[HIGH COURT OF AUSTRALIA.]

BLYTH CHEMICALS LIMITED . . . APPELLANT;
DEFENDANT,

AND

BUSHNELL . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 22; *April* 3.

Starke, Dixon, Evatt and McTiernan JJ.

Employer and Employee—Wrongful dismissal—Employee controlling company being a potential competitor—Reasonable apprehension of competition—No competition in fact.

The respondent, who was the manager of the appellant's business of manufacturing lead products, was dismissed by the appellant from its employment. The substantial grounds for such dismissal were that the respondent had during the period of his employment, without the knowledge or consent of the appellant or its directors, become chairman of directors for life and sole or principal shareholder with a controlling interest in a company which was a potential rival in business of the appellant, and that the respondent would not procure a covenant from such company not to compete with the appellant. Other items of alleged misconduct became known to the appellant after the respondent's dismissal. In an action for damages for wrongful dismissal the trial Judge refused to find that the circumstances justified the dismissal of the respondent. On appeal to the High Court,

Held, that the burden of proving a justification for the dismissal was upon the appellant, and that the decision should not be interfered with.

Per Starke and *Evatt* JJ: The mere apprehension that an employee will act in a manner incompatible with the due and faithful performance of his duty affords no ground for dismissing him: he must be guilty of some conduct in itself incompatible with his duty and the confidential relation between himself and his employer.

Per Dixon and *McTiernan* JJ.:—Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal; but the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. It is not enough that ground for uneasiness as to his future conduct arises.

Decision of the Supreme Court of Victoria (*Wasley* A.J.) affirmed.

APPEAL from the Supreme Court of Victoria.

The respondent, Sydney Richard Bushnell, brought an action in the Supreme Court of Victoria against the appellant, Blyth Chemicals Limited and Jaques Proprietary Limited, claiming £826 10s. damages for wrongful dismissal. By his statement of claim the plaintiff in substance alleged that he was employed by Jaques Proprietary Limited or Blyth Chemicals Limited as manager of the works and business carried on by the defendant Jaques Proprietary Limited at Madden Grove, Burnley, under an agreement whereby the plaintiff was to be paid by the defendants or one of them a salary of £600 per annum from 7th March 1927, which salary was increased to £750 per annum in December 1927, and should be retained in such employment until the employment should be determined by six months' or a reasonable notice on either side terminating the said employment at the expiration of the yearly period; that the plaintiff served the defendants or one of them in the said capacity until the defendants, on 26th January 1932, although no such notice had been given on either side to determine the service, wrongfully terminated the said employment as from 29th February 1932.

The defence, so far as is relevant to this appeal, alleged in substance that if the defendants or either of them terminated the plaintiff's service with them without due or proper notice in that behalf the plaintiff after the alleged contract and before the alleged breach was guilty of conduct inconsistent with the due and faithful discharge of the duties for which he was engaged and there was accordingly good cause for his dismissal from such employment and the defendants therefore discharged the plaintiff from the said service, which is the alleged breach.

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Particulars of the alleged breaches of duty on the part of the plaintiff were substantially as follows:—(*a*) Between 7th March 1927 and 26th January 1932 the plaintiff occupied the time which should have been given to the service of the defendants in doing work for his own benefit and on his own account. (*b*) Whilst manager of the defendants' works and business the plaintiff contrary to his duty to the defendants used the defendants' plant and machinery and the service of the defendants' clerks and servants for his own purposes and benefit and not for the purposes or benefit of the defendants or either of them but to further and assist his own business ventures and transactions. (*c*) During the said period the plaintiff commenced and carried on another business at Cremorne Street, Richmond, and devoted time and attention thereto which should have been devoted to the business of the defendants or one of them and used the defendants' plant and machinery and the service of the defendants' clerks and servants in connection therewith and to further the same contrary to his and their duty to the defendants. (*d*) The plaintiff during the said period became the chairman of directors for life and the principal or sole shareholder and acquired the controlling interest in a company known as Electrolytic Lead Products Proprietary Limited without the knowledge or consent of the defendants or either of them. The said proprietary company was a rival or potential rival in business of the defendants or one of them and the plaintiff thereby placed himself in a position in which his personal interest conflicted with his duty as a servant of the defendants or one of them. (*e*) After the defendants discovered that the plaintiff had become chairman of directors of the said Electrolytic Lead Products Proprietary Limited and had acquired a controlling interest therein they required the plaintiff to covenant and agree with the defendants that neither he nor the said proprietary company should during the period of his employment by the defendants manufacture or sell or be concerned in manufacturing dealing in or selling (except with the written consent of the defendants) any products containing or consisting of arsenate of lead, litharge, red lead or lime sulphur (being products which the defendants or one of them was then engaged in manufacturing and selling in Australia). The plaintiff refused to so do. (*f*) Further

