

FEDERAL COURT OF AUSTRALIA

Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited (No 2)

[2011] FCA 509

Citation: Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited (No 2) [2011] FCA 509

Parties: **DIGITAL CINEMA NETWORK PTY LTD (ACN 132 404 481) v OMNILAB MEDIA PTY LIMITED (ACN 002 585 391), OMNILAB MEDIA CINEMA SERVICES PTY LTD (ACN 145 363 855) and MICHAEL GEOFFREY SMITH; OMNILAB MEDIA PTY LIMITED (ACN 002 585 391) and OMNILAB MEDIA CINEMA SERVICES PTY LTD (ACN 145 363 855); MICHAEL GEOFFREY SMITH**

File number: VID 813 of 2010

Judge: **GORDON J**

Date of judgment: 16 May 2011

Catchwords: **CORPORATIONS** – directors – fiduciary and statutory directors’ duties – whether company director breached his duties by substantially aiding a competitor – secret commissions – accessorial liability – relevant principles – whether first and second respondents were knowingly involved in the third respondent’s contraventions of the *Corporations Act 2001* (Cth) – whether first and second respondents knowingly assisted the third respondent with his breaches of fiduciary duties – whether ‘lost opportunity’ relevant – *Corporations Act 2001* (Cth) ss 180, 181, 182, 183

TRADE PRACTICES – misleading or deceptive conduct – incorporation of new corporate entity – whether name of new corporate entity is misleading or deceptive – mere ‘confusion’ or ‘wonderment’ insufficient – *Trade Practices Act 1974* (Cth) ss 52, 82

RELIEF – injunction

Legislation: *Competition and Consumer Act 2010* (Cth)
Corporations Act 2001 (Cth)
Trade Practices Act 1974 (Cth)
Wrongs Act 1958 (Vic)

Cases cited:

ASIC v Adler (2002) 168 FLR 253
ASIC v Australian Investors Forum Pty Ltd (No 2) (2005) 23 ACLC 929
ASIC v PFS Business Development Group Pty Ltd (2006) 57 ACSR 553
ASIC v Maxwell (2006) 24 ACLC 1308
ASIC v Somerville (2009) 259 ALR 574
Baden Delavaux v Societe General [1993] 1 WLR 509
Barnes v Addy (1874) LR 9 Ch App 244
Beach Petroleum NL v Johnson (1993) 115 ALR 411
Biala Pty Ltd v Mallina Holdings Ltd (1993) 11 ACSR 785
Boardman v Phipps [1967] 2 AC 46
Briginshaw v Briginshaw (1938) 60 CLR 336
Butcher v Lachlan Elder Realty Pty Ltd (2008) 218 CLR 592
Campbell v Back Office Investments Pty Ltd [2009] HCA 25
Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45
Canadian Aero v O'Malley [1974] SCR 592
Carl Zeiss Stiftung v Herbert Smith (No.2) [1969] 2 Ch 276
Chew v R (1991) 4 WAR 21
Coco v AN Clark (Engineers) Ltd [1969] RPC 41
Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39
Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373
Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 14 FCR 434
Darvall v North Sydney Brick and Tile Co Ltd (1989) 16 NSWLR 260
Farah Constructions v Say-Dee Pty Ltd (2007) 230 CLR 89
Giorgiani v R (1985) 156 CLR 473
Industrial Development Consultants Ltd v Cooley [1972] 2 All ER 162
Johnson Tiles Pty Ltd v Esso Australia Limited (2000) 104 FCR 564
King Network Group Pty Ltd v Club of the Clubs Pty Ltd (2008) 69 ACSR 172
Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181
O'Brien v Komesaroff (1982) 150 CLR 310
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191
Periera v DPP (1988) 63 ALR 1
R v Byrnes (1995) 183 CLR 501
Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378
Taco Co of Australia Inc v Tacobell Pty Ltd (1982) 42 ALR 177

Warman International Ltd v Dwyer (1995) 182 CLR 544
Yorke v Lucas (1985) 61 ALR 307

Date of hearing: 15-18 March and 4 April 2011

Date of last submissions: 6 April 2011

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 233

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**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 813 of 2010

**BETWEEN: DIGITAL CINEMA NETWORK PTY LTD (ACN 132 404 481)
Applicant**

**OMNILAB MEDIA PTY LIMITED (ACN 002 585 391)
First Cross-Claimant**

**OMNILAB MEDIA CINEMA SERVICES PTY LTD
(ACN 145 363 855)
Second Cross-Claimant**

**AND: OMNILAB MEDIA PTY LIMITED (ACN 002 585 391)
First Respondent**

**OMNILAB MEDIA CINEMA SERVICES PTY LTD
(ACN 145 363 855)
Second Respondent**

**MICHAEL GEOFFREY SMITH
Third Respondent and Cross-Respondent**

JUDGE: GORDON J

DATE OF ORDER: 16 MAY 2011

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The parties bring in orders to give effect to these reasons for decision and to deal with the next stage of these proceedings by 4:00 pm on 23 May 2011.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION

VID 813 of 2010

BETWEEN: **DIGITAL CINEMA NETWORK PTY LTD (ACN 132 404 481)**
 Applicant

OMNILAB MEDIA PTY LIMITED (ACN 002 585 391)
 First Cross-Claimant

OMNILAB MEDIA CINEMA SERVICES PTY LTD
 (ACN 145 363 855)
 Second Cross-Claimant

AND: **OMNILAB MEDIA PTY LIMITED (ACN 002 585 391)**
 First Respondent

OMNILAB MEDIA CINEMA SERVICES PTY LTD
 (ACN 145 363 855)
 Second Respondent

MICHAEL GEOFFREY SMITH
 Third Respondent and Cross-Respondent

JUDGE: **GORDON J**

DATE: **16 MAY 2011**

PLACE: **MELBOURNE**

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In these reasons for decision, the following abbreviations will be adopted:

Abbreviation	Description
Aseme	means Richard Aseme, Director of Distribution in Europe, the Middle East and Africa and Head of International Digital Cinema for Paramount.
Blinderman	means Jonathan Blinderman, a lawyer at Glaser, Weil, Fink, Jacobs, Howard, Avchen & Shapiro, LLP.
Cartledge	means Ross Cartledge, former Chief Financial Officer of AAV Australia, hired by Omnilab Media during the relevant time as a consultant.
DCI	means digital cinema initiatives.
DCN	means the Applicant, Digital Cinema Network Pty Ltd (ACN 132 404 481).
digitAll	means digitAll Pty Ltd, a company owned and controlled by the Gardiner brothers. It, inter alia, supplies digital projection and related equipment to the cinema industry in Australia and overseas.
Dell	means Kieran Dell, President of ICAA.
Disney	means The Walt Disney Company (Australia) and/or Walt Disney Studios Motion Pictures International (and/or other related Disney corporate entities), as appropriate.
Entwistle	means Ross Entwistle, the managing director, owner and operator of Limelight Cinemas Pty Ltd, in Canberra, a member of ICAA and a Board member of Screen Australia.
Fleming	means John Fleming, the General Manager of Omnilab Media Melbourne Pty Limited, a subsidiary of Omnilab Media.
Fox	means Twentieth Century Fox Film Corporation and/or other related Fox corporate entities, as appropriate.
Gardiner	means Martin Gardiner, a director of DCN.
Goyal	means Manisha Goyal, the in-house legal counsel for the Omnilab Parties.
ICAA	means the Independent Cinemas Association of Australia, the industry body representing cinema owners and operators within Australia.
James Gardiner	means James Gardiner, the brother of Martin Gardiner and a director of DCN.
Levin	means Julian Levin, the Executive Vice President of Fox (Exhibition and Non-Theatrical Sales and Distribution).
MGS	means MGS Group Pty Ltd, a company controlled by Smith.
Omnilab Media	means the First Respondent, Omnilab Media Pty Ltd (ACN 002 585 391).

Abbreviation	Description
Omnilab MCS	means the Second Respondent, Omnilab Media Cinema Services Pty Ltd (ACN 145 363 855) (formerly called Omnilab Media Digital Cinema Network Pty Ltd).
Omnilab Parties	means Omnilab Media and Omnilab MCS.
Paramount	means Paramount Pictures International Limited, and/or other related Paramount corporate entities, as appropriate.
Sarfaty	means Mark Sarfaty, a Board member of ICAA since 2003 and, since September 2007, the Chief Executive Officer of ICAA. His position with ICAA was part-time.
Smith	means Michael Geoffrey Smith, the Third Respondent. Smith was a director of DCN and the sole director of MGS at all relevant times.
Sony	means Sony Pictures Entertainment, and/or other related Sony corporate entities, as appropriate.
SPAA	means the Screen Producers Association of Australia.
Studios	means the film studios in the United States including Disney, Fox, Paramount, Sony, Universal and Warner Bros.
TPA	means the <i>Trade Practices Act 1974</i> (Cth) (as it was prior to the enactment of the <i>Competition and Consumer Act 2010</i> (Cth)).
Universal	means NBC Universal, and/or other related NBC Universal corporate entities, as appropriate.
VPF	means Virtual Print Fee.
Warner	means Warner Bros Studios, and/or other related Warner Bros corporate entities, as appropriate.
Zylberstein	means Nicolas Zylberstein, the Director of Global Digital Cinema at Disney.

REASONS FOR JUDGMENT

A. INTRODUCTION

1 Since the mid 2000s, cinemas around the world have been moving from analogue projection to digital projection. The cost is large. The Studios decided to assist by providing financial subsidies to cinema owners to upgrade their projection equipment from analogue to digital. These subsidies are known as “Virtual Print Fees”. The agreements with the Studios which provide the financial subsidies are commonly described as “VPF agreements”.

2 In these proceedings, DCN alleges that as between itself and the First and Second Respondents (the Omnilab Parties), it alone is entitled to be party to (and receive the benefits flowing from) the VPF agreements that have been made (as well as those agreements that are to be made in the future) with the Studios. Under these agreements, the Studios will provide financial subsidies to independent cinema owners in Australia as an incentive to upgrade to digital projection equipment. DCN alleges that the Omnilab Parties cannot make any agreements with the Studios, and that the Omnilab Parties hold on trust for DCN the benefits and profits obtained from one VPF agreement that has already been concluded (with Paramount). DCN further alleges that the third respondent, Smith, contravened the duties (both statutory and fiduciary) he owed DCN as a director and that the Omnilab Parties knowingly assisted and/or were knowingly involved in those breaches. DCN also alleges that each respondent was guilty of misleading and deceptive conduct, contrary to s 52 of the TPA, in the course of negotiating with the Studios.

3 Although this trial was limited to questions of liability, it is important to understand the several forms of specific relief that DCN claims against each of the respondents: compensation orders pursuant to s 1317H of the *Corporations Act 2001* (Cth) (the **Corporations Act**); an account of profits; damages or equitable compensation (as appropriate); injunctions restraining each respondent – the Omnilab Parties and Smith – from negotiating with the Studios in respect of any VPF agreement; a declaration that the Omnilab Parties hold on trust for DCN the benefits and profits that accrue from the VPF agreement already concluded with Paramount; and orders pursuant to s 82 of the TPA.

4 As is implicit in what has already been said, the claims against Smith are founded, for the most part, on him being a director of, and thus owing duties to, DCN. The claims against the Omnilab Parties are founded in large part on the footing that the Omnilab Parties knowingly assisted Smith in his breach or breaches of duty (or were knowingly involved in the breach/es).

5 The evidence adduced at trial demonstrated that, on many different occasions, Smith said or wrote things that were untrue, or that were (at the very least) economical with the truth. The details of these occasions will be examined later in these reasons. It is important to bear at the forefront of consideration, however, that apart from the particular claim made about misleading and deceptive conduct, the bare fact that it is demonstrated that

Smith misrepresented some fact does not, without more, establish the claims that DCN now makes, whether against Smith or against the Omnilab Parties.

6 In looking at the unfolding story of the dealings that was revealed in the evidence led at trial, it is useful to record at the outset some matters that are important to the ultimate resolution of the matter. First, until August 2010, in all his dealings with the Studios, Smith made plain that if the Studios were to contract for provision of VPFs to independent cinema owners in Australia, DCN was to be the contracting party. In fact, until 9 August 2010, DCN was named as the contracting party on each draft form of VPF agreement produced by the Studios and negotiated by Smith (see [139] below). Secondly, Smith gave these draft agreements to the Omnilab Parties and ICAA and it follows that both the Omnilab Parties and ICAA knew that this was the proposal put to the Studios. Thirdly, to assist Smith in his negotiations with the Studios he asked ICAA for, and ultimately was given, a letter which, after a great deal of debate both within ICAA and with Smith about including a reference to DCN, said that “ICAA has an arrangement with Michael Smith of MGS Group (*and DCN*) to undertake Virtual Print Fee (VPF) negotiations on behalf of ICAA members” (emphasis added) (see [83] below). Fourthly, after the Studios had provided Smith with draft VPF agreements naming DCN as the contracting party, ICAA decided that it wanted to deal with the Omnilab Parties rather than DCN. In August 2010, ICAA told Smith and DCN that it had been in “focused discussions with” the Omnilab Parties “with the full knowledge and active participation of” Smith “since early 2009”. Fifthly, after this litigation was commenced, the Omnilab Parties made a VPF agreement on behalf of ICAA with Paramount. Sixthly, ICAA was not joined as a party to these proceedings. DCN makes no claim against ICAA. Instead, DCN says that the Omnilab Parties and Smith are liable to it on the bases already outlined.

B. FACTS

(1) *Mid 2000s up to and including 2007*

7 In the mid 2000s, the Studios began providing financial assistance to cinemas to upgrade their projection equipment from analogue to digital. As described above, the financial assistance (in the form of a subsidy) was called a “VPF”. Digital cinema was the talk of the industry.

8 ICAA was the industry body representing independent cinemas in Australia. From at least August 2007, it was part of ICAA's business plan to assist its members to understand the move to digital and possibly become a buying group to obtain the best deals for its members.

9 By 30 September 2007, the Board of ICAA was being asked to consider an industry-wide approach, with ICAA joining with Amalgamated Holdings Limited (which includes Greater Union Cinemas) to represent all cinema screens for the purposes of negotiating with Studios over the VPF and with hardware suppliers over the cost of installing the necessary equipment.

(2) 2008

10 At about the same time, and independently of ICAA, Smith was seeking to meet and, in fact, did meet with the Studios to discuss moving independent cinema owners in Australia to digital.

11 In late May / early June 2008, Smith met Sarfaty, the CEO of ICAA. They discussed independent cinemas and the digital age. Sarfaty was keen to meet Smith again to pursue the idea. Smith delayed the meeting on the basis that he wanted to get the digital plan sorted out. This is the first recorded instance of non-disclosure by Smith. It was a non-disclosure because, as at 4 June 2008, Smith was in the throes of establishing a "partnership" called "Digital Cinema Network Australia (DCN)" between MGS (his company) and digitAll, a company controlled by the Gardiner brothers. At that time, the intention was for DCN to "supply and install turn key DCI [digital cinema initiatives] solutions, Projection and Servers," all locally networked at each location and "in turn networked back to [DCN]". A standard conversion fee was proposed. There was no mention of VPF agreements.

12 By August / September 2008, DCN was further advanced. DCN was in the process of going public about its move into the digital era. A draft brochure and press release were prepared for the Australian International Movie Convention (AIMC). At that time, the focus was to convert the Sun Theatre, a theatre connected to Smith, to a fully networked and automated digital theatre as a prototype. The foot of the brochure stated that while digital conversions would not become common place until the VPF had been successfully agreed

with all Studios, they would implement a digital complex and develop the system “while those negotiations [were] taking place”. There was no mention of ICAA.

13 Smith was to speak at the AIMC. He prepared notes. His notes record Smith introducing DCN. The last bullet point of the notes, entitled “What we are after,” effectively asked cinema owners to allow DCN to include their screens in their VPF negotiations on a non-binding basis. Smith’s presentation to AIMC was reported in an industry magazine in September 2008. That report said that Smith was negotiating the roll-out of digital cinema for 500 independent screens across Australia as Chairman of DCN and expected to reach agreement with the Studios in 2009.

14 On 6 August 2008, Smith (as a representative of MGS) emailed a Disney representative (Jason Brenek). Smith told Disney he had been discussing digital conversion with each of the film companies in Australia and, in turn, with their representatives in Los Angeles. Smith also told Disney that “*we are negotiating a VPF on behalf of 550 cinemas in Australia (and more are still coming on board). Our company DCN is an integrator that specialises in the independent chains in Australia*”. Smith then said that most of the Studios had already sent him their boiler plate VPF document to study, and asked for a copy of Disney’s standard document. The email contained misinformation. Neither DCN nor MGS had 550 cinemas on board at that time, or so far as the evidence disclosed, at any time. Smith provided the same misinformation to the Paramount representative on 12 August 2008. And, further, at this time he did not have one, let alone most, of the Studios’ boiler plate VPF agreements. By September 2008, Smith’s story had changed a little, but it was still misinformation – he told Roadshow Distribution (for Warner Bros) that DCN was negotiating VPF agreements on behalf of a number of independent exhibitors, representing about 180 screens but anticipating more to “come on board, as high as 350 screens”.

15 At the same time, and independent of DCN, ICAA was continuing to explore digital cinema. On 21 July 2008, Sarfaty (as the Executive Director and Vice President of ICAA) reported to ICAA members that ICAA had held discussions with the Australian Competition and Consumer Commission in relation to the creation of a digital buying group among ICAA members, and had commenced negotiations with the Motion Picture Distributors Association of Australia about VPFs. Sarfaty also advised that ICAA had held initial discussions with major digital equipment suppliers and integrators. ICAA’s recommendation to its members

was that the position on digital transition would become clearer over the next 12 months. If only that had been the result. This proceeding is proof it did not.

16 Of course, there were other players in the Australian industry. One of those players was Omnilab Media. It described itself as Australia and New Zealand's largest independently owned vertically integrated media company. In September 2008, Fleming was (and still is) the General Manager of Omnilab Media Melbourne Pty Ltd, a subsidiary of Omnilab Media. Fleming had attended AIMC. He heard Smith's presentation. He does not recall DCN being mentioned. However, after the conference, Fleming met Gardiner who told him that digit4ll had entered into a partnership with Smith and the partnership was operating as DCN.

17 On 24 September 2008, the Board of Omnilab Media met. The Board was presented with a document entitled "Digital Cinema Current Strategy". It had a mind map attached. DCN placed considerable reliance on the contents of the mind map as evidence of Omnilab Media's knowledge of DCN. DCN was described as representing between 200 and 400 independent exhibitors. This document also states that DCN aimed to be an integrator, and worked with ICAA. Smith and Gardiner were identified. Fleming said he obtained the information from the market. The information was considered further at an Omnilab Board meeting on 22 October 2008.

18 If the clock stopped then (at the end of September 2008), the relationship between digit4ll and MGS would have been a quasi partnership conducted through DCN. The plans of the two entities (to be effected through DCN) included converting the Sun Theatre to digital. It had been negotiating with at least some of the Studios and telling them that DCN had the support of a large number of screens when in fact it did not. At the same time, Smith was talking to Sarfaty and Gardiner was talking to Fleming.

19 But the clock did not stop. On 1 October 2008, Smith emailed Sarfaty a draft proposal he had prepared for the ICAA Board. It was from Smith of the MGS Group. The draft proposal resulted from discussions between Smith and Sarfaty. The draft referred to DCN. It set out Smith's understanding of the arrangement he was putting to ICAA and contained the following:

We are currently negotiating a VPF on behalf of approximately

200 independent cinemas, many of them members of ICAA, but not all. As has been mentioned often, these talks are progressing in the right direction, but slowly. However, with one studio we are making great progress, and expect a deal to be agreed before Xmas.

The boilerplate agreements from the studios are designed around the Digital Integrator negotiating and managing the VPF. We have suggested that studios in Australia could pay the VPF's directly to each cinema operator, but they have made it clear they are not prepared to do so, as they want to keep separation between day to day film bookings and the VPF payment structure. However, I have mentioned the idea of an industry group being the VPF administration entity to some of the studios and they have been comfortable with the idea.

I believe there is an opportunity for ICAA to position itself to be the key organisation for all independent cinemas to access a VPF.

I propose that as we continue with our negotiations, rather than just on behalf of the cinemas we have spoken to, we do so on behalf of all ICAA members at the direction of the ICAA board.

At the point that deals are agreed between each studio, we would present the deal to the ICAA board for approval. While we will have agreements checked by our own lawyers, we would understand the ICAA board may want to use their own representatives to confirm[.]

ICAA can then be the body that administers the VPF over it's (sic) lifespan.

The advantages in taking this approach are:

- *The deal will become an ICAA deal rather than an MGS or a DCN deal, so every cinema outside of the majors wanting to access a VPF will have to join ICAA, which should be a healthy boost to the ICAA numbers.*
- We have allowed 3% in our negotiations for administration of the VPF, which would go to ICAA and be able to be used to underwrite the employment of full time admin staff.
- As an industry group, it will further forge the importance and central relevance of ICAA.
- *MGS will charge a fee of 1% upon successful implementation of each VPF agreement. All costs for travel, time, etc are born by MGS out of the fee. No costs are payable by any cinemas until agreements are in place (sic) and the digital screenings have commenced.*

In this proposal the negotiation of the VPF's is a completely separate exercise from the supply of equipment, the two are not tied together.

During the negotiation period we would keep the board informed with a monthly report, and I could be available to report directly to the conference call board meetings.

(Emphasis added.)

20

A careful reader will notice some important matters:

1. Smith sent the email as a representative of MGS, not DCN;
2. if the deal was accepted by ICAA, the deal became an ICAA deal rather than an MGS or DCN deal; and
3. any deal was subject to ICAA Board approval and ICAA would be the body that would administer the VPF over its lifespan.

