

CITATION: *Carnese and Canese v Commissioner of Police & Greaney v Commissioner of Police* [2007] NTMC 075

PARTIES: MARIO CARNESE AND ROCCO CARNESE
v
COMMISSIONER OF NORTHERN
TERRITORY POLICE;

&

CHRISTOPHER WAYNE GREANEY
v
COMMISSIONER OF NORTHERN
TERRITORY POLICE

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act (NT); s 130B

FILE NO(s): 20525771; 20526699

DELIVERED ON: 7 November 2007

DELIVERED AT: Darwin

HEARING DATE(s): 10 & 11 August 2006; 21 November 2006;
19-20 March 2007; 31 July 2007; 1 August
2007

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

DELIVERY OF PROPERTY – PROPERTY IN POSSESSION OF POLICE IN
CONNECTION WITH A CHARGE - PERSON “APPEARING” TO BE THE
OWNER

s 130B *Justices Act* NT s 130B

McCulloch v Debra Otto as Administratrix of the Estate of Brian Joseph Phee
(unreported 10 December 1996 (CCA) Qld)

Northern Territory Licensing Commission v Marion Roberts [2006] NTMC 065

Northern Territory Licensing Commission v Gumbuli [2006] NTMC 066

Povey v Mathews Pty Ltd v Paul (1987)

Baltic Shipping Co v Dillon (1993) 176 CLR 244

REPRESENTATION:

Counsel:

Applicants: Mario Carnese and Rocco Carnese: Mr Lee, Mr Rowbottam

Applicant: Christopher Greaney: Ms Truman

Solicitors:

Applicants: Mario Carnese and Rocco Carnese: Withnalls

Applicant: Christopher Greaney: Halfpennys

Judgment category classification: B

Judgment ID number: [2007] NTMC 075

Number of paragraphs: 63

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20525771; 20526699

[2007] NTMC 075

BETWEEN:

**MARIO CARNESE & ROCCO
CARNESE**

Applicant

V

**COMMISSIONER OF NORTHERN
TERRITORY POLICE**

AND:

CHRISTOPHER WAYNE GREANEY

Applicant

V

**COMMISSIONER OF NORTHERN
TERRITORY POLICE**

REASONS FOR DECISION

(Delivered 7 November 2007)

JENNY BLOKLAND CM:

Introduction

1. Applications under s 130B *Justices Act* are usually straight forward. These applications are not the usual type. As would be well known to practitioners in the Court of Summary Jurisdiction, a person who claims to be the owner of property seized by police during the course of a charge or prosecution, may apply to the Court for the delivery of the property to them. The procedure is reasonably common in relation to exhibits and has recently been utilized in relation to (now repealed) *Liquor Act* motor vehicle confiscations (see eg: *Northern Territory Licensing Commission v Roberts*

[2006] NTMC 065; *Northern Territory Licensing Commission v Gumbuli* [2006] NTMC 066).

2. Essentially two of the applicants, Mario Carnese and Rocco Carnese, (at times referred to in the proceedings and at times in these reasons as “the Carneses”) were investigated at one point with the alleged theft of four pedi-cabs. The complaint did not proceed and on 10 November 2005 Mario Carnese filed an application for return of the pedi-cabs from the Commissioner of Police. On 11 November 2005 Christopher Wayne Greaney, (referred to in the proceedings and at times in these reasons as “Wayne”), filed an application for the return of the four pedi-cabs and “miscellaneous boxed items” seized by Northern Territory Police on 15 September 2005. The Commissioner, who was represented at earlier mentions, was excused from the hearing. The case has proceeded as a dispute between the Carneses on the one hand and Christopher Greaney on the other. I allowed Mario Carnese to amend the application on the first day of hearing to include Rocco Carnese. In circumstances where the respondent was not participating in the proceedings, over objection I ruled on 10 August 2006 that the two applications should proceed together to ensure the parties could ventilate their claims to the disputed property and test the veracity of the opposing claim. Counsel for the Carneses wanted the Court to hear their claim first as they filed their application a day before Christopher Greaney. In my view such an approach would have been arbitrary. There was some discussion about how the proceedings should run given the Commissioner would not be participating in the proceedings. I ruled there should be leave to cross-examine witnesses giving evidence that impacted adversely on the cross applicants’ rights. (T 10/8/2006 at 7).
3. The relevant section of the *Justices Act* provides as follows:

130B. Power of Court to order delivery of property

- (1) Where any property –

- (a) has come into the custody or possession of a member of the Police Force in connection with a charge or prosecution under a law in force in the Territory or otherwise in the course of his duty; or
- (b) has come into the custody or possession of the Court of Summary Jurisdiction, or a clerk of the Court, whether as an exhibit or otherwise in connection with a summary proceeding in the court,

the Court of Summary Jurisdiction may, on application either by a member of the Police Force of the Northern Territory or a clerk of the Court of Summary Jurisdiction or by a claimant of the property, make an order for the delivery of the property to the person appearing to the court to be the owner thereof, or, may make such order with respect to the property as to the Court may seem fit.

(2) No order made under this section shall be a bar to the right of any person to recover the property by action from the person to whom it is delivered by virtue of the order where that action is brought within 6 months after the order is made.