and in the alternative with (*e*), the defendants after they discovered the plaintiff's connection with the said proprietary company required the plaintiff to satisfy them that his connection with the said proprietary company did not place him in a position in which his duty to the defendants was brought in conflict with his interest arising out of his connection with the said proprietary company. The plaintiff refused or failed so to satisfy the defendants or either of them.

Wasley A.J., who tried the action, held that the fact that the plaintiff spent some time during business hours in conducting his own business was not sufficient to justify his dismissal, nor was the fact that he used part of the machinery of Blyth Chemicals Limited, as this was not used to any substantial extent, nor was the fact that the plaintiff made use of the servants and the typewriter of Blyth Chemicals Limited. As to the fact of the plaintiff becoming chairman of directors for life and principal shareholder in Electrolytic Lead Products Proprietary Limited, his Honor found that that company had not in fact entered into competition with Blyth Chemicals Limited and that the defendants were premature in their dismissal of the plaintiff, and were not justified in dismissing him because he had done an act that might lead to another act that would justify the dismissal; that before dismissing him they were bound to wait until he had done this act that justified the dismissal, and the fear or apprehension of the future act was not sufficient to justify the dismissal. As to par. (*e*) of the particulars, his Honor found that the plaintiff was willing to enter into such an undertaking as was required on his own personal behalf, but was not willing to bind the company which he had taken such an important part in forming, and that the defendants were not justified in compelling the plaintiff to insist on the new company entering into such a covenant, and the fact that he did not so compel it was not sufficient to justify his dismissal. As to par. (*f*) of the particulars, his Honor found that as far as the plaintiff personally was concerned he did show that at that time this new company was not in competition with the defendant companies, and that the plaintiff could go no further than that and could not bind the new company as to what it would do in the future. In these circumstances his Honor found

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that the defendants had failed in their contention that the dismissal of the plaintiff without notice was justified. His Honor thereupon gave judgment for the plaintiff against Blyth Chemicals Limited for £400. His Honor did not give judgment against Jaques Proprietary Limited as he found that there was no contract with them, the contract being that Blyth Chemicals Limited should engage the plaintiff to do the work that had previously been carried on by Jaques Proprietary Limited.

From this decision Blyth Chemicals Limited now appealed to the High Court.

Further facts appear in the judgments hereunder.

Wilbur Ham K.C. (with him *O'Bryan*), for the appellant. Bushnell's promoting the Electrolytic Lead Co. was the immediate cause of his dismissal. In addition he had committed various breaches of his duty to the appellant Company. He spent the time he should have employed in the service of the appellant Company in promoting his own company and made use of the services of the appellant's employees in conducting his own business. The trial Judge regarded the breaches of his duty as independent acts and did not regard them in their aggregate effect. There was no need for the appellant to wait until the respondent's company had actually entered into competition with the appellant before dismissing the respondent. Where the master employs a person in a fiduciary position and knows him to be unfaithful, he is entitled to dismiss him and is not bound to wait until he is defrauded. Where there is reasonable apprehension that the employee had misconducted himself, the employer is entitled to dismiss him (*Pearce* v. *Foster* (1); *Aberdeen Railway Co.* v. *Blaikie Bros.* (2)). It was the duty of the respondent not to put himself in a position in which his duty and interest conflicted (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3); *Parker* v. *McKenna* (4)). If the appellant was reasonably apprehensive that the respondent's company would compete with its business it was justified in dismissing him, as he was managing director in a fiduciary position and held a controlling interest in his company. The trial

(1) (1886) 17 Q.B.D. 536, at p. 540.
(2) (1853) 1 Macq. H.L. 461, at pp. 471, 472.
(3) (1888) 39 Ch. D. 339, at p. 357.
(4) (1874) L.R. 10 Ch. 96, at pp. 118, 124.

