminal case *Lumley v Gye* which concerned procuring breach of contract. Rascals submits that the principles in the case should not be confined to breaches of contract and may apply to other circumstances where the wrong and damage is analogous. In this English case, the Court said:[102]

> It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.
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> … He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract.

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[101] Relying on Andrew Tettenborn and Michael A Jones (eds), *Clerk & Lindsell on Torts* (Thomson Reuters, Croydon UK, 24th ed, 2023) at 23-24 to 23-26.

[102] *Lumley v Gye* (1853) 2 El. & Bl. 216, 755.

[673] Rascals refers to *Boulting v Association of Cinematograph Television and Allied Technicians* where the rule was applied to directors' fiduciary duties. Lord Denning held:[103]

> It is contrary to public policy that any director should be made to deny his trust and throw over the interests of those whom he is bound to protect…it is wrong to induce another to act inconsistently with the duty of fidelity which he has undertaken by contract or trust to perform.

[674] Rascals says that the elements of the tort are those that have been recognised for the tort of inducing breach of contract:[104]

(a) a legal duty;

(b) breach of that legal duty induced by the defendants;

(c) the defendants knowingly and intentionally induced the breach; and

(d) the defendants' conduct caused loss or damage to the plaintiffs.

JJK's defence

[675] JJK says that it is unclear whether the tort of inducing a breach of duty is recognised in New Zealand. JJK cites the customary caution that the courts have applied in recognising novel torts and submits that the present circumstances are not appropriate for this, particularly where the evidence does not support the claim.

[676] If the Court holds that tort of inducing breach of duty is actionable, JJK submits that Rascals must show:[105]

(a) a breach of a duty by Grant Taylor;

(b) that JJK knowingly and intentionally procured the breach; and

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103 *Boulting v Association of Cinematograph Television and Allied Technicians* [1963] 2 Q.B. 606 at 627.

104 *Diver v Loktronic Industries Ltd* [2012] NZCA 131, [2012] 2 NZLR 388 at [30].

105 Following the elements for inducing breach of contract set out in *Diver v Loktronic Industries Ltd,* above n 104, at [30].

(c) that JJK procured the breach knowing that it would cause Rascals loss.

Discussion

Recognising a tort of knowingly inducing a breach of duty

[677] A tort of inducing a breach of contract has been recognised in New Zealand law.[106] Rascals has not cited any New Zealand authority for the existence of a tort of inducing breach of fiduciary or statutory duties and I am not aware of any.

[678] In *Kupe Group Ltd v Ariadne Australia Ltd*, this Court in the context of a strike-out application, described such a cause of action as "rather dubious".[107] More recently, in *Ideal Garages*, Heath J traversed the differing opinions across the English courts,[108] but considered it unnecessary to determine the issue as the case involved inducing a breach of contract.[109]

[679] Lord Denning's statement in *Boulting v Association of Cinematograph, Television and Allied Technicians*, a decision of the English Court of Appeal, was made in a very different context.[110] The Law Lord was commenting on the lawfulness of union bylaws which required the Boulting brothers to act inconsistently with their duties as managing directors to act in the production company's best interests.[111] I do not see this case as providing compelling support for recognition of a tort of procuring breach of fiduciary duty in New Zealand.

[680] A prominent Australian text goes as far to say that:[112]

> There is no tort of procuring a breach of trust comparable with the tort of procuring a breach of contract. Any protection of the interest of a beneficiary against a person procuring a trustee or other fiduciary to commit a breach is to be found in equity.

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106 *Diver v Loktronic Industries Ltd*, above n 104.
107 *Kupe Group Ltd v Ariadne Australia Ltd* HC Auckland CL 151/88, 10 July 1989 at 14.
108 *Ideal Garages Ltd v Independent Construction Company* HC Auckland CIV-2004-404-2685, 18 November 2004 at [210].
109 At [211].
110 *Boulting v Association of Cinematograph, Television and Allied Technicians*, above n 103.
111 The rules empowered the union to expel a member or impose a fine if they were to act to the prejudice of the association or fail to abide by any instruction of the union, which was plainly incongruent with the primacy of their duty as directors if a dispute ever arose involving the company.
112 Ramsay, above n 15, at [14.18].

[681] In New Zealand, in a case about inducing breach of contract, the Court of Appeal commented that the tort is "apparently the same" as conspiring by unlawful means without the allegation of conspiracy.[113]

[682] It follows that I must decide whether to recognise a tort of inducing a breach of statutory or fiduciary duties.

[683] As this Court has said:[114]

> The courts always approach the introduction of a new tort cautiously because it involves the imposition of civil liability where there has been none. … As a result, the courts will only recognise a new tort where policy considerations and the likely practical consequences confirm that this is both necessary and appropriate.

[684] The recognition of a new tort does not follow a prescribed process.[115] In all cases, a 'wrong' must first be recognised for which there is no remedy, or no adequate remedy, under existing law for the injured plaintiff. The imposition of liability for that tortious injury then develops slowly and with reference to changing technology, social norms, commercial concerns, and, as a catch-all, public policy.

[685] In *Hosking v Runting*, Gault P and Blanchard J observed:[116]

> From time to time, however, there arise in the Courts particular fact situations calling for determination *in circumstances in which the current law does not point clearly to an answer*. Then the Courts attempt to do justice between the parties in the particular case. In doing so the law may be developed to a degree. It is because the legislative process is inapt to anticipate or respond to every different circumstance that some developments in the law result from such case-by-case decisions. That is the traditional process of the common law.

[686] Lang J summarised the approach involved in deciding whether to recognise a new tort:[117]

(a) whether there is a "gap" in the law, which may be caused by changes in technology, or changes in societal attitudes, practices and values;

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113 *New Zealand Airline Pilots' Association v Air New Zealand Ltd* [1992] 2 NZLR 656 at 659.
114 *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2024] NZHC 1361 at [57].
115 At [60].
116 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [4] (emphasis added).
117 *Sweeney v Prison Manager, Spring Hill Corrections Facility,* above n 114, at [64].

(b) whether the current law may already point to an answer or resolution in respect of the claimed harm;

(c) whether the decision to extend the law would be consistent with general legal principle and public policy; and

(d) whether it is a step that is appropriate for the judiciary to take.

[687] The Court of Appeal in *Burns v National Bank of New Zealand Ltd* also identified a range of policy reasons, including:[118]

(a) the availability of alternative remedies;

(b) the speculative nature of any damage; and

(c) inconsistency with existing policy.

[688] The Court of Appeal in that case declined to recognise the new tort of spoilation. The Court noted that remedies already existed to address the same conduct and the case for recognition of the new tort was not made out.[119]

[689] In my view, the present circumstances do not demand the recognition of a tort of knowing procurement of breach of statutory or fiduciary duty, whether characterised as a novel tort or a variation to an existing tort (knowing procurement of breach of contract). There is an existing remedy available to Rascals which captures the allegation that JJK knowingly encouraged Grant Taylor to breach his directors' duties: a claim for dishonest assistance.

[690] Further, there is a recognised remedy that provides Rascals with relief if JJK knowingly procured Grant Taylor to misuse confidential company information: third party liability for breach of confidence.

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118 *Burns v National Bank of New Zealand Ltd* [2004] 3 NZLR 289 (CA) at [85].
119 At [74], [80] and [91].

[691] Therefore, there is no need, on the facts of this case, to recognise a tort of knowingly procuring a breach of fiduciary or statutory duties. I decline to do so.

Cause of action would fail anyway

[692] Even if I was to recognise a tort of knowingly procuring breaches of directors' statutory and/or fiduciary duties, and the s 145 prohibition on misusing inside company information, it would fail on the facts.

[693] It is common ground that if such a tort is recognised, it will have comparable elements to those involved in the tort of inducing breach of contract. The elements are set out at [674].

[694] To be liable for the tort of inducing breach of contract, the defendant must have either actual knowledge or be wilfully blind to the fact that they are inducing another to breach their contract.[120] It is not sufficient that the defendant ought reasonably to have known that their actions would cause a breach, or that a breach was a reasonably foreseeable consequence.[121]

[695] By analogy, and as with the cause of action for dishonest assistance, the JJK directors must have known or turned a blind eye to the fact that they were inducing Grant Taylor to breach his statutory and fiduciary duties as a director, and/or s 145 (which only applied to Grant Taylor while he was a director (see [268] to [270]).

[696] I have found on the facts that JJK did not know that Grant Taylor was still a director of Rascals when they began talking to him. JJK did not know and nor were they wilfully blind to the fact that he was breaching his statutory and/or fiduciary directors' duties, or s 145. Furthermore, Grant Taylor did not in fact breach his fiduciary duty to not profit from Rascals' business opportunities.