Finally, what would Smith / MGS or DCN get out of it? MGS would get the right to charge a 1% fee upon successful completion of *each* VPF agreement from which MGS would pay all of its costs. Sarfaty included the draft proposal in his Executive Director's Report to the Board of ICAA dated 1 October 2008.

21

The following week, Smith was to travel to Los Angeles to meet with the Studios. Prior to leaving, he was busy. He needed to legitimise DCN. He had DCN business cards designed. Most importantly, he needed the support of the independent cinemas. On 15 October 2008, he emailed independent cinemas on his "vpf list" to obtain their written confirmation that he represented them when dealing with the Studios. The email was sent under cover of MGS. Again, MGS was seeking a 1% signing fee to be deducted initially from the VPF. MGS had also allowed for a 3% fee for management and distribution of the VPFs over the life of the VPF agreement. The subsequent emails Smith sent to his "vpf list" sought written confirmation for "*Digital Cinema Network* to negotiate a [VPF] deal to enable the digital projection conversion of cinemas". The response was not overwhelming. A lot of the people Smith wrote to called Sarfaty and said they wanted ICAA to negotiate the VPF on their behalf, not Smith. As at 22 October 2008, Smith had unequivocal support of approximately 54 screens and an expression of support from another 28 screens; a total of 86. The Studios would only deal with an entity that represented a critical mass of screens. The number of required screens varied between the Studios. Whatever the minimum, Smith did not have the numbers. Smith concluded that he could not get the support he needed to conduct the VPF negotiations without the support of ICAA. Smith told his partners in DCN, the Gardiners, that he had been approached by Sarfaty of ICAA.

22 Sarfaty of ICAA received both emails Smith had sent to cinemas on 15 October 2008. During cross examination, Smith gave evidence that he and Sarfaty had been discussing VPFs throughout most of 2008 and that Sarfaty had expressed annoyance at Smith's emails. Later on 16 October 2008, at Sarfaty's request, Smith sent a further version of one of the emails to Sarfaty under the MGS banner. The draft was significantly different. It now included the following statements:

We have been discussing with ... Sarfaty, CEO ICAA, the role that ICAA can play in the VPF's. Most of the exhibitors we are negotiating on behalf of are ICAA members. We would like to include all ICAA members in our negotiations in these discussions, and in turn, would be prepared to hand over the management and administration of the VPF's once in place.

...

We propose a 1% signing fee to be deducted initially from the VPF, and have allowed in our negotiations for a 3% fee on top of the nominated VPF for management and distribution of the VPF's over the period. We would like to see ICAA handle this management and distribution of VPF role, and hence ICAA would receive the 3% fee.

...

There was no mention of DCN.

23 On 23 October 2008, Smith wrote to Sarfaty stating 'I'm hoping we may be able to get something back from you on the VPF's by tomorrow ready for my meetings next week'. On 27 October, Smith emailed Sarfaty again asking him to sort out a letter from ICAA recording their support for Smith's negotiations. Sarfaty responded:

No worries. Am working on this with Kieren [the President of ICAA] and will be back to you later today. Our thought is that we send a letter to members informing them that we believe ICAA should retain a representation position in VPF discussions and in order to do that ICAA members should assign representation privileges to ICAA. We then work with you on understanding the deals you're proposing and report back to members. How does that sound to you?

24 At 6:51pm on 28 October 2008, Sarfaty sent Smith a draft of a letter to ICAA members. A copy was also provided to the President of ICAA. Sarfaty sought Smith's views on the draft. Smith was not happy with it. Smith proposed that Sarfaty defer sending the letter to ICAA members until after he returned from Los Angeles.

25 By 8:14am on 30 October 2008, the draft had been further amended. Sarfaty sent the latest draft to Smith attached to an email which read “below is what went to the [ICAA] Board this morning and I will be forwarding to members later today”. The letter sent to members three days later was substantially in the form of this draft. Attached to the draft was a proforma letter for members to complete authorising ICAA to represent them in the negotiations for the VPFs. Smith’s response on the same day – “Great, thanks Mark”.

26 By Monday 3 November 2008, a further draft to ICAA members was prepared by Sarfaty and amended by Smith. At 10:41pm on 3 November, the following letter was sent to ICAA members:

...

There are a number of issues surrounding the VPF negotiations and one of the most significant is the fact that the Hollywood studios that they (sic) will not commence negotiations with individual exhibitors, but rather with Digital Integrators on behalf of the circuits they represent. Some studios have also indicated that *they will not negotiate with any entity representing less than 100 screens.* ...

ICAA at this time represents some 340 screens and is well placed to represent its members’ interests in the process of VPF negotiations.

...

In order to further the process of negotiating VPF’s, ICAA proposes that individual members complete the attached letter of authorization appointing ICAA to negotiate indicative VPFs on their behalf.

This letter does not compel the individual member to accept the terms of the VPF Agreement if they are deemed to be unsatisfactory. The letter merely serves to confirm the member has authorized ICAA to solicit VPF agreements on their behalf.

ICAA then proposes to engage Michael Smith of MGS Group to represent ICAA members in the VPF negotiations.

The purpose of this process is to ensure that member interests are directly represented by ICAA in all VPF discussions and negotiations between studios and integrators on behalf of independent cinemas.

Although MGS Group joint venture partner, Digital Cinema Network will be making ICAA members an offer for equipment supply in the future, at this time Michael will only be seeking to negotiate the VPF and these negotiations will not be contingent on equipment supply.

...

Michael has proposed a fee structure which will see MGS retaining a

proportion of the VPF as a “signing fee” for costs incurred and services rendered, with a further proportion of the VPF being retained as an ongoing administration fee which would go to ICAA. ...

(Emphasis added.)

The draft letter to be signed by ICAA members stated, in part, that the member understood that ICAA intended to engage *Smith of MGS Group* to negotiate VPFs on behalf of ICAA, and that the commercial terms of VPFs negotiated by Smith were non-binding and would be further negotiated subsequent to presentation in contractual form to ICAA members. ICAA received numerous signed letters of authorisation including from some to whom Smith had sent his email seeking support for DCN’s VPF negotiations. A number of significant matters must be noted. At this time, ICAA and its members engaged Smith of MGS, not DCN. Next, the ICAA members were told about Smith’s role in DCN, but that role was limited to equipment supply. Thirdly, negotiation of the VPF was not contingent on equipment supply. Fourthly, without the support from ICAA, Smith would not have continued his negotiations with the Studios. Finally, ICAA retained the final say as to the terms of the VPF agreements and who would be appointed as the deployment entity under a VPF agreement.

27 Over the next few days, Smith sought meetings with the Studios. On 6 November 2008, he emailed Disney and enclosed a three page document entitled “Digital Cinema Network – The Independent DCI Integrator”. The document stated that DCN was negotiating VPFs to facilitate conversion of independent exhibitors in Australia and was working closely with ICAA which represented the majority of cinemas in Australia (apart from the four major exhibitors).

28 Smith’s modus operandi at this stage is obvious. When working with ICAA – he is MGS and working as their agent. He refers to DCN in relation only to the sale of equipment. When talking to the Studios – he is DCN and working closely with ICAA. So, for example, on 21 November 2008, Smith emailed the Paramount representative under the heading “DCN VPF Australia”. Smith asked the representative to send their VPF boilerplate agreement.

29 During October, Fleming was still pursuing digital cinema opportunities for Omnilab Media. On 22 October 2008, the Board of Omnilab Media granted Fleming approval to hold discussions with digitAll and DCN about a possible partnership.

30 On 12 November 2008, Smith emailed Sarfaty. He reported on his meetings with the Studios and then said "... Fleming has been in touch a few times getting info for his presentation [at the upcoming SPAA Conference], I've kept it all general info at this stage". On 14 November, Fleming made his presentation to SPAA.

31 At the Omnilab Board meeting on 19 November 2008, Fleming reported on his discussions with Gardiner and Smith – "currently no feedback". By 10 December 2008, things had not progressed much further. Fleming was still to complete a whitepaper on digital cinema (which, on 24 September, the Board had asked him to prepare). The Board resolved that Fleming would "maintain [a] watching brief" on DCN, Gardiner and Smith.

32 In the first week of December, Sarfaty and Smith met. On 12 December, Sarfaty emailed Smith summarising where they had reached. The email recorded that:

1. Smith was currently engaged in seeking VPFs from the Studios; and
2. The Studios had indicated to Smith that they would only pay a VPF to an integrator supplying DCI compliant equipment to cinema operators, would require the integrator to guarantee the compliance of the equipment for the term of the VPF agreement and would require the integrator to collect and distribute the VPFs to cinema operators.

Sarfaty sought a meeting to review and discuss the contracts supplied by the Studios so that ICAA and MGS could form a business relationship for the negotiation of the VPFs. Attached to the email was a confidentiality agreement designed to allow ICAA and MGS to examine the issues that needed to be considered in order to form that business relationship. On 16 December 2008, Smith responded. He had amended the confidentiality agreement. Smith stated that he had "included both MGS and DCN in the document to protect ICAA fully".

(3) *January and February 2009*

33 In January 2009, Smith was again communicating with the Studios. On 14 January, he emailed Fox. The email, entitled "DCN VPF for independent cinemas in Australia", requested Fox's revised VPF Agreement. On the same day, Smith sent an email to Universal entitled "VPF's for Australia: DCN on behalf of Independent Cinemas", seeking a copy of its boilerplate VPF agreement. The next day, 15 January 2009, Smith emailed to Sarfaty a copy

of the Disney VPF Agreement. By 29 January 2009, Smith had received a copy of the Fox VPF Agreement and provided it to Sarfaty. By 5 February 2009, Smith had the Paramount VPF Agreement and had provided it to Sarfaty. This was all conduct consistent with an agency arrangement with ICAA.

34 At the same time, ICAA was speaking to Omnilab Media. On 8 February 2009, ICAA and Omnilab Media entered into a Confidentiality Agreement. Under that agreement, ICAA reserved all of its rights in relation to “Confidential Information”. “Confidential Information” was broadly defined. The Confidentiality Agreement provided that the confidential information was supplied by ICAA to Omnilab Media for specified purposes and could not be made available to any other person or entity without the express permission of ICAA. There were two specified purposes. First, to enable ICAA and Omnilab Media to consider the feasibility of entering into a business arrangement for the creation of a digital media distribution network for ICAA members. Secondly, to enable ICAA and Omnilab Media to consider the feasibility of entering into a business arrangement for exploration of business opportunities associated with digital cinema transition in the independent cinema sector. The second purpose was broad.

35 Notwithstanding the discussions between ICAA and Omnilab Media, on 9 February 2009 Sarfaty recommended to the ICAA Board that “ICAA instruct ... Smith to pursue a ‘paramount style’ offer for ICAA members”. The ‘Paramount style’ offer involved “direct agreements with exhibitors”. In other words, under such an agreement there would be no need for DCN (or any other entity) to be a party to the agreement because there was no digital integrator. By 11 February 2009, Smith told the Gardiners that the Paramount deal had gone ‘direct to exhibitor’. On 16 March, Sarfaty told the ICAA Board that, consistent with previous Board decisions, Smith had been instructed to seek “Paramount” style agreements with the Studios.

36 In late February 2009, Fleming produced the White Paper that Omnilab Media’s Board had asked for in late 2008. The White Paper, dated November 2008, was described as a “collection of a lot of research notes”. The paper contained a disclaimer about the accuracy of many of the “broad sweeping claims made by parties involved in the roll-out (e.g. the number of screens they have)”, and that the interdependence and relationships of the parties mentioned was often not clear. Attached to the White Paper was a copy of the industry

magazine article that reported Smith's presentation to AIMC (see [13] above) as well as an analysis of the Australian market. Fleming drafted the analysis. The analysis referred to ICAA as a stakeholder. In relation to DCN, Fleming suggested that there was an opportunity for Omnilab Media "to align with [DCN] to be involved as an integrator for independent cinema operators". Fleming surmised that the challenge for DCN would be funding the independent exhibitors. DCN contended that the content of significant parts of the White Paper was prepared from information provided by Gardiner to Fleming. The evidence does not support that submission and I reject it.

(4) March and April 2009

37 In March, the arrangements between Smith and ICAA reached a climax. On 5 March, Smith sent an email to Sarfaty entitled "VPF negotiations" outlining his thoughts on the agreement. Under the heading "VPF negotiations", Smith listed the following points:

Michael Smith, of MGS Group P/L and [DCN] to negotiate VPF details for ICAA on behalf of members.

Arrangement is with ICAA, not individual ICAA cinemas.

Invoice for services will be to ICAA, who will in turn invoice cinemas.

MGS will charge ICAA \$500 / screen for negotiating VPF deal with all major studios and primary independent distributors in Australia ...

...

Process of negotiation is:

MS to negotiate with each studio

Bring results of those negotiations to liaise with Mark Sarfaty

When MS and MS believe deal is sorted, take to the ICAA board for ratification.

Negotiations for the last year have been with DCN as the integrator. Negotiations continue on that basis, but we are pushing for studios to agree that once details of deal are agreed, the local distributor could pay VPF's to each exhibitor directly. Not all studios are prepared to entertain that idea at present.

...

(Emphasis added.)

38 Smith was still negotiating with the Studios. On 2 March 2009, he emailed Paramount telling them that the proposed “Failure to Play Penalties” clause in the draft VPF agreement was a major stumbling block for ICAA. On 13 March, Smith emailed Fox regarding its VPF Agreement, and said that:

[O]ur intention is that we would come to an agreement that we are both happy with, we would then have the ICAA board ratify the document (perhaps they will ask fo (sic) some changes) but it would then be presented to members on the basis that it is “the document ready to sign now” ...

Smith provided the same information to Gardiner on 16 March 2009. DCN then knew that Smith was negotiating on behalf of the ICAA members and that the ICAA Board had to approve the VPF agreement before it was finalised with the Studios.

39 On 18 March 2009, Gardiner emailed Smith and asked him to convey to ICAA members apologies from the Gardiner brothers for not attending the ICAA conference.

40 On 2 April 2009, Smith emailed the Paramount representatives under the heading “DCN VPF Australia”, seeking a copy of its international VPF agreement. On 5 and 6 May, Smith emailed Fox under the heading “DCN VPF Australia”. Smith was looking to meet Fox. Smith wanted to know where Fox were up to and wanted to discuss the impact of the Paramount direct contract on ICAA’s members.

41 At the end of April 2009, Sarfaty was talking again to Fleming. Sarfaty sent Fleming ICAA’s Business Strategy which stated that “ICAA [was] seeking to negotiate a VPF deal with the studios”, and asked “how can *Omnilab Media and MGS/DCN work together* to achieve a successful outcome for ICAA members ... whilst deliver[ing] appropriate returns for their individual investments” (emphasis added). The next day, they met. Fleming drafted notes of the meeting and sent them to Sarfaty on 3 May 2009. The notes recorded that “*ICAA (through MGS) [would] get a VPF deal which will allow for a 3 year transition*”. The balance of the notes concerned a technology transition strategy for independent cinema operators.

(5) May – August 2009

42 On 6 May 2009, ICAA held its May Board meeting. The notes of the meeting record that ICAA was pursuing a “collective” position on VPF. The notes do not refer to Smith,

DCN or Omnilab Media. They refer to MGS in the context of equipment supply and “network administration”, envisioned to be a network that would be responsible for the operation and servicing of digital projectors. It was assumed that such a network would also “act as the interface between digital cinemas and content suppliers”.

43 On 11 May 2009, Fleming emailed Smith. He enclosed what were described as “draft structure charts”. There were three. Each draft structure showed ICAA holding the VPF. No less significantly, each structure included DCN and MGS. In each structure, MGS was the preferred supplier and, as a partner with DCN, responsible for theatre management systems (TMS). In each structure, Omnilab Media’s role was different. In the first, it was responsible for the Distribution Network, to “Collect Content, Prepare and Distribute” (the **Distribution Network**). In the second and third structure, Omnilab Media was a “partner” with DCN, and DCN was responsible for the Distribution Network and TMS.

44 A week later, 18 May 2009, Smith was busy. He emailed the Gardiners and told them that “[w]e have been directly assigned to negotiate on behalf of ICAA (Independent Cinema (sic) Association Australia), which represents the majority of independent cinemas in Australia”. The same day, Smith emailed Warner Bros and enclosed “an updated document regarding DCN and the VPF for independents in Australia” (the **DCN VPF Document**). The DCN VPF Document contained the following statements:

...

DCN is negotiating a VPF on behalf of independent cinemas across Australia and in discussions with New Zealand. We currently represent 350 screens, but we believe this could ultimately be as high as 500 screens.

...

[DCN] is a partnership between MGS ... and DigitAll ...

DCN are negotiating VPF’s ... on behalf of independent exhibitors in Australia. We have been directly assigned to negotiate on behalf of ICAA ... We also represent a number of operators who choose not to be members.

Our discussions with key operators and the CEO of ICAA have led us to propose a model for Australia that differs from the US model of integrator financed / VPF funded conversion ...

Given this, the underlying role of the integrator in the standard agreements will be different and require some fundamental changes to the examples of US boilerplate contracts we have perused thus far. ...

DIRECT AGREEMENT / INTEGRATOR

- Since the announcement of the “Paramount direct to exhibitor” agreement, there has been great interest in pursuing this model from exhibitors we represent. The ICAA board has directed that this is their preferred model.
- We are liaising with Paramount on the details of their agreement for Australia, so that the document is acceptable to all members once it is tabled.
- We are continuing to negotiate contracts with all other studios on the basis of being the integrator. However, at the completion of these negotiations, if the studio is prepared to entertain direct exhibitor contracts, we will allow this to happen.

...

(Emphasis added.)

The email is important. It records, as was then the fact, that although Smith of DCN would negotiate the contract on behalf of ICAA, ICAA’s preferred model was a contract directly between the Studio and each exhibitor. In other words, Smith and ICAA would settle the form of the contract that each exhibitor would sign. There was no role for a digital integrator. DCN would not be a party to the contract. How then was Smith to be rewarded? He proposed a fee per screen.

45 That same day, 18 May 2009, Smith pursued the direct exhibitor contract with Paramount. He sent them a marked up copy of the Paramount Agreement and a copy of the DCN VPF Document: see [44] above. Smith also sent a copy of the DCN VPF Document to Sony and Disney.

46 On 30 May 2009, Gardiner emailed Smith regarding the “ICAA-VPF update”. A number of emails were attached. One email was from Sarfaty to ICAA members which recorded, as was the fact, that ICAA had authorised Smith to activate VPF negotiations with the Studios and that he and Smith were meeting regularly to discuss progress and contractual design.

47 Throughout June, the relationship between Smith and ICAA was the subject of further discussion. On 29 June 2009, Smith confirmed their verbal discussions and direction of the ICAA Board in the following terms:

...

We are exclusively negotiating VPF's on behalf of the ICAA member cinemas with all major and local distributors / studios.

You and I shall liaise on the content of the agreements as we negotiate, and when we have a document that we believe is acceptable, it will be tabled with the ICAA board for consideration. Upon their agreement, the agreements will be put to the ICAA members for ratification.

We will negotiate towards the following outcomes:

- Maximum financial outcome to the benefit of exhibitors
- *Agreements to be directly between the distributor and the exhibitor*
- *If an integrator is demanded by the studio, DCN in conjunction with ICAA shall manage the requirements for ICAA members*
- ...

Legal review and associated costs documents to be undertaken by ICAA.

The discounted ICAA fee charged by DCN will be a total of \$500+gst per screen, invoiced as 50% upon commencement of take up agreements, final 50% upon completion of at least 5 Hollywood and 5 Australian distributor agreements.

- Invoice will be to ICAA, and ICAA will on charge to exhibitors ...

Should a deal be reached for ICAA members to receive VPF's through another integrator, the details of that arrangement will be negotiated by DCN and the fee still payable.

All travel, time and overhead costs (excluding legal fees) associated with the negotiation (sic) of the agreements will be borne by DCN and paid from their fee.

(Emphasis added.)

Two days later, on 1 July 2009, Sarfaty completed his CEO report. He reported that Smith had told him VPF negotiations were progressing and that an offer for Board consideration was expected at the August Board meeting. His report included the contents of the 29 June email. In this email, the relationship was said to be with DCN. The fees were to be charged by DCN – regardless of whether or not the VPF agreement was to be concluded directly with the exhibitor, or by way of a digital integrator. If there was to be a digital integrator, DCN was the named entity.

48 Later that month, 27 July 2009, Sarfaty emailed Smith. Sarfaty told Smith that the 29 June email had been discussed by the ICAA Board and that there was a general view that the arrangement should be put to members. Sarfaty asked Smith to put the offer into a contractual form for “legal review” so that ICAA had an offer for recommendation at its

Annual General Meeting (**AGM**). Sarfaty also asked for copies of the current draft VPF agreements. Smith responded on 29 July 2009. Smith stated that he did not think a contractual agreement was required, as ICAA had already directed “us” to conduct the negotiations on behalf of the ICAA members, and that the letters of offer and confirmation of the verbal appointment “already in place” were sufficient. Smith’s stated reason – contracts will only complicate and delay matters. No copies of the current draft VPF agreements were provided. Sarfaty was concerned. Smith emailed Dell, the President of ICAA, who responded that a letter of appointment, countersigned by Smith, would be sufficient but ICAA needed something formally in writing to put to members. The President advised that emails were not sufficient for this purpose. The issue was resolved by August. Sarfaty’s August CEO Report stated that Smith had tabled a letter of offer to take to the ICAA AGM, and that Smith would present the details at the AGM in a closed meeting. In relation to “the question of legals”, Sarfaty reported that he had spoken to a law firm and that up to \$100,000 would be charged for contract review and variation of VPF contracts globally. The report was tabled and discussed at the August Board meeting.