Judge took each one of these complaints separately and did not take into account the conglomerate effect of them. The appellant in the interests of its shareholders was, in the circumstances, bound to dismiss the respondent unless he gave the assurances required. His actions can be judged in the light of his subsequent conduct.

[DIXON J. referred to *Birtchnell* v. *Equity Trustees, Executors and Agency Co.* (1).

[STARKE J. referred to *Shepherd* v. *Felt and Textiles of Australia Ltd.* (2).]

The point the trial Judge found against the appellant was that the appellant had no right to dismiss the respondent until the damage was done. The evidence is uncontradicted as to the use made by the respondent of the appellant's machinery and employees.

Robert Menzies, A.-G. for Vict., (with him *Magennis*), for the respondent. The fact that the respondent made use of the machinery and employees of the appellant was dealt with by the trial Judge, who found the facts in the respondent's favour. He found that such use of the servants and machinery was negligible. It is not every trifling matter of that kind that gives rise to a right of dismissal (*Adami* v. *Maison de Luxe Ltd.* (3)).

[EVATT J. referred to *In re Rubel Bronze and Metal Co. and Vos.* (4).]

In the result the trial Judge was correct in concentrating his attention on the gravamen of the charge, namely, the incorporation of the new company. If the matter is to be tested by looking at the memorandum of association of the company in which the respondent is interested to see if it can come into competition with the company by which he is employed, it will become a very serious matter for any person engaged by one company investing his money in another company. The respondent was always ready to give a personal assurance that there would be no competition by the new company, but the appellant required in addition a covenant by the company itself. The mere possibility that circumstances may arise in the future which would give a cause for dismissal if and when they arose, will not entitle an employer to dismiss an

(1) (1929) 42 C.L.R. 384.
(2) (1931) 45 C.L.R. 359.
(3) (1924) 35 C.L.R. 143.
(4) (1918) 1 K.B. 315.

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employee before such circumstances in fact arise. The distinction is between the case where something may happen in the future and the case where something has actually occurred. There is no probability that the business of the new company will be altered in the future so as to compete with the business carried on by the appellant.

Wilbur Ham K.C., in reply. The evidence does not support the contention that the respondent was willing to enter into an agreement not to compete with the appellant.

Cur. adv. vult.

April 3. The following written judgments were delivered :—

STARKE AND EVATT JJ. This was an action brought in the Supreme Court of Victoria in which the respondent Bushnell claimed damages for that the appellant, Blyth Chemicals Limited, wrongfully dismissed him from its employment. *Wasley* A.J., who heard the action, entered judgment in favour of the respondent for £400 damages and his costs, and from this judgment an appeal has been brought to this Court.

The appellant was a manufacturer of chemical products, mainly for the purpose of spraying fruit trees. It prepared arsenate of lead, lime sulphur, litharge, and red lead. It is not disputed that the appellant appointed the respondent as the manager of its works at a salary of £600 per annum, afterwards raised to £750 per annum, and that the respondent agreed not, for ten years, to compete or be in any way associated with any concern competing directly or indirectly with products then being manufactured by the appellant. Nor is it disputed that the appellant summarily dismissed the respondent, and the only question is whether it was justified in so doing.

As manager for the appellant, the respondent was in a confidential position. And it is clear that he might be dismissed without notice or compensation if he acted in a manner incompatible with the due and faithful performance of his duty, or inconsistent with the

confidential relation between himself and the appellant (*Pearce* v. *Foster* (1); *Shepherd* v. *Felt and Textiles of Australia Ltd.* (2)). The degree of misconduct that will justify dismissal is usually a question of fact (*Clouston & Co.* v. *Corry* (3)).

The appellant justified the dismissal of the respondent on the ground that during the period of his employment he, without the knowledge or consent of the appellant or its directors, became chairman of directors for life and the principal or sole shareholder with a controlling interest in a company known as the Electrolytic Lead Products Proprietary Limited, which was a rival or potential rival in business of the appellant. It is a fact that the respondent formed and was chairman of directors of this company, and completely controlled it. It was a company which had such wide powers under its memorandum of association that it could lawfully engage in the same class of business as the appellant. But, as a matter of fact, the business of the company was confined to the manufacture of white lead, much used in the preparation of paints. The appellant had no objection to the company preparing white lead, so long as it so confined itself. But it was apprehensive—the learned trial Judge says not unreasonably apprehensive—that the company would not confine itself to the manufacture of white lead, but would soon launch out into a business competing with the appellant's. Consequently, the directors of the appellant challenged the respondent on the subject, and pointed out to him the serious position that would arise if he identified himself with the company and it became a rival of the appellant in the manufacture of arsenate of lead, lime sulphur, litharge, and red lead. The respondent apparently recognized the ambiguity of his position, and said he was prepared to sign a document giving the appellant his assurance that while he was in any way associated with the company it would not become a competitor of the appellant in the manufacture of the products mentioned. This proposal satisfied the directors of the appellant, who referred the matter to solicitors to draw up an agreement embodying the respondent's undertaking. The solicitors drew up an agreement, in which they joined the company as a party.