[697] This cause of action fails for these reasons.

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120 *Diver v Loktronic Industries Ltd,* above n 104, at [34]-[35] citing *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 (CA).

121 *OBG Ltd v Allan and others* [2007] UKHL 21 at [39]; Todd, above n 86, at [12.2.4].

[698] In their closing submissions, Rascals purported to advance a claim in knowing receipt as an alternative conception of knowing procurement of breach of duty. I am not prepared to consider a cause of action that has not been pleaded.

[699] In any case, Rascals has claimed that JJK dishonestly assisted Grant Taylor and that as a result, JJK held or holds the assets in connection with the Treasures brand or business on constructive trust for Rascals. And, Rascals has brought a claim against Taonga that because of JJK's dishonest assistance, Taonga now holds the Treasures brand and any profits Taonga has made on constructive trust for Rascals. This claim would seem to cover the substance of the alternative claim that Rascals now wishes to advance.

CONSPIRACY BY UNLAWFUL MEANS

Rascals' claim

[700] Rascals claims that JJK conspired with Grant Taylor by unlawful means to acquire the Treasures brand, injuring Rascals' commercial and proprietary interests. The unlawful means were through the breach of confidence (in disclosing and misusing confidential information) as well as breaches of Grant Taylor's various duties, in particular his fiduciary duties, and the JJK directors' knowing procurement of and dishonest assistance with those breaches.

[701] Rascals claims damages for losses said to be caused by the conspiracy, namely loss in the value of the Rascals shares and of the Treasures opportunity.

JJK's defence

[702] JJK says that there was no unlawful means (no breach of confidence, knowing procurement of breach of duties or dishonest assistance). Furthermore, Rascals has not proven that JJK was at least wilfully blind as to the alleged unlawfulness of its actions. There was no action directed at injuring ZURU or Rascals. Grant Taylor acted on the understanding that Rascals had said "thanks but no thanks" to the Treasures opportunity and was not intending to pursue it. The JJK directors did not

know that Rascals was interested in purchasing Treasures. Finally, JJK's actions cannot have caused loss to Rascals.

[703] Therefore, Rascals has not proven an unlawful action, a common intention to injure Rascals, or loss.

Legal principles

[704] An unlawful means conspiracy arises where "two or more persons combine and agree that at least one of them will use unlawful means to cause damage to the claimant".[122] The plaintiff must establish the following four elements to succeed:[123]

(a) a common intention between conspirators;

(b) the use of unlawful means;

(c) an intention to injure the plaintiffs; and

(d) actual damage to the plaintiffs.

[705] On the first element, while a common intention between conspirators is required, it is not necessary to prove the existence of an express agreement, whether formal or informal. A tacit understanding will suffice.[124]

[706] Turning to the second element, the common law does not generally prohibit a person from intentionally causing harm to another in commerce, even maliciously. Therefore, it is only if *unlawful means* are used to cause the harm that the conduct is tortious.

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122 *Wagner v Gill* [2014] NZCA 336, [2015] 3 NZLR 157 at [49].
123 At [50].
124 *SGS New Zealand Ltd v Nortel (1998) Ltd* HC Whangarei CIV-2006-488-384, 20 December 2007 at [164].

[707] The meaning of "unlawful means" in the context of economic torts is not entirely settled around the margins.[125] However, it is well established that "unlawful means" captures breach of confidence and breaches of fiduciary duties, and even dishonest assistance.[126] For example, in *SSC & B Lintas New Zealand v Murphy*, the defendants had acted in concert to misuse confidential information, which was enough for the High Court to find that there had been unlawful means.[127]

[708] To establish a conspiracy, it is not necessary that the conspirators know that their actions are unlawful, but they must know the facts which make their actions unlawful.[128] It is clear that wilful blindness to the unlawfulness of their actions will be sufficient.[129]

[709] Regarding the third element of "intention", it is not necessary that the defendants' sole or predominant purpose is to injure the plaintiff.[130] An intention to injure, together with other purposes, will be enough.

[710] *Todd on Torts* states that it is unclear whether "intention" is satisfied by mere foreseeability that the defendants' unlawful conduct is likely to cause damage to the plaintiffs.[131] One line of authority (the best example being the Court of Appeal in *Swann v Secureland Mortgage Investment Nominees Ltd*) does not require the

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125 *Wagner v Gill*, above n 122, at [60]–[63]. In *Wagner v Gill*, the Court of Appeal noted that, in *OBG Ltd v Allan*, above n 121, Lord Nicholls considered that unlawful means encompassed anything that a defendant was not permitted to do. The Court recorded that this formulation was consistent with its earlier decision where it had identified unlawful means as being "an overt act that is independently actionable at the suit of the plaintiff": at [62], quoting *Jiao v Barge* CA213/05, 19 July 2006 at [70].

126 Todd, above n 86, at [12.4.3(2)]. See also *Plumpton v Terry* [2019] NZHC 3450 at [187] and *SSC & B: Lintas New Zealand Ltd v Murphy* [1986] 2 NZLR 436 (HC) at 461.

127 *SSC & B: Lintas New Zealand Ltd v Murphy,* above n 126.

128 *Spark New Zealand Trading v B* [2025] NZCA 153 at [20]; *ABC Developmental Learning Centres (NZ) Ltd v Artemis Early Learning Ltd* HC Christchurch CIV-2010-409-1198, 25 June 2010 at [53]; *International Stevedoring Operations Ltd (t/a Mainland Stevedoring Ltd) v New Zealand Waterfront Union* [2001] ERNZ 321 HC at [29]; *Cookright Filtering Services Ltd v Wallis* [2013] NZHC 2535 at [38].

129 *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [114] and [159]. In this case, the Court of Appeal (England and Wales) acknowledged that it may be a defence to a claim in unlawful means conspiracy for the defendant to prove that they believed the means to be lawful. This would require the defendant to establish a positive belief: [146].

130 Todd, above n 86, at [12.4.3] citing *Raja v McMillan* [2020] EWHC 951 (Ch).

131 At [12.4.3].

defendant to intend to cause harm specifically to the plaintiff — it is sufficient that such harm was incidental to another purpose, such as profit to themselves.[132]

[711] However, the more recent Court of Appeal authority of *Wagner v Gill* criticised *Swann* as "against the weight of authority" and "unreasonably widen[ing] the scope of the tort".[133] Rather, the Court of Appeal in that case preferred a conception of the 'intention' requirement that was directed at the plaintiff — "that the plaintiff's loss must be either the desired end itself or the intended means of achieving the desired end".[134] It should be noted that the Court did not arrive at a conclusive view. It merely stated a preference, albeit following a comprehensive review of the relevant authorities.[135] The Court referred to Lord Nicholls' comments:[136]

> Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct…

[712] I respectively adopt the conception of this element set out in *Wagner v Gill*. A deliberate intention directed at the plaintiffs is required.

[713] In terms of the fourth element, the tort requires that the conspirators not merely agree to injure the plaintiff, but that they cause damage by action under that agreement.[137] That is the meaning of 'actual damage'.

[714] There must be a "sufficient link" between the loss suffered and the conspiracy.[138] It is not necessary for the loss to have been caused directly by the unlawful means employed to give effect to the conspiracy.[139]

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132 *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 (CA).
133 *Wagner v Gill*, above n 122, at [90].
134 At [97] and [106].
135 At [90]–[107].
136 At [98], citing *OBG Ltd v Allan*, above n 121, at [166].
137 *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 529 (Ch); and *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 (HL) at 188.
138 *Plumpton v Terry,* above n 126, at [212].
139 At [212].

Discussion

[715] The plaintiffs have established that Grant Taylor and JJK shared a common intention for JJK to acquire the Treasures brand, so JJK could design, produce and sell nappies using the Treasures brand name, most likely through Countdown, if they could reach a deal with the supermarket chain.

[716] However, the second element of "unlawful means" is not made out. JJK was did not know or turn a blind eye to the facts that made Grant Taylor's actions unlawful. JJK did not know or turn a blind eye to the fact that some of the information that Grant Taylor passed to them was confidential or inside Rascals information. JJK did not know or turn a blind eye to the fact that he was a director of Rascals when they began speaking with him. Grant Taylor did not breach his fiduciary duty to not exploit a Rascals opportunity for his own benefit.

[717] There is no unlawful means in the form of knowing procurement of breach of duty or dishonest assistance, because Rascals has not proved those causes of action.