4. I note there is some discussion in the authorities on the comparable provisions in other jurisdictions to the effect that this provision should not be relied on where there are conflicting claims that may be difficult to resolve. There is a view that those claims should be left to the civil courts with some reliance on interpleader: *McCulloch v Debra Otto as Administratrix of the Estate of Brian Joseph Phee*: (unreported 10 December 1996 (CCA) Qld). In that case it was recognised the legislation still had practical utility and relative inexpensiveness and that if situations could reasonably be dealt with under it, there were advantages to using it. Although this has been a difficult matter factually, s130B provides a procedure to bring evidence forward concerning the competing claims. As will be seen from the facts that are summarised below, there is a genuine dispute as to ownership. I assume police must have realised that there was a significant question concerning ownership given no criminal proceedings eventuated. In my view, although there are competing claims, it is a proper case to determine the outcome of the competing claims. A similar approach was taken in answer to the same argument in *Northern Territory Licensing Commission v Marion Roberts* (cited above) where the Licensing Commission argued the property in question belonged to the Crown.

5. One matter of some concern that arose during the hearing was there was little cross-examination of the applicant Christopher Greaney by counsel appearing at that time for the Carneses'. This had implications for later evidence being lead on the Carneses' behalf attempting to contradict Mr Greaney and Ms Milner. Counsel for the Carneses' argued that I should not apply *Browne v Dunn* in a strict manner given the unusual nature of the proceedings. In my view it was clear that cross-examination would be needed on the evidence concerning the competing claim. It is a matter of procedural fairness. Some parts of the Carneses' evidence has been disregarded as a result of this procedural matter, however the difficulty has primarily been resolved by a weighing of all the relevant testimony. As the applicant Christopher Greaney called most of his evidence first, I will summarise the evidence given in support of his application noting that what follows is not in the same order as was given in the proceedings.

Evidence Given on Behalf of the Applicant Christopher Wayne Greaney.

Christopher Wayne Greaney (Referred to at times throughout these proceedings as "Wayne").

6. Mr Greaney's case in its essential form is set out in his affidavit sworn 26 October 2005 (Exhibit "G2"). He stated he was a part owner in equal shares with James Kent of a pedi-cab business operated and registered under the name "Pedi-Power"; that they began operating the business in Darwin around January 2004 and had registered the business name in the Northern Territory on 8 August 2003. He explained "Pedi-Power" comprised four pedi-cabs that were leased to riders on a nightly basis. His affidavit states that the origin of "Pedi-Power" was in late 2001/early 2002 when he designed and constructed six pedi-cab vehicles in New Zealand. He said in May 2001 he forwarded funds to his brother Michael Greaney to set up a pedi-cab business in New Zealand. He said his brother also put funds into the business; his friend Andrew Drabble was retained to provide metal materials used in construction and to build the body work of the pedi-cabs;

his friend Willy Aulhousen utilized these materials and built the smaller intricate pieces necessary for the pedi-cabs. Those bikes were built and stored at Mr Greaney's parents place in New Zealand.

7. He said in early 2002 he became involved in a joint business venture with James Kent (referred to often in these proceedings as "Boyzee") and the applicants, the Carnese's. He said they commenced a security business registered as "Austop Security Pty Ltd" on 28 June 2002 involving the provision of security and crowd control services, automatic teller machine installation and maintenance and armed guard money deliveries. He said Rocco Carnese maintained and undertook the accounting and he possessed the cheque book for Austop. He said all four of them had access to the Austop account.
8. He states that in mid December 2002 he flew to New Zealand to assist in the construction of the New Zealand pedi-cabs and decided to have a holiday while he was there. He said as a result of that James Kent, Mario Carnese and his own partner Michaela Milner also went to New Zealand for a holiday. His affidavit states that because James Kent, Mario Carnese and Michaela Milner were staying with him at his parents' home they would also assist in completing construction of the pedi-cabs. He said they all agreed to do that because they weren't paying for accommodation while in New Zealand. He said James Kent and Mario Carnese assisted in cutting fabrics to be used on the seats, cutting wood to be used in the seats and other minor work. He said the work was voluntary and unpaid but they received free accommodation in return. He said occasionally Mario Carnese would collect parts at the bike shop, (for example handlebars and seats to be used on the pedi-cabs). He said Mario Carnese did that as a favour and never requested repayment for the small amount of monies expended on these small items. He said the "Pedi-Power" business was registered in New Zealand on or about 22 December 2002. He said his brother continues to own and operate that business. He said James, Mario and Michaela all rode the pedi-cabs

voluntarily in New Zealand to get the business going; at no stage did Rocco Carnese have any involvement in the construction of the pedi-cabs in New Zealand during that period. He states that he, James, Mario and Michaela all returned to Darwin on or about January 2003.

9. Mr Greaney states that shortly after returning to Darwin he decided to construct some more pedi-cabs, (it will become clear in the facts that these are a different set of pedi-cabs to the six constructed in New Zealand), and have them sent to Darwin to operate a similar business in Darwin. He needed assistance and states that James Kent agreed to be involved in the joint venture; that he made arrangements for the construction of the pedi-cabs in New Zealand drawing on Andrew Drabble and Willy Aulthousen again; he said the pedi-cabs were constructed and stored in his parents' garage and that the funds for the construction for the pedi-cabs were provided by himself, James Kent and his brother Michael Greaney. The money earned from the original pedi-cabs in New Zealand was put into the construction of the second set of cabs. He states neither of the Carneses had any involvement in relation to decision making concerning the second lot of pedi-cabs, nor did they make any financial contributions. He states that under his instruction, on about 9 July 2003 four pedi-cabs were shipped from New Zealand to Darwin by Michael Greaney. Christopher Greaney states that he provided the funds for the shipment being \$2107.45. Annexure "A", to his affidavit *Bill of Lading Freight Manifest* notes Mike Greaney as the shipper and Wayne Greaney as the consignee of four "tuk tuk push bikes" at a cost of \$2107.45. He said the pedi-cabs arrived in Darwin on or about 31 July 2003 and he collected them and paid a fee of \$464.60 paid by an Austop cheque. He said that this money represented income that was due to him from Austop. His affidavit states that there is no written agreement between the Carneses, Mr Kent and himself in relation the use of monies from Austop for personal expenditure however they all used the Austop cheque book and card for personal expenditure, for example for