(1) (1886) 17 Q.B.D. 536. (2) (1931) 45 C.L.R. 359.
(3) (1906) A.C. 122.

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But the company would not join in the covenant. The respondent, however, was prepared to covenant that neither he nor the company would whilst he remained in the employment of the appellant, or for two years after his employment was for any cause terminated, manufacture or sell or be concerned directly or indirectly in manufacturing, dealing in or selling (except with the consent of the appellant) any products containing or consisting of arsenate of lead, litharge, red lead or lime sulphur, and that should any breach of this undertaking be made, the appellant should be entitled to damages and an injunction. The agreement did not satisfy the appellant, and it dismissed the respondent.

The appellant did not regard the respondent's connection with the company as in any way incompatible with the due and faithful performance of his duty, if it confined itself solely to manufacturing and dealing in white lead. And we see no reason why the learned trial Judge should have formed a different conclusion from that of the appellant itself. The mere apprehension that an employee will act in a manner incompatible with the due and faithful performance of his duty affords no ground for dismissing him ; he must be guilty of some conduct in itself incompatible with his duty and the confidential relation between himself and his employer.

But it was strongly urged before us that the formation of the company was part of a scheme or plan which the respondent adopted for the purpose of competing ultimately with the appellant and depriving it of business, making use, no doubt, of the information and experience that he gained in the appellant's business. This really is a charge of fraud which is not clearly stated in the pleadings. In support of the contention, it was said that evidence was given which proves that the respondent induced employees of the appellant to go over to him and start another business styled " Orchard Sprays Limited " allied to his company and in direct competition with the appellant. The onus of the charge is, of course, upon the appellant, and it has no finding of the learned trial Judge in its favour. It is quite impossible for this Court, which has not seen or heard the witnesses, to reach any affirmative conclusion on the matter. It was suggested that the learned Judge did not consider this aspect of the case, but even if the suggestion were accurate, still it was

the duty of the appellant to call his attention to it and obtain the necessary findings of fact. We should think it unlikely, on the view the learned Judge took of the case, that he would have made any such finding, but that is immaterial.

Some other grounds justifying the dismissal were also relied upon, but, though the respondent acted indiscreetly on several occasions, the learned Judge did not think his acts and omissions amounted to so serious a degree of misconduct as to warrant his dismissal. The finding is, as already pointed out, one of fact, and, in our opinion, this Court should not disturb it.

The appeal should be dismissed.

DIXON AND MCTIERNAN JJ. By the judgment appealed from *Wasley* A.J. awarded to the respondent, the plaintiff in the action, £400 damages for wrongful dismissal by the appellant Company from the position of manager of a business conducted by the appellant Company in the name of another company of which it was proprietor. This subsidiary company is called "Jaques Proprietary Limited"; the business carried on in its name is that of manufacturing chemical sprays and the like, used by fruitgrowers and others, and of selling them to consumers. The principal chemicals sold appear to be arsenate of lead paste and powder, lime sulphur, atomic sulphur, blue stone, red oil, bordeaux mixture and bordeaux compound.

The respondent, who describes himself as a manufacturing chemist, and another man were for many years the chief, if not the only, shareholders in Jaques Proprietary Limited. They conducted its operations upon their own account. But in March 1927 the appellant Company, which also manufactured chemicals for use in agriculture, made a proposal, which the respondent and his fellow shareholder accepted, for the purchase of all the shares of Jaques Proprietary Limited. On 7th March 1927 an agreement was executed by which for a consideration in money they agreed to transfer, or procure the transfer of, all the shares in the company and agreed that for ten years they would not compete or be in any way associated with any concern competing, either directly or indirectly, with products then being manufactured by them. The agreement provided that, until

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further arrangements were made, the business should be conducted and the same salaries drawn as theretofore. Three days after the making of the agreement the board of directors of the appellant Company engaged the respondent as manager of Jaques Proprietary Limited at a salary of £600 a year with a bonus and car expenses. In January 1928 his salary was raised to £750; and he remained manager until 21st January 1932, when the board of the appellant Company adopted a resolution dismissing him from the end of February then next. This is the dismissal complained of. It is not disputed that the respondent was a yearly servant and was entitled to six months' notice. But the appellant justifies the dismissal on the ground of misconduct.