[718] And the third element of the cause of action is not met. Rascals has not proven that Grant Taylor and JJK intended to harm Rascals or even that they understood that Rascals would be harmed by JJK's purchase of the Treasures brand.

[719] The plaintiffs' primary position is that Grant Taylor and JJK knew that by buying the brand, they were taking the Treasures opportunity away from Rascals. That allegation is not proved. Rather, the evidence shows that Grant Taylor acted on the understanding that Rascals had declined the Treasures opportunity and did not want it. There is no evidence to infer that JJK's directors understood that Rascals wanted to buy Treasures.

[720] If I find that JJK did not know that Rascals intended to buy Treasures, Rascals advances an alternative argument. Rascals would have benefited from Treasures (a competitor) exiting the market, as Treasures was one of the three big brands at the time, along with Huggies and Rascals. As Asaleo Care was desperate to sell Treasures, had already gone through an unsuccessful sales process, and was prepared to contemplate the low-ball offer by JJK, it is reasonable to infer that no other serious

purchaser existed. Had JJK not bought the brand, Rascals would no longer have faced competition from Treasures and would have gained further market share. So, Rascals submits that the acquisition, while possibly not primarily aimed at injuring Rascals, would have that effect by creating a competitor (fuelled by access to Rascals' business model and information).

[721] I reject that argument. It depends on characterising the effect of competition in the market as an "injury". I do not consider that the tort is intended to impose liability for creating or maintaining market competition.

[722] Furthermore, the fourth element is not met under this alternative conception of the cause of action. Assuming for the sake of argument that Grant Taylor and JJK deployed unlawful means to establish Treasures as a competing brand; and that creating competition can be construed as "injury" in this cause of action, the damage to Rascals is the effect on it of this competition. That is, the difference between the profit it made with Treasures in the market, compared to the profit it would have made had Treasures disappeared as a competitor.

[723] The plaintiffs do not claim to have suffered loss of this kind. Their claim is that Grant Taylor and JJK caused them loss in the form of foregone profit and increase in company value, which they would have made had they bought the Treasures brand and grown the brand in Countdown supermarkets. The plaintiffs have led expert evidence quantifying that loss. They have not led evidence of loss from the effect of competition from JJK-owned Treasures.

[724] This cause of action also fails.

CONSTRUCTIVE TRUST

Rascals' claim

[725] In this cause of action, Rascals seeks a declaration that Taonga holds any assets received or developed in connection with the Treasures brand or business on a constructive trust for Rascals; an account of any profits earned from the assets; and/or damages.

[726] The pleaded grounds are that:

> The fourth defendant received from JJK and developed assets of or in connection with the Treasures brand or business (particulars of which are known to the fourth defendant but not to the plaintiffs), knowing that they were subject to a constructive trust in favour of Rascal NZ and then the first plaintiff.

[727] Rascals submits that JJK's knowing receipt or dishonest assistance is sufficient to mean that JJK held the Treasures' assets that they purchased on a constructive trust in Rascals' favour. That is because JJK received the assets knowing, or at the very least being wilfully blind to, the fact that their receipt of the Treasures opportunity, which included the Treasures trade marks, involved Grant Taylor breaching one or more of the obligations he owed to the plaintiffs – his directors' duties or other duties owed under the Act, his fiduciary duties, his contractual restraints or the obligation of confidence that he owed.

[728] As the directors of JJK are the same as the directors of Taonga, the knowledge from JJK can be imputed to Taonga. Further, the directors transferred the Treasures' trade marks from JJK to Taonga on or around 21 February 2022, after Rascals initiated this litigation against JJK and Grant Taylor, reinforcing this knowledge.

JJK and Taonga defence

[729] JJK and Taonga's defence has four limbs.

[730] First, Rascals cannot claim both compensation for loss and restoration (be it account of profits or constructive trust). They must make an election.[140] A proprietary remedy, together with equitable compensation for the allegedly lost opportunity, would be double recovery and an unfair windfall.

[731] Second, it is not clear whether constructive trust for a corporate opportunity, allegedly diverted in breach of fiduciary duty, is available at law in New Zealand.[141] In *Equiticorp Industries Group Ltd (in statutory management) v Attorney-General (No 47),* Smellie J suggested that in respect of accessory liability, the appropriate remedy

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140 *Tang Man Sit (personal representatives) v Capacious Investments Ltd* [1996] 1 AC 514.
141 Butler, above n 36, at [14.5].

was equitable compensation for loss.[142] Even in more "trust friendly" jurisdictions, relief by way of constructive trust is imposed *only if* some other remedy is not suitable.[143] The plaintiffs' case (and the evidence it adduced, including substantial quantum evidence) makes clear that equitable compensation is clearly an adequate remedy here.

[732] Third, constructive trust does not apply to these facts:

(a) "Trust property" does not include information, whether confidential or otherwise.[144]

(b) Australian cases suggest "it does not follow under [Australian] law as it stands that the information which third parties obtain from a fiduciary is trust property, or that [property] bought by using that information is trust property".[145] So even if Grant Taylor passed on confidential information in breach of fiduciary duty, it does not follow that the Treasures brand will be held on trust.

(c) Knowledge of something which is in the public domain is not property capable of being owned by anyone.[146] The Treasures opportunity was an opportunity in the public domain.[147]

[733] Fourth, the plaintiffs have not made out a constructive trust claim on the facts. JJK and Taonga submit that the plaintiffs have not proved that JJK knew that Grant Taylor was knowingly or dishonestly breaching his fiduciary duties. The plaintiffs have not proved that Taonga received the brand knowing that JJK held the assets on trust for Rascals.

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142 *Equiticorp Industries Group Ltd (in statutory management) v Attorney-General (No 47)* [1998] 2 NZLR 481 at [2.16].

143 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [200], citing *Giumelli v Giumelli* (1999) 196 CLR 101 at 113–14 [10], 125 [49]–[50]; ALR 476, 485.

144 At [120]. At [118] the Court suggests trade secrets might be held on trust, but Rascals state in its opening at [5.32], "this is not a trade secrets case. There is no black box." So a constructive trust theory is not appropriate.

145 *Farah Constructions Ltd v Say-Dee Pty Ltd,* above n 143, at [120].

146 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 5 ALR 231 at 265.

147 The plaintiffs acknowledge the same in Mr Wilding's "wish list" email by saying "Grant was not saying that it was solely Grant's recommendation that drove JJK to buy the brand, they may have come up with this themselves".

[734] Even after the transfer occurred, Taonga cannot have known that the brand was held on trust. On 1 July 2022 (after the proceeding was filed) Nick Mowbray told Kirk Penney, regarding the Treasures Brand "you're not going to lose it. No, not in this legal situation. It's just going to be lots and lots of damages."

Discussion

[735] The plaintiffs have not established a case for a constructive trust over the Treasures trade marks.

[736] The plaintiffs have not proved a cause of action against JJK. The plaintiffs have not proved that JJK dishonestly assisted Grant Taylor to breach his directors' duties. JJK did not have actual knowledge, or a strong suspicion coupled with a deliberate decision not to inquire, that Grant Taylor was still a director when he gave them information and advice.

[737] Nor did JJK know or turn a blind eye to the fact that Grant Taylor breached his obligation of confidence to Rascals because some of the information was confidential.

[738] Consequently, JJK did not acquire the Treasures trade marks on constructive trust for Rascals.

[739] It follows that Taonga did not receive and does not hold the Treasures trade marks or any profits derived from them on constructive trust for Rascals.

LOSS CAUSATION

[740] There is a further problem with Rascals' claim, which I consider it important to address even though it is not strictly necessary because Rascals has not established that JJK is liable under any of the causes of action.

[741] Rascals claims that JJK's unlawful diversion of the Treasures opportunity away from it caused it significant losses. Rascals says it:

(a) was unable to acquire the Treasures' brand, enter Countdown almost instantly, and develop Treasures into a successful business according to its Treasures Business Plan;

(b) had to wait until Millie Moon was developed, the Strategic Partnership with Foodstuffs was amended in December 2023 to remove the first right of refusal, and Countdown agreed to range Millie Moon in March 2025, leading to lost revenue for over four year; and

(c) had to launch Millie Moon in Countdown in circumstances where they had to compete with Treasures, which was firmly established as the number two brand in Countdown. This additional competition, which they would not have faced, means that the profits Millie Moon will make may be reduced in the long term.

[742] The plaintiffs' expert economist, Mr Mellsop, assesses the plaintiffs' losses as being between $7,376,033 and $20,556,159, by:

(a) assessing the value and profits the plaintiffs would have made in the counterfactual, being where the plaintiffs acquired the Treasures brand in 2020 and have operated it since; then

(b) subtracting the value and profits made in the factual, being where the plaintiffs introduced Millie Moon into Woolworths in March 2025.