49 In addition to Sarfaty’s arrangement with Smith regarding VPF negotiations on behalf of ICAA members, by early August 2009 Sarfaty had also held confidential discussions with Omnilab Media and another entity about the viability of establishing a national digital distribution network. Fleming asked Sarfaty about Smith’s role in both advertising and what he described as “the business structure of the distribution network”. Sarfaty responded by excluding Smith from the advertising and telling Fleming that:

As I’ve said previously, I’m cautious about the notion of a vehicle that includes DCN in a capacity which is greater than as an installation company because I would have to sell it into (sic) ICAA members and at this time I’m not in a position to offer that assurance (I have some meetings in Melbourne on Friday that will offer a greater level of insight into that question). ...

50 At the end of August, Smith was negotiating with Disney. At that time, Disney was adopting the Paramount ‘direct to exhibitor’ model of VPF agreement. Disney wanted to know whether ICAA would provide a performance guarantee. Following this, and as foreshadowed at the ICAA August Board meeting, Smith made his presentation to the ICAA AGM. The minutes of the AGM record that Smith made his presentation after the AGM and that Sarfaty was to further progress and finalise the VPFs.

(6) ***September and October 2009***

51 By early September 2009, ICAA was unhappy with Smith. The issue was a lack of information. On 3 September, Sarfaty emailed Smith confirming discussions held between Smith, Sarfaty and the President of ICAA that “ICAA need[ed] to ... establish a greater level of understanding and engagement with the process of VPF negotiation both in terms of detail as to what negotiations [were] taking place and with whom (a status report) and with regard to [Sarfaty] and the ICAA Board making a recommendation to members as adoption of [Smith’s] current proposal and the outcomes of any services delivered by way of VPF negotiations and outcomes”. Sarfaty expressed concern that at that moment he could not provide any of that detail to members who “of course, have authorised ICAA to act on their behalf in respect of the VPF’s”. The next day, 4 September 2009, Smith responded saying he would be in touch the following week.

52 On 10 September 2009, Smith forwarded the Paramount Exhibitor Agreement to Sarfaty. Smith asked Sarfaty to not disclose the agreement to anyone.

53 Fleming was still working on a digital cinema strategy. In early October 2009, he sent a document entitled “Digital Cinema Study” to Omnilab Media staff. It described DCN as:

A partnership between independent exhibitor and equipment supplier MGS, and content storage and management business Digital, DCN supplies a turnkey DCI solution (projector, server, TMS) to independent exhibitors. ... A solid player in the independent sector, providing the only true turnkey solution, but its capacity to scale up to cover a significant portion of the sector is questionable. *Critically, Mike Smith, the principal of DCN has been leading the negotiations with studios on VPF’s on behalf of ICAA.*

(Emphasis added.)

On any view, Omnilab Media knew that Smith of DCN was conducting the negotiations with the Studios and that Smith had the support of ICAA.

54 In Sarfaty’s CEO report to the ICAA Board in October (dated 7 October), Sarfaty recorded his dissatisfaction with Smith and, in particular, the lack of detailed information. The report referred to the discussion between ICAA and Smith in which ICAA insisted Smith provide more detailed information, include Sarfaty in final negotiations with

the Studios and provide information to support the size of his fee. Smith was reported as undertaking to meet with Sarfaty in two weeks and to supply all available information.

55 Smith's actions were less than satisfactory. And the position was about to get worse.

56 A few days later, on 11 October 2009, Smith was talking to Fleming, not Sarfaty. Smith ultimately received an "action plan development" from Fleming. In it, Fleming talked about the need to (among other things):

develop and gain agreement on an ownership structure that recognizes:

- The needs of ICAA;
- The needs of Mark Sarfaty;
- The value of and role to be played by DCN in this relationship.

At this time, ICAA (or more particularly Sarfaty) had decided to put the integrator role out to tender. That was not surprising. ICAA was concerned about the lack of information from Smith. Omnilab Media sensed an opportunity. And, it would appear, Smith sensed an opportunity with Omnilab Media.

57 On or about 19 October 2009, Fleming, Entwistle and Alan Engert of Omnilab Media (with the assistance of Sarfaty) prepared a feasibility study for consideration by Omnilab Media's Board. It had a number of attachments. Critically, it contained an attachment entitled "Structure, Transition Services (NewCo)". The attachment contained the following:

- Omnilab Media takes a 51% share of DCN
- The remaining 49% is shared between the current shareholders of DCN at their determination
- Buyout exclusive provisions on both sides – first right of refusal if either partner wishes to exit partnership

Board

- Director from ICAA – commitment for 3 years – paid position
- Director – DCN
- Director – OM
- Director – OM
- Executive Director
- Chair – Independent
- Primary Executive Role – Manager Cinema Services – Cost of Role Shared with Distribution Services 50/50
- NewCo Subcontracts the service of the OM NOC
- Administrative Support (including VPF Administration) provided by

OMM

The value of DCN will be determined by:

- VPF being delivered for ICAA members
- Market Contracts ... support companies, exhibitors, distributors
- TMS IP

Omnilab Media would be providing

- Guarantee of entitlements to staff
- Funding of training programs
- Sales Strategy
- Operating Capital for 3 to 6 months to establish the network of installation and support technicians
- Cashflow funding of equipment purchased to point of payment
- Administrative support
 - AR
 - AP
 - Contract Management

Maybe we can drive (sic) DCN shares of the business through key KPIs

- 10% for finalized VPF
- 10% for X volume of sales both in systems and in distribution contracts
- 10% for completed and documented TMS

Note; DCN Software developers will provide documentation for all software and firmware systems, submit to external software/firmware audit with place software in escrow

...

(Emphasis added.)

58 Omnilab Media increased its efforts. At Sarfaty's suggestion, Omnilab Media retained Entwistle, the managing director, owner and operator of Limelight Cinemas Pty Ltd in Canberra, a member of ICAA and a Board member of Screen Australia. Entwistle's role was to assist Fleming to understand the opportunities that existed for Omnilab Media in digital cinema. On 23 October 2009, Entwistle prepared what he described as an "Opportunity Statement". It identified the players in the industry, the size of the market and the opportunities for Omnilab Media. Significantly, the document recorded that:

1. ICAA had authorised MGS to negotiate VPF deals for the ICAA members but that ICAA's plan lacked coordination beyond the negotiation of a VPF figure;

2. Smith, the principal of DCN, had been leading the negotiations with Studios on VPFs on behalf of ICAA;
3. The Studios had thus far shown a significant preference for dealing with integrators on VPFs;
4. Given the speed and credibility imperatives, Entwistle suggested that Omnilab Media join forces with a local partner that possessed complementary skills and resources, and that the best fit would appear to be DCN;
5. Initial discussions had taken place with DCN about the viability of a collaboration but that DCN's suggested approach of Omnilab Media buying equity in DCN was not considered to be the preferred option because of the difficulty in valuing DCN's business in its current state.

(7) November 2009

59

On 8 November 2009, Entwistle emailed Fleming with a suggested "approach". Entwistle reported he had meetings scheduled with Sarfaty and Smith that week, deliberately scheduled in that order. Entwistle sought Fleming's approval to approach those meetings with the aim of convincing Sarfaty that ICAA should skip the tender process and immediately enter into a "co-operative approach" with Omnilab Media while, at the same time, convincing Smith that "his only way to get ICAA [was] with an Omni-led entity", and getting him to agree to key elements of the Entwistle's proposed structure. That proposed structure involved the following:

...

1. Sarfaty

... [The] better approach for ICAA than creating a two horse race, may be to take a more active role in the process, via a seat at the table of an Omni-controlled "Transition Services Business". The basic structure would be:

Board

- Director from ICAA – commitment for 3 years – paid position
- Director – DCN
- Director – OM
- Director – OM
- Executive Director
- Chair – Independent

This would provide ICAA with comfort around a number of key elements:

- led by company with credibility / professionalism / longevity (ie: Omni)
- Technical personnel to execute installations (ie DCN)
- ...
- A seat at the table on VPF discussions.

2. Mike Smith

Advise Mike we have ICAA ready to commit, but conditional on the following:

1. Omni – controlled entity
2. ICAA Board Seat

Based on the above, suggest the best way forward might include:

- Omni buying DCN (in whole or part) with some kind of “earn-out” structure (ie: small % upfront, with balance from % of commissions etc)
- DCN maintaining a seat on Board, and key people to be maintained throughout transition phase

Key issues to be resolved / questions answered:

- What is the DCN business structure now?
- How do we propose to value?

...

60 In the middle of November 2009, the state of the negotiations between Omnilab Media and DCN was the subject of internal debate within Omnilab Media. Entwistle emailed Fleming on 18 November telling him of the need to:

- a) Nail down DCN. We need them ‘in the tent’ asap, where we can get full transparency, and stop them running around on their own.
- b) Get [Sarfaty] and [Smith] in the same room and force the parties to get on the same page ...

As will become evident, they attempted to (and ultimately did) achieve the first objective through Smith. The structure proposed by Entwistle on 8 November (see [59] above) was adopted by Omnilab Media. The question is whether the steps that they took were lawful.

61 The Gardiners were aware of the Omnilab negotiations. On 30 November 2009, Gardiner emailed Smith and his brother stating that he believed “DCN need[ed] ... some ground rules associated with the negotiation (sic).” Gardiner stated:

...

Being a startup business, with really only six months (sic) of trading as of the end of Dec 09, I would argue a 6x multiplier for June-Dec Profit would be a fair bases of valuation. If we wish to sell. And hell, we don't know what that is.

...

... Also, the true (sic) is, Omnilab is interested in the commercial position and opportunities being in this position gives an organisation. What would it have cost Omnilab to try setting this up? What would be Omnilab's risk factor?

A position to take, IF we are to enter into investigating this opportunity, and devolve commercial information about our operations, Omnilab needs to commit to a bases of valuation (a formula one to agree on), before we commit to any commercial disclosure.

This will need to be in the form of a 'Heads of Agreement' or a 'Letter of Indicative Offer.' I have attached the one 'WAN TV' had with Technicolor, as a reference.

Also, as part of our commitment to disclosure information, we need a formal undertaking by Omnilab that we are disclosing commercial, in confidence information, that they they (sic), as a commercial acknowledgeable (sic) of that, agree that they cannot enter the business of, purchase a business in, or partner with, another Digital Cinema installer/integrator of any form for a period of 3 years from the signing of the agreement.

I known (sic) you will think this is high, but that would be my minimum start point. And they need to commit not to screw us, because John does play hard ball. John is most likely feeling out Edge on a partnership as we speak. We need to be carefully (sic).

...

Smith responded:

I agree with everything ... , I also think you start point of 6 x 6 month trade is the absolute minimum – I have suggested 5x annual profit.

Is the meeting with [Fleming] and [Entwistle] in person or on the phone. We need to talk before that, and I'd like to be there – we don't want them trying to drive a wedge between us ... which I wouldn't put past John either.

...

No heads of agreement or formal undertaking from Omnilab Media was sought or provided.

In November 2009, negotiations with the Studios moved up a level. On 5 November 2009, Smith spoke at length to the Fox representative, who appears to have asked for a list of

the exhibitors in his group and some acknowledgement that Smith was negotiating on their behalf. Smith's response – to tell Fox that he would chase up the letter from ICAA with the list of cinemas.

63 To secure the letter from ICAA, Smith set to work. On 6 November 2009, Smith sent Sarfaty a draft VPF agreement he had received from Disney. By 16 November 2009, Paramount had provided versions of its VPF agreement to Smith, which Smith provided to Sarfaty. Smith also sent Sarfaty a copy of the Fox Deployment Agreements and the draft Sony VPF Agreement. After providing Sarfaty with the draft VPF agreements, Smith emailed Sarfaty on 29 November 2009 asking for a letter from ICAA that stated:

- DCN has been appointed to negotiate VPF's on behalf of it's (sic) members
- That members understand that this a joint process, and that we are aiming for a VPF document that all members will accept

In his email, Smith advised that this letter was "needed to get Fox to the next step". Sarfaty did not respond.

(8) December 2009

64 A week later, on 6 December 2009, Smith wrote again seeking the letter for Fox.

65 It was around this time that the fundamental shift occurred. On 1 December 2009, Smith had attended a meeting at Omnilab Media which was attended by Sarfaty and Fleming. At that meeting, Sarfaty invited Omnilab Media (on behalf of ICAA members) to undertake the role of deployment entity for the VPFs, as well as potentially being the supplier of digital equipment. As Smith explained it, the position was that if ICAA wanted to do a deal with the support of its members, then there was nothing that he could do against it. As will become apparent, they did not mean that Smith was required to have acted, or should have acted, to the detriment of DCN.

66 By 15 December 2009, Fleming had drafted what was described as "Digital Cinema Update 15.12.09". The opening line – "There has been a change". The change? "ICAA would prefer [Omnilab] to take on the position is (sic) Integrator". Fleming described the role as a 10 year commitment to the Studios *with responsibility for VPF negotiation*,

management of payments, administration and the like. In further describing the role, Fleming included the following in his update:

As an Integrator it is possible to claim a fee per screen (from the exhibitor) to cover costs and legal costs. This can be somewhere between \$500 and \$1,500 per screen (collected by holding onto the first 2 VPF fees). *\$500 of this would go to DCN for their work so far.* There is also a fee that can be claimed from the distributor at around \$200 per screen or \$10-20K per distributor.

...

Action: Understand what a Digital Cinema Integrator does.

...

Action: *Get access to VPF agreements (from Michael) subject to NDA.*

...

Action: Do business modelling based on new organisation structure and costs associated with VPF and identified risks.

- There is angst between [Sarfaty] and [Smith]
- This is being presented by [Sarfaty] as an issue in that it will be difficult to get key ICAA members onboard with [Smith] involved
- It could also be seen as [Sarfaty] increasing his value for pulling this alliance together
- ICAA members still support [Smith] finalizing VPF negotiation
- [Sarfaty] has opened up discussions with key members of ICAA has appears to have support

Action: *Ross [Cartledge] to do research on issues with Michael [Smith].*

Action: Consider compensation for ... Sarfaty – success fee

...

(Emphasis added.)

This update contemporaneously recorded the position at that time – tension between Smith and Sarfaty. It also recorded a number of other important facts. First, that Omnilab Media knew that DCN was negotiating VPFs for ICAA members. Why else would Omnilab Media contemplate paying DCN \$500 of the fee per screen “for their work so far”? Secondly, Omnilab Media needed access to the VPF agreements to understand the role of a digital integrator and its risks and, thirdly, and most importantly, it identified the person who was to provide that information – Smith. And that is precisely what happened. The question is whether what Smith and the Omnilab Parties did was lawful – in light of the events of

30 November (see [61] above), 1 December (see [65] above) and now 15 December 2009. As will become apparent, the answer is no.

67 First, on 18 December 2009, Smith sent Fleming, by email, the template Universal and Sony VPF Agreements. In the Sony agreement, the deploying entity was named as “DCN”. Although the definition of ‘deploying entity’ was left blank in the Universal agreement, the document’s header stated “UNIVERSAL – DCN – Universal International DCDA Template...”. Smith told Fleming that the documents were highly confidential in nature, only for his eyes and those of his in-house counsel “for the purpose of evaluating the role, risk and liabilities inherent in being an integrator”.

68 One might well ask: why was Smith providing the draft VPFs to Omnilab Media when DCN (a company he was a director of) was not only proposed to be the integrator, but named in the draft agreements? And why was Smith stating that he was providing the documents “for the purpose of [Omnilab] evaluating the role, risk and liabilities inherent in being an integrator” unless Fleming had told him of Omnilab Media’s objectives?

69 Later that morning, Fleming forwarded the draft agreements to Goyal, Omnilab Media’s in-house counsel. The email stressed the confidential nature of the content of the email and then stated:

For the last 12 months I have been negotiating a position as a Digital Cinema Integrator. We are now getting to the pointy end. The three things that require consideration are:

- Contracting the [VPF] with the Studios
- The organisation structure of the new entity which must have an advisory board that includes industry representatives
- *A purchase agreement for an existing business, Digital Cinema Network (DCN)*

The immediate requirement is to review the VPF agreements to determine our commitments and build a risk profile for the Board. There are 6 agreements to be negotiated but the two attached should provide a good picture of what is involved.

Michael Smith (of DCN) has been negotiating the agreements with the Studios.

...

I am back on 11.1.10. I would like you and Michael [Smith] and I to get together that week and spend a day going through the agreement, getting his

input on commercials, your input on legals and me determining the areas of cost and risk. Are you available this week and what day would suit? Michael [Smith] has to fly to LA either this week or the following week to continue negotiations so a response ASAP would be appreciated as he is trying to book flights. Additionally, if you had to fly to LA with him, are you available the following week w/c 18.1.10

...

(Emphasis added in italics.)

70 As at 18 December 2009, there was no doubt that Omnilab knew:

1. Smith *of DCN* was conducting the negotiations;
2. Smith had provided the VPF agreements to Omnilab; and
3. Smith of DCN was to provide “his input on commercials” for the benefit of Omnilab.

71 At lunchtime on 18 December 2009, Smith received another email from Fox. Fox again sought the information it had asked for on 5 November 2009 – a list of exhibitors in the group and some acknowledgement that Smith was negotiating on their behalf (see [62] above). The difficulty was that Smith still had not received the letter from ICAA. He needed the ICAA letter because he did not have support from a sufficient number of exhibitors independently of ICAA. During the afternoon of 18 December 2009, Smith emailed Sarfaty again in the following terms:

Fox are chasing me on this letter – they are wanting to engage, but I can’t do so without it.

Can you please get for me asap.

It needs to point out that we are negotiating on behalf of ICAA members, and that the members accept it is a group negotiation.

...

(Emphasis added.)

72 Sarfaty’s response on 19 December 2009 – “Sorry. Completely slipped off my radar ... who does it need to be addressed to?” Smith then responded seeking a “generic letter” that he could use for other Studios, in the form of “a letter to DCN confirming that [DCN had] been appointed to negotiate the VPF’s on behalf of ICAA members, and that the contract will be a group deal”.

(9) **January 2010**

73 Nothing then occurred until 7 January 2010 when Sarfaty produced the “generic letter”. There was a difficulty. The generic letter stated that its purpose was to “*advise that [ICAA] ha[d] an arrangement with Michael Smith of MGS Group to undertake ... VPF negotiations on behalf of ICAA members*”. It also stated that the current arrangement between ICAA members and ICAA was by way of a letter of agreement between ICAA and member businesses to negotiate VPFs on their behalf, and that the activity was being undertaken in an arrangement between ICAA and Smith. Finally, it stated that upon presentation of a draft VPF agreement by Smith to ICAA, the Executive and Board of ICAA would consider the agreement and, subject to review and Board approval, the VPF agreement would be recommended to members for adoption. In other words, ICAA held the right of veto.

74 Smith responded later that day, stating: “[t]he letter is great, but we probably need to note DCN, suggest you refer to “... Smith of MGS Group and Digital Cinema Network ...”. That would then cover both bases”. Five days later (12 January 2010) Sarfaty forwarded that email to ICAA’s President. Sarfaty told the President that:

The reality is that MGS is mike’s (sic) company whilst DCN is a JV with the Gardner (sic) brothers and at no stage did we agree that the Gardners (sic) were involved in VPF’s on behalf of members. My feeling is that the letter is fine as it stands.

The President responded immediately – “Agree that it is not acceptable to mention DCN”.

75 Then there was a further twist. On 20 January 2010, Smith received an email from Goyal. The email was also sent to Fleming and a solicitor at Holding Redlich. Attached to the email was a first draft of a memorandum that could be presented to ICAA and the Studios outlining the role each would play. The attached document recorded Omnilab Media, not DCN, as a non-exclusive integrator. This confirmed what Smith had been told on 1 December 2009: see [65] above.

76 Later that afternoon, Smith received an email from Sarfaty. Sarfaty refused to alter the “generic letter” to include reference to DCN. The email stated:

I’ve been through our emails and discussion notes and the relationship on VPF’s has always been on you and MGS with a specific intention to keep the

role of DCN separate from VPF negotiations per your email to me of Nov 2008 (copied below) and the letter subsequently sent by me to ICAA members. I've discussed with ICAA board members and they are comfortable with the letter as it stands and feel it reasonably represents the position agreed upon.

The "Nov 2008" email and the letter to members is at [26] above.

77 Smith responded to Sarfaty on 22 January 2010 in the following terms:

A lot has happened since Nov 2008 so I feel I need to summarise much that has been discussed with you since we first started pursuing VPF's.

- When we first started chasing VPF's, we did so as MGS. But we were chasing a direct deal for cinemas.
- Many of the studios insisted that an integrator be involved. You have read all of the contracts, and many refer to responsibilities of an integrator – so an integrator needs to be involved.
- MGS is a partner in an Integration Company, DCN.
- *We trade as DCN, and the deals are being negotiated with DCN as the integrator.*

I appreciate the original discussion ... referenced MGS specifically, but since soon after starting DCN has been the party negotiating with the studios.

I don't believe there is any issue at all for DCN to be represented on the letter from ICAA. The wording "Michael Smith of MGS Group and Digital Cinema Network" doesn't place any duress on any members, but is going to save explaining with the studios, as all of their communications relate to DCN.

...

If ICAA board members have an issue I can discuss with each of them directly ...

(Emphasis added.)

