



Neutral Citation Number: [2007] EWHC 955 (Ch)

Claim No: HC 05C 01961

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
2nd May 2007

Before:

MR CHRISTOPHER FLOYD QC
(Sitting as a Deputy Judge of the Chancery Division)

BETWEEN:

GARY FEARNs t/a AUTOPAINT INTERNATIONAL **Claimant**

- and -

(1) **ANGLO-DUTCH PAINT AND CHEMICAL COMPANY LIMITED**
(2) **DE BEER LAKFABRIEKEN BV**
(3) **CHRISTOPHER WELCH**
(4) **RICHARD JONGSMA**
(5) **MARCO VAN DER WOUDE**
(6) **THEO WEMMERS**

Defendants

AND BETWEEN

DE BEER LAKFABRIEKEN BV **Part 20 Claimant**

- and -

GARY FEARNs t/a AUTOPAINT INTERNATIONAL **Part 20 Defendant**

Mr Richard Lissack QC and Mr Giles Fernando (instructed by **Bevans**) for the
Claimant and Part 20 Defendant
Mr Thomas Moody-Stuart (instructed by **Faegre & Benson LLP**) for the Defendants
and Part 20 Claimant.

Heard: 13th, 14th, 15th, 16th, 19th February, 19th March 2007

JUDGMENT

Christopher Floyd QC

Introduction

1. Gary Fearn, the Claimant in this action, hit on a good commercial idea. He decided to sell high quality paint for spray painting cars to a particular sector of the market. He built up an excellent business under the name and trademark Autopaint. The business consisted of his own paint shops and franchisees. For this purpose, he bought paint (including so-called tinters and commodity products such as hardeners and clear coats) from various paint companies, including in particular the Second Defendant, De Beer Lakfabrieken B.V. (“De Beer”) a company run by the Fourth to Sixth Defendants, Messrs. Jongsma, Van Der Woude and Wemmers. The First Defendant, Anglo-Dutch Paint and Chemical Company (“Anglo-Dutch”) is the UK distributor of De Beer and the Third Defendant, Mr Welch is their UK representative.
2. It is not in dispute that at some point in 2004 Anglo-Dutch began selling paint direct to Autopaint franchisees under the Autopaint brand. The Claimant contends that in doing so Anglo-Dutch (and the other Defendants by association) were acting unlawfully. The Claimant’s case, at least as advanced at trial, is based on infringement of trade mark, passing off, malicious falsehood, infringement of copyright and breach of contract. He also alleges that the Defendants have acted together or individually intentionally to inflict economic harm on him by unlawful means. He claims in particular that the loss of his franchise business was caused by the unlawful acts of the Defendants.
3. These were not the only causes of action which were raised in the Particulars of Claim. I struck out certain other causes of action originally pleaded which required proof of foreign law at the commencement of the trial. Yet further causes of action have not been pursued in the light of the evidence.
4. The Defendants contend that they were acting at all times with the Claimant’s consent. “Consent” is by far the biggest issue in this action. So much so that it was agreed that, as the Defendants shoulder the burden of proof on this issue, they should call their witnesses first. The Defendants also counterclaim for moneys due to them for goods sold and delivered. The Claimant now admits a debt of 598,000 Euros, although that is a comparatively recent development.
5. Although consent is the key to unlocking much of this dispute, it is not quite the binary issue which it would appear from the foregoing. Thus there is an issue as to the scope of the consent. The Claimant says that even if there was some form of limited consent to allow the Defendants to sell to franchisees, it did not go as far as to sanction what the Defendants ultimately did. Likewise the Defendants say that even if they did not have the benefit of Mr Fearn’s consent, then nonetheless there are specific defects in most but not all of the causes of action pleaded against them.
6. With the above introduction, I must return in more detail to the facts of the case.

Factual background

Autopaint International

7. The Claimant, Gary Fearn, is the owner of an unincorporated business which trades under the name AUTOPAINT INTERNATIONAL in the supply of paint and associated products for use on cars. It is sometimes referred to in the documents as "API".

De Beer and Anglo Dutch

8. De Beer is a manufacturer of automotive paint and associated products. De Beer is based in Lelystad in the Netherlands. Anglo-Dutch is De Beer's distributor in the United Kingdom. From 1988 the Claimant began to buy paint and ancillary products from De Beer for sale under his AUTOPAINT brand.
9. Mr Welch (the Third Defendant) was Technical and Commercial Manager of De Beer from 1995. Mr Jongsma (the Fourth Defendant) joined De Beer as Export Manager in 1996 and from 1998 to December 2005 was Sales and Marketing Director. Mr Van Der Woude (the Fifth Defendant) joined De Beer in 1996 as Commercial Director and was Managing Director of De Beer from January 1988 until December 2005. He was also a director of Anglo Dutch until December 2005. Mr Wemmers (the Sixth Defendant) trained as a Public Accountant and joined De Beer in 1998 as Financial Controller. He is now Managing Director of De Beer and a director of Anglo Dutch.
10. The Defendants admit for the purposes of this action that to the extent that any Defendant is liable for any of the pleaded wrongs, they are all jointly and severally liable.

The main Anglo-Dutch and De Beer witnesses

11. This is a case where an assessment of the credibility of witnesses is, unfortunately, of considerable importance. The documentary record is far from complete. On the critical issue of consent and its scope the Defendants' case as it was ultimately put forward was based on an oral agreement as to which there is an acute conflict. Many of the agreements entered into by Mr Fearn in the course of business were oral.
12. Mr Jongsma gave evidence by video link from Japan where he was present on business. He did not strike me as an entirely frank witness, being more concerned to find out where questions were going before committing himself to an answer. His ability to recollect events in the critical months seemed to me to be somewhat selective. Although this may be something of a lawyer's criticism, he demonstrated that he had difficulty in distinguishing between a discussion and an agreement. Thus he repeatedly confirmed as accurate the statement in his witness statement that there had been an agreement concerning direct sales at the Schiphol meeting when in fact what he meant was that that this had been discussed. Moreover he signed the Statements of Truth in relation to pleadings which alleged an agreement made at a face-to-face meeting in Liverpool (see below) when his evidence was that the agreement was made by telephone between himself and Mr Fearn at a later date. I have therefore to approach his evidence with some caution.
13. Mr Welch seemed to me to be doing his best to tell the truth in the witness box. However, his witness statement gave a detailed account of the critical

agreement having been made in Liverpool, when he accepted in cross examination that he had no real recollection of the content of the meeting, except that there was heated disagreement.

14. No particular criticism was made of the Defendants' other witnesses, Mr Van Der Woude and Mr Wemmers. Whilst it seemed to me that they were anxious to defend their positions (particularly on the issue of what their precise intentions were) I have no doubt that they were giving their evidence broadly fairly.