[743] The additional problem with Rascals' claim is that it has not proven that it is likely that it would have acquired Treasures, had JJK not been involved.

[744] Earlier, I found that the evidence does not support the claim that Rascals had a firm "Treasures Business Plan". The evidence shows that Rascals discussed the option of buying Treasures intermittently throughout 2019 and 2020, but never committed to the idea.

[745] Rascals never made a serious formal offer for the brand, despite being approached repeatedly by Asaleo Care and their brokers. Rascals declined to make an

offer when Treasures was formally marketed for sale in May 2020, even when informed that there was another buyer interested. Even if Nick Mowbray did not expect anyone else to be interested in buying Treasures, he was prepared to take the chance, which does not indicate a serious interest in the brand.

[746] It appears that at some point before Asaleo Care announced the closure of Treasures, a decision was made within Rascals not to buy the brand. Mr Banfield's message to Grant Taylor was: "*na didnt go after it in the end, said thanks but no thanks*". Having passed on the opportunity, Rascals assumed that someone else had bought the brand "*assume Zeta bought it…*". Mr Banfield later told Keith Taylor that Rascals had the chance to buy Treasures but did not want it. As I observed earlier, Rascals could have called Mr Banfield to explain these comments but chose not to, without explanation. I infer that his evidence would not have been helpful to Rascals' case.

[747] After the closure announcement, Nick Mowbray's interest was momentarily revived, but again, Rascals did not take it any further with Asaleo Care. Nick Mowbray's informal offer to Mr Kirsopp was not capable of acceptance and he did not follow it up. Six months later, he asked his general counsel to inquire about what happened to the brand without referring to his offer to Mr Kirsopp, suggesting the possibility that he had forgotten about it.

[748] Rascals argues that the Court can infer that had JJK not been in the picture, Rascals would have picked up Treasures with the offer Nick Mowbray made to Mr Kirsopp, or Asaleo Care would have negotiated with Rascals, rather than with JJK. That is possible, but Rascals has not proven that it is likely. I am not persuaded, considering its prior ambivalence, and the indications that it reached a deliberate decided to pass on the opportunity in 2020, that it is more likely than not that Rascals would have acquired Treasures had JJK not been involved.

[749] I understand Rascals to suggest that its approach throughout 2020 was driven in part by the Strategic Partnership with Foodstuffs that was under negotiation. And that once the carve-out for existing brands was inserted, this freed up Rascals to pursue Treasures when it could not earlier. Nick Mowbray's evidence was that "we

were negotiating the term in the agreement to be able to buy, if we bought an existing brand in Countdown we could still distribute in the channel, we were sort of formulating terms...so that's why I'm sort of saying there were lots of spinning plates because those terms kind of dictated like a little bit of our strategy as well".

[750] Yet that explanation is not entirely convincing. First, the Strategic Partnership was between ZURU and Foodstuffs in relation to ZURU-branded products. The whole attraction of the Treasures brand was that it would be a separate brand from Rascal and Friends and therefore would not infringe the existing exclusivity arrangement with Foodstuffs (that continued to apply after the ZURU Strategic Partnership was negotiated). Up until 2022, Rascal NZ owned and operated the Rascal and Friends nappy business. It is difficult to understand how a Rascal NZ-owned Treasures brand of nappies would infringe the Strategic Partnership concerning ZURU-branded products.

[751] Second, if the Strategic Partnership prevented Rascals from buying the Treasures brand, why did Rascals make a "cheap offer" for Treasures in February 2020 and consider making offers later in 2020, before the carve-out was raised?

[752] Third, why did Rascals not immediately act to buy Treasures once the carve-out was agreed? The term was agreed in September 2020, but Nick Mowbray waited five months to make a further inquiry about what had happened to the Treasures brand.

[753] The conclusion I reach is that buying the Treasures brand was an idea that Rascals considered intermittently, but it was far from a firm business plan. Rascals has not proven that it is more likely than not that it would have acquired the Treasures brand had JJK not been involved.

[754] So, even if Rascals had made out liability on one or more of the causes of action, its claim to damages would fail on the question of loss causation.

[755] My conclusions on liability and causation make it unnecessary for me to address the expert quantum evidence offered by Rascals and JJK. Nevertheless, I thank Mr Mellsop and Mr Hayward for the expert evidence they provided to the Court.

JJK'S COUNTERCLAIM

[756] JJK's counterclaim has two causes of action: breach of s 9 of the FTA or, in the alternative, injurious falsehood. The counterclaim arises out of Nick Mowbray's interference with its arrangements with Countdown, which resulted in Countdown cancelling its initial purchase orders and renegotiating its terms with JJK. These terms were less favourable to JJK. JJK claims that, because of the resulting change to JJK's terms, Nick Mowbray's statements caused it loss, in the form of increased working costs of $1,188,652.58. It says that this loss estimate is conservative by not accounting for lost opportunity.

[757] JJK filed this counterclaim on 22 July 2024, two days after applying for and receiving leave to bring the counterclaim.[148]

Factual background

[758] Aspects of this background are already set out earlier in the judgment. I set them out again for convenience.

[759] JJK and Countdown finalised the terms and conditions of their supply agreement on 28 April 2021. Mr Penney signed the agreement on behalf of JJK on 2 May 2021.

[760] On 14 May 2021, Countdown issued its first set of purchase orders to JJK. But, three days later, Countdown cancelled these orders.

[761] This was because, on the afternoon of 13 May, Nick Mowbray contacted Angela Deehan, General Manager at Countdown, and alleged that Grant Taylor had breached a restraint of trade and disclosed Rascals' intellectual property; and JJK had acted illegally and copied Rascals' products.

[762] Nick Mowbray said:

[148] *Rascals International Ltd v Taylor* HC Auckland CIV-2021-404-1041, 22 July 2024 (Minute of Associate Judge Sussock).

> Hi Angela. Hope well. I just wanted to give you a bit of a heads up on the Nappy Category [sic]. Unfortunately as much as we want to work with you - our contract on Nappies means we cannot for a few years . Did a pretty deep dive ! Just wanted to get you across something else and give you a heads up as well Re: Treasures. In order to give you a little colour with your decision making. (our team will send a formal letter so aware) but we signed a pretty hefty non compete when buying out Rascals. As you can imagine the contract was super clear. Unfortunately we have a number of clear breaches with Grant and his Neighbor / friend buying Treasures and disclosing all our IP illegally. We have evidence of a number of clear breaches and clearly through discovery there will be a lot more . We are pretty straightforward with these things - and we spent 30 mil. So we obviously can't let this go. So I know whilst not your problem I think the right thing to do to let you know to aide in any decision making. What these guys have done has been completely underhanded and illegal. I know you mentioned there was a lot they needed to do. But ultimately it's up to you but we won't be letting it go with them in a legal sense - but will only take full action if hits shelves. Either way just wanted to give you a heads up ! Cheers Angela.
>
> - just a little more colour to give you the extent of how bad- grant went down with the guys who bought to meet asaleo care – so we now have all the evidence and witness 's and they tried to contact our JV factory … who immediately made me aware – along with a number of other things. So big material contract breaches. Going to get very messy.

[763] Ms Deehan responded the next day, Friday 14 May: "Thanks for the heads up Nick. I will follow up with the Category Manager".

[764] Ms Deehan discussed the issue with the Category Manager, being Ms Young. They decided to cancel JJK's initial purchase orders. Ms Young's evidence was that she made this decision with Ms Deehan as Countdown needed to "change [its] terms with JJK because of allegations Nick Mowbray had made about JJK stealing his intellectual property". The orders were cancelled on the next working day, Monday 17 May 2021.

[765] JJK was told of the reasons for the cancellation. There is no written record, so I infer that it was a verbal conversation between Ms Young and Mr Penney. Mr Penney emailed Ms Young on 17 May 2021 refuting the allegations. Mr Penney said:

> Hi Lisha,
>
> If you want to have a round table with me, James, our lawyers, you and anyone else about this we should.
>
> We bought this company, Nick should have bought it but he didn't. I think he is afraid of what we can do collectively in this category and will do anything

so keep market share. Again, Grant Taylor is not involved in our business in any way.

With buying Treasures who were already in nappies, we partnered with a manufacturer who once manufactured Rascals & Friends. They don't any more. There is no IP restriction on the design of the nappy as it was a contract manufacturer, but we still did change the nappy as you know – back sheet, top sheet, tabs, stitching etc… our Treasures nappy is a better performer and more absorbent as a result.