mobile phones, spare parts and mechanical work, or to pay for lunch when they went out together. He said it was well recognised between them that there were monies owing to all of them from the business and so occasionally they would use the card or cheque to meet personal expenditure.

10. He states that he and James Kent were unable to find premises in Darwin to store the bikes and Rocco Carnese offered to arrange for their storage in his brother-in-law's shed in Winnellie. He said the offer was made as a personal favour and no payment of rent or storage fees was ever discussed or requested by Rocco Carnese. Mr Greaney states he arranged the bikes to be painted and paid for the paint with an Austop cheque that he said were monies representing income due and owing to him from Austop. He said Rocco Carnese attended the paint shop with him when he collected and paid for the paint but otherwise Rocco Carnese had no involvement. He said a friend painted the pedi-cabs and he also arranged for the seats to be upholstered. He said payment for the upholstery for the seats was paid for by a company cheque from Austop that once again represented monies due and owing to him as income.
11. Annexure "B" to his affidavit is the registered business name "Pedi-Power" registered on 8 August 2003 noting Christopher Greaney and James Kent as persons carrying on the business.
12. On or about 26 September 2003 Mr Greaney arranged for the lease of shed premises located under the ramps at Westlane Carpark; the lease for the shed was with Darwin City Council in the names of James Kent and himself; James Kent and he were the only people who had keys to the shed. He said at no time was there any agreement between himself, James Kent and the Carneses to involve the Carneses in the Pedi-Power business; he said at no stage did he or James Kent request funding or a loan from the Carneses; he

said at no stage was there any arrangement that Austop be used to assist the Pedi-Power business financially or otherwise.

13. He states that on 10 September 2005 he received a call from one of his pedi-cab drivers who told him that three men came into the shed; that one of the men told him his name was “Rocco” and that the people who owned the bikes owed him money and that he (Rocco) was taking the pedi-cabs. He said the men then loaded the pedi-cabs and several boxes onto the back of a large truck and left the area. Mr Greaney made arrangements for Michaela Milner to report the matter to police. Mr Greaney states that he believes police do not intend to bring criminal charges in relation to the “theft” of the pedi-cabs and seeks their return. Tendered in Mr Greaney’s evidence was Exhibit G3 a “parking agreement” for storage space under the ramp off Westlane at \$110 per month. The agreement is between Christopher Greaney and Darwin City Council. Tendered also through Mr Greaney was Exhibit G4 comprising numerous receipts and invoices for metal items; engineering supplies and packing slips and various other electrical items that appear to date throughout 2003, including a shipping invoice for the four bikes from “Quadrant Pacific”.
14. In cross-examination Mr Greaney agreed that the address given by Mr James Kent on the registration of “Pedi-Power” in New Zealand is 11/5 Manilla Place Woolner – the Austop address. Mr Greaney denied having any assistance from the Carneses in relation to the designs of the pedi-cabs. He confirmed that Mario Carnese had nothing to do with the construction or assembling of the bikes and did not agree that the footage Ms Milner took showed Mario Carnese assisting with the construction of the pedi-cabs. He said the comments from Ms Milner that Mario Carnese was the “*apprentice*” were actually said by way of mocking Mr Carnese. He said Ms Milner, James Kent and Mario Carnese would do things like clean up and sweep but they did nothing mechanical; nor did they paint the bikes as the bikes were

professionally spray painted; he said they may have helped paint the frames but it would have been minor work.

15. The certificate from the Company's Office, (Ministry of Economic Development New Zealand), was shown to Mr Greaney and he agreed the address given by Mr Kent was the Austop address; the shareholders were identified. The Business Affairs/Application for Registration of Business Name in the Northern Territory was noted by him and it was pointed out to him that Mario Carnese and Rocco Carneses' names had been scratched out. Mr Greaney was asked about his financial contribution to Austop. He said he wasn't sure but he would have put some money into it. He said he contributed most to the work that was done in getting the pedi-cabs up and running. He said he spent about four months, once or twice a week, sometimes three times a week rebuilding the pedi-cabs for Darwin. He said it was more of a hobby and he could not indicate the hours he spent working on them. He said he didn't charge for this. He said the money for the four pedi-cabs came from the money that the first pedi-cabs had made in New Zealand. He said he was not sure how much the Carnese brothers contributed to Austop; he said the initial security licence was for \$1,000 to \$1,500. He said when he, Mario Carnese and James Kent went to New Zealand, Rocco Carnese looked after Austop. He said he would value the pedi-cabs at about \$3,000 each comprising materials and maybe \$4,500 if labour was included. He confirmed Mr Aulhousen and Mr Drabble worked without pay. He said he used funds from the New Zealand pedi-cabs and his brother purchased the steel.
16. He said he and James Kent paid for the transport of the pedi-cabs out of their own personal funds. He said his brother worked for Stevedores in New Zealand but that he obtained a standard rate; the pedi-cabs were transported in the hull; he said the pedi-cabs were in a good condition but there were some bent mudguards; he said that Rocco Carnese told him to use his uncle's shed for storage. He said that Conrad, Nick, George and he worked