Mr Fearn

15. Mr Fearn was not a wholly satisfactory witness. Clearly, this action is of great importance to him as a sole trader, and he feels very strongly that he has been wronged by the Defendants. I fear that this led him to overstatement and, on occasions, misstatement in the course of his evidence. On some parts of his evidence, what I believe occurred was that, where events were not entirely clear in his mind, he persuaded himself that the events could not have been as suggested by the Defendants. On other parts it is not possible to be so charitable.
16. It was also suggested by Mr Moody-Stuart, who appeared for all Defendants, that Mr Fearn had a tendency to place all the ills that had befallen him at the door of the Defendants without recognising his own part in his downfall. I think there is some force in this: but the criticism does not mean that I should conclude that the Defendants were not in fact responsible in law for some or all of the damage which Mr Fearn's business has sustained. That depends on the evidence.
17. I must mention Mr Fearn's evidence in relation to the Counterclaim. In his first and only witness statement prepared for this action he did not accept that he owed the Defendants any money, and contended that he had been a prompt payer. This was plainly not the case, as his eventual acceptance of the debt claimed by the counterclaim demonstrated. He claimed that he had given this evidence on the strength of an accountants' report (later accepted to be wrong and based on an incomplete documentary record provided by Mr Fearn). That will not do. Given that there had been several discussions and arrangements over the years about managing the overdue debt, the accountants' report must have come as a surprise to Mr Fearn. The accountant claimed to have uncovered an overpayment of £390,000 against invoices in 1996: but given that Autopaint's gross profit in 1996 was only £300,000, this is something which, if it had occurred, would have been picked up at the time or subsequently. Mr Fearn had seized on the accountants' report to put his case in a better light.

Autopaint gets into debt

18. From about 2000 the Claimant was regularly indebted to De Beer in amounts in excess of his permitted credit terms.
19. From January 2003 De Beer took the Claimant off “open account” status. This meant that orders would only be shipped by De Beer when they had been paid for. At this stage the Claimant owed De Beer some €700,000. The debt remained at that level over 2003 against a background of falling turnover.
20. The high level of debt was of concern to De Beer. By March of 2004 Mr Jongsma’s evidence was that if De Beer wanted to recover this debt they would have to take “alternative action”. Mr Jongsma set out a number of options in an email dated 3rd March 2004 to Mr Welch. It appears from this email that De Beer had rejected the idea of taking over Autopaint as a business. De Beer was concerned about the consequences of Autopaint going out of business, and what proportion of Autopaint sales it would be able to retain through other channels. One particular option considered was whether De Beer could “*take him down with the money he owes us. Supply his franchise stores direct with API or Octoral direct. [T]ell all our distributors that they should chase the AI business as API will be out of business soon. How much business will we regain in this respect?*” The email continued “*Are we going to act, send him a letter and take him down and take over his sales, not his business?*”.

Meeting of 11th March 2004: Schiphol

21. A meeting was held at Schiphol Airport on 11th March 2004 to discuss the level of debt. It was attended by Mr Jongsma and Mr Welch for De Beer and Mr Fearn. A payment plan was tabled under which the Claimant would pay €20,000 per week to De Beer. Half that sum would be used to reduce the overdue account. The other half would go towards payment for new orders. Mr Fearn’s evidence was that he would do his best to make these payments. Whether there was a firm agreement to this effect is not entirely clear – on balance I think there was - but nothing turns on that as it is now accepted that these payments were made.
22. It was also *suggested* at the meeting that if Autopaint did not stick to the payment plan then De Beer would have to implement a different scheme in which they sold direct to the franchisees (“the direct sales alternative”). De Beer would charge a marked-up price as compared with the price at which the goods were sold to Autopaint. The difference would be used to discharge Autopaint’s debt to De Beer, subject to a small handling charge.
23. Mr Jongsma reported this meeting to his colleagues, including Messrs. Van Der Woude, Wemmers and Welch in an email dated 11th March, in terms which suggested that the direct sales alternative had been agreed. Indeed this was how he put it in his witness statement – plainly suggesting that it had been agreed that a failure to pay would trigger the implementation of the direct sales alternative without more. He instructed his colleagues to prepare for what he regarded as the inevitable by making preparations for direct sales to franchisees.

24. Mr Fearn's account of this meeting is that the direct sales alternative was indeed suggested (with the caveat that Autopaint would be the first port of call), but never agreed to as an immediate consequence of failure to meet the payment schedule. He said (and I accept) that he told De Beer that this was unacceptable, not least because he would look ridiculous to his franchisees. He said matters got so heated between him and Mr Jongsma that Mr Welch attempted to butt in and try to calm things down. The De Beer representatives could not have left the meeting believing that they could deal with his franchisees directly.
25. Mr Fearn is largely supported in his account of what was agreed at the meeting by Mr Welch. Mr Welch had not dealt with the meeting of 11th March in his first witness statement. In his second witness statement he confirms that matters got very heated when Mr Jongsma suggested the direct sales alternative and he intervened to try and calm the situation down. He confirms that Mr Fearn said that this would send the wrong message to his employees and dealers. In cross examination Mr Welch confirmed that, so far as he was concerned the direct sales alternative was not agreed at the meeting of 11th March – indeed he said nothing was agreed at that meeting.
26. There was no agreement at the 11th March meeting to allow direct sales to franchisees in the event of a failure to meet the payment plan.

Meeting of 24th May 2004: Liverpool

27. A further meeting was held in Liverpool on 24th May 2004 attended by Messrs Fearn, Welch and Jongsma as before. Although it was originally pleaded by the Defendants that this was the meeting at which it was agreed that De Beer could go direct to the franchisees, that suggestion was abandoned in favour of the suggestion that the agreement was made in a telephone conversation between Mr Fearn and Mr Jongsma at the end of May. I permitted an amendment to the Defence in the course of the trial to allow this alternative version of events to be advanced.
28. Mr Welch gave a detailed account in his witness statement as to what was agreed at this meeting. When he was cross examined about it he said he was in such pain from gout at the meeting that he could not really remember anything about its content. All he could remember was that it was similar to the Schiphol meeting - as Mr Lissack suggested to him and he accepted - it was another round of disagreement between Mr Jongsma and Mr Fearn. It is unfortunate that he should have put his signature to the original account. He must have appreciated the importance of his evidence to the Defendants' case. Although his painful condition could have explained a lack of recollection of what occurred at the meeting, it does not explain how he came to give a detailed account of a meeting of which he has no detailed memory.