We along with our lawyers are confident in any guarantee we have to supply to you and Countdown. Zuru Edge and Nick Mowbray are on the border of anti-competitive behaviour and blackmail. Which is sad that they have to try to intimidate us like this.

[766] Mr Penney then emailed Nick Mowbray on 26 May 2021 asking for the allegations be set out in detail and denying what he understood them to be. He said:

Hi Nick,

I have reread the messages you sent me on WhatsApp a couple of weeks ago. I've discussed the messages with James and Jarrod. All three of us are surprised and very concerned about the assertions made in your messages. You have alleged that we have "stolen IP", claimed that you have evidence to bring a court case against us, and made various threats. These are significant allegations and we ask that you set them out, in detail, so that we can respond accordingly.

We would also like to reiterate and make clear that Grant is not involved with JJK Group Limited or our Treasures business – he is not a director or shareholder and has no beneficial interest in the company.

I have been made aware that you have recently contacted Countdown in relation to the Treasures nappies which we (JJK Group Limited) are intending to sell through Countdown. Following your contact, Countdown has rescinded our purchase orders and is looking to change the commercial terms that were in place prior to your contact. The situation has gotten out of hand and is now actually affecting me, my family and team.

We would like to resolve this matter as soon as possible because it is impacting our commercial relationship with Countdown and our ability to operate. We would like to discuss with you what the best way is to resolve this. I know you've wanted to meet, and given the current situation I'm happy to meet on a without prejudice basis to enable a full and frank discussion with a focus on finding a solution…

[767] Nick Mowbray continued to message Ms Deehan on LinkedIn. On 18 May 2021 he said:

Hey Angela sorry one last thing as we finalised wider agreement on new brands in nappies and I was a little confused on the detail - with Millie moon just launched Target US - foodies have 120 days in which to accept or not

> accept on first right of refusal - if they don't we can take elsewhere . I know this won't work into your schedule but wanted you to be across as well. Would not make any decisions based on this. But high chance down track we could offer this. So just wanted to give heads up. Few moving parts ! But want to be fully transparent.

[768] On 27 May, Nick Mowbray sent Ms Deehan an extract of what appears to be a letter from Grant Taylor's lawyers to Rascals' lawyers explaining his visit to the Treasures factory. Namely, that it was a result of Grant Taylor bumping into Messrs Armitage and Penney at the Black Cottage Café that morning. Nick Mowbray said:

> Hi Angela thought this would be of interest - they are now being blatantly dishonest. And trying to pretend that some how in august they all went to the factory together 😅 😅 this along with what is now amounting to a pile of evidence . Crazy as this was in August - way after closing rascals with all the non competes that are water tight ! Can imagine how silly this now looks - the above attempted cover up which is obviously not true. Anyway it's going to get very very messy. So wanted to give you a little more insight with how big a breach this is.
>
> " the just happened to all bump into each other and go to meet aseleo 😅 😅 " We have now caught them on multiple fronts. But their attempted cover ups are going to put them into further hot water .

[769] On 28 May 2021, Ms Deehan thanked Nick Mowbray for the update. He responded that a lawsuit would be filed that day or the next against Grant Taylor and JJK.

[770] On 3 June 2021 Nick Mowbray sent a further message:

> Hi Angela - what's the best people / address to send our high court filing on JJK and Grant/ Keith so you can see a copy of it. We have also just found they are using our old factory as well and even further I.P the list just keeps going on - so strongly suggest cannot ship from this factory. Breaches all the non competes and restraint of trade. Unfortunately I don't think they are across any kind of detail of what all this means. High court has accepted the case.

[771] Ms Deehan told Nick Mowbray to email her the documentation, saying that she would give the Countdown legal team a copy. She acknowledged receipt of the claim the following day.

[772] On 18 June 2021 , Ms Deehan messaged Nick Mowbray, saying:

Hi Nick, I have heard from our Legal team about your request to meet regarding the Statement of Claim that your lawyer sent us for our information. I had previously told our lawyers that the issue was a non compete clause related to Rascal and Friends that Grant had signed, as per your previous message to me above. However, from reading the Statement of Claim it appears that is not the case? Instead, it appears to be quite a technical legal argument you are raising, about a breach of Grant's directors duties to Rascal and Friends under the Companies Act and not any breach of contract regarding a non-compete clause.

As a result, we are not sure why you want to meet Countdown about this, as this appears to be a matter for you and the Taylor family to sort between yourselves? If we have this wrong, please let me know.

[773] In response, on 21 June Nick Mowbray said:

To answer your question. Yes this is a dispute between the Taylors, JJK Group Limited and the ZURU Group, but as you may already be aware, if Countdown sells the Treasures products then Countdown might will [sic] end up having involvement in the dispute in terms of any discovery that may be required or any relevant witnesses that may need to be called. I was hoping to get on a call to discuss/answer questions that Countdown might have. As it is almost certain now as we continue down this path that we have a rock solid case (even transpires now the factory is all through our old employees)

The allegations in the Statement of Claim brought by R+F NZ against the Taylors and JJK Group Limited relate to the non-compete, specifically in connection with alleged breaches under the Companies Act (with JJK allegedly being the ultimate beneficiary of such breaches). The express allegation of the contractual non-compete is subject to an arbitration brought by ZURU Inc. and we are currently in the process of selecting an arbitrator to hear the dispute.

ZURU is active in protecting its rights and interests, including seeking remedies and relief through the courts (by way of monetary compensation, injunction, etc.). We wanted to make Countdown aware of the dispute as we believe it will be in all interests to pause on this while the dispute is heard.

[774] Nick Mowbray then added:

I am also in progress of working out how we can work with Countdown further going forward and being extremely active to make this happen- I know I have said this in the past and need to do more! Dose + co was the first cab of the rank. As our ex talent going across and creating copies (like everblue) is going to end in a complete legal mess for many years to come .... And I think that is in no ones best interest . So bottom line I think i understand you need alternatives to some of the things we have built due to that exclusive partnership. So I understand why you support a brand like everblue - and we willl work on a way to fix this. But people stealing no how and trade secrets internally / or blatantly breaching non competes with large payouts connected is frustrating. So it would be great at least in the case of treasures if you can

> hold on this whilst we work on a solution with them. Countdown supporting will mean the dispute goes far longer and gets far messier. If you hold we can find a solution with them more quickly. Otherwise it's going to be a long mess which they will almost 100% loose and then injunctions will come and stock will be pulled and it will create 10 x the issues down the track. Obviously totally up to you but I think a discussion with your team makes sense so we can avoid this. Let me know if that makes sense and perhaps we jump on a zoom Or can meet in person?

[775] Countdown and JJK negotiated new trading terms over the course of several weeks. A new final agreement was reached on 28 July 2021, with the main change being that JJK would supply Countdown on FIS, rather than FOB. Mr Collie's evidence is that JJK had to accept the amended terms or risk ending up without a buyer.

[776] JJK's first supply to Countdown was ordered on 3 September 2021. The parties eventually transitioned to FOB terms in 2022. Once a local inventory was cleared on 22 November 2022, all further sales proceed on an FOB basis.

Breach of the FTA

Legal principles

[777] Section 9 of the FTA prohibits people from, in trade, engaging in conduct that is misleading or deceptive or likely to mislead or deceive. Parties being "in trade" broadly encompasses "all kinds of commercial dealing by the party whose conduct is under examination".[149]

[778] It is not necessary for a successful claim to show that the defendant had any intention to mislead or deceive.[150] Rather, "[i]f the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9".[151] That assessment is context dependent.[152]

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149 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [26].

150 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information* (1978) 140 CLR 216 at 228; *Neumegen v Neumegen & Co* [1998] 3 NZLR 310 at 317. As cited in *Red Eagle Corporation Ltd v Ellis,* above n 149, at [28], n 14.

151 *Red Eagle Corporation Ltd v Ellis,* above n 149, at [28].

152 At [28], *Goldsboro v Walker* [1993] 1 NZLR 394 at 401.

[779] The Court may make orders under s 43 if it finds that a person has suffered, or is likely to suffer, loss or damage by the conduct in breach of s 9.[153] Simply because a reasonable person could be misled or deceived does not mean that they necessarily were. For an order to be made, conduct does not have to be the sole cause of the loss or damage, but it must be an effective cause.[154]

[780] A person may apply for an order at any time within three years of the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought to reasonably have been discovered.[155] The following principles have been set out:[156]

(a) Time starts running when the applicant discovers or ought to have discovered that loss or damage had already occurred or is likely to occur in the future.