on the pedi-cabs once they were stored in the shed at Winnellie; he said Conrad was paid by being provided with an old Land Cruiser but there was no other payment; he could not calculate the value of monies owed to him from Austop; he said they were just in general agreement that they could purchase things using the Austop card or cheque book. He said it was through contacts with his girlfriend and her mother and Steven Kay that they were introduced to the storage area at the Carpark. He said in the first year the bikes did not make any money because of significant repairs needed, new parts from New Zealand needed and with the arrival of the wet season he needed to make canopies. He said the next year they started working but there were still problems with spokes breaking every night and lack of shock absorbers.

17. He said a guy called “Andy” used to look after the pedi-cabs as well as James Kent. He would do the repairs; he would pay for the advertisements by credit card; he controlled the keys to the storage area for the pedi-cabs; he said the lock was now changed after it had been “broken into”. He was asked if he was aware of Mr Kent and Mario Carnese providing a gift voucher of \$500 to his parents for accommodation; he said he recalled giving one to his mother for a Christmas present but didn’t know if they had chipped in; he said he should have still been owed money from the Austop directorship but he had been taken off as a director. He agreed that with the second (four) pedi-cabs he paid for about four items from Austop: paint, quarantine, upholstery and maybe a couple of other minor items. Mr Greaney didn’t agree that the video footage produced in the proceedings shows Mario Carnese in his parent’s garage working on the bikes. He said he transferred \$2107.45 to New Zealand to pay for the shipment of the bikes. He said he transferred the money directly over from Darwin to New Zealand and the money came from his bank account. He said it was not money from the Austop Company. Mr Greaney said that the four of them

had equal shares in Austop but he did not know what the value of each share was.

Michaela Whatarau Milner

18. Ms Milner gave evidence that she was and is in a de-facto relationship with the applicant Wayne Greaney. It is convenient to summarise the significant parts of her affidavit, particularly where there is additional material to the evidence given by Mr Greaney. Her affidavit states that Mr Greaney owns the pedi-cab business with James Kent. Ms Milner states that to the best of her knowledge and belief the Carnese brothers had never been part of the Pedi-Power business.

19. Ms Milner notes that she had a meeting some time in mid November 2004 when contacted by Andreas Andreaou who told her that Mario Carnese had contacted him with a proposition to participate in mediation regarding the business affairs of Mr Greaney, James Kent and the Carneses. As a result she met with them on a Sunday afternoon in November 2004 at the Cool Spot Café in Fannie Bay; she said Mario Carnese stated that he believed that he and Rocco Carnese had spent a lot of money on business ventures and wanted to be repaid; options were put forward by Mario Carnese on how this could occur, particularly in relation to the Austop security business. She states a proposal was put forward that the Carneses' would like Wayne Greaney and James Kent to buy out the Austop security business. She informed them that Mr Greaney and Mr Kent did not want Austop. She states Mario Carnese made reference to the Darwin pedi-cabs and suggested that James Kent and Mr Greaney could use the pedi-cabs as consideration and exchange the pedi-cabs for the Austop security business; her understanding of the proposal was the Pedi-Power business could be used as payment for the Austop security business. She said at no time was there any agreement or admissions made that there was any money owing to the Carneses; she said she made it clear to them that neither Mr Greaney nor Mr

Kent wanted anything from the Austop business. She said she told them that this was due to the damage caused to the business reputation by Rocco Carnese and that the accounting undertaken by Rocco Carnese was inadequate and inappropriate. She confirmed that the pedi-cabs would not change hands as Mr Greaney and Mr Kent had put too much time and effort into it and did not want Rocco and Mario Carnese dealing with it. She said her role at the meeting was only as an intermediary and that neither Mr Greaney nor Mr Kent wanted to talk to or associate with either Mario or Rocco Carnese. Ms Milner states she believed she made it clear she was happy to have a further meeting and made this clear to Mr Andreaou but there was never any contact made. She stated that in relation to the New Zealand pedi-cabs Mario Carnese's input was "minimal"; she said it was voluntary unpaid work and his only financial input was to pay for occasional parts such as handlebars and seats; she states at no stage did Rocco Carnese have any input or involvement in the construction or the business affairs of the bikes in New Zealand; she said the dealing on the part of the Carneses with the bikes in Darwin was minimal. She states any conduct undertaken by Rocco or Mario in relation to the bikes in Darwin was only done at the request of the owners as a personal favour.

20. In relation to Mr Kent and Mario Carnese staying at Mr Greaney's parent's home, Ms Milner said there was no payment for accommodation; it was a five bedroom house and Mr Greaney's mother would not accept rent; she thought that a voucher had been purchased by Mario Carnese and Mr Kent as a gift. She said she took some videos and was constructing skits with commentary; she said she did refer to Mario Carnese as being the "*apprentice*" but it was mocking Mario Carnese. She outlined the work that she did on the bikes including riding them in New Zealand but she said she didn't take part in any construction or assembly of the bikes and did not receive payment. She said it was only ever a bit of fun on the holiday. She didn't receive any remuneration for arranging for riders in relation to the

Darwin bikes. Ms Milner collated the invoices and receipts tendered through Mr Greaney and I note they total \$9,528.14: (Exhibit G6).

