

BETWEEN

KAWASAKI (AUSTRALIA) PTY LTD (ACN 000 748 621)

First Applicant

and

DP WORLD (AUSTRALIA) LTD (ACN 000 049 301)

Second Applicant

and

ARC STRANG PTY LTD (ACN 062 605 850)

First Respondent

and

TOLL (FHL) PTY LTD (ACN 004 272 860)

Second Respondent

and

TOLL HOLDINGS LTD (ACN 006 592 089)

Third Respondent

and

PRIXCAR SERVICES PTY LTD (ACN 007 063 505)

Fourth Respondent



APPLICATION

1. The Fast Track List Application is made on behalf of the first applicant ('**Kawasaki**') and the second applicant ('**DP World**') and relates to:
 - (a) breaches of clauses 5, 20 and 23 of a shareholders agreement dated 31 March 1995 between Kawasaki and DP World (then operating as P&O Ports Limited, the first respondent ('**ARC Strang**') and second respondent ('**Toll (FHL)**') in respect of shares in the fourth respondent, Prix Car Services Pty Ltd ('**PrixCar**');
 - (b) breaches of section 52 of the *Trade Practices Act* 1974 (Cth) ('**TPA**') by ARC Strang and Toll (FHL) and by the third respondent ('**Toll Holdings**') by reason of section 84(2) of the *TPA*; and
 - (c) the commission of equitable fraud by ARC Strang, Toll (FHL) and Toll Holdings.
2. Each of Kawasaki, DP World, ARC Strang, Toll (FHL) and Toll Holdings have at all relevant times been incorporated under the *Corporations Act* 2001 ('the *Act*').

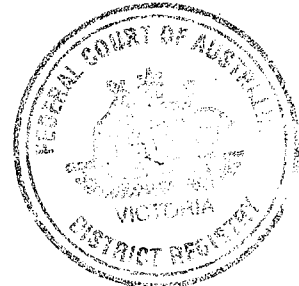
3. The shareholding in PrixCar is as follows:
 - (a) Kawasaki holds 33.333 percent of the issued shares in PrixCar;
 - (b) DP World holds 16.667 percent;
 - (c) ARC Strang holds 16.667 percent; and
 - (d) Toll (FHL) holds 33.333 percent.

4. Toll Holdings owns:
 - (a) all of the shares in Toll (FHL);
 - (b) since 30 May 2007, all of the shares in ARC Strang ('ARC Strang shares').

5. PrixCar has at all relevant times been incorporated under the *Act* and carries on business principally in the storage, preparation and distribution of motor cars imported into Australia.

A. DETAILS OF CLAIM AND RELIEF SOUGHT

On the grounds stated in the accompanying statement of claim.



1. A declaration that the transfer of the beneficial interest in the shares in PrixCar held by ARC Strang ('Strang PrixCar shares') from ARC Strang in its capacity as trustee of the ARC Strang Family Trust to ARC Strang in its own capacity, pursuant to the Deed of Assignment dated 30 May 2007, breached Clause 5 of the Shareholders Agreement;

2. A declaration that the transfer of the beneficial interest in the Strang PrixCar shares from ARC Strang in its capacity as trustee of the Strang Family Trust to ARC Strang in its own capacity, pursuant to the Deed of Assignment dated 30 May 2007, in conjunction with the transfer to and acquisition of the ARC Strang shares by Toll Holdings pursuant to the Share Sale and Subscription Agreement ('SSSA') dated 30 May 2007 and all related documents executed on or around 30 May 2007 (together, the '**Transaction**') breached clauses 20 and 23 of the Shareholders Agreement;

3. A declaration that ARC Strang holds and has held all of the Strang PrixCar shares on a constructive trust for the benefit of Kawasaki, DP World and Toll (FHL) on a pro rata basis;

4. Alternatively, a declaration that Toll Holdings holds and has held all of the ARC Strang shares on a constructive trust for the benefit of Kawasaki, DP World and Toll (FHL) on a pro rata basis;
5. A mandatory injunction forcing ARC Strang to transfer all of the Strang PrixCar shares pro rata to all other registered shareholders of PrixCar for the amount of the purchase price of \$13,500,000 as set out in the Deed of Assignment dated 30 May 2007;
6. A mandatory injunction forcing Toll Holdings to transfer all of the ARC Strang shares pro-rata to all other registered shareholders of PrixCar for the amount of the purchase price of \$13,500,000;
7. Similar relief as above under section 87 of the *TPA* for misleading and deceptive conduct;
8. Similar relief as above on the grounds of equitable fraud because of material non-disclosure and misstatements to Kawasaki and DP World about the nature of the Transaction in breach of the pre-emptive provisions of the Shareholders Agreement;
9. Damages;
10. Equitable Compensation;
11. Costs; and
12. Such further or other orders as the Court sees fit.

B. CLAIM FOR INTERLOCUTORY RELIEF

Not applicable.

DATE: 18 October 2007



Scott Chesterman Minter Ellison

Scott Chesterman

MINTER ELLISON

Solicitors for the first and second applicants

C. NOTICE TO RESPONDENT

TO The first, second, third and fourth respondents, as set out below:

ARC Strang Pty Ltd
Level 7
380 St Kilda Road
MELBOURNE VIC 3000
(registered office)

Toll Holdings Limited
Level 7
380 St Kilda Road
MELBOURNE VIC 3000
(registered office)

Toll (FHL) Pty Ltd
Level 7
380 St Kilda Road
MELBOURNE VIC 3000
(registered office)

PrixCar Services Pty Ltd
C/- Mr Shaun Steffenson
Dibbs Abbott Stillman
Level 4
575 Bourke Street
MELBOURNE VIC 3000
(solicitors for the fourth respondent)



This application has been set down for the time and place stated below. If you or a legal practitioner representing you do not attend the Court at that time, the application may be dealt with and judgment may be given, or an order made, in your absence. As soon after the time mentioned as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard;
- (b) directions may be given for the further conduct of the proceeding;
- (c) any application for interlocutory relief may be heard.

Before any attendance at Court, you must file an appearance in the Registry.

scheduling conference
Time and date for ~~hearing~~:

~~3 December 2007~~

Place Federal Court of Australia *29 NOVEMBER 2007* 10.00 AM
Commonwealth Law Courts Building
305 William Street
MELBOURNE VIC 3000

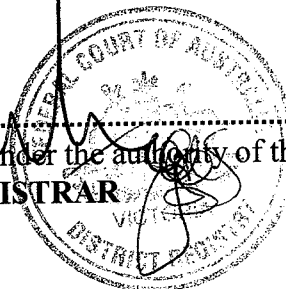
D. ABRIDGMENT OF SERVICE

Not applicable.

DATE: 18 October 2007

18 OCT 2007

an officer acting under the authority of the
DISTRICT REGISTRAR

**E. FILING AND SERVICE**

This application is filed by Minter Ellison for the first and second applicants whose address for service is:

Minter Ellison Lawyers
Level 16
525 Collins Street
MELBOURNE VIC 3000
Attention Jane Salveson/Scott Chesterman

The first applicant's address is Kawasaki (Australia) Pty Ltd Level 11, 222 Kingsway, South Melbourne 3205

The second applicant's address is: DP World Australia 160 Sussex Street, Sydney, New South Wales 2000.