The facts upon which the justification depends require statement at length. In November 1930 the respondent bought from a liquidating company some plant for the manufacture of white lead and he entered into relations with a patentee of an invention concerning the electrolytic production of white lead. A small factory was established and operations were commenced under the direction of the patentee. In August 1931 they registered a proprietary company called "Electrolytic Lead Products Proprietary Limited," with very wide objects, to take over from the respondent for a consideration in shares, the plant and business carried on at this factory, and to acquire from the patentee, also for a consideration in shares, a licence to exercise the invention. The articles of association made the respondent chairman of directors for life. On 21st August 1931 a statement about the registration of the company appeared in a newspaper in which the respondent was mentioned by name. One of the directors of the appellant Company spoke to him about the announcement. The respondent said that the new company was purely and solely a manufacturer of white lead. A few days after the statement appeared he asked the chairman of directors of the appellant Company whether he had noticed that he had taken an interest in another company. The chairman answered that he had seen it in the press. Until these conversations, the respondent had made no express communication upon the subject of his new venture to anybody in authority representing the appellant, but, on the other hand, he had taken no measures to avoid disclosure and had

made no secret of the matter. On 8th September 1931, the appellant's board of directors considered the respondent's connection with the formation of the new company and resolved to write to him as follows:—"That the Board having been given to understand you have taken an active part in the formation of a business known as Electrolytic Lead Products Co., the question has arisen as to how this can be compatible with your position in our Company (which is also a lead products business) more especially in view of the conditions at the time of the purchase of Jaques that you were not to be interested in any concern of a competitive nature. Kindly give this your consideration and reply by letter."

In reply the respondent requested a personal interview with the board, but the board insisted on a fuller written answer in order to have "some basis for consideration, and discussion if found desirable." In response to this he renewed his request for a personal interview, but added:—"The Electrolytic Lead Products Co. of which I am a shareholder, is at present manufacturing white lead, a pigment used for painting, and in the manufacture of paints. Your directors will see that the product produced by this company is not competitive with either Jaques Pty. or Blyth Chemicals Ltd. As I hold 1,200 shares in Blyth Chemicals Ltd. for which I paid hard cash, it is not likely that I would be interested in any other company manufacturing similar lines."

After some time the board asked to be informed definitely whether the new company was to confine its manufacture to white lead only or was its intention at present or in the future to manufacture arsenate of lead, red lead or litharge. A correspondence then ensued. The respondent said that the company was confining its intention solely to the manufacture of white lead, that it had no intention at present or in the future of manufacturing arsenate of lead, litharge, or red lead. The appellant's board informed him that they had ascertained that he had been appointed chairman of directors for life of Electrolytic Lead Products Proprietary Limited and wished to know how he could serve two concerns and what would be his attitude if a potential trade rivalry arose. To this he replied that his position as chairman was honorary and involved duties which he carried out in his own time and which did not

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interfere with his management of Jaques Proprietary Limited. At length, on 24th November 1931, the appellant's board of directors gave him a personal interview. A long statement was read to him, which disclaimed any hostility to him, but stated the surprise of the directors on learning that he had become head of another lead product company capable of competing at any time it chose with their business, reminded him of his agreement of March 1927 not to compete or associate himself with any concern which competed with the products manufactured by Jaques Proprietary Limited, expressed a feeling that his written replies to the board displayed an evasiveness which was not reassuring, enquired how he could perform the duties of a full time branch manager, and, finally asked him for an assurance drawn up to the satisfaction of the solicitors of the appellant Company undertaking that " there will be no action of a competitive nature taken by the Lead Products Co. beyond the manufacture of white lead, and that his connection with that Company will not be allowed to interfere in any way with his duties to Blyth Chemicals Ltd." The respondent agreed to give such an undertaking. He said in his evidence :—" I said I was prepared to do what Pearson " (a director) " wanted as read out and was prepared to give an agreement that I would not be connected with any company manufacturing similar lines or in competition with Blyth's or Jaques. I meant that this should be while I was in the employ of defendants."