21. In cross-examination Ms Milner agreed she had very minimal involvement with Austop; her involvement with Pedi-Power in the Northern Territory was in relation to the business name registration.
22. In relation to the meeting with Mario Carnese and Mr Andreaou, she said she was there to speak to Mario; she referred to Mr Andreaou as an “informal mediator”; she said there was no animosity. She said her understanding was that Mario arranged for Andreas to contact her. She said the financial records for Pedi-Power would be held by either Mr Greaney or James Kent; she said she assisted Mr Kent to apply for an ABN number. Ms Milner said that any funds drawn by Mr Greaney and Mr Kent from the Austop business were drawn well before the meeting in November 2004; that by that stage Mr Greaney and Mr Kent didn’t want anything more to do with Austop.
23. Ms Milner agreed that she contacted police complaining that the bikes had been stolen and that some boxes with tools were taken as well. Ms Milner was shown Exhibit C5 and agreed that “apparently” Mario Carnese and Rocco Carnese’s names were legible under the scratching. Ms Milner thought the documents on the Form 3 in Exhibit C5 looked “foreign”; she said the signature “could be” Mr Kent’s.

Robert Glen Smith

24. Mr Smith told the Court he was previously employed by a business known as Pedi-Power; he said this was shortly after Easter in 2005 for about five months until the cabs were “taken”; the people involved in hiring him were Wayne Greaney and Andy Brownscombe. He said his role was to hire a bike for a night to transport people around the city; he said there were particular fees set for particular nights; Sunday, Monday, Tuesday and Wednesday

were \$30 per night; Thursday was \$40 and Friday and Saturday were \$60 per night. He said that a diary was left in the shed to make these arrangements and the money would be left there. He said the diary was provided by Christopher Greaney and Boyzee. He said the problems were usually in relation to spokes but anything that went wrong with a bike would be written in the diary. In relation to communication back to him he said that he would occasionally receive a call from Wayne or Boyzee or they would go to the shed and fix the bikes. He said Andy ran most things but Wayne and Boyzee also had input. He said Andy gave him the key to the shed under Westlane Carpark. He said he would sometimes receive calls from Wayne but not anybody else. He said he would determine the period that he hired the bike out. In terms of money he received from customers to transfer people around the city he would keep their money and apart from reporting it for tax he had no obligations to give the money received to anyone.

25. He said he met Rocco Carnese once prior to their meeting at the shed but he had only heard of Mario Carnese since the court case started. Apart from the meeting at the shed he said he didn't have any dealings in relation to the bikes with Mario or Rocco Carnese. He said he went to the shed on 10 September 2005 shortly after 9.00pm; he noticed some people were at the front of the shed; he went into the shed and fixed some spokes; he recognised Rocco Carnese. He said Rocco spoke to him about him owning the bikes and that he hadn't been paid any money for them and he was going to take them. Mr Smith said that he told Rocco that he needed the bike for his employment as it was his only source of employment; he said Rocco Carnese apologised but said it wasn't his problem. Mr Smith said he didn't agree with Mr Carnese just taking the bikes and he tried to contact "Boyzee" as a result of Mr Carnese's instruction but Boyzee's phone rang out. Mr Smith said Mr Carnese told him to contact Boyzee for confirmation about his claim on the bikes. He said the three started collecting the bikes and also some tools and they put them in a truck. He said there were three boxes

with items in them but he couldn't remember exactly what they were. He said Rocco Carnese said something about taking power tools because they also belonged to him. Mr Smith said he hid \$300 worth of cash that was on the bench that he thought belonged to Wayne Greaney and Boyzee. He said he was unable to get in touch with either Wayne Greaney or Boyzee that night. He said of the three men only Rocco identified himself after he asked what his name was.

26. In cross-examination Mr Smith was asked about whether he had filed tax returns on the income that he made out of riding the bikes; he stated he had not filed a tax return but he did have an ABN. He agreed that staff from the nearby restaurants would often sit near the shed and have a smoke. He said he didn't notice anyone from the restaurants there on the night that he received a visit from the Carnese's; he agreed it was quite a public area; Mr Smith said he didn't recall Rocco Carnese giving his surname; he agreed he was on pretty good terms with Mr Greaney and Mr Kent. Mr Smith said he was aware that Wayne Greaney was conducting some repairs but it was Andy who kept the bikes running in the main part; he said there were always a couple of bikes running; he didn't recall a syndchrome toolbox being taken and had no memory of the tools that were taken.

James Manu Kent

27. Mr Kent agreed he is also known as "Boyzee"; he spoke of being in the business "Austop" with Wayne Greaney, Mario and Rocco Carnese. He said in relation to Pedi-Power he was in business with Wayne Greaney. He said Pedi-Power began operating at the end of 2004. He explained how the bikes were hired. He said he and Wayne Greaney determined the price. He said the riders would pay in cash and either he or Wayne Greaney would attend the next day, collect the money and fix the bikes if there was any damage; he said the riders would write in a diary each night if there was a need for any repairs. He noted his own writing in the diary (Exhibit G20). He said

there was no writing from Mario or Rocco Carnese in the diary and as far as he was concerned they didn't ever use the diary. He said he was involved in obtaining the shed for the bikes at Westlane Carpark through one of the riders who worked for Darwin City Council. He said he was involved in hiring Steven Kay as a rider. There was no involvement from either Mario or Rocco Carnese in relation to Steven Kay being a rider. He said Steven Kay advised him about the premises in about August 2003; he said that he and Wayne Greaney looked at the premises with the Manager of Darwin City Council and that Wayne Greaney entered the lease. He said either he or Wayne Greaney would pay the rent; sometimes it would be out of their own money or if they had made enough money from earnings from the bikes they would pay it from that. He said there was never any involvement from Mario or Rocco Carnese in relation to the payment of the rent for the storage of the bikes.