(b) Discovering loss means being aware of it.

(c) Being likely to occur means loss is more probable than not.

(d) The loss that must be discovered is more than minimal loss.

[781] Time starts to run from the claimant's discovery of loss, not their discovery of the legal basis for proceedings.[157]

JJK's submissions

[782] JJK submits that the elements are made out. It submits that Nick Mowbray's messages to Ms Deehan were made "in trade", as they were part of a commercial dealing where Nick Mowbray was acting on behalf of Rascals.

[783] JJK says that the following LinkedIn messages are actionable:

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153 Fair Trading Act 1986, s 43(1)(a).
154 *Red Eagle Corporation Ltd v Ellis,* above n 149, at [29].
155 Fair Trading Act, s 43A.
156 *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd (No 2)* [2016] NZHC 2838, [2017] 2 NZLR 538 at [176], citing *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379 at [27], [29], [30] and [34].
157 At [180], citing *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) at [111].

(a) "we have a number of clear breaches with Grant and his Neighbor/friend buying Treasures and disclosing all our IP illegally";

(b) "What these guys have done has been completely underhanded and illegal";

(c) "they tried to contact our JV factory"; and

(d) saying that Grant Taylor and JJK had stolen "knowhow and trade secrets".

[784] JJK submits that these statements are false or misleading. Grant Taylor never breached his restraint of trade clause. He had not "illegally disclosed Rascals' IP" and he had not stolen Rascals' "IP" or "confidential information". JJK had not "copied Rascals' product" or done anything illegal. It had not "tried to contact [Rascals'] JV factory", as Rascals had terminated Yoursun in November 2017.

[785] JJK submits that the effect of the messages is clear. Ms Deehan and Ms Young's evidence is that JJK's initial purchase orders were cancelled because of Nick Mowbray's intervention. Countdown's primary concern was the risk of holding unsaleable stock, which came about because of Nick Mowbray's allegations. Ms Deehan in evidence stated that "[i]f it was not for Nick's approach, there would have been no need to renegotiate JJK's terms". Therefore, Nick Mowbray's conduct was an effective cause of JJK's loss.

[786] As to Rascals' limitation defence, JJK submits that the earliest date for limitation to apply is 28 July 2024, three years on from when JJK agreed to its amended trading terms with Countdown. Although Countdown proposed local vendor terms on 16 July 2021, the increased costs were not apparent at that point. Simply switching from FOB to local supply terms did not necessarily mean JJK would suffer loss. JJK submits that the increased costs, and thus the loss, only materialised once JJK received the updated purchase orders on the new terms on 3 September 2021.

[787] In any event, JJK submits that the limitation period should begin when Rascals gave discovery of Nick Mowbray's LinkedIn messages on 19 August 2024. Before that, JJK did not know exactly what Nick Mowbray had said. The viability of the cause of action depends on the statements made.

[788] Further, JJK submits that a party cannot rely on a limitation defence that rewards its failure to comply with discovery obligations. JJK suggests that Rascals withheld these messages as it: had failed to discover them within the discovery deadline of 11 August 2023; served interrogatory responses that omitted any mention of them and provided false information; and denied their existence in four letters over the course of six months.

Rascals' submissions

[789] Rascals principally raises a limitation defence. It submits that, if the statements were found to be in breach of the FTA, the loss crystalised when the orders were cancelled by Countdown on 17 May 2021; and that JJK had all the relevant information, at the latest, when Mr Penney emailed Nick Mowbray on 26 May 2021.

[790] Rascals raise three issues with JJK's submission that the limitation period should begin on the discovery of Nick Mowbray's LinkedIn messages:

(a) JJK had the necessary information to file its claim in May 2021 after it was told what Nick Mowbray supposedly said by Ms Deehan and Ms Young.

(b) The messages were not suppressed, and it was not until JJK added the counterclaim that any obligation existed to disclose them.

(c) The existence of the communications was not hidden. They were acknowledged in an affidavit of the plaintiffs.

[791] Beyond the limitation point, Rascals make the following submissions as to why Nick Mowbray's conduct is not in breach of the FTA.

[792] First, the LinkedIn messages were not misleading or deceptive, and limited evidence of statements other than the LinkedIn messages exists. In making those statements, Rascals say that Nick Mowbray made clear that he did not yet have the full story and that, while he did not believe them, Grant Taylor and JJK denied the allegations.

[793] Second, even if the Court considers that Nick Mowbray's LinkedIn messages were misleading, they did not cause JJK loss. Rascals say that the timeline does not support this narrative. Nick Mowbray contacted Ms Deehan on 13 May 2021. Yet Countdown issued its first purchase orders after that date, on 14 May 2021. It took another three days to cancel those orders.

[794] Countdown took its own legal advice and met with JJK. Countdown was alive to the differences in the legal arguments, and did not accept Nick Mowbray's complaint entirely at face value. Whatever it might have made of the LinkedIn messages, it can be inferred that Countdown found JJK's explanation unsatisfactory.

[795] The risk that Countdown identified was that if an injunction was ordered against JJK, as a result of the FOB arrangement, Countdown would be left with stock that it owned but could not sell. To mitigate this risk, Countdown requested a refundable $30,000 deposit for the cost to remove stock from shelves, and a letter of credit for $1,100,000 that would be drawn from only if an injunction was issued. JJK rejected that simple and cheap solution. Mr Penney acknowledged that if they had a letter of credit and kept on FOB terms, JJK would have made a lot more money.

[796] Rascals submits that $16,500 is the maximum loss that can be claimed, being the 1.5 per cent issuance fee for the letter of credit. Beyond that, any loss suffered is a result of commercially unwise or negligent decision-making by JJK.

[797] Rascals submits that JJK failed to mitigate its losses. The factual position is that from September 2021 until December 2021 JJK was using only FIS terms; but from December 2021 Countdown restarted making orders on the FOB terms. However, JJK imported a significant quantity of nappies in the three month period on

FIS terms and so needed to continue on that basis through November 2022, when it in fact only used FOB terms.

[798] Rascals additionally submits that the reasonableness of the increased costs claimed is difficult to interrogate on the evidence before it. JJK has provided self-generated records from Xero, but it has not provided the arrangements it had for storage or otherwise. At the same time, JJK has not accounted for the increased prices it was invoicing Countdown for.

JJK's reply

[799] JJK replies that it did not fail to mitigate its loss. It says that Rascals' argument, made on the basis of a letter of credit, is a red herring. While a letter of credit was discussed, it was removed as an option by Countdown. Any delay in response to Countdown was because of ASB, not JJK. While JJK was waiting, Countdown requested a $1,000,000 cash bond, which JJK could not provide. The only option was to agree the local supply terms, as the alternative was to be unstocked.

[800] JJK say that there is no merit to the submission that JJK did not do enough to renegotiate its FIS terms with Countdown. Countdown had a strong bargaining position and a reasonable trader in JJK's position would seek to secure a deal to get its product on the shelf. JJK's approach was reasonable. JJK notes that this proposition was not put to the JJK directors in Court.

Discussion

[801] I consider that but for the limitation point, JJK would have a valid claim against the plaintiffs under the FTA.

[802] First, Nick Mowbray's messages to Ms Deehan were made "in trade". They were part of a commercial dealing where Nick Mowbray was acting on behalf of Rascals.

[803] Second, Nick Mowbray made several statements that were inaccurate, and which objectively had the capacity to mislead or deceive the hypothetical reasonable person. These were that:

(a) Grant Taylor had breached the "non-compete" (the restraint of trade provision in the SPA) and engaged in other "material contract breaches". He had not breached the restraint of trade provision.

(b) Grant Taylor had disclosed Rascals' intellectual property to the JJK directors. He had not. The only intellectual property in Rascals' nappies was the trade marks. There was no question of JJK breaching Rascals' trade marks. There was no copyright or patent in Rascals' nappies.

(c) JJK had contacted Rascals' joint venture factory. JJK had not contacted Joylink. JJK had only contacted Rascals' former factory, Yoursun. Nick Mowbray may have been referring to Grant Taylor contacting Joylink on 18 May 2020 on behalf of ALDI. This predated his discussions with JJK, and JJK had no knowledge of or involvement in this engagement.

(d) JJK was using Rascals' "further IP". Again, JJK did not use Rascals' trade marks. There was no other Rascals' intellectual property.

[804] These statements had the potential to mislead the hypothetical reasonable person into believing that Grant Taylor and JJK had infringed Rascals' intellectual property; Grant Taylor was involved in Treasures in a way that had breached the restraint of trade; and JJK had contacted Rascals' joint venture factory with a view to having Treasures nappies manufactured there. None of those propositions were true.