Telephone conversation at the end of May

29. Mr Jongsma says that towards the end of May 2004 there was a telephone conversation with Mr Fearn. In his witness statement he says that Mr Fearn agreed to pay 35,000 Euros to release an order, and in addition eight payments of 50,000 Euros per week starting on 17th June 2004. He says it was also agreed that where Autopaint could not supply his dealers with the required products, De Beer would supply them from Doncaster. De Beer would supply products to Autopaint to the full value received against the 50,000 Euros

payments – not just half for goods and half to reduce the debt as suggested at the March meeting.

30. Here there is a straight conflict of evidence between Mr Jongsma and Mr Fearn. Mr Fearn categorically and repeatedly denied having reached any such agreement. Mr Jongsma's account is consistent with an email or draft email bearing a date of 1st June 2004 to be sent to Mr Fearn and due to be copied to Mr Welch as well. There is no independent evidence of this email having been sent. It was not found on Mr Welch's computer and Mr Fearn denies receiving it. Despite Mr Jongsma's evidence to the contrary I find that it was not sent. Other emails from Mr Jongsma which are in evidence have the usual date and time of sending on the header. Although emails were not without precedent, the normal method of confirming oral agreement with Mr Fearn was by fax.
31. The fact that the 1st June 2004 email was not sent does not of course resolve the question of whether the email accurately records an agreement made on the telephone between Mr Jongsma and Mr Fearn. It was not suggested to Mr Jongsma that the email was a litigation-inspired forgery: so the issue is whether it accurately records what was said. The email ends with the suggestion that, if anything is inaccurately recorded, Mr Fearn should say so, thus at least implicitly recognising that there may have been a misunderstanding. As I have said, Mr Fearn strenuously denies that there was any such agreement: but I must be cautious about accepting that evidence for the reasons I have given. Mr Jongsma, whose somewhat vague grasp on the difference between discussion and agreement I have already noted, says that there was. Again I cannot simply prefer his evidence without more. Both sides look to subsequent events to support their version, or undermine that of their adversary. To these events I now turn.

Events after June 1 2004

32. There was no immediate implementation of direct sales by De Beer to franchisees following the alleged May agreement. The first shipment occurred on about 30th June. This despite the fact that in March De Beer had already given instructions to put in place the machinery for direct sales. There is no record of an agreement having been communicated to other De Beer executives at that time.
33. On 28th May Mr Welch emailed Mr Jongsma saying that he had been contacted by numerous Autopaint shops and franchisees who were asking what is happening and had run out of fast moving tinters. He said that

“there is no way Gary can pay us 50,000 a week with such low sales volumes”.

This suggests that he had heard at least of a proposal that Gary Fearn should pay €50,000 a week. He added that he had no idea what was going on. On the same day Mr Welch put in motion the mailing of price lists to all known franchisees in UK and Ireland. It was proposed that each would be contacted by telephone in due course. He then said this:

“If for any reason API stick to their agreement then good, all we do is to supply Liverpool from Doncaster”.

The combined effect of these two emails is that Mr Welch thought that the agreement with Autopaint to allow direct sales to franchisees was contingent on default in a payment plan, and that at this date he thought the payments requested were 50,000 Euros a week.

34. Also at around this time Mr Welch made a list of contacts he had made and those he had not. Two were identified as “too close to Gary will call him later”. Mr Lissack draws attention to this as suggesting that, if an agreement was in place allowing such contact, then there was no need for such restraint.
35. Autopaint did pay 35,000 Euros on June 1 2004, and 50,000 Euros on 17th June, consistently with the alleged agreement set out in the email, at least as to a payment schedule.
36. On 8th July 2004 Mr Jongsma emailed his colleagues including Messrs Welch, Wemmers and Van Der Woude. He gave directions that “the full order for Autopaints (150 000 Euros)” be filled, 100,000 Euros worth were to be sent to Autopaint and the remainder to Anglo-Dutch at Doncaster

“because Chris will start contacting all API franchisees on Monday to supply them from Doncaster. So we need to build up some stock in Doncaster”.

This suggests that the Defendants had decided to supply the franchisees independently of any failure to pay by Autopaint.

37. On Monday 12th July 2004 the franchisees were sent a fax promising a price list and order form and including the following:

“Please order your products from Autopaints Liverpool as normal, if they send you short supply then please contact our distribution centre in Doncaster to top up your order”.

The fax gave contact details for the Anglo-Dutch office in Doncaster. This is supportive of any agreement being limited to shortfalls in the ability of Autopaint to supply.

The October 1st meeting in Liverpool and the credit notes

38. By about the last week in September it appears that Autopaint were running very short of stock. On 1st October 2004 there was a meeting in Liverpool attended by Mr Wemmers, Mr Jongsma and Mr Fearn. Mr Wemmers says that at this meeting he discussed the shipments being made by Anglo-Dutch to the franchisees and the method of calculation of the credits. He said that credit notes would be sent on a monthly basis going forward. The first credit note dated 30th September 2004 was sent shortly after this meeting and covered the 3 month period July to September. It was suggested to Mr Wemmers that he had got the date of this meeting wrong, and that he intended to refer to a meeting in 2005, but I accept his evidence, as it is supported by documentary evidence, despite Mr Fearn’s denial. Monthly credit notes were sent thereafter until July 2005.
39. Mr Fearn accepts that the credit notes were received by his company, but says that he was not aware of this at the time. I am unable to accept this evidence. The level of debt between his business and De Beer must have been

very high, if not the highest item on Mr Fearn's agenda at the time. The first credit note of 28,500 Euros is not likely to have passed unnoticed. In any case he knew about the credit notes from the meeting in Liverpool in October..

Sales of commodity products

40. It appears that during September/October 2004 Mr Welch had been contacting Autopaint franchisees and offering them supplies of "Autopaints ancillary products". These are products which are not colour specific, unlike tints which are. In the main Autopaint had not purchased these ancillary or commodity products from De Beer for some time. Although the evidence does not permit an assessment of the exact proportions, it appears that these products were being supplied to franchisees by other suppliers direct, or by Autopaint using product sourced from HMG, another supplier. The products were being offered in some cases with a special 5% discount deal. Mr Welch's justification for doing this was that he had ascertained that the franchisees were going to other paint suppliers for these products, and that it was therefore in Autopaint's interests that he should retain these sales under the Autopaint brand. Mr Fearn's claims that the result was to undercut his prices and therefore put direct competitive pressure on his business.

Request for legal advice from Valspar

41. On 24th December 2004 Mr Van Der Woude sought legal advice from in-house counsel of De Beer's parent company. It appears that De Beer were contemplating selling Autopaint brand generally in the UK, not just to franchisees "to put pressure on" Gary Fearn's. In addition to asking for a check on registration of the brand and design, the request goes on:

"we are currently also selling under Autopaint label to Autopaint franchise stores in the UK who have contacted us because they cannot get supplies thru the central organisation. Mr Fearn's is aware that we do this and has not raised objections."

