

Allen & Overy Private Law Moot – 2018 Problem Question

FACTS

1. The following facts and events occur in Australia.
2. Shaun Ash is a qualified nutritionist and lives in Sydney, NSW. Shaun has an online nutrition advice business.
3. Astro Pty Ltd ('Astro') is a supplier of gourmet pre-made meals that can be ordered online by its customers and delivered. Astro operates in Sydney.
4. In 2011, Astro's board of directors resolved to increase the company's market share in Sydney. In March 2011, Astro employed Shaun as its executive sales manager to spearhead Astro's expansion in Sydney for delivered pre-made meals. Shaun has a keen understanding of Astro's target market, is extremely good at product promotion and in identifying new sales opportunities. Whilst employed at Astro, Shaun has also maintained his online nutrition advice business.
5. As a result of expanding into the Sydney market for delivered pre-made meals, Astro's net profits have increased from \$500 000 in FY 2012 to \$1 million in FY 2013, and \$1.5 million in 2014.
6. Astro's board of directors is of the view that a key contributor to Astro's Sydney success is the utilisation of social media platforms for advertising. In particular, Astro's Instagram account has over 1.5 million followers. The Instagram account is run by Astro's media manager, Lucy Pollett.
7. Shaun has a different opinion as to the source of Astro's success in Sydney. Shaun believes Astro's success is due to Shaun's ability to utilise his existing clientele from his nutrition advice business to promote Astro's pre-made meals. Shaun believes that his role and talent are underappreciated by Astro's board of directors. Shaun has been considering setting up his own gourmet pre-made meal delivery business in Sydney. However, Shaun does not have the capital needed to start up this aspect of his business.
8. Tim Lin is a successful celebrity chef and restaurateur and has made a fortune from owning and running multiple successful restaurants. Tim lives in Sydney. Tim has been following Astro's Instagram account since 2014 and is very impressed with the meal design, presentation and growth of Astro's delivered pre-made meals business.
9. On 10 July 2014, Tim meets with Lucy and Shaun at Astro's offices to discuss the possibility of Tim and Astro investing together in a new venture. At the meeting, Lucy and Shaun represent Astro. During the meeting, Tim is impressed with Lucy's track record in promoting Astro's product on social media, and is equally impressed by Shaun's meal design skills.

10. Tim wants to invest in a business offering pre-made meal delivery services in Sydney. Lucy indicates that rather than further expanding in Sydney, Astro is more interested in targeting new markets, such as Brisbane. Lucy explains that according to a Management Consultant Report commissioned by Astro from QWC Consultants, the Sydney pre-made meal market is estimated to be worth \$5 million, and, thanks to rapid expansion in the offering of pre-made meals in the last 5 years, this market has reached saturation and will not likely grow again until 2020. In FY 2013 and FY 2014, Astro's share of this market was 50%. The market in Sydney is tight, with many competitors, and Astro's board of directors believes that it will be more lucrative to break into the Brisbane market which has fewer market players. QWC advises that the Brisbane market is predicted to grow from \$5 million in FY 2014 to \$30 million in FY 2018, to \$50 million by FY 2020.
11. Consistently with its recommendation to expand into the Brisbane market, the QWC Report lists 10 companies based in Brisbane that are looking to engage a corporate caterer on a long term basis. QWC has had preliminary discussion on behalf of Astro with these companies. Astro's board of directors resolves to approach the 10 Brisbane companies in order to negotiate and enter into corporate catering contracts for pre-made meals.
12. On 20 July 2014, the Australian Competition and Consumer Commission ('ACCC') issues Astro with an Infringement Notice in respect of false and misleading conduct. Lucy had made false health claims about the weight loss benefits of Astro's pre-made meals on Astro's social media platforms. The ACCC was flooded with consumer complaints from Astro's customers.
13. On 1 August 2014, Tim calls Shaun and arranges for both to meet at Tim's home the next day. At the meeting on 2 August 2014, Shaun and Tim come to realise that they have similar business goals and complimentary skills. Shaun and Tim decide to form a new company, MeFoodz Pty Ltd ('MeFoodz'), offering gourmet pre-made meals similar to those offered by Astro. Shaun and Tim are each 50% shareholders and directors of MeFoodz.
14. Shaun and Tim have decided that MeFoodz will not compete in the Sydney market against Astro. Rather, MeFoodz will enter the Brisbane market. Tim and Shaun were unaware of the opportunities in the Brisbane market, including the 10 Brisbane companies seeking corporate catering services, until Lucy revealed the contents of the QWC Report at the meeting at Astro's offices on 10 July 2014. MeFoodz's meals will be marketed as having been designed by Tim, who has celebrity chef status in Australia (having appeared on cooking shows in Australia) and as being nutritionally balanced and designed by Shaun Ash.
15. Shaun resigns from Astro on 3 August 2014 to pursue the new venture with Tim. Shaun uses his client network from his nutrition business and, unbeknown to Astro's board of directors, uses Astro's supplier network. On behalf of MeFoodz, Shaun contacts the 10 Brisbane companies as a result of which MeFoodz enters into contracts with 4 of them to supply pre-made meals. These 4 companies have rejected Astro's approach to supply pre-made meals. Shaun and Tim predict MeFoodz will make a total of \$200 000 per annum in net profits from the 4 contracts.