[805] The restraint of trade point requires further explanation. As discussed earlier, the Taylors agreed to the inclusion of a restraint of trade in the SPA, at the insistence of the Mowbray interests. This restraint of trade read:

> **13 Vendor Restraint of Trade**
>
> For the period commencing on the date the Vendor acknowledges receipt of the final payment outline in clause 5(a)(ii) and for five years thereafter, the Vendor or its affiliates, each agree that it will not in any manner, directly or indirectly:
>
> (a) design, produce and or/ sale disposable diapers/nappies for babies insofar as it relates to transacting with Countdown New Zealand (formerly Progressive Enterprises) or its affiliates; or
>
> (b) persuade or attempt to persuade any employee, sales person or agent of the Company or the Purchaser or its affiliates to leave their employ or to become employed by or to provide services to any other entity.

[806] Plainly Grant Taylor did not breach this restraint of trade. He did not, directly or indirectly design, produce or sell nappies into Countdown supermarkets. He was not a shareholder or director in JJK and had no beneficial interest in the company. He was not engaged by JJK as an employee, consultant, or contractor or in any capacity.

[807] Third, Nick Mowbray's misleading statements caused JJK financial loss. Countdown's immediate reaction to Nick Mowbray's statements was to cancel the purchase orders it had already placed. Countdown cancelled the orders on the first working day after Ms Deehan acknowledged receipt of Nick Mowbray's first message. Ms Young's evidence was that she decided to cancel the orders after consulting with Ms Deehan as Countdown needed to "change [its] terms with JJK because of allegations Nick Mowbray had made about JJK stealing his intellectual property".

[808] It is evident from Ms Deehan's 18 June message that up until then, Countdown had acted based on Nick Mowbray's allegations. She said: "I had previously told our lawyers that the issue was a non compete clause related to Rascal and Friends that Grant had signed, as per your previous message to me above. However, from reading the Statement of Claim it appears that is not the case? Instead, it appears to be quite a technical legal argument you are raising, about a breach of Grant's directors duties to Rascal and Friends under the Companies Act."

[809] I accept that from then, Countdown acted based on its own legal advice and assessment of the risk in light of the statement of claim and JJK's responses. But

there is no reasonable doubt that the orders were cancelled because of Nick Mowbray's misleading statements and those statements continued to drive Countdowns' approach until around mid-June 2021.

[810] Ms Deehan's evidence was consistent with that:

> [W]hen Nick Mowbray told me about the prospect of legal proceedings, we became worried about being in the middle of a fight between suppliers or being stuck with Treasures nappies we could not sell as a result of an injunction. We therefore cancelled the purchase orders on 17 May 2021. JJK understood our concerns and worked with us to find a solution. This included agreeing that we would cancel the purchase orders already issued for the Treasures nappies until we had discussed an acceptable alternative approach. Ultimately we agreed with JJK that the best way to proceed would be to renegotiate the commercial terms so that JJK was a local supplier, rather than an FOB supplier. JJK also agreed to give us a guarantee that JJK would remove the products from the shelves if an injunction was issued, and be responsible for all the associated costs.
>
> The discussions took several weeks. 28 July 2021 was the date Countdown and JJK signed the amended trading terms.
>
> If it was not for Nick's approach, there would have been no need to renegotiate JJK's terms.

[811] However, I consider that JJK's claim under the FTA is statute barred.

[812] I do not accept JJK's submission that it could not make a claim until it received discovery of the LinkedIn messages on 19 August 2024. It is apparent from Nick Mowbray's messages to the JJK directors in May 2021 and Mr Penney's emails to Nick Mowbray and Ms Young that JJK was aware of the substance of the allegations made by Nick Mowbray to Countdown. JJK was aware that Nick Mowbray was alleging that Grant Taylor was involved in the Treasures business in breach of the restraint of trade in the SPA; and that JJK was misusing Rascals' intellectual property. JJK knew the nature of the allegations Nick Mowbray was making, even if they did not know precisely what he had said.

[813] I note also that in its memorandum seeking leave to bring this counterclaim filed on 9 July 2024, JJK set out the representations made in the LinkedIn messages. It is clear that JJK knew of the nature of the misrepresentations forming the basis of its claim prior to the discovery of the LinkedIn messages on 19 August 2024.

[814] The issue is when did JJK know or ought JJK to have known that it would suffer loss because of Nick Mowbray's misleading conduct. I consider there to be four possible dates. The first is 17 May 2021, when Countdown cancelled the purchase orders. The second is 17 June 2021, when Countdown indicated to JJK that it would not progress any purchase orders unless JJK agreed to supply as a local vendor, on "local supplier" (FIS) terms. The third is 16 July 2021, when Countdown proposed amended trading terms. The fourth is 28 July 2021, when JJK and Countdown agreed to FIS terms.

[815] The loss that JJK claims to have suffered is the working costs it was required to bear under the FIS terms which it would not have had to bear under the originally agreed FOB terms. These were import freight costs, local storage costs, local freight costs, discounts and rebates provided to Countdown under the FIS terms, and costs to clear JJK's local inventory, which JJK sold at a loss to be able to transition fully back to FOB supply terms.

[816] In my view, JJK was aware or ought to have been aware that it was going to sustain freight and storage costs at a minimum, when Countdown communicated, after the letter of credit solution failed, that it would require JJK to supply on FIS rather than FOB terms. JJK submits that this occurred on 16 July 2021 when Ms Young sent an email to Mr Penney proposing the FIS terms. Yet Countdown indicated this earlier, on 17 June 2021, when Ms Young sent an email to Mr Penney in which she said:

> Hi Kirk,
>
> In light of the upcoming legal proceedings with your company being implicated, we have decided to put a hold on placing Pos on Treasures until we have more certainty on the risks for Countdown. We do not want to order in over $1m of stock with a probability of not being able to sell it.
>
> However, if you are able to bring the stock in ourself and supply it locally, which means our stock holding would substantially reduced, and as long as your company is willing to cover the costs of removing it from shelf and take back the stock, then we would be more than happy to range it (pending an agreed local costs per unit obviously).
>
> Thanks
>
> Lisha

[817] It is apparent that there was then a meeting between Mr Penney and Countdown to discuss the revised terms on 23 June 2021. Over 8 to 12 July 2021, steps were taken to have JJK set up in Countdown's systems as a local vendor.

[818] Therefore, I consider that the three-year limitation period began to run from 17 June 2021. JJK ought reasonably to have appreciated from that date that it was going to sustain freight and storage costs arising out of moving from FOB to FIS terms. JJK may not have known how much those costs would be until it settled the specific terms with Countdown, but it would have been apparent that it was going to incur costs of that nature.

[819] As JJK applied for leave to bring a counterclaim on 9 July 2024 and filed the counterclaim on 24 July 2024, it is barred from bringing the claim.

Injurious falsehood

[820] In the alternative, JJK make a claim for injurious falsehood.

Legal principles

[821] The essential elements of injurious falsehood are: a false statement; published maliciously; to a third person; with damage resulting.[158] The tort is rare and has received little discussion in New Zealand since the early 1900s.[159]

[822] Whether a statement is published maliciously requires an assessment of motive.[160] The defendant's knowledge of the truth or falsity of the statement will typically be significant in this. Where the natural result of a statement is to cause damage and the defendant either knew or was reckless as to its correctness, the Court will find malice.[161] Malice may be inferred from the failure to withdraw the statement

158 *BDM Grange Ltd v Trimex Pty Ltd* [2017] NZCA 12, [2017] NZCCLR 11 at [28].
159 *Robinson v Whangarei Heads Enterprise Ltd* [2018] NZHC 43 at [78].
160 *Customglass Boats Ltd v Salthouse Brothers Ltd* [1976] 1 NZLR 36 (SC) at 49.
161 *Zorb Ltd v Akers* [2014] NZHC 1756 at [19]. See also Todd, above n 86, at [14.3.3(3)] and *Robinson v Whangarei Heads Enterprise Ltd,* above n 159, at [93].

even after a warning of its falsity.[162] In determining whether recklessness as to a statement's correctness existed, the Court of Appeal said:[163]

> It was submitted on behalf of the appellants that Mr Clegg must have been reckless because he had no evidence to support his allegations and took no steps to check their accuracy. But recklessness in the case of injurious falsehood as in many other jurisprudential concepts has the implication of not knowing whether a fact be true or false and not caring. A genuine belief that facts are true may reflect carelessness but not recklessness.