It is intended to serve this application on each person listed below:

ARC Strang Pty Ltd
Level 7
380 St Kilda Road
MELBOURNE VIC 3000
(registered office)

Toll Holdings Limited
Level 7
380 St Kilda Road
MELBOURNE VIC 3000
(registered office)

Toll (FHL) Pty Ltd
Level 7
380 St Kilda Road
MELBOURNE VIC 3000
(registered office)

PrixCar Services Pty Ltd
C/- Mr Shaun Steffenson
Dibbs Abbott Stillman
Level 4
575 Bourke Street
MELBOURNE VIC 3000
(solicitors for the fourth respondent)



2

VID943 / 2007

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY**

FAST TRACK LIST
No 2007

BETWEEN

KAWASAKI (AUSTRALIA) PTY LTD (ACN 000 748 621) First Applicant

and

DP WORLD (AUSTRALIA) LTD (ACN 000 049 301) Second Applicant

and

ARC STRANG PTY LTD (ACN 062 605 850) First Respondent

and

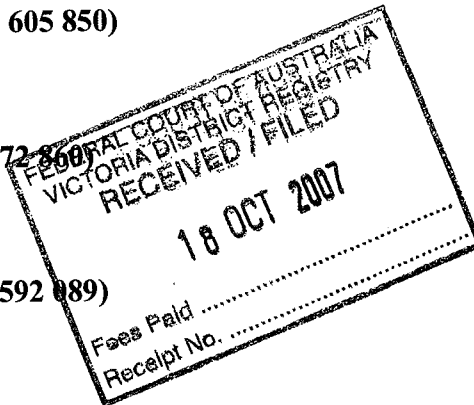
TOLL (FHL) PTY LTD (ACN 004 272 869) Second Respondent

and

TOLL HOLDINGS LTD (ACN 006 592 089) Third Respondent

and

PRIXCAR SERVICES PTY LTD (ACN 007 063 505) Fourth Respondent



STATEMENT OF THE FIRST AND SECOND APPLICANTS' CLAIM

Date of document 18 October 2007

Filed on behalf of the first and second applicants

Prepared by
MINTER ELLISON
Lawyers
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DX 204 MELBOURNE
Telephone (03) 8608 2000
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Reference JLS SCC 30-5582764

PROCESSED

This Statement of the First and Second Applicants' claim is structured as follows:

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1. INTRODUCTION

1.1 Overview

- (a) The accompanying Fast Track List Application made on behalf of the first applicant ('**Kawasaki**') and the second applicant ('**DP World**') relates to:
- (i) breaches of clauses 5, 20 and 23 of a shareholders agreement by the first respondent ('**ARC Strang**') and second respondent ('**Toll (FHL)**');
 - (ii) breaches of section 52 of the *Trade Practices Act 1974* (Cth) ('**TPA**') by ARC Strang and Toll (FHL) and by the third respondent ('**Toll Holdings**') by reason of section 84(2) of the *TPA*; and
 - (iii) the commission of equitable fraud by ARC Strang, Toll (FHL) and Toll Holdings.
- (b) On 31 March 1995, Kawasaki and DP World (then operating as P&O Ports Limited, ARC Strang and Toll (FHL) entered into a shareholders

agreement ('Shareholders Agreement'). On or before 8 February 2007 and thereafter ARC Strang was desirous of transferring its shares in the fourth respondent, Prix Car Services Pty Ltd ('PrixCar'). It failed to transfer its shares ('Strang PrixCar shares') in compliance with its obligations under clause 5 of the Shareholders Agreement. ARC Strang, Toll (FHL) and Toll Holdings acted in concert to circumvent the operation of clause 5 of the Shareholders Agreement by arranging for ARC Strang to stand possessed only of its PrixCar shares and for Toll Holdings to own 100% of ARC Strang. In that respect, ARC Strang and Toll (FHL) breached their obligations of utmost good faith and co-operation with Kawasaki and DP World (under clause 23 of the Shareholders Agreement). ARC Strang, Toll (FHL) and Toll Holdings were party to the commission of equitable fraud upon and also misled and deceived Kawasaki and DP World.

1.2 Parties

- (a) Each of Kawasaki, DP World, ARC Strang, Toll (FHL) and Toll Holdings have at all relevant times been incorporated under the *Corporations Act* 2001 ('the Act').
- (b) The shareholding in PrixCar is as follows:
 - (i) Kawasaki holds 33.333 percent of the issued shares in PrixCar;
 - (ii) DP World holds 16.667 percent;
 - (iii) ARC Strang holds 16.667 percent; and
 - (iv) Toll (FHL) holds 33.333 percent.
- (c) Toll Holdings owns:
 - (i) all of the shares in Toll (FHL);
 - (ii) since 30 May 2007, all of the shares in ARC Strang ('ARC Strang shares').

- (d) PrixCar has at all relevant times been incorporated under the *Act* and carries on business principally in the storage, preparation and distribution of motor cars imported into Australia.

1.3 Relief Sought

- (a) A declaration that the transfer of the beneficial interest in the shares in PrixCar held by ARC Strang ('**Strang PrixCar shares**') from ARC Strang in its capacity as trustee of the ARC Strang Family Trust to ARC Strang in its own capacity, pursuant to the Deed of Assignment dated 30 May 2007, breached Clause 5 of the Shareholders Agreement;
- (b) A declaration that the transfer of the beneficial interest in the Strang PrixCar shares from ARC Strang in its capacity as trustee of the Strang Family Trust to ARC Strang in its own capacity, pursuant to the Deed of Assignment dated 30 May 2007, in conjunction with the transfer to and acquisition of the ARC Strang shares by Toll Holdings pursuant to the Share Sale and Subscription Agreement ('**SSSA**') dated 30 May 2007 and all related documents executed on or around 30 May 2007 (together, the '**Transaction**') breached clauses 20 and 23 of the Shareholders Agreement;
- (c) A declaration that ARC Strang holds and has held all of the Strang PrixCar shares on a constructive trust for the benefit of Kawasaki, DP World and Toll (FHL) on a pro rata basis;
- (d) Alternatively, a declaration that Toll Holdings holds and has held all of the ARC Strang shares on a constructive trust for the benefit of Kawasaki, DP World and Toll (FHL) on a pro rata basis;
- (e) A mandatory injunction forcing ARC Strang to transfer all of the Strang PrixCar shares pro rata to all other registered shareholders of PrixCar for the amount of the purchase price of \$13,500,000 as set out in the Deed of Assignment dated 30 May 2007;

- (f) A mandatory injunction forcing Toll Holdings to transfer all of the ARC Strang shares pro-rata to all other registered shareholders of PrixCar for the amount of the purchase price of \$13,500,000;
- (g) Similar relief as above under section 87 of the *TPA* for misleading and deceptive conduct;
- (h) Similar relief as above on the grounds of equitable fraud because of material non-disclosure and misstatements to Kawasaki and DP World about the nature of the Transaction in breach of the pre-emptive provisions of the Shareholders Agreement;
- (i) Damages;
- (j) Equitable Compensation;
- (k) Costs; and
- (l) Such further or other orders as the Court sees fit.

2. BACKGROUND

- 2.1 The Strang Family Trust was created by Deed of Settlement on 5 January 1994 (**Trust Deed**).
- 2.2 ARC Strang Australia Pty Ltd (**ARC Strang Australia**) has been the trustee of the Strang Family Trust since 30 May 2007. Prior to this, ARC Strang was the trustee.
- 2.3 Robert Strang has been the sole director and company secretary of ARC Strang Australia since February 2007. Prior to this, there were also four other directors.
- 2.4 From 18 November 1993 to June 2001, Robert Strang and Elizabeth Strang were the only directors of ARC Strang. Since June 2001, Robert Strang has been the sole director and company secretary of ARC Strang.