16. Tim is also able to use his Instagram account to advertise MeFoodz, and with Tim's 3 million followers, and Shaun's networks, MeFoodz becomes a rapid success in Brisbane. In FY 2016 MeFoodz captured 25% of the Brisbane market, earning total net profits from Brisbane sales of \$1.5million. In FY 2017 MeFoodz captured 40% of the Brisbane market, earning total net profits from Brisbane sales of \$5 million. Shaun and Tim predict that MeFoodz will capture 50% of the market worth \$30 million in FY 2018 (forecast net profits of \$10 million in FY 2018). MeFoodz has strong net profit growth forecast, until FY 2020.
17. Astro's board of directors are informed by Lucy about Shaun's involvement with MeFoodz, in December 2017. Astro commences legal proceedings against Shaun, alleging that Shaun owed fiduciary duties to Astro and breached those duties through Shaun's involvement with Tim and MeFoodz.
18. Following the ACCC's Infringement Notice, Astro has received adverse media publicity. Demand for Astro's products has fallen. As at 24 December 2017 Astro had failed to enter into any contract with the 10 Brisbane companies identified by the QWC Report. The feedback received from the 10 Brisbane companies is that they did not want to do business with Astro after the ACCC investigation and Infringement Notice. Astro's board of directors has resolved to terminate Lucy's employment contract.
19. Astro makes two alternative claims against Shaun:
 - a) A constructive trust over all of Shaun's remaining shareholding in MeFoodz and an account of profits for past profit earned by Shaun by reason or use of his position; or
 - b) An account of profits for past profit earned by Shaun by reason or use of his position and future profit earned by Shaun by reason or use of his position.
20. Astro also claims equitable compensation against Shaun for the lost opportunity to enter into contracts with the 4 Brisbane companies with whom MeFoodz enters into contracts for the supply of pre-made meals.
21. At trial, Shaun does not contest liability on the basis of breach of fiduciary duties. The dispute is as to the nature and extent of equitable relief and quantum. All parties submit to the jurisdiction of the Supreme Court of New South Wales. It is common ground between the parties that there are no conflicts of laws and that the *Corporations Act 2001* (Cth) does not raise any issues for dispute. By consent, no claim has been made against Tim or MeFoodz by Astro or Shaun.
22. At trial, Smith J made following findings:
 - (a) A reason for Astro's loss of opportunity to contract with the 4 Brisbane companies was Shaun's breach of fiduciary duty.
 - (b) Lucy as an employee of Astro contributed to the loss of the opportunity.
 - (c) Since the 4 Brisbane contracts are 40% of the possible contracts, Astro had a 40% chance of obtaining the 4 Brisbane contracts. These contracts are valued at \$200 000. Therefore, the value of the lost opportunity to contract is \$80 000.
 - (d) MeFoodz earned net profit of \$7 million in 2016 and 2017 (2015 no profit made). Earnings were divided equally between Tim and Shaun, each earning \$3.5 million for the two years combined.

- (e) MeFoodz's future net profit for 2018, 2019 and 2020 will be \$10 million per annum. On the basis that earnings will be divided equally between Tim and Shaun, Shaun will earn \$5 million per annum. No discount is made for future contingencies.
- (f) In relation to Astro's claim for a constructive trust, Smith J finds that a proprietary remedy is not supported on the facts. The interests of third parties, including Tim as another shareholder in MeFoodz, must also be taken into account.
- (g) Lucy's conduct the subject of the ACCC Infringement Notice has no relevance to these proceedings.

Smith J made the following orders:

1. Shaun must pay Astro \$80 000 as equitable compensation for the lost opportunity to contract with the 4 Brisbane companies;
2. Shaun must pay Astro \$3.5 million as an account of profits for the past profit earned by reason of Shaun's position;
3. Shaun must pay Astro \$15 million as an account of profits for the future profit Shaun will earn by reason of Shaun's position.

Shaun appealed to the New South Wales Court of Appeal, which dismissed his appeal, agreeing with the findings and orders of Smith J.

Shaun was granted leave to appeal to the High Court, raising the following questions:

1. Whether the primary judge erred in holding that there was a sufficient causal link between Shaun's breach of fiduciary duty and Astro's loss of opportunity to contract with the 4 Brisbane companies.
2. Whether the primary judge erred, by taking into account Lucy's actions as an employee of Astro, in connecting Astro's loss of opportunity to Shaun's breach of fiduciary duty.
3. Whether the primary judge erred in holding that the value of Astro's lost opportunity to contract is \$80 000.
4. Whether the primary judge erred in not requiring Astro to elect between equitable compensation and an account profits.
5. Whether the primary judge erred in awarding an account of profits for the future. In the event that no error is made in this regard, whether the primary judge erred in making no discount for future contingencies in the valuation of the account of profits for future profit to be made by Shaun.
6. Whether the primary judge erred in declining to award a constructive trust.
7. Whether the primary judge erred in finding that Lucy's conduct the subject of the ACCC Infringement Notice had no relevance to the proceedings.

END OF PROBLEM