

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
Auckland OFFICE

BETWEEN Jackel (NZ) Limited (Applicant)

AND Craig Ireland (Respondent)

REPRESENTATIVES Maria Berryman and David Campbell for Applicant
Peter Davey for Respondent

MEMBER OF AUTHORITY Janet Scott

INVESTIGATION MEETING 2 – 4 August 2004

DATE OF DETERMINATION 15 November 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant seeks to recover damages from the respondent for breach of the implied term in his employment contract which required him to act in the best interests of the applicant honouring his duty of fidelity and good faith.

The respondent's position is that the applicant's claims against him are exaggerated and that his conduct has not caused it to suffer any loss.

Background

Jackel (NZ) Ltd (Jackel) was described by the applicant as a small sized company that specialises in marketing branded consumer products through traditional retail outlets in pharmacies, supermarkets and large discount stores. Among other products the company imports, distributes and markets are baby feeding and accessory products in the brand names Tommee Tippee, Nuborn and Playpath. The Tommee Tippee brand is the market leader and has been for many years.

In May 1993 Craig Ireland was employed by the respondent as its Managing Director. At the time of the events in question Mr Ireland's package included a salary of \$133,000 pa which included a director's fee of \$12,000 pa.

On 31 January 2003 Mr Ireland sent an email to Paul Turner, a business consultant who provides business management advice to Jackel (NZ), advising that his wife Pauline had set up a business (IHL Ltd) to import and supply to The Warehouse Ltd (TWL) a range of baby accessories.

Jackel commenced an investigation into IHL's activities and Mr Ireland's involvement in IHL. That investigation culminated in a disciplinary meeting with Mr Ireland to inquire into the extent of his involvement in IHL and Jackel's concern that an actual or potential conflict of interest may exist between his relationship with and involvement in IHL and his role as Managing Director of Jackel.

As a result of its investigation Jackel arrived at the position it had lost all trust and confidence in Mr Ireland and, on 17 March 2003, he was summarily dismissed for serious misconduct.

Jackel now seeks to recover damages, for profits lost as a result of Mr Ireland's activities in breach of his contract, and exemplary damages. Jackel also seeks to recover expenses it has incurred as a result of Mr Ireland's breaches of duty.

Evidence

***Note:** It has been Mr Ireland's position (from the time he advised Mr Turner of the existence of IHL and its activities through to the investigation meeting - 17 months) that his involvement with IHL did not place him in breach of his duty of good faith and fidelity to Jackel (albeit he seems to accept that IHL's non branded bottles did compete with the corresponding Jackel items). However, in response to questions from the Authority member very early in it's questioning of Mr Ireland he admitted he had, through IHL, competed with his employer Jackel. This admission was followed by equivocation and backtracking by Mr Ireland.*

There was some debate about the merits of moving straight to an assessment of damages. In the event, however, the Authority did question Mr Ireland further on the subject of his alleged breach of duty.

At the close of the investigation meeting I proposed to the parties that, given Mr Ireland's oral admissions, the determination on this matter should address only the quantity of damages. The parties were requested to address the Authority on this.

However, having reflected on the issue, I decided that given the equivocation by Mr Ireland and his attempts to minimize the impact of his admission of breach e.g. "It wasn't deliberate", "I didn't know I was not allowed to compete" it was necessary, for the sake of completeness, to consider all the evidence i.e. that going to the allegations of breach of duty and that going to the assessment damages. I have, therefore, set out the evidence and made formal findings of fact on the question of breach of duty prior to considering the question of damages. Consistent with this approach I have included summaries of the evidence of both parties going to the alleged breach of duty. Along with the summary of Mr Ireland's written brief of evidence going to this topic, I have summarised his oral evidence.

The principal witnesses (Mr Turner and Mr Ireland) each submitted evidence in reply to the other's evidence. I have not summarised their evidence in reply. It will be noted where it is relevant to my findings.

Applicant's Position - Breach of Duty

There was one witness for the respondent on this issue. This was Paul Turner. He is a business consultant who has (since 2000) provided business management services to Jackel (NZ) Ltd pursuant to instructions from the Director (Cesar Esterman¹) of Downtown House (No.39) Ltd which is the sole shareholder of Jackel (NZ) Ltd.

Mr Ireland –Terms of his Employment and Job Responsibilities

Mr Turner's evidence canvassed Mr Ireland's role and responsibilities as Managing Director of Jackel, the events leading to Mr Ireland's dismissal and the investigations undertaken by Jackel to establish the nature and extent of Mr Ireland's breaches of the duty of fidelity that was an essential feature of the employment relationship and his duty as a company fiduciary. He also set out the results of the company's investigations

Mr Turner's evidence was that Mr Ireland was employed by the applicant in the position of Managing Director. He was employed pursuant to a written employment agreement dated 20 May 1993. Among other responsibilities described in the employment agreement Mr Ireland was to:

- Maximise the sales and profitability of brands under the company's control; and
- Control and direct all day to day activities of the company.

Note: Three months notice of termination was required under the terms of the contract. The contract did not contain a restraint of trade provision.

In addition to the responsibilities specified in his employment agreement Mr Turner described Mr Ireland as being solely responsible for control over sales, marketing, financial and warehousing operations; the sourcing of new products; selection of products for importation and sale; decisions as to purchase and sale prices; selection of products to be shown to clients; marketing, advertising and all purchasing decisions. Mr Ireland also had responsibility for all human resources matters in respect of the company's NZ operations.

As Managing Director Mr Ireland was responsible for:

- Promoting and maximising business opportunities for Jackel.
- Preparation and tabling at Board meetings business and strategic plans and any other opportunities available to Jackel.
- Maintaining the financial security of the company and protecting its assets.

It was submitted for the applicant that Mr Ireland had an implied duty of fidelity and good faith. It was also submitted that as Managing Director of the company Mr Ireland was a fiduciary and was required to act in the best interests of the company in accordance Cl. 17.3 of the Company Constitution which states:

“A director, when exercising powers or performing duties, must act in good faith and in what the director believes to be in the best interest of the company”

¹ Mr Esterman has been unable to assist the investigation because he died on July 21 2002

Board Records

Mr Turner gave evidence that he has attended Board meetings since 2000 and that he has inspected the minute book and statutory records of Jackel. There is no record in these sources of any disclosure by Mr Ireland that he proposed directly or indirectly to import/sell products in NZ or that he was a director or shareholder or had an interest in any company (other than Jackel (NZ) Ltd and its associated companies). Neither had he found any resolution of directors authorising Mr Ireland to act as a director of IHL or to acquire shares in that company or to disclose information about the affairs of Jackel other than to officers and employees of Jackel in the course of their employment or to set up a business which would or would be likely to compete with Jackel or to use information other than for legitimate purposes associated with Jackel's business or to use Jackel's information/resources to compete with Jackel or cause it detriment.

At the investigation meeting (2-4 August 2004) Mr Turner introduced the Board minutes of 17 November 2002. There was an objection to the introduction of these minutes given their eleventh hour appearance. Mr Turner explained the minutes contained a record that was highly relevant to the investigation. The entry had only recently come to light. I admitted the evidence in question (J/E).

In the minutes of the Board meeting of 17 November 2000 Board members including Mr Ireland are recorded as discussing "Opportunities" (5.2 p.4). Listed is the result of discussions on the various ways to obtain new retail space. Listed at no.8 is the following:

TWL Opportunity of TWL imports changed over to TT (Tomme Tippee) lines.

An accompanying Opportunity Action Plan details that Craig Ireland and another employee were to meet with the buyer (TWL) to promote this initiative by the end of February 2001.

Mr Ireland's email of 31 January 2003

Mr Turner described receiving an email from Craig Ireland dated 31 January 2003 (J 5).

In that email Mr Ireland informed Mr Turner that his wife had set up a business to supply a range of 'bottom end' baby accessories to TWL.

He advised that the opportunity had originally been presented to Jackel but when Mr Ireland had advised Mr Esterman of the opportunity, Mr Esterman had turned it down. According to Mr Ireland's email Mr Esterman had rejected the proposal on the grounds "*that unless we can brand it TT (Tomme Tippee) we would not be interested*".

According to Mr Ireland's email a subsequent approach by TWL was also declined by Mr Esterman. Mr Ireland's email went on to say that following this, a close friend² (who was, at that time a merchandise manager for TWL) had approached his (Mr Ireland's) wife, Pauline, requesting her to import the items it sought. Mr Ireland advised that at that point he and his wife discussed it but said no. He advised the friend had persisted and indicated "*a bottom end baby range was also on the planning board*".

Mr Ireland said he approached Cesar Esterman on the subject again in May 2002. Again the opportunity was declined.

² Mr Allen Court – a witness for Mr Ireland.

As a result, Mr Ireland advised, his wife had set up IHL (NZ) Ltd and was working with TWL to import items on their behalf. This, he advised, was a part time operation which worked around her varsity studies. Four items had hit the market in September 2002 and Mrs Ireland had now developed a baby range which was about to be launched – comprising an additional 8 items. It was advised that Mrs Ireland also had listings with The Baby Factory.

Mr Ireland advised that he did not consider that these items would impact Tommee Tippee as TWL had run similar products for the last four years and Jackel's business kept growing. He closed the email "*Thought you should be informed*".

Jackel's Investigations and the Dismissal of Mr Ireland

Mr Turner's evidence was that he spoke to Mr Ireland following receipt of the above email. During the conversation Mr Ireland stated that he had no involvement in IHL, that it was Pauline's company and that he did not want to have any involvement. Mr Turner's evidence was that he made no negative comment about IHL as he was endeavouring, at this stage, to obtain more information from Mr Ireland to fully understand the situation.

Jackel's enquires revealed that IHL (NZ) Ltd had been incorporated on 11 June 2002. Craig Ireland was listed as a director of the Company. Mr Turner gave evidence that he knew that Mr Ireland had resigned as a director of the company on 12 June (although this resignation was not filed with the Companies Office until 7 October 2002). Mr Turner's evidence was that, as of the date of the disciplinary meeting (17 March 2003), Mr Ireland remained a shareholder of IHL – he and his wife owned 250 shares each. This was contrary to information given at the disciplinary meeting that Mr Ireland had transferred his shares to Mrs Ireland on 12 June 2002.

Mr Turner gave evidence that on 3 March 2003 he gave Mr Ireland a letter from Sandra Archer (a director of Jackel). Mrs Archer requested information from Mr Ireland relating to:

1. The fact he had failed to disclose in his email to Mr Turner that he was a director and shareholder in IHL. Mrs Archer stated she had a preliminary view that this non-disclosure conflicted with Mr Ireland's duties to Jackel as a director and an employee.
2. The reason he did not seek approval from Jackel's Board prior to setting up IHL.
3. In relation to TWL and The Baby Factory information on -
 - Conversations with representatives of those companies in respect to the supply or possible supply of goods.
 - Supplier details in respect to supplies sold to those companies.
 - Trading terms between IHL and the named companies
 - Products sold to the named companies by IHL.

Mr Turner's evidence was that when he gave this letter to Mr Ireland, Mr Ireland offered an explanation. Mr Turner stopped him and asked him to make his explanation in writing within 7 days. However, Mr Ireland did say "*that his time and involvement was only 5%*". Mr Turner submitted this was a different position to that communicated to him by Mr Ireland in the phone call which followed Mr Ireland's email of 31 January.

The evidence shows that on 10 March Mr Ireland responded through his solicitor to Jackel's letter of 3 March (J 10). Mr Ireland's responses were:

1. He had no involvement in either the setting up or running of IHL.
2. IHL is managed by his wife Pauline.
3. Craig had only been recorded as a director of IHL due to the Mr Ireland's mistaken belief at the time of registering the company that more than one director and shareholder was required.
4. Cesar Esterman had expressed approval and support for Pauline's business proposal and had no concerns for Jackel.
5. Craig had kept the company informed via email as a courtesy.
6. Craig has been a loyal and energetic employee of Jackel. He had always and continues to act in the company's best interests and has striven to maintain and develop the company's business in New Zealand.