- 2.5 Robert Strang was the appointor of the Strang Family Trust. Under clause 23 of the Trust Deed, the appointor may remove or appoint any trustee.
- 2.6 There are two classes of beneficiaries under the Trust Deed. Both are open classes, as the 'Primary Beneficiaries' definition includes Robert Strang and any spouse, widow or child of Robert Strang, and 'General Beneficiaries' includes *inter alia* charities and relatives yet to be born.
- 2.7 The trustee has a wide discretionary power including the power to pay, apply or set aside as it thinks fit the net income of the trust fund. Clause 7 of the Trust Deed refers to the trustee's exercise of power to apply or invest any trust money 'as if they were absolute owners beneficially entitled', and to exercise all rights relating to shares 'as if they were the sole, absolute and beneficial owners of the shares..... or interests concerned'.
- 2.8 Under the Shareholders Agreement executed on 31 March 1995 and amended by deed on 26 June 1996, Kawasaki, DP World (then operating as P & O Ports Limited), Toll (FHL) and ARC Strang agreed to operate the business of PrixCar and regulate that operation and their rights and obligations pursuant to it by that agreement.
- 2.9 On 9 June 2006, Toll (FHL) gave notice of transfer of its intention to sell its shares in PrixCar.
- 2.10 On 18 September 2006, the parties to the Shareholders Agreement engaged Deloitte to provide an expert determination of the value of Toll (FHL)'s PrixCar shareholding.
- 2.11 On 25 October 2006, Deloitte issued its expert determination.
- 2.12 On 5 December 2006, Alan Miles, the Chairman of PrixCar, invoked clause 5.1(b) of the Shareholders Agreement requiring Toll (FHL) to execute transfers of shares in favour of the non-Toll shareholders.

- 2.13 On 13 December 2006, Alan Miles informed Toll (FHL) that he would execute transfers of the Toll shares in favour of the other shareholders as at close of business on 20 December 2006 under 5.1(j)(vi) of the Shareholders Agreement.
- 2.14 On 13 December 2006, Toll (FHL) requested undertakings from the other shareholders to refer the matter to dispute resolution under clause 13 of the Shareholders Agreement.
- 2.15 On 18 December 2006, Toll (FHL) issued a writ and summons in the Supreme Court of Victoria at Melbourne proceeding number 10435/06 ('**Proceeding**'), alleging, amongst other things, that the parties were obliged to abide by clause 5 of the Shareholders Agreement.
- 2.16 Following discussions and correspondence between officers of Kawasaki and Robert Strang, on 22 December 2006, a letter of intent was sent from Kawasaki to Robert Strang and Elizabeth Strang, confirming Kawasaki's intention to purchase all of the issued shares in ARC Strang, subject to due diligence, board approval, execution of a sale agreement and the payment of a deposit to be held on trust by solicitors for ARC Strang, Blake Dawson Waldron ('**BDW**').
- 2.17 On 28 December 2006, a deposit of \$250,000 for the ARC Strang shares was paid into BDW's trust account by Kawasaki.
- 2.18 On 9 January 2007, BDW informed Minter Ellison, solicitors for Kawasaki that the Strang PrixCar shares registered in the name of ARC Strang were in fact held by ARC Strang on trust for the Strang Family Trust. ARC Strang proposed, as a preliminary step to the acquisition by Kawasaki of ARC Strang, that the beneficial ownership of the Strang PrixCar shares be transferred from the Strang Family Trust to ARC Strang, so that ARC Strang would hold both legal and beneficial title to the Strang PrixCar shares.
- 2.19 On 11 January 2007, ARC Strang wrote to the secretary of Prix Car proposing to transfer the Strang PrixCar shares to ARC Strang Australia, a wholly owned subsidiary of ARC Strang (which was previously known as Wahnz Pty Ltd

('Wahnz')). It requested the PrixCar directors' approval under clause 5.2(b) of the Shareholders Agreement.

- 2.20 On 29 January 2007, the Toll (FHL) appointed directors of PrixCar confirmed their intention to approve the proposed transfer to ARC Strang Australia on the basis that it would fall within clause 5.2(b) of the Shareholders Agreement.
- 2.21 On 8 February 2007, Toll (FHL) wrote to the directors and company secretary of PrixCar noting ARC Strang had previously sought consent to transfer the Strang PrixCar shares to Wahnz. The letter noted that Robert Strang had informed Toll (FHL) of an agreement that ARC Strang had reached to sell the shares in Wahnz to Kawasaki. Toll (FHL) objected to the agreement between Kawasaki and ARC Strang.
- 2.22 On 8 February 2007, Clayton Utz, solicitors for Toll (FHL) wrote to ARC Strang demanding that ARC Strang undertake in writing that day to take no further action to effect a transfer of the sale of its PrixCar shares to Wahnz and/or Kawasaki (Kawasaki was also referred to in the correspondence as 'K-Line').
- 2.23 On 8 February 2007, BDW wrote to Clayton Utz stating that ARC Strang shareholders did not intend to proceed with the transfer of shares in PrixCar to ARC Strang Australia. BDW further wrote that no binding agreement with Kawasaki had been entered into, but it was the intention of the shareholders in ARC Strang to transfer their shares in ARC Strang to Kawasaki. BDW contended that the Shareholders Agreement did not have any application to such a transaction.
- 2.24 On 8 February 2007, Clayton Utz replied objecting to BDW's proposal and requesting advance notice of any future agreement.
- 2.25 On 15 February 2007, Minter Ellison wrote to BDW to advise that Kawasaki was unable to consider any transaction relating to the shares in ARC Strang without the agreement of all shareholders in PrixCar and that the preliminary step of transferring the beneficial interest in the PrixCar shares from ARC Strang in its capacity as the trustee of the Strang Family Trust to ARC Strang in its personal

capacity would be a transfer of shares for the purposes of clause 5.1 of the Shareholders Agreement.

- 2.26 On or about 19 February 2007, BDW returned the \$250,000 in its trust account to Kawasaki.
- 2.27 On 26 March 2007, the Proceeding was heard before Justice Hollingworth.
- 2.28 On or about 30 May 2007, Robert Strang, Elizabeth Strang and Toll Holdings entered into a Share Sale and Subscription Agreement ('SSSA') by which:
- (a) Robert and Elizabeth Strang agreed to sell, and Toll Holdings agreed to buy, all the issued capital of ARC Strang for \$2 (purchase price);
 - (b) Robert and Elizabeth Strang agreed to procure the issue of, and Toll Holdings agrees to subscribe for, 13,500,000 shares in the capital of ARC Strang for \$13,500,000 ('issue price');
 - (c) the total price paid by Toll Holdings for the shares referred to in (a) and (b) together constituting the ARC Strang shares was \$13,500,000;
 - (d) Toll Holdings agreed to procure the transfer of the domain name www.strang.com.au from its subsidiary, Strang Stevedoring Australia W.D.W Pty Limited, to Robert and Elizabeth Strang or their nominee;
 - (e) Robert and Elizabeth Strang were required to ensure that up until the Completion Date (29 May 2007 or such other agreed date), unless otherwise required by the agreement itself or unless Toll Holdings first consents in writing, ARC Strang did not dispose of, grant an option over, or grant any interest or encumbrance over the Strang PrixCar Shares;
 - (f) under clause 5.7, Toll Holdings was required to pay the \$13,500,000 issue price for the ARC Strang shares to ARC Strang, or as ARC Strang may direct, including to satisfy any obligations of the company to third parties;
 - (g) under clause 8.1, Toll Holdings acknowledges that, under the terms of the Deed of Assignment, ARC Strang will owe the Strang Family Trust

\$13,500,000 payable before or at Completion, as well as any directors fees paid by PrixCar to ARC Strang in respect of the period up to and including Completion which are received after the Completion Date;