28. Mr Kent said that the bikes first came into being because Wayne Greaney had made six the year before in New Zealand and later on asked if Mr Kent would like to be a part of making or bringing over four more from New Zealand. He said that occurred just after a holiday in New Zealand probably January/February 2003. He said prior to December 2002 when he went to New Zealand there was no discussion about going into business with Wayne Greaney about the bikes, neither was he present for any discussions between Mario and Rocco Carnese about the bikes. He said the bikes were made "from scratch" and built by Wayne Greaney, his brother, their neighbour Willie and his mate Andrew. He said the design idea was Wayne Greaney's. He said he had no involvement with the initial six built in New Zealand; when he went to New Zealand in 2002 he said he did nothing in relation to the six bikes in New Zealand construction wise. He said the only work he did was that he swept up around the shed after Wayne finished for the day and maybe packed a few things away. He said the nature of the trip to New Zealand in 2002 was that it was a holiday. He said in relation to Mario there

had been discussions indicating that Mario was taking the trip as a holiday as well. He said that was discussed a month before Christmas.

29. He said he did not see Michaela Milner do anything in relation to the bikes, neither did he see Mario Carnese do anything in relation to the bikes. He said it was just a similar involvement as his own and on occasion they would go to the bike shop to pick up parts for Wayne. He said he wasn't usually involved in purchasing the parts. He said he didn't know who was purchasing the items at that time. He said he was only in New Zealand at that time for two weeks. He said he thinks Mario stayed on when everyone else returned. He said he would have done sweeping up and packing up work about once a day for around fifteen minutes to half an hour; he said Mario basically did the same. He said the rest of the day they would go to the beach, the gym, go to the next town, it was strictly holidays. He said this would usually be with Ms Milner and Mario Carnese; he said Wayne spent most of his time working on his bikes. He said he did not contribute financially to the construction of the first six bikes. Before December 2002 he was not involved in sending any money to New Zealand nor did he participate or was he present in watching Mr Greaney or the Carneses sending money to a bank in New Zealand. When the six bikes were ready he said they all jumped on them and rode them for a few hours in New Zealand. (He said that included himself, Ms Milner, Mario Carnese and Mr Greaney's brother and a couple of other people). He said it was Christmas night and he went riding to meet some girls; he said it was just celebrating Christmas; he didn't receive any money for that nor did he believe he would obtain money for that, nor a portion of the business. He said he is a shareholder in the pedi-cabs in the New Zealand business because that just came about as a joke. He said they were basically Wayne Greaney's bikes but when Wayne was filling out the registration he had to put shareholders on; he said he had a bit of a giggle about it as Wayne Greaney had said he was going to put him on as a shareholder. In relation to Exhibit C5 and the registration of the

Company name in New Zealand; he said there was no discussion between himself, Wayne Greaney and the Carneses about setting up the Company in New Zealand; he told the Court that Willy machined the parts for the bikes from his garage; that he saw Micky cutting timber and welding and saw Andrew bring over steel for the bikes. He said that Wayne Greaney was doing everything, a lot of welding, a lot of fitting, welding and grinding.

30. He said during the holiday in New Zealand he was staying at Wayne Greaney's parents place and he didn't give them anything for staying there; Ms Milner and Mario Carnese also stayed there. He said he had known Mario Carnese for ten to twelve years and Rocco Carnese for just under ten years. He said he was a Director of Austop as were the Carneses and Wayne Greaney. He said Austop was set up in June 2002; he said none of them put any money into the establishment of the Company but Rocco Carnese took care of most of the documents relevant to that business. He said Austop earned money from services that were provided in terms of crowd controlling and security and that he had worked as a crowd controller and security officer; they would receive an income for the hours that they worked; there was never any agreement about receiving anything more than wages. He said from the profits it was just agreed they would leave them in the account but if they needed to buy anything personally they would use the business account; that was an agreement with all four of them; he said he used that money on a number of occasions, (for example purchasing a mobile phone and going out to lunch). He said Rocco Carnese paid to get his truck fixed on the business account. He said there was a Toyota Landcruiser that belonged to Austop and that Rocco Carnese would spend money on the Landcruiser but also on his own truck. He said he believed Mario Carnese also used the business account; he said Wayne Greaney used Austop monies to buy a washing machine and a fridge. He said he considered those items to belong to Wayne Greaney. He said in terms of access to the money he did not have immediate access but would access it through Rocco. He said

whenever they wanted to purchase something he would ask Rocco Carnese for the card or the cheque book and let him know what they were using it for. He said any of them could sign an Austop cheque. He said if any of them went on a holiday the other would stay in Darwin to run the business. He said in relation to Pedi-Power neither Mario nor Rocco Carnese were ever involved in the business and he never saw them involved in the construction of the bikes for that business. Mr Kent said he had never received anything from the shareholding in the New Zealand company.