Mrs Archer was not satisfied with the above response and Mr Turner was directed to meet with Mr Ireland to discuss further his involvement in IHL. That meeting, which took the form of a formal disciplinary meeting, occurred on 17 March 2003. Mr Ireland had been advised of the seriousness of the matter and his right to representation. Both parties had legal representation at the meeting.

Prior to that meeting Mr Turner had a meeting with Peter Jackson (Jackel's Sales Manager – Non Pharmacy). Mr Jackson advised him that at the end of January (one day prior to Mr Ireland's 31 January email to Mr Turner) he (Mr Jackson) had gone to see Mr Ireland to tell him he had seen a large, well presented new baby brand on the market. It was called First Steps and it had been given prime position at The Baby Factory in Albany. Craig had told Peter Jackson that he would find out who was behind it. The next day Mr Turner received Mr Ireland's email to informing him '*of his wife's activities*'. Mr Turner's evidence was that he believed it was Peter's discovery of the First Steps products on the market that prompted Mr Ireland's email because it would only have been a matter of time until Mr Jackson discovered who was behind the range. On this point Mr Turner noted that Jackel would usually respond to a new competitor by finding out as much as possible about it, it would promote Tommee Tippee's features to retailers or offer alternative products. Mr Ireland took none of these steps because he was behind IHL's entry into the market.

Mr Turner submitted that Mr Jackson also advised the following:

- He had been present when Mr Ireland made a presentation on IHL products to a buyer at TWL and provided him with a submission document. This was done in Jackel's time and prior to the meeting with the buyer Mr Ireland had advised Mr Jackson he may need "*to close his ears*" during the meeting.
- He had received a phone call from a Leon Roff at Foodstuffs, Wellington regarding First Steps samples that had been sent to him by Craig Ireland.

Mr Jackson was requested to put all this in writing which he did. That document was submitted in evidence (J 13).

Mr Turner contacted Mr Roff. That conversation took place on 17 March. As a result of their conversation Mr Roff agreed to provide a written statement. (J 14). Mr Roff's statement advised:

- He had received a call from Mr Ireland about five weeks previously. A new brand "First Steps" was discussed.
- Mr Ireland led him to believe it was a bottom- to-middle end Jackel range.
- Mr Roff agreed to look at the range and he had received samples accompanied by a letter from Craig.
- He had believed at all times this range was a Jackel range bearing in mind it had been introduced to him by Craig Ireland.

Mr Turner subsequently obtained the letter which had accompanied the range sent to Mr Roff. (J15). That letter (dated 2 March and signed Craig Ireland, IHL (NZ) Ltd) commenced:

Dear Leon,

Several weeks ago I discussed with you a little venture my wife Pauline and I have started.

In September last year we formed a company called IHL (NZ) Ltd, importing and distributing quality baby accessories at affordable prices. Our philosophy is to offer the consumer good quality, fashionable colours and prices under \$4.99 retail.....

Over the last three years I have highlighted this gap to the Jackel NZ board and to the owner of Tommee Tippee brand. Each time it has been raised I have received a firm "no interest". Time to do it ourselves was the outcome.

.....

Mr Ireland went on to describe the market and introduce the 23 lines IHL had to date (the letter was accompanied by a sample of these products and a colour brochure) and left it to Mr Roff with a statement he would appreciate his thoughts and assistance.

At the disciplinary meeting held with Mr Ireland on 17 March discussions between the parties focussed on the following. (See the minutes of that meeting which were confirmed by Mr Ireland as being an accurate record of discussions between the parties (J16)).

- Mr Ireland's conversations with Cesar Esterman (when and in what circumstances did they take place).
- Mr Ireland's involvement in IHL.
- Whether he considered there was a conflict of interest; and
- Why he had waited until 30 January 2003 to tell Jackel about it.

Mr Turner selected certain statements made by Mr Ireland during that meeting and highlighted them in his evidence.

- *"I was never concerned that there was a conflict"* (between Jackel and IHL).

- *“I find it strange that you think that I would kill something that I have worked 10 years for. Tommee Tippee is a passion not a job”.*
- *“I emailed Paul in January that we were adding products to be launched in early February”.*
- *“That was totally up to Pauline, as it is her business”.*
- *We are not offering competition; we are simply fulfilling the Warehouse’s need.*
- *“I do not believe that IHL is competing”.* (And when Paul Turner made a comparison between Jackel’s brush and comb set and that of IHL) Mr Ireland’s response was *“Yes, they may be the same, but that is the only product you can pick on”.*
- *“I have virtually nothing to do with Pauline and IHL. I don’t want to help”.*
- *“I’ve been as honest as I can up to this point. It is Pauline’s business, she is driving it, and everything is her call”.*

Mr Turner also referred to Mr Ireland’s statement at this meeting that Cesar Esterman had had no issue with his advice that Pauline had set up a company to import the original four items requested by TWL. (J16/1).

Mr Turner’s evidence was that having known Cesar Esterman for some 12 years before his death it would have been totally out of character for him not to have mentioned such a discussion. He did not believe that Cesar would have agreed (or failed to object) to Craig being involved in a competing company and had Cesar known of the full extent of Craig’s intentions he would certainly have objected to it and raised Craig’s obligations of fidelity and good faith to Jackel. He would also have advised the other directors of Jackel.

During the disciplinary meeting Mr Roff’s written statement and Mr Ireland’s letter to him were put to Mr Ireland and an adjournment was allowed to enable him to consider it. In response Mr Ireland continued to hold he had no involvement in IHL, that he simply wanted Leon’s professional opinion and that Pauline had written the letter to Leon Roff. He also said:

- *“it could be interpreted”* (that the letter had been from him); and
- *“Pauline put the letter together, I just signed it”.*

A similar process was followed in respect of the written statement provided to Mr Turner by Peter Jackson (J13). By way of example, I note that Mr Ireland responded to Mr Jackson’s statement that in February 2002 Mr Ireland had, following a meeting scheduled with TWL in relation to Jackel products, produced a schedule of IHL products for the buyer. Mr Ireland admitted that he had dropped off a submission for IHL. He advised that Pauline had been unable to do it so since he was going to be there he did it. He said *“David is a buyer and therefore he is God. I would have done anything for him. He asked, so I did it”.*

Mr Ireland denied that it was the conversation with Mr Jackson on 30 January (regarding the new baby range) that had prompted his email to Paul Turner. He said that the email was prompted by the fact that TWL wanted more products and this changed the situation he had advised to Cesar Esterman.

Mr Ireland also denied the incident reported by Mr Jackson in this written statement that Mr Jackson had been approached by a business person (Warren Cavanagh) at the opening of a new baby store in Botany Downs who had explained to him that Craig Ireland had approached him (Mr Cavanagh) over the Christmas period 2002 and had shown him samples of IHL products one of which he had compared with a Jackel product and highlighted the price differential between the products.

Following an adjournment Mr Turner considered the information before him. Peter Jackson's statement and the fact that Craig had written to Leon Roff on 2 March enclosing products for consideration confirmed to Mr Turner that Mr Ireland had deliberately lied throughout the investigation. This, and the fact he admitted he would provide The Warehouse buyer with anything he could get his hands on led him to believe that Mr Ireland had breached the obligation of good faith he owed to Jackel and the duty of fidelity he owed as an employee and Managing Director of Jackel. It was decided Jackel could no longer have trust and confidence in Mr Ireland and he was summarily dismissed for serious misconduct.

Report on the Forensic Investigation of Jackel's Computers

Mr Turner's evidence was that following Mr Ireland's dismissal it was decided, following consultation with the company's directors and legal advisors, that it was necessary to undertake further investigations into Mr Ireland's involvement with IHL. Jackel knew that Mr Ireland had been involved in setting up and promoting IHL for nine months prior to his dismissal. He had knowledge of Jackel's confidential information including costings, detailed accounting information, future plans, budget forecasts, customer profiles and pricing policies. There were concerns that Mr Ireland may have breached his duty of confidentiality whilst employed by Jackel in using this information to assist in the formation and trading of IHL. As a first step Daniel Ayers at McCallum Petterson was requested to carry out a forensic search of the Jackel computers used by Mr Ireland at work and at home. The following documents were found and produced by Mr Turner and described by him in his evidence.

- 6 IHL purchase orders dated from 18 July 2002 to 10 April 2003 with estimated delivery dates from August 2002 to May 2003 (J20).
- A First Steps Baby Price List dated November 2002 which listed 23 items (J21).
- A (IHL) submission to TWL prepared in November 2002 for March 2003 delivery which listed 19 items with bar code, purchase and selling price and packaging sizes (J22).
- Another similarly detailed submission to TWL dated January 2003 for February/March 2003 delivery which included the date the products would be in stock (J23).
- IHL unit budgets for April 2003/ March 2004 which had a run date of 20 November 2002 (J24).
- A Foodstuffs submission dated January 2003 detailing 23 items (J25).
- An IHL price list dated January 2003 detailing 22 new items for release or delivery in July/August 2003 (J26).

Also found on the computers were a large number of email exchanges between Craig Ireland and his suppliers in Thailand, Royal King Infant Products and other email exchanges relating to IHL's business. Mr Turner's submitted these emails confirm the time and energy spent by Craig Ireland in pursuit of IHL interests.

The emails included the following:

To Sudraker Rao in Sydney - 20 August 2002.

Dear Sud....my sincere apologies, after I phoned you in Sydney things turned into a bucket of worms and I was pleased to get home. Since then I have been totally focussed on getting the business up and running plus getting ready to move house and then to top it all off of course Jackel has absorbed the rest of my time.

.....

My next trip to Sydney is on Monday September 9th. Can we arrange dinner that night. I would dearly love to catch up and fill you in on our progress to date and more importantly discuss the opportunities going forward.....

.....

Sud, again, my sincere apologies for not contacting you, I know you understand time means nothing when you are in set up mode.

To Wachira at Royal King in Thailand - 9 Oct 2002.

Dear Wachira, Thank you for your time during my recent visit to your company. It was a pleasure to finally meet with you and your team. I trust you now have a better understanding of who IHL is and where we are going.... before we move into the next phase I wish to confirm with you the price changes you agreed at our meeting.... (items listed)..... We now want to move into the next phase. We have selected eight products. They are...(items listed)... Our time plan is to start the development work in October, finalize early November, ship around mid to end December and launch here in February 2003.

With regard to the above email Mr Turner submitted that all the items listed in this email were items that Jackel sells.

To Wachira at Royal King - 2 November 2002.

Dear Wachira, if I predict it correctly, we only need to hold these prices for a year, long enough to take Tommee Tippee cheap bottles off the market and allow them to concentrate on the middle to top, while IHL owns the bottom to middle ground. Any assistance you can offer will only be needed for the first-year to establish ourselves with the buyer, after that you will be able to revert back to current pricing. Let's call it an investment on both our parts to capture a market dominated by Tommee Tippee.

To Wachira at Royal King - 2 November 2002 (on the subject of cheap bottles).

For IHL to capture this market, we need to price point the single bottle shrink wrapped with latex teat at a retail of \$1.99, the 2 pack \$3.99 and the 3 pack at \$5.99. Tommee Tippee dominated this market with prices of \$2.50 for a single, \$4.99 for a pack of two and \$6.99 pack of 3.

To Parisee at Royal King - 25 November 2002.

I will be emailing you tomorrow our official order,.... I will need to transfer the money by Thursday 28th latest. We are almost finished with the product specs and colours for the first eight items... We will also send you, where applicable, images of competitive products for a reference to the colours we require. Parisee, thank you for the work, long term it will pay off for us both.... I have just received an email from Mark Deller, to date he has not received the brochure you were to send to him. Can you please follow this up and send as soon as. I have a meeting with him in and Newcastle, Australia next week and on the agenda is the development of baby ranges in both countries.

To Dean Osmond 25 Nov 2002.