- (h) under clause 5.14, the parties acknowledge that ARC Strang will, prior to Completion, divest itself of all assets held in its capacity as trustee of the ARC Strang Family Trust and the ARC Strang Superannuation Fund, other than the Strang PrixCar Shares;
- (i) under Warranty 3.1, Robert and Elizabeth Strang warranted to Toll Holdings that the only assets held by ARC Strang are the Strang PrixCar Shares, and that those shares are legally and beneficially owned by ARC Strang and are not subject to any encumbrance;
- (j) under Warranty 3.9, Robert and Elizabeth Strang warranted to Toll Holdings that ARC Strang has not conducted any business other than as trustee of the Strang Family Trust and the Strang Superannuation Fund, and has never operated in its personal capacity, other than in relation to the acquisition of the beneficial interest in the Strang PrixCar Shares on or about the Completion Date;
- (k) on the Completion Date, Robert and Elizabeth Strang were required to provide an executed copy of the Guarantee Deed to Toll Holdings, under which:
 - (i) ARC Strang Australia indemnified ARC Strang against all losses arising from the conduct of the ARC Strang Family Trust prior to Completion, with the exception of any liability resulting from a claim that ARC Strang has breached pre-emptive rights in relation to the Strang PrixCar Shares;
 - (ii) ARC Strang Australia guaranteed the warranty obligations of Robert and Elizabeth Strang under the share sale and subscription agreement and indemnified Toll Holdings against any loss arising from a breach of warranty by Robert and Elizabeth Strang; and

- (iii) Strang Family Superannuation Pty Ltd indemnified ARC Strang against any loss or liability arising from the conduct of the ARC Strang Superannuation Fund prior to Completion;
 - (l) at Completion, Toll Holdings was required to deliver to Robert and Elizabeth Strang an executed copy of the Trade Mark Assignment Deed, under which Toll Ports Pty Limited agreed to assign to Strang Australia, for the sum of \$100, all right, title and interest in the unregistered trademark set out in Annexure A to the deed;
 - (m) Toll Holdings acknowledged that ARC Strang would be solely and wholly responsible for any costs or liability arising out of:
 - (i) the Proceeding and attributed to ARC Strang;
 - (ii) any litigation brought against ARC Strang after the date of the agreement arising directly out of matters pleaded in the Proceeding; and
 - (iii) any litigation brought against ARC Strang arising from a claim that ARC Strang has breached pre-emptive rights in relation to the Strang PrixCar Shares.
- 2.29 On 30 May 2007, a Deed of Assignment was executed between ARC Strang in its capacity as trustee of the Strang Family Trust and ARC Strang in its own capacity under which:
- (a) ARC Strang, in its capacity as trustee of the Strang Family Trust, assigned the beneficial interest in the Strang PrixCar shares to ARC Strang in its personal capacity, on and from 30 May 2007;
 - (b) ARC Strang in its personal capacity, as the assignee of the beneficial interest in the Strang PrixCar shares, was obliged to pay the purchase price of \$13,500,000 to the trustee of the Strang Family Trust (ARC Strang Australia) on the Payment Date;

- (c) the Payment Date was the date which is the earlier of Completion under the share sale and subscription agreement and the date of termination of that agreement;
- (d) the purchase price for the beneficial interest in the Strang PrixCar shares may be adjusted for any directors' fees paid by PrixCar to ARC Strang in respect of the period up to and including the Completion Date, and not paid prior to the Completion Date, and this amount must be paid to the trustee of the Strang Family Trust within 5 business days of receipt by ARC Strang.

2.30 On or about 30 May 2007, ARC Strang, ARC Strang Australia, Robert Strang and the ARC Strang Family Trust entered into a Deed of Appointment and Retirement. Under the terms of this agreement:

- (a) Robert Strang appointed ARC Strang Australia as the new trustee of the Strang Family Trust from 30 May 2007 and ARC Strang Australia accepted this appointment;
- (b) ARC Strang retired as trustee of the Strang Family Trust from 30 May 2007 and was released from all further obligations in relation to the Strang Family Trust;
- (c) ARC Strang Australia indemnified ARC Strang from the trust fund for any liability properly incurred by ARC Strang while it was trustee of the Strang Family Trust to the extent that ARC Strang would have been entitled to be indemnified out of the trust fund if it had not retired;
- (d) the parties acknowledged that the indemnity referred to above does not extend to any liability incurred by ARC Strang as a result of a claim that ARC Strang has breached the pre-emptive rights agreement in relation to the Strang PrixCar shares; and
- (e) from 30 May 2007, ARC Strang Australia assumed ARC Strang's carriage of any proceedings to which ARC Strang is a party in its capacity as trustee

of the Strang Family Trust and which did not involve any personal liability of the trustee.

- 2.31 Several other Agreements were executed by Robert and Elizabeth Strang, ARC Strang and Toll Holdings on or around 30 May 2007 (together with the agreements referred to in paragraphs 2.28 – 2.30, constituting the Transaction).
- 2.32 On 8 June 2007, Justice Hollingworth handed down her decision in the Proceeding dismissing Toll's claims for the reasons set out therein.
- 2.33 On or about 19 June 2007, Toll Holdings advised Kawasaki and DP World for the first time that ARC Strang was now a wholly owned subsidiary of Toll Holdings. Under the provisions of clause 9.2 of the Shareholders Agreement, ARC Strang removed Mr Robert Strang as nominee director and appointed Mr Neil Chatfield.
- 2.34 On 22 June 2007, Toll (FHL) appealed Justice Hollingworth's decision in the Court of Appeal of the Supreme Court of Victoria.

3. PRINCIPAL MATTERS AND FACTS ON WHICH KAWASAKI AND DP WORLD INTEND TO RELY

- 3.1 There are express terms of the Shareholders Agreement which state that:
- (a) each of the parties shall and shall procure its associates to sign, execute and do all documents, acts, matters and things as shall be necessary or desirable to give effect to the agreement (Clause 20);
 - (b) in as much as business is being conducted through the company, the parties agree at all times through the currency of the agreement to act towards each other with the utmost good faith (Clause 23); and
 - (c) a person desiring to transfer any shares in PrixCar shall give a transfer Notice to the Directors of the company and the Directors and the proposing transferor shall proceed to establish the Fair Value of the shares with 28 days after the transfer Notice is given; (Clause 5.1(a)) and otherwise comply with the provisions of clause 5.

- 3.2 By 8 February 2007, Kawasaki and ARC Strang had proposed to enter into a transaction in certain respects similar to that set out in paragraphs 2.28-2.32 and ARC Strang had sought the approval of the Toll FHL appointed directors of PrixCar to enter into the Transaction (see paragraphs 2.20- 2.22).
- 3.3 On 8 February 2007, Toll (FHL) wrote to the directors of PrixCar (who were representatives of all shareholders of PrixCar) objecting to the proposed transfers of shares from ARC Strang to Wahnz Pty Ltd (now ARC Strang Australia, a wholly owned subsidiary of ARC Strang) on the grounds of a failure to comply with the Shareholders Agreement, including a lack of the required approval under clause 5.2(b), a lack of disclosure of the circumstances of the proposed transfer under clause 23 and that such a transaction was impermissible under the Shareholders Agreement.
- 3.4 Subsequently between February 2007 and 19 June 2007, ARC Strang was desirous of transferring its shares. Wrongfully, ARC Strang failed to issue a Transfer Notice which it was obliged to do under clause 5.1(a) of the Shareholders Agreement.
- 3.5 Further ARC Strang, and Toll (FHL) wrongfully failed to comply with the preemptive rights provisions in clause 5 of the Shareholders Agreement, but proceeded with steps designed to circumvent the operation of clause 5 of the Shareholders Agreement without the knowledge and consent of the directors of PrixCar.
- 3.6 On 30 May 2007, ARC Strang, in its capacity as trustee of the Strang Family Trust, and ARC Strang in its personal capacity, entered into a Deed of Assignment. Under the terms of the Deed, ARC Strang, in its trustee capacity, assigned the beneficial interest in the Strang PrixCar shares to ARC Strang in its personal capacity. As the assignee, ARC Strang, in its personal capacity, was obliged to pay a purchase price of \$13,500,000 to the trustee of the Strang Family Trust.