31. He said it was after the bikes were built in New Zealand Wayne Greaney asked him if he would like to be part of the four bikes business in Darwin; the bikes were constructed by Wayne Greaney's brother and Willie and Andrew; he said he sent funds from time to time to New Zealand for the four bikes; he said he would give money to Wayne and on one or two occasions he went with Wayne Greaney to the bank and he transferred money across; nobody else went to the bank with them when that money was transferred; neither Rocco nor Mario Carnese went with them on those occasions. He said he was involved in arranging for the four bikes to come to Darwin but it was mostly Mr Greaney and his brother. He said his involvement was for the cost for shipping them over that was just over \$2000; he said he and Wayne Greaney sent the money over to Mickey Greaney (Mr Greaney's brother). He said when the bikes were shipped over he was working at P&O Ports; there was no special deal that he could receive by virtue of working there. He said at no stage were there any discussions with the Carneses about shipping bikes over to the Northern Territory; he said as far as he was aware they were not involved in any way in terms of the shipment of the bikes from New Zealand to the Northern Territory; he said he was not aware of the Carneses contributing at all to the payment to bring the bikes over. He said he was present when the bikes were collected in Darwin and Wayne Greaney and Rocco Carnese collected them. He said he didn't know where the bikes had been put on the ship. He said they used Austop's ute and they

had a trailer when they picked up the bikes. He recalled that Customs, duty and “pest” had to be paid and that was paid with the Austop chequebook. He said Austop funds were used because he and Wayne Greaney needed the money to pay for it given the general agreement between the Directors of Austop. He said they looked for a place to store the bikes but they couldn’t find anywhere and Rocco Carnese offered his brother’s shed; there was no discussion about paying money; there was no discussion about Rocco Carnese receiving a portion of the business or the bikes. He said the bikes were at that shed for a few weeks, maybe a month. At that time they were about 70% finished. He said they arranged for Conrad Bruppacker to paint the bikes and have some electricals done by Mick Samma. Wayne Greaney paid Conrad Bruppacker for the work by giving him a slightly beat up old truck. He said neither of the Carneses’ were involved in that arrangement nor were they involved in arranging for Conrad to paint; Mr Kent told the Court that Wayne Greaney determined the colour of the paint and Wayne Greaney arranged for Mick Samiotis to do the electricals. Wayne Greaney gave Mick Samiotis his outboard motor as payment. As far as he was aware there were no further payments and neither of the Carneses were involved in that. He said he helped Wayne Greaney as much as he could on the bikes and that Wayne Greaney was always playing around with the gears and the brakes. He assumed that Wayne Greaney was working on the bikes there everyday or every second day; he said he went to the shed twice a week. He said he did not help Wayne Greaney out for long on the bikes and he saw Rocco Carnese when Wayne was working on the bikes but did not see Rocco or Mario working on the bikes. He said Wayne Greaney determined the upholstery that would be used. He said he registered Pedi-Power about a month after the bikes arrived; he identified a document within Exhibit C5 as the application for the registration of the business name; he said either he or Wayne paid the fee for the registration. He said he could see Mario and Rocco Carnese’s names had been crossed out. He said that it was a mistake that they had been put on. He said he had filled out many documents with

Austop Security putting all of their names down; he said he simply made a mistake in putting their name down and once he realised he crossed their name out. He said there was never any discussion before completing those forms to the effect that the Carneses' were to be persons registered as carrying on the business as Pedi-Power. He said Wayne Greaney's address was the principal place of business, at that time was Unit 9/65 Aralia Street. Mr Kent agreed it was Austop's email address that was given in terms of a contact. He said Austop's email was given as they did not have one set up for Pedi-Power at that time.

32. Mr Kent told the Court that he and Wayne Greaney had a set of keys for the shed; once they became familiar with other riders they would give a key to a rider; Mario and Rocco Carnese were never given a key. Mr Kent told the Court he was advised of the incident of 10 September 2005 when he was in Alice Springs and asked Mr Greaney if he or Ms Milner could contact police. Mr Kent said that as far as he was aware in September 2005 he did not owe any money to the Carneses. Mr Kent said the Carneses didn't put any money into construction of the first six bikes in New Zealand nor did they contribute to the four bikes in Darwin. In relation to Mario Carnese going to New Zealand Mr Kent said he believed as a result of what Mario Carnese had told him on the phone that he was going to New Zealand to see a girl and there was never any discussion about the bikes. Mr Kent said he was never told by Mario Carnese at any stage that he had paid \$700 for each bike plus parts. Mr Kent said there was no discussion concerning Mario Carnese being repaid monies if the bikes were a success; he said there was never any discussion that Carneses would get \$3500-\$4000 per bike. In relation to Exhibit C5 he agrees he had given Unit 11/5 Manilla Place Woolner as his address and that was Mario's address. He said he put Mario Carnese's address on because he did not take it seriously, it was a joke. He said there was never any agreement between him and Mario Carnese that he was holding a share with him.