Thanks, sincerely for the update. Was wondering how the visit went. Things are starting to gain momentum. IHL is up and running, four products only at this stage, and after three months trading. we are showing a small loss. A little better than we budgeted. The drive forward will occur in March 2003, we plan to introduce 20 additional products. Two major retailers have accepted all items and that will give us 100 retail outlets. Once they are launched I will visit the other major accounts and present the range. After that phase three is underway with an additional 12 items for June launch. All happening, a little quicker, than planned, the only person who will benefit from all this is my bank manager. I plan at that stage to be out of JNZ, would rather put 100% into my own pocket than Sandy's. Are you in Sydney, Tuesday, November 3rd. Would love to meet you for lunch if that was possible.

To Mark Deller of 3P Pty Ltd., Australia (a supplier of some products to Jackel) 31 Jan 2003³.

What we intend to do is employ someone to work with Pauline, and I will continue on at Jackel for as long as possible to allow us to build up cash in the business. We are looking at the second round of products in August, a good time for me to reconsider my position. This will allow me to continue selling IHL product to majors and will give Jackel the privilege of paying for my trips to see suppliers.

Drawing on the information recovered from the company's computers relating to Mr Ireland's activities in respect of IHL business Mr Turner highlighted the following:

- The IHL First Steps baby price list, dated November 2002 (J21) detailed the selling price and suggested retail prices of 23 products. The IHL First Steps baby price list, dated January 2003 detailed the selling price and suggested retail prices of an additional 22 products, for release in July/August 2003. This would make the total number of products, 45. This latter price list also contained a comparison the between the selling price of the IHL product and that of the comparable Jackel product.
- By comparing IHL's price lists and its projected unit budget (J 24) for the year April 2003/March 2004 with Jackel's price lists (J A & B) it can be clearly seen that Craig through IHL competed directly with the products Jackel sold. IHL products are identical to Jackel's. Mr Turner introduced photographs of Jackel/Tommee Tippee products to highlight the similarity between the products as proof that IHL products serve the same purpose as Jackel's products.
- It appears that IHL was predominantly run on Jackel's computers, including the computers which Craig had at his home. This illustrates that Craig used Jackel's resources and time to set up IHL and compete with Jackel. Approximately 250 pages of emails were found - between Craig and his supplier Royal King Infant Products and between Craig and other parties interested in IHL and First Steps. The comments Craig made in these emails illustrate Craig's devotion to IHL and confirm the time and energy spent in promoting IHL products.
- The emails between Craig and Royal King in Thailand show that the Craig was in frequent contact on the subject of prices, existing and possible new products, delivery schedules,

³ This email shows that the launch of phase three, had moved out to August 2003.

colours and packaging. Craig was heavily involved in the day to day running and strategic planning of IHL - much more than he 5% he claimed in March 2003.

- The email that concerned Jackel the most was Craig's email to his supplier (2 November 2002 p.10) in which Craig spelt out his intentions to take Tommee Tippee bottles off the market. He called on the supplier to reduce the price at which he supplied the products and asked the supplier "*to call it an investment on both our parts to capture a market dominated by Tommee Tippee*".

Other issues pertaining to the applicant's allegations that Mr Ireland was in breach of his duty of good faith and fidelity

Deletion of Jackel products: It was Mr Turner's evidence that TWL delisted Jackel's cheap bottles in January 2004 and it subsequently carried IHL's equivalent bottles. He submitted that the result of having your product delisted is that TWL no longer purchases the product and you lose sales on that item. Mr Ireland had the explicit responsibility of maximising the sales and profitability of brands under Jackel's control. He did not use his best endeavours to ensure Tommee Tippee cheap bottles were retained by TWL. He did use his best endeavours to ensure IHL's equivalent product was '*established with the buyer*'...*to capture a market dominated by Tommee Tippee*'. (Email to Wachira at Royal King dated 2 November 2002 p.10). This email gives lie to Mr Ireland's statements that he was trying to protect Jackel and was not competing with Tommee Tippee. It shows an express intention to undercut Jackel's bottles.

Another example of Craig's involvement in the deletion of Jackel products from TWL is that relating to *bottle banks*. These are unbranded baby goods contained in an oversized baby's bottle. They were very popular with new mothers and as gifts. Mr Turner's evidence was that Jackel sold 80% of its bottle banks to TWL. If TWL did not purchase them then Jackel would not be able to import them for any customer.

Mr Turner said that he had a meeting with Craig Ireland on 4 March to review the 2004 draft sales budget. He asked Mr Ireland why there were no budgeted sales for the bottle banks. Mr Ireland's response was that Jackel could not meet the MQO (minimum quantity order) of the supplier and the price was becoming too high to meet the recommended retail price required by TWL. Mr Turner's evidence was that he told Craig that Jackel could not afford to let this business go and he had to find a way to keep TWL happy even if Jackel had to order more stock or lower its margin to sell to TWL. Craig said he would see what he could do.

It was Mr Turner's evidence that there were a number of ways around the MQO problem and Craig could also have asked Jackel Australia to assist in negotiations with the supplier. Craig did not resolve the problem. Subsequently, Jackel Australia's Operations Director negotiated a successful outcome with the supplier.

However, in July 2003 Jackel discovered that TWL had delisted this product in March 2003⁴. It was replaced by an identical looking product supplied by IHL.

Mr Turner gave similar evidence in respect to Jackel's *easy grip fork and spoon*. This was delisted with TWL in about December 2002. It was delisted by Craig Ireland as he had decided not to negotiate the necessary requirements with the supplier to ensure its continued supply. IHL supplies an identical product to TWL⁵

⁴ Despite being delisted in March 2003 some orders were placed up to June that year because of a computer glitch at TWL.

⁵ IHL commenced supplying this item to TWL in January 2003.

Jackel's Gel Soother did not get off the ground: Mr Turner gave evidence that in the latter part of 2002 Jackel decided to launch a new patented soother product (*gel filled soother*) which it had acquired the rights for from a manufacturer in the United States. The product offers a number of advantages over the water filled soother and Jackel was expecting to make large sales on it when it was launched in early to mid 2003. When Jackel showed this product to buyers they were told they had already seen and ordered a gel filled soother from IHL. The IHL price list of November 2002 (J 21) and emails in October that year (J 30/p.37) refer to this item⁶.

Pursuit of IHL interests in Jackel's time: It was Mr Turner's evidence that not only did Mr Ireland make contact with the buyers David Camps at TWL and Leon Roff at Foodstuffs he also make contact with Anne Warwick a buyer at Foodstuffs, Auckland. That meeting, was originally scheduled for 22 January 2003 when Peter Jackson, the manager who would normally deal with that buyer, was on a holiday. However, that meeting was postponed by Anne Warwick and it eventually took place on 28 January. Pauline Ireland also attended that meeting. It was Mr Turner's evidence that Craig and Pauline Ireland presented IHL's First Steps brand at this meeting. This again demonstrates how Craig was using Jackel's time and resources and contacts to start up IHL and compete directly with Jackel.

On the 22 January 2003 David Camps, the TWL buyer with whom Craig maintained contact, emailed Ewan Jones TWL Australia to introduce IHL. Craig followed this up with an email and suggested meeting with Ewan to detail the IHL range and pricing to him. Craig was still employed by Jackel at this time and this trip was planned to coincide with a planned Jackel Board meeting to be held in Sydney to present the 2004 Business Plan and Strategy. All costs for this trip were met by Jackel. This is another example of Mr Ireland, using Jackel's time and resources to gain a benefit for himself and IHL. Mr Turner submitted, Mr Ireland should have been attempting to pass on this potential business opportunity to Jackel Australia rather than taking for himself.

Mr Turner submitted evidence going to the applicant's claim that Mr Ireland visited or attempted to visit IHL suppliers during Jackel's time, and on trips paid for by Jackel e.g. Mr Ireland's trip to Thailand in October 2002 where he met with Wachira from Royal King. It is apparent from the dates of emails relating to this visit that the visit was conducted in Jackel's time and using Jackel's resources to get him there. Mr Ireland was on a Jackel trip to see Jackel's suppliers. Similar evidence was led by Mr Turner in respect of a planned visit to the Hong Kong Toy Fair. Mr Ireland was to have attended this fair and he was to look for possible products to purchase for Jackel and to meet Jackel's Asian suppliers and other strategic partners. In the event, Mr Ireland did not attend the show, because of the death of a close family friend in New Zealand. Mr Turner noted that Mr Ireland was anxious to attend this fair even though he would have arrived when it was more than 80% over. For this reason the Jackel trip was cancelled.

Concerns over copyright: Mr Turner gave evidence that there were three products in which Jackel had the copyright that are now being sold by IHL. These products are the subject of a separate in High Court hearing.

IHL Packaging/Similarity to Tommee Tippee packaging: Mr Turner gave evidence that a bear design is used on some of Jackel's products. He submitted that in all the time that Tommee Tippee products have been sold in New Zealand (for approximately 20 years) a bear has been included on either packaging, catalogues, advertisements or other promotional items. In addition, when a consumer writes to Tommee Tippee and a reply is sent, the letter is signed by Tommee (the bear) with a stamp of his footprint. Mr Turner gave evidence that on all First Steps packaging there is a series of bear footprints on the front of the packaging. Footprints are sometimes included on Tommee Tippee packaging.

⁶ IHL first ordered this item – *star teether gel filled and hand teether gel filled* – on 22 November 2002.

It would seem to be that it was Craig's intention to confuse the customer into thinking they were getting the same product as Tommee Tippee, by copying and mimicking Jackel's packaging. It was Mr Turner's evidence that not only did Craig steal Jackel's sales and business, he also set out to profit from the equity in Jackel's branding. It was Mr Turner's evidence that a customer will feel more assured, where a product is different to that they usually purchase, if the packaging looks very similar to the packaging of the usual product. All IHL's packaging looks strikingly similar to Jackel's from colour (blue) to the shape and placement of bears and footprints.

Use of Jackel's bank, freight company, business systems and stationery: Mr Turner also gave evidence that Craig used the same freight company as that used by Jackel, the same bank, and business banking branch and business banking manager for his IHL business as Jackel and he copied Jackel stationery, templates, submission forms, pricelists, spreadsheets and order forms to conduct IHL business.

Mr Turner summarised his evidence as to Craig Ireland's breaches of his duty of good faith and loyalty to Jackel:

- Cesar Esterman would not have agreed to Craig setting up IHL whilst still an employee of Jackel or (for that matter) to go into competition with Jackel and there is no evidence to support Mr Ireland's evidence that he did take it up with Cesar Esterman and obtain his approval.
- It was simply not Craig's prerogative or right as Managing Director of Jackel to claim that as Jackel had declined the opportunity to supply products to TWL, that he was entitled to set up IHL to compete with Jackel. That is a breach of his duty as a director and employee of Jackel.
- Despite the overwhelming evidence to the contrary (emails, statements obtained from buyers and other employees etc) Mr Ireland had claimed he "*absolutely knew of his obligation of good faith and that he was trying to protect Jackel from rubbish products*"⁷. He had also stated that he found it strange "*that you would think I would kill something that I have worked 10 years for, Tommee Tippee is a passion not a job*".
- As a result of Craig's actions Jackel has suffered substantial losses. Mr Turner gave evidence that through Craig's actions 13 products had been deleted by TWL and replaced with IHL products. Jackel had also suffered losses through lost sales as a result of Craig's launching comparable IHL products which directly competed with Jackel products. (Mr Turner's evidence as to the financial losses suffered by Jackel, as a result of Mr Ireland's actions, is covered below (15)).
- Mr Ireland's activities over the last 9 months of his employment in setting up in direct competition with Jackel are incomprehensible to Jackel. In this regard it was noted that in 1999 Mr Ireland suffered a heart attack. Jackel had supported him and his family with 12 weeks paid sick leave as Jackel wanted to support a senior employee. This slowed the growth Jackel was enjoying at that time.

⁷ Statements made by Mr Ireland at the disciplinary meeting held on 17 March 2003.

Applicant's Position –Loss of Profits & Damages Sought

Mr Turner gave evidence on the losses suffered by Jackel as a result of Mr Ireland's activities in breach of his duty of fidelity. He submitted that Mr Ireland's actions have had a major impact on Jackel. It has resulted in loss of profit that Jackel relies on and has affected the continued economic productivity of the company. In addition Jackel has incurred large expenses in trying to stabilise the company's position. There is also the impact on the business from lack of stability, loss of direction and significant staff uncertainty that has resulted from Craig's actions. It is also Jackel's view that it should be compensated for the damage to its good will and relationships with existing clients with whom Craig dealt with in the course of his employment with Jackel.