- 3.7 On or about 30 May 2007, Robert Strang, Elizabeth Strang and Toll Holdings entered into the SSSA under which Robert and Elizabeth Strang agreed to sell all of the issued share capital (two shares) in ARC Strang to Toll Holdings for \$2 and under which Robert and Elizabeth Strang agreed to procure the issue of 13,500,000 shares in ARC Strang for which Toll Holdings would pay \$13,500,000 to ARC Strang.
- 3.8 On or about 30 May 2007, ARC Strang, ARC Strang Australia, Robert Strang and the ARC Strang Family Trust entered into a Deed of Appointment and Retirement. ARC Strang Australia became the trustee of the Strang Family Trust, and under the terms of the deed, indemnified ARC Strang for any liability incurred by ARC Strang as former trustee. The exception to this indemnity was where the liability was incurred by a breach by ARC of pre-emptive rights in relation to the Strang PrixCar shares.
- 3.9 On 19 June 2007, and after completion of the Transaction, ARC Strang and Toll (FHL) disclosed to Kawasaki and DP World that:
- (a) the beneficial interest in the PrixCar shares had been transferred from ARC Strang in its capacity as Trustee of the Strang Family Trust to ARC Strang in its own capacity; and
 - (b) ARC Strang was now a wholly owned subsidiary of Toll Holdings.
- 3.10 At no time prior to 19 June 2007 did ARC Strang and Toll (FHL) disclose their intention to enter into and complete the Transaction or the fact that they had done so. The Transaction was completed without Kawasaki and DP World's knowledge and consent.
- 3.11 Further, Toll (FHL) took no steps to ensure that its associate Toll Holdings did not enter into the Transaction.
- 3.12 Further, Toll FHL failed to procure its associate, Toll Holdings to refrain from entering into the Transaction and such failure was in breach of Clause 20 of the Shareholders Agreement.

4. ISSUES LIKELY TO ARISE

4.1 Kawasaki and DP World believe the following issues may arise in this proceeding:

- (a) Was there a breach by ARC Strang and/or Toll (FHL) of clauses 5, 20 and/or 23 of the Shareholders Agreement?
- (b) Does the prohibition of the transfer of shares in clause 5 prohibit a transfer of beneficial interest in the Strang PrixCar shares by ARC Strang from the Strang Family Trust to itself?
- (c) Was there a breach of section 52 of the *TPA* by ARC Strang and Toll (FHL) and by Toll Holdings by reason of section 84(2)?
- (d) Did ARC Strang, Toll (FHL) and Toll Holdings' conduct constitute an equitable fraud on Kawasaki and DP World?
- (e) What relief are Kawasaki and DP World entitled to?

5. KAWASAKI AND DP WORLD'S CONTENTIONS

5.1 Legal Contentions

5.1.1 Breaches of the Shareholders Agreement

- (a) By reason of the matters referred to in paragraphs 3.1 to 3.12 herein, ARC Strang breached clause 5 of the Shareholders Agreement as a shareholder desirous of transferring its shares in PrixCar by failing to issue a transfer notice and otherwise comply with clause 5 of the Shareholders Agreement.
- (b) By reason of the matters referred to in paragraphs 3.1 to 3.12 herein and in particular by proceeding with the 30 May 2007 agreements and failing to disclose to each of Kawasaki and DP World their intention to do so, ARC Strang and Toll (FHL) have breached clauses 20 and 23 of the Shareholders Agreement.

5.1.2 Breaches of the TPA

- (a) Between 8 February 2007 and 19 June 2007, in all the circumstances set out in paragraphs 3.1 and 3.12, ARC Strang and Toll (FHL) represented to each of Kawasaki and DP World ARC Strang, Toll (FHL) or any associated entity did not intend, would not and were taking no steps to:
- (i) sell or purchase shares in ARC Strang except in accordance with clause 5; and
 - (ii) act in a manner inconsistent with the letter of Toll (FHL) of 8 February 2007.
- (b) Further, the representations in paragraph (a) (i) and (ii) were false and untrue in that ARC Strang and Toll (FHL) knew and were taking steps during the period between 8 February 2007 and 19 June 2007 to the effect that ARC Strang and Toll (FHL), intended to engage in a stratagem ('**the stratagem**') by which ARC Strang, Toll (FHL) and Toll Holdings, developed and put into effect a transfer of the beneficial ownership of the Strang PrixCar shares from ARC Strang in its capacity as Trustee of the Strang Family Trust to ARC Strang in its own capacity (as part of the Transaction) in a manner designed to circumvent the operation and purpose of clause 5.
- (c) In the premises, ARC Strang and Toll (FHL) have engaged in conduct that is misleading and deceptive or is likely to mislead and deceive in trade or commerce under section 52 of the *TPA*.
- (d) Toll Holdings knew of and participated in the stratagem, through Bernard McInerney ('**McInerney**') and other officers, Toll (FHL) and Toll Holdings' common directors and officers engaged in the conduct referred to in paragraphs 5.1.2(a) and (b) above . Toll Holdings benefited financially by the said conduct. Toll (FHL) and Toll Holdings' common directors and officers including McInerney engaged in the said conduct 'on behalf of Toll Holdings within the meaning of section 84(2) of the *TPA*.

- (e) In the premises, Toll Holdings has engaged in misleading and deceptive conduct in trade or commerce under section 52 of the *TPA*.
- (f) In reliance on the conduct of ARC Strang and Toll (FHL) set out at paragraphs 5.1.2(a)(i), Kawasaki and DP World did not take any steps to prevent the stratagem.
- (g) By reason of the said conduct, Kawasaki and DP World and each of them have suffered or may suffer loss and damage.
- (h) By virtue of the said conduct, Kawasaki and DP World are entitled to relief under sections 82 and 87 of the *TPA*.

5.1.3 *Equitable Fraud*

- (a) By reason of the matters referred to in paragraphs 3.1 to 3.12 herein, ARC Strang, Toll (FHL) and Toll Holdings and each of them have participated in a scheme which constituted an imposition and deceit on each of Kawasaki and DP World.
- (b) The imposition by ARC Strang, Toll (FHL) and Toll Holdings and each of them was constituted by circumstances where Kawasaki and DP World believed that ARC Strang and Toll (FHL) had no intention of pursuing and had taken no steps in furtherance of the stratagem.
- (c) The deceit by ARC Strang, Toll (FHL) and Toll Holdings was constituted by the conduct in paragraphs 3.1 to 3.12 which was secret in nature.
- (d) In the premises ARC Strang hold all of the PrixCar shares on constructive trust for Kawasaki, DP World and Toll (FHL) on a pro-rata basis.

5.2 **Legal Grounds for Relief Claimed**

5.2.1 *Breaches of Shareholders Agreement*

- (a) By virtue of the conduct described in paragraphs 3.1 to 3.12 herein ARC Strang has failed to comply with clause 5 of the Shareholders Agreement. ARC Strang was 'desirous' of transferring its shares and ought therefore

have complied with its contractual obligations to issue a Transfer Notice and otherwise comply with clause 5.