In cross examination, Smith sought to distance himself from the contents of the email and said he disagreed with the statement that he was actually conducting the negotiations on behalf of DCN. His explanation was that at that time the Fox agreement was a direct exhibitor agreement and did not involve a digital integrator. I reject Smith's evidence. He "had continued to represent [himself] as being from DCN and asked Sarfaty to acknowledge that by mentioning DCN on the letter".

78 Sarfaty's unchallenged evidence was that he met Smith on 2 February 2010 in Sydney, and they had a heated exchange about the content of the letter sought by Smith.

79 On 31 January 2010, the Omnilab Board considered a proposal drafted by Fleming. The proposal was for Omnilab Media to become an integrator, to negotiate a VPF with the Studios and to undertake sales installation and support of digital cinema systems for ICAA members. The business structure was a “NewCo” called “Omnilab Media Cinema Services or Digital Cinema Network (DCN)”, 100% owned and operated by Omnilab Media. Its advisory board included one current DCN director (Smith) and one ICAA director (Sarfaty). Entwistle was identified as the independent chair. Under the heading “What do ICAA want from Omnilab”, the list included “a VPF” and “a company of substance to manage the VPF and provide ongoing systems support”. The summary recommended that given the time limitations and the need to establish credibility within the exhibition community, Omnilab Media should partner with an established player – DCN. The draft SWOT (strengths, weaknesses, opportunities and threats) analysis recorded that Smith provided Omnilab Media with the best opportunity for a VPF and equipment deals. What had been foreshadowed by Fleming in December (see [65] and [66] above), and started to become reality (see [65], [69], [70] and [75] above), was now a formal proposal to Omnilab’s Board.

80 Given the proposed name and the appointment of Smith to the Board, how was Omnilab Media going to deal with DCN? That was addressed in the summary as follows:

THE ACQUISITION OF DCN

- DCN is a joint venture between MGS and Digitall with paid up capital of \$2
- We propose the acquisition of the business and assets rather than the corporate entity

...

- ... Smith has been the main negotiator with the Studios on a VPF deal for ICAA members. Given the negotiation is 80% complete (marked up contracts), it would be difficult to restart this process given we are so close DCIPA signing their contracts

...

- *DCN does not have the credibility to be seen as capable of providing long term support of installed technology and VPF.*

DRAFT “HEADS” WITH DCN

The value of DCN will be determined by:

- VPF being delivered for ICAA members (Michael Smith) - \$125,000

- Conversion of support network - \$25,000
- ...
- Goodwill Fee – Market contacts, exhibitors, distributors – Michael Smith needs to be the Champion - \$25,000
- ...
- **Total - \$400K**

DCN CONTRACT CONSIDERATIONS

- Avoid getting screwed by Digitall on development costs
- Restraint to prevent MGS and Digitall establishing a competitive business in ANZ Cinema Market for 5 years – they will want to remain active internationally
- We take the name *Digital Cinema Network*

MARK SARFATY

- There is an expectation that Mark Sarfaty will be rewarded for his role in bringing together this deal and selling it to ICAA members
- Possible method of dealing with this is to provide a success fee ...
- [Holding Redlich] to confirm requirements to avoid any issues of secret commissions given Mark's position on ICAA board

...

IMMEDIATE ACTIONS

- Gain Board Approval to proceed with Business Unit establishment
 - ...
 - Support acquisition of DCN – 5.2.10

...

KEY STRATEGIC STEPS

- Negotiate and Contract VPF
- Establish *Cinema Services*
 - Take Over DCN order book - Estimated \$4m at \$10% margin
 - ...

(Emphasis added.)

(10) February 2010

81

The ICAA Board also considered the new proposed structure on 3 February. Sarfaty's CEO's report stated ICAA was pursuing an affiliation with a new entrant to the digital cinema services arena and that the proposal – which allowed for ICAA's participation in the business activities of this entity – had been discussed before Christmas 2009. In cross examination, Sarfaty accepted that the “new entrant” was Omnilab Media. The elements of the proposal were listed as follows:

- *[Omnilab Media] buys out the operations of Mike Smith joint venture, Digital Cinema Network (DCN) and forms new company*

[Omnilab Media] cinema services

- [Omnilab Media] appoints board which will include 1 independent director, 1 ICAA appointed director, 1 DCN appointed director and 2 [Omnilab Media] directors
- [Omnilab Media] takes over VPF negotiations and finalises VPF contracts for approval by ICAA board

...

(Emphasis added.)

82 In the same CEO's report, Sarfaty addressed the issue of the letter that Smith had requested from ICAA. Sarfaty told the Board that Smith had requested and received the letter of authorisation from ICAA in the form set out at [73] above. Sarfaty went on to tell the Board that Smith had requested DCN be added to the letter as an authorised party and that the addition of DCN could be seen as adding a new business to the authority and one which was not fully approved by the members.

83 After the Board meeting, Sarfaty called Smith and told him that the Board had instructed him not to alter the letter. Smith continued to press Sarfaty for the inclusion of DCN, saying that it would have a negative impact on the VPF negotiations if DCN was not included in the letter. Ultimately, there was a three-way discussion between Sarfaty, Smith and the President of ICAA. Smith insisted that DCN be included and said that the inclusion would in no way compromise ICAA. Without it, Smith told them, the negotiations might slow down. ICAA's president then suggested that the letter could acknowledge that as well as working for MGS, Smith also worked for DCN. By 10 February 2010, the letter was changed. It now read:

This letter is to advise that ... *[ICAA] has an arrangement with Michael Smith of MGS Group (**and DCN**) to undertake Virtual Print Fee (VPF) negotiations on behalf of ICAA members. ICAA is the largest business association for independent cinema in Australia and represents 400 screens nationally comprised of 63 businesses and 103 locations. The independent cinemas represented by ICAA account for 83% of annual independent box office revenue.*

The current arrangement between ICAA members and the [ICAA] is by way of Letter Of Agreement between ICAA and member businesses to negotiate VPF's on their behalf and this activity is being undertaken in an arrangement between ICAA and Michael Smith. Upon presentation of a draft agreement for a Virtual Print Fee from Michael Smith to ICAA, the Executive and the Board of ICAA of (sic) will consider the agreement and, subject to review and board approval, the Virtual Print Fee agreement will be recommended to members for adoption.

(Emphasis added.)

84 On 12 February 2010, Smith contacted Blinderman, a lawyer in the United States. Smith told Blinderman that DCN was “an integrator in Australia ... [which had] been negotiating the VPF on behalf of [its] clients over the last 18 months [and were] seeking local counsel in LA to assist with finalising the deals”. Blinderman responded on 13 February setting out his fee structure and providing some additional information. You would expect Smith to forward the email to DCN. He did not. Instead, he sent it to Fleming and Goyal. Smith asked them: “[d]o you want to engage in any way initially, or shall we wait until I’ve met him and seen how flash his offices are?” Three days earlier, Smith had sent the Fox draft deployment agreements to Goyal.

85 Sarfaty’s unchallenged evidence was that Smith contacted him whilst he was in Los Angeles and discussed the desirability of appointing a Los Angeles based attorney with experience in finalising VPFs, and it was Smith who suggested Blinderman. Sarfaty’s unchallenged evidence was that because an Omnilab controlled entity would be providing digital integration services to ICAA members and signing the VPF agreements, he put to Fleming that the principles of an ICAA / Omni / DCN deal were sufficiently advanced that Omnilab Media should engage Blinderman itself.

86 Four days later, on 16 February 2010, Fleming prepared a “Digital Cinema Update”. The update explained that Omnilab Media was working on three fronts – the VPF negotiation, the purchase of DCN and the ICAA commitment. Under the heading “VPF negotiation”, it recorded (contrary to Sarfaty’s evidence) that the appointment of Blinderman was at the suggestion of Omnilab Media’s lawyers in Australia, that Smith was travelling to the US on 19 February 2010 to undertake further discussions with the Studios, and that it was Smith’s intention “*to alert the studios to Omnilab Media’s **intention** to invest in DCN and present the revised commercial terms developed by [Goyal] and reviewed by [external solicitors]*” (emphasis added).

87 Fleming also sought Board approval for expenditure of \$9,000 on Blinderman and for Smith to represent Omnilab Media’s interests in Studio meetings the following week. The update also recorded that Smith had rejected Omnilab Media’s initial offer of \$400,000 for the purchase of DCN, and set out a revised deal of \$650,000 over three years. \$250,000

was attributable to the VPF, the DCN Order Book (currently at \$4 million), the DCN Name (but not the company) and commitment from ICAA members to buy from Omnilab Media. Under the heading "ICAA Commitment", the report stated that the current assumptions surrounding the business modelling had been sent to Sarfaty, Entwistle *and Smith* to confirm that Omnilab Media had not missed anything, and "that they [were] fully aware of the basis on which the business has been modelled". In the paper, consideration was still being given to a success fee for Sarfaty comprised of an upfront payment of \$50,000 along with an annual fee of \$20,000 for his proposed role on the advisory board for three years. On 16 February Omnilab Media offered to purchase the assets of DCN for \$650,000. The offer was rejected by Smith.

88 Soon after, Fleming met Sarfaty in South Melbourne. Sarfaty told Fleming that "ICAA was really the one driving the process and the one who had the power to determine who was going to be providing integration services to [ICAA] members". Sarfaty told Fleming that he did not think Omnilab Media needed DCN.

89 Despite that advice from Sarfaty, from this point, Smith's involvement with (and, in particular, the frequency with which he acted at the direction of) Omnilab Media intensified. Between 16 and 18 February, Smith settled a cover note to be sent out by Omnilab Media, sought advice from Goyal about how to deal with Blinderman and then, finally, sought confirmation from Fleming and Goyal that Fleming wanted Smith to take Blinderman with him to the negotiations with the Studios. The cover note recorded, as was the fact, that Omnilab Media had conducted a preliminary review of the VPF agreements *provided by DCN*. Omnilab Media was referred to as the integrator throughout the emails. On 18 February 2010, Fleming sent another email to Smith about engaging Blinderman on behalf of Omnilab. Fleming told Smith that the Omnilab Board supported the initial costs for Blinderman to attend with Smith at the meetings with the Studios and that once Smith was happy that he could work with Blinderman and had an estimate of the cost involved, Omnilab Media would release a purchase order for that amount.

90 In preparation for Smith meeting with Blinderman in Los Angeles, on 19 February 2010 Smith sent a summary to Fleming in the following terms:

This is what I believe I need to proceed with. Comments please ...

Omnilab Media Melbourne has agreed to provide legal assistance to DCN towards finalising VPF agreements, while negotiations towards a purchase of DCN continue. Omnilab have conducted a preliminary review of Digital Deployment Agreements provided by DCN.

...

Fleming's response was that he felt the summary was exactly where they needed to be. On 19 February 2010, Smith emailed the summary to Blinderman stating that he was a partner in an integration company, DCN. The substance of the summary was then incorporated into a document sent by Smith to Universal on 23 February 2010. That document, on DCN letterhead dated 22 February 2010, stated that DCN now "[had] VPF agreements at various stages between "completed" and "in progress"" with the Studios, and that Omnilab Media had agreed to provide legal assistance to DCN for the purpose of finalising these agreements.

91 Smith was cross examined about this document. His evidence was far from satisfactory and, at times, implausible. When it was put to him that the document accurately reflected the position as at 22 February 2010, his response was that it did not and that he "continued using the name of DCN long beyond [he] was supposed to (sic)". When and why he was supposed to stop using DCN was never explained. Moreover, Fleming had assisted Smith to draft the following section of the document:

...

Omnilab Media Melbourne has agreed to provide legal assistance to DCN towards finalising VPF agreements, while negotiations towards a purchase of DCN continue. Omnilab have conducted a preliminary review of Digital Deployment Agreements provided by DCN.

The agreements issued by the studios to date assume that the integrator is responsible for financing the costs of the roll-out of digital cinema. The integrators collect VPF's directly from the studios, to recoup *their own* costs of the roll-out.

In Australia the individual exhibitors will be financing their own costs of roll-out so the role of the Integrator will be slightly modified. The Integrator will collect VPF's which it will disburse to the individual exhibitors. Effectively the Integrator will act as a collecting agent to administer these payments between the studios and the exhibitors.

The integrator will still hold the responsibility for installing the Digital Cinema System and meeting minimum deployment targets. They will facilitate maintenance, compliance, quality and security of the systems along with providing reports to track cost recoupment.

The contracts will need to relate to three parties, the relationship in the contracts will be between the Studio and the Exhibitor, with the Integrator providing services to both parties, however, the Integrator cannot be held liable for the financial relationship between the two key parties.

That document was sent to at least two Studios.

92 By this time, Smith had made significant disclosures to Omnilab Media. He had provided the draft VPF agreements to Omnilab Media as early as December 2009: see [67] above. He had assisted Omnilab Media with its assessment of the commercial risks and financial modelling: see [66] – [69], [75], [86] – [87], [89] – [91] above. Moreover, he had failed to take any steps, or at least sufficient steps, to protect DCN's position: cf see [61] above.

93 On 22 February 2010, DCN and Blinderman's firm executed a retainer agreement. The retainer fee was \$10,000. Blinderman wanted the retainer to be paid. On 23 February, Smith sent the "wiring instructions" to Fleming. Omnilab Media refused to pay against an invoice / contract not in its own name. Fleming asked Smith to prepare a document which named Omnilab Media with Fleming as the contact, telling Smith that Omnilab Media would then transfer the funds. Fleming then added, "I won't be offended if you want to pay this yourself if it suits your strategy better". On 25 February 2010, a new retainer in the name of Omnilab Media Melbourne Pty Ltd, a wholly owned subsidiary of Omnilab Media, was provided by Blinderman. It was signed by Fleming on 2 March 2010. Omnilab Media paid the retainer fee.

94 Smith's "strategy" was never disclosed. Not only that, the conduct of Smith, Sarfaty and Fleming was far from open. On 21 February 2010, Fleming had emailed Sarfaty telling him that Fleming was now "considering advising [his] board to abort discussions with DCN, that Omnilab Media take on the responsibility of managing the VPF only and build on the delivery aspect of the opportunity" and noting "the challenges created by acquiring DCN including the fact that DCN does not have an agreement in place with ICAA to negotiate the VPN – this resides with MGS".

(11) March 2010

95 On 1 March 2010, Fleming emailed Sarfaty, Smith and others proposing a meeting to “[c]larify ICAA’s arrangement with MGS or DCN or Michael Smith – Omnilab needs clarity on this before we move ahead”. Sarfaty responded by email on 4 March 2010 and attached a “briefing note”, which stated that:

ICAA consequently entered a working relationship with Mike Smith of MGS whereby MGS acts as ICAA’s agent to negotiate VPF’s on behalf of ICAA members on the basis of the commercial understanding outlined in the draft email of 1 Oct. 2008 (attached). This understanding was further articulated by MGS in an email dated 29 June 2009 (attached).

The 1 October 2008 email is at [19] above. The 29 June 2009 email is at [47] above. Smith responded by emailing a copy of the 10 February 2010 ICAA generic letter (see [83]) to Sarfaty, Fleming, Entwistle, Goyal and Cartledge. The 10 February 2010 ICAA generic letter was read by Fleming. It referred to the arrangement between ICAA and Smith of MGS and DCN.

96 Smith, Sarfaty, Fleming, Entwistle met in Sydney on 4 March 2010. Fleming emailed notes of the meeting to Smith, Sarfaty and others on 9 March 2010. The notes had been prepared in the form of a “Presentation to ICAA Board”. The notes recorded a tripartite agreement between Omnilab Media, DCN and ICAA, with payments to cover MGS’s costs of between \$1,000 and \$1,300 per screen. Under the heading “Process”, the document recorded that there were to be two agreements. First, an agreement between Omnilab Media and MGS, and secondly, an agreement between ICAA and Omnilab Media with Omnilab Media “being the integrator with MGS”.

97 Smith emailed Fleming on 9 March 2010. He asked for a copy of the document Fleming had handed him on 4 March. Fleming sent it. The document set out a “DCN Omni Deal” which included the following statements:

1. “[Omnilab Media] [would] become the integrator”;
2. “[Omnilab Media] [would] acknowledge that Michael Smith of MGS has an agreement with ICAA to negotiate a VFP (sic). The proposed fee is valued at \$500 per screen plus legals”;

3. “[Omnilab Media] [would] enter into a contract with MGS to complete the VPF negotiations and contracting with the studios in a manner that ensures acceptance by ICAA members”;
4. “At this point Omnilab [Media] is an Integrator with a VPF and aspiration to establish a digital distribution service”;
5. “Omnilab [Media] is considering the benefits of also owning a transition service business. It believes there is value in the acquisition of DCN”;
6. “Omnilab [Media] will also consider purchasing DCN primarily for its order book but also its network of support staff and ongoing client relationships in the provision of cinema support services”.

98 The Gardiners were aware the negotiations were on foot. On the same day, 9 March, Smith emailed Gardiner requesting a meeting as “this Omni thing has taken another step and we really need to talk”. On 10 March 2010, Gardiner emailed Smith requesting a meeting and later that day, emailed Smith again asking him if Omnilab Media had a number in relation to the service fee to the cinema.

99 Also on 11 March, a further draft of the “DCN Omni deal” was sent by Smith to Fleming. With Smith’s amendments, Omnilab Media remained the integrator but MGS was to receive somewhere between \$150,000 and \$300,000. At the end of the document, Smith added that consideration would be given to a 12 month contract of \$50,000 to James Gardiner for 2 days per week for specified work. On 11 March, Fleming forwarded the email to Goyal with the comment that Cartledge would call her shortly to discuss the document.

100 On 11 March 2010, Cartledge emailed Goyal and Fleming. Cartledge’s advice was that Omnilab Media needed two agreements. First, an agreement with Smith and the Gardiner brothers of DCN “as per the draft sent by [Fleming]”. Cartledge recorded that the draft had been discussed numerous times and that they were very close to agreement. Cartledge went on to say that “*we need to get an agreement to [Smith] (accepted by him) for him to negotiate with his partners before anyone announces we (Omnilab having acquired DCN) are to be the integrator to an ICAA conference*”. Secondly, what was also required was a draft of the understanding of the relationship between Omnilab Media as Integrator and ICAA members. Cartledge asked Fleming whether he agreed. Fleming responded on

11 March saying that Cartledge's draft was good and reiterated his understanding of the terms of the two agreements. Fleming however suggested eight documents were required, including: (1) the agreement between Omnilab Media and MGS about the VPF; (2) the letter from ICAA accepting that Omnilab Media will become an integrator and take over the Smith / MGS agreement to negotiate the VPF with the Studios; (3) commercial terms with ICAA that recommended Omnilab Media as its integrator; and (4) a Heads of Agreement with DCN. Fleming attached his notes from the meeting on 4 March: see [96] above. Goyal responded on 12 March 2010, saying that in her opinion the three most important agreements were the sale of assets agreement between Omnilab Media and DCN, and the two executive services agreements concerning Gardiner and Smith. Fleming agreed and told her to add them to the list.

101 On 13 March, Smith received an initial draft of Blinderman's mark up of the Deployment Agreement. Smith sent the draft to Fleming and Goyal. He asked Fleming if he wanted to be copied in on everything. Fleming responded "Yes ... I believe we also agreed to be transparent with [Sarfaty] at our last meeting. I would therefore suggest that he also be copied in ...".

102 On 15 March 2010, drafting of the agreements in relation to the Australian entities continued in earnest. Mid afternoon on 15 March, Goyal emailed Fleming and Cartledge about the sale of assets agreement. She raised a number of questions. Fleming responded to the questions. Fleming's answers are in bold:

In my head these agreements are:

- (a) Agreement with Smith for on-going consulting services to the Omnilab business **yes**
- (b) Agreement with Gardiner for the on-going consulting services to the Omnilab business **yes**
- (c) Assignment of software agreement **yes**
- (d) Sale of equipment from Spectre **no ... we are not going to buy the hardware**
- (e) A letter with ICAA stating that we are the exclusive (sic) VPF negotiators (sic) *(taking over MGS and DCN)*. **Possibly a commercial doc with ICAA yes**
- (f) Agreement with Smith for VPF negotiations; **yes**

There are many agreements that need to go into place once we are up and running. Do any of the below for any reason need to be finalised in order for the sale to go through:

- Six studio VPF agreements with Omnilab as the Integrator **4 or 6 the six studios must be signed up**
- A commercial terms document for Australian Independent Distributors a Pro Forma agreement – **yes**
- A commercial terms documents (sic) for contracting Exhibitors to the VPF **yes**
- Service Level Agreements between OM Cinema Services and Exhibitors **yes**

E.g do we want a minimum number of VPF agreements signed or negotiated in order for this sale to go through? **Above**

...

(Emphasis added.)

In addition to answering the questions, Fleming attached a copy of what he described as “essentially the final commercial terms with DCN”. It was a final copy of the document set out at [97] above. The document recorded the proposed payment to DCN of \$400,000 subject to due diligence which included a \$50,000 fee to be paid in 12 equal monthly instalments to each of James Gardiner and Smith.

103 Version “6” of the Omnilab Media / DCN deal was still being negotiated between Smith and Fleming on 14 and 15 March 2010. On 15 March 2010, Fleming emailed Smith three documents – Heads of Agreement contracting MGS to negotiate the VPF for ICAA members, Heads of Agreement for an Executive Agreement for Smith, and a Heads of Agreement for the purchase of DCN. Fleming told Smith that:

One anomaly I came across is that there [are] no hours specified in the purchase agreement for you. I have made this 15 hrs per week for the first year. I think that James [Gardiner] would have questioned this if not and we needed something in the sale agreement.

This means that when you combine the agreements we see you with 30 hours per week in the first year. This is probably consistent with the idea that you would be working almost full time on this for the first 6 months ...