Lost sales and loss of profit

Mr Turner gave evidence of the lost sales to Jackel through TWL. He described those lost sales under two heads:

- Losses suffered by Jackel through the deliberate, planned actions and involvement by Craig Ireland in the deletion of 13 of Jackel's products and their replacement with comparable IHL products. Mr Turner submitted that Jackel's annualised lost sales under this head amount to \$132,927 and Jackel's lost profit on that sum (measured by applying Jackel's gross profit rate to sales lost (58%) is \$77,098.
- Losses suffered as a result of Craig Ireland launching comparable IHL products that were planned and developed whilst he was employed by Jackel as its Managing Director. Mr Turner submitted that Jackel's annual lost sales under this head amounts to \$59,910. The lost profit is \$34,737.

Mr Turner introduced a bundle of photographs of Jackel products alongside the comparable IHL product to demonstrate the similarity between Jackel's products and those of IHL. (J8/J37).

On the matter of the period of loss for which Jackel seeks compensation in respect of the profits it has lost Mr Turner traced the history of Mr Ireland's involvement with IHL in directly competing with Jackel whilst employed by Jackel. Mr Turner submitted that it took Mr Ireland 14 months from the time IHL was incorporated until the products from IHL's second price list (prepared in January 2003) were delivered to TWL in August 2003. Accordingly, in addition to the loss Jackel seeks for the profit IHL made whilst Craig was still an employee, Jackel believes Craig should also be liable to compensate Jackel for ongoing profit for the products he listed whilst still an employee of Jackel and for a period of 14 months after his dismissal. (In its submissions Jackel seeks compensatory damages for a period of three years).

Compensation for other costs incurred by Jackel as a result of Mr Ireland's breach of fidelity

Mr Turner also submits that Jackel should be compensated for 1/3 of Mr Ireland's salary, car expenses, telephone and other expenses incurred by the company between June 2002 and 17 March 2003 when Mr Ireland was dismissed (\$126,454). In return for his salary Mr Ireland was expected to devote all his time to Jackel. It is clear on the evidence, however, that Mr Ireland was focussing on the setting up of his own business. Jackel claims 1/3 of salary and other expenses incurred in supporting Mr Ireland i.e. \$42,109.

Mr Turner also submitted that Jackel should be compensated for ½ of the cost the company incurred in respect of two trips made by Mr Ireland and paid for by Jackel where Mr Ireland met and did business with suppliers and other interested parties in Thailand and Australia. Claim \$6,880.

Mr Turner submits that Mr Ireland should be directed to compensate Jackel in full for the costs associated with

- The forensic examination of Jackel's computers which were used by Mr Ireland - \$11,725.
- Legal expenses associated with the termination of Mr Ireland's employment - \$15,886.
- Expenses incurred in regard to advertising for a new Managing Director - \$1,771.
- Fees paid to Turner Business Consultants to investigate Mr Ireland's actions and deal with his deliberate attempts to cause Jackel financial damage - \$ 72,755.

Exemplary damages

It is Jackel's view (submitted by Mr Turner) that Mr Ireland should be penalised for his intentional damaging and dishonest conduct in setting up IHL whilst an employee of Jackel, using Jackel's confidential information and actively competing with Jackel whilst employed the position of most trust in the company – Managing Director. The company considers Craig's conduct in breach of his contract was outrageous and flagrant and is deserving of punishment. His competing was deliberate, substantial and ongoing and what made his conduct even worse was his dishonesty when approached by the company regarding his actions.

Steps Taken by the Company to Mitigate Loss

Mr Turner's described the steps taken by the company to mitigate it losses. He said that he and Peter Jackson personally visited all key clients in the North and South Island to support to those clients and to provide information on the level of service Jackel could provide. They tried to evaluate the impact of IHL on Tommee Tippee products and adjusted the prices of products accordingly. In some cases Jackel's sales increased but returns decreased.

Mr Ireland had to be replaced and Mr Turner also commenced the search to fill the role. That person did not commence his employment until late July 2003 and Mr Turner's role from March 2003 until the July 2003 (in addition to investigating Mr Ireland's activities) was to provide stability to the business both internally and externally.

When the new Managing Director commenced his employment he, Mr Jackson and the new Managing Director went on a tour of the North and South Island to meet with all Jackel's key customers. After this (mid August) Jackel started a review of its product range, prices and advertising.

Expert Witness – Mr Appleby

Note: To avoid confusion I have reported here Mr Appleby's amended evidence which reflected concessions he accepted as appropriate having considered points made by Mr Ireland.

David Appleby appeared as an expert witness for the applicant. His evidence went to the assessment of loss of profit sustained by the applicant company as a result of Mr Ireland's breach of duty. He also submitted evidence on the expenses incurred by the company as a result of Mr Ireland's breach.

Mr Appleby's assessment of Jackel's lost profit assumes that all of the sales made by IHL to TWL and The Baby Factory could have or would have been made by Jackel as part of its normal business. Mr

Appleby based his assessment of Jackel's lost profit on the discovered sales figures for IHL for the three quarters 1 January 2003/31 September increased by an assessment for sales over the Christmas 2003 quarter to arrive at an annualised sales figure for the 2003 year for IHL of \$253,000. He submits \$15,800 should be deducted from IHL's sales figures to account for products imported/sold by IHL for which there is no comparable Jackel product. After this calculation he arrived at a sales figure for IHL for the 2003 year of \$237,000 (rounded).

To this figure Mr Appleby applied Jackel's gross profit rate of 58% to establish Jackel's annual loss of gross profit as a result of Mr Ireland's competitive activity in breach of his duty of fidelity to Jackel - \$137,000 (rounded).

It was Mr Appleby's evidence that having regard to the expansion of IHL's product range and the fact that IHL's sales exceeded its discovered budgeted sales IHL will continue to have a detrimental effect on Jackel's long term share of the market. Mr Appleby acknowledged it is for the Authority to determine what period of loss should be recognised in any award of damages to Jackel. Whatever period of loss is determined it is his evidence that loss should be at the rate of \$137,000 per annum (or \$130,500 per annum if IHL sales of teats are excluded from the analysis⁸).

Finally, Mr Appleby noted that the expansion of the IHL range and sales in excess of budget supports a finding that IHL sales are likely to continue to grow. His assessment was that this likely growth offsets the need to apply a discount factor to reflect net present value.

Respondent's Position - Breach of Duty

There were three witnesses for the applicant – Mr Ireland himself, Mr Court who was a Merchandise Manager for TWL until March 2003 (and a friend of the Irelands) and Mr McCann a former National Sales Manager for Jackel.

Duties and Responsibilities.

Mr Ireland challenged the applicant's evidence as to the level of responsibility for Jackel's business that was reposed in him as Managing Director of Jackel NZ. He submitted that two sales managers and a logistics person had primary responsibility for fulfilling many of the responsibilities described by Mr Turner. He also contradicted Mr Turner's evidence in respect of the degree of autonomy that he enjoyed in the sourcing, negotiating and pricing of baby accessory products. He submitted that he was controlled as to what he could or could not do. He said that in the main, Jackel New Zealand was not involved with that side of the business and Sandy Archer had the final decision as to what products fitted the brand profile. Further, Jackel New Zealand paid Jackel Australia \$120,000 per annum for product development, price negotiation and sourcing. He said that and he had no authority at all to import or sell any product outside existing brands without Mr Esterman's confirmation.

It was Mr Ireland's evidence that it was Jackel Australia's policy to limit its product line to the supply of medium to high priced baby accessory products branded in the Tommee Tippee range. He said there were some exceptions to this rule being the supply of non-branded cheap bottles and bottle banks.

⁸ On the basis these were not contemplated for importation and sale until after Mr Ireland left Jackel.

Proposal by TWL to import baby products .

Mr Ireland gave evidence that in late 2000 Joanne Smith, a buyer at TWL approached him and asked if Jackel would import, on their behalf, a range of four items in the bottom end baby accessories market. TWL had been directly importing a range of the First Steps brand of baby products since the mid-1990s.

Mr Ireland said he could see an advantage for Jackel New Zealand to sell products in the bottom end range. He felt it would keep low quality products from being introduced into the New Zealand market. He gave evidence that he approached Cesar Esterman to discuss this opportunity, and he strongly supported it. Mr Esterman came back to him, some days later, and advised that Sandy Archer had said that Jackel would not be interested unless the products could be branded Tommee Tippee. Mr Ireland described reporting this response back to TWL. He said the issue went away for six months.

Mr Ireland described being approached by TWL again (May 2001) with a request that Jackel import the items sought by TWL. Mr Esterman again declined the opportunity and TWL was advised accordingly. In January 2002 Allen Court, Merchandising Manager for TWL and a friend of the Irelands, suggested to Pauline Ireland (who had extensive experience in the industry) that she import the items requested. At that time the Irelands discussed the proposal and declined the opportunity. However, the matter was raised by Jo Smith again in April 2002 and the Irelands agreed to supply the four products in question. Mr Ireland reiterated at that he did not consider that this meant that they would be competing with Jackel New Zealand, because the proposal put to them involved supplying to the bottom end of the market, whereas Jackel New Zealand was supplying product to the medium-high end. (Mr Ireland did accept IHL's unbranded bottles and bottle banks ordered in January and April 2003 respectively did compete with the comparable Jackel products).

Mr Ireland's discussions with Cesar Esterman & Setting up IHL

Mr Ireland said he could not remember the date when he spoke to Cesar Esterman but he did speak to him. He told Cesar that Pauline was setting up a small company to work with TWL on a range of four products. Mr Esterman did not see any issue with that and suggested that Pauline use one of his companies for that purpose.

Mr Ireland gave evidence that IHL was incorporated by him from his computer at home on a Sunday. He acknowledged this was a computer that had been supplied by Jackel New Zealand and although he had received a letter to say that it was for business use only it had been generally accepted that he and John Montgomery (Financial Director) could use their home computers for private activities. Mr Ireland said that the time IHL was registered he thought it was necessary to have two directors appointed so he put himself down as a director of IHL. He then received advice from IHL's accountant that it was not necessary to have two directors and he resigned the following day. Because of this he did not believe that it was necessary to seek a resolution from Jackel's Board in respect of his directorship of IHL.

Craig Ireland's Involvement in IHL's business & his attention to Jackel

Mr Ireland gave evidence that on 18 July 2002 IHL placed its first purchase order with Royal King. Pauline placed the order. She was responsible for placing orders, looking after the arrival of shipments and delivery to TWL. It was Mr Ireland's evidence at that point they were only looking at supplying those first four products to TWL.

Mr Ireland accepted that in September 2002 he had travelled to Thailand to meet with Jackel's suppliers. He did meet with IHL's suppliers Royal King on that trip. The visit was brief, for the purpose of obtaining a catalogue. Mr Ireland did not accept that this impacted on the business he conducted with

Jackel's supplier. Nor did it cause any additional expense. He visited Royal King during the time he was waiting around to take his flight home.

It was only as a result of this visit that he realized that Royal King, could supply a range of products beyond the four products that IHL had sold to that date. TWL had inquired about obtaining further products through IHL, so Pauline and he selected a further eight products from the Royal King catalogue, and he sent emails to them about these products. He did this from his home computer. It was Mr Ireland's evidence that he did not believe these new products would compete with Tommee Tippee as they were in different price brackets or related to products that were no longer being supplied by Jackel NZ. Mr Ireland submitted some examples to support his evidence that IHL products did not compete with those of Jackel e.g. the Tommee Tippee smiley rattle was a very different product to the IHL product and he noted that the Tommee Tippee brush and comb set retails at \$6.95 whereas the First Steps brush and comb set is only \$3.99.