- (b) The transfer by ARC Strang of its shares constituted a transfer of beneficial interest and constituted a transfer for the purposes of clause 5 of the Shareholders Agreement (see *ASIC, re: Richstar Enterprises Pty Ltd v Carey* (No. 6) 153 FCR 50; *Ascot Investments v Harper* (1981) 148 CLR 337; *In the Marriage of Ashton* (1986) 11 Fam LR 457; *In the Marriage of Goodwin* (1990) 101 FLR 386; *In the Marriage of Davidson* (1990) 101 FLR 373).
- (c) The obligation under clause 23 that ARC Strang and Toll (FHL) show utmost good faith to their fellow shareholders included the duty to disclose the stratagem (see *United Dominions Corporations Limited v Brian Pty Limited* (1987) 157 CLR 1 at 5, 6) *Esso Australian Resources Pty Ltd v Southern Pacific Petroleum NL & Ors* [2005] VSCA 228, *Metropolitan Life Insurance Co. v. RPR Nabisco Inc.* 716 F Supp. 1504, 1517 (S.D.N.Y., 1989).

5.2.2 Breaches of TPA

- (a) Section 52 and silence:
- (i) Silence will amount to misleading a deceptive conduct where circumstances impose a duty to disclose relevant facts to a person so that silence may be relied on (see *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546; see also *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 88; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32; *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 453).
- (b) Section 84(2)
- (ii) Section 84(2) of the TPA is a provision of wide application. (see *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 at 37; *ACCC v Australian Safeway Stores (No. 2)* (2001) 119 FCR 1 at [81]).

5.2.3 Equitable Fraud

(a) Imposition and Deceit

- (i) An agreement which is *bona fide* between the parties to it, but an imposition and deceit on third persons, is an equitable fraud within the meaning of the 'fourth head' of equitable fraud as identified by Lord Hardwicke LC in *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 156, 28 ER 82 (at 100 ff).
- (ii) A fraud in equity involves a relatively low mental threshold. It includes an innocent act by reason of a person's ignorance of the obligations owed by them in equity. Equity takes that person as knowing their obligations in equity and thereby having committed an equitable fraud in breaching those obligations, if inadvertently. (see *Nocton v Lord Ashburton* [1914] AC 932 at 939-940; [1914-1915] All ER Rep 45 at 52-3, per Viscount Haldane LC, see also Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*, 4th Edition at [12-005][12-025][12-030]); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 187; *Huynh v Helleh Holdings Pty Ltd* [2001] NSWSC 1162 at [19], *Re La Rosa; ex parte Norgard v Rocom Pty Ltd* (1990) 21 FCR 270 at 287-288; *The Bell Group Ltd v Westpac Banking Corporation* [2001] WASC 315 at [102]).

Dated: 18 October 2007



MINTER ELLISON

Solicitors for the first and second applicants

This pleading was prepared by James W S Peters SC and Daniel Crennan of Counsel

BETWEEN

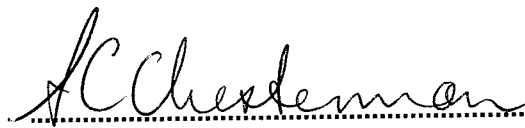
KAWASAKI (AUSTRALIA) PTY LTD (ACN 000 748 621)	First Applicant
and	
DP WORLD (AUSTRALIA) LTD (ACN 000 049 301)	Second Applicant
and	
ARC STRANG PTY LTD (ACN 062 605 850)	First Respondent
and	
TOLL (FHL) PTY LTD (ACN 004 272 860)	Second Respondent
and	
TOLL HOLDINGS LTD (ACN 006 592 089)	Third Respondent
and	
PRIXCAR SERVICES PTY LTD (ACN 007 063 505)	Fourth Respondent

CERTIFICATE OF LEGAL PRACTITIONER

I, **SCOTT CHESTERMAN**, certify to the Court that, in relation to the statement of the first and second applicants' claim dated 18 October 2007 filed on behalf of the first and second applicants, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the statement; and
- (b) each denial in the statement; and
- (c) each non-admission in the statement.

DATE 18 October 2007


.....
SCOTT CHESTERMAN
Legal practitioner representing the first and second applicants

PROCESSED

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY
GENERAL DIVISION

FEDERAL COURT OF AUSTRALIA VICTORIAN DISTRICT REGISTRY RECEIVED / FILED 21 NOV 2007 Fees Paid Receipt No.

FAST TRACK LIST
VID 943/2007

B E T W E E N

KAWASAKI (AUSTRALIA) PTY LTD (ACN 000 748 621) and
DP WORLD (AUSTRALIA) LTD (ACN 000 049 301)

Applicants

-- and --

ARC STRANG PTY LTD (ACN 062 605 850)

First Respondent

TOLL (FHL) PTY LTD (ACN 004 272 860)

Second Respondent

TOLL HOLDINGS LTD (ACN 006 592 089)

Third Respondent

PRIXCAR SERVICES PTY LTD (ACN 007 063 505)

Fourth Respondent

**POINTS OF DEFENCE
OF THE FIRST, SECOND AND THIRD RESPONDENTS**

To the statement of the applicants' claim, the first, second and third respondents (collectively, "the Toll parties") respond as follows.

RESPONSE TO SECTIONS 1 AND 2: "INTRODUCTION AND BACKGROUND"

1. The threshold issue in this case is whether, in the events that have occurred, the pre-emption procedure commencing under clause 5.1 of the Shareholders' Agreement has been engaged. The applicants say, in essence, that the Toll parties have acted to circumvent the clause, and should have disclosed their intentions beforehand. As the Toll parties apprehend it, the case will substantially depend on a question of construction of clause 5.1, and an objective analysis of the impugned dealing.

Date of document:
Filed on behalf of:
Prepared by:
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21 November 2007
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Fax: (03) 9629 8488
Ref: Kym Fraser

2. For the reasons summarised in section 5 below, the Toll parties contend in essence that as a matter of construction, the impugned transaction did not trigger the pre-emption clause. If that is found to be so, then all of the other grounds of action propounded by the applicants (based on clauses 20 and 23 of the Shareholders Agreement, “equitable fraud”, and section 52 of the *Trade Practices Act*) collaterally disappear because they all beg the question of whether the impugned conduct triggered the pre-emption clause. If the pre-emption clause was not triggered, the Toll parties were entitled to act in their own self interest without breaching any obligation of co-operation (clause 20) or “utmost good faith” (clause 23) under the Shareholders' Agreement, and there is no basis for the applicants' allegations of “deceit” and “secrecy”. For the same reason, there could be no reasonable expectation that they had to disclose beforehand their intentions to the applicants and there is no case of mere silence under section 52 of the *Trade Practices Act*.
3. They agree that the application raises, as questions for determination, the matters referred to in paragraph 1.1 (a), and they admit the facts concerning the parties stated in paragraph 1.2.
4. Apart from paragraph 2.26 (which is outside the knowledge of the Toll parties, and is therefore denied), they agree with the substance of the matters stated in paragraphs 2.1 to 2.27 without here taking exception to inaccuracies in facts stated or narrations of the contents of documents. They reserve the right to refer, or refer more accurately to, the complete contents of the various documents identified in those paragraphs, and the right to contend that certain “background” facts are ultimately immaterial to the construction exercise or disposition of the case.
5. As to the matters in paragraph 2.28:
 - (a) they admit the allegations in paragraphs (a), (b) and (d) to (m);
 - (b) they deny the allegations in paragraph (c) and say that the total price paid by Toll Holdings for the shares referred to in paragraph (a) and (b) was \$13,500,002, not \$13,500,000; and