Although not put in terms of an agreement, this again supports the view that the Defendants knew that their ability to sell was limited to shortfall in Autopaint's ability to supply.

February 2005 meeting

42. There was a further meeting in February 2005, again involving Mr Wemmers, Mr Jongsma and Mr Fearn's. The meeting was followed by a fax dated 9th February 2005 from Mr Jongsma and Mr Wemmers to Mr Fearn's which Mr Fearn's accepts he received. This fax attempts something of a potted history of the dealings between Autopaint and De Beer over the debt. The fax contains this paragraph:

"In order to increase the speed in paying off the overdue amount we agreed in 2004 that De Beer Lakfabrieken B.V. can sell Autopaint International brand directly to the agents (franchise shops) that are not owned by Autopaint International, the Maltese Autopaint distributor and other distributors. The extra margin that De Beer Lakfabrieken B.V. makes on this sale minus 10% for handling charges will be used to decrease the overdue amount and will continue until all outstanding invoices are paid for. This together with the agreed

royalty of 1/2% over the sales of the Autopaint brand from De Beer Lakfabrieken B.V. to Australia has reduced the overdue amount in 2004 with €45,000”

43. On receipt of this fax Mr Fearn claims to have sent a reply fax asking, as a single question “What is this all about?”. He claims to have tried to contact De Beer repeatedly. So far as this is concerned, Mr Fearn’s telephone records do not support him. Mr Jongsma said he received no reply and assumed that Mr Fearn agreed with him. I do not accept that Mr Fearn responded in this way. Equally I do not accept that the fax accurately records the detail of all the agreements.
44. The fax record of the 1st February 2005 meeting goes further than the alleged agreement of May 2004. There is now no limitation to “products you cannot supply from Doncaster”. But other evidence suggests that the Defendants were observing this restriction, as I describe below.

The Birmingham meeting

45. At the end of March 2005 Anglo-Dutch sent out a letter accompanied by a price list and dummy order form to all Autopaint International franchisees. It began

“For the last six months, we have successfully supplied to you the Autopaint International Mixing Colours when the supplies from API Liverpool were not possible”.

This again supports the existence of a limitation on the right to supply to shortfall in Autopaint’s ability to supply. It went on to explain that it intended to hold a seminar in Birmingham to discuss legislative developments in 2007. However it concluded:

“Please be kind enough to study the enclosed price list for these products.

If you are interested in purchasing these items from ADPCC please could you fill in the quantities on the dummy order form that you would order in one Month, this will give us some indication of the size of stock holding needed to supply you”.

46. On 22nd April 2005, Mr Welch emailed Mr Jongsma in terms which Mr Lissack for Autopaint suggests are significant. On this day he had confirmed the date for the Birmingham seminar as 6th June. He asked:

1/ When can we announce that we have no longer dealings with API Liverpool and WHAT exactly do we say?

2/ When can I ask each franchisee to now purchase all paint products from ADPCC?

3/ When will the production of commodity products be finished and shipped to ADPCC?

4/ Estimated delivery date for the commodity products at ADPCC

5/ *The type of label to be placed on the commodity product (Valspar)*

6/ *If Blank I have a bigger problem than I first believed, for a short period I could convince them but this will effect sales and they may be happier to continue purchasing commodity products from Liverpool, this will then make it harder to make the break away from Gary and give him the opportunity to switch them to M&M*

The reference to Valspar is the brand of De Beer's parent company. M&M were a rival paint supplier to De Beer. Again the terms of this request suggest that the Defendants did not regard themselves as free of the restriction to sell only when Autopaint could not supply.

47. The invitation to the Birmingham meeting was issued on 4th May 2005 and the meeting took place as planned on 6th June. The notes for the presentation and the PowerPoint display, in addition to covering the impact of the impending legislation, read as a sales pitch to the franchisees to commit to buy their paint and commodity products from ADPCC. Examples are:

"How can ADPCC help?"

With your commitment to us now we can make plans to introduce the products you will need during the run up to 2007 and beyond. Only with your joint purchasing power on all products....will make this a possibility for everyone to benefit.

The price structure has been changed on all of these products to make the full product portfolio of interest to you.

EVERYONE OF YOU WILL HAVE THE SAME PRICE

EVERYONE OF YOU WILL BE ALLEGABLE (SIC) FOR AN ANNUAL INDIVIDUAL VOLUME RELATED BONUS STRUCTURE

...

In order to help you ... WE NEED:

- *Your commitment to ADPCC*
- *Your purchasing power*
- *Your acceptance to change*
- *Your willingness to grow with us*

In return ADPCC will:

- *Support you in price*
- *Support you in technical back up*

(etc)"

48. Mr Jongsma and Mr Welch attended the meeting. Mr Fearn's was aware of the meeting but did not attend. Mr Jongsma made a presentation in which he said that there were financial difficulties between De Beer and Autopaint and that De Beer was not supplying or not in a supply line with Autopaint at that time. Neither he nor Mr Welch said at this meeting that the franchisees could only obtain supplies from ADPCC if they had been unable to obtain those same supplies from Autopaint. The prices of tinters that were offered at the meeting were more expensive than Autopaint's product, however.
49. The letter before action was sent on 27th June 2005. It is not in dispute that ADPCC and De Beer ceased any use of the Autopaint mark shortly thereafter. On 6th July 2005 Autopaint sent a letter to the franchisees. Mr Fearn's stated in the letter that "recently I have not been in a position to provide you with Autopaint products and now these are not available from De Beer or Anglo Dutch either". The letter went on to make it clear that he had at no stage authorised the communications from Anglo-Dutch/De Beer about the meeting/conference, the newsletter or proposed training and that he had no trading connection with Anglo-Dutch. It is noticeable that he did not say that previous supplies of paint to franchisees (when he was unable to supply) were made without his consent.
50. Notwithstanding the letter it appears that most if not all of the franchisees chose to buy non-Autopaint branded products from Anglo-Dutch/De Beer and not to take Autopaint up on their offer to resume supply.

Consent

51. The critical question is whether the parties agreed by means of a telephone conversation towards the end of May 2004 that De Beer could sell directly to franchisees where the product could not be obtained from Autopaint.
52. The principal matters advanced by Mr Moody-Stuart for the Defendants are:
 - (a) there is a contemporaneous record of agreement in the form of the draft email of 1st June, even if it was not sent to the Claimant;
 - (b) Autopaint did make the payment of €35,000 and started making the weekly payments of €50,000 referred to in the agreement;
 - (c) the discussion with Mr Fearn's at the meeting of 1st October at which the method of calculating the credits was discussed shows he was aware of what was being done, and hence the agreement;
 - (d) the failure to comment on the credit notes, likewise;
 - (e) the failure to comment on the fax recording the meeting in February 2005, likewise;
 - (f) that there was advantage for Autopaint in agreeing to this version of the direct sales proposal: all Autopaint's payments would go towards stock, rather than only half as under the March proposal. But in return Anglo-Dutch/De Beer did not have to wait for a default before proceeding to make direct sales.
53. Mr Lissack QC and Mr Fernando for Mr Fearn's argue:

- (a) that the agreement alleged would be commercial suicide for Autopaint;
 - (b) the pleaded case about the agreement, although supported by a Statement of Truth, is abandoned by amendment. Why, asks Mr Lissack forensically was the agreement now relied on not mentioned to De Beer's solicitors before?
 - (c) there was no confirmatory fax: it was Mr Jongsma's usual procedure to confirm important agreement by this method;
 - (d) there is no explanation of why Mr Fearn's would have changed his position only a few days after a heated exchange in which he refused to countenance direct supply;
 - (e) the uncertainties about when the agreement was struck (Mr Jongsma's evidence wavered on this);
 - (f) the delay before the direct supply was started: if there was an agreement in place by June 1st, why did De Beer/Anglo-Dutch wait at least a further month before making supplies when all the arrangements had been in place – something for which Mr Jongsma had no explanation;
 - (g) the fact that De Beer/Anglo-Dutch were apparently still nervous about letting Gary Fearn's know what they were doing even in July 2004: the "too close to Gary" comment and the fact that they did not check with Autopaint before supplying a franchisee as to whether Autopaint could supply.
54. Despite the considerable force of many of the forensic points advanced by Mr Lissack, I conclude that Mr Jongsma's account is more credible than that of Mr Fearn's and is the one which can be more readily reconciled with the documents. Accordingly I find there was an agreement reached orally at the end of May 2004 between Mr Fearn's on behalf of Autopaint and Mr Jongsma for De Beer/Anglo-Dutch that De Beer could sell direct to franchisees where Autopaint was unable to supply the product. Such an arrangement, contingent as it was on Autopaint being unable to supply, did make commercial sense. Such funds as Autopaint was able to send to De Beer would be applied in their entirety to stock rather than only as to 50%. That would explain why Mr Fearn's would have been persuaded to change his position from that which he made clear at the earlier meetings. The contemporaneous material – the draft email, the credit notes and the February 2005 fax – points heavily in favour of Mr Jongsma's account unless some explanation can be found for them.
55. I am of course troubled by Mr Jongsma's tendency, pointed out above, to confuse discussion and agreement and I have carefully considered whether that could explain the draft email and the 2005 fax. In other words was Mr Jongsma merely inaccurately recording an agreement in much the same way as he recorded the March 2004 discussion in his email to his colleagues and his witness statement as if direct sales had been agreed? In favour of this view is the communication from Mr Van Der Woude dated 24th December 2004, which describes the sales as having place "without objection" rather than with express agreement. In the end I have rejected that theory. The preponderance of evidence is in favour of the existence of a concluded agreement.

Did the agreement cover what the Defendants did?

56. In my view the answer to this question is that the Defendants went further than the agreement permitted them to do. The agreement only made commercial sense if it was limited to sales which Autopaint was itself unable to make. In particular it did not in my judgment extend to sales of any product which the franchisee was able to obtain from Autopaint. It is clear, for example, that De Beer regarded itself as entitled to sell commodity products where the product was being obtained from a third party paint supplier. That fact alone did not justify the sale if Autopaint were able to supply (from any source). The prices in such circumstances were not based on Autopaint's prices. Moreover discounted bonus schemes on such products were being used to create an incentive for franchisees to buy their products from De Beer/Anglo-Dutch. This was a contradiction of what the agreement was intended to achieve, not within it.
57. The agreement certainly did not authorise De Beer/Anglo-Dutch to hold a meeting at which the long term commitment of the franchisees to purchasing from them as opposed to Autopaint was sought, through the incentive of an annual bonus structure. Notwithstanding the 12th July 2004 fax, the impression given at the meeting in June 2005 was that franchisees were free to choose to obtain their supplies of Autopaint branded products from De Beer/Anglo-Dutch over the long term. They would not have received the impression that the ability to obtain these supplies was contingent on Autopaint's inability to supply.

Trade Mark Infringement

58. The Claimant is the registered proprietor of UK Registered Trade Mark Nos. 2,233,338 and 2,233,339 being respectively the words AUTOPAINT INTERNATIONAL and a device mark also including those words. It is common ground that, absent consent, the Defendants have committed acts of trade mark infringement, either directly or by virtue of the law of joint tortfeasance.
59. I have concluded that the consent which the Defendants have proved does not go far enough to protect all their actions. In my judgment, and by way of example, the unauthorised selling of ancillary products by reference to the Autopaint brand was an infringement, as was offering to supply the full range of products by reference to the Autopaint mark in June 2005. The evidence does not go into sufficient detail to allow me to draw precisely the line between authorised and unauthorised uses of the mark. I do not rule out the possibility that some sales of paints and tinters were unauthorised on the grounds that it is not established that the Claimant could not have sold them. Those are matters which will have to be left over to an enquiry.

Passing off

Law

60. There is no dispute as to the law which applies. It is clear from the judgment of Lord Oliver in the *Jif Lemon* case that the Claimant must establish three things:
- (a) that it has established a goodwill and reputation in connection with the goods or services in issue;

- (b) that the acts of the Defendants complained of constitute a misrepresentation of some connection in the course of trade between the parties or their goods or services and that as a result a significant proportion of the public has been or is likely to be deceived into thinking such a connection exists; and
- (c) that as a result of that deception the Claimant has suffered damage or is likely to.

61. As to joint tortfeasance, it is well established (and not disputed) that merely facilitating the acts of others is not enough.

The 4 species of passing off alleged

- 62. Four different species of passing off are alleged and call for separate treatment. To start with, I set out the allegations and give them a label.
- 63. Firstly there is the supply without consent by the Defendants to franchisees of Autopaint branded goods. I call this “standard passing off”.
- 64. Secondly it is suggested that the Defendants, in sending out communications such as the invitation to the Birmingham conference, and by presentation at the conference represented that they were connected or associated with and authorised to act on behalf of the Claimant, when that was not the fact. I call this “false representation of status”.
- 65. Thirdly it is said that in response to orders for Autopaint branded goods, the Defendants supplied their own brand OCTORAL goods without informing customers that this is what they were doing. I call this “switch selling to the trade”.
- 66. Finally it is alleged that the onward sale to the public by franchisees of Octoral and De Beer goods supplied to franchisees by the Defendants amounts to passing off on the basis of joint tortfeasance – “switch selling to the public”.
- 67. A case of passing off by supplying instruments of deception was not, in the end, seriously pressed and I need not consider it further.

Standard passing off

- 68. The Defence to this is consent, along the same lines as the trade mark infringement case. To the extent that this defence fails, it is accepted that the sales from July 2004 at least would amount to actionable passing off. This will cover the ancillary products. It will also cover the consequences of the general offer to supply at and in connection with the Birmingham conference when it was not made clear that the Defendants’ only licence to sell was where the relevant product was not available from Autopaint.

False representation as to status

- 69. I have reviewed the materials said to give rise to this species of passing off, including the invitation to the conference and what was said and done there. It is not established that anything that the Defendants did there was such as to lead to any false inference of association of the kind pleaded. Of course I have held that the impression was given that the Defendants had a wider authority

to sell than that which they had: but that is not the gravamen of this part of the pleaded case: and if it were it would not add anything significant to the allegation that unauthorised sales were in fact offered and made.

Switch selling to the trade

70. The particular sale relied on to establish this class of passing off is a sale to Mr John Fearn of Car Paint (UK) in May 2005. Mr John Fearn's evidence on this topic was not, I am afraid to say, very coherent. In cross-examination he accepted that he knew before the tins arrived that they would be De Beer or Octoral branded: but he said the contrary in re-examination. I am afraid he was trying to be helpful both to cross-examiner and to re-examiner, when the truth is he had no clear recollection of what happened. On the other hand Mr Evans gave evidence that when he placed an order for Autopaint he would receive a pallet of paint, some of which was branded De Beer/Octoral. He assumed this was being done with the consent of Mr Fearn.
71. In my judgment the Defendants did effect some switch supplying of De Beer and Octoral in response to orders for Autopaint. This amounted to passing off.

Switch selling to the public

72. This species is relied upon in respect of De Beer/Octoral branded product which is decanted into Autopaint tins and sold by franchisees as Autopaint. It is said that the Defendants are liable as joint tortfeasors with the franchisees. The fact of re-packaging De Beer/Octoral product in this way is admitted. Two matters are relied on here by way of defence: (a) it is said that this is something the franchisees were entitled to do as there were no restrictions on their right to source paint from elsewhere: so there is no tort and (b) that the Defendants did no more than facilitate this: so even if there is a tort it is not a joint one.
73. To deal with the first point I need to explain a little more about Autopaint's arrangements with their franchisees. Mr Fearn was not able to produce a single signed franchise agreement. Most agents did not have a written agreement, a fact commented on adversely in a 1992 review by management consultants Stoy Hayward which Mr Fearn commissioned. The report said:

"The agents are not supposed to stock products outside of the Autopaint range, though in practice most do to some extent, some far more than others"

Mr Fearn's evidence was that dealers were not allowed to stock products which he was able to supply. Mr Evans of Autopaint Telford said that he felt free to buy Alcea paints when he was not able to obtain supplies from the Claimant: although Mr Fearn suggested this was something of a special case.

74. The key question on this branch of the case is not what the franchisees did or believed themselves entitled to do, but what the public believed on being sold cans of Autopaint branded product. Although the evidence is not extensive, I am satisfied that members of the public purchasing tins of Autopaint branded product are led to believe that the contents are a paint authorised by the Claimant, rather than one where the franchisee is free to choose the contents independently. Where the contents have been switched by the Defendants to De Beer/Octoral without the Claimant's consent, there is passing off.

75. I am also satisfied that the Defendants went beyond mere facilitation of the acts of the distributors. They insisted that the dealers sell the product as Autopaint: not leaving it up to them to decide. They did not want Octoral or De Beer branded products going through the Autopaint network, as they were presented to the market as differing in quality and higher price.

Malicious Falsehood

76. The malicious falsehood relied upon is a statement at the Birmingham conference. It has two limbs:
- (a) that the Claimant was unable to supply Autopaint products;
 - (b) that from 6th June any Autopaint products would have to be purchased from De Beer and Anglo-Dutch.
77. There is no satisfactory evidence that these statements were made. Certainly it was said that the supply line from De Beer was broken. Certainly dealers were being invited to obtain their supplies in future from Anglo-Dutch and De Beer. But what was missing in my judgment was any prohibition on obtaining future supplies from Autopaint, for example of paint from an alternative manufacturer approved by Autopaint. There was also no statement that supplies would have to be obtained from Anglo-Dutch.
78. Mr Lissack QC relies on the email of 22nd April 2005 from Mr Welch quoted above as being the best evidence of what was said at the meeting. I have of course taken it into account, but it can go no further than evidence of a desire expressed by Mr Welch some 6 weeks before the conference to make statements which went further. In the end the effect of the evidence, including witnesses called by the Claimant, is that the pleaded malicious falsehood was not published.

Infringement of copyright

79. There is only one point which arises for decision under this heading: does the design and logo appearing on the Autopaint tins (the copyright in which it is accepted belongs to the Claimant) enjoy full or limited (i.e. 15 year) copyright protection? If the copyright protection is limited it is by virtue of Section 52 of the Copyright Designs and Patents Act 1988 (“CDPA 1988”) as applied by Schedule 1 paragraph 20 of the transitional provisions. It is common ground that this brings in the application of section 10 of the Copyright Act 1956 as well.
80. Section 52 of the CDPA (as did section of the 1956 Act) operates to cut down copyright protection where the copyright owner has made by an industrial process and marketed articles falling to be treated as copies of the work, or has consented to such acts. But for certain articles there is an exception: in particular, by virtue of rules, “printed matter primarily of a literary or artistic character”.
81. There is no dispute that the selling of tins with Autopaint’s consent from about 1988 bearing the printed labels satisfies the “industrial process” and “marketing” requirements. These were initially stuck-on labels, with lithographed tins coming later. There was also no dispute that a label as such constitutes printed matter. The dispute is over whether the limitation on

copyright term should apply because what was marketed was a tin, not just printed matter. In other words was that article “printed matter primarily of a literary or artistic character”.

82. I was referred to a case on what appear to be corresponding Australian provisions: *RA and A Bailey v Boccaccio and Pacific Wine Co Pty. Ltd.* 6 IPR 279, a decision of Young J in the Supreme Court of New South Wales. Young J approached the case on the basis of the construction of the word “label” which appeared in the rule, and by reference to cases where it had been necessary to construe that term in other contexts. The cases cited presented, not surprisingly, an inconsistent view of what was meant by a label. The learned judge does not appear to have asked the question whether the article to which the label was applied remained printed matter of a primarily literary or artistic character.
83. Section 52 of the CDPA 1988 and its predecessor section, section 10 of the Copyright Act 1956 are concerned with the overlap of copyright and registered design protection. Literary and artistic printed matter enjoy protection under the law of copyright, and their exclusion from design protection is presumably on the basis that additional protection is not necessary. But difficulties arise because much surface decoration on articles of a wide variety of design is or can be applied by printing. A printed artistic design on the surface of a teapot should be registrable. If one gives the provision a wide construction so as to extend copyright protection, one is cutting down the scope for registering designs beyond what I would consider to be reasonable
84. In my judgment the limited period of copyright protection applies. The articles in question are paint tins, not printed matter of a primarily literary or artistic character.

Breach of contract – Tin Agreement

85. The Claimant contends that in late 1998 he made an agreement with De Beer governing the manufacture of tins in the Autopaint get-up. He contends that this agreement (“the tin agreement”) was made orally over the telephone. It is said to have been an express term that tins were to be supplied exclusively to Autopaint and an implied term that De Beer would not have tins or labels made by any manufacturer not approved by the Claimant.
86. The Defendants deny the existence of both terms. They say that from 1995 De Beer was given permission to arrange for the manufacture of tins but there was no restriction on change of manufacturer.
87. I am satisfied that the permission granted by Mr Fearn to supply paint in these branded tins was expressly or by the most obvious implication limited to supply to the Claimant. I am however far from being persuaded that there was an implied term that manufacture had to be approved. Despite the points urged in Mr Lissack’s written opening, such a term could only be implied if it is necessary. It does not seem to me to be necessary that Mr Fearn should approve a change of manufacturer.

Breach of Contract – Australia

88. In 1998 De Beer entered into an oral agreement with the Claimant to allow De Beer to supply products under the brand AUTOPAINT to Australia for sale by Issa Autopaints. There is an issue as to the terms of that agreement, in particular the royalty to be paid by De Beer to the Claimant under it. The evidence relating to what the royalty rate was agreed to be is as follows.
89. Some time prior to November 1998 at a meeting in Lelystad, Mr Jongsma and Mr Fearn discussed the royalty. De Beer offered 0.5%. In late October/early November 1998 Mr Welch had a meeting with the Claimant in which Mr Fearn said he would like to discuss the commission. So much is recorded in a fax from Mr Jongsma to Mr Fearn dated 3 November 1998.
90. A De Beer invoice (in fact a credit note) dated 13th April 1999 credits Autopaint with 7089 NLG and carries the endorsement "Concerning ISSA Autopaints 3% of turnover NLG 236.303".
91. On 10th April 2000 Mr Jongsma sent a faxed agenda to Gary Fearn for a meeting in Holland the following week, including as one item "Autopaint Australia". Before the meeting Mr Jongsma requested from Mr Wemmers a summary of what was paid and due to Autopaint under the Australia agreement, and was told what was due for 1999, calculated at 3% of turnover. Mr Wemmers' evidence was that the figure of 3% came from Mr Jongsma. The meeting appears to have taken place on 20th April, and the commission/royalty on sales to Australia was discussed. Notes of the meeting show that Autopaint was to receive 7430 NLG, which was calculated as 3% of a 1999 turnover of 297,687.65 NLG. After the meeting it was confirmed that a credit note would be sent for that sum, as it was on 30th April, again recording the rate as 3%.
92. Later documents, including the February 2005 fax to which I have already referred, show the royalty being set at 0.5%.
93. It is not suggested by the Defendants that a change in royalty was ever agreed. Mr Jongsma maintained in cross-examination he always believed that the rate of royalty was 0.5%. He was, however, unsure as to when and how it was agreed. He had no explanation for how Mr Wemmers came to be told that the rate was 3%.
94. In my judgment the agreed royalty for Australia was 3%. There should be an account, if necessary, accordingly.
95. It was said to be a further term of the Australia agreement, to be implied into it, that the supply of products under the AUTOPAINT brand to a country other than Australia would be a breach. This was not seriously pressed by Mr Lissack in closing. In any case I reject the implication of such a term because it cannot be said to be necessary: the position in other countries is to be governed by the overall relationship between the parties and the rights which exist in each country, not the country-specific agreement for Australia,

Breach of contract - Malta

96. In April or May 2004 Mr Jongsma and Mr Fearn made an agreement about the supply of products to the Claimant's distributor in Malta, a Mr Xuereb. The Claimant says it was a one-off agreement relating to a single order, and that further supplies of AUTOPAINT branded products were unlicensed. The

Defendants say that it was a continuing arrangement whereby the Defendants would sell at the same price as charged by the Claimant, but would account for 90% of the extra margin, 10% being retained by way of distribution costs.

97. The evidence about precisely when the Malta agreement was made is not clear, although it was common ground that it was in the period April/May 2004. The draft email dated 1st June 2004 to which I have referred in connection with the agreement to supply UK franchisees, also records that, for the time being, De Beer would supply Malta direct. It is clear that De Beer had in fact accepted an order from Malta somewhat earlier, but had not shipped it.
98. In my judgment such evidence as there is supports a continuing permission to supply Malta, whilst the difficulties with Autopaint's credit continued.
99. Although a number of further terms of the Malta agreement were pleaded, these were not pressed at trial.

Intentionally inflicting economic harm

100. Although a conspiracy to injure by "lawful means" was pleaded, it was not pursued. That cause of action requires that the causing of harm be the predominant purpose. We are left with inflicting harm by unlawful means, and the corresponding conspiracy. As Clerk & Lindsell say in paragraph 25-88 of the nineteenth edition of their book:

"There exists a tort of uncertain ambit which consists in one person using unlawful means with the object and effect of causing damage to another".

The paragraph goes on to explain that (a) damage is essential to the cause of action (b) damage must be shown to be, or to be about to be, caused by the unlawful interference and (c) the intention to injure must be a contributing cause of the claimant's loss. The requisite intention for inflicting economic harm by unlawful means and the corresponding unlawful means conspiracy are the same: for the purposes of this judgment it is only necessary to consider the former tort.

101. The need to establish that the damage relied on was caused by the unlawful means was emphasised in *Douglas v Hello* [2003] EWHC 786; [2003] 3 All ER 996. There, false statements had been made to the Court of Appeal in the course of a hearing concerning an interlocutory injunction. These statements were relied on as the unlawful means. The injunction had been discharged, but not as a result of the false statements. Lindsay J (at [254]) held that the tort had not been established on this basis.
102. The nature of the intention that must be proved was elaborated by the Court of Appeal in *Douglas v Hello* [2005] EWCA 595; [2005] 4 All ER 128. Lord Phillips MR, giving the judgment of a court including Clarke and Neuberger LJ said at 223:

"The gist of the tort of unlawful interference is the intentional infliction of economic harm. In other words it must be shown that the object or purpose of the defendant is to inflict harm on the claimant, either as an end in itself, or as a means to another end."

Lord Phillips went on to explain that foresight of probable consequences was not enough.

103. It is worth pausing here to consider why this tort is pleaded at all. If the various causes of action with which I have attempted to deal so far are established, then the Claimant will be entitled to an enquiry as to what harm has been suffered (or an account as appropriate) by the use of those particular unlawful means. What benefit, one may ask, is there in attempting to establish the further tort of causing harm by unlawful means? It can only be of value to the Claimant if the harm complained of goes further than that which would be recovered under the other heads. These considerations led to a dispute between the parties as to what it was necessary to establish at the liability stage of the action. The Claimant contended that all I needed to decide is whether the Defendants intended some harm: the quantum of such harm being a matter for the enquiry as to damages. The Defendants contended that, as damage is an ingredient of the cause of action it was necessary for the Claimant to establish some specific harm which he claims that the Defendants intended him to suffer. Moreover they pointed to the allegation in paragraph 38 of the Particulars of Claim which alleged that the object and effect of the trade mark infringement and passing off was to “steer the Franchisees and distributors away from the Claimant’s Autopaint Products which they ordered to the brands of the First and Second Defendants”. Having made that allegation in the Particulars of Claim, it was for them to prove it, rather than retreat to the position that proof of any harm would do.
104. It seems to me that, absent the allegation that the object and effect of the use of unlawful means was to steer away the distributor network, nothing would be added by the tort under consideration to the causes of action I have already dealt with. The real value of the tort of intentional infliction of economic harm by unlawful means comes where the unlawful means are not themselves actionable at the suit of the claimant: but that is not the position in this case.
105. If I am right thus far in holding that the Defendants are liable for trade mark infringement and passing off, then there must follow an enquiry as to the damage caused to the Claimant by those unlawful means. It also seems to me that it will be appropriate, and indeed desirable, in some cases of infliction of harm by unlawful means for the Court to leave over questions of what harm was caused to an enquiry, including heads of damage not specifically dealt with at the liability stage. However, in view of the specific allegation in paragraph 38 of the Particulars of Claim, it would be wrong, in the specific circumstances of this case, to leave over the issue of whether the object and effect and the Defendants’ acts of trade mark infringement and passing off were to take away the Claimant’s network of franchisees. I have seen all the relevant witnesses and they have been cross examined extensively on their motives and intentions. I consider that I am well placed to form a view as to what the Defendants’ intentions were.
106. The critical issues between the parties are those of intention and causation.
107. The Claimant says that the Defendants had the necessary intention to harm him by taking away his distributors. He says that the harm which befell his business by the loss of the franchisees was not merely a foreseeable consequence of what the Defendants did: it was what they intended to cause and did cause.

108. The Defendants say that they did not intend the Claimant to lose his franchisee business and their actions did not cause him to do so. They say that he was losing the franchisees anyway as a result of his inability to supply them. The joint expert accountants' report in the action confirms that Mr Fearn's drawings on the business were too great: they exceeded the profit of the business over several years with the result that the business was starved of cash. The Defendants' actions were of course directed at advancing the business of Anglo-Dutch and De Beer, but they wanted to place themselves in the best position to obtain the business that the Claimant was losing in any event.
109. Such strength as this aspect of the Claimant's case may have had is much diminished by the finding I have made as to consent. I have held that between June 2004 and June 2005 Autopaint had authorised the Defendants to supply where Autopaint could not. If this allowed the Defendants to get closer to the franchisees than they already were (through training visits and the like) then it is not something the Claimant can complain of. The major area in which they had been acting without authorisation was in the sale of ancillary products. It is clear from Mr Welch's email of 22nd April 2005, and other evidence, that prior to this date (and indeed as I have found, prior to the June 2005 meeting) the Defendants were not saying that franchisees could purchase all their Autopaint products from them. Moreover the ancillary products were to a large extent being purchased by franchisees from sources other than the Claimant.
110. I find that prior to the meeting in June 2005 the Defendants' activities, insofar as they were unlawful, were not sufficient to cause the Claimant to lose his distributors.
111. At the meeting in June 2005 however, the position in my judgment changed. By offering the whole range of the Claimant's products under the same name, and thereby clearly stepping outside the consent which they had, and by seeking the long term commitment of the distributors to them, the Defendants did unlawful acts which were calculated, if left unchecked, to harm the Claimant by losing him his distributors. Their activities could no longer be characterised as a way of preserving both Autopaint's and their own interests. The intention was to supply Autopaint in situations where it was unauthorised, with the inevitable consequence that Autopaint's ability to hold on to its distributors would be compromised.
112. Did the Defendants' unlawful acts at the meeting, by offering the entire Autopaint range and seeking long term commitment of franchisees cause the loss complained of? In my judgment the answer here is that it did not. The position was made clear shortly afterwards, as I have held. The franchisees had a choice as to whether to proceed with Autopaint or De Beers/Anglo-Dutch under a new brand and chose the latter. That they made such a choice is not surprising in view of the supply difficulties which had beset Autopaint's business, through no fault of the Defendants. Although there are criticisms of the way in which the Defendants went about matters, in particular the brief period of offering the complete range, I find it impossible, when I stand back from the totality of the evidence, to say that what was done at the June conference was a real cause, or indeed any cause at all of the loss of the network.

111. I should add that the Claimant sent further unsolicited submissions after the conclusion of oral argument which were responded to by the Defendants. At the stage I received them this written judgment was nearing completion. Although, inevitably, I have read them, nothing contained in them has altered the views which I had formed beforehand. I have therefore not dealt specifically with either side's additional submissions.

Summary

113. The claims which I have indicated as not being pursued will be dismissed. Of the claims pursued at trial:

- (1) the claim for trade mark infringement and "standard" passing off succeeds to the extent that the marks were used in relation to products where it was not established that the Claimant could not supply them;
- (2) the claim for passing off by false representation as to status fails;
- (3) the claim for passing off by switch selling to the trade succeeds;
- (4) the claim for passing off by switch selling to the public succeeds;
- (5) the claim for malicious falsehood fails;
- (6) the claim for infringement of copyright fails;
- (7) the claim for breach of the tin agreement succeeds to the extent that Autopaint branded tins were supplied other than to the order of the claimant;
- (8) the Australian royalty was 3%;
- (9) the Malta agreement was a continuing one, not limited to a single order;
- (10) the claim for intentionally inflicting economic harm by unlawful means and conspiring to do so fails.

114. I will hear counsel as to the form of order if it cannot be agreed.