Mr Ireland confirmed that IHL forwarded its second and third orders to Royal King in November 2002 and January 2003. Mr Ireland said that in January 2003 they had received a list of prices from their Royal King suppliers. These were collated into an internal price list for their reference only.⁹ It was Mr Ireland's evidence that IHL only sold three products from that list i.e. *the easy grip bottle, the sip 'n seal cup and the bottle and teat brush*. (A fourth order was also forwarded in January 2003).

Mr Ireland admitted that in his e-mail to Sudraker Rao (20 Aug 2002 p./10) he said that he had been totally focused on getting the business up and running, moving house and that Jackel absorbed the rest of his time. However, Mr Ireland submitted that he did not believe that his involvement in the IHL impacted on his role as Managing Director of Jackel New Zealand because he attended to virtually all IHL business after working hours, on weekends or public holidays. Likewise his meeting with Sudraker Rao was in the nature of meeting a friend and occurred after business hours

Mr Ireland disputed Mr Turner's evidence that there were 250 pages of the emails relating to IHL business. There was a large amount of duplication in the emails submitted by the respondent in evidence. Mr Ireland's evidence was that he had analysed 40 [out of 48] emails sent by him to Royal King between August 2002 and January 2003. All of them were either sent at night or on public holidays.

Referring to his emails to Dean Osmond and Mark Dellar sent in November 2002 and January 2003 respectively, Mr Ireland acknowledged that it had been his intention to leave Jackel but this did not mean he was not fulfilling his obligations to Jackel. He also accepted that his comment to Mark Dellar about giving Jackel the privilege of paying for his trips to see suppliers was flippant and inappropriate. The reality was that there were no other trips planned at that stage.

Lastly on the subject of the emails recovered by the company Mr Ireland accepted that in hindsight it was inappropriate to make the comment he had made to Wachira at Royal King (email 2 November 2002) that prices needed to be held only for a year "*long enough to take Tommee Tippee cheap bottles off the market.*" Mr Ireland submitted that this request was only made to obtain a price reduction from the supplier. He also argued that in fact it would be extremely difficult to take Jackel's non-branded bottles off the market and they are still available at Woolworths, Foodtown, Countdown, Pak n Save, New World Kmart, Baby City and pharmacies. Mr Ireland submitted that it was not until February 2004 that Jackel's non branded bottles were deleted by TWL.

⁹ This price list was introduced by the applicant (J 26). It lists 22 baby accessory products with trade and suggested retail prices (SRP). Alongside the IHL prices the Tommee Tippee retail prices are listed.

Mr Ireland rejected Mr Turner's submission that he spent at least 25% of his time on IHL business. He said that during the business day his focus was on Jackel NZ and he was little for him to do for IHL because Pauline was carrying out most of the work.

Mr Ireland accepted he had had a meeting with Anne Warwick of Foodstuffs. It was not unusual for him to meet with buyers and it was irrelevant whether Peter Jackson was on holiday or not. Again, he did not consider his meeting with Anne represented a conflict of interest or meant that he was failing in his duties to Jackel. (On this latter point Mr Ireland submitted he did not usually take a break during the day). At that time Foodstuffs were buying a product called Little Nippers. He was trying to prevent Little Nippers getting a listing with Foodstuffs.

Lastly, on the subject of his attention to his duties at Jackel, Mr Ireland said that Jackel's results speak for themselves. He submitted that during 2002 Jackel had great difficulty obtaining stock from Jackel Australia. Making budget depended on obtaining product from Jackel Australia, but these products did not arrive. This was raised at management meetings, and Mr Ireland introduced minutes which confirmed the fact that products had been delayed or were not coming at all. He also noted the statement contained in the same minutes (made by John Montgomery) that Jackel New Zealand needed to be conservative with its budget setting criteria for the next year as new lines which were budgeted for from September 2002 were now causing the company to fall well short of its original budget (CI 13). Despite that Jackel NZ was still managing to produce reasonable sales and this had been acknowledged by Mr Turner in an email to Craig Mr Ireland at the end of December 2002 in which he asked him (Craig) to pass on his sincere thanks to the *“whole team for the way in which they all focus on the job and do their best to achieve it”*. He added *“there have been a few areas where I know they would like to have done a bit better, however an excellent outcome has been achieved and everyone should be proud of their achievements.”*(CI 13)

Events leading to Mr Ireland's dismissal.

Mr Ireland confirmed that he had sent the email to Mr Turner on 31 January 2003 which outlined Pauline's business.

He denied that the email was prompted by the visit he received from Peter Jackson relating to a new range of products he had seen at The Baby Factory.

Mr Ireland confirmed there was a subsequent telephone conversation with Mr Turner and he confirmed the exchange of letters and the fact of the disciplinary meeting which took place on 17 March. He also submitted that by the time he received Sandra Archer's letter dated 3 March he knew he was going to be dismissed because during the month of February he had seen a fax enclosing a shareholders' resolution removing him as a director of the Downtown House group of companies.

Mr Ireland admitted that he was not entirely honest about his involvement with IHL in his letter to the company dated 10 March and that he was not honest in respect of some of his answers to matters raised at the disciplinary meeting on 17 March. His evidence was that - knowing he was to be dismissed - it made sense to deny everything and then the whole process would be over and done with more quickly.

Lastly on this matter Mr Ireland submitted that Roff had told him he regretted signing the letter he gave the company (J14). He did not provide any supporting evidence for this statement.

Other evidence

Gel Soother: In response to Mr Turner's allegations that Jackel had lost sales because IHL had got its gel teether to the market first, Mr Ireland submitted these items are very different products. The gel teether that IHL's sourced from Royal King was very basic and was part of the catalogue that they had been

selling for years. The product that Jackel proposed to launch was a new technology called “Coolbite”. Jackel aimed this product at the medium to high end of the market where it sells for about \$7.95 as opposed to \$3.99 for the IHL product.

Packaging: Mr Ireland denied claims that IHL had copied Jackel's packaging. He submitted he had worked from samples sent to him by Royal King and had adapted those to the First Steps range. He did not send samples of Jackel packaging to Royal King but had sent them samples of an American brand known as Luv n Care. He had told Royal King, that the card did not necessarily have to be blue but “*that colour tends to bring out the best in the product*”.

Mr Ireland denied copying the bear that was used by Tommee Tippee to market its products. He submitted that Jackel Australia had changed the packaging for Tommee Tippee from May 2002 and there had been no bear displayed on the cards since the late 1990's. First Steps had been a brand in New Zealand and Australia for some years and the bear was part of the Baby Care collection and part of the packaging for some products in the Royal King catalogue. He also submitted that Royal King had organized all the artwork and production of the new packaging with little input from the Irelands. There was no basis therefore, for Jackel to claim that he attempted to deliberately confuse the customer into thinking they were getting a Tommee Tippee product and he did not believe the packaging would cause confusion.

All of the above evidence went to Mr Ireland's claim that IHL's products did not compete with those of Jackel. He said that had been trying to compete with Jackel he would have imported teats, soothers, bottle brushes or breast accessories. IHL did not import teats until September 2003 and did not launch soothers until March 2004.

Bank, freight forwarding, systems and stationery: Mr Ireland did not see any issue arising in respect of the fact that IHL uses the same logistics company (APC Logistics) as Jackel. Mr Ireland submitted that in any event Jackel terminated its relationship with this company in January 2002 and Pauline did not approach them until mid July that year. Neither did Mr Ireland see any issue with IHL using the same bank as Jackel. That bank manager was also the Mr Ireland's personal bank manager.

Mr Ireland's Oral Evidence

Mr Ireland's oral evidence was at variance with his written brief on a number of critical issues, particularly in respect to his long expressed view that IHL did not compete with Jackel (other than in respect of unbranded bottles). However, among a number of other admissions by Craig Ireland he stated or accepted all of the following:

- He knew he had a duty of fidelity to Jackel NZ and that as Managing Director of Jackel he owed that duty to a very high level. (He accepted he owed that duty to the 'utmost' level).
- That the explicit obligation set out in his employment contract “to maximise the sales and profits of brands under the company's control” was consistent with the duty of fidelity he owed to Jackel.
- That he could not dispute that he was in breach of his duty of fidelity (by competing with Jackel); and
- That products imported and sold by IHL (with one exception) served the same function as comparable Jackel products, they were substitutable for comparable Jackel products and were products that that Jackel could have supplied at the same price.

Mr Court

Mr Court's evidence went to describing the fact that TWL's strategy was to cover all price ranges in any given product market from 'bargain' to 'better' and 'best'. In his written evidence he submitted that Tommee Tippee products are an example of the 'better' items of their type stocked by TWL. In his oral evidence Mr Court acknowledged that Jackel supplied items over all three ranges from 'bargain' to 'better' and 'best' (not without some reluctance and a deal of equivocation however). He also acknowledged that suppliers would be loathe to turn down an opportunity which was presented by TWL to supply products and it would not make sense for Jackel to do so. He also accepted that Jackel would not want to lose the sales of unbranded bottles it made to TWL .

Mr Court also confirmed that after he had been told by Craig Ireland that Jackel had declined the opportunity to import and supply products directly imported by TWL he had approached Pauline Ireland to take over the supply of these products.

Mr McCann

Mr McCann's evidence went to confirming Mr Ireland's evidence that TWL had presented to Jackel the opportunity to take over its direct imports but that Cesar Esterman had taken the position that Jackel would not take up the opportunity because the products were unbranded and Jackel wanted to stick to and promote the Tommee Tippee brand. Because Mr McCann's written brief did not state that he had personally been told this by Cesar Esterman he was requested to attend the investigation meeting to be questioned on this point. When he was questioned on this critical point (which would corroborate Mr Ireland's evidence) he confirmed that he had been told this by Cesar Esterman. However, he also admitted to having been pre warned as to the one matter on which the Authority wished him to provide clarification.

Respondent's Position on Jackel's Alleged Loss and Quantum of Damages Sought

Note: Mr Ireland did not present any expert witness evidence to challenge that of the company on the assessment of damages.

On the claim made by Mr Turner that Mr Ireland had been responsible for the deletion of a number of Jackel's products Mr Ireland submitted all of the following:

- The deletion of a number of the items in question could be explained by the fact that sales of those items had been tracking downward for a period of three years prior to their deletion.
- Some items, for example, non-branded baby bottles were not supplied to TWL by IHL until March 2003. Jackel's product was not delisted by TWL until January 2004 which was some considerable time after Mr Ireland's departure from Jackel.
- In respect of other items Mr Ireland submitted that IHL had never imported the product that Jackel claimed had led to the deletion of its product e.g. *the decorated bottle, the wide neck bottle and the soft tip spoons*.
- The deletion of Jackel's *soft ring and wrist rattles* cannot be explained by the sale of IHL's *hard fish and cow rattles*. The IHL rattles were launched in March 2003 *prior* to the launch in May of that year of the Jackel rattles. These are very different products.

- He believed Jackel had delisted its *potty* nationally.
- In response to Mr Turner's claim that he did not take the necessary steps to resolve the MQO (minimum quantity order) issues with the supplier in relation to Jackel's *bottle banks* Mr Ireland said that in January 2003 he took up with Jackel suppliers the fact that they appeared to have upped the MQO numbers for this product. He had discussed this with Paul Mr Turner and he kept him informed. However, the issue had not been resolved by the time he was dismissed. In response to Mr Turner's claim that Australia's Operations Director had subsequently been able to renegotiate supplies of this item Mr Ireland noted that it was for the MQO's that had been quoted to him.

In response to the evidence relating the calculation¹⁰ of Jackel's losses, Mr Ireland takes issue with the calculation of loss (financial y/e 2004 compared with financial y/e 2003) which is based on six months sales between October 2002 and March 2003 multiplied by 2 to arrive at an annualised figure for loss. Mr Ireland considers a more accurate calculation would be based on actual sales for the 12 months to y/e March 2003. He submits the calculation based on six months sales exaggerates Jackel's losses because it includes sales for two Christmas months and can overstate sales where a buyer initially orders a large quantity of an item only for sales of that item to taper off subsequent to the initial purchase.

Relying on actual monthly sales figures Mr Ireland submitted:

- Some products showed only a small decrease, less than that claimed by Mr Turner e.g. *sip and seal cup*.
- Some products showed an increase in sales over the two years e.g. *easy grip no spill cup*.
- Jackel cannot have suffered losses where IHL did not import/sell the items alleged to be responsible for Jackel's losses on, for example, *the decorated bottle, wide neck bottle and soft tip spoons*.
- An analysis of Jackel's sales to The Baby Factory showed that there had been an increase between the 2003/4 years in respect of two items e.g. the *designer bottle* (\$283) and the *soft tipped spoons* (\$564).

In respect of the calculation of Jackel's lost profits Mr Ireland submitted that some sales made by IHL and included in Mr Appleby's calculation of Jackel's loss of profit were sales made after he had left Jackel including (among other items) the *fun feeding bottle*, the *easy grip bottle* and the *silicone and orthodontic teats*. At that point Mr Ireland considered he was free to sell any of these products as he was not under any restraint of trade. Mr Ireland introduced evidence to show that IHL's sales up to 31 March 2003 totalled \$72,503.

Mr Ireland also submitted that Jackel's loss of sales can be explained by reasons unrelated to his/IHL's activities. He submitted lost sales can be explained by the fact:

- He had left the company. He was the main driver for Jackel NZ. The Pharmacy and Non Pharmacy Managers also left the company.

¹⁰ One issue raised by Mr Ireland relating to the calculation of Jackel's lost profit was conceded by Mr Turner and his evidence amended accordingly. To avoid confusion I have not recorded the detail of the original point made by Mr Ireland.

- Numerous other brands were on the market. Any one of these brands could have caused Jackel to lose sales.¹¹

Lastly Mr Ireland disputed Mr Turner's evidence that it took him 14 months to develop IHL to the point where it was delivering products. He considered the lead time to be three months – that is the time it took for IHL to deliver its first four products to the market.

In summary Mr Ireland submitted that Jackel's claims against him are grossly exaggerated. With the exception of the non branded bottles he does not consider that First Steps products competed with Tommee Tippee products. He reiterated that Cesar had been advised of Pauline's business and did not have a problem with it and, with one or two exceptions, all the work that he carried out for IHL was done outside working hours. He performed his duties for Jackel and was not involved in the deletion of Tommee Tippee products from TWL. Neither did he see that First Steps products would have had any effect on Jackel's sales.

Legal Principles

Duty of Fidelity

Mr Ireland employment agreement contained an implied term that he was under a duty of fidelity to his employer to abstain from conduct which would or would be likely to damage or undermine the relationship of trust and confidence. He also had a statutory obligation to act in good faith towards his employer. A specific example of the kind of conduct which is prohibited under these obligations (and a particularly relevant example in this case) is described by the Chief Judge in *Waldren v Barrance* [1996] 2 ERNZ 598.

*“.....during the employment the employee was under a duty of fidelity to do nothing deliberately that was likely to injure the employer's business. **The prohibition included competing with the employer directly or by working at the same time for a competitor**”.*
(Emphasis mine).

The duty of fidelity an employee owes to his or her employer does not survive the termination of employment.

However, the duty of good faith and fidelity Mr Ireland owed towards his employer is arguably higher than that which reposes in an ordinary employee. Mr Ireland was the Managing Director of Jackel New Zealand. He was the company's most senior employee entrusted with the explicit responsibility *'to control and direct all day to day activities'* of the New Zealand business for its owner and in particular to *'maximise the sales and profitability of brands under the company's control'* (Employment agreement J1). He was a director of the company and as such he was a *fiduciary* and was required in the exercise of his duties to act in good faith and *'in what the director believed to be in the best interests of the company.'* (CL.17.3 of the Company Constitution J3).

¹¹ Mr Turner (in reply) noted all the brands mentioned by Mr Ireland as being (possibly) responsible for the drop in sales. The majority do not sell into TWL (where all the evidence on this issue is focussed). Those 2 that do sell a very small number of items.

This is what the Supreme Court of Canada said of those who stand in a fiduciary relationship with the company that employs them. *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371.

*“As senior officers of a working organisation they stand in a fiduciary relationship with the company and are precluded from obtaining for themselves, either secretly or without the approval of the company, any property or business advantage belonging to the company or for which it has been negotiating. This is particularly true where the officers are participants in the negotiations on behalf of the company. They are disqualified from usurping for themselves or diverting to another person or company with whom they are associated a maturing business opportunity which the first company is actively pursuing. **They are also precluded from so acting even after their resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for themselves the opportunity sought by the company or where it is their position with the company rather than a fresh initiative that leads them to the opportunity which they later acquire**”*
(Emphasis mine)

Because it is Mr Ireland's position that Mr Esterman gave approval to the establishment of IHL and the importation by that company of four baby accessory items sought by TWL I note the relevant rule described by the Supreme Court in *New Zealand Netherlands Society “Oranje” Inc v Kuys* [1973] 2 NZLR.

*“ Their Lordships entirely accept, as a matter of law, that if an arrangement is to stand, whereby a particular transaction, which would otherwise come within a person's fiduciary duty, is to be exempt from it, **there must by full and frank disclosure of all material facts**”.*
(Emphasis mine)

In addition to the duty of fidelity Mr Ireland owed to Jackel he was prohibited from using Jackel's confidential information. This is any information the parties expressly or impliedly agreed was confidential. This obligation survives the termination of the employment relationship.

Assessment of Damages

In *Medic Corporation Ltd v Barrett (No.2)* [1992] 3 ERNZ 977, the Chief Judge set out guidance on this point.

“The purpose of damages is to compensate a plaintiff for the loss it has sustained”.

And

“..it [the plaintiff] is entitled to such an amount as will put it back, so far as money can achieve that result, in substantially the same position financially as it would have been in if the defendants had not injured it by unlawful activity”.

And

“The law places limits on the consequences that may be laid at the door of a defendant. They must be consequences of which it can be convincingly be said that they are the result of the defendant's conduct, in the sense that they would probably not have ensued but for the defendant's conduct. And they should be such consequences as would be apparent to any person of reasonable intelligence contemplating whether or not to engage in that conduct. They must be consequences that are sufficiently proximate. They must not be too remote”.

And

“It is for the plaintiff to prove, not for the defendant to disprove that loss has been sustained, that it is not too remote to be taken into account and the extent of that loss, but only on the balance of probabilities and not beyond reasonable doubt”.

Liability for damages resulting from a breach of contract is not limited to losses that crystallised during the period of the employment relationship.

“The Court’s inquiry must be to ascertain what is recoverable by the plaintiff by reference to the usual tests for contract damages and I would find that the plaintiff is not restricted in its claim for damages to losses arising only out of the first defendant’s trading in breach of the restraint during its currency. If, by such unlawful activity and/or by the further unlawfulness of the breach of his obligations of fidelity during the currency of the contract, the first defendant caused loss within the accepted remoteness parameters, then I would find such to be potentially recoverable as damages”. BFS Marketing v Field (No.1) [1993] 2 ERNZ 101.

In closing on this statement of relevant legal principles I note that it was unquestionably the case that the opportunity which was presented by the TWL was an opportunity presented to Jackel which the TWL wanted Jackel to take up. This is apparent on Mr Ireland’s own evidence. The principles in the Court of Appeal and Employment Court judgements in Interchem Agencies Ltd v Morris Filmchem Agencies Ltd CA 185/02 and AC 24/04 are relevant to the assessment of the chance that Jackel may not (even if Mr Ireland had acted impeccably in observing his duty to Jackel) have obtained the opportunity presented by TWL and the profitable connection that it represented.

Discussion and Findings

Credibility

Mr Ireland was an evasive and contradictory witness. Despite the overwhelming documentary evidence he persisted in denying any wrongdoing and in minimising that wrong doing where he could no longer get away with outright denials. This reflects a pattern of conduct on his part – deny for as long as possible and then evade, equivocate and/or minimise when denial is no longer tenable. As a result I do not accept Mr Ireland as an honest witness. Neither did I find Mr Court or Mr McCann to be reliable witnesses.

Mr Turner’s evidence on the other hand was well prepared and supported and laid out in a most balanced way given the very difficult circumstances faced by the company. I found Mr Appleby’s evidence to be straight forward and clear and he was a most credible witness. He volunteered appropriate concessions where they were due.

I record then, that it is the evidence of the company’s witnesses that I prefer where that evidence is in dispute.

Findings – Dismissal

In his Statement of Reply Mr Ireland submitted that he had been unjustifiably dismissed by Jackel NZ and stated he would be seeking compensation on this basis. He did not pursue this claim at the investigation meeting except to submit his dismissal was predetermined because he had seen, prior to the disciplinary meeting, a fax which removed him as a director of the Downtown House group of companies.

For the sake of certainty, I note that the imperatives for and processes adopted in respect of removing a person from the Board of a Company are not those that govern the consideration of misconduct in employment and the processes that are required to be followed if an employer is to show that a dismissal is justified. Mr Ireland was not justified in thinking that his dismissal was a certainty given his removal from the Downtown House Board(s). I also find that the procedure adopted by the company in investigating the matter and in raising its concerns with Mr Ireland was impeccable as was the conduct of the disciplinary meeting on 17 March 2003. The dismissal was justified on the information available to the employer following its investigation and after hearing Mr Ireland. I also find that Mr Ireland, knowing what he knew of his activities, was expecting to be dismissed.

Findings – Breach of Duty of Fidelity and Good Faith

1. An important initial finding relates to Mr Ireland's intentions in setting up IHL. Mr Ireland attempted to minimize the business of IHL and his activities associated with the business e.g. it was Pauline's business set up to import four basic items that TWL wanted and the whole thing was contemplated as some practical exercise in conjunction with Mrs Ireland's university business studies programme or something that she could do part time around her varsity studies. The resultant growth in IHL's business is then presented as an almost accidental consequence of things getting out of control on the Irelands. This approach to the evidence by Mr Ireland is relevant to his position that his activities did not amount to a calculated, planned and deliberate breach of his duty of fidelity to Jackel.

Mr Ireland's evidence on this issue is contrary to the weight of the evidence. It is clear on the evidence overall that IHL was a carefully planned venture and that Mr Ireland was a key driver of the business. It is not the case that the business was set up around Mrs Ireland's business studies with the view to importing only four basic items. That this is the case is apparent on the words of Mr Ireland's email to Paul Turner on 31 January "*About a year two year ago (sic) The Warehouse approached Jackel and asked us to develop a bottom end baby accessories range, they had previously run a range of 12 items and although wanting to continue this range they didn't want the unit commitment required by the supplier*". And in respect of the approach made to Pauline Mr Ireland by Allen Mr Court of TWL in January 2002 Mr Ireland said "*[he] indicated a bottom end baby range was on the planning board*".

I also note that by November 2002 (three months before he sent his email to Mr Turner) Mr Ireland was discussing with Parisee a planned meeting with Mark Dellar in Australia where "*on the agenda is the development of baby ranges in both countries*" (See email to Parisee dated 25 November 2002 p10).

IHL did import four items initially, but that was not the reason IHL was established by Mr Ireland. IHL was conceived, established and operated with a view to creating a viable business importing and selling a full range of baby accessory products to be sold into a market or markets dominated by Jackel's products. In support of this finding I note it is highly improbable that Mr Ireland would have jeopardised his position with Jackel for the value of the sales made in respect of the four products initially imported and sold by IHL, total sales of which over the 13 months September 2003-September 2004 amounted to \$37,056 (with profit at approximately 50% of that figure).

2. As I interpret Mr Ireland's position he is submitting that he advised Cesar Esterman of the opportunity presented by TWL, Cesar repeatedly rejected the opportunity and that he subsequently gave his blessing to the set up and operation of IHL.

I find on the balance of probabilities that Mr Ireland did not report TWL opportunity to Mr Esterman. If his own evidence is to be accepted TWL first raised the opportunity with Jackel (via

Mr Ireland) in December 2000 or January 2001 only weeks after an opportunity of this nature was canvassed at a meeting of Jackel's Board (J/E) which was attended by Mr Esterman. Mr Ireland was directed to report on his efforts to progress this initiative by the end of February 2001. It is inconceivable in these circumstances that Mr Esterman would not have grasped this opportunity with both hands had it been advised to him.

Mr Ireland highlighted the fact the Board record refers to opportunities to change TWL imports to *Tomme Tippee* lines. I don't accept that is an accurate interpretation of the Board's intentions because it is a brief minute and not a detailed strategic statement. If the opportunity had been reported by Mr Ireland as he was bound to do Jackel could have approached this business in a number of ways from taking over the imports and taking the profit on those sales *for Jackel* to developing a house brand range or a even a basic range labelled Tomme Tippee.

I also find that even if Mr Ireland did raise TWL opportunity with Mr Esterman, on his own evidence, the advice he gave misrepresented the true state of affairs regarding IHL and Mr Ireland's involvement in the business. Any approval given (and I don't accept Cesar did give his approval) would have no standing because there was no full and frank disclosure of all material facts *New Zealand Netherlands Society "Oranje" Inc* (cited above p 25).

In conclusion on this point I find that Mr Ireland took for himself and IHL the opportunity which was presented by TWL to Jackel and which belonged to Jackel.

3. I find that Craig Ireland was the key driver of IHL. He was immersed in the business from its conception. Having seen the gap in the market and been presented by TWL with the opportunity to meet it, he directed all of his passion and much of his time to the set up of IHL. He planned a staged development for IHL (to enable him to build up capital in the business before he departed Jackel). He positioned it in the market, planned and implemented the marketing strategy (get the majors with multiple outlets). Mr Ireland personally engaged in marketing IHL products with key retailers (during Jackel's time and at Jackel's expense) and he was closely involved in the selection, presentation and packaging of products, the negotiation of prices, quantities and ordering and delivery including scheduling.

I find that IHL competed directly with Jackel across a comprehensive range of products and across all those segments of the market described in evidence alternatively as "*bottom, mid and upper range*" or "*bargain, better, best*". In competing with Jackel Mr Ireland adopted a strategy for IHL to import and sell a comprehensive range of what might be described as "every day items" across all categories (bottles/teats, utensils, cups, playthings etc) utilizing criteria of good quality, attractive products in modern jazzy colours and attractively packaged (and deceptively similar to Tomme Tippee packaging to benefit from the market recognition of that product). The competitive edge determined by Mr Ireland and one of the keys to IHL success was to hold all the features that made Tomme Tippee a dominant player but to do it at a cheaper price. Document J26 dated January 2003 lists 22 items planned for launch in August/September 2003 and shows Tomme Tippee prices alongside IHL prices for each product. This document confirms Mr Ireland's strategy to compete with Tomme Tippee on price.

Another important key to the strategy adopted by Mr Ireland for IHL was to take Jackel's unbranded products off the market again by undercutting Jackel on price¹². These were Jackel's unbranded *promotional bottles* (singles and packs of two and three) and the bottle banks. To put

¹² TWL delisted Jackel's promotional bottles in January 2004. The mini bottle banks were deleted by TWL in March 2003 the same month that IHL's bottle banks were listed with TWL. Jackel's promotional bottles were not sold to The Baby Factory after September 2003.

the importance of these items in perspective I calculate on the evidence before me that the value of Jackel's sales of unbranded *promotional bottles* and the *mini banks* to TWL in the year ending March 2003 amounted to approximately 30% of all the value of all its sales to TWL in the baby accessories range. The evidence also reveals that during the year ended March 2004 sales of its comparable bottles and its bottle bank amounted to 30 % of all IHL's sales to TWL¹³.

Any line of business that represents 30% of the total value of business is extremely valuable. It was Jackel's bread and butter and if Mr Ireland was to have a viable business he needed those sales. Mr Ireland admits competing with Jackel on these items. I find that does not fully explain Mr Ireland's actions. The evidence discloses (see the emails) how important it was for IHL to secure this business and how much energy went into getting this right. Mr Ireland deliberately went after this business with the stated aim (in respect of promotional bottles¹⁴) of driving Jackel out of this market. He was wholly successful (at least as far as TWL and The Baby Factory are concerned).

4. Mr Ireland secretly competed with Jackel for a period of at least nine months. On 30 January 2003 Mr Jackson (Jackel's Sales Manager – Non Pharmacy) noticed a new well presented range of baby accessories being promoted at The Baby Factory Albany. He mentioned it to Mr Ireland who advised he would check it out and find out who was behind it. I find it was this that prompted Mr Ireland to email Mr Turner on 31 January advising of his "*wife's business activities*". He would have known it would not be long until IHL and its directors and shareholders were revealed for who they were. Starting with this email and on through Jackel's investigations Mr Ireland was dishonest about IHL and his involvement in it. The examples (in the evidence) of his dishonesty are legion. I mention one. In his email Mr Ireland advises that four items have been on the market for some time and another eight are about to be launched. The evidence shows, however, that as of 31 January 2003 12 items were in fact on sale and orders were in for products to be launched in March 2003 bringing IHL's product range to 23 items. In addition, plans were in place for the launch of a further 22 products in August/September 2003. On January 31 2003 Mr Ireland and IHL had a total of 45 items on sale, about to be launched or scheduled for launch within months.

Before concluding on this leg of my findings I must address one or two matters argued by Mr Ireland as excusing his conduct.

- I find Mr Ireland, as Managing Director of Jackel, was not entitled to use his evenings, weekends and lunch hours in pursuit of IHL business. As Jackel's most senior employee in New Zealand and the company's Managing Director he was required to act always in the best interests of Jackel NZ and to devote his full attention and energy to Jackel NZ. The same point is made in respect of Mr Ireland's excuses for meeting IHL's suppliers and marketing to IHL's prospects in Jackel time and at Jackel's cost.
- Mr Ireland denied being responsible for deleting Jackel's products from sale to TWL. On this point, I do not understand Mr Turner to have said that Mr Ireland personally delisted these items with TWL. Rather he is saying that these items have been delisted with TWL as a result of Mr Ireland's activities overall. In respect of some items there were, I find, acts of omission by Mr Ireland in not sorting out promptly the MQO issues relating to bottle banks and the fork and spoon. It is no coincidence, I find, that IHL was ready to launch identical items with TWL in January and May 2003. In respect of other items e.g. promotional bottles they were delisted by the retailers as IHL's sales exceeded those of Jackel's identical items. No retailer carries identical items from two suppliers where space can be given to sales of other products. The item to be

¹³ Based on IHL sales figures for the June and September quarters for 2003.

¹⁴ See email to Wachira dated 2 November 2002 p10.

delisted in such a situation will be the one that is not selling well. This was Mr Ireland's intention of course - to remove Jackel's cheap bottles from the market. Jackel could not immediately respond to this competition because it took time after Mr Ireland's dismissal to investigate and uncover the nature and extent of the competition it faced from IHL.

Conclusion on Liability

Mr Ireland took the opportunity which belonged to Jackel and set up IHL (in partnership with his wife) and competed directly with his employer Jackel NZ Ltd. In doing so Mr Ireland was in breach of his duty of fidelity and good faith to Jackel NZ Ltd. He was in breach of his statutory obligations of good faith. He was also in breach of his duty as a fiduciary¹⁵ of Jackel NZ which required him to act always in the best interests of the applicant company.

Mr Ireland's breach(es) were deliberate, planned, substantial, ongoing and undisclosed.

Remedies - Jackel's Losses and Assessment of Damages

Did Jackel suffer financial loss as a result of Mr Ireland's breach of his duty of fidelity and good faith?

For the applicant company to recover damages I must be able to find on the balance of probabilities that it suffered a loss of sales and profit and that that loss was caused by Mr Ireland's breaches of the duty of fidelity and good faith he owed to the company. If I am able to find that then I must also find that the company's losses were not caused by events unrelated to Mr Ireland's breach(es).

I find it clearly established that the company has suffered a drop in sales. The company's sales figures show a dramatic loss of sales to TWL. Jackel has also lost sales to The Baby Factory particularly, I note, in respect of the promotional bottles and the cutlery set. The figures submitted relating to the loss of sales to TWL show a sharp drop in sales from the March 2003 quarter which is the quarter during which IHL sales of the enlarged range of 23 items entered the market. There are two points I would make about figures which show this dramatic loss of sales.

1. In answer to Mr Ireland's criticisms that Jackel's figures on loss are overstated being based on a comparison between sales over the six months October 2002/ March 2003 and doubled to give an annualised figure representing its lost sales on various items¹⁶ I would note that the evidence shows Jackel suffered a dramatic loss of sales to TWL during the year ended March 2004 whichever assessment it used to calculate the value of lost sales for that year.

For the record and for the purposes of this determination I accept the basis for loss as it is described by Mr Turner. Having examined the figures I agree there is little seasonal variation in sales of the products in question. I also accept, as reasonable, Mr Turner's submission¹⁷ that assessing loss of sales on the basis of Jackel's sales over the six month period October 2003/March 2004 flattens out variations in customer ordering cycles and appropriately

¹⁵ I am primarily interested in Mr Ireland's duties as an employee. His obligations as a fiduciary are addressed because they are relevant my finding that the TWL opportunity belonged to Jackel and could never legitimately have been available to Mr Ireland. The Authority has the jurisdiction to make this finding pursuant to s.5 as I am dealing with any problem "relating to or arising out of an employment relationship".

¹⁶ Mr Ireland considers this does not take account of seasonal variation in sales and may overstate sales where items on initial release are ordered in larger quantities thus distorting annual sales through double counting of these one off type sales. Mr Ireland submitted that comparisons made should be between actual monthly figures for the entire 2003 year compared with sales over the 2004 year.

¹⁷ See his evidence in reply.

represents Jackel's actual sales at the time Mr Ireland was dismissed. The total sales for this six month period are then annualised by Mr Turner i.e. multiplied by 2 and are thereafter compared with Jackel's sales going forward from April 2003 to enable the calculation of loss.

2. Mr Ireland submitted that no loss suffered by Jackel can be attributed to competition from IHL products where IHL did not import/sell comparable products to those of Jackel. He submits therefore that Mr Turner's evidence that Jackel suffered loss as a result of competition from IHL is flawed in respect to that part of his evidence which relates to (among other items) Jackel's *designer bottle*, *wide neck bottle* and the *soft tipped spoons*.

This point has validity to a degree and it has been recognised by Mr Appleby in his assessment of loss of profit based on IHL's sales¹⁸. However, the argument has no validity where a different but comparable and substitutable product was imported by IHL and sold. Mr Turner's evidence might be flawed in respect of the particular comparison made but it is not flawed in principle where another item imported by IHL serves just as well as the claimed item in making the comparison. For example Mr Ireland submits that IHL did not import/sell the *250ml decorated bottle* that Mr Turner claims competed with Jackel's *250ml designer bottle*. Therefore, argues Mr Ireland, Jackel cannot have suffered a loss of sales on its *designer bottle* due to his or IHL's activities. I don't accept this argument for this reason. IHL may not have imported and sold the *250ml decorated bottle* but it did import and sell to TWL a *250ml easy grip bottle*. Given the close functionality and substitutability between IHL products and Jackel's products across the range (comparisons accepted by Mr Ireland in his evidence) I find that Jackel's losses on its *designer bottles* may be attributed to the sales by IHL of its *easy grip bottle*. I note that Mr Appleby specifically approved of this approach to the assessment of Jackel's loss i.e. that where the evidence shows that IHL did not sell the product claimed to have competed with a specific Jackel product the loss could be assessed against a comparable product that *was* sold by IHL. The same point may be validly made in respect of Mr Ireland's submissions in respect of lost sales of Jackel's *wide neck bottle* and its *soft tip spoons*.

3. Mr Ireland also submits that Jackel did not suffer a loss of sales on some of the items it has claimed to have suffered a loss on. He cites an example relating to sales of Jackel's *easy grip no spill cup*. Mr Ireland submits that - contrary to Mr Turner's evidence that Jackel suffered an ongoing loss of sales of its *easy grip no spill cup* - sales of this item actually increased between 2003 and 2004. This is incorrect. Certainly a casual assessment of sales shows the value of sales for this item was \$15,034 for 2003 and \$18,827 for 2004 – on the face of it an increase. The real story is revealed when one assesses the pattern of these sales. This item was not sold to TWL until September 2002 and was therefore only sold over seven months of the 2002/2003 financial year. The average monthly sales tracked at \$2147. By comparison, average monthly sales for the 2003/2004 financial year for this product were \$1569. Jackel undoubtedly faced a loss on this item between the 2003 and 2004 years. I am satisfied Mr Ireland is well aware of the reality and this evidence is just another example of the overall dishonesty he has exhibited throughout.

Other considerations weighed by me in reaching findings on this question are these:

- The evidence shows Mr Ireland deliberately intended to cause Jackel financial loss that would be his financial gain. Nowhere in the evidence is this made clearer than in the emails between Mr Ireland and his suppliers and other interested parties. For example, see the email to Dean Osmond dated 25 November 2002... ***“the only person who will benefit from all this is my bank manager***

¹⁸ Mr Appleby has removed from his calculation for loss of profit those sums which flowed from IHL's sales of the *Stay Warm Bowl* and *Sports Bottle* for which there was no comparable Jackel product.

I plan at that stage to be out of JNZ [June 03], would rather put 100% into my own pocket than Sandy's" (Emphasis mine); and see the email to Wachira at Royal King 2 November 2002... *if I predict it correctly, we only need to hold these prices for a year, long enough to take Tommee Tippee cheap bottles off the market and allow them to concentrate on the middle to top, while IHL owns the bottom to middle ground. Any assistance you can offer will only be needed for the first-year to establish ourselves with the buyer, after that you will be able to revert back to current pricing. Let's call it an investment on both our parts to capture a market dominated by Tommee Tippee.* (Emphasis mine).

Mr Ireland is an experienced player in this industry. The evidence shows he was the key driver in the set up of IHL – a set up which was strategically well thought out, carefully planned and developed to ensure that growth of the business did not out run the resources available to support it. As I have already found, IHL started with a basic range of products (bottles, a set of spoons, bowls etc.) holding quality and presentation constant with the competitive edge being price. He focussed on selling those products to retailers with significant numbers of outlets in order to establish its place in the market before moving on to expand the range after which (in his own words) Mr Ireland saw himself out of Jackel and pocketing the proceeds of a successful business.

Mr Ireland saw all this and planned for it including the fact that his gain would come from Jackel's loss. I consider that that being the case I am entitled to conclude that that consequent losses suffered by Jackel came about as a direct result of Mr Ireland's actions given of course that figures presented by Jackel demonstrate the losses anticipated (which they do).

- Mr Ireland now submits that Jackel's losses result from factors unrelated to IHL's sales of comparable products. I have assessed Mr Ireland's submissions on this point and find them to be without merit, particularly (given the circumstances of this case) the self serving claim that Jackel has lost its main driver, *himself*. I find specifically that Jackel's financial losses can be attributed to Mr Ireland's activities in breach of his duty to Jackel NZ.
- Mr Ireland has accepted that IHL unbranded bottles and the bottle banks did compete with Jackel's comparable products. These products are included in Jackel's assessment of those losses it has suffered which are total i.e. TWL no longer buys/sells Jackel's product. Mr Ireland's admission on this point is significant because the losses suffered by Jackel on sales of these products alone amount to 73% of the total loss suffered Jackel in this category i.e. items deleted from sale at TWL. (Annualised losses on these items of \$96,688/ total of losses (annualised) on all items in this category \$132,927).

Taking the evidence overall I find that Jackel NZ has suffered financial losses in the order of the amounts submitted by it in evidence (see p. 15) and that those losses result from Mr Ireland's breaches of his duty – being his duty of fidelity and good faith to Jackel as an employee and his duty to always act in the best interests of the company as a fiduciary of the company.

Assessment of Damages

The following factors are relevant to setting damages in this matter.

- It took Mr Ireland/IHL 14 -15 months to establish a viable business. The evidence shows (email to Mark Dellar dated 31 January) Mr Ireland intended to consider his position with Jackel in August 2003 after the launch of a new range of products that month¹⁹. He intended to stay with Jackel till at least that time “*to allow us to build up cash in the business.*”
- During the nine months that Mr Ireland competed with Jackel during his employment with the company and until he was dismissed on 17 March 2003 he was engaged in the planning for or the importation and sale of all the items or similar items (e.g. *the hard and soft teether and sports teether* instead of the *bee and fish teethers* described in J26) that were on in the market by September 2003. In other words all the items on sale at September 2003 had been actively planned for and worked on during his employment with Jackel and in breach of his duty to Jackel. I specifically note on this point that the *silicone and orthodontic teats* are included in this finding. Reference to Mr Ireland planning for the importation of these items is found in the bundle of emails at J30/65. I also find that the *sip and seal cup, the bear shaped bank and bottle banks* were items planned for by Mr Ireland whilst in Jackel’s employment.
- As a fiduciary who was required at all times to act in the best interests of Jackel Mr Ireland could not simply resign, work out his notice and then and take up the opportunity presented by TWL. It belonged to his employer Jackel.
- On the evidence I find that had the opportunity which was presented to Jackel been advised by Mr Ireland as he was duty bound to do then it is certain that Jackel would have taken up the opportunity presented. It would have worked with TWL to obtain for it the products sought and worked to develop the full range of products that was in the contemplation of TWL at the time. That being the case then Jackel would have enjoyed the profit on all the sales made of the items in question.
- If Mr Ireland had done the right thing and advised Jackel of the opportunity which had been presented to it he would then have been engaged 100% in pursuing this opportunity for Jackel. If he had been at the same time of the mind to resign and set up his own business then he would have had to give notice (three months) and would not have been in a position to establish his business until (at least) September or October 2002. He would of course have had to find retailers to take his products because TWL opportunity which belonged to Jackel would have been taken up by them. That opportunity having been taken up by Jackel would also have satisfied, to a large extent if not totally, that gap in the market which existed for good quality, attractive bread and butter items at a competitive price. If Mr Ireland had, nevertheless, decided to persevere with his business, on an optimistic assessment it would have taken a minimum of 14-15 months to establish a viable business. Certain factors militate against him ever setting up a viable business. The success of IHL hinged on TWL opportunity which would never have legitimately been available to Mr Ireland. Given this, it is questionable whether Mr Ireland would have even contemplated setting up this business without the TWL opportunity.
- Jackel’s assessment of damages is orthodox and is based on the justified supposition that all the sales made by IHL in the subject period are sales that Jackel would have made had Mr Ireland not

¹⁹ It seems the plan to have 45 products in the market by August/ September 2003 was amended. IHL had approximately 37 products on the market by September 2003.

been in breach of his duty to Jackel. Mr Appleby has applied Jackel's gross profit rate of 58% to IHL's annualised sales figure of \$237,000 to yield a figure for loss of profit to Jackel as a result of Mr Ireland's breach of duty of \$137,000 per annum. Jackel seeks compensatory damages based on this figure for three years.

- Mr Ireland has not challenged this calculation or brought expert evidence of his own to contradict it.
- I am satisfied that Jackel has taken steps to mitigate its losses. Unfortunately for Jackel, Mr Ireland had secured for IHL a solid niche in the market by the time his competing business was disclosed by him and the damage had essentially been done albeit the reality of the deletion of products from TWL (where the most significant damage was done) had yet to eventuate and impact on Jackel's profits. In saying this I reiterate that the effect on Jackel's profits was inevitable given the strategy adopted by Mr Ireland to remove the unbranded products from the market and the head start he had in doing this unbeknown to Jackel.
- Against all of the above I am aware that Mr Ireland was not subject to any restraint of trade after he left the employment of Jackel.

Orders of the Authority

Compensatory damages

There is no question that Jackel is entitled to compensatory damages to restore it, as best that money can, to the position it would have been in had Mr Ireland not breached his duty of fidelity to the company. Mr Appleby's calculation of Jackel's lost profit has been assessed in an orthodox manner and the calculation was not challenged by Mr Ireland. The only difficulty posed to me in awarding compensatory damages relates to the period for which damages are to be awarded.

On the one hand Mr Ireland was competing with his employer for a period of nine months before it was revealed. All of the items on sale by September 2003 were either on sale or being planned for during Mr Ireland's employment with Jackel. The profit on those sales undoubtedly belongs to Jackel. However, Jackel's loss extends well beyond this period and in respect of the deleted items that loss is total.

On the other hand Mr Ireland was not bound by any restraint of trade and at some point the right of Jackel to be compensated for Mr Ireland's breach of duty must give way to recognition that the market has forever changed due to this competition – competition which in itself is desirable. The principles of remoteness must also be considered. It is now a fact that IHL has developed and launched new ranges.

On balance I award the company a sum which represents 18 months of lost profit being \$205,000 (rounded) and I direct Mr Ireland to pay that sum to Jackel NZ to compensate it for profit it has lost as a result of the breach of duty of fidelity and good faith which he owed to that company, his former employer.

Mr Ireland is directed to pay to the applicant company the sum of \$205,000 being compensatory damages.

Reliance Expenses

Jackel sought reimbursement for a portion of Mr Ireland's salary and for travel expenses incurred by them – expenditure incurred by them for which it got no benefit from Mr Ireland.

I make no award under this head as an award of this type is incompatible with an award of compensatory damages. *Anglia Television v Reed* [1971] 2 All ER 690 (CA).

Other Expenses Incurred by Jackel as a Result of Mr Ireland Breach of His Duty of Fidelity

The availability to the plaintiff of reimbursement for this type of expense is addressed in *Binnie v Pacific Health* [2002] 1 ERNZ, 438.

The company has incurred considerable expense (itemised) in taking in taking legal advice in respect of Mr Ireland's breach of duty, in commissioning the forensic examination of its computers to understand the nature and extent of Mr Ireland's breach of duty and by way of the payments made to Turner Consultants when it requested Mr Turner to investigate Mr Ireland's wrongdoing, stabilise the business and mitigate its losses. This latter expense was high but it has to be realised that Mr Ireland was the company's most senior employee and there was no more senior employee available in New Zealand to undertake this necessary work. The company also seeks expenses incurred in advertising for a new managing director.

Under this head I direct Mr Ireland to pay to Jackel a sum which reimburses it for the total cost of the forensic examination of the computers (\$11,725) and for two thirds of the costs incurred in obtaining the legal advice (\$10,500) and in engaging Mr Turner (\$48,000) a total of \$70,000²⁰ (rounded). I make no award to reimburse the company for advertising for a new managing director. That is a normal business expense which flowed from Mr Ireland's termination rather than a direct expense which flowed from his breach of duty.

Mr Ireland is directed pay to the applicant company the sum of \$70,000 under this head.

Exemplary Damages/Penalty under s.134 of the Act

Jackel seeks exemplary damages and a penalty under the Act to punish Mr Ireland for his wrong doing arguing that such awards are warranted in all the circumstances of this case.

I am not prepared to entertain awards under both heads. Both are intended to punish a wrongdoer when the circumstances warrant it but it would wrong to punish Mr Ireland twice in respect of the same set of facts.

The maximum penalty that may be awarded against an individual under s135 of the Act is \$5000. I don't believe the Act ever contemplated wrong doing on the scale of that engaged in by Mr Ireland against his former employer.

Mr Ireland's breaches of duty were planned, deliberate, substantial, ongoing and undisclosed and, I must say, attended by a degree of gloating about the damage he was inflicting on Jackel. Mr Ireland's conduct is deserving of that word used to described the worst conduct of its type "*contumelious*" and most

²⁰ I don't accept all the items submitted are expenses solely incurred because of Mr Ireland's wrong doing.

certainly warrants punishment by way of an award of exemplary damages at a level which recognises the extremely serious nature of his misconduct.

Therefore, pursuant to s.162 of the Act, I direct Mr Ireland to pay to the applicant company the sum of \$20,000 under this head.

Costs

Costs are reserved. The parties are directed to attempt to resolve between them the question of costs incurred in bringing this claim for the Authority to resolve. If they cannot do so they are to file and serve submissions on the subject and the Authority will decide the matter.

Janet Scott
Member of Employment Relations Authority