- (c) they will refer to and rely upon the complete terms of the Share Sale and Subscription Agreement at the trial.
6. As to the matters in paragraph 2.29 they admit the Deed of Assignment, but say the effect of the deed was to remove the obligation of trust impressed upon the shares and alter the capacity in which ARC Strang held the shares, that is, from a trustee to its personal capacity without any change in legal ownership.
7. As to the matters in paragraph 2.30:
- (a) they admit those allegations; and
 - (b) they will refer to and rely upon the complete terms of the Deed of Appointment and Retirement at the trial.
8. As to paragraph 2.31:
- (a) they admit that on or about 30 May 2007 a Deed of Guarantee was entered into between ARC Strang Pty Ltd, ARC Strang Australia Pty Ltd, Strang Family Superannuation Pty Ltd and Toll Holdings Ltd;
 - (b) they admit that on or about 30 May 2007 an Assignment of Trade Mark was entered into between ARC Strang Australia Pty Ltd and Toll Ports Pty Ltd;
 - (c) they otherwise deny those allegations; and
 - (d) they will refer to and rely upon the complete terms of the documents referred to in paragraphs (a) and (b) at the trial.
9. They admit the allegations in paragraph 2.32.
10. They admit the allegations in paragraph 2.33.
11. They admit the allegations in paragraph 2.34.

RESPONSE TO SECTION 3: "PRINCIPAL MATTERS AND FACTS ON WHICH KAWASAKI AND DP WORLD INTEND TO RELY"

12. As to paragraph 3.1 of the statement of the applicants' claim, the Toll parties:
 - (a) admit the terms of the Shareholders Agreement therein set out; and
 - (b) will refer to and rely upon the complete terms of the Shareholders Agreement at the trial.

13. As to paragraph 3.2:
 - (a) they admit that, in December 2006, ARC Strang and Kawasaki were seeking to deal with each other apparently on the basis that a sale of shares in ARC Strang to Kawasaki (as distinct from a sale of ARC's Strang shares in PrixCar) did not trigger the pre-emption clause;
 - (b) they admit that, in January 2007, ARC Strang had sought the approval of the Toll (FHL) directors of PrixCar to a proposed transfer of ARC Strang's shares in PrixCar to Wahnz Pty Ltd, a related party of ARC Strang under clause 5.2(b) of the Shareholders' Agreement, and
 - (c) otherwise they deny the vague statement in paragraph 3.2.

14. They admit the allegations in paragraph 3.3.

15. They deny the allegations in paragraph 3.4.

16. They deny the allegations in paragraph 3.5.

17. As to the allegations in paragraph 3.6, they refer to and repeat paragraph 6 above.

18. As to paragraph 3.7, they repeat paragraph 5(a) and (b) above and will otherwise refer to and rely upon the complete terms of the Share Sale and Subscription Agreement at the trial.

19. As to paragraph 3.8, they repeat paragraph 7 and will otherwise refer to and rely upon the complete terms of the Deed of Appointment and Retirement at the trial.
20. As to paragraph 3.9, they:
- (a) admit that on 19 June 2007, the Company Secretary of ARC Strang Pty Ltd, Bernard McInerney wrote to PrixCar (Services) Pty Ltd, Kawasaki and P & O Ports Ltd (now DP World Australia Pty Ltd) informing them that ARC Strang Pty Ltd was now a wholly owned subsidiary of Toll Holdings Ltd, that Mr McInerney was the Company Secretary for ARC Strang Pty Ltd and removing Robert Strang as ARC Strang Pty Ltd's nominee Director of PrixCar and appointing Neil Chatfield in his place; but
 - (b) otherwise deny those allegations.
21. As to paragraph 3.10, they admit that prior to 19 June 2007 ARC Strang and Toll (FHL) did not disclose to Kawasaki or DP World their intention to enter into the agreements made on about 30 May 2007 and referred to by the applicants as the Transaction, but deny that they were under any obligation to do so, or that their failure to do so was legally wrongful.
22. As to paragraph 3.11, Toll (FHL) admits that it took no steps to ensure that its associate Toll Holdings did not enter into the Transaction but denies that it had any obligation to do so, or that its failure to do so was legally wrongful.
23. As to paragraph 3.12, they admit that Toll (FHL) failed to procure its associate Toll Holdings from refraining from entering into the Transaction, but deny that such a failure was in breach of clause 20 of the Shareholders' Agreement.

RESPONSE TO SECTION 4: "ISSUES LIKELY TO ARISE"

24. The Toll parties agree generally with the summary of the issues likely to arise in the proceeding as set out in section 4 of the applicants' statement.

25. They say further that:
- (a) the applicants' claims depend on it first being established that ARC Strang desired to transfer its shares in PrixCar within the meaning of clause 5.1 prior to the entry into of the Transaction documents; and
 - (b) what occurred by way of the Transaction did not constitute a "transfer" within the meaning of clause 5 of the Shareholders' Agreement.
26. The other issues referred to in paragraph 4.1 of the applicants' claim only arise if these threshold questions are answered unfavourably to the Toll parties.

SECTION 5: CONTENTIONS OF THE TOLL PARTIES

27. Clause 5 does not apply to a change in control or ownership of the shareholding company, ARC Strang, itself.¹ The Shareholders Agreement does not have a change of control provision — the absence of such a clause is most significant in this case.
28. In order to see whether a person was “desiring” to “transfer” any shares in PrixCar, the Court looks to the impugned transaction to see if it amounted to evidence of a desire to transfer the shares: see *Lyle & Scott Ltd v Scott's Trustees*², *Scotto v Petch*³. Secondly, in the absence of clear words to the contrary, to “transfer” means an instrument of transfer passing the legal interest in the shares; it does not cover a transfer of the beneficial interest in the shares: see *Safeguard Industrial Investments Ltd v National Westminster Bank*⁴, *Scotto v Petch*⁵ and Palmer, *Company Law*.⁶ Thirdly, the word “transfer” ordinarily entails a disposition by the former owner and receipt by the new owner as third party, or the passing of a legal right from one person to another so as to vest the right in the other.⁷

¹ See Hewitt, *Joint Ventures* (3rd Ed. Thomson Sweet & Maxwell) at 12-46, 13-28.

² [1959] AC 763.

³ [2000] 2 BCLC 211; affmd. [2001] BCC 889.

⁴ 1980] 3 All ER 849; affmd. [1982] 1 WLR 589.

⁵ See fn 2.

⁶ Palmer's *Company Law*, (Loose leaf service) 1992, (London), 25th Edition; para 6.62ff

⁷ See *Coles Myer Ltd v Commissioner of State Revenue* [1998] 4 VR 728; *Lion Nathan Aust Pty Ltd v Coopers Brewery Ltd* [2006] 236 ACR 561; and *Devereaux Holdings Pty Ltd v Pelsart Resources NL* (1995) 9 ACLR 879.