[823] Reflecting the lack of clarity around this tort, Stephen Todd states:[164]

> It may be that such a finding would also be made in cases where the defendant believed his or her statement to be true, if his or her sole or dominant motive was to injure the plaintiff.

[824] The following summary of malice in the Australian jurisdiction has been quoted in the New Zealand High Court:[165]

> Again unlike in defamation, in injurious falsehood malice is also an essential element of the cause of action, to be proved by the plaintiff. While the notion of 'malice' in the context of this tort is not easy to define … it is a question of motive, intention or state of mind and it involves the use of an occasion for some indirect purpose or indirect motive such as to cause injury to another person. … The English Court of Appeal has said that the criteria for malice in injurious falsehood are the same as at common law for libel and slander. … Its content has been variously described as 'an intent to injure another without just cause or excuse' or 'some indirect, dishonest or improper motive', … or 'a purpose or motive that is foreign to the occasion and actuates the making of the statement'. … It involves that the statement was made mala fide or with a lack of good faith. In this context, while a person who acts in good faith is not liable … malice may exist without an actual intention to injure.
>
> As motive must often be inferred from what the defendant did or said or knew, malice is commonly proved by inference … Malice may be inferred from the 'grossness and falsity of the assertions and the cavalier way in which they were expressed' … Proof that the defendant knew that a statement was untrue is ordinarily conclusive evidence that its publication was actuated by an improper motive. … On the other hand, mere lack of affirmative belief in truth is insufficient of itself to establish malice. … But malice can be inferred not only where the false publication was made with knowledge of its falsity, but

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162 Todd, above n 86, at [14.3.3(3)], citing *Customglass Boats Ltd v Salthouse Brothers Ltd,* above n 160, at 49 per Mahon J; *Taylor v Hyde* [1918] NZLR 279 (SC) at 283.

163 *Alexander v Clegg* [2004] 3 NZLR 586 (CA) at [68]. I note a High Court authority which also states that neither negligence nor a genuine mistake will amount to malice: see *BDM Grange Ltd v Trimex Pty Ltd* [2015] NZHC 2469.

164 Todd, above n 86, at [14.3.3(3)].

165 *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2010] NSWSC 1395; [2011] Aust Torts Rep 82-077 at [31]–[32]. As quoted in *DHR International, Inc v Challis* [2015] NSWSC 1567 at [32], cited in *Robinson v Whangarei Heads Enterprises Ltd,* above n 159, at [79].

> also where it was made with reckless indifference as to whether it was true or false…

JJK's submissions

[825] JJK submits that the elements of the tort are made out. It submits that recklessness occurs when a risk is recognised and unreasonably disregarded.[166] Nick Mowbray was aware of the risk that the statements he was making were false and made them anyway. Before he reached out to Ms Deehan, he had been advised on multiple occasions that he was wrong or may have been wrong. Those occasions include Mr Armitage's email to him on 7 February 2021; Mr Banfield's caution to him on 29 March 2021; and Mr Penney's message to him on 13 May 2021 and email on 26 May 2021.

[826] JJK claims the same losses as under the FTA claim and makes the same submissions concerning causation and mitigation of its losses.

Rascals' submissions

[827] Rascals submits that the statements made were, in fact, true; were not published maliciously; and did not result in any loss. This first issue rests on issues already traversed.

[828] As to malice, Rascals submits that, in his opening, counsel for JJK acknowledged that Nick Mowbray "genuinely believe[d] the statements were true". There is no evidence before the Court to suggest anything different. In the absence of the statements being predominantly made for a dishonest purpose, this concession is submitted to be fatal to the claim.[167] Rascals submits that there would be no evidence to support an allegation that the statements were made for a dishonest purpose: Nick Mowbray's concern was to prevent further damage to Rascals' business.

[829] Rascals submits that Nick Mowbray's LinkedIn messages did not cause any loss, for the reasons discussed above in relation to the FTA claim. It makes the same submissions regarding JJK failing to mitigate its losses.

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166 *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [13].
167 *Alexander v Clegg,* above n 163, at [68].

Discussion

[830] Nick Mowbray's statements to Countdown were untrue and misleading in several respects, and were made with the intention of harming JJK's business. Nick Mowbray's implicit and explicit objective was to have Countdown "pause" stocking JJK's Treasures nappies. In later messages, he suggests that Countdown work with Rascals rather than JJK.

[831] But I am not persuaded that Nick Mowbray did not sincerely believe the truth of his statements. Viewing the LinkedIn messages in the context of the other correspondence around the time, Nick Mowbray seemed genuinely convinced that Grant Taylor was involved in JJK's business in breach of the restraint of trade.

[832] For example, see his:

(a) 7 February 2021 email to Jarrod Armitage:

> I find it hard to belive Grant has shared nothing with you and *we have quite a lot of evidence allready with the breaking of the non compete* . So would be good to chat through . In my experiance the chances of your neighbor and friend buying it completely disconnected does not wash based on the evidence we have allready. But let's sit down and chat . Would love to hear it from your side first
>
> (emphasis added)

(b) 13 May 2021 WhatsApp message to Grant Taylor:

> - unfortunately we now have evidence of you meet aseleo care with the guys . Have witness and statements . How did you think you were going to get away with this? We are putting a case together to sue – as *we have factory evidence from west confirming breach of non compete*. So one chance – other wise we are throwing everything at you for breach of contracts. Treasures stops tomorrow. Or it's on.
>
> You went with them to aseleo – what were you thinking.
>
> …
>
> I have been on phone today with aseleo care who told me you and Jarrod and others meet with aseleo care. So unless this person from aseleo care who has no interests in telling me this info or not tell the truth ….. I have statement from him. So can't you be honest on it? *You have disclosed confidential IP to them – and breaches the contract. Do you think really it's Jarrod that you were not disclosing IP outside contract we all know you have done this* . Maybe

now you want to remove your self because of situation. But problem is you did it – and we have to come after it sorry. So unlesss you have Jarrod and kurt in front of me . Then we are coming after.

You can put them in a room with me – but they wouldn't do that for obvious reasons. But they have traded on confidential information.

(emphasis added.)

(c) 13 May 2021 message exchange with Kirk Penney:

Nick Mowbray: Mate unfortunately we now have a bunch of evidence against you guys including from internal sources when you went and met treasures with grant . We have everything we need now to bring a case. I want to give you a heads up - as we can talk about it now or we have witness and evidence - if you thought we would leave this then that's a mistake

Met aseleo care

I can share you some clips from the source if you want to hear but have all we need now .

Kirk Penney: Hi Nick, I hope you're well. Grant is not involved in the business at all, we did ask him although he said he wouldn't be and couldn't be involved in nappies. I have a lot of respect for you, Mat and Anna, and all you have achieved. Especially as kiwis going against the big boys. I hope we can have a good yarn about this at some point, I'm sure I could learn a lot from you.

Nick Mowbray: You went to aseleo care with him.

He also contacted our factory

Material breach -

You have stolen IP

All under non competes

We paid 30 mil if you believe we won't come after this

Then that's a huge mistake.

I have statements and evidence - of it all now. We went to work as I knew that it was not above board . Now all is confirmed .

So I'm happy to talk about it first. If you want to meet . Outside of that we will throw everything at it.

Your partners did - got to aseleo care

Mine and grants Neighbor. A director of your company

Incredibly dumb.

> So we have one chance to chat face to face other wise - *we are coming for stolen IP under all the non competes*
>
> (emphasis added.)

[833] It is conceivable that Nick Mowbray genuinely believed that JJK had contacted Rascals' current factory, Joylink, if he thought that Grant Taylor was involved in JJK. He knew that Grant Taylor had recently contacted Joylink in relation to ALDI. His statement is consistent with that interpretation: "they tried to contact our JV factory … who immediately made me aware".

[834] It is more difficult to excuse Nick Mowbray's statements that Grant Taylor disclosed, and JJK misused, Rascals' intellectual property. Nick Mowbray must have known that there is no intellectual property in Rascals' nappies, aside from the trade marks. There was no question of JJK breaching Rascals' trade marks. Yet it is not uncommon for the term "intellectual property" to be confused with "confidential information" by people without legal expertise in the area.

[835] For these reasons, I consider that Nick Mowbray did not act with malice in the legal sense of the word. He certainly wished to injure JJK's business by convincing Countdown suspend its orders for JJK's Treasures nappies. He was reckless about the accuracy of the serious allegations he made about JJK to Countdown. But I am not convinced that he was deliberately untruthful.

RESULT

[836] The first and second plaintiffs' claim against the third and fourth defendants is dismissed.

[837] The third defendant's counterclaim against the first plaintiff is dismissed.

Gardiner J

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