33. Mr Kent said he was aware of the meeting at the Cool Spot and that Mario had instigated it. Mr Kent also advised the Court that he was once a Director of Austop but was no longer a Director and he received a letter in 2004 from ASIC advising he was no longer a Director; he said he couldn't recall any conversation with the Careneses indicating that they had received information from Racing and Gaming about a difficulty with him being a Director; he said the issue of his prior convictions was raised between the four of them prior to an application for the business Austop. Mr Kent advised that he had prior convictions for drug charges and break and entry from around seven years ago, all charges relating to the one incident. He then said it was maybe ten or twelve years ago. He said he became aware that he was no longer a Director via a letter from ASIC in 2005. Mr Kent was shown a document while giving evidence that he had only just been made aware of (MFI 21/later forming part of C21) being a telegraphic transfer receipt from ANZ Banking Group, Casuarina branch. Mr Kent acknowledged that he is named as the applicant with Ngaire Greaney as a beneficiary. He said he did not know the signature and he did not give Mario Carnese permission to sign any document on his behalf. He indicated he had never been present at the bank when the Carneses had sent any money to New Zealand.
34. In relation to the meeting at the Cool Spot Mr Kent said he did not want to participate but understood it was to do with breaking up Austop Security. He did not believe that it had anything to do with Pedi-Power or its assets.
35. In cross-examination Mr Kent said that once the pedi-cab business was running properly he could be taking between \$100 to almost \$500 per week. Mr Kent agreed that in relation to the paperwork for Austop, Rocco Carnese organised the paperwork; he said he liked to be in control of things. Mr Kent agreed that he also prepared documents for the business such as tenders for jobs and functions. Mr Kent said he had been involved in the business for three years and he did not recall resigning as a Director in

2002. Mr Kent agreed that Rocco Carnese would fill out most of the forms. He disagreed with the proposition that he accidentally put Rocco and Mario Carnese on the registration form and then crossed them out. It was suggested to him that he was never at the shed owned by the Carneses brother-in-law unless there was a member of the Carnese family there. He disagreed with that. He said whenever he was at the shed Mr Greaney or Biagio were present. He said he was never alone at the shed but he would visit Mr Greaney. He said on a few occasions Mr Greaney was at the shed working on the bikes but nobody else was. Exhibit C19 was put to Mr Kent indicating his resignation as a Director of Austop on 10 July 2002. Mr Kent said he could not recall this and could not recall resigning. He did acknowledge that it was his signature and it was signed twice. He said he thought he paid \$2,000 towards the second four bikes but he couldn't remember how he paid for it; he said it wasn't a lump sum. He said he couldn't remember the approximate dates of any of the payments but if Wayne Greaney said he needed an amount for the bikes Mr Kent would give it to him. He said that some of the income from the first bikes would have gone into the second bikes.

36. Mr Kent said he knew of no reason or no basis for thinking that Mario Carnese had entered into a business relationship with any member of the Greaney family including Wayne Greaney's mother. He disagreed that he paid any amount to Mrs Greaney for his time spent there during the 2002 holiday. He said that they bought her a gift but he did not think a gift voucher. He said the gift would not have been to the value of \$3,000. He agreed MFI 21 (now part of Exhibit 21) showed that \$3000 went to Mrs Greaney on 19 November 2002 just a few weeks before the trip. He disagreed that he went into the bank on 11 November 2002 and arranged the transfer to Mrs Greaney. He agreed the address shown on the document is 83 Tiwi Gardens Road which is where he was living and it was under his name. The phone number shown on the document was his phone number at

the time. He disagreed he was given Mrs Greaney's account number and bank details. He said he had never had Mrs Greaney's account number and bank details.

37. Mr Kent agreed there was a blow-up in a relationship concerning a girl that Michael Greaney fancied although he disagreed that was the start of the deterioration in the relationship. He agreed it didn't help. He agreed he didn't know of any reason why Mario Carnese would have sent \$3,000 to New Zealand prior to his trip. He said he didn't know anyone from P&O Ports and didn't know Michael Greaney used to work there. Mr Kent clarified that the \$2,000 he paid was paid before the bikes came over. He said he did pay for some more parts but he didn't have the receipts as his accountant had them. He reiterated that he would give Mr Greaney money when he needed it and sometimes the bikes were provided free of charge to the riders to earn a living from. Mr Kent said he wouldn't have a clue if the business was earning money; he said he was a shareholder, he wasn't running the business. He said he was using Mario Carnese's address as a joke. He conceded that it could possibly be true that the bikes in Darwin were funded by some of the monies from the bikes from New Zealand. He agreed he did not put money into Austop Security and he was not aware of the amount of money put in by Mr Greaney to Austop. He said he was aware that Rocco Carnese had put money into Austop but he wasn't sure how much. He agreed he had driven around in a car provided by Austop. He agreed that the green ute used was Rocco Carnese's personal ute. He could not say whether it had been stolen. He agreed that previously he had spent a lot of time with the Carneses including socialising with them, and going to Rui's gym. He agreed that Mr Tran trained at the gym with them also. He agreed he was drawing a wage while he worked for Austop but not when he went on holidays in December 2002. Mr Kent said he believed Mario Carnese went back to New Zealand in mid 2003. He agreed he was unable to say whether Mario worked on the bikes during that period. He

agreed he would sometimes go to the shop with Mario Carnese to pick up bike parts; he said he would stay in the car and did not contribute anything prior to Christmas 2002; he said he started to contribute money when he was back in Darwin. During that time he didn't go into any shops for bike parts with Mario Carnese. He disagreed that the bikes in Darwin were self funding; he said he couldn't estimate what he put in personally to keep them on the road. He said there were so many small expenses that he can't give a proper estimation. He explained the reason he let the riders ride them free at first was because he didn't think it was fair if they were going to keep breaking down. He said every cent they made they put back in to buy tools and receipts were kept but they were with his accountant. Mr Kent denied discussing the bikes with a Mr Ryan and said he couldn't remember making any purchases either in his own right or using the card from Mr Ryan at Bens Automotive. He agreed he could have. Mr Kent acknowledged that it must have been a mