FRANKLIN *v.* GIDDINS
[1976 No. 1918]

Supreme Court, Brisbane (Dunn J.)

10, 11, 12 August; 12 October 1977.

Equity – Protection of secrets – Budwood capable of producing unique nectarine trees stolen by defendant – Whether a trade secret – Whether equity should intervene in the absence of contract – Form of equitable relief in such circumstances.

The plaintiffs conducted an orchard where they grew "Franklin Early White" nectarines which were highly successful from a commercial point of view. The plaintiffs were the sole suppliers to their markets of this type of fruit; the male plaintiff having commenced breeding the trees which bore the fruit as early as 1946. The Franklin Early Whites were unique in that as a matter of practical genetics it was impossible to repeat the cross-breeding programme followed by the male plaintiff in producing the nectarines, except by grafting the plaintiffs' budwood cuttings to root stock. The male defendant, who along with the female defendant conducted an orchard in the plaintiffs' locality, knew that the plaintiffs' budwood was not for sale and realised that the plaintiffs wished to retain their commercial advantage. Without the knowledge of the female defendant the male defendant stole budwood cuttings from the plaintiffs' orchard and by carrying out the necessary grafting process commenced to grow Franklin Early White nectarines, in competition with the plaintiffs. Subsequently the female defendant learnt that the nectarine trees being grown in an orchard conducted by both defendants were the produce of the budwood stolen by the male defendant.

The plaintiffs did not claim damages against the defendants, but in an action by the plaintiffs for equitable relief,

Held: (1) That the male defendant had stolen a trade secret, the property of the plaintiffs, which enabled him and the female defendant to propagate Franklin Early White nectarines.

Ansell Rubber Co. Pty. Ltd. v. Allied Rubber Industries Pty. Ltd. [1967] V.R. 37, *Mense v. Milenkovic* [1973] V.R. 784, referred to.

(2) That, although information had not been confidentially imparted by the plaintiffs to the male defendant while a contract was in existence between them, the male defendant had behaved unconscionably and in contravention of the plaintiffs' rights. In the circumstances, the plaintiffs were therefore entitled to equitable relief against him independently of any contractual relationship.

Prince Albert v. Strange 2 De.G. & Sm. 651; 64 E.R. 293, *Saltman Engineering Co Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302, followed.

(3) That, having regard to the fact that the female defendant knew that the Franklin Early White nectarine trees grown in the orchard conducted by her and her husband were the produce of a stolen trade secret, it would be unconscionable for her to derive any benefit from the trees, and that she, as well as the male defendant, having infringed the plaintiff's rights was subject to the equitable jurisdiction of the court.

(4) That in the present case the root stocks on the defendants' orchard were of no value without budwood legitimately obtained. An appropriate order in the circumstances was therefore that the defendants deliver up to the plaintiffs for destruction the productive budwood.

A *Prince Albert v. Strange (supra), Ormonoid Roofing and Asphalts Ltd. v. Bitumenoids Ltd.* [1931] S.R.N.S.W. 347, referred to.

ACTION

The facts relevant to this report appear sufficiently in the judgment reported below.

P. D. Connolly, Q.C., with him *S. M. Kiefel*, for the plaintiffs.

B *E. J. P. F. Lennon*, for the defendants.

Curia advisari vult.

DUNN J.: The plaintiffs are orchardists, who conduct an orchard at Pozieres, in which nectarines are grown commercially. The male plaintiff is a self-taught, successful and skilful plant-breeder, who has for many years engaged in plant-breeding with the object of developing new varieties C of deciduous fruits, such as nectarines, peaches, apricots and apples. He has interests in other orchards – one called Glenrae, near Warwick, and the other at Araluen.

This litigation concerns one of the varieties of nectarine which the plaintiffs grow at Pozieres; it will be convenient to refer to it as the "Franklin Early White" nectarine, although it would be more accurate to call it the Franklin Early White (Pozieres Orchard) nectarine. The D male plaintiff developed this variety by selective cross-breeding of peach and nectarine trees over a period of some fifteen years. The work began in 1946 and the product which the plaintiffs now market was evolved in 1961. Thereafter, there was a delay until enough trees matured for commercial production to commence; such production commenced in 1965.

E The Franklin Early White has qualities which distinguish it from the general run of nectarines. Most nectarines become available to the market after the Christmas period, and continue to be available during January. By contrast, the Franklin Early White nectarine may ripen (in an unusual season) in the last week of November, and will ripen (in an ordinary season) early in December. There is a great commercial advantage in supplying stone-fruit to the market early, especially if the F fruit are fruit of good quality. The Franklin Early White is a nectarine of outstanding quality, and distinctive and attractive appearance. It competes on the market with other early varieties of nectarines, but it is of better quality than most; additionally, the trees produce prolific crops of fruit, a feature which distinguishes this variety from other trees which bear early nectarines. There is great market demand for the G plaintiffs' fruit, which are sold in the Brisbane Market, in North Queensland markets, in New South Wales markets and on occasions in Noumea. Properly marketed, the fruit fetches unusually high prices.

The fruit is unique, in the sense that – as a matter of practical genetics – it is impossible to repeat the cross-breeding programme which was with the parents of those trees cannot be recreated. As a practical matter, followed in order to evolve the tree which bears it. Parents identical

Franklin Early White nectarine trees cannot be grown from seed; the seed will not germinate and, even if it would, the resulting tree would be (because inbred) inferior to and not necessarily identical with the parent tree.

The only way in which this variety of nectarine tree may be reproduced is by taking a twig of budwood (or scion wood) and budding (which is a form of grafting) it to root stock. The root stock (usually a peach seedling is used) is merely a feeding agent, and does not have any influence on the type of fruit produced or any other characteristic of the tree. After budwood has been budded to the root stock, it grows, producing a tree which is of exactly the same genetic composition and has exactly the same characteristics as the parent tree from which the budwood was taken.

The parent tree may be likened to a safe within which there are locked up a number of copies of a formula for making a nectarine tree with special characteristics which make it specially valuable; when a twig of budwood is taken from the tree, it is as though a copy of the formula is taken out of the safe; the budding procedure may be likened to the manufacture of a tree which corresponds exactly with the formula.

It has for many years been general knowledge in the locality in which the plaintiffs conduct their orchard, and was at all material times well known to the male defendant, that the male plaintiff wished to "keep to himself" the Franklin Early White nectarine, as well as some other varieties of fruit-trees which he had bred. That is to say, the defendant at all material times knew that Franklin Early White budwood was not for sale, and that the plaintiffs wished to retain the commercial advantage of being the sole supplier of this variety of fruit to their markets.

The male defendant was a friend of the sons of the plaintiffs, particularly their son Trevor, with whom he on one occasion engaged in a joint tomato-growing venture. Mr. Giddins "helped out" on odd occasions in the Pozieres orchard, and one such occasion was during the first commercial harvest of the nectarines with which I am concerned, during December, 1965.

He assisted in picking the fruit; he was not employed to do this, nor paid for his services; he simply "lent a hand." He noted and remarked on the quality of the fruit, and observed the whereabouts of the fruit trees, which were situated some distance from a road which ran past the orchard. It was mentioned that the plaintiffs wished to keep the trees to themselves, which he already knew.

The female defendant worked as a paid fruit-picker in the period December, 1966 – January, 1967 in the orchards at Pozieres and Araluen; I should, however, note that there is no evidence – nor was it suggested – that she was in any way a party to the theft by her husband (the male defendant) of some budwood, which I shall now describe.

A Time passed and the defendants (or the male defendant) acquired a small orchard at Bapaume. Early in 1968, the male defendant came by night to the plaintiff's orchard at Pozieres and made his way some distance along a farm track to nectarine trees in the orchard. He took four twigs of budwood from one of the trees, which was a Franklin Early White nectarine tree. He budded the twigs thus stolen into two peach trees in the orchard at Bapaume, and the budding proved successful. B The trees grew, and so more budwood become available.

The orchard at Bapaume was later sold to the Forestry Department and the defendants acquired some land at Amiens, where they presently conduct an orchard in partnership. In 1969 or 1970 the male defendant acquired a sufficient quantity of root stocks (including peach seedlings purchased from the male plaintiff) to enable this orchard to be started, C and he brought from the property at Bapaume sufficient Franklin Early White budwood to enable six hundred root stocks to be budded with such wood. The evidence was that nectarine budwood is indistinguishable (externally) from peach budwood. Thus it came to pass that the male defendant asked the plaintiff's son, Trevor, to help with the budding; he told Trevor that the budwood was peach budwood. Trevor helped, D believing that in years to come he would see a peach orchard on the defendants' property at Amiens. As to the trees at Bapaume into which the stolen twigs were budded, they have long since been bulldozed by the Forestry Department out of existence.

The foliage of a peach tree is like the foliage of a nectarine tree, and it is only when the trees are in flower or in fruit that the difference between the varieties can be detected. Nobody suspected that E the defendants were growing Franklin Early White nectarines until some time towards the end of 1974, when Trevor Franklin drove past the defendants' orchard at Amiens, and noticed that the trees which he had helped to bud, believing that he was budding peach trees, appeared to be bearing nectarines. He reported this to his father, reporting also that the nectarines were suspiciously in colour like the Franklin Early F White variety. The male plaintiff disbelieved Trevor.

During the next year however, the male plaintiff heard further rumours, in consequence of which he went in October to the defendants' orchard, accompanied by a Mr. Fanning (a partner of his in conducting Glenrae orchard). There was a conversation, during which the male defendant denied that he was growing any Franklin variety of nectarine (he asserted G that the nectarine trees which he was growing were a special strain of a variety known as "Early Rivers"). He did, however, say that he had put it about that he was a "licensed grower" of Franklin nectarines, with a view to boosting sales and obtaining better prices for his product. The upshot was that the male plaintiff stated that he would like to inspect the orchard when the fruit was more mature, and that he would return and do so.

He did return in late November, 1975 accompanied by his son Raymond. During this inspection, he satisfied himself that the fruit on the defendants' trees were indeed Franklin Early White nectarines. He put to the male defendant that this was so, and the male defendant denied it. The male plaintiff threatened legal action, and shortly thereafter put the matter in the hands of the police.

On June 16, 1976, the male defendant pleaded guilty to a charge that "he between the Thirty-first day of December 1965 and the First day of January 1967 at Pozieres in the State of Queensland severed and made movable four budwood nectarine cuttings the property of Henry Edmund Franklin and Alice Gertrude Franklin trading as Franklin Orchards with intent to steal the same." He was convicted and fined. It emerged that, in the course of the police investigation, he voluntarily made and signed a written statement admitting the theft, and also signed a Record of Interview with respect to the matter. It appears, having regard to his evidence before me, that the charge incorrectly stated the dates between which the theft took place, but nothing turns on that.

In his evidence, the male defendant claimed that it was fortuitous, and not by design, that the twigs which he admittedly took were taken from a Franklin Early White nectarine tree. I am unable to accept that this is so, having regard to the probabilities, and having regard also to a question and answer in the Record of Interview.

The question and answer are as follows:–

"Q.5. For the record would you tell us what actions you took on that night to obtain those cuttings?

A. Well I knew where they were and I just drove up to the trees and they were about 150 yards off the road on to his property. I cut them all off the one tree."

There are some other questions and answers in the Record of Interview which should be quoted. They are as follows:–

"Q.6. What was your reason for removing those cuttings from that tree?

"A. I knew they were early nectarines and I wanted some of them on my own place.

…

Q. 29. Were you aware that you were doing wrong on the night that you entered into Franklin's property and took those four cuttings?

A. Yes.

Q. 30. Were you aware that Franklin had developed a variety of nectarines for the early market and that he was not allowing any person to obtain cuttings or scions of those nectarines?

A. Yes I knew about both those things.

…

A Q. 32. Do you know of any other orchardist or farmer that is growing the Franklin variety of nectarine?
A. No."

The writ in this action issued on August 12, 1976; proceedings for an interlocutory injunction were commenced on October 15. On November 8, the male defendant was (by consent) enjoined from selling or dealing with the trees without the consent of the plaintiffs, and he was ordered B to keep an account of all sales of their produce (the 1976 harvest period was approaching); leave was given to the plaintiffs to join the female defendant as a party, and the action was certified for speedy trial.

The plaintiffs claim equitable relief, claiming a declaration that the Franklin Early White nectarine trees growing in the defendants' orchard are their property and an order for the delivery up to them, for C destruction, of all the wood which (because of its genetic character) causes the trees to bear the kind of nectarine which they do bear, which is, moreover, wood capable of producing budwood from which other such trees may be brought into existence. They do not claim damages, and they do not claim an account of the profits derived to date by the defendants from sales of the produce of the trees. The evidence is that the defend- D ants have not disposed of any trees, nor of any budwood. They have harvested and sold fruit.

The defendants assert that, whilst the plaintiffs might be entitled to other relief in proceedings differently framed, they are not entitled to the relief which they claim. Other arguments apart, it was urged that a Court of Equity would not order the destruction of the wood which produces the nectarines in question, that wood having become part of E the defendants' real property. The defendants claim, further or alternatively, that if the plaintiffs may otherwise be entitled to relief, their claim is defeated "by reason of laches and unreasonable delay."

The defence of laches need not detain me for any length of time at all. The plaintiffs did not commence proceedings earlier because the theft of their budwood was surreptitious, and the male defendant kept the fact F of the theft concealed by lies for as long as he could. When the facts became known, the plaintiffs proceeded with acceptable diligence, the facts being such that this cannot be described as a run-of-the-mill case.

The plaintiffs claim equitable relief on the footing that it is unconscionable that the defendants should use a commercial secret deliberately stolen to their own advantage and to the detriment of the plaintiffs, part of that G detriment being the destruction of the plaintiffs' monopoly of production of Franklin Early White nectarines for the early market. Part of the detriment is that they have lost a potential monopoly of sales of budwood. It is submitted on their behalf that they have no satisfactory remedy at law.

The inadequacy of their remedy at law is manifest.

It may be that the plaintiffs could recover substantial damages for the

theft of the four twigs of budwood. It may be that those parts of the nectarine trees on the Amiens property which bear the genetic imprint of the stolen twigs should be regarded as property to which the plaintiffs are legally entitled. This this is arguable was pointed out by learned senior counsel for the plaintiffs, who noted that:

(a) Section 26(1) of *The Sale of Goods Act* of 1896 provides that: "when goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods … notwithstanding any intermediate dealing with them;"

(b) In *Scattergood v. Sylvester* 15 Q.B. 506 (17 E.R. 511), it was held that, upon the conviction of a thief who had stolen a cow, sold by him in market overt on the day following the theft, the owner became entitled to maintain trover against the purchaser, for the cow and (additionally) for a calf born to it and milk produced by it after the conviction.

Assuming that substantial damages might be recovered in an action at law, and that the judgment was satisfied, the consequence would be what has been described as "an involuntary sale to the converter." The plaintiffs would be divested of their title to the productive wood and the defendants would have an unassailable right to sell fruit in competition with the plaintiffs. They would also have the valuable right to deal in budwood, so that what in my opinion may fairly be described as the plaintiffs' trade secret would be a secret no longer. (The reference to "an involuntary sale" is a reference to a passage in Professor Fleming's "The Law of Torts" 4th Edition, page 73).

The cases upon which the plaintiffs relied were cases in which equity has intervened in order to prevent a breach of confidence; they are collected, and there is a helpful commentary, in Meagher, Gummow and Lehane's, *Equity – Doctrines and Remedies*, at pp. 713 et seq.

What has been protected by equity has been "confidential information;" that is defined by those authors as "facts, schemes or theories which the law regards as of sufficient value or importance to afford protection against use of them by the defendant otherwise than in accordance with the plaintiff's wishes."

Usually, the relevance of "the plaintiff's wishes" is that the protected "information" has been voluntarily imparted in confidence, often being imparted by an employer to a trusted employee. But it is clear that equity recognised a personal obligation to respect trust and confidence which did not arise consequently upon a contractual relationship. See *Prince Albert v. Strange* 2 De.G. & Sm. 651 (64 E.R. 293), and 1 Mac and G. 25 (41 E.R. 1171).

In some cases (e.g. *Caird v. Sime* (1887) 12 App Cas. 326) the jurisdiction which the Court of Equity exercised was said to be exercised in protecting a common law right of property, but it now seems settled that

–apart from any question of property rights – information gained in confidence cannot be made use of to the detriment of the person from whom it was obtained.

(It is interesting to note that Professor Ashburner, in his *Principles of Equity* (2nd ed.) at p. 374, expressed the opinion that when in the early cases of this kind Courts of Equity granted injunctions, they sometimes professed to do so in furtherance of a common law right, because they were anxious to conceal every extension of their jurisdiction from the common law judges; and that the implication of a term, not to disseminate knowledge acquired in a confidential relation, into contracts is "a fiction invented by common law Judges in order to give the common law credit for a recognition of principles which originated exclusively in equity!").

I shall mention two modern decisions in which the nature of the right to relief was discussed.

In *Saltman Engineering Co. Ltd and Others v. Campbell Engineering Co. Ltd* (1948) 65 R.P.C. 203, Lord Greenc M.R. said (at p. 211):

> "The main part of the claim is based on breach of confidence, in respect of which a right may be infringed without the necessity of there being any contractual relationship. I will explain what I mean. If two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it some confidential matter, even though the contract is silent on the matter of confidence the law will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract; *but the obligation to respect confidence is not limited to cases where the parties are in a contractual relationship*." (my emphasis).

The principle is expressed in the headnote to *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302, as fllows:–

> "A contract or obligation of confidence need not be expressed, but could be implied, and a breach of contract or trust or faith could arise independently of any right of property or contract … the Court, in the exercise of its equitable jurisdiction, would restrain a breach of confidence independently of any right at law."

The headnote reflects the judgment of Ungoed-Thomas J. at p. 322.

If I have laboured the point that the jurisdiction which I am asked to exercise exists independently of contract, it is because learned counsel for the defendants placed a good deal of reliance upon the circumstances that the male defendant was never employed by the plaintiffs at Pozieres, notwithstanding an allegation in the pleadings that that had been the case.

He also argued that the budwood twigs were not "information confidentially imparted" and that therefore no obligation of confidence deserving of protection had arisen, challenging the proposition that "it would be extraordinary if a defendant, who acquired by eavesdropping or other

improper covert means the secrets of the plaintiff because he would not have been able to get them by consensual arrangement, could defend proceedings by the plaintiff on the ground that no obligation of confidence could arise without communication of the information by the plaintiff." (Meagher, Gummow and Lehane's book, at page 719).

I find myself quite unable to accept that a thief who steals a trade secret, knowing it to be a trade secret, with the intention of using it in commercial competition with its owner, to the detriment of the latter, and so uses it, is less unconscionable than a traitorous servant. The thief is unconscionable because he plans to use and does use his own wrong conduct to better his position in competition with the owner, and also to place himself in a better position than that of a person who deals consensually with the owner.

I have already expressed the opinion that, when the male defendant stole budwood from the plaintiff's orchard, what he got was a trade secret. The secret was the technique of propagating Franklin Early White nectarines, using budwood from the plaintiff's orchard. The technique of budding was no secret, but the budwood existed only in the plaintiff's orchard, where the plaintiffs guarded it by exercising general surveillance over fruit-pickers and visitors, and by bruiting it abroad that it was theirs and theirs alone. The "information" which the genetic structure of the wood represented was of substantial commercial value, much time and effort had been expended by the male plaintiff in evolving it and it could not be duplicated by anybody whatsoever.

It is true that the plaintiff's orchard was not surrounded by an electric fence nor patrolled by guard-dogs, but I consider that the plaintiffs were entitled to rely on the fact that other people could normally be expected to respect their rights of property.

The factors which I have mentioned enable one, in my opinion, to identify the technique of propagating this variety of fruit-tree as a trade secret. In referring to those factors, I have had regard to the commentary on "Secrecy" in the *American Re-Statement of the Law of Torts* (1st ed.), Article 757, quoted and considered by Gowns J. in *Ansel Rubber Co. Pty. Ltd. v. Allied Rubber Industries Pty. Ltd.* [1967] V.R. 37, and also considered by McInerney J. in *Mense v. Milenkovic* [1973] V.R. 784. The commentary includes this observation:

> "A substantial element of secrecy must exist, so that, *except by the use of improper means*, there would be difficulty in acquiring the information."

In *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (supra)*, Greene M.R. accepted as a correct statement this proposition:

> "If a defendant is proved to have used confidential information, directly or indirectly obtained from the plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights…" (p. 213).

A

I hold that the male defendant has been guilty of infringements of the plaintiffs' rights since he stole and used the budwood; as for the female defendant, she has since at least the middle of last year known that the Franklin Early White nectarine trees in the orchard conducted by her husband and herself are the produce of a stolen trade secret, and – this being so – it is unconscionable for her to derive any benefit from
B the trees, and she too infringes the plaintiffs' rights.

Learned counsel for the defendants argued that the plaintiffs must be confined within their pleading and that they had not pleaded facts which imposed any obligations upon his clients. However, the following facts are stated in the Statement of Claim and the Particulars:

(a) that the plaintiffs had developed a new variety of nectarine
C for the purpose of sales;

(b) that the male defendant learned of a secret method and process by which this variety of fruit is produced, and of its special qualities and attributes, and of the location of the trees upon which the fruit grew;

(c) that he stole budwood, propagated trees of the new variety, and sold their produce, without the plaintiff's consent.

D In my opinion, proof of these facts – which were proved – entitles the plaintiffs to relief, and it matters not that the contract of employment which was pleaded was not proved. The value of the plaintiff's secret is substantial (a circumstance relevant to the question whether a discretionary order should be made).

Learned counsel for the defendants opposed the order sought by the
E plaintiffs, which was an order that the productive wood of the trees be destroyed. He submitted that, at worst for his clients, they should be treated as constructive trustees of something analogous with a blended fund, in this regard referring to *Black v. S. Freedman and Co.* (1910) 12 C.L.R. 105. The analogy with a "blended fund" results from the combination of nectarine-productive wood (derived from the budwood originally stolen) and root stocks (the property of the defendants). How-
F ever, this case may I think be distinguished from "blended fund" cases because the productive wood is identifiable. It is that wood which is capable of bearing leaves, flowers and fruit; each root stock is merely a feeding agent.

If it be right to regard the defendants as constructive trustees of the productive wood, leaves, flowers and fruit then they are obliged to deal
G with them as the plaintiffs direct. If they were directed to do so by the plaintiffs they would be bound to destroy that property.

It appears to me that I have power to make such an order as the plaintiffs seek and that this is a proper case for such an order. In *Prince Albert v. Strange (supra)*, a workman who had been entrusted with copper-plates for the purpose of taking impressions for the plaintiff of certain etchings made by the latter, and not intended for publication, took

impressions for himself in violation of the trust reposed in him, and sold the impressions to the defendant, who published a catalogue of them. It was held that the plaintiff was entitled to an injunction restraining the publication of the catalogue and to a decree ordering the impressions to be destroyed. And in *Ormonoid Roofing and Asphalts Ltd. v. Bitumenoids Ltd. and Ors* [1931] S.R.N.S.W. 347, Harvey C.J. in Eq. ordered the dismantling and delivery to the plaintiff for destruction of so much of a machine as had been constructed in breach of an obligation to respect a trade secret (the learned Judge expressed the view that the plaintiff had no property in the machine).

When *Prince Albert v. Strange (supra)* was before Knight Bruce V.-C., it was argued – with respect to the claim for an order that the impressions made by the workman and sold to the defendant be destroyed – that the impressions were the property of the defendant, and that it was not a case in which a party had by mixing his property with that of another forfeited his own property. Dealing with this argument, the Vice-Chancellor said:

> "With regard to the impressions, it might possibly be right to attend to the defendant's claim, had the impressions been upon a material of intrinsic value – upon a material not substantially worthless, except for the impressions which, by the wrongful act of the defendant, had been placed there. That case, however, does not arise. The material here is substantially worthless, except for that in which the defendant has no property. There consequently can be no reason why the effectual destruction of subject should not be directed by the Court; in doing which, I repeat, I abstain from giving any opinion as to the particular mode of proceeding which the Court ought to adopt in a case similar in all points except as to the intrinsic value of the material." (2 De.G. and Sm. at p. 716; 64 E.R. at pp. 320–1.)

In this case, if root stocks without productive wood growing from them are of any value, that can only be because they will continue to live and may be used as feeding agents for other budwood legitimately obtained. If the root stocks will die after separation from them of the productive wood which it is unconscionable for the defendants to have in possession and to use, then the root stocks are substantially worthless. The defendants have done work in producing the trees, but their labours have been rewarded by sales of fruit. In all the circumstances, I shall order the delivery up to the plaintiffs for destruction of the productive wood. I shall include in my order a provision for liberty to apply, in case the parties are able to agree on some cheaper means of destroying the productive wood than by delivery to Pozieres. The order will also include injunctions restraining the defendants from marketing the produce of the trees and from disposing of any budwood, or themselves taking any budwood, from the trees prior to the destruction of the productive wood.

A I publish the order which I propose to make. Before pronouncing it as a final order, I shall give the parties an opportunity to study it, in case it needs some amendment.

The order which I propose is as follows:

1. That the defendants and each of them do within 28 days after service of this Order upon them deliver to the plaintiffs at their orchard at Pozieres for destruction the whole of each nectarine tree (save the root stock of the tree) in their possession which tree produces Franklin Early White nectarines of the variety developed by the male plaintiff and which tree was propagated from budwood grown at Bapaume which budwood was taken from trees which were grown by budding root stocks with four budwood twigs stolen by the male defendant from the plaintiffs' orchard at Pozieres, or alternatively, that the defendants destroy the said trees within such period in such manner as the parties may agree; in default of agreement, liberty to apply.
2. That until the destruction of all such trees (save the root stocks thereof) the defendants and each of them and their servants or agents and the servants or agents of either of them be restrained from:
   (i) selling or disposing of or using the fruit of the said trees or of any of the said trees;
   (ii) selling or disposing of or using the said trees or any of them, or any part of any of the said trees, and in particular any budwood growing upon any of the said trees.
3. That the defendants give to the plaintiffs not less than twenty-four hours notice in writing of the days between which the deliveries ordered are to be made (in this order referred to as "the delivery period").
4. That the defendants allow to the plaintiffs, and each of them, and, if the plaintiffs so direct, one agent of the plaintiffs authorised by them in writing, entry at reasonable times to the defendants' orchard at Amiens during the whole of delivery period, and that the plaintiffs and any such agent of the plaintiffs be at liberty to enter and inspect the defendants' said orchard at such times during such period.
5. That the defendants do pay the costs of the plaintiffs including reserved costs to be taxed.
6. And the parties are to be at liberty to apply.

(His Honour subsequently made the following order):

That the operation of the orders numbered 1, 3, 4 and 5 in my final Order be stayed until the determination of any appeal against my Judgment and Order upon the following terms:

(i) That the defendants institute any appeal against the judgment and order within the time limited by the Rules of Court for appealing, and that the defendants thereafter diligently prosecute such appeal.

(ii) The plaintiffs by their Counsel undertaking that if the operation of the injunctions set forth in the paragraph numbered 2 of my order occasions any damage to the defendants which the Court or a Judge may think the plaintiffs ought to pay, I order that the injunctions contained in paragraph 2 continue until the determination of any appeal.

(iii) I further order that the defendants give to the plaintiffs not less than 24 hours' notice in writing of the day upon which the Franklin Early White nectarines (as they are called in my reasons) will be first ripe and ready for picking, and that, thereafter, the defendants allow to the plaintiffs and to each of them and, if the plaintiffs so direct, one agent of the plaintiffs authorised by them in writing, entry at reasonable times to the defendants' orchard at Amiens during the whole of the period within which such nectarines are ripening and would but for the first of the injunctions set forth in the paragraph numbered 2 of my order be available for harvesting.

(iv) I give liberty to the plaintiffs and to any such authorised agent of the plaintiffs to enter and inspect the orchard, and to count and note the condition of the Franklin Early White nectarines therein, at reasonable times during such period.

(v) The parties are to be at liberty to apply with respect to this staying order (so that if, for instance, no appeal is instituted, the stay can be removed and some further appropriate order made with respect to the destruction of the productive wood of the Franklin Early White nectarine-trees to which the order relates).

Order accordingly

Solicitors: *Neil Sullivan & Bathersby* (Stanthorpe) by *Walsh Fitzgerald & Hilton* (town agents) (plaintiffs); *F. C. Burges & O'Shea* (Stanthorpe) by *King and Company* (town agents) (defendants).

M.J.N.