The appellant Company's solicitors prepared a covenant with Jaques Proprietary Limited by Electrolytic Lead Products Proprietary Limited and the respondent. The substance of the proposed covenant was that neither covenantor would while the respondent was employed by Jaques Proprietary Limited and for two years afterwards, in Australia, manufacture or sell or be concerned in manufacturing or selling arsenate of lead, litharge, red lead or lime sulphur. The respondent altered the draft so as to exclude Electrolytic Lead Products Proprietary Limited from the covenant, to confine the restraint it imposed to Victoria and to terminate its operation when his employment with Jaques Proprietary Limited should cease. The appellant Company refused to agree to these alterations, but the respondent on his part would not agree to

procure his company to give the covenant sought. In his evidence he said that Electrolytic Lead Products Proprietary Limited was at the time under offer for sale and that he told one of the directors of the appellant Company that he was negotiating to sell the business. Finally, on 13th January 1932, the respondent returned the document saying that he had given the undertaking that he promised. He appears then to have gone on an annual visit to Tasmania. On 21st January 1932 the directors of the appellant Company dismissed him. They did so because of his conduct in relation to and arising out of the establishment and carrying on of the new enterprise to which they objected, and the first justification relied upon by the appellant Company for the dismissal has the same foundation. But, in the investigation which followed, matters were discovered which are relied on as additional grounds of justification and as strengthening that upon which they acted. It was ascertained that under the respondent's direction some white lead had been treated for the Electrolytic factory by the hydro-extractor of the Jaques Company and that some, or one of the employees of that company had done some work for that factory. The respondent says that a small quantity of white lead was thus treated in May 1931 because the new factory's extractor was not in working order, while that of Jaques Company was no longer in use owing to the fact that its arsenate of lead was all manufactured by the appellant Company. He says he wanted to experiment with Jaques Company's extractor and that he directed that the cost should be charged up to the Electrolytic Lead venture. He says that he did direct one of the employees of Jaques Company to do a couple of hours' work in connection with this venture, but, again that he directed that his time should be charged. However, this may be, no entry appeared for either matter in the books of Jaques Proprietary Limited and the appellant relies upon both matters as amounting to misconduct. His work of selling chemical sprays necessarily brought the respondent into frequent contact with fruitgrowers, and it was further ascertained that he had offered to find buyers for the fruit of some of them and had sought a commission. Moreover, upon his visit to Tasmania, during which he was dismissed, he spent much time in fruit-growing districts and it appeared that

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consignments of fruit bearing his initials came from Tasmania to Melbourne, from which the appellant infers that, although he was travelling at the expense of Jaques Proprietary Limited ostensibly on its business, he really was speculating or trading in fruit on his own account. These are assigned as further grounds of justification for the dismissal. With the object of colouring the conduct of the respondent, the appellant also called evidence of his proceedings after dismissal, but, except in so far as it illustrates the opportunities open to him of entering into an injurious trade rivalry, this evidence, properly considered, throws little or no light upon his past conduct. Upon his dismissal he was in a position of commercial hostility with his former employers and what he did in that condition affords no safe measure of his antecedent motives and intentions.

Upon these circumstances, *Wasley* A.J. refused to find that a justification existed for dismissing the respondent. The fact that some of the items of alleged misconduct were not known to the appellant Company at the time it terminated the employment is, of course, immaterial (*Shepherd* v. *Felt and Textiles of Australia Ltd.* (1)). But his Honor was of opinion that the machinery of Jaques Proprietary Limited had not been used to any substantial extent, and he found himself unable to say how long the employee had been occupied with work for the Electrolytic Lead factory. His Honor did not say whether he accepted the respondent's statement that he directed that the work should be charged. He did not in his judgment mention the transactions, or proposed transactions in apples, apparently because they were not referred to in the particulars, the allegations in which the learned Judge traversed in delivering judgment. There is, therefore, some uncertainty whether his Honor accepted the respondent's explanation of these matters, the truth of which was challenged. Upon the principal question of misconduct, his Honor, in effect, found that no present inconsistency arose between the respondent's duties as manager of Jaques Proprietary Limited and his interest in Electrolytic Lead Products Proprietary Limited, or his position as its chairman of directors, and he held that he had not in fact diverted any of his labour or energies from the fulfilment of his duties as manager to

