Re Avtex Airservices Pty Limited; International Pilot Training Course Pty Limited; Dieter Siewert and Paul Lange v Ronald Ian Charles Bartsch; David Lee; Anthony Hugh Webster; Peter James Punch; Aviation Dynamics Pty Limited; Axis Aviation Pty Limited [1992] FCA 187 (4 May 1992)

FEDERAL COURT OF AUSTRALIA

Re: AVTEX AIRSERVICES PTY LIMITED; INTERNATIONAL PILOT TRAINING COURSE PTY LIMITED; DIETER SIEWERT and PAUL LANGE
And: RONALD IAN CHARLES BARTSCH; DAVID LEE; ANTHONY HUGH WEBSTER; PETER JAMES
PUNCH; AVIATION DYNAMICS PTY LIMITED; AXIS AVIATION PTY LIMITED and CALDTEAR
PTY LIMITED
No G73 of 1991
FED No. 248
Contracts - Equity - Estoppel - Copyright and Design

(1992) AIPC 90-898
(1992) 107 ALR 539
(1992) 23 IPR 469

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Hill J.(1)

CATCHWORDS

Contracts - exclusive licence to use computer system - whether superceded by later agreement - whether of indefinite duration.

Contracts - restraint of trade - exclusive licence of indefinite duration within defined area - whether void for restraint of trade.

Equity - General Manager not employee - whether fiduciary duty owed - whether breach of fiduciary duty - whether breach enforceable against those who knowingly benefit.

Equity - waiver - whether necessary intention - whether representation of intention - whether

encouragement of assumption.

Estoppel - whether conduct induced assumption - whether sufficient knowledge to create duty to disabuse.

Equity - equitable release - whether present fixed intention - whether delay with sufficient knowledge.

Copyright and Design - Copyright Act - ownership of copyright in slides, video and student work books produced by contractors - whether continued sale and use constituted breach where publication initially licensed but licence revoked.

Copyright Act 1968 (Cth): ss.31(1), 35(5), 36(1), 38, 98.

Adamson v NSW Rugby League [1991] FCA 425; (1991) 103 ALR 319

Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd (1894) AC 535

Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1973] HCA 40; (1973) 133 CLR 288

Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1967] UKHL 1; (1968) AC 269

Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41

Timber Engineering Co Pty Ltd v Anderson (1980) 2 NSWLR 488

The Commonwealth v Verwayen (1990) 170 CLR 394

Thompson v Palmer [1933] HCA 61; (1933) 49 CLR 507

Grundt v Great Boulder Pty Gold Mines Ltd [1937] HCA 58; (1937) 59 CLR 641

Legione v Hately [1983] HCA 11; (1983) 152 CLR 406

Waltons Stores (Interstate) Limited v Maher [1988] HCA 7; (1988) 164 CLR 387

Wright v Vanderplank [1856] EngR 331; (1856) 44 ER 340

Farrant v Blanchford [1863] EngR 168; (1863) 46 ER 42

Life Association of Scotland v Siddal [1861] EngR 300; (1861) 45 ER 800

HEARING

SYDNEY
4:5:1992

Counsel and Solicitors A. Sullivan QC with E. Strasser
for Applicant: instructed by N. Schweizer and Co.

Counsel and Solicitors J.M. Ireland QC with J. Maston

for Respondent: instructed by Webster O'Halloran

ORDER

1. The matter be stood over until a date to be determined when directions will be given for the further disposition of the

case.

2. The applicant bring in Short Minutes of Order on that date to give effect to the judgment of the court.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

Avtex Aviation Pty Limited ("Avtex"), the first applicant, was incorporated in 1984 or 1985. Its directors and shareholders were Mr Dieter Siewert and Mr Paul Lange, who had for many years prior to that time been in business together in the building industry.

2. Mr Siewert had become interested in flying in the 1970's, having become a private pilot in about 1975 and having secured a commercial licence in approximately 1982. Avtex was formed to carry on a charter business in twin-engined aircraft operating out of Bankstown. The idea of utilising available space for expansion on the site of Avtex premises at Bankstown for a school teaching flying theory arose in 1988 in discussions between Mr Siewert and one or both of the Operations Manager of Avtex, Mr Bob Nash, and the General Manager of Avtex, Mr David Chapman. Mr Nash, as a result of these conversations, made contact with the first respondent, Mr Bartsch, a man with prior experience of teaching flying theory, who at the time was teaching aviation at Sydney TAFE college. Mr Nash told Mr Bartsch that Avtex was contemplating establishing an aviation ground theory school at Bankstown and asked him whether he would be interested in assisting the company in setting up the school. Mr Bartsch thought this to be a good idea provided it was done properly and expressed qualified interest.

3. Following a further meeting between Mr Bartsch, Mr Chapman and Mr Nash, an arrangement was made for Mr Bartsch to prepare a proposal for consideration by Messrs Siewert and Lange and a meeting was arranged for that purpose to be held at the Bankstown premises of Avtex on 3 August 1988. Present at that meeting were Messrs Siewert, Lange, Chapman, Bartsch, Nash and a Mr Lee. Mr Lee, an engineer, was a long time friend as well as a business associate of Mr Bartsch, with experience in computers.

4. At the meeting Mr Bartsch prepared a document headed "Proposal for Airtex Aviation Academy". The document stated on its face that it had been prepared by Aviation Consultancy Services ("ACS"). The name Aviation Consultancy Services was a registered business name of Caldtear Pty Limited, the seventh respondent, a company owned, it may be inferred, by Mr Bartsch, of which he and his father were directors. According to the witnesses for the applicants, Mr Bartsch told the meeting that this was his own company. Mr Bartsch denied the conversation, however Mr Lee confirmed it.

5. There is little dispute as to what happened at this meeting. Mr Bartsch took the meeting through the document which was concerned with the advantages of establishing a ground theory school and a proposed structure for it. Mr Bartsch, according to Mr Siewert's evidence, introduced Mr Lee as being a computer expert. Mr Bartsch recommended that computers be used as a teaching aid at the proposed academy, as they had already been used successfully both by Qantas and Ansett for the same purpose. The computer assisted interactive class learning system involved the use of computer terminals to record answers to multiple-choice questions projected onto a screen during the course of the class. The lecturer would be able, from a central control unit, to monitor the overall progress of the students by calling up the number of questions correctly answered. The interactive class learning system came later to be known as the ACE System. That name, which was not used at the time of the initial meeting, came to be used some time in January of the next year.

6. The proposal contained schedules of estimates of the cost of setting up the academy, with alternative figures depending upon whether equipment was purchased or leased. Mr Bartsch said that the cost of setting up three interactive class learning systems would be $32,100. Staffing of the academy was to involve Mr Bartsch as General Manager, in addition to an Administration Manager and lecturers. It was Mr Bartsch's responsibility to find the lecturers, who were to be attracted not

only by salary but by the opportunity to fly with the charter service of Avtex and thereby keep their flying hours current.

7. Mr Bartsch said he would be unable to work five days a week because of his other interests, but he could run the academy by working on average two days per week, and would prefer to run it from home. Mr Bartsch said he would look after all the training material, including lecture notes for students and slides. He said that he had had a training school before and that he had lots of material already and would liaise with lecturers on the preparation of course workbooks. Avtex, for its part, was to expand its premises and provide the necessary funding for the venture.

8. The proposal detailed potential profitability and proposed that ACS was to be paid a service and consultancy fee of $2,500 per month, together with 10% of the amount charged to students as the course fee. In addition, there was to be a once-off payment of $6,000 to enable Mr Bartsch to start work and $2,500 per month to cover expenses of setting up the course between the acceptance of the arrangement and the commencement of operations on 30 January 1989. In explaining the $2,500 per month, Mr Bartsch said that he had to pay someone to type the pages and books that he was to prepare, this also was to cover telephone and car expenses. According to Mr Siewert's evidence, the service and consultancy fee was to be for Mr Bartsch's wages.

9. In discussing the interactive teaching system, Mr Bartsch raised the question of marketing it around Australia. He illustrated this by reference to an earlier franchise system operated by Cessna. He said that he thought that he could sell at least a dozen systems around Australia. He said he wanted the right to sell the system around Australia. Mr Siewert said that he could see no particular problem with that because Avtex only wanted a system in Bankstown, or for the Sydney area, and was not interested in franchising. Mr Lange then said:

> "If you want to sell it around Australia what's in it for us, I mean we are paying for the developing of it."

10. Mr Bartsch said that he was considering paying Avtex a franchise fee, maybe something like 10-15% of the turnover. Mr Siewert then said that in those circumstances he had nothing against that proposition. Mr Lange, in the course of the conversation pointed out that Avtex would not want a franchise to be granted around the Sydney area, to which Mr Bartsch replied: "No, definitely not." There was some discussion, according to both Mr Siewert and Mr Lange, whose evidence I accept, as to how the Sydney area was to be defined. Mr Lange defined it as extending from Newcastle to the north to Wollongong to the south. No doubt both Mr Siewert and Mr Lange were conscious of the fact that the Avtex students would come from the wider coastal area around Sydney. No firm agreement was reached at the meeting.

11. Mr Bartsch and Mr Lange later discussed the proposal and requested Mr Chapman to arrange a further meeting with Mr Bartsch. At this subsequent meeting, on 5 August 1988, Mr Siewert indicated that Avtex wished to tie Mr Bartsch up for at least four years, relative to his employment. Either Mr Siewert or Mr Lange indicated that they were not prepared to pay a percentage of course fees to Mr Bartsch unless, at least, the academy broke even. This was agreed to. The third point made by Mr Siewert was that if the academy did not break even within a three month period, Avtex wanted the right to terminate the agreement at that point of time. The three month period was to commence from the time courses began at the academy.

12. Mr Bartsch said that it was fair enough that if either party wanted to pull out after the three month period he was happy with this. According to the evidence of Mr Chapman, which I accept, Mr Siewert said that he was not too excited about the possibility of releasing Mr Bartsch once he had the opportunity to come in and see if the system worked and then be in a position to operate it or market it himself. He said that he would expect that if Avtex wanted to continue the business, Mr Bartsch would be obligated to remain and would want a contract for four years. According to Mr Chapman, Mr

Bartsch indicated that this was fine. Mr Bartsch's evidence on this matter, that the matter was left with either party having the right to pull out after the three months period is inherently improbable, given that the development of the system was being wholly financed by Avtex and I reject it.

13. There was some discussion also at this second meeting of the proposal to franchise the system to others. Mr Bartsch agreed that a payment would be made to Avtex in circumstances where the system was sold or franchised outside the Sydney area. Mr Siewert indicated that Avtex was not interested in the system outside that area. Apart from the earlier discussions set out above of the need to tie Mr Bartsch up for four years, there was no discussion of any period in which the system would be used by Avtex.

14. Following that meeting, a letter was probably sent to Mr Bartsch outlining the matters discussed at this second meeting with him. That letter, if ever sent, had apparently been lost by both parties and was not available to be tendered in evidence. Thus the terms of the contract between the parties at this stage must be gleaned from the conversations between them as set out above.

15. Some time prior to the initial meeting between Mr Bartsch and representatives of Avtex, Mr Bartsch had contacted a number of persons about the possibility of their being employed at a ground theory school. He mentioned to these persons that he had been approached by a company to establish a ground training organisation and indicated, by way of an incentive to them, that there would be flying of larger aircraft involved. He did not, in these conversations, specifically mention Avtex. Mr Bartsch also contacted a Mr Donoghue who later became the Operations Manager of the Airtex Academy, as it later came to be known.

16. On 31 August 1988, Mr Bartsch caused an advertisement to be inserted in The Australian newspaper advertising under the Avtex name for lecturers to teach ground theory.

17. On 6 November 1988, Mr Bartsch held a barbecue at his home to which he invited a number of persons, some of whom subsequently became lecturers at the academy. The purpose of the barbecue was to discuss the new school. At the barbecue Mr Bartsch outlined the role of each of the invitees in the school and discussed the syllabus and format of teaching. There was also discussion as to who would be writing the various course materials to be used in the course. Mr Bartsch indicated that books needed to be written and allocated topics among the invitees. According to his evidence, he gave out materials, being his own notes, to form the basis of these books. This was not referred to by the lecturers who gave evidence and was not put to them in cross-examination. To avoid recalling these witnesses, the parties agreed that if recalled each would deny Mr Bartsch's allegation. I do not accept Mr Bartsch's evidence on this matter and I find it did not happen. The invitees were told that the prospective lecturers would be paid for their time in preparing the course books.

18. The next major meeting between Mr Bartsch and Messrs Siewert and Lange, according to the evidence of Messrs Siewert and Lange, took place around the middle of December 1988. Messrs Siewert and Lange were unclear whether Mr Lee was also present. Mr Bartsch and Mr Lee (to the extent that it was contended that he was present) denied this meeting took place. According to the evidence of Messrs Siewert and Lange, Mr Bartsch outlined a proposal for running an Airline Pilot Training Course ("APTC") incorporating both theory and practical training to bring students to Qantas minimum entry requirements. Mr Bartsch suggested that the academy advertise such a course and that this would be a great boost for the academy to get it started. He said that he had already talked to some flying schools in the Bankstown area and that at least five or six flying schools would be interested in running the course in conjunction with Avtex. He asked whether Avtex would be prepared to pay for the advertising, which was agreed to. Mr Lange gave evidence that Mr Bartsch, at this meeting, said that the Airtex Aviation Academy, the business name used by Avtex for its ground theory school, would collect all the money.

19. Mr Bartsch, according to the applicants' account of the meeting, said that he would pay the flying schools more than their standard rate in order to obtain preferential treatment from them. A decision

was made that one or more open-nights be held to promote the idea of an airline pilot training course.

20. According to the evidence of both Mr Bartsch and Mr Lee, they visited the Avtex premises in the week between Christmas and New Year having in mind to speak to Messrs Siewert and Lange about the idea of the airline pilot training course. According to this evidence, neither Mr Siewert nor Mr Lange was available and in their absence they spoke to Mr Nash. They said that Mr Siewert had nominated Mr Nash as the contact point for matters relating to the academy.

21. Mr Bartsch, according to this evidence, explained to Mr Nash the proposal for an integrated flying course in which Avtex would participate. According to Mr Bartsch's evidence, Mr Lee said in the course of this meeting:

> "Do you understand, Bob, that we will be running this, we will be managing this, and that what we will be providing to Airtex is their theory component but in a block rather than individual subjects."

22. Mr Nash, it is said, expressed the view that he thought it was a good idea.

23. Mr Lee in chief gave evidence that after Mr Bartsch had outlined the idea and its advantages to Avtex in boosting the numbers of students in the start-up phase he, Mr Lee, had said:

> "I want you to be very clear that we are running it, it's our idea. Airtex will get the theory side and the flying schools will get the flying side."

24. Mr Nash is alleged, by Mr Lee, to have then said: "Yes, it sounds great".

25. In cross-examination, Mr Lee suggested that at this meeting he had said words to the effect that it might seem to a lot of other people, students and others, that the airline pilot flight training school was Airtex's business but that he wanted to make it clear to Mr Nash that he and Mr Bartsch were running the business.

26. Mr Nash, while admitting the possibility that he had had some conversation with Messrs Bartsch and Lee in late December 1988, ultimately denied that any conversation such as deposed to be Messrs Bartsch and Lee took place. His credit, unlike that of Messrs Bartsch and Lee (a matter which I will deal with separately) was not impugned; he had left the employ of Avtex and had no financial interest in the outcome of the litigation. I have observed him in the witness box and find him to be a witness of truth. I accept his evidence that no conversation suggesting that the APTC business was to be the business of Messrs Bartsch and Lee took place.

27. According to Mr Nash's evidence, he had a conversation about the APTC proposal early in January 1989 at Bankstown when the question of setting up the open-nights was discussed. He said that there had been discussions earlier, in fact soon after the August 1988 discussions, about the possibility of setting up such a course. In this respect his initial evidence, so far as the timing was concerned, is suspect. In cross-examination he said that he had first heard of the idea of an integrated pilot training course APTC five or six weeks before the opening of the academy, which was on 30 January 1989. This time frame seems more likely and fits in with the evidence of Messrs Siewert and Lange. He said that he had been present at a meeting with Mr Bartsch and Mr Siewert at which the APTC proposal had been discussed and at which the need for the flying school money to be kept separate had been discussed.

28. In the January discussion Mr Nash said that Mr Bartsch had discussed setting up a bank account in which to bank the moneys to be paid in the future to the flying schools. Mr Nash said that it was

correct that a separate bank account be set up for these moneys because they were funds to be held in trust for later payment. He said that he told Mr Bartsch that the account should be set up at the Commonwealth Bank at Moorebank where Mr Siewert's other accounts were kept.

29. At some stage in January a further discussion took place between Mr Bartsch and Mr Siewert at which the structure of payments for the proposed APTC course was discussed. Mr Lee was not present but said that he had been told by Mr Bartsch that a discussion had taken place. According to Mr Siewert's evidence, Mr Bartsch proposed that the charge for the course be by way of two components; the first, a deposit, was to be the amount which Avtex would normally charge students for the ground theory course, less a 10% discount; the second was to be payable by students in four instalments. This second component, which was to pay for the flying school fees was to be kept separately from the academy money.

30. According to Mr Bartsch's evidence, the first conversation he had with Mr Siewert on the subject of the APTC was in January when Mr Bartsch presented to Mr Siewert a draft brochure for the integrated course which had been prepared by Mr Lee. Mr Bartsch said that he reminded Mr Siewert that this was the course he had discussed with Mr Nash and that Mr Siewert thereafter understood. I reject this account of events as being highly improbable. No attempt was made to put into writing any agreement between the Avtex and Bartsch interests relating to the flying school, which one might have expected if it were to be on a totally different footing from the ground theory school. Rather, it seems more likely that the proposal was advanced and accepted as involving no more than a way of advertising the ground theory course to be run by Avtex and with the moneys to pay the flying schools being collected from students and paid in due course to the flying schools. This, in essence, is the way that it is presented in the brochures ultimately given to prospective students. The name Airline Pilot Training Course, hardly a distinctive name, is used rather as describing a type of training course than as a business name. The brochure described Airtex and the flying schools as participating in this course. It is difficult to read the brochure, handed out to students at the Avtex open-night at the premises of Avtex, as suggesting that an entity controlled by Mr Bartsch but having a registered business name of Airline Pilot Training Course was running for its own profit a course in which the ground training was being supplied by Avtex and the flying component by named flying schools.

31. Mr Bartsch made contact with a number of flying schools which agreed to train students. According to the evidence of Mr Young, from one of those schools, Mr Bartsch told Mr Young that Airtex (ie Avtex) would be responsible for payment of their fees. According to Mr Bartsch, he told representatives of the flying schools that Airline Pilot Training Course would be responsible for the fees. Given that Mr Bartsch was associated with the Airtex academy of Avtex and that the name Airline Pilot Training Course is descriptive and not distinctive, particularly when the words are spoken without the benefit of capital letters, it is not surprising that the flying schools would believe they were dealing with Airtex and indeed it is probable that in his negotiations Mr Bartsch set out to give that impression.

32. The name Airline Pilot Training Course was registered as a business name under the proprietorship of Dyljot Pty Limited ("Dyljot"), a company which later changed its name to Aviation Dynamics Pty Limited and which is the fifth respondent. Dyljot was a company in which Mr Bartsch, Mr Lee and their respective wives were interested until 1990 when the shares of Mr and Mrs Lee were sold to Mr Webster and Mr Punch, the third and fourth respondents.

33. Two open-nights were held on 17 and 18 January 1989, shortly before the official opening of the academy on 30 January of that year. There were approximately 200 people present on each night. Both Mr Bartsch and Mr Donoghue, who had been by then appointed as Operations Manager of the Academy, spoke outlining the details of the airline pilot training course. The flying schools were represented on these occasions, together with a representative of the Moorebank branch of the Commonwealth bank which had agreed to provide finance for students desiring to undertake the flying course.

34. Eight students were enrolled for the first course which commenced on 30 January 1989, prior to the time that students workbooks were all ready. The workbooks, when ultimately printed, all displayed on the front page the words "Copyright ACE System". At no time was there any discussion between the Bartsch interests and the Siewert interests as to the question of copyright. The computer system was not installed in time for the opening-night but arrived in February. The classrooms had been set up in accordance with Mr Bartsch's proposal and approximately 75% of the cost was borne by Avtex, although some equipment was purchased from the academy account, that is to say out of the moneys which students had paid. Mr Lee supervised the installation of the computer system. He personally devised the circuit boards for the student terminals and had them manufactured. A software programme was written by a relative at a cost of $3000.

35. In about March 1989, according to Mr Siewert's evidence, Mr Siewert learned that there was an account in a bank in Paddington in which the moneys for the flying component of the course had been banked. He then had a conversation with Mr Bartsch who, according to Mr Siewert, confirmed that this was the case. Mr Siewert said words to the effect that all the accounts of Avtex were in the Commonwealth Bank at Moorebank and that he expected that the moneys would be transferred to the company's account at Moorebank. According to Mr Siewert, Mr Bartsch agreed that he would organise that. This conversation was not denied by Mr Bartsch and Mr Lee was also aware of Mr Siewert's insistence that the account be held with the Commonwealth Bank at Moorebank. No doubt this requirement was related, at least in part, to the bank's role in financing students. Despite Mr Bartsch's agreement, no attempt was made to comply. Mr Lee and Mr Bartsch both gave evidence that, after discussing the matter with their wives who had a role in banking funds, they formed the view that it would be inconvenient to bank at Moorebank and they did no more than open an account to which a token amount of money was placed. With the exception of amounts banked into the Moorebank account, in this period all moneys paid in excess of the ground school component were placed in an existing account of Dyljot and used to pay flying fees and for the purposes of Messrs Bartsch and Lee. Students who enrolled in the integrated course paid the first instalment directly to the Academy and subsequent cheques were generally drawn in favour of "Airline Pilot Training Course". Cheques which came directly from the Commonwealth Bank were generally drawn in favour of Airtex Academy.

36. Cheques for the non-ground school component of the course when received were passed on by Mr Donoghue to Mr Bartsch who had an office at Paddington which had formerly been his home. Receipts were issued to students from an Airline Pilot Training Course receipt book.

37. About a month later, Mr Siewert and Mr Bartsch had a further conversation in which Mr Siewert alleges that he asked Mr Bartsch whether the money had been transferred to the company's account at Moorebank. According to Mr Siewert, Mr Bartsch's answer was "vague". According to Mr Lee's evidence, at some time a meeting was held at which both Mr Siewert and Mr Lange were present at which Mr Siewert questioned Mr Lee as to why the money from the Airline Pilot Training Course was not being deposited into Airtex's account at Moorebank.

38. Prior to that meeting, Mr Bartsch had forwarded an invoice to Airtex for the bonus component of his fee, ie 10% of course fees. Mr Siewert indicated to Mr Bartsch that he did not believe that the academy was yet breaking even, or making a profit, and the matter would be looked at at a later stage.

39. There were discussions between Mr Siewert and Mr Bartsch in late March and early April 1989 about the printing of the books to be used in the course. Many of them were apparently still being edited and changed by the lecturers and this was a matter of concern to Mr Siewert. Mr Bartsch arranged for quotes to be obtained for the printing of an average book of 200 pages with a cost of approximately $13. That amount was accepted. Mr Bartsch said, in the course of one of these conversations, that he proposed to take over the printing of the books as he had been developing proposed franchises of the system and would need a large quantity of books for them. To order the books in a large quantity would reduce the cost, not only to franchisees but also to Avtex.

40. According to the evidence of Mr Bartsch, in March 1989 Mr Bartsch was challenged by Miss Siewert, Mr Siewert's daughter, as to why the APTC moneys were not being banked at the Commonwealth Bank at Moorebank. Mr Bartsch said that Miss Siewert was working in the accounts section of the academy. According to Mr Bartsch, he told Miss Siewert that the money was the money of Mr Bartsch and Mr Lee. According to Mr Bartsch's evidence, Mr Siewert came to see Mr Bartsch on the same day to talk about APTC and a meeting was arranged with Mr Bartsch and Mr Lee.

41. According to both Messrs Bartsch and Lee, at this meeting Mr Siewert challenged them about the APTC and they made it clear to him that the business was theirs and that this had already been agreed in the discussion with Mr Nash.

42. According to their testimony, Mr Siewert then called Mr Nash in and confronted him with the proposition that the whole matter had been agreed between Mr Nash and Mr Bartsch in late December 1989. According to Mr Bartsch, Mr Nash nodded assent to this in the presence of Mr Lange, who had joined the meeting.

43. The initial conversation was denied by Miss Siewert. She said that she did not work in the accounts section of the academy but in the accounts section of the construction business of Mr Siewert and Mr Lange. She did however, have something to do with banking as several deposit slips for academy moneys were signed by her, as she was forced to admit in cross-examination. Although in the result her credit was challenged by the respondents, I find it is more probable than not that although she did from time to time do banking (she was a relatively junior age), at least when others were not available, she was telling the truth when she deposed that the conversation with Mr Bartsch did not take place.

44. Both Mr Siewert and Mr Nash denied that any such conversation occurred at that time. I accept their evidence. According to their evidence, there was a later conversation in October 1989 where Mr Nash was called in and I will deal with this conversation in chronological order.

45. Shortly after the end of the financial year 1988/1989, accounts for the academy were prepared derived from information obtained by Mr Donoghue, the Operations Manager. Those accounts, for a five month period of operations, showed a turnover of $177,638, being 48.5% of potential student space. According to the initial figures produced by Mr Bartsch, this should have shown a profit of $63,000 to Airtex and $17,760 to ACS, but instead showed a total profit overall of only $14,090 or, if adjusted by certain amounts, $10,654.

46. Following the preparation of the accounts, Mr Siewert had a further discussion with Mr Bartsch in the first week of July 1989. At that meeting Mr Siewert told Mr Bartsch that if Avtex was to pay ACS 10% it would lose money. He suggested a compromise to share the net profits actually made in the ratio of 30%:70%. According to Mr Siewert's evidence, Mr Bartsch agreed to this compromise. At the same meeting, according to Mr Siewert, Mr Bartsch indicated that he would be soon starting to sell franchises and Mr Siewert suggested that the actual monetary exchange for the 30% be left to a later stage and then be adjusted with the 10% of turnover of franchisees. This, according to Mr Siewert, Mr Bartsch also agreed to. Mr Bartsch and Mr Lee denied that they agreed to any variation of their entitlement to the 10% of turnover. It is not necessary to resolve this conflict.

47. According to Mr Siewert's evidence, the next meeting of significance with Mr Bartsch occurred in October 1989 when a meeting took place at which were present Messrs Bartsch, Lee, Siewert and Lange. The meeting was called at the request of Mr Bartsch. According to Mr Siewert's evidence, Mr Bartsch indicated that he had a further proposal to put to Mr Siewert and Mr Lange. Mr Bartsch said that he believed that Australia would be a good place to train overseas pilots and formulated a proposal that there be run a course for training of overseas pilots including accommodation. The proposal was that the overseas course be run as a separate course. Mr Siewert indicated to Mr Bartsch that he was interested in the proposal and was prepared to look at an equal share partnership. According to Mr Siewert's evidence, a counter-proposal was then formulated and put to Mr Bartsch and ultimately signed on 31 October 1989.

48. By the agreement dated 31 October 1989, Messrs Lange, Siewert, Bartsch and Lee agreed to establish an International Pilots Training Course ("IPTC") as four equal shareholders in a company to be established. For this purpose a shelf company, Dawnvisa Pty Limited, was acquired and renamed International Pilot Training Course Pty Limited. That company is the second applicant. There was an estimated operating cost of $108,000 per student with a proposed charge-out fee of $135,000. New premises were to be built for the proposed IPTC at Bankstown Airport. Messrs Bartsch and Lee were to be responsible for coordinating the theory and flying training; Messrs Siewert and Lange to be responsible for building and supervising the offices, accommodation and catering of the Bankstown section of the course. In fact this proposal never came to fruition.

49. In October 1989 Messrs Bartsch and Lee made arrangements for the preparation of a video to promote the International Pilot Training Course to overseas airlines. The evidence is unclear precisely when this video was completed. Of this video, which was tendered in evidence, little need be said save that the script, in part at least, was written by Mr Bartsch, that it showed scenes of the Airtex Academy and the interactive system and was, in many respects, misleading.

50. At about the same time, Mr Chapman, the General Manager of Avtex chartered operations, was chasing some money from a flying school which had chartered one of its aircraft. He rang that school to demand money and was told that he should deduct it from the academy account as Avtex owed the flying school more than it owed Avtex. Following this conversation, Mr Chapman spoke to Mr Donoghue who referred Mr Chapman to Mr Bartsch or Mr Lee. When Mr Chapman spoke to Mr Lee, Mr Lee told him that the flying money was no concern of Avtex and that it belonged to Messrs Bartsch and Lee.

51. Mr Siewert, according to his evidence, then rang Mr Lee and had a conversation with him, following which, according to Mr Siewert, Mr Lee agreed to send a cheque. The question of the APTC bank account was, according to Mr Siewert, raised at the meeting of 31 October. According to Mr Siewert's evidence, he expressed surprise that the APTC money was still held in an account, not being an account of Avtex, at Paddington. Mr Bartsch said that there was no money in the course and that in any event Mr Nash, in January, had agreed that Messrs Bartsch and Lee could run the APTC as a separate enterprise for their own account. According to Mr Siewert's evidence, this was the first that he had heard of any such arrangement. Subsequently, Mr Siewert spoke to Mr Nash and asked him whether he had agreed that Messrs Bartsch and Lee could run the APTC as a separate business. Mr Nash denied any such agreement in that conversation and Mr Nash denied, as I have already indicated, that any such conversation had taken place. Mr Siewert's account is largely corroborated by Mr Nash and I accept it.

52. Another matter discussed at the meeting of 31 October 1989, was the question of advertising for the IPTC. Mr Bartsch indicated that he had been preparing letters to be sent overseas to international airlines and that he had commissioned a video to be prepared as a promotional video. For this purpose, he indicated to Mr Siewert, that he had paid already a $10,000 deposit for the preparation of the video and requested that Avtex reimburse him for amounts that he had spent. Mr Siewert agreed and an amount of $10,300 was paid. That video was, as already indicated, produced and the finished product was available in early January 1990.

53. By the end of December 1989, it was made clear to Mr Siewert that the profit made by the academy was small. Mr Siewert commenced investigations, so he said, as to why more money was not being made. He spoke to Mr Donoghue who said that the APTC flying component contained a big mark up and was making heaps of money. Following this conversation, Mr Siewert called a further meeting with Mr Bartsch and Mr Lee at which Mr Lange was also present. At that meeting Mr Siewert pointed out that Airtex seemed to be going nowhere. He reminded Messrs Bartsch and Lee that they had said in October that there was no money or profit involved in the flying component when Mr Siewert's investigations just prior to that meeting had indicated that there was a mark up of something in the order of $3,500 per student. By the time of the meeting there had been some 45 students with the result that the mark up had amounted to $135,000-$145,000.

54. The meeting was a long one and at the end of it Mr Siewert suggested that all four operations be merged, that is to say the IPTC, the APTC, the training academy and the ACE System as one company in equal shareholding. According to Mr Siewert, at this time he believed that the amount necessary to pay for the flying component of the APTC was still in the bank account operated by Messrs Bartsch and Lee for APTC.

55. Messrs Bartsch and Lee did not give an immediate answer to this proposal as they wished to talk to their wives. A subsequent meeting was held later in January 1990 at which Mr Bartsch, Mr and Mrs Lee, Mr Lange and Mr Siewert were present. At that meeting Mr Bartsch agreed to a proposal that the various businesses be put together into one company, but indicated that he wished to exclude the computer system because there was a use for it in other areas. This was agreed by Messrs Siewert and Lange who expressed the view that they had never had any interest in the computer system in the first place. There was discussion about Mrs Lee being paid for doing accounting work and further discussion as to the potential profit by merging the three businesses.

56. A further meeting was held on 7 March 1990 at which the same persons were present. According to Mr Siewert's evidence, it was at this meeting for the first time that it became clear that the moneys in the APTC bank account operated by Messrs Bartsch and Lee were inadequate to pay flying schools for the flying component of the APTC course. It was revealed that only $68,000 was in the bank account and at that stage, according to Mr Siewert, neither Mr Bartsch nor Mr Lee knew how much money was missing. It was estimated that the missing amount was something in the order of $95,000. Mr Bartsch indicated it would be necessary to reconcile the account to determine the precise figure.

57. At the meeting Mr Lee produced a draft agreement which he had prepared between Avtex, Dyljot and Dawnvisa Pty Limited for the merging of the operations of APTC the academy and IPTC. The agreement provided, in essence: that Dawnvisa Pty Limited would purchase the fittings of the existing academy; that the premises of the academy be leased to it for four years with a further option of three years; that a General Manager, Mr Len Sales, be appointed; and the consultancy arrangement with ACS of $2,500 per month would cease on the employment of Mr Sales. Relevant to the present dispute, the agreement provided, in clauses 11-14, as follows:

> "11. On signing of this agreement, Dyljot Pty Ltd will transfer the current balance of the APTC account held by Dyljot Pty Limited to the APTC account held by Dawnvisa Pty Limited. The current balance is $68,362.06.
> 12. Dawnvisa Pty Ltd agrees to accept responsibility for the payment of all unpaid and yet to be incurred flying training fees in relation to students who commenced with Airline Pilot Training Course while it was owned by Dyljot Pty Limited. This debt is approximately $147,784 (net of credits held by Navair Flying School and instalments owned by APTC 1989 students) and the difference between this amount and the amount transferred in accordance with clause 11 shall be deemed to be an advance against the profit share of **Ron Bartsch** and David Lee...
> This debt will be interest free to Dyljot Pty Limited ... and all officers and shareholders of those companies and will be repayable only out of the distributions of profit from Dawnvisa Pty Ltd.
> **Ron Bartsch** and David Lee ... will not be

> eligible for any further distribution of profit from Dawnvisa Pty Ltd until Dieter Siewert and Paul Lange have received between them a distribution of profit equal to the above shortfall of approximately $79,422, and such further distributions of profit will be made simultaneously and equally to the four directors.
> 13. Ace System (a division of Dyljot Pty Ltd) agrees that it will pay 10% of turnover from sales made after 1 January 1990 to its franchises excluding Airtex Aviation Academy. This payment will be made to Silan Trading every 1 month, together with a record of trading.
> 14. All banking will be done through the Commonwealth Bank, Moorebank."

58. The figures of $147,784 and $79,422 set out above were calculated during the course of the meeting and filled in on the draft prepared by Mr Lee. Eventually the agreement was executed that day.

59. Later in the year 1990, further tensions occurred between Mr Siewert and Mr Bartsch arising out of an increase in the cost of the student workbooks. Some payments had been made in respect of franchises granted by Aviation Dynamics Pty Limited in respect of the ACE System, but these ceased in April 1990. The parties resorted to correspondence setting out claims and counter-claims against each other. Mr Webster, who by that time had replaced Mr Lee as a shareholder in the fifth respondent, took the view that all matters were in abeyance until a suitable agreement was finalised between Avtex and the fifth respondent. By late in August, solicitors had become involved. A directors' meeting was called of the second applicant to endeavour to resolve the impasse, but failed so to do.

60. The final parting of the ways between the parties came after an open-night was held by the sixth respondent, Axis Aviation Pty Limited, in January 1991. Mr Siewert had heard a rumour that Mr Bartsch had arranged to franchise the ACE System to Axis. According to Mr Siewert, this was initially denied. Mr Siewert arranged for some persons to attend the opening night, at which was screened a video, and at which there was an ACE stand.

61. There is some dispute between the parties whether the first, second or both of two videos, which are in evidence before me, were shown at these open nights. The first, of roughly two minutes' duration, consists of extracts from the original video and shows, inter alia, the Airtex Academy in operation. Although it was prepared to promote a competitor, Axis Aviation Pty Ltd, the names Airtex and Avtex are clearly legible in some scenes. The second video is longer and consists of scenes from the first interspersed with new material which is, perhaps, even more misleading. It is unnecessary to resolve this dispute as it is clear that both videos contain material which amounts to a substantial reproduction of the original video in addition to new material.

62. In February 1991 both Mr Bartsch and Mr Lee resigned from their position as directors of International Pilot Training Course Pty Limited. The present litigation commenced on 27 February 1991.

The case as pleaded by the applicants

63. As ultimately pleaded, Avtex claimed to be the owner of the copyright in the ACE system comprising 17 student workbooks, visual slides and computer programmes or the components thereof. Alternatively, by virtue of certain assignments of copyright from the original author lecturers, Avtex and Messrs Siewert and Lange jointly claimed to be the copyright owners of the workbooks.

64. The statement of claim alleged alternatively that Avtex was entitled to the exclusive right to the system in the Sydney area, which right had been transferred to International Pilot Training Course Pty Limited, and that the Bartsch interests had, in breach of that licence, licensed Axis to use the system at Bankstown.

65. In another count it was alleged that the sum of $266,290.18, being moneys belonging to Avtex, had been converted by Messrs Bartsch and Lee and Aviation Dynamics Pty Limited and that Mr Bartsch and/or Caldtear Pty Limited owed a fiduciary duty to Avtex which had been breached by the appropriation of the moneys paid for the APTC course, in that they had received secret remuneration or secret financial benefits. It was alleged that Mr Lee or Caldtear Pty Limited, to the extent that they had benefited, had done so with knowledge of this breach.

66. Additionally, it was alleged that copyright in the video belonged to International Pilot Training Course Pty Limited and that this copyright had been breached by the showing of the video at the Axis open-nights.

67. There were claims, which it is unnecessary to note in detail, said to arise under the provisions of s.52 of the Trade Practices Act 1974 (Cth), to which no argument was addressed but which, in essence, went to representations said to have been made arising out of copyright or the right of Axis to use the ACE system. These claims raise no separate issues and may be put to one side.

68. The respondents denied or did not admit the relevant allegations. A cross-claim by the respondents was not proceeded with.

69. The applicants claimed to be entitled to a declaration as to the ownership of copyright in the system, the software and the video, a declaration that the registered business name ACE SYSTEM is held by Aviation Dynamics Pty Limited on trust for Avtex and an order that it be transferred to Avtex; an order restraining the respondents from infringing the copyright claimed or from holding themselves out as being entitled to that copyright. Perhaps commercially more significant is the claim for an order restraining the grant of rights to use the system in the Sydney area and order for accounts and damages.

70. By agreement of the parties, the question of an accounting for profits or damages was deferred until the substantive liability of the parties was determined.

The issues of credit

71. Before considering the various submissions as to liability, it is now convenient to set out my views on the credit of witnesses which have substantially been taken into account in my narration of the relevant evidence and my finding of fact on that evidence.

72. Apart from there being some minor inconsistencies between the evidence of Mr Siewert and Mr Lange, their evidence was not really capable of challenge. There was nothing implausible about their accounts of the various meetings with Mr Bartsch and Mr Lee and in the witness box they gave their evidence, in my opinion, honestly. I was particularly impressed by Mr Lange whose evidence I would accept without question. Equally, I accept the evidence of Mr Siewert.

73. The same can not be said of the evidence of Mr Bartsch nor, to some extent, the evidence of Mr Lee.

74. I formed an unfavourable view of Mr Bartsch in the witness box. He is, as his degrees in science and law suggest, an intelligent man, but in my view was prepared to give evidence which at the very best was a half truth and was prepared to shift ground in his evidence when the occasion appeared to suit him.

75. An affidavit of Mr Lee had been prepared in the proceedings detailing the expenses and income of the APTC course. That affidavit referred to amounts expended in payments to the Civil Aviation

Authority for student examination fees. On the first day of hearing before me, reference was made to a subpoena issued by the applicants to that authority. The significance of that was obvious both to Mr Bartsch and to Mr Lee.

76. It emerged that when students had paid examination fees directly to the Authority, cheques were drawn on the account of APTC conducted by the fifth respondent to cash. In those written by Mr Lee, the cheque butts were originally left blank. Some cheque butts had been completed showing a payment to the Authority. A number of these cheques were written by Mr Bartsch, who initially denied this. The proceeds, some $29,292 were distributed to Mr Bartsch and Mr Lee. Mr Lee agreed that in swearing a second affidavit in which the Aviation Authority moneys were treated as management fees to Mr Bartsch and himself, he had been influenced by the knowledge of the subpoena and had thereafter discussed the matter with his counsel. He was aware that the affidavit was untrue and, in my view, was prepared to lie because he did not believe that he would be caught out. He did say that he believed that he would in any event have changed that evidence, but I find this difficult to accept.

77. Mr Lee, after learning of the subpoena and after discussions with his counsel, had a conversation with Mr Bartsch in which he told Mr Bartsch that he proposed to allocate these cash funds to management fees. According to his evidence, Mr Bartsch agreed. Mr Bartsch claimed not to have seen Mr Lee's affidavit and to have been unaware that he had filed a second correcting affidavit. Indeed, he claimed not to have been aware of the first affidavit at the time.

78. This whole episode reflected badly upon the credit both of Mr Bartsch and Mr Lee. But there were other matters that were also damaging to the credit of Mr Bartsch. He was shown a document of projections of profits of the APTC business which was given to a bank manager in connection with a loan to purchase a house in August 1989. That document showed a contemplated profit mark-up on the APTC course of $3,050 per student. Mr Bartsch denied knowledge of the document. Mr Lee deposed that it had been produced to the bank manager and discussed at a meeting at which Mr Bartsch was present. I have no doubt that Mr Bartsch was not telling the truth in respect of this matter and that Mr Lee was.

79. In cross-examination Mr Bartsch was shown videos of television interviews conducted with him by three national programmes concerning his involvement in the promotion of AAA Airlines for an aviation licence to carry passengers within Australia. Mr Bartsch's answers to the interviewers' questions were inconsistent, particularly as to the amount of capital that had been secured overseas. That material was not, of course, on oath, but hardly gave substance to Mr Bartsch's claim to be believed, particularly when in cross-examination he asserted the truth of what he had said in each interview.

80. In addition, counsel for the applicants referred to an informal prospectus for AAA Airlines in which Mr Bartsch was featured as being a "qualified lawyer". In one sense he was, as he did have a law degree, although it may be said that the expression "qualified lawyer" suggests someone who is qualified to practise. In various places Mr Bartsch described himself as a Qantas pilot or second officer. The fact of the matter was that he was employed by Qantas as a trainee pilot but failed to pass an examination on a flight simulator. His employment with Qantas was subsequently terminated although he later passed the flight simulator examination. He was never re-employed. While the correspondence left scope for argument about Mr Bartsch's status, it was, in my opinion, misleading of him to describe himself as having been employed by Qantas as either a pilot or second officer.

81. Mr Bartsch was also shown on the promotional video as saying that until recently he had never flown a plane larger than the plane depicted, when he had trained on planes considerably larger with Qantas. Whether there is in the aviation industry a distinction between flying a plane under instruction and flying it as a licensed pilot as Mr Bartsch asserts is little to the point. At the best, the statement was a half truth. In the promotional video for Axis, taken in part it will be recalled from the Avtex video, Mr Bartsch talks of "we at Axis" as he had in the previous version spoken of "we at Avtex". He

had no connection at all with Axis, other than as a licensor of the ACE system, and his attempts to justify the use of the first person plural are but another example of the difficulty in accepting his evidence.

82. Mr Bartsch's evidence was contradicted by Mr Lee on other matters that had relevance to the case. This was notwithstanding that they had, as they admitted, got together to prepare the evidence in the case and to jog each others recollections. In saying this I do not suggest that they put their heads together to concoct false evidence or that there was anything improper in their discussing the case beforehand to prompt recollection of events that had occurred some time before. Mr Bartsch's evidence, that he had provided his lecture notes to the lecturers to prepare the workbooks, a highly relevant matter on the copyright issue and disputed by all lecturers, is another pointer to the difficulty of accepting his evidence.

83. The question of Mr Lee's credit is a more difficult one. It is clear that Mr Lee was prepared not only to participate in tax evasion, but also to swear false evidence by way of an affidavit in the present proceedings, which would not only have hidden the tax evasion but also have assisted the respondents' case. It is true also that on at least one occasion he recalled in cross-examination evidence which was not given in chief, but which appeared to strengthen his case. However, it does not necessarily follow that all his evidence should be disbelieved merely because he has been caught out on the CAA matter. I have given this matter anxious consideration, particularly having regard to his demeanour in the witness box when, and I say this with no disrespect to Mr Lee, he at times acted like a schoolboy who had been caught out cheating. In the end, I have decided that it would be unsafe to accept the evidence of Mr Lee where it conflicted with the evidence of others whose credit has not been challenged, or if challenged has not been impugned, particularly Messrs Siewert, Lange and Nash.

84. Accordingly, unless otherwise indicated, I accept the versions of conversations adduced in evidence by Messrs Siewert, Lange and Nash where those versions differ from the evidence given by Messrs Bartsch and Lee.

The claim based upon exclusive licence of the ACE System

85. The parties were not in dispute that as at 5 August 1988, or the time of the missing confirmatory letter, Avtex became entitled to an exclusive licence to use the ACE System which was to be developed by ACS. There was dispute as to whether this exclusive licence was for a term of four years as alleged by the respondents, or of indefinite duration as alleged by the applicants. The respondent did not seek to rely upon a term of the agreement that Mr Bartsch had a right to terminate upon three months notice, presumably at least in part because of the appreciation of the difficulties which the attack on the credit of Mr Bartsch created for the acceptance of his evidence on this matter, when it was denied by an independent witness.

86. The respondents, however, submitted as their primary submission that whatever the initial term (and the four years had not expired when there was a purported grant of a licence to Axis) the events of March 1990 operated to bring that right to an end. Put simply, it was submitted that the August 1988 agreement was superseded by the March 1990 agreement.

87. I do not accept this submission. It is true that the March 1990 agreement does not deal specifically with the grant of an exclusive licence to use the ACE System, but one thing is certain, the parties to the 1990 agreement did not contemplate that Dawnvisa, which was to be set up to run the operations of the academy, APTC and IPTC would not have the right to use that ACE System. To give business efficacy to that agreement it is necessary to imply a term that Dawnvisa, which was to be the successor of Avtex in relation to the use of the system, enjoy the same rights as Avtex had done. Should I be wrong, then I would be of the opinion that there never was any termination of the original agreement with Avtex, so that the latter company continued to have the right, for at least four years, or indefinitely, to the exclusive use of the system with the right to license Dawnvisa to use the system for the same period. On either view of the facts, either Avtex or Dawnvisa had the right to restrain a grant of a right by the fifth respondent to Axis to use the system in Bankstown and a declaration to

this effect should be made.

88. It is, however, necessary to express my conclusions as to whether the right was for a period of four years or indefinite, both having regard to the terms of the injunction and the accounting of profits or damages which would flow from such relief being granted, and to the submission made by the respondents that if the right were indefinite it would be an unreasonable restraint of trade and void in accordance with the common law doctrine of restraint of trade.

89. Although the question is made more difficult by reason of the absence in evidence of the letter of confirmation, if indeed there ever was such a letter, I would conclude that the reference to four years was not a reference to the term of the agreement of exclusive licence, but a reference to the time in which Mr Bartsch would be required to participate. It was Mr Bartsch's involvement which Messrs Siewert and Lange regarded as significant. They understood that they were financing, probably totally, the development of the system and expected, as indeed all parties did, that they would have an indefinite right to it. But they were relying on Mr Bartsch to be involved in developing and running part-time the ground theory school. It is true that there were discussions about the appointment of a full-time employee to take over the position of General Manager of the academy, a role which Mr Bartsch was to undertake part-time, and that the parties understood that at that time Mr Bartsch would step down from that position, but that does not alter the intention of the parties that the right to use the system, which was essential to the whole arrangement, was not to terminate at the expiration of four years.

90. Indeed, both the applicants and the respondents submitted that the licence part of the arrangement was to continue indefinitely, carrying with it the right to restrain the appointment of other licencees in the Sydney area.

91. The common law doctrine of restraint of trade is in principle clear, albeit that its application may be difficult in a particular case. It has most recently been discussed by the full court of this court in Adamson v NSW Rugby League [1991] FCA 425; (1991) 103 ALR 319. As that case points out, the classic statement of the modern common law rule is that of Lord Macnaghten in Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd (1894) AC 535 at 565 where his Lordship said:

> "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

92. As pointed out by Gummow J in Adamson there is a distinction to be drawn between restraints of

trade which are contractual and which are arrived at by bargaining between the covenantee taking the benefit of the restraint and the covenantor who accepts the burden on the one hand and other restraints such as those involved in Adamson on the other. In the former class of case the situation is as stated by Menzies J in Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1973] HCA 40; (1973) 133 CLR 288 at 294:

> "...when parties negotiate a commercial arrangement from positions where one does not have the other at an unfair advantage and do, after hard bargaining, reach an agreement which each finds in its interests to accept, the Court will not readily find that their bargain is unreasonable between themselves, notwithstanding the well-established policy of the law against restraints of trade."

93. Thus, the courts will more readily find valid restraints of trade given on the sale of a business to protect the goodwill acquired by a purchaser of that business, at least where limited as to time and place, although in each case consideration of the public interest will be required to ensure that the restraint is no more than is reasonably necessary: cf Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1967] UKHL 1; (1968) AC 269 at 335-6 per Lord Wilberforce, and Bridge v Deacons (1984) AC 705 at 713, and see too Iraf Pty Limited v Graham (1982) 1 NSWLR 419.

94. In Amoco the restraint, which was given, inter alia, in circumstances where Amoco was to lend to the respondent plant and equipment to operate a service station, was for a period of fifteen years and was to bind the respondent to purchase petrol in that period solely from Amoco. The restraint was held to be more than was reasonably necessary to protect Amoco's interests and thus an unreasonable restraint of trade.

95. The approach to be adopted in a case such as the present is that adopted by Lord Reid in the Esso Petroleum Case at 301, where his Lordship said:

> "I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect and then to see whether these restraints were more than adequate for that purpose."

96. In the present case, there is little dispute that the development of the "system" was wholly financed by Avtex. The parties could, if they were so minded, have agreed that the "system", by which I mean the industrial property rights therein, was to be owned by the applicants, but with a licence to the respondents to grant rights of user to others outside Sydney. The parties did not purport to adopt this commercial solution, but impliedly left the industrial property rights to fall where they would under the general law. They agreed to exploit these rights by permitting the fifth respondent to license others for reward outside the Sydney area (subject to the payment of a "royalty") and permitting the use of those rights in Sydney by the first applicant or its successor. In these circumstances, the legitimate interests of the applicant were the right to use in Sydney and for its own business purposes the industrial property rights the development of which it had wholly paid for. It was, in my view, entitled to protect the goodwill of the business which it was developing against the competition of others in the Sydney area and the restraint implicit in that protection was no more than was adequate for that purpose.