29. The applicants' first contention is that by reason of the matters referred to in paragraphs 3.1 to 3.12 of their statement, ARC Strang breached clause 5 of the Shareholders' Agreement. It is said that ARC Strang was "desirous of transferring its shares in PrixCar" and was therefore obliged to give a Transfer Notice (as defined) and otherwise comply with clause 5 of the Shareholders' Agreement.
30. The onus is on the applicants and the Toll parties contend that the material relied upon by the applicants does not demonstrate that prior to the Transaction occurring on or about 30 May 2007, ARC Strang was desirous of transferring its shares in PrixCar. The fact that Toll Holdings purchased the shares in ARC Strang does not evidence such a desire.⁸ Evidence of ARC Strang's desire is best reflected by the Transaction entered into on 30 May 2007.
31. The flaw in the applicants' case is to equate or portray a sale of shares in ARC Strang as being a device to "circumvent" the pre-emption clause, or as somehow concealing a desire by ARC Strang to transfer its shares in Prixcar. ARC Strang could exit this joint venture by selling its shares in Prixcar (attracting pre-emptions). Alternatively, the shareholders of ARC Strang could sell the company. If there is no change of control clause, and no other restriction on the sale of shares in ARC Strang (as distinct from PrixCar), then it is not "circumvention" (in the sense of defeating rights or avoiding responsibilities) for the shareholders of ARC Strang to sell their shares in ARC Strang.
32. The fact is that ARC Strang held the shares in PrixCar, together with other assets, as trustee. Under the Transaction, ARC Strang became entitled to the PrixCar shares free of its previous trust obligations. These additional matters do not alter the fundamental fact that the Shareholders Agreement does not contain a change of control provision.
33. The applicants then contend that the purported assignment by ARC Strang (as trustee) of its PrixCar shares to itself constituted a transfer of the beneficial interest in those shares, and therefore a "transfer" for the purposes of clause 5 of the Shareholders' Agreement. This contention is also flawed. The effect of the Deed of Assignment was to relieve ARC Strang of its obligations as trustee of the PrixCar shares. This did not amount to a

⁸ *Scotto v Petch* [2000] 2 BCLC, affirmed [2001] BCC 889.

"transfer" under clause 5 of the Shareholders' Agreement.

34. Further, and in any event, clause 5 of the Shareholders' Agreement is concerned with transfers of the legal interest in shares by execution of a share transfer and registration. Quite apart from the authorities that support that, so much follows textually from the definition of "Transfer Notice" in clause 5.1(j) and the provisions of the Shareholders' Agreement dealing with registration of such share transfers – see clauses 5.1(g) and 5.2(a). It is also consistent with articles 6(1) and 6(2) of the Constitution of PrixCar which states that

"(1) Except as required by law, the Company shall not recognise a person holding a share upon any trust.

(2) The Company is not bound by or compelled in any way to recognize (whether or not it has notice of the interest, or rights concerned) any equitable, contingent, future or partial interest in any share or unit of a share or (except as otherwise provided by these regulations or by law) any other right in respect of a share except as an absolute right of ownership in the registered holder."

35. Thus, the outcome is that the legal interest owner, ARC Strang, has always remained the same. It simply ended up holding the shares in a different capacity, that is, free of the trust obligations.
36. The second matter relied upon by the applicants is what is said to be a breach of clauses 20 and 23 of the Shareholders' Agreement.
37. Clause 20 of the Shareholders' Agreement states:

"Each of the parties hereto shall and shall procure its associates to sign, execute and do all such further documents, acts, matters and things as shall be necessary or desirable to give effect to the provisions of this Agreement."

38. This appears to be a typical clause importing an obligation on a contracting party to cooperate by doing all that is necessary on its part to enable the other party to have the benefit of the contract. This principle of construction (possibly an implied term) emanates from the seminal decision in *Mackay v Dick*⁹ and was recognised by the High

⁹(1881) 6 App Case 251
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Court in *Secured Income Real Estate(Aust) Pty Ltd v St Martins Investments Pty Ltd*¹⁰ and *Fitzgerald v FJ Leonhardt Pty Ltd*.¹¹ However, before clause 20 may be triggered, the clause itself says there needs to be a relevant obligation to "give effect to the provisions of" the Shareholders' Agreement. The transactions entered into on or about 30 May 2007 by way of the Transaction did not trigger clause 5.1(a) of the Shareholders' Agreement. Clause 20 is therefore irrelevant in that it does not create any independent obligation on Toll (FHL) or ARC Strang.

39. The next alleged breach of the Shareholders' Agreement is said to arise under clause 23. That clause states that, "In as much as the Business is being conducted through the Company, the parties agree at all times during the currency of this Agreement to act towards each other with the utmost good faith." The word "Business" is defined in the Shareholders Agreement as the automotive distribution business - see Recital A.
40. Clause 23 imposes a duty of good faith on the parties in respect of their dealings concerning the joint venture business. That is the purport of the opening words "In as much as the Business is being conducted through the Company". The clause is directed at ensuring that one shareholder (active or potentially active in the same industry or field of business) does not divert to itself a business opportunity that properly belongs to the business of the joint venture company, PrixCar. This sense of obligation of utmost good faith to the Company picks up the first part of the language of Recital C of the Shareholders' Agreement which states that: "The Shareholders are desirous of regulating their respective rights, duties and obligations towards the Company and the conduct of the Business and each other in the manner set out in this Agreement."
41. There are a growing number of cases concerning the implication of good faith in the performance of contracts or in the exercise of powers or discretions under a contract.¹² Whatever may be the content of the obligation of good faith arising under clause 23 and the significance of the added word "utmost", such a clause cannot operate in a manner inconsistent with another provision of the Shareholders Agreement. Either the applicants

¹⁰(1979) 144 CLR 596

¹¹ (1996) 189 CLR 215

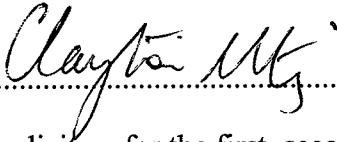
¹² See for example *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903; and *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (Receivers and Managers Appointed) (Administrators Appointed)* [2005] VSCA 228.. See generally E Peden, *Good Faith in the Performance of Contracts* (Lexis Nexis 2003)

establish that the pre-emption clause was triggered, or they do not. If the clause is now being used to say that the applicants should have been told of the "secret" dealing, then it is a sterile point if *ex hypothesi* the pre-emption clause does not apply and the shareholders of ARC Strang were free to deal with their shares in ARC Strang in their own interests.

42. This is connected to the applicants' contention that, in effect, it had a right to know what the Toll parties intended doing, and that non-disclosure constituted breaches of s.52 of the *Trade Practices Act* by ARC Strang and Toll (FHL), and that Toll Holdings also contravened under the agency provisions of s.84(2) of the Act.
43. It cannot be disputed that silence may constitute misleading and deceptive conduct under section 52 of the *Trade Practices Act*. However, the Toll parties say that the allegation of a breach of s.52 begs the question. Either clause 5 of the Shareholders' Agreement is engaged in the circumstances that occurred, or it is not. The applicants' misconception is made plain in paragraph 5.1.2(a)(i) and (ii) of its statement. It is irrelevant what was allegedly represented on behalf of Toll (FHL) on 8 February 2007. What is relevant is the question of ARC Strang's desire or otherwise to sell shares in PrixCar immediately prior to the entry into the Transaction Documents on 30 May 2007, and whether the Transaction Documents effected a transfer for the purposes of clause 5 of the Shareholders Agreement
44. The last legal contention made by the applicants is that by reason of the matters referred to in paragraphs 3.1 to 3.12 of their statement, ARC Strang, Toll (FHL) and Toll Holdings have engaged in equitable fraud. The Toll parties will contend that reliance upon the so-called "fourth head" of equitable fraud (as identified by Lord Hardwicke LC in *Earl of Chesterfield v. Janssen*¹³ is misconceived. Again, either clause 5.1 was, on its proper construction, engaged, or it was not.

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¹³ (1751) 2 Ves Sen 125 at 156, 28 ER 82 at 100 ff
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third respondents

This pleading was prepared by Nemeer Mukhtar QC and Philip Crutchfield of Counsel.