(1) (1931) 45 C.L.R. 359.

the conduct of the new enterprise. But his Honor said :—" Considering that the machinery used in the manufacture of white lead and the skill necessary for the manufacture of white lead might easily be turned to the manufacture of products in which the defendant Company dealt, and particularly arsenate of lead, the defendant was not unreasonably apprehensive that this new Company would very soon extend its operation past the manufacture of white lead and would be manufacturing products that were distinctly in competition with those of the defendant Company, and the question is whether the defendants, being so apprehensive, were justified in dismissing the plaintiff. I have come to the conclusion that the defendants were premature in their dismissal ; that they were not justified in dismissing him because he had done an act that might lead to another act that would justify the dismissal. They, I think, were bound to wait until he had done this act that justified the dismissal, and the fear or apprehension of the future act was not sufficient to justify the dismissal."

The appellant contends that if the respondent had by his own conduct caused it to be " not unreasonably apprehensive " lest the Company under his control might soon enter into direct competition with it, he had destroyed his employer's confidence in him, the continued existence of which was an essential condition of his contract of service. As manager of Jaques Proprietary Limited, he occupied a position in which he had great influence with its customers. His long connection with the business made it likely that the staff would follow him. Once he was enabled to supply the customers' requirements, he might easily divert the greater part of its business to his own company. In these circumstances, it is said, the appellant was not bound to wait until its reasonable apprehensions were realized, but might avert the danger by dismissing the respondent. Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1) ;

(1) (1888) 39 Ch. D. 339, at pp. 357-8 and 362-4.

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English and Australian Copper Co. v. *Johnson* (1); *Shepherd* v. *Felt and Textiles of Australia Ltd.* (2)). But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises. In the present case, many circumstances were given in evidence from which it might have been inferred that in all that he did the respondent was actuated by one design, namely, to prepare a position to which he could retreat with a considerable part of his employer's business, if it should become necessary or desirable to vacate the managership of Jaques Proprietary Limited. If any such finding had been made, the learned Judge would clearly have been entitled, if not bound, to hold that the respondent had been guilty of misconduct. But, although there was evidence from which such an inference might have been drawn, the respondent's conduct was capable of an innocent construction. The Electrolytic Lead Products Proprietary Limited did not in fact turn its attention to anything but white lead. The sale of white lead is an entirely different trade from the sale of arsenate of lead and chemical sprays. The respondent was bound by a covenant which would prevent him from retaining his position of chairman of directors, or any association with the Company, if it did turn to the manufacture of any of the products made by Jaques Proprietary Limited. Except that a hydro-extractor is used in both processes, there appears to be no close relation between the electrolytic production of white lead and the manufacture of arsenate of lead. In the view we take of the circumstances of the case, the motives and intentions of the respondent become all-important; for the significance and sufficiency as a justification of the other items of misconduct relied upon appear to us to depend upon the truth of his explanation or the bona fides of his acts. Further, the effect to be given to all the acts combined, which have been established against the respondent, must in the end be governed by an estimate of his honesty and motives. The chief embarrassment we have felt in the decision of the appeal arises from the lack of any explicit finding by the learned Judge

(1) (1911) 13 C.L.R. 490. (2) (1931) 45 C.L.R. 359.

upon this subject. It is open to much doubt, whether, in the absence of an express statement of his conclusion in this respect, a new trial should not be directed. It would clearly be a hazardous and unwise proceeding for us to attempt to form our own independent judgment upon such an issue without having seen or heard the witnesses. But, after all, the burden of proving a justification is upon the appellant; it is for it to obtain the necessary findings to establish misconduct. The particulars of misconduct do not in terms draw pointed attention to the question, and it may be that his Honor considered it sufficient to deal with only the allegations expressly made in the particulars. In his actual findings there is a good deal which implies an acceptance of the respondent's evidence on some important questions of fact. No request was made to the learned Judge at the time when he delivered judgment to make any further findings, and it seems likely that the appellant would have profited little from seeking further findings. It may fairly be inferred that his Honor did not take an adverse view of the respondent's good faith.

On the whole, it does not appear to us to be a proper case in which to order a new trial.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Parkinson & Wettenhall.*

Solicitors for the respondent, *Herman & Coltman.*

H. D. W.