104 The Heads of Agreement for the engagement of MGS to negotiate a VPF for ICAA members was conditional as follows:

The purchase of DCN remains subject to:

- Contracting the VPF for 4 out of 6 studios
- Approval by the Omnilab Media Board
- Due diligence of DCN
- ICAA accepting operational strategy
- Establishing the viability of the content distribution service to

cinemas Australia wide

- 1 OM will become the Integrator
- 2 OM will fund the legal process to complete contracting of the VPF
- 3 OM will acknowledge that Michael Smith of MGS has an agreement with ICAA to negotiate a VPF (sic). The proposed fee is valued at \$500 per screen plus legals
4. OM will enter into a contract with MGS to complete the VPF negotiations and contracting with the studios in a manner that ensures acceptance by ICAA members ...

105 By 19 March 2010, it appeared to be all over. An ICAA confidential briefing note dated 19 March stated that:

ICAA ha[d] successfully engaged, Omni Group Media, a large and well resourced media company in the prospect of entering the field of digital cinema transition services for independent cinemas in Australia. ICAA introduced Omni Group to Mike Smith of DCN with a view to the purchase of DCN being the vehicle for Omni's entry into the market. *Omni has reached a Heads of Agreement with DCN for purchase of the DCN business.* Given ICAA's position as an aggregator of screens for the purpose of acquiring VPF's for independent screens and representative of the group buying power of ICAA members Omni and ICAA wish to reach Heads of Agreement with regards to the novation of the ICAA arrangement with Mike Smith (MGS) for negotiation of VPF's and a position of collective support from ICAA members for the use of installation services.

(Emphasis added.)

The difficulty was that Omnilab Media had not reached a Heads of Agreement with DCN for purchase of the DCN business.

106 On 24 March 2010, a Non Disclosure Agreement (**NDA**) between the 'Omnilab Parties' (defined as being Omnilab Media and related corporations), the DCN Parties (defined as being Michael Smith and related corporations) and the ICAA and its members was executed by the Omnilab Parties for the defined purpose of "*the involvement of the Omnilab Parties and the [DCN] Parties to provide a [VPF] and digital cinema equipment and services to ICAA Member[s]*". The confidential information was described as "all information provided ... by any Disclosing Party about its business, including trade and business secrets, documents, reports, notes, accounts, business and marketing plans, proposals and analyses, customer and market research information, technology and other materials". DCN referred to this as the "Non Disclosure Agreement". During closing submissions, DCN abandoned any claim for misuse of information provided to the Omnilab Parties under this agreement. The evidence did not identify what information in fact was

disclosed by Smith. DCN does not now assert that the Omnilab Parties misused any confidential information in relation to information subject of the NDA or any information subsequently obtained in the course of their due diligence examinations in early to mid 2010.

107 On 25 March 2010, Fleming and Sarfaty made a presentation to the ICAA members. Fleming told the members that Omnilab Media was currently in discussions to acquire DCN. Each of the ICAA members who attended the presentation signed the NDA. The next day, Fleming emailed Sarfaty and Smith confirming the key steps remaining were continuing to contract the VPF, to finalise the details of the DCN Heads of Agreement, consolidate feedback from ICAA members and to continue to work on viability of a digital delivery network .

(12) April and May 2010

108 In early April, Smith continued to negotiate with the Studios. When dealing with Universal, he copied in Blinderman. DCN was described in the Universal documentation as the “Deployment Entity” that would sign the finalised deal. On 8 April, Smith provided an update to Fleming, Goyal, Sarfaty and Entwistle regarding his negotiations with Sony, Fox, Universal and Warners. Attached to the email was a copy of the draft Disney Deployment Agreement. Again, DCN was named as the Deployment Entity. This occurred again on:

1. 20 April 2010, when Smith emailed the Disney VPF Agreement to Blinderman, Goyal and Fleming;
2. 22 April 2010, when Smith emailed the Fox VPF Agreement to Blinderman, Goyal and Fleming;
3. 27 April 2010, when Blinderman emailed the Fox VPF Agreement to Smith, Fleming and Goyal; and
4. 27 April 2010, when Blinderman emailed the Disney VPF Agreement to Smith, Fleming and Goyal.

On each occasion, DCN was named as the Deployment Entity.

109 In May 2010, Gardiner received from Smith the Heads of Agreement for Omnilab Media’s purchase of DCN. The purchase of DCN (\$400,000) remained subject to the conditions set out in [104] above. The Heads of Agreement went on to provide that:

Omnilab will consider purchasing DCN primarily for its order book but also its network of support staff and ongoing client relationships in the provision of cinema support services. ... The sale price includes the equivalent of a \$50,000 fee to be paid in 12 equal monthly installments to Michael Smith in consideration of him working on average 15 hours per week, providing ready access to deal with business development and strategic issues, being flexible in attending meetings and events as required, and developing new business (sales) based on agreed performance indicators, the primary ones being equipment sales, industry profiling and strategic guidance.

110 At the same time as seeking to negotiate a sale of DCN, Smith and Blinderman were engaged with Fox and Disney seeking to settle the terms of the Deployment Agreements. In each case, the Deployment Agreement named DCN as the Deploying Entity. On 4 May 2010, when writing to Disney, Smith stated that “[p]lease note that in as much as certain *DCN executives* have not had an opportunity to read this draft, I must reserve their right to comment”. On 13 May 2010, Smith forwarded the email to Goyal with the statement that “in my email below you will see I have reserved *your* right to further comment when you have time to review thoroughly” (emphasis added). On any view, Omnilab’s in-house counsel was not a DCN executive. The fact that Omnilab Media was being treated as synonymous with DCN is further evidenced by an email Blinderman sent to Goyal and Smith in which he thanked Goyal for her comments on the draft Disney VPF, provided answers to her comments and stated, “we do need to ensure that the deal is one that best protects DCN, and we should not be shy to ask” the Studios.

111 On 17 May 2010, Goyal emailed Fleming and Cartledge and asked whether Blinderman was aware that Omnilab Media was to be both the integrator and signing the document. Fleming responded:

I believe so however he is currently contracting for DCN such that we will acquire DCN ... Ross I think it would be a challenge to get [Smith’s] agreement for contacting to change now to Omnilab before the acquisition?

112 Two hours later, Goyal emailed Blinderman. A copy of the email was sent to Fleming, Cartledge and Smith. Goyal analysed the draft Disney Agreement and in relation to cl 3(a) stated:

I am comfortable inserting Omnilab as an approved contractor. Can you please explain how Omnilab will “take over” these agreements from DCN? Ie what would be the process?

...

(Emphasis added.)

113 On 25 May 2010, Blinderman responded saying:

This can take any form that Omnilab prefers. I've been assuming a stock purchase, but we can do an asset deal. You guys should structure Omnilab's deal with DCN first and then we'll make sure it is approved. ...

(13) June 2010

114 By 4 June 2010, Blinderman had disclosed the possibility of a change in ownership of DCN to Disney who requested a summary document highlighting the structure of the relationships between DCN and the exhibitors and a detailed update on the ownership of DCN. Blinderman drafted a response for Smith. Smith used the draft and responded to Disney as follows:

Please understand that DCN's role is not that of a traditional aggregator, but is instead serving as a facilitator to ensure that the independent theatre owners in Australia and New Zealand have access to the VPF financing mechanism. DCN will be taking on the responsibility to interact with the Exhibitors and to ensure that all centralized duties are fulfilled but will not be taking on the liability of an Exhibitor failing to comply with the terms of Deployment Agreement. In that instance, the remedy will be to terminate the Deployment Agreement with respect to the individual Exhibitor. This mechanism is crucial, as Exhibitors will be unwilling to have their VPFs put at risk by the actions of another Exhibitor. Furthermore, DCN is not receiving sufficient financial benefits from this deal to justify placing itself as a financial guarantor of the Exhibitors. DCN is willing to take on the responsibility of enforcing the Deployment Agreement against Disney on behalf of the Exhibitors so that Disney will only need to deal with a single entity.

This arrangement is beneficial to all of the parties involved. First, Disney is saving money over traditional aggregator arrangements, since there is no equity component with the built in return on investment. Second, it benefits everyone to have a mechanism that permits the independent Exhibitors to participate in the VPF program. Finally, Disney is protected from problem Exhibitors by DCN being able to exclude them from the deal after an appropriate cure period.

Please let me know if you have any further questions with respect to the relationship between DCN, Exhibitors and Disney.

...

3 – Also, any update on the ownership of DCN? Jonathon mentioned a possible M&A transaction? Here, again, a detailed update would be critical in our appreciation of the situation. THIS IS STILL A WORK IN PROGRESS, SO WE NEED TO CONTINUE AS IS FOR NOW. SHOULD IT PROCEED, THE STRUCTURE OF THE DEAL WON'T CHANGE,

WE WOULD JUST BE OWNED BY A LARGER COMPANY.

None of this was disclosed to anyone in Australia. The ownership of DCN did not change.

115 In the first week of June, Smith was in Los Angeles. On 7 June, whilst still in Los Angeles, he emailed the Gardiners about Omnilab Media. Smith said that he “had some thoughts on how to deal with the whole Omni thing” and proposed that they set aside a few hours to discuss these issues when he returned to Australia on about 15 June. Gardiner’s evidence about when he learned about the prospect of an Omnilab deployment entity was inconsistent. On any view, Gardiner knew no later than August 2010 and most probably as early as May 2010.

116 Negotiations with the Studios were still ongoing. By 10 June, Disney had forwarded a revised draft agreement to Smith and Blinderman. DCN was still the named party. On 14 June, Smith emailed Sarfaty, Fleming, Cartledge and Entwistle a summary of what had been achieved in Los Angeles. Smith suggested that there would be finalised contracts with three or four studios by mid July 2010. Smith returned to Australia. On 17 June 2010, a teleconference was attended by Smith, Fleming, Sarfaty, Entwistle and Goyal. There was friction between them. The next day, Smith emailed the attendees and recorded, as was the fact, that he had provided Fleming and Goyal with a copy of the Paramount Agreement in January, the Fox Agreement in February, the Sony Agreement in March and the Disney Agreement in April. Smith then attached the latest Fox Agreement. Fleming then emailed Cartledge and Goyal asking the following question:

Just covering off on our concerns re the confidentiality responsibility that Omnilab will assume when it takes over the role of integrator ... should we prepare a confidentiality agreement (the same one we have already prepared in Omnilab’s name) for DCN to issue (given DCN is written into the VPF agreements) to those who have received a copy of the VPF contract which Omnilab then assumes on acquisition? Michael will then not have to sign.

117 By 23 June 2010, relations between Gardiner and Smith were strained. Gardiner emailed Smith stating that commercially DCN started with a joint venture on the basis that digit4// provided the technical depth and MGS negotiated the VPFs. Gardiner stated that the DCN Board members had liability attached to the contracts currently under negotiation by Smith and that the Board needed to be aware of what was negotiated and in agreement. Smith responded on 23 June 2010 at 4:43pm stating that:

MGS's role in the JV was to use it's (sic) contacts to generate sale and bring work into the business. We've ended up running the business as well, so that you guys can concentrate on development, which was cool. I was separately negotiating the VPF contracts, and if successful, would aim to have our company DCN manage the VPF's. The original aim was I was trying to negotiate a deal directly between cinemas and distributors. It is only since Xmas I have returned to an Integrator type deal. I discussed with you many times over the last several months about my concerns about the VPF negotiations, ICAA's influence over this, and I really really want to spend some time with the three of us discussing this.

118 Gardiner responded at 5:10pm, stating:

[Andrew Taylor] and I have made plans to do [Service Level Agreement] development Thursday afternoon, here in the boards (sic) room. I would welcome [Taylor's] input on the VPF too.

So if you can let [Taylor] know that agenda for the meeting has slightly changed, but in all honesty, I believe much of the direction of the [Service Level Agreement] will be driven by the VPF. So it is the same meeting.

Andrew Taylor was called to give evidence by the Omnilab Parties. On 11 October 2010 he commenced working as the Operation and Client Services Manager of Omnilab MCS. For the six months prior to October 2010, he worked for DCN as its General Manager.

119 Towards the end of June 2010, Goyal was busy. She sought written advice from Blinderman on the draft Fox Agreement which named DCN as the contracting party and revised the Sale of Assets Agreement for the sale of DCN to Omnilab. Under the Sale of Assets Agreement, DCN was to sell and Omnilab Media was to purchase "the business and its associated assets". "Business" was defined to mean "the business carried on by the Seller [meaning DCN] or its related body corporates being using the Assets, of providing certain equipment and services to enable individual Exhibitors in the Territory to deploy and operate digital technology to enable Exhibitors to use digital technology for the theatrical presentations of audio-visual content (including without limitation films and advertisements)". "Assets" was defined to mean "the Goodwill, the Client List, the Equipment, the Phone Numbers, the Domain Names, and all of the Seller's right, title and interest in and to the Contracts, the Intellectual Property, the Equipment Leases and all other assets, current and non current, tangible and intangible of the Seller which form part of or are used in connection with the Business". The purchase price was now \$300,000. The arrangement between ICAA and MGS was referred to but did not form part of DCN's assets.

(14) July 2010

120 On 6 July, a revised Sale of Assets Agreement was circulated by Goyal to Smith and Cartledge. The definition of “business” had been amended to include “to negotiate a VPF’s”. Smith sent Goyal a marked up copy of the agreement. Smith stated that “[as] a position ha[d] been taken by ICAA and [Omnilab] that VPF negotiations were between MGS and ICAA, and not DCN, mention of VPF arrangements did not belong in this agreement”. Smith went on to suggest that the ICAA / MGS / Omnilab Media VPF agreement be put in place before the Sale of Assets Agreement was signed.

121 Later on the same day, 6 July, Fleming emailed Sarfaty, Goyal and others in relation to the deal between ICAA and Omnilab Media, seeking confirmation from Sarfaty that he would discuss apportionment with Smith given that this had previously been the subject of an agreement between ICAA and MGS that Omnilab Media would inherit. The email also sought confirmation from Goyal that the proposed deal involved “ICAA and MGS agreeing to assign their current arrangement to be ICAA and Omnilab, however subject to ... Smith continuing until VPF negotiations are complete with ALL six studios (which I gather was the original agreement with ICAA)”. An hour later, Goyal emailed Sarfaty and asked him to deliver a letter to Omnilab Media signed by Smith and accepting “that the deal [ICAA had] with him / DCN / MGS [was] terminated”. There was no evidence of any letter being provided.

122 On 7 July 2010, Smith became concerned. Smith spoke by telephone with Goyal. It is unclear whether that conversation occurred before or after he emailed Blinderman saying that he was not comfortable with copying Goyal and Cartledge on all their correspondence with the Studios unless Omnilab Media “proceed [to take] all of this over”. That evening he emailed Goyal. The email referred to a discussion with her that seemed to satisfy him. He enclosed a marked up copy of the draft Assignment and Services Agreement between Omnilab Media and MGS whereby MGS assigned its arrangement with ICAA to Omnilab Media. Goyal was not called to give evidence.

123 8 July 2010 was a busy day. At 8:33am, Blinderman emailed Smith and asked him if Smith’s concern that he had expressed the previous day (see [122] above) was that the Studios would see names of the Omnilab Media people on the emails and focus on these people. At 9:05am, Smith emailed Blinderman, Goyal, Fleming and Cartledge. Smith raised

the possibility of an assignment of the VPF agreements from DCN to Omnilab Media. He had discussed the issue with Goyal. Twenty five minutes later Blinderman replied. He addressed the options. First, because there were no currently executed agreements with the Studios, he considered that Omnilab Media could simply sign the agreements. Blinderman mentioned that it was possible that the Studios may request some due diligence on Omnilab Media. However, if a contract was entered into between DCN and a Studio, Blinderman said that they would need Studio approval for Omnilab Media to either purchase DCN or take over the contract. Blinderman referred to the fact that they had already discussed Omnilab Media's acquisition of DCN with Disney and Fox.

124 As a result of Smith's email of 6 July (see [120] above), the definition of "Business" in the Sale of Assets Agreement was amended by Goyal on 8 July at 5:37pm. Fleming talked to Smith that evening. At 10:32pm on 8 July 2010, Fleming emailed Goyal and Cartledge. Fleming's email starts with the ominous words "This getting to be a challenge". The email concludes with the following paragraph:

I am still wondering how we restrain the Gardners (sic). I have also asked [Smith] to consider how we walks away from the partnership. I gather the Gardners (sic) have already threatened a 'conflict of interest' so I sense this is going to get messy ... in away (sic) not our problem but I believe we still need to do this deal but protect ourselves from being exploited by the Gardners (sic).

125 At 10.44 pm on 8 July 2010, Smith provided Blinderman and Goyal with the latest draft of the Universal Agreement. At 11:23pm, Fleming sought the incorporation of an entity to be named "Omnilab Media Digital Cinema Network Pty Ltd". Fleming asked that it be done "today so that we can write it into the drafts of the VPF agreements next week while [Smith] is in LA".

126 The next day, 9 July 2010, Gardiner emailed Smith expressing his concern about an announcement of the sale of DCN to Omnilab Media. He referred to conversations over the past few weeks about the proposed merger between DCN and Omnilab Media. He expressed anger that people had drawn the conclusion that DCN had approved a deal with Omnilab Media. He asked Smith whether he had seen an ICAA announcement before it went out. He concluded by asking Smith the following questions:

Are the studios very clear that it is DCN negotiating this VPF deal?

Given what's already happened with ICAA, I just want to make sure that we are protecting the interests of our business. ...

Also, what's been happening in the most recent conversations with Fleming?
Did Omnilab send any written proposal?

127 His concern had arisen because in the first week of July he had run into an industry colleague, Robert Ward, who had congratulated him on the sale of DCN to Omnilab Media. Gardiner told Ward that DCN had not been sold and DCN had not even seen a formal offer from Omnilab Media. Gardiner then contacted a number of other cinema owners. One cinema owner, Tim Schouten, told him that during the 2010 ICAA conference (attended by Smith and Sarfaty), a presenter announced that Omnilab Media was to purchase DCN. Schouten told Gardiner that he was of the view that the sale deal "had already been done". However, Schouten was unwilling to disclose any further details as he had signed an NDA. The NDA was dated 24 March 2010 (see [106] above). At a subsequent DCN Board meeting in July 2010, Gardiner asked to see the material presented to the ICAA conference. Smith told Gardiner that the information from the Omnilab presentation, including information about Omnilab Media's purchase of DCN, was subject to the NDA (see [106] above) and that he could not tell Gardiner its contents. Smith did not disclose that DCN was in fact a party to the NDA.

128 On 13 July, Blinderman emailed Cartledge, Smith and Fleming addressing issues relating to the agreements with the Studios. On the same day, Smith met with the Gardiners. Earlier Fleming had provided Smith with a draft of the Heads of Agreement for Omnilab Media to Purchase DCN by email. The purchase price was \$400,000. The draft provided that:

1. Omnilab Media would become the Integrator;
2. Omnilab Media would acknowledge that Smith of MGS has an agreement with ICAA to negotiate a VPF and that the proposed fee is valued at \$500 per screen plus legals;
3. Omnilab Media is an Integrator with a VPF and aspires to establish a digital distribution service;
4. While Omnilab Media is considering the benefits of also owning a transition service business, it believes there is value in the acquisition of DCN;

5. Omnilab Media will consider purchasing DCN primarily for its order book but also its network of support staff and ongoing client relationships in the provision of cinema support services;
6. The sale price included the equivalent of a \$50,000 fee to be paid in 12 equal monthly instalments to James Gardiner in consideration for working two days per week. It also provided for the equivalent of a \$50,000 fee to be paid in 12 equal monthly instalments to Smith in consideration for him providing ready access to deal with business development and strategic issues, being flexible in attending meetings and events as required, and developing new business (sales) based on agreed performance indicators (the primary ones being equipment sales, industry profile and strategic guidance).

129 On 16 July, Fleming emailed Christopher Mapp, the Managing Director of Omnilab Media. He told Mapp that they were finalising negotiations for the VPF and that the contracts needed to show “Omnilab Media as the integrator instead of DCN”. Fleming sought approval to incorporate Omnilab MCS. Smith knew this. The next day, 17 July, Smith emailed Fleming asking him if Omnilab MCS was incorporated in Victoria, asking for its ACN as soon as possible and finally, if he could refer to it in casual form as “Omni DCN”. Smith thought the name had “a nice ring”. Omnilab Media Digital Cinema Network Pty Ltd (the initial name of the Second Respondent) was incorporated on 22 July 2010.

130 At about the same time, Smith was directed by Omnilab Media to insert Omnilab MCS into the draft VPF agreements. As Fleming conceded in cross examination, that was Omnilab Media’s plan. Fleming’s refusal during cross examination to accept the proposition that the name change was done at Omnilab Media’s direction should be rejected. His evidence was inconsistent with his contemporaneous actions only a few days earlier – the establishment of a new entity with a similar name to meet his stated objective on 8 July of writing the new entity’s name “into the drafts of the VPF agreements next week while [Smith] is in LA”: see [125] above. The Omnilab Parties’ submission that the email exchanges between Smith and Fleming of 10 and 17 July 2010 support the conclusion that Smith sought information to enable him to replace the name is rejected. Those exchanges occurred after 8 July. Thereafter Omnilab MCS was inserted into all of the VPF agreements with the Studios.

131 On 26 July, Smith sought to clarify his various roles. At 8:25am on 26 July 2010, Smith emailed Sarfaty as follows:

The intention from my point of view was always accepting that you wanted the relationship to be between me personally (through MGS) on the negotiations, but that if an Integrator model was used, that DCN would be the Integrator. Our verbal discussions now suggest you want Omni to be the Integrator once these deals are ready to go. Can you please confirm which way I am heading on this?

132 Later that morning, at 11:45am, Smith emailed Gardiner setting out his understanding on whose behalf he was negotiating VPF agreements. He stated:

Some thoughts and comments in no particular order, dates are as I recall them.

Prior to that, a summary of the VPF negotiations, the aim has always been to get the best deal for exhibitors.

Early 2008 I started talking to local distributors and in turn studios regards a VPF for Indie cinemas paid direct to cinemas.

[In] Q3 2008 it became clear the Integrator model would need to be used, as studios didn't want local distributors to be paying directly to cinemas. At this stage I was working on DCN being the Integrator. I started contacting more cinemas to get over the minimum number required, which triggered these cinemas to contact ICAA and ask what was going on, as they thought Mark was going to do the VPF for the ICAA members. Mark then arranged for ALL ICAA members to assign their rights to ICAA for the negotiations, and in turn, they directed me, under MGS, to continue with these negotiations. At this point, it was my intention that DCN would be the Integrator.

In January of 2009 Paramount released their Direct to Cinema VPF deal, which changed everything. ICAA directed me to chase Direct deals with everyone, which I then did for the rest of the year.

In November/December I advised Mark that I did not believe we were getting anywhere with the direct approach, and that we may have to accept returning to the Integrator model.

Up until this I believe Mark had been talking to Omni regards satellite distribution, at or round this point, he asked them to also look to be the Integrator for the ICAA deal.

Around Jan/Feb 2010 Omni started discussing buying out DCN to bring technical skills and our order book.

It has been my intention all along to have DCN as the Integrator when an Integrator was required, until it was made clear to me that this was not acceptable to ICAA. At the ICAA meeting in March, Mark presented the proposal for the background for Omni to take over (which I was not in the

room for) and then a presentation regards the Omni proposal (which I was in the room for) and was left with the membership that there would be another meeting soon. There were then a series of meetings, telecon's (sic), etc (I think) in May, where the ICAA proposal was further discussed.

ICAA is signing a deal with Omni to provide Integration services with exclusivity of equipment supply as part of the deal. This was never offered to us, and in fact right from the start the two were not linked together.

All expenses related to the VPF negotiations have been paid from MGS. I consider these negotiations to be an MGS rather than a DCN negotiation, as it was carried on behalf of ICAA, it had been the plan that DCN would [be] the Integrator with ICAA actually carrying out the VPF processing, however it has not worked that way.

If we are all at fault on anything, it is probably not confirming enough of our discussions in writing. I think it is important at this point for me to summarise what I can recall of important points made verbally over the last 6 months.

I have said to you a number of times I was very concerned about the VPF contracts, and that I was unwilling to sign them and take on the responsibilities within them. ... I estimate we would need a cash injection of \$1.3 million to be able to do this.

...

133 At 10:16pm on 26 July 2010, Fleming emailed Cartledge. The email was entitled "Michael Smith". The email recorded, contemporaneously, Fleming's knowledge and understanding of what Smith had done:

One thing that we need to consider with [Smith], over the last 2 years he has openly and unreservedly (well for the most part ☺) provided considerable knowledge on digital cinema to Omnilab Media who entered this market from a standing start.

For all of his failings, we do need to recognise this, as under normal circumstances we would have gone to someone ... who is costing us US\$10K per month. Over 2 years it adds up.

We do have a problem with the Gardeners (sic) ... however [Smith] needs to be recognised by Omnilab outside the VPF payments – no matter how [Sarfaty] feels about him.

This email is important. As noted, it recognised, as was the fact, that Smith had provided significant assistance to the Omnilab Parties. The legal consequences of Smith doing so will be addressed later in these reasons for decision.

134 The next day, 27 July 2010, Fleming emailed Cartledge with a draft Board paper and other documents. None of these documents ultimately went to the Board. The documents included statements that the ICAA Board, as the representative body, “approached Omnilab to ensure that the relationship of its exhibitors with ... [the Studios] was via a reputable and solid multi media business and a business that could provide the service level to its members”. A section entitled “The Value of DCN” made no reference to the VPFs. One section was headed “Cinema Strategy without DCN”. The opening line read “ICAA will insist that the arrangement they have is with MGS and not DCN”.

135 At the end of July 2010, Omnilab Media commenced to undertake some due diligence on DCN “as part of its consideration of providing DCN with a better offer.” Smith told Gardiner about the due diligence and that it would be undertaken by Cartledge. Cartledge met Taylor (who at that time was employed by DCN). Cartledge told Taylor that Omnilab Media’s offer to purchase DCN was subject to conditions. One of the conditions was that the VPFs had to be signed – the VPF agreements then being only negotiated by Smith. No sale of DCN to Omnilab Media was ever concluded.

(15) August and September 2010

136 On 1 August 2010, the dispute became litigious. At 4:19pm, Fleming emailed Sarfaty, Cartledge and Mapp stating that he had been advised by Smith that his partner in DCN was “mounting a legal challenge”. Fleming recorded that Smith’s partner believed that DCN controlled the VPF negotiation and planned to continue finalising negotiations. Fleming requested ICAA urgently clarify who they had commissioned to negotiate the VPFs, and whether ICAA had control in choosing the entity that will complete the negotiations and become the integrator of ICAA and independent cinemas in Australia and New Zealand. Fleming ended the email by stating that the Omnilab Parties would seek legal advice on Monday morning, consider whether it should continue with the processes and take action to recover all costs associated with the negotiation.

137 On the same day and at the same time, Fleming emailed Cartledge and Mapp after becoming aware that DCN was threatening legal action. The email is instructive:

After the conversation with [Smith] re the legal action being taken by his partner and his partner’s assertion that DCN control the VPF not ICAA, I see [Smith’s] choices as

1. Stays with DCN and attempts to claim ownership of the VPF and builds on the current momentum with DCN for he and his partner. Omnilab would have to come up with a multi million offer to acquire or take legal action to recover costs (including management time)
2. [Smith] walks away from the partnership, attempts to avoid any legal action or restraints- sell his share for a dollar. He could then be available to continue to close the VPF on behalf of ICAA and ICAA's preferred Integrator
3. [Smith] is bought out of DCN by his partner based on the valuation from OM and is restrained by DCN, preventing him from being involved with OM ... still a question mark on if ICAA have control over the VPF negotiation.

In the brief conversation I had with [Smith] he seemed positive about Omnilab. However I guess he will make a choice that suits him and that decision will no doubt consider avoiding costly litigation.

In points 2 and 3 (above) there maybe a possible legal action against Omnilab by [Smith's] partner. I feel it would be prudent to make contact with Ian Robertson Monday morning to seek counsel on how we avoid being dragged into the dispute between [Smith] and his partner. This in particular relates [to] the Omnilab registered entity (of a similar name) and the entity now described on the VPF contracts.

We must assert that we always understood that ICAA commissioned the VPF negotiation and that it always had the right to appoint an integrator. I will send an email to ... Sarfaty requesting that ICAA confirm they are in control of the VPF negotiation and maintain the right to appoint an integrator. Until we get this I would say we have stalled. For OM to continue, ICAA will have to establish a position on 'ownership' of the VPF negotiations.

We should continue with the distribution modelling session tomorrow as I sense [Smith] was trying to confirm that we still definitely wanted to play (yesterday) so we need to take a clear position by Tuesday on if we are moving forward or not. I will seek to arrange a briefing session with Christopher late tomorrow afternoon.

(Emphasis added.)

138 At 6:36pm on 1 August 2010, Smith told Fleming that a better deal was needed "to get the DCN sale over the line". The price was increased to \$600,000. Fleming forwarded the email and the draft deal to Cartledge. At about the same time, Mapp emailed Fleming stating that it was not good news that the Gardiners were taking legal action. At 7:50pm, Fleming emailed Mapp stating that he had just spoken with Sarfaty and that Sarfaty was "fully confident" that DCN could not lay claim on the VPFs. Fleming attached Smith's revised offer. He described Smith as a man who, having found himself in a dark hole, was attempting to dig his way out. Fleming stated that Omnilab Media needed to determine if it wanted to commit, on what terms and how much they wanted to assist Smith with his predicament. On 2 August, Fleming emailed Sarfaty and confirmed

that Blinderman was engaged by Omnilab Media. As is apparent, that was not a complete description of what had transpired: see [84], [85], [87] and [93] above and [184] below.

139 On 9 August 2010, Smith provided copies of the new Paramount, Fox, Disney and Universal Agreements to the Omnilab Parties. For the first time, the name of the deployment entity had been changed to Omnilab Media Digital Cinema Network Pty Ltd.

140 The position ultimately reached its climax on 11 August 2010 when Sarfaty sent Fleming a copy of a letter from ICAA to Smith, MGS, the Gardiners and DCN. The letter stated:

At no time has ICAA authorised MGS or DCN to act as so-called ‘Digital Integrator’ on behalf of, or deployment entity to, ICAA members, or endorsed or represented that either MGS or DCN had any such authority. Indeed, with full knowledge of MGS (and the active participation of Michael Smith), ICAA has been in focused discussions with Omnilab Media since early 2009 with a view to it providing various services to ICAA members relating to digital conversion, including the services of Digital Integrator and/or deployment entity for participating ICAA members.

141 The same day, 11 August 2010, DCN’s solicitor sent a letter of demand to ICAA. The letter stated that ICAA purported to suggest it “own[ed] the negotiations”. The letter stated that assertion was false. The letter went on to state that no-one owned a right to negotiate unless there was a specific option arrangement, which there was not.

142 Later that afternoon, Smith sent an email to Aseme (copied to Blinderman) which included the following statement:

Omnilab are going to be the Integrator, and DCN will be a subcontractor to install the systems. I will be on the Omni advisory board to ensure continuity on VPF. I have attached the Omni Corporate Profile. They are a significant media company in Australia, who is well placed to take on the responsibilities of these agreements. This discussion has been going on for a few months but just being finalised now.

Smith’s email was required because the previous day, 10 August, Aseme had emailed Smith stating that it was the first time he had heard that the deal with Paramount was to be arranged with the Omnilab Parties. Aseme had asked for a “full explanation of why it is that DCN [was] not handling the integrator role” as had been discussed. Aseme wanted to know what Smith was proposing. What Smith was proposing was never explained. His statement that DCN was to be a subcontractor was false.

143 On 13 August 2010, Omnilab Media's solicitors sent two letters. The first responded to the letter from DCN's solicitors. The next, to Smith, stated that there was no formal arrangement between Omnilab Media and Smith or MGS and that to the extent that Smith acted as agent or representative of the Omnilab Parties, that authority was rescinded.

144 On 12 August 2010, Aseme emailed Smith stating that the deal was predicated on two things: (1) that Smith would be the "point person", acting as an integrator; and (2) that Paramount would have the support of ICAA and with it, cover all the independents. At that time, Smith did not have either. On 17 August 2010, DCN forwarded a proposal to ICAA seeking "an endorsement from ICAA which recommended to its members that they support this proposal" to negotiate VPF's on behalf of ICAA members.

145 On 25 August 2010, David Whealey, General Counsel of Omnilab, drafted a "risk list" associated with the "VPF / Digital Cinema Deployment Business". Cartledge and Mapp commented on the risks. The first identified risk was the failure to finalise the VPF (or a sufficient number of them) with the Studios, and the potential for this to result in the Studios deciding that dealing with "either Omni lab (sic) / DCN is going to be too hard". Cartledge and Mapp's response was that this issue depended upon whether the Omnilab Parties were to "re-engage with ... Smith to complete the Studio negotiations or whether [the Omnilab Parties were to] send ... Sarfaty". Paragraph 10 of the list of risks dealt with Blinderman. Whealey reported that Blinderman had informed the Omnilab Parties that he could no longer act for either them or DCN.

146 The first risk was resolved by late August / early September 2010 when Sarfaty contacted each of the Studios stating that Smith was unable to continue the negotiations and that ICAA would be continuing the process. On 9 September, Aseme emailed Sarfaty and introduced himself as the person who had been handling the negotiations of the VPF deals for Paramount internationally and the "primary point of contact with DCN". Other studios also responded. On 16 September 2010, the commercial relationship between Omnilab and ICAA was formalised. ICAA members were informed of the arrangement. ICAA requested non-binding expressions of interest from its members. It received a positive response from ICAA members representing 594 screens.

(16) Other factual matters

147 As is self evident, the communications between the principal players were numerous and complex. It was necessary to set them out in some detail because each of the protagonists relied on different aspects of them to support their legal position.

148 The preceding factual analysis has primarily focussed on contemporaneous documentary records. That was deliberate. Most of the witnesses were unimpressive and more intent on advancing their case rather than answering the questions asked of them. As Smith's counsel said of Gardiner, "he was prone to give speeches rather than answer questions that were put to him". The same criticism should be levelled against Fleming, Sarfaty and Smith. There were significant discrepancies in the accounts each gave of critical events. In the end, I have principally relied upon the contemporaneous documentary record.

149 DCN's witnesses fell into two groups. First, Gardiner gave evidence. His evidence was coloured by the view he strongly holds – that he and his brother, James, had been betrayed by Smith. No explanation was proffered as to why James Gardiner was not called to give evidence. Smith submitted that the failure to call James Gardiner should be the basis for an adverse inference: *Jones v Dunkel* (1959) 101 CLR 298. There was no basis for drawing such an inference in relation to any particular evidentiary issue because, for the reasons stated above, the factual analysis has primarily focussed on contemporaneous documentary records. The second group of witnesses called by DCN were three executives from the Studios. Aseme of Paramount gave evidence that he was not told that Omnilab Media had purchased DCN. Instead, on 11 August 2010, Smith told Aseme that DCN's name had been replaced on the draft VPF agreements because DCN was a subcontractor for the Omnilab Parties: see [142] above. That explanation was false.

150 Zylberstein from Disney gave evidence that on 17 September 2010 Sarfaty and a representative of the Omnilab Parties telephoned him and told him that Smith could not pursue the negotiations with Disney about the VPF agreements with ICAA, and that therefore the negotiations would be taken over by the Omnilab Parties (which had received ICAA's support). The third executive, Levin from Fox, gave evidence that on receipt of the letter from Smith dated 10 February 2010 (see [83] above), it was clear on whose behalf Smith was negotiating. By October 2010, Levin's view had changed – there was confusion in the market "over the [identity of] the local deployment entity and who was doing what to who".

151 The Omnilab Parties called four witnesses – Fleming, Sarfaty, Entwistle and Cartledge. Smith also gave evidence. As I have said above, most of the witnesses were unimpressive and more intent on advancing a particular case rather than answering the questions asked of them. That analysis applies particularly to Fleming, Sarfaty and Smith. The difficulty was that each had acted in a manner which, at the very least, raised serious questions about their actions. As a result, each was intent on defending, or recreating, what occurred to justify his actions.

152 Against that analysis of the facts, I turn to the claims made by DCN, the relevant legal principles and an analysis of those claims.

C. LEGAL CLAIMS AND PRINCIPLES

(1) SUMMARY OF CLAIMS

153 Before turning to consider the various ways that DCN puts its case it is necessary to identify what is now *not* in dispute:

1. MGS entered into an agreement with ICAA, which provided for MGS to conduct negotiations on behalf of ICAA for VPF agreements with the Studios;
2. Smith did not breach his duties to DCN as a result of his actions in causing MGS to enter into the agreement identified in (1) above;
3. Omnilab did not misuse confidential information in relation to:
 - 3.1 the information provided by Gardiner and Smith to Fleming on 11 November 2008;
 - 3.2 any information subject of the NDA dated 24 March 2010; and
 - 3.3 any information Omnilab obtained in the course of any due diligence examinations it conducted on DCN's premises in early to mid 2010.
4. The respondents did not engage in misleading and deceptive conduct in relation to the ICAA letter of 16 September 2010.

154 As noted above, DCN made a number of claims. They involved seven alleged breaches of duty to DCN by Smith and allegations that the Omnilab Parties were knowingly involved in and/or assisted Smith in those breaches of duty, as well as a claim for misleading

and deceptive conduct. Although this hearing was limited to the question of liability, I note that DCN claims its alleged losses principally flow from it not being a party to the VPF agreements.

(2) RELEVANT LEGAL PRINCIPLES

(a) Contraventions of the Corporations Act

155 Section 180(1) of the Corporations Act provides that:

A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) were a director or officer of a corporation in the corporations circumstances; and
- (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

156 It is an objective standard. The question here is what an ordinary person with the knowledge and experience of the director in question (Smith) might be expected to have done in the circumstances if he or she was acting on their own behalf: *ASIC v Adler* (2002) 168 FLR 253 at 347.

157 Section 181(1) of the Corporations Act provides that:

A director or other officer of a corporation must exercise their powers and discharge their duties:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose.

158 To establish a breach of s 181(1) it is necessary to show that the director acted with a consciousness that what was being done was not in the interests of the company: *ASIC v Maxwell* (2006) 24 ACLC 1308 at [108] and [109]. In *Chew v R* (1991) 4 WAR 21 at 49, Malcolm CJ summarised the requirements of the duty to act in good faith as including that directors must:

1. exercise their powers in the interests of the company;
2. not misuse or abuse their power;

3. avoid conflict between their personal interest and those of the company;
4. not take advantage of their position to make secret profits; and
5. not appropriate the company's assets for themselves.

159 In determining whether a director exercised his duties in good faith, in the best interests of the corporation and for a proper purpose, the question is whether a reasonable person would foresee that there was a real, sensible possibility of a conflict, taking into account the relevant facts and circumstances of the case: *Boardman v Phipps* [1967] 2 AC 46, 124.

160 Section 182(1) of the Corporations Act provides that:

A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

161 In *R v Byrnes* (1995) 183 CLR 501 at 514-515, the High Court stated that impropriety for these purposes consists of a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers, and authority of the position and the circumstances of the case.

162 Finally, s 183(1) of the Corporations Act provides that:

A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

163 "Information" in s 183(1) covers any information that a person may have acquired because of their position in the corporation: *ASIC v Somerville* (2009) 259 ALR 574 at [39].

(b) Fiduciary Obligations

164 DCN submitted, and I accept, that Smith's relevant fiduciary obligations to DCN were in substance no different to the obligations imposed by ss 180 to 183 of the Corporations Act: *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260.

(c) Damage Necessary?

165 DCN submitted that it was not necessary for it to demonstrate that the corporate opportunity DCN claimed it lost was one which, as beneficiary of the fiduciary obligation, it could have availed itself of: *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 at 392-394; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162; and *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

166 What then is the relevant principle? As the High Court stated in *Warman* at 558, it is no defence that DCN was unwilling, unlikely or unable to make the profits for which the account is to be taken or that the fiduciary acted honestly and reasonably. Put another way, a director is precluded from obtaining for himself or diverting to another person or company with whom he or with which he is associated, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts) any business advantage either belonging to the company or for which it has been negotiating: see by way of example *Canadian Aero v O'Malley* [1974] SCR 592 at 606-607.

167 The principle reflects a strict ethic in this area but, of course, each case must be considered on its facts.

(d) Accessorial Liability**(i) Involvement in a Contravention of the Corporations Act – s 79**

168 It is common ground that in order to establish that the Omnilab Parties have been involved in a contravention of ss 181(2), 182(2) and/or 183(2) of the Corporations Act, DCN must first prove that Smith breached ss 181(1), 182(1) and/or 183(1) of the Corporations Act respectively.

169 Section 79 of the Corporations Act provides that:

A person is involved in a contravention if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

...

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention.

170 The Omnilab Parties cannot be found to have been “involved” in Smith’s contraventions of the Corporations Act unless they intentionally participated in them: *Giorgiani v R* (1985) 156 CLR 473; *Yorke v Lucas* (1985) 61 ALR 307 at 310; *Periera v DPP* (1988) 63 ALR 1; *ASIC v PFS Business Development Group Pty Ltd* (2006) 57 ACSR 553 at [390].

171 In other words, DCN must establish that the Omnilab Parties had actual knowledge of each of the essential matters that go to make up the contravention, and that knowledge must have come about at the time of Smith’s alleged contraventions: *ASIC v Australian Investors Forum Pty Ltd (No 2)* (2005) 23 ACLC 929 at [114] – [115]. It is not sufficient for the purposes of s 79 that a person acquires knowledge of the essential matters which go to make up the contravention *after* it has occurred and, at that time, fails to take appropriate action even if the effect of that action is to conceal, ratify or knowingly derive benefit from the contravention.

(ii) ‘Knowing Assistance’ – Breach of Fiduciary Duties

172 For DCN to establish that the Omnilab Parties ‘knowingly assisted’ Smith in breaching his fiduciary duties to DCN, in accordance with the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244, DCN must establish that the Omnilab Parties possessed the requisite degree of knowledge. DCN must also establish that any breach of fiduciary duty by Smith was dishonest and fraudulent. Mere breach of fiduciary duty by Smith without dishonesty and fraud will not suffice: *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 160). Finally, it must be established that the Omnilab Parties actually assisted Smith in this dishonest and fraudulent breach of duty.

173 The High Court considered the degree of knowledge required for this purpose in *Say-Dee Pty Ltd* (2007) 230 CLR 89. The High Court accepted the first four categories of knowledge set out in *Baden Delavaux v Societe General* [1993] 1 WLR 509 at 575-576 and 582 as sufficient to establish the second limb of *Barnes v Addy*: *Say-Dee* (2007) 230 CLR 89 at 163. Those four categories were:

1. actual knowledge;
2. wilful shutting one's eyes to the obvious;
3. wilfully and recklessly failing to make such enquiries as a reasonable man would make; and
4. knowledge of circumstances that would indicate the facts to an honest man.

174 The High Court in *Say-Dee* rejected the fifth category of knowledge set out in *Baden Delavaux* – namely, “*knowledge of circumstances that would put an honest and reasonable man on enquiry*” – as being insufficient to establish liability under the second limb of *Barnes v Addy*. The basis for this conclusion was that this fifth category was not supported by the early decision of the High Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, which the High Court in *Say-Dee* (2007) 230 CLR 89 stated represented the current law in Australia as to the state of knowledge required for that purpose: at 163-164.

175 Further, mere knowledge of a disputed claim is not sufficient to constitute knowing assistance in the subject matter of that claim in circumstances where the alleged accessory does not know whether the claim is well-founded or not: *Carl Zeiss Stiftung v Herbert Smith (No.2)* [1969] 2 Ch 276 at 293 and 296.

176 DCN must also establish that any breach of fiduciary duty by Smith was dishonest and fraudulent. A Court should not find dishonesty in circumstances where reasonable minds could differ as to the validity or otherwise of a disputed claim: *King Network Group Pty Ltd v Club of the Clubs Pty Ltd* (2008) 69 ACSR 172 at [55].

177 As to the requirement that DCN also establish that the Omnilab Parties *assisted* Smith towards that dishonest and fraudulent breach, it is a serious allegation that ought to be properly particularised and opened and assessed with regard to the principles in *Briginshaw v*

Briginshaw (1938) 60 CLR 336; *Say-Dee* (2007) 230 CLR 89 at 162. Further, the Omnibus Parties must be shown to have had the intention of furthering that dishonest and fraudulent breach: *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 11 ACSR 785 at 832. Merely permitting or allowing the breach to occur may be insufficient: *Wickstead v Browne* (1992) 30 NSWLR 1 at 16.

(e) Misleading and Deceptive Conduct

178 A corporation will breach s 52 of the *Trade Practices Act 1974* (Cth) (now s 18 of the Australian Consumer Law, contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) if its conduct, in trade or commerce, is “misleading or deceptive”. Conduct will only be misleading or deceptive if it induces or is capable of inducing error: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191. Whether particular conduct is misleading or deceptive is an objective test and a question of fact. It must be deduced “from the whole course of conduct” and not by isolated references to a document or one act: see for example *Butcher v Lachlan Elder Realty Pty Ltd* (2008) 218 CLR 592 at [109]; *Campbell v Back Office Investments Pty Ltd* [2009] HCA 25 at [24] – [26] and [131].

179 Further, conduct cannot be misleading or deceptive unless the person to whom the representation is directed labours under some error: *Taco Co of Australia Inc v Tacobell Pty Ltd* (1982) 42 ALR 177. The representee must be led, or likely to be led, into error by the conduct alleged: *Johnson Tiles Pty Ltd v Esso Australia Limited* (2000) 104 FCR 564.

180 Finally, regardless of whether conduct is likely to produce confusion, it cannot be categorised as misleading for the purposes of s 52 unless, in all the circumstances, it contains or conveys a misrepresentation: *Taco* (1982) 42 ALR 177. It is not sufficient for the conduct to simply cause “confusion” or “wonderment”: *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45.

D. ANALYSIS

(1) Introduction

181 The key to understanding this case is to recognise the fact that it concerns negotiations by, or on behalf of, an entity that either was, or sought to become, an intermediary (or agent)

for one or more Australian independent cinemas. This entity sought to produce an outcome through these negotiations which would see it make a set of agreements on behalf of these cinemas with another set of interests, namely the Studios. Ultimately, the position was that if one or more of these agreements were made, the intermediary would be a party to the agreement/s, and obtain benefits. But the intermediary could achieve that result *only* if it had authority from cinemas (in fact, from a *sufficient* number of cinemas) to make the agreement/s. It could not make any agreement/s with the Studios unless it could bind cinemas.

182 For a time, Smith (in his capacity as director of DCN) sought and had authority from some individual cinemas to make such an agreement. Then, for a further time, Smith in his capacity as director of MGS sought and had authority from ICAA to make such an agreement on behalf of its members. Finally, Smith, seeking to act on behalf of both MGS and DCN, sought and obtained authority from ICAA to make such an agreement on behalf of its members. But no agreement was concluded. ICAA then engaged the Omnilab Parties to make agreements with the Studios. As previously noted, ICAA is not a party to these proceedings.

183 Both before and after the Omnilab Parties were engaged in this capacity by ICAA, Smith told the Omnilab Parties what he knew about every aspect of the negotiations. It may be assumed, for the purposes of argument, that after ICAA appointed Omnilab, Smith was bound to tell ICAA all he knew about the state of negotiations. However, to do this before the Omnilab Parties were an agent of the principal in the negotiations (ICAA) would be a breach of Smith's duties to DCN if he was not authorised to do so.

184 Gardiner's evidence was that he knew from February 2010 that Omnilab Media was paying Blinderman. Gardiner conceded in cross examination that he expected that because Omnilab Media was paying, the Omnilab Parties would be looking at the VPF agreements and the advice from Blinderman at that time. DCN did not seek to suggest that Gardiner's conduct in permitting Omnilab Media to pay Blinderman was unauthorised or, that between them, Smith and Gardiner did not have authority on behalf of DCN to permit these steps to be taken. However, Gardiner considered that Smith had acted like "a bloody idiot".

185 DCN's complaint can then be understood as follows: had Smith *not* told the Omnilab Parties of all he knew about the state of negotiations before February 2010, ICAA would likely not have engaged the Omnilab Parties to act as ICAA's agent. That is, that the Omnilab Parties were appointed as a rival of DCN only because the Omnilab Parties were able to take up negotiations seamlessly. And that was made possible only because, according to DCN, Smith (in breach of his duties to DCN):

1. had told the Omnilab Parties all that they needed to know for the Omnilab Parties to take up negotiations at the point that had been reached by DCN;
2. had told the Studios that Omnilab Media proposed to purchase DCN;
3. had assisted in the creation of the name – 'OmniDCN'; and
4. amended a draft VPF agreement by deleting DCN as the digital integrator and replacing it with an Omnilab-related entity.

186 Even if DCN had been acting as an agent for ICAA (and no party suggested that it was), DCN had no exclusive right to negotiate on behalf of ICAA. It was always open to ICAA to appoint an agent alone or in addition to or in substitution for MGS, or DCN. But only if and to the extent to which DCN had been acting as ICAA's agent would DCN have been bound to make available to (or at the direction of) its principal, ICAA, what DCN knew about the state of negotiations with the Studios.

187 However, as no party suggested that DCN was ever appointed as ICAA's agent, DCN was not obliged (and Smith was not authorised) to assist a rival in becoming an agent for ICAA. And that is what Smith did. He assisted the Omnilab Parties (and ICAA) to make the transition from DCN having the leading role in negotiating with the Studios. No party suggested that in doing so Smith acted outside the scope of his authority as a director of DCN. However, the apparent attempt by Smith in his supplementary closing submissions to assert this fact as part or all of a defence to the allegations of breach of Smith's statutory and fiduciary duties is rejected. Such an argument seems to misunderstand the relevant principle, which was discussed in *Beach Petroleum NL v Johnson* (1993) 115 ALR 411 as being relevant to the question of whether or not a company (in this case, DCN) may be imputed with the conduct and knowledge of one of its directors in an action against DCN, rather than whether or not that director has breached his duties as a director. It will be important to pay particular attention to what happened in and after October 2009 when, as already noted,

a fundamental shift occurred in and as a result of discussions and exchanges between Smith of DCN, Sarfaty of ICAA and Fleming of the Omnilab Parties. The shift being that ultimately Omnilab was to be the named contracting party, and those associated with DCN were to be rewarded, if at all, by DCN being taken over by the Omnilab Parties.

188 Against that background, I turn to consider each of DCN's claims.

BREACHES OF DUTY BY SMITH

Claims 1 and 2 – Alleged Disclosure to Omnilab about the VPF negotiation process, the requirements, responsibilities and functions of a digital integrator under VPF agreements, the commercial opportunities presented by being a digital integrator under VPF agreements, and the form of the contents of draft VPF agreements being negotiated by DCN.

189 For reasons that will become evident, it is both necessary and appropriate to consider these claims together. In its final submissions, DCN submitted that commencing from about October 2009, in breach of his duty to DCN, Smith communicated confidential information to the Omnilab Parties about the VPF negotiation process, the requirements, responsibilities and functions of a digital integrator under VPF agreements, and the commercial opportunities presented by being a digital integrator under VPF agreements which included Smith's contributions to the information contained in the Omnilab "*Digital Cinema Feasibility Study*" of October 2009.

190 The facts relied upon by DCN establish that:

1. in early October 2009, Fleming sent a document entitled "Digital Cinema Study" to Omnilab Media staff which described DCN as:

[a] partnership between independent exhibitor and equipment supplier MGS, and content storage and management business Digital, DCN supplies a turnkey DCI solution (projector, server, TMS) to independent exhibitors. ... A solid player in the independent sector, providing the only true turnkey solution, but its capacity to scale up to cover a significant portion of the sector is questionable. *Critically, Mike Smith, the principal of DCN has been leading the negotiations with studios on VPF's on behalf of ICAA.*

(see [53] above; emphasis added.)

2. on 11 October 2009, Smith talked to Fleming and then received from him an “action plan development” which talked about the need to:
 - develop and gain agreement on an ownership structure that recognises:
 - The needs of ICAA;
 - The needs of Mark Sarfaty;
 - The value and role to be played by DCN in this relationship.(see [56] above);
3. on or about 19 October 2009, Fleming, Entwistle and Engert of Omnilab Media (with the assistance of Sarfaty and Smith) prepared a feasibility study for consideration by Omnilab’s Board: see [57] above. The feasibility study contained detailed information about equipment. Questions were asked of “Michael”, which DCN submitted, and I accept, was a reference to Smith. One attachment to the study entitled “Structure, Transition Services (NewCo)” discussed the purchase of DCN by Omnilab. It stated that Omnilab would take a 51% share of DCN with the remaining 49% to be shared between the current shareholders of DCN at their determination. The Board was to be constituted by one existing DCN director as well as an ICAA director in a paid position. The value of DCN was to be determined by reference to the “VPF being delivered for ICAA members”. Fleming accepted that what he was proposing in the feasibility study was to value part of DCN’s business by reference to the value of finalised VPF agreements;
4. in the middle of November 2009, the state of the negotiations between Omnilab Media and DCN were the subject of internal debate within Omnilab Media. Entwistle emailed Fleming on 18 November telling him of the need to “[n]ail down DCN. We need them ‘in the tent’ asap, where we can get full transparency, and stop them running around on their own”;
5. on 15 December 2009, Fleming updated the Omnilab Board: see [66] above. One of the action items was to “[g]et access to VPF agreements (from Michael) subject to NDA”. Fleming obtained them from Smith but without any formal non-disclosure agreement. On 18 December 2009, Smith provided Fleming with a copy of the Universal and Sony agreements: see [67] above. The deploying entity was named in the agreements as “DCN” Smith told Fleming that the documents were highly confidential in nature, only for his eyes and those of his in-house counsel “for the purpose of evaluating the role, risks and liabilities inherent in being an integrator”.

Fleming forwarded the draft agreements to Goyal telling her “[P]lease note the highly confidential nature of this content – for your eyes only”. As noted earlier, one might well ask: why was Smith providing the draft VPFs to Omnilab Media when DCN (a company he was a director of) was not only proposed to be the integrator but named in the draft agreements? And why was Smith stating that he was providing the documents “for the purpose of [Omnilab Media] evaluating the role, risks and liabilities inherent in being an integrator” unless Fleming had told him of Omnilab Media’s objectives and he was assisting them to achieve that objective? This all occurred before Omnilab Media had agreed to pay for Blinderman, and Gardiner was made aware of that fact;

6. as well as access to the VPF agreements, another identified action item listed on the update to the Omnilab Board on 15 December 2009 was to “do business modelling based on new organisation structure and costs associates with VPF and identified risks”: see [66] above. Cartledge and Smith were responsible for these issues. And in oral evidence, they confirmed that is what they did;

7. on 20 January 2010, again before Omnilab Media had agreed to pay for Blinderman and Gardiner was made aware of that fact, Smith received an email from Goyal. The email was also sent to Fleming and a solicitor at Holding Redlich. Attached to the email was a first draft of a memorandum that could be presented to ICAA and the Studios outlining the role each would play. The attached document recorded Omnilab Media, not DCN, as a non-exclusive integrator: see [75] above.

191 As DCN submitted, the facts that (i) the information was provided to Omnilab Media, (ii) Omnilab Media knew that it was provided by Smith when there was no arrangement between DCN, Omnilab Media and ICAA, and (iii) Omnilab Media knew what it intended to do with it, was contemporaneously recorded in Fleming’s email to Goyal of 18 December 2009, when Fleming stated:

For the last 12 months I have been negotiating a position as a Digital Cinema Integrator. We are now getting to the pointy end. The three things that require consideration are:

- Contracting the [VPF] with the Studios
- The organisation structure of the new entity which must have an advisory board that includes industry representatives
- A purchase agreement for an existing business, Digital Cinema

Network (DCN)

The immediate requirement is to review the VPF agreements to determine our commitments and build a risk profile for the Board. There are 6 agreements to be negotiated but the two attached should provide a good picture of what is involved.

Michael Smith (of DCN) has been negotiating the agreements with the Studios.

...

I am back on 11.1.10. I would like you and Michael [Smith] and I to get together that week and spend a day going through the agreement, getting his input on commercials, your input on legals and me determining the areas of cost and risk. Are you available this week and what day would suit? Michael [Smith] has to fly to LA either this week or the following week to continue negotiations so a response ASAP would be appreciated as he is trying to book flights. Additionally, if you had to fly to LA with him, are you available the following week w/c 18.1.10

...

(Emphasis added in italics.)

192

There is no doubt that at this time, Omnilab Media knew that:

1. Smith, as the principal of DCN, had been leading the negotiations with the Studios on VPFs on behalf of ICAA;
2. Smith, as the principal of DCN, had obtained information about the VPF negotiation process, the requirements, responsibilities and functions of a digital integrator under VPF agreements, the commercial opportunities presented by being a digital integrator under VPF agreements, and the form of the contents of draft VPF agreements being negotiated by DCN;
3. Smith as the principal of DCN, considered the draft VPF agreements to be highly confidential;
4. Smith disclosed the information identified in paragraph 2 above to Omnilab Media when there was no arrangement between DCN, Omnilab Media and ICAA;
5. DCN was the named contracting party in the draft VPF agreements.

Omnilab Media required the VPF agreements it received from Smith to enable it to assess whether it could become a digital integrator. In addition, Fleming sought to arrange for Goyal to meet with Smith to “spend a day going through the agreement, *getting his input on*

*commercial*s, your input on legals and me determining the areas of cost and risk”. Fleming’s evidence that he denied knowing that DCN was the party negotiating the VPF agreements, and that his explanation to Goyal was a “simplified explanation” because he did not want to go into the detailed differences between DCN and MGS, is rejected. Both assertions are inconsistent with the contemporaneous documentary record, which includes emails Fleming sent and received. Ultimately, the position was put beyond any doubt by the executive summary Fleming produced for the Omnilab Board dated 31 January 2010: see [79] and [80] above. That Board paper recorded, as was the fact, that:

1. DCN was negotiating the VPF agreements with the Studios and intended to sign the VPF agreements;
2. negotiations were 80% complete (marked up contracts) and it would be difficult to restart the process.

In cross examination, Fleming unsurprisingly conceded that as at 31 January 2010, he believed DCN was going to be the entity signing the VPF contracts “on the basis that Omnilab was going to acquire DCN”. It was unsurprising because DCN’s name was on the draft VPF agreements when Fleming first received them in mid December 2009.

193 By the end of July 2010, Smith’s disclosures to the Omnilab Parties over a two year period were recognised by Fleming when he wrote to Cartledge: see [133] above. Fleming described it as follows:

One thing that we need to consider with [Smith], over the last 2 years he has openly and unreservedly (well for the most part ☺) provided considerable knowledge on digital cinema to Omnilab Media who entered this market from a standing start.

For all of his failings, we do need to recognise this, as under normal circumstances we would have gone to someone ... who is costing us US\$10K per month. Over 2 years it adds up.

We do have a problem with the Gardeners (sic) ... however [Smith] needs to be recognised by Omnilab outside the VPF payments – no matter how [Sarfaty] feels about him.

Smith’s disclosures were “open” and “for the most part”, “unreserved”, and provided “considerable knowledge” to the Omnilab Parties, who had entered the digital market from a “standing start”. The value to the Omnilab Parties was estimated at US\$10,000 per month for 2 years.

194 Smith's actions of disclosing information to the Omnilab Parties constituted a breach of Smith's duties to DCN. First, his actions amounted to breach (or breaches) of s 180(1) because, objectively, an ordinary person with the knowledge and experience of Smith would not be expected to have disclosed the information that he did if he was acting on his own behalf: *ASIC v Adler* (2002) 168 FLR 253 at 347. The fact that there was a possibility of DCN being purchased by Omnilab Media should, in my view, have heightened Smith's concern to ensure that he did not disclose the information identified above. The fact that, for the purposes of this litigation, DCN described the information in question as "confidential information" may distract attention from the more basic consideration of whether what Smith did was what an ordinary person with his knowledge and experience might be expected to have done in the circumstances if he or she was acting on their own behalf. The answer is no.

195 Further, Smith's actions contravened s 181(1) of the Corporations Act. In my view, Smith acted with a consciousness that what was being done was not in the best interests of the company: see, by way of example, [65], [67] – [68] above: *ASIC v Maxwell* (2006) 24 ACLC 1308 at [108] and [109]. His actions were dishonest. His conduct was not inadvertent. He played one entity off against the other. He failed to make full and true disclosure to DCN. He knew that the information he was providing to the Omnilab Parties should not have been disclosed. Put another way, it cannot be said that between October and December 2009 Smith exercised his powers in the interests of DCN. As was said in *Boardman v Phipps* [1967] 2 AC 46, a reasonable person would foresee that there was a real, sensible possibility of a conflict in Smith in taking the actions that he did. Further, those actions caused detriment to DCN in breach of ss 182(1) and 183(1) of the Corporations Act. The detriment foreshadowed in November 2009 – the disclosure of commercially valuable information: see [61] above.

196 Smith sought to make a number of answers to these claims. Smith submitted that the VPF negotiations were "never part of DCN's business" but belonged to ICAA. Smith submitted that, at best, DCN could only hope or aim for a role in the implementation of digital cinema in Australia. As will be apparent from the foregoing analysis, the way in which Smith now seeks to characterise his conduct and the consequences that flow from it is rejected. Smith, as a director of DCN, started to negotiate and continued to negotiate with the Studios over the VPF agreements. In that role and capacity he obtained access to the draft VPF agreements and commercial information about the role of a digital integrator. He turned

to ICAA, and ultimately Omnilab. The information he provided to Omnilab was obtained by him in his capacity as a director of DCN, and was commercially valuable. The fact that it was possible, if not probable, that DCN would not have the minimum number of screens available to satisfy the Studios is, for the reasons stated earlier, no answer to the claim for breach of duties brought against Smith. The next principal basis on which Smith sought to answer these claims was that DCN could not have pursued the VPF opportunity itself. That contention is addressed in further detail below under the heading “Lost opportunity” and is rejected.

Claims 3, 5 and 6 – From in about January 2010, Smith breached his fiduciary duties to DCN by, in effect, transferring DCN’s negotiations for VPF agreements to Omnilab.

197 The facts relied upon by DCN establish that:

1. on 15 December 2009, Fleming updated the Omnilab Board and identified one of the action items to be to *‘[g]et access to VPF agreements (from Michael) subject to NDA’*: see [66] above;
2. on 18 December 2009, Smith provided Fleming with a copy of the Universal and Sony Agreements: see [67] above. The deploying entity was named in the agreements as “DCN”. Smith told Fleming that the documents were highly confidential in nature, only for his eyes and those of his in-house counsel “for the purpose of evaluating the role, risks and liabilities inherent in being an integrator”. Fleming then forwarded the draft agreements to Goyal telling her “[P]lease note the highly confidential nature of this content – for your eyes only”: see [190] above;
3. on 20 January 2010, before Omnilab had agreed to pay for Blinderman and Gardiner was made aware of that fact, Smith received an email from Goyal. The email was also sent to Fleming and a solicitor at Holding Redlich. Attached to the email was a first draft of a memorandum that could be presented to ICAA and the Studios outlining the role each would play. The attached document recorded Omnilab Media, not DCN, as a non-exclusive integrator: see [75] above;
4. on 13 February, after Smith contacted Blinderman and told Blinderman that DCN was “an integrator in Australia ... [which had] been negotiating the VPF on behalf of [its] clients over the last 18 months [and were] seeking local counsel in LA to assist with finalising the deals”, Smith sent Blinderman’s fee structure and additional information

to Fleming and Goyal and asked them “[d]o you want to engage in any way initially, or shall we wait until I’ve met him and seen how flash his offices are?”;

5. on 16 February 2010, Smith sent the Fox draft deployment agreements to Goyal;
6. on 16 February 2010, Fleming prepared a “Digital Cinema Update” that explained that Omnilab Media was working on three fronts – the VPF negotiation, the purchase of DCN and the ICAA commitment. Under the heading “VPF negotiation”, it recorded that Smith was travelling to the US on 19 February 2010 to undertake further discussions with the Studios, and that it was Smith’s intention “*to alert the studios to Omnilab Media’s **intention** to invest in DCN and present the revised commercial terms developed by [Goyal] and reviewed by [external solicitors]*”;
7. between 16 and 18 February, Smith settled a cover note to be sent out by Omnilab Media, sought advice from Goyal about how to deal with Blinderman and then, finally, sought confirmation from Fleming and Goyal that Fleming wanted Smith to take Blinderman with him to the negotiations with the Studios. The cover note recorded, as was the fact, that Omnilab Media had conducted a preliminary review of the VPF agreements *provided by DCN*. Omnilab Media was referred to as the integrator throughout the emails;
8. in preparation for Smith meeting with Blinderman in Los Angeles, on 19 February 2010, Smith sent a summary to Fleming in the following terms:

This is what I believe I need to proceed with. Comments please ...

Omnilab Media Melbourne has agreed to provide legal assistance to DCN towards finalising VPF agreements, while negotiations towards a purchase of DCN continue. Omnilab have conducted a preliminary review of Digital Deployment Agreements provided by DCN.

...

Fleming’s response was that he felt the summary was exactly where they needed to be;

9. on 19 February 2010, the substance of the summary was then incorporated into a document sent by Smith to Universal on 23 February 2010. That document, on DCN letterhead dated 22 February 2010, stated that DCN now “[had] VPF agreements at

various stages between “completed” and “in progress” with the Studios, and that Omnilab Media had agreed to provide legal assistance to DCN for the purpose of finalising these agreements. The document was sent to at least two Studios;

10. after 4 March 2010, Omnilab Media received and commented upon many draft VPF agreements which, until mid July 2010, named DCN as the deployment entity;
11. on 16 July, Fleming emailed Mapp and told him that they were finalising negotiations for the VPF and that the contracts needed to show “Omnilab Media as the integrator instead of DCN”. Fleming sought approval to incorporate Omnilab MCS. Smith knew this. The next day, Smith emailed Fleming asking him if Omnilab MCS was incorporated in Victoria, asking for its ACN as soon as possible and finally, if he could refer to it in casual form as “Omni DCN”. Smith thought the name had “a nice ring”. Omnilab Media Digital Cinema Network Pty Ltd (the initial name of the Second Respondent) was incorporated on 22 July 2010;
12. at about the same time, Smith was directed by Omnilab Media to insert Omnilab MCS into the draft VPF agreements. Thereafter Omnilab MCS was inserted into all of the VPF agreements with the Studios;
13. finally, on 11 August 2010, Smith sent an email to Aseme (copied to Blinderman) which included the statement that “Omnilab are going to be the Integrator, and DCN will be a subcontractor to install the systems”. Smith’s email was sent in response to an email from Aseme asking for a “full explanation of why it is that DCN [was] not handling the integrator role” as had been discussed.

198 DCN submitted, and I accept, that Smith’s actions of disclosing information to the Omnilab Parties and transferring the negotiations for VPF agreements to the Omnilab Parties constituted a breach of Smith’s duties to DCN. First, his actions amounted to breach (or breaches) of s 180(1) because, objectively, an ordinary person with the knowledge and experience of Smith would not be expected to have disclosed the information or behaved in the way that he did if he was acting on his own behalf: *ASIC v Adler* (2002) 168 FLR 253 at 347. The issue may be tested in this way – was what Smith did what an ordinary person with his knowledge and experience might be expected to have done in the circumstances if he or she was acting on their own behalf? The answer is no.

199 Further, Smith's actions contravened s 181(1) of the Corporations Act. In my view, Smith acted with a consciousness that what was being done was not in the best interests of the company: see, by way of example, [65], [67] – [68] above: *ASIC v Maxwell* (2006) 24 ACLC 1308 at [108] and [109]. His actions were dishonest. It cannot be said that between October and December 2009 Smith exercised his powers in the interests of DCN. As was said in *Boardman v Phipps* [1967] 2 AC 46, a reasonable person would foresee that there was a real, sensible possibility of a conflict in Smith in taking the actions that he did. Again, those actions caused detriment to DCN in breach of ss 182(1) and 183(1) of the Corporations Act: see [198] above.

Claim 4 – Smith breached his fiduciary duties to DCN on about 4 March 2010 by agreeing with Omnilab and ICAA to declare that DCN had not been negotiating VPF agreements with the US Studios to that point in time. That declaration was not true

200 This claim was not addressed by DCN in its final submissions and may be put to one side.

Claim 7 – Smith also breached his fiduciary duty to DCN by negotiating secret commissions to himself (and/or his company, MGS), being:

- (a) a payment of \$500 per screen for every cinema screen receiving VPFs under VPF agreements negotiated with the US film studios – this agreement entered into some time in 2008 or 2009 with ICAA;
- (b) a payment of \$500 per screen for every cinema screen receiving VPFs under VPF agreements negotiated with the US film studios – this arrangement agreed by Omnilab on about 15 March 2010 (estimated to be between \$150,000 to \$300,000); and
- (c) a payment of \$250,000 after Omnilab took over the VPF agreements – an arrangement agreed by Omnilab on about 15 March 2010.

201 This claim proceeds upon a fundamental misconception – that Smith *concluded* his negotiations with the Omnilab Parties. The evidence discloses that negotiations with the Omnilab Parties were on foot and, *if concluded*, would entitle Smith to substantial sums. Moreover, the evidence discloses that the terms of the draft agreements changed over time. The 15 March 2010 email (see [102] – [104] above) upon which DCN placed considerable reliance does not support DCN. None of the draft agreements (including those referred to in the 15 March email) were ever concluded. No commission arrangement was ever agreed between the Omnilab Parties and Smith (in any capacity) or ever paid. The fact that under

the various versions of the draft agreements there was disparity between what Smith might have received and what DCN *might* have received from the Omnilab Parties does not establish that Smith breached his fiduciary duty to DCN. The claim is dismissed.

OMNILAB KNOWINGLY ASSISTED IN SMITH'S BREACHES

Claim 8 – Omnilab knowingly assisted Smith in respect of each of the breaches of duty identified in claims 1 to 7

(i) *Involvement in a Contravention of the Corporations Act – s 79*

202 The essential elements are established. First, Smith breached ss 181(1), 182(1) and/or 183(1) of the Corporations Act: see [194] – [199] above.

203 Secondly, the facts establish that the Omnilab Parties had actual knowledge of each of the essential matters that go to make up the contravention and had that knowledge at the time of Smith's alleged contraventions: *ASIC v Australian Investors Forum Pty Ltd (No 2)* (2005) 23 ACLC 929 at [114] – [115]. What then were the essential matters that went to make up the contravention and what facts establish that the Omnilab Parties had actual knowledge of each of those matters at the time of the alleged contravention?

Claims 1 and 2

204 The essential matters that go to make up the contravention by Smith of ss 181(1), 182(1) and/or 183(1) of the Corporations Act are summarised in [189] – [190] above. As those paragraphs demonstrate, the Omnilab Parties (and Fleming in particular) had actual knowledge of each of those matters at the time of the alleged contravention. In fact, the Omnilab Parties obtained that knowledge because of the plans drafted by Fleming, approved by the Omnilab Board and then implemented by the Omnilab Parties to obtain from Smith the information and assistance the Omnilab Parties needed to “evaluate the role, risks and liabilities inherent in being an integrator”, to do business modelling on “costs associated with VPF and identified risks” and to “determine [their] commitments and build a risk profile for the Board”. The Omnilab Parties knew this because they requested the information for a specific purpose, they then received the information sought and used it as they intended.

Claims 3, 5 and 6

205 The essential matters that go to make up the contravention by Smith of ss 181(1), 182(1) and/or 183(1) of the Corporations Act and his fiduciary duties are summarised in [194] – [199] above. As those paragraphs demonstrate, the Omnilab Parties (and Fleming in particular) had actual knowledge of the following matters at the time of the alleged contravention:

1. the disclosure of the information from Smith to Omnilab: see [197] above;
2. from 20 January 2010, Omnilab Media took steps to insert the name of an Omnilab entity as the deployment entity; and
3. in mid July 2010 it directed Smith to insert Omnilab MCS into the draft VPF agreements.

206 As Fleming said on 26 July 2010 (see [134] above), for the previous two years Smith had been open, for the most part unreserved and had provided considerable knowledge to Omnilab who entered the market from a standing start.

Conclusion

207 For those reasons, the Omnilab Parties were involved in Smith's contraventions of the Corporations Act. Each aided, abetted, counselled or procured the contravention and, alternatively, by act and omission, was directly and indirectly, knowingly concerned in, or party to, the contraventions.

(ii) 'Knowing Assistance' – Breach of Fiduciary Duties

208 For the same reasons, I consider that the evidence also establishes that the Omnilab Parties "knowingly assisted" Smith in breaching his fiduciary duties to DCN in accordance with the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244. The Omnilab Parties possessed the requisite degree of knowledge: see [204] and [205] above. The breaches of fiduciary duty by Smith were dishonest and fraudulent. The conduct, constituting the breaches of duty by Smith, was not inadvertent. Moreover, the dishonest and fraudulent conduct that gave rise to those breaches of duty was conduct in which the Omnilab Parties actually assisted Smith. They assisted him because they not only drafted and approved the plan but directed the plan. This is not one of those cases where reasonable minds could differ

as to the validity or otherwise of a disputed claim: *King Network Group Pty Ltd v Club of the Clubs Pty Ltd* (2008) 69 ACSR 172 at [55].

209 I accept that, in order to demonstrate knowing assistance, (a) it is necessary to recognise that the allegation is a serious allegation that ought to be assessed in accordance with the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Say-Dee* (2007) 230 CLR 89 at 162), and (b) it is necessary for DCN to demonstrate that the Omnilab Parties had the intention of furthering that dishonest breach (*Biala Pty Ltd v Mallina Holdings Ltd* (1993) 11 ACSR 785 at 832). In the present case, I consider that each of those elements is satisfied. As noted above, the contemporaneous evidence disclosed that the Omnilab Parties (and Fleming in particular) had actual knowledge of each of the matters constituting the contravention at the time of the contravention. In *Say-Dee* at [163], the Court stated “*there is a distinction between rendering liable [1] a defendant participating with knowledge in a dishonest and fraudulent design and rendering liable [2] a defendant who dishonestly procures or assists in a breach of trust or fiduciary obligation where the trustee or fiduciary need not have engaged in a dishonest or fraudulent design*”. The defendant in [1] is liable. The defendant in [2] is not. Here, the Omnilab Parties clearly fall within the first category. They planned it and then executed it.

(iii) Amended case on knowledge

210 During closing submissions, DCN foreshadowed an application to amend its Summary of Claims to expand the ‘knowing assistance’ claim to include the other categories of knowledge identified in *Baden Delavaux v Societe General* [1993] 1 WLR 509. A proposed amended Summary of Claims and written submissions in support were filed and served after the hearing. The Omnilab Parties opposed DCN being granted leave to amend its claim in that manner.

211 Given the views I have formed, it is unnecessary to consider DCN’s application. However, it is appropriate that I indicate that if DCN had failed to establish its pleaded case, I would not have granted it leave to amend its claim at such a late stage in the proceedings. I do not accept DCN’s submission that the expanded claim was “implicit” in its pleaded claim of knowing assistance. Moreover, the expanded claim did not accord with the way in which the parties conducted the litigation.

(iv) **Lost opportunity**

212 The Omnilab Parties submitted that any allegation of dishonesty by reason of knowing involvement on their part is negated by the fact that DCN could not have pursued the VPF opportunity itself, and that the Omnilab Parties secured ICAA's support to continue negotiating and execute (where relevant) the VPF agreements.

213 The Omnilab Parties submitted that for DCN to be able to pursue the VPF opportunity itself, DCN had to have the following characteristics (and it did not):

1. be a company of substantial resources;
2. have the support of a minimum number of screens; and
3. be seen by the Studios and by ICAA as having satisfied conditions (1) and (2), i.e. to be a company of substantial resources, and to have the support of a minimum number of screens.

In other words, DCN was not in a position to sign and perform the VPF agreements. The Omnilab Parties also submitted that Gardiner did not see any copies of the VPF agreements until July 2010, there were no DCN Board meetings to discuss the draft VPF agreements, DCN had no list of "confirmed screen contracts", DCN had no plan or capacity to develop the VPF opportunity and DCN lacked the support of ICAA.

214 In light of those facts, the Omnilab Parties submitted that it was apparent that "no VPF opportunity was diverted (nor could commercially and reasonably be seen to be diverted) from DCN to Omnilab".

215 That submission is rejected on two bases. First, it misdescribes the nature of the breaches by Smith in which Omnilab knowingly assisted and/or was knowingly involved. The breaches were not limited to a "lost opportunity": see [192] – [204] above. Secondly, as the High Court stated in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558, it is no defence that DCN was *unwilling, unlikely or unable* to make the profits for which the account is to be taken or that the fiduciary acted honestly and reasonably. The obligation is strict. In any event, Smith as a director of DCN was precluded from diverting to the Omnilab Parties without the approval of DCN any business advantage *for which it had been negotiating*: see by way of example *Canadian Aero v O'Malley* [1974] SCR 592 at 606-607. In the present case, the business advantage for which DCN had been negotiating was the

possibility of DCN being appointed the digital integrator. Here, the case was not concerned with the diversion of a concluded or semi-concluded business advantage (and nor does it have to be), but with the taking of steps by Smith (with the knowledge and at the direction of the Omnilab Parties) which were intended to achieve (and ultimately did achieve) the appointment of Omnilab MCS as the digital integrator in the Paramount VPF Agreement. As Fleming said, the taking of steps by Smith (with the knowledge and at the direction of the Omnilab Parties) for the previous two years had provided considerable knowledge to the Omnilab Parties, who entered the market from a 'standing start'.

(v) DCN as a 'placeholder'

216 Along similar lines, the Omnilab Parties submitted that DCN simply acted its part in the VPF negotiations until the Omnilab Parties confirmed that they were prepared to assume the obligations as the deployment entity. In other words, the Omnilab Parties' submission was that the fact that DCN's name appeared in the documentation had no legal significance. As will be apparent, in light of the views I have formed about the conduct of Smith and the Omnilab Parties, this submission may be put to one side. It provides no answer, or no complete answer, to either the breaches of duty by Smith or the Omnilab Parties' knowing involvement in those breaches.

(vi) Estoppel

217 The Omnilab Parties submitted that because one of the directors of DCN (Smith) was present at the 4 March 2010 meeting (see [96] above), had seen the ICAA briefing note (see [95] above) and did not raise any complaint about the change from DCN to Omnilab as the nominated integrator, Omnilab was entitled to rely upon Smith's silence and to assume that the deal struck that day constituted DCN's agreement to it. The Omnilab Parties further submit that because of Smith's failure to raise any objections on behalf of DCN, DCN should now be estopped from contending to the contrary. I reject that contention. Many of the breaches of duty by Smith in which Omnilab Media knowingly assisted had already occurred by 4 March. Moreover, assessment of the Omnilab Parties' knowledge is made at the time of the contraventions. By 4 March, Omnilab Media knew most if not all of what it needed to know because it had planned and then executed the plan to obtain access to the VPF agreements through Smith.

Claim 9 – Specifically, in respect of the breach alleged in claim 1, Omnilab was aware from about September 2008 and/or November 2008 that the confidential information in question belonged to DCN and that Smith was one of DCN’s directors. Omnilab was aware of those facts as a result of what Martin Gardiner had told John Fleming on those occasions (and also as a result of Fleming reading (at AIMC 2008) the promotional material prepared by DCN describing its ambitions in relation to VPF agreements).

218 Given the manner in which I have dealt with claims 1 to 9, it is unnecessary and inappropriate to address this claim separately.

CLAIM 10 – OMNILAB ENGAGED IN MISLEADING AND DECEPTIVE CONDUCT

219 In its final submissions, DCN’s claim under this heading was refined. DCN claimed that by incorporating Omnilab MCS with the name ‘Omnilab Media Digital Cinema Network Pty Ltd’, and by corresponding with the Studios and equipment suppliers in that name, the Omnilab Parties represented that they had purchased DCN or that they were still negotiating with DCN. I reject this claim.

220 In December 2009, the default name for the proposed Omnilab entity that would be signing the VPF agreements was to be “Omnilab Media Cinema Services”. On 22 July 2010, at the time of incorporation, the name was changed to Omnilab Media Digital Cinema Network Pty Ltd. No evidence was led as to why there was this name change. Fleming conceded that the name was confusing. Smith told Fleming that “Omni DCN” had a nice ring to it and asked Fleming if he could refer to it in that manner.

221 On 23 July, Omnilab MCS sent out a request for quotation to suppliers (including DCN’s suppliers) in the name of “Omnilab Digital Cinema Network”. In mid July Fleming asked Smith to put the name on the draft VPF contracts. Fleming conceded that he knew at the time the name was very similar to DCN but that he did not believe that it was likely to mislead people at that time because “[he] still have every intention of purchasing DCN’s business”. On 2 September 2010, the name was changed to Omnilab MCS.

222 DCN submitted that by inserting Omnilab Media Digital Cinema Network Pty Ltd in to the draft VPF agreements in place of DCN’s name, executives from the Studios were mislead into believing that they were still negotiating with DCN. In support of that contention, DCN referred to the evidence of Mr Zylberstein that he did not know his

negotiations with the Omnilab entity were unrelated to DCN until he was contacted by Gardiner in October 2010.

223 As noted, DCN alleged that by using the name Omnilab Media Digital Cinema Network Pty Ltd in the circumstances identified above, the Omnilab Parties represented that they had purchased DCN or that the Studios were still negotiating with DCN.

224 Even if the conduct identified contained one or both of the representations alleged, there was no evidence that any of the Studios laboured under any error as a result of the use of the name, Omnilab Media Digital Cinema Network Pty Ltd. Moreover, there was no evidence that any of the suppliers laboured under any error. The only supplier called was Mr Della Tolla. When he received the Request for Quote in the name of Omnilab Media Digital Cinema Network, he was surprised and puzzled and wondered what was going on. His solution was to call Gardiner who told him that DCN had not purchased Omnilab, and then to meet with Cartledge who told him that there were discussions taking place, but that no acquisition of DCN by Omnilab had yet been completed. Mere confusion or wonderment is insufficient for the conduct to be misleading or deceptive.

225 This claim is dismissed.

E. CROSS-CLAIM

226 The Omnilab Parties contend that to the extent that they are found liable for compensation orders under s 1317H of the Corporations Act and damages or alternatively, equitable compensation by reason of the Omnilab Parties' knowing involvement in the breaches and contraventions of Smith, they claim contribution from him at law, in equity and / or pursuant to s 24 of the *Wrongs Act 1958* (Vic) on the basis that he is liable to DCN for the same damage by reason of the breaches and contraventions found against him.

227 This was not addressed in oral argument. The written submissions were limited to that stated in paragraph [226] above. For present purposes, it is sufficient to state that having regard to the extent of Smith's responsibility for the damage, I consider that it is just and equitable that the Omnilab Parties should not recover a complete indemnity for the damages to be awarded against it as the Omnilab Parties stood to benefit to a greater extent than Smith.

I consider that the Omnilab Parties should recover contribution from Smith to the extent of one third of the damages awarded against it.

F. RELIEF

228 Notwithstanding the hearing was limited to liability, DCN sought a permanent injunction seeking to restrain each respondent – the Omnilab Parties and Smith – from negotiating with the Studios in respect of any VPF agreement. DCN’s application for injunction was only sought on 2 February 2011, almost five months after the application was filed on 22 September 2010.

229 I refuse to grant DCN the injunction it sought. First, injunctions are not granted if damages are an adequate remedy. I am not persuaded on the evidence led at this trial limited to the question of liability that damages is not an adequate remedy. Secondly, if an injunction was granted, it would prejudice third parties – the ICAA members – from obtaining immediate access to the VPF scheme and the significant financial benefits that flow from it. Neither ICAA nor any of its members were joined as parties to these proceedings or given notice of the application. The fact that ICAA was not joined as a party to these proceedings provides the third basis for refusing the injunction. ICAA has and retains access to all relevant information. It has pursued and continues to pursue the VPF agreements with the Studios and is entitled to do so. Fourthly, as DCN is well aware, ICAA and Omnilab have continued to negotiate with the Studios. Those negotiations have resulted in the agreement between Omnilab and Paramount and the real possibility of other agreements with other Studios. Fifthly, under any VPF agreement, there is no evidence to suggest that Omnilab will perform the role of digital integrator. It is said that in any event, ICAA will not appoint DCN to that role.

230 Sixthly, Gardiner conceded in cross examination that he may have told Smith in August 2010 that *‘if [DCN] don’t do the VPF’s, no-one will and I will blow them up’*. Over the balance of his cross examination, his evidence waxed and waned about the precise words he used. Ultimately, he suggested that he “put forward” the fact that:

... commercially, DCN was better off nobody having the VPF and it being an even playing ground than for another party to be offering a 75% rebate on equipment that they sell and set up a network in competition to DCN which would reduce [or] remove the reason for the company to exist.

231 Finally, the evidence disclosed that DCN was unable to perform the functions of a
digital integrator to the satisfaction of the Studios – it could not provide the minimum number
of screens and did not have sufficient financial resources to provide the guarantees sought by
the Studios.

232 In all the circumstances, equitable relief in the form of an injunction is refused.
The other relief sought by DCN will be the subject of further hearing.

F. ORDERS

233 Given the complexity of the issues raised in these reasons, I will direct the parties to
confer and to submit orders to give effect to these reasons for decision by 23 May 2011 and
to deal with the next stage of the proceedings. If the parties cannot agree orders, I will list the
matter for further directions on 30 May 2011.

I certify that the preceding two
hundred and thirty-three (233)
numbered paragraphs are a true copy
of the Reasons for Judgment herein
of the Honourable Justice Gordon.

Associate:

Dated: 16 May 2011