97. In one sense it can be argued that there was no relevant restraint as the fifth respondent had not given up any right or freedom which it might formerly have had (cf Esso Petroleum at 298 per Lord Reid, at 309 per Lord Morris, at 316-317 per Lord Hodson and at 335 per Lord Wilberforce). But

whether or not such an analysis is now acceptable after Rocca Bros and Queensland Co-operative Milling Association v Pamag Pty Limited [1973] HCA 24; (1973) 133 CLR 260 or is confined to the special case of leases need not be here considered. For accepting that there is here a relevant restraint of trade, the protection given under the restraint is no more than is reasonably necessary to protect the legitimate interests of Avtex and its successor and does not infringe any relevant public interest. It is thus not unreasonable.

Breach of fiduciary duty

98. The applicants submit that Mr Bartsch, as General Manager of the Airtex Academy business of Avtex, was under a fiduciary duty to Avtex and that accordingly he was liable to account to Avtex for benefits received from the operation of the Airline Pilot Training Course. It was submitted to be immaterial that his services were provided through the medium of a corporate entity such that he was not, in a general law sense, an employee of Avtex; he was nevertheless the General Manager of the business and it was from this position that his fiduciary relationship arose. There being a fiduciary relationship, the law was clear, it was submitted, that Mr Bartsch might not use his position to obtain a benefit by entering into a transaction (the running of the APTC course) to gain a profit or advantage for himself in conflict with his fiduciary duty.

99. As Gibbs C.J. pointed out in Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, the authorities give little guidance as to the criteria by reference to which the existence of a fiduciary relationship may be established. It is, of course, well established that an employee owes a fiduciary duty to his employer, but no employment relationship existed in the present case between Avtex and Mr Bartsch.

100. The Chief Justice in Hospital Products approved, with perhaps some hesitation, the test formulated in the Court of Appeal by reference to comments made by the trial judge, McLelland J. McLelland J had said that there were two matters of importance in determining whether a fiduciary duty existed. As paraphrased by Gibbs C.J. (at 68), these matters were:

> "First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is, in his opinion, analogous to a trust. Secondly... the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power."

101. The first, as Gibbs C.J. observed, required qualification in the opinion of the Court of Appeal, namely:

> "...that the undertaking to act in the interests of another meant that the fiduciary undertook not to act in his own interests;".

102. Mason J, in the same case, while dissenting on the question whether a fiduciary relationship existed on the facts, emphasised that the classes of fiduciary relationship were not closed. In his Honour's view, in each case the critical factor was that the:

> "... fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The

> relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."

103. Dawson J emphasised the position of disadvantage or vulnerability on the part of one party which causes him to place reliance upon another and requires the protection of equity acting upon the conscience of the other as being the notion underlying all cases of fiduciary obligation. As his Honour said (at 142):

> "From that springs the requirement that a person under a fiduciary obligation shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not, except by special arrangement, make a profit out of his position."

104. The applicants also relied upon the decision of Kearney J in Timber Engineering Co Pty Ltd v Anderson (1980) 2 NSWLR 488, where employees who, through the medium of a company in which they and their wives were directors and shareholders, commenced to sell products of their employers and were found to be in breach of their fiduciary duties. The same obligations to account were found against the wives and company.

105. The respondents relied upon what had been said by Gibbs C.J. in Hospital Products (at 70) and the decision of the full court of this court in The Paul Dainty Corporation v National Tennis Centre Trust [1990] FCA 163; (1990) 22 FCR 495, that no fiduciary relationship will be found where there is an agreement between parties of a purely commercial kind, to which the parties had adhered, dealing with each other at arm's length. However, in Paul Dainty, the rights and responsibilities of the parties had been spelled out in detail in the commercial agreement. Here, although there was a commercial agreement entered into between parties at arm's length on a particular matter, namely the establishment of the air flight theory training school, the alleged breach of fiduciary duty did not arise directly out of the commercial circumstances of that agreement, but out of the continuing relationship of Mr Bartsch as General Manager of the Airtex business.

106. If what was said in these cases were to be taken literally, the fact that there was a partnership agreement to carry on a commercial enterprise entered into between partners at arm's length would preclude a fiduciary relationship arising between one partner and the other in the course of dealings in that enterprise. But that clearly is not the law. It was Mr Bartsch's responsibility, while he was General Manager of the school, to run it. For this continuing service, payment was to be made to a company controlled by him, no doubt with an eye to perceived taxation advantages. Mr Bartsch put himself in a position where his interest and duty conflicted in organising, apparently for his employer, a venture for an integrated system of flying training. He chose not to reveal, initially, that through the medium of a company in which he, Mr Lee and their wives participated, he had priced the course so that there was a substantial profit to accrue to that company. Not only did he not reveal this, but he told Messrs Siewert and Lange that there was no mark up on the flying component. In other words, he fraudulently concealed the profit, choosing to open a bank account at a bank unconnected with Avtex and failed to comply with the request that an account be opened with Avtex's bank and the flying moneys banked in that account. In addition, Mr Bartsch and the fifth respondent took advantage of Mr Bartsch's position with Avtex to suggest a relationship between the APTC business and Avtex.

107. The present was a case, in my opinion, where Mr Bartsch was, as a result of his continuing responsibility as General Manager of the Airtex business, obliged to act in relation to the affairs of the

academy in the interests of his employer and that obligation required him not to act in his own interest. Avtex was, in the result, in a position of vulnerability. Mr Bartsch chose to appropriate for himself, Mr Lee and their respective spouses an opportunity for profit which came to him as a result of his position with Avtex and concealed that from Avtex. The fact that the relationship between Avtex and Mr Bartsch was not strictly an employer-employee relationship is, in my view, immaterial. The relationship was a fiduciary one. In the result, Mr Bartsch is obliged to account to Avtex for profits gained from the breach of his fiduciary duty.

108. The liability of Mr Lee and the fifth respondent arises because each participated with knowledge in the dishonest and fraudulent design put into effect by Mr Bartsch; cf Timber Engineering (at 495). The benefits which they took were taken with Mr Bartsch's "transmitted fiduciary obligation": see Queensland Mines Ltd v Hudson (1976) ACLC 40-266 at 28,709, affirmed by the Privy Council on other grounds at (1978) 52 ALJR 399; Barnes v Addy (1874) 9 LR Ch App 244 at 251-2 per Lord Selborne, L.C.. Accordingly, Mr Lee and the fifth respondent are obliged, just as Mr Bartsch is obliged, to hold the profits made by them in breach of Mr Bartsch's fiduciary duty upon trust for Avtex.

109. While it is no doubt correct to say, as Avtex submits, that, prima facie, the measure of the profits for which the respondents must account is the gross profit made on the APTC courses in the period between 31 January 1989 and 7 March 1990, less the proper and reasonable expenses in making that profit, there is difficulty on the evidence before me in arriving at this figure. The gross profit figure is clear, it is $817,540. However, there is some difficulty on the evidence in arriving at the proper and reasonable expenses of the respondents. Mr Lee has filed an affidavit of amounts expended. However, that affidavit fails, in a number of respects, to apportion expenses, eg rent, wages and salary, between the APTC business and the ACE business. The latter was clearly for the account of the respondents.

110. Counsel for the applicants submitted that in these circumstances I should give judgment for Avtex for the total of the gross profits, with no allowance for expenses. However, it seems to me preferable, in a case where damages were substantially put to one side until liability was determined, for the matter of the reasonable outgoings of the respondents referable to the deriving of the APTC income to be left to be determined when damages are determined.

111. Although the respondents denied the existence of any fiduciary duty on the present facts, and accordingly any breach, the main thrust of their defence lay elsewhere. It was submitted that the agreement of 7 March 1990, and the antecedent surrounding circumstances, operated to bar the claim of Avtex for any breach of duty.

112. The respondents relied upon the doctrines of estoppel, waiver and equitable release, there being no direct release in the agreement itself. The respondents, in their oral submissions, claimed also that Messrs Siewert and Lange had acquiesced in the breach. If there were acquiesce, however, it was certainly not explicit. The applicants were unaware that the business was being conducted for the benefit of Messrs Bartsch and Lee until, at the earliest, October 1989 and were unaware, in any event, that there was a profit mark up to the fifth respondent until the end of December 1989. Nothing that happened between December 1989 and March 1990 could be construed as acquiescence.

113. The decision of the High Court in The Commonwealth v Verwayen (1990) 170 CLR 394, made two problems abundantly clear. The first is that there is confusion in the case law as to the precise distinction, if any, between the concepts of election, waiver and estoppel; the second is that there is, as yet, no unanimous view as to whether there is a unified doctrine of estoppel applicable both to estoppel by conduct and equitable or promissory estoppel, and including perhaps as well, the doctrines of waiver and election.

114. To the extent that there is no single doctrine into which election, waiver and estoppel are all merged, the distinction between waiver and estoppel by conduct was stated by the High Court in Craine v Colonial Mutual Fire Insurance Co Ltd [1920] HCA 64; (1920) 28 CLR 305 at 326-328. The

essential ingredient of waiver is that it is an intentional act done with knowledge; estoppel by conduct, on the other hand, looks chiefly at the situation of the person relying on the estoppel and the knowledge of the person sought to be estopped is immaterial. Generally, an existing legal right can not be destroyed merely by an express or implied intimation that the person in whom the right is vested does not intend to enforce that right, absent consideration: Larratt v Bankers and Traders' Insurance Co [1941] NSWStRp 34; (1941) 41 SR (NSW) 215 at 226-7; Verwayen at 406 per Mason C.J. For that right to be destroyed, in the absence of a deed or consideration, there need be an estoppel.

115. The classic statement of the doctrine of estoppel by conduct, or as it is called estoppel in pais, is to be found in the judgment of Dixon J in Thompson v Palmer [1933] HCA 61; (1933) 49 CLR 507 at 547 where his Honour said:

> "The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act of omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct... or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted."

116. In Grundt v Great Boulder Pty Gold Mines Ltd [1937] HCA 58; (1937) 59 CLR 641 Dixon J again considered the operation of the doctrine of estoppel in pais. For an estoppel to arise from conduct there was, in his Honour's view, an indispensable condition, viz (at 674):

> "That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption."

117. It is clear from what his Honour said in that case that an essential element of estoppel by conduct

is that the person to be estopped must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were free to ignore it. Estoppel in this sense generally arises as a result of a representation which induced the person seeking to rely upon the estoppel to act to his detriment, but is not limited to that class of case. As Mason and Deane JJ. said in Legione v Hately [1983] HCA 11; (1983) 152 CLR 406 at 430:

> "Estoppel in pais includes both the common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement."

118. While the traditional view of estoppel by conduct limits that doctrine to assumptions founded upon a representation as to existing fact, not future conduct, promissory estoppel, as Legione reminds us, extends to representations or promises as to future conduct. Equitable or promissory estoppel depends upon the principle, as the joint judgment of Mason C.J. and Wilson J in Waltons Stores (Interstate) Limited v Maher [1988] HCA 7; (1988) 164 CLR 387 at 404 points out:

> "... that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has `played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it'... Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption."

119. It is important to understand what is meant by unconscionable conduct in this context. The mere failure to fulfil a promise is not such conduct; something more is required. As Mason C.J. and Wilson J point out in Waltons Stores (at 406), there may be unconscionable conduct if the assumption has been created or encouraged by the party estopped and the other party has relied on this assumption to his detriment to the knowledge of the first party.

120. In Walton Stores, Brennan J noted (at 421) the emphasis which Denning L.J. had given in Combe v Combe [1952] EWCA Civ 7; (1951) 2 KB 215 at 220 to the requirement that the promise made by the promisor be "intended to affect the legal relations between them and to be acted on accordingly." It is also essential, in the view of Brennan J, that the party who induces the adoption of the assumption or expectation know or intend that the party who adopts it will act or abstain from acting in reliance on the assumption or expectation.

121. Cases may arise where failure to act gives rise to a promissory estoppel. For example, where a party is conducting his affairs under a particular assumption, he may be encouraged to adhere to that assumption by the failure of the other to object to the assumption or expectation, at least when it was his duty so to do: cf Ramsden v Dyson (1866) LR 1 HL 129. In such a case, it would be unconscionable to refrain from making the denial leaving the other party to continue to rely upon the assumption or expectation to his detriment.

122. The relationship of estoppel to waiver, the circumstances where equity might intervene and the appropriate form of relief, were matters upon which the various members of the High Court differed in Verwayen. Of the majority, Deane and Dawson JJ. found that the Commonwealth was estopped from relying upon the Limitations of Actions Act 1958 or from raising the defence that it owed no duty of care, the plaintiff being a serviceman injured in the course of combat exercises. The remaining members of the majority, Toohey and Gaudron JJ., held that the Commonwealth had, by its conduct, waived its rights to rely on these defences. Mason C.J. and Deane J were both of the view that there was but one doctrine of estoppel of which estoppel by conduct and promissory estoppel were emanations. In the view of Mason C.J. (at 413):

> "... it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid."

123. Deane J summarised the unified law of estoppel, as his Honour saw it, in a series of eight propositions (at 444-6). Important for the present case is his Honour's explanation of what is meant by the concept of unconscionable or unconscientious behaviour, a concept at the central focus of the doctrine. All circumstances must be considered. The allegedly estopped party must:

> "... have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it. The cases indicate four main, but not exhaustive, categories in which an affirmative answer to that question may be justified, namely, where that party: (a) has induced the assumption by express or implied representation; (b) has entered into contractual or other material relations with the other party on the conventional basis of the assumption; (c) has exercised against the other party rights which would exist only if the assumption were correct; (d) knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so. Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he

> would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted. In cases falling within category (a), a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption. Particularly in cases falling within category (b), actual belief in the correctness of the fact or state of affairs assumed may not be necessary."

124. The present facts do not admit of the application of any so called doctrine of waiver, if such a doctrine could ever be applicable to fact situations such as the present, for there was absent the necessary intention on the part of the Avtex interests to give up their pre-existing rights against the Bartsch and Lee interests. The evidence does not go so far. At best, all it establishes is that subjectively both Mr Siewert and Mr Lange saw the 7 March 1990 agreement as "calling it quits" in relation to past claims. Certainly at the time they entered into it they appeared not to have entertained a thought that they would in the future litigate those claims. There was no discussion between the parties on the question; their attention was directed to a quite different matter, namely their future relationship. The fact that that future relationship came to an end when Mr Bartsch franchised a competitor in Sydney, an event which no doubt precipitated the present litigation, does not, in my view, affect the matter. The evidence does not admit of a finding that Messrs Siewert and Lange, with full knowledge of their claim against Mr Bartsch and others of the respondents, consciously waived their rights in entering into an agreement which dealt not at all with the matter.

125. Nor can I find in the present circumstances any representation of Avtex, express or implied, upon which the respondents relied, that no action would be taken by the Avtex interests against the Bartsch interests. It is noteworthy that neither Mr Bartsch nor Mr Lee said in evidence that he understood that the March agreement would operate to release or override any liability to the applicants to account for the profits of the APTC business. Mr Lee had prepared a draft before the March agreement containing, so he said, all the matters discussed and agreed upon between the two interests. There was no reference in that document to a release. Neither Mr Bartsch nor Mr Lee asserted that there was any conduct of Mr Siewert or Mr Lange upon which they or either of them relied to their detriment which caused them to continue dealings upon a false assumption of their situation. There is not present in the facts any suggestion that the applicants had created or encouraged the assumption by Mr Bartsch, Mr Lee or any other of the respondents that they would not be called to account for the APTC profits, or that they were to be, or had been, released. The statement by Mr Bartsch that, had he been told that he was not to be released, he would not have executed the agreement, does not, in my view, enhance his case, even were I to accept this self-serving evidence, which I do not. Mr Lee gave similar evidence which I also reject.

126. If there is but one unified principle of estoppel, then it too has no application to the facts of the present case. It simply can not be said on the evidence that Mr Siewert or Mr Lange, in the events leading up to the March agreement or in putting forward that agreement, played such a part in the adoption of or persistence in any assumption by Messrs Bartsch and Lee that they were to be released from any liability to the applicants (even assuming, in the absence of evidence, that there was such an assumption) that they would be guilty of unjust and oppressive conduct if they were now to be allowed to recover damages for breach of fiduciary duty. Nor can it be said that the evidence shows that the Avtex interests knew that Mr Bartsch or Mr Lee laboured under such an assumption and thus had a duty in conscience to disabuse them. In other words, whichever way the case in estoppel may be put, and whichever formulation of it may be adopted, the respondents have not made out the necessary factual basis for it.

127. The respondents submit also that there has been a release in equity by the Avtex interests of the claim.

128. While it is clear that a common law right may only be released at common law by a deed of release or by an agreement for consideration, an equitable right may be released in equity without the necessity of a deed, but indeed, simply by conduct. The learned authors of Meagher, Gummow and Lehane, in Equitable Doctrines and Remedies 2nd Ed at 753 (para 3506), cite Turner L.J. in Wright v Vanderplank (1856) 8 DeGM and G 133 at 147 [1856] EngR 331; (44 ER 340 at 346) as authority for this principle. In speaking of a transaction originally voidable on the grounds of undue influence, his Lordship said:

> "I am not of the opinion that a positive act is necessary to render the transaction unimpeachable. All that is required is proof of a fixed, deliberate and unbiassed determination that the transaction should not be impeached. This may be proved either by the lapse of time during which the transaction has been allowed to stand, or by other circumstances."

129. The learned authors emphasise that there must be a "present, fixed intention immediately to release". A promise to release in the future will not suffice.

130. No act of the applicants can, in my view, be seen as a fixed, deliberate and unbiased determination that the applicants would not bring proceedings in equity against the Bartsch interests for breach of fiduciary duty. Nor, in anything that was said or done by them in conjunction with the March 1990 agreement, can there be found a present fixed intention to release the Bartsch interests. As the statement of principle by Turner L.J. makes clear, lapse of time may, in some cases, be construed as signifying a release, at least in circumstances where the equitable beneficiary fully and clearly appreciates the nature and the circumstances of the transaction out of which the equitable right alleged to have been released arises. An example is Farrant v Blanchford (1863) 1 De GJ and S 107[1863] EngR 168; , 46 ER 42, where it was found that there had been acquiescence on the part of a cestui que trust to a breach of trust committed before he came of age, ten years having elapsed between his learning of the breach, shortly after he came of age, and his commencement of the action. The elapse of time was evidence of acquiescence.

131. But what constitutes "acquiescence" in a case such as the present? There can only be acquiescence where there is full knowledge on the part of the person taken to have released the equitable right. As The Lord Justice Turner said in Life Association of Scotland v Siddal (1861) 3 De GF and J 58 at 74[1861] EngR 300; , 45 ER 800 at 806:

> "... I take the rule to be quite settled that a cestui que trust cannot be bound by acquiescence unless he has been fully informed of his rights and of all the material facts and circumstances of the case."

132. The need to demonstrate full knowledge before acquiescence is found gives rise, at least in some cases such as those involving relationships of confidence, to the requirement illustrated by cases such as Mitchell v Homfray (1881) 8 QBD 587 at 591 that the person claimed to have acquiesced be independently advised; see too Rhodes v Bate (1866) LR 1 Ch App 252. However, the present is not a case where a confidential relationship is suggested such as would give rise to a claim for undue influence. No doubt the court will scrutinise the circumstances carefully to ensure that there was true knowledge of the breach and that the release or acquiescence was informed, but that is not to elevate the requirement of independent advice developed in the context of undue influence to a principle of

law applicable in every case.

133. At the end, the respondent's submissions amount to saying that the lapse of time between knowledge of the breach of fiduciary duty and commencement of proceedings itself raises the inference that the Avtex interests acquiesced in that breach of duty. Obviously not every delay would permit that inference to arise. On the facts of the present case the Avtex interests first learned that the Bartsch interests were treating the APTC course as their own business on or about 31 October 1989. But at that time they believed that the APTC business was run without profit. The knowledge that there was a profit mark up came at the end of December 1989. Proceedings were not threatened until after the open-nights in January 1991, and were instituted in this court in February 1991. In other words there was a delay of approximately 14 months, in which time the parties sought to work together, as it turned out, unsatisfactorily.

134. On a consideration of the whole of the circumstances of the present case, I do not think that it can be said that this lapse of time was such as to require me to conclude that the applicants had abandoned their rights against the Bartsch interests. It was a lapse of time in which the parties were seeking a modus vivendi for future business relationships between them. If I be wrong on this, there remains the question whether the applicants had the relevant knowledge which would convert mere delay to waiver or acquiescence. It seems that knowledge alone of the facts which give rise to the claim said to have been waived may not be sufficient. Rather, there needs to be knowledge as well of what rights emerge from those facts: Re Howlett (1949) Ch 767 at 775. The onus of showing this lies upon the person alleging the waiver or acquiescence, although knowledge of the relevant facts may give rise to a presumption of knowledge of those rights: Stafford v Stafford (1857) 1 De G and J 193[1857] EngR 474; , 44 ER 697. I think the reality of the matter is that the Avtex interests did not direct their minds to such matters. Their concern was the commercial reality of a business which was losing money. I see no reason to infer that they turned their minds to the question of whether the facts gave rise to legal rights.

135. For these reasons, I am of the view that whether the submission be put on the basis of estoppel, waiver, or acquiescence, it should fail.
The Copyright claims

136. The claims for breach of copyright can be disposed of quickly.

137. The applicants claim copyright in the student work books, the slides and the software, all of which comprise the ACE system of teaching. For present purposes it may be assumed that each is an original work. The slides were the work of a Mr King, who prepared them pursuant to arrangements with Dyljot. They were paid for by Dyljot, notwithstanding that the source of actual funds could be said to have come from the payments that were made by Avtex under the agreement with Mr Bartsch and ACS. No arrangement for the ownership of the copyright was made between Avtex and Dyljot, or Avtex and Mr King.

138. It is trite law that, prima facie, the author of an original work will be the first owner of the copyright in it. Except in the case of photographs, paintings, drawings or engravings, the mere commissioning of an original work will not cause the person commissioning it to become the owner of the copyright. On the other hand, if the work is brought into existence by an employee in the course of his or her employment, the copyright will exist in the employer. In the present case, there is no suggestion that the author of the slides was an employee.

139. By s.35(5) of the Copyright Act 1968 (Cth) a person who makes for valuable consideration an agreement with another person for the taking of a photograph becomes the owner. Thus, whatever the arrangements may have been between Dyljot or Mr Lee on the one hand an d Mr King on the other, on no view of the matter can it be said that copyright in the slides is owned by the appellants or any of them.

140. The situation is somewhat more complicated with respect to the video. I should say that there is

no real commercial significance in the video at this point of time. To use it would, no doubt, be to run the risk of a breach of s.52 of the Trade Practices Act 1974 (Cth). In any event, Axis Aviation Pty Limited has undertaken not to display the video in the future.

141. The initial video was made by a video production company, Fitzair Pty Limited. By force of s.98(2) of the Copyright Act 1968, but subject to s.98(3) of that Act, the maker of the film is the owner of the copyright subsisting in it. However, s.98(3) provides that where a person makes for valuable consideration an agreement with another person for the making of a film by the other person and the film is made in pursuance of that agreement, the first mentioned person is, in the absence of any agreement to the contrary, the owner of any copyright subsisting in the film. Since the initial commissioning of the film arose by virtue of an agreement between the fifth respondent and Fitzair Pty Limited, prima facie, the fifth respondent is the owner of any copyright subsisting in the film.

142. However, it will be recalled that at the meeting of 31 October 1989, which occurred after the video was commissioned and after Mr Bartsch had arranged to be paid a $10,000 deposit for the preparation of the video, he requested reimbursement to him of this amount and it was agreed that Avtex would take over responsibility for payment of the video. The estimated cost of the video was $22,000, the total cost was $24,824. A document in evidence from Fitzair Pty Limited described as an invoice and dated 15 November 1989, showed the $10,000 to have been received. This was refunded by Avtex to the fifth respondent by cheque drawn on 28 November 1989.

143. In evidence was a further invoice dated 30 November 1989 for the balance of $14,824. That invoice is directed to "I.P.T.C. Pty Ltd, c/- AIRTEX AVAITION (sic)" at Bankstown. That document clearly enough suggests that by the date of the invoice the film was completed. Payment of that invoice was made on 11 January 1990 by Avtex.

144. There is no evidence as to when the film was actually completed to the point where copyright in the film existed. The inference, however, is that this must have occurred between the date of the first "invoice", 15 November 1989, and the date of the final invoice, 30 November 1989. The fact that the second applicant was billed makes it clear that there was a novation of the contract, initially between the fifth respondent and Fitzair Pty Limited, with the latter's consent, as is signified by its invoicing the second applicant. On this basis, and drawing the inference that the video was produced after 15 November 1989, the new contract for the making of the video was one between the second applicant and Fitzair Pty Limited and had the consequence that by virtue of s.98(3), copyright in the film attached to the second applicant.

145. Another element of the ACE System was the software. The computer programme was written by a Mr Overs, the cousin of Mr Lee's wife, who was a professional computer programmer. It was completed in January 1989. Payment for this work was made by the fifth respondent, although, as was the case with the slides, the funds to make the payment undoubtedly came from the payments which Avtex was obliged to make to Caldtear Pty Limited under the original ground flying school agreement.

146. Whatever the terms of the arrangement between Mr Lee and Mr Overs were as the to the ownership of copyright in the software, a matter not explored in the evidence, it is clear that in these circumstances copyright in the software programme subsists either in the fifth respondent or Mr Overs. It does not subsist in the applicants or any of them.

147. There remains the question of the ownership of the copyright in the workbooks. There was a dispute between the parties as to whether copyright subsisted in the workbooks merely as compilations on the one hand or whether individual copyright rights existed in the various components in the workbooks being the written material, written by the authors of it, diagrams, which were initially suggested by the authors but actually executed using a computer by Mr Lee, or drawings. It is unnecessary to resolve this controversy. For the purpose of the present case it may be assumed, in the way most favourably to the applicants, that copyright subsisted in the book as a whole as the applicants pleaded, and that the individual writers of each book were entitled to the whole copyright

notwithstanding that copyright in the drawings clearly enough existed in others.

148. Again, the prima facie position is clear. Copyright in the workbooks, on the assumptions I have made, would exist in the authors, that is to say, those commissioned by Mr Bartsch to write the workbooks. There was no agreement existing between those authors and any of the Bartsch interests at the time they were commissioned; the authors were not working as employees of Avtex at the time the books were written, nor were they paid by Avtex directly. Rather, they were paid by one of the companies controlled by the Bartsch interests (not being an employer), albeit that the actual source of funds lay in the fees payable by Avtex to Caldtear Pty Limited.

149. Thus, there seems no doubt that initial copyright lay in the authors. A number of the authors, at the request of Avtex, assigned their copyright to Avtex. The result of these assignments was, accordingly, that copyright in the workbooks then vested in Avtex. However, the applicants claim that their copyright has been infringed by the fifth respondent licensing the use or sale of the workbooks or distributing or selling them to Axis Aviation Pty Limited.

150. There is a difficulty in the applicants' submissions, in that they fail to analyse precisely what rights vest in a copyright owner and what constitutes an infringement of those rights. Section 31(1)(a) of the Copyright Act 1968 confers upon the copyright owner the exclusive right, relevantly, to reproduce that work in a material form and to publish it. It does not confer upon the owner of the copyright in a literary work, being a book, the exclusive right to sell the book or to grant others the right to sell that book. Infringement of a copyright, by force of s.36(1) of the Copyright Act 1968 arises where a person, not being the owner of the copyright, without licence, does something in Australia, or authorises the doing of an act in Australia which act is an act comprised in the copyright.

151. Section 38(1) of the Copyright Act 1968 provides relevantly:

> "The copyright in a literary, dramatic, musical or artistic work is infringed by a person who, in Australia, and without the licence of the owner of the copyright:
> (a) sells, lets for hire, or by way of trade offers or exposes for sale or hire, an article; or
> (b) by way of trade exhibits an article in public.

152. Thus, by virtue of being the owner of the copyright in that which he had written, each author had the exclusive right to publish it or reproduce it in a material form: s.31(1)(a). The publication or reproduction of each manuscript as a student workbook was carried out by the fifth respondent with the consent of the authors and accordingly itself did not constitute an infringement. In the result, the sale by the Bartsch interests of the workbooks to aviation schools did not constitute a breach of copyright because publication of each workbook was not a breach of copyright. Nor would a breach of copyright arise by virtue of a sale of the workbooks by a franchisee to members of the public, provided that those books sold were published prior to the assignment of the copyright from the authors to Avtex.

153. The applicants did not seek to explore the question whether any workbooks had, in fact, been published after the assignment of copyright to Avtex and I will assume therefore that none had. Of course, any further reproductions of the workbook without the licence of Avtex would constitute an infringement.

154. The applicants submitted that no licence had been given by the respective authors. They referred to passages in the evidence concerning whether there had been a licence granted by the authors to the Bartsch interests to use the workbooks in "ACE Schools", at least outside the Sydney area. I would find that each of the relevant authors was, by the time work on the relevant manuscript was completed and certainly by the time the workbooks were published, aware that they would be used, not only at

the Airtex Academy, but also at other schools franchised by Mr Bartsch. I would find too, that each, at least impliedly, assented to this course. Certainly none protested when they became aware that the workbooks were in fact so used.

155. However, these findings are ultimately irrelevant to the issue before me. The relevant licence to which s 38(1) refers is a licence to publish or reproduce, not a licence to use that which has been published.

156. The result is that the applicants have failed to show an infringement of copyright in the workbooks.

157. In their statement of claim, the applicants relied upon a breach of s.52 of the Trade Practices Act 1974, arising from what was said to be a representation made by the fifth respondent. The way the case is pleaded makes it clear that this count is related to the question of copyright, although the terms of the representation are not directly pleaded. This matter was not developed in oral argument, it being said to involve no different issue to the copyright issue. I am not sure that this is necessarily correct in the present case.

158. Each workbook, as published, carried a copyright symbol indicating that the copyright in it was held by "ACE Systems". That clearly is a representation that copyright in the workbook, including, if there be a difference, copyright in the text as well as the compilation of text, diagrams and drawings, resided, at least at the time the book was published, in the fifth respondent. Even assuming that the representation spoke as at the time of publication only, it would have been false and misleading and perhaps could have entitled the applicants to appropriate relief. As the matter was not explored in argument, it is, however, unnecessary to take the matter further.

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159. I propose to order that the applicant bring in short minutes of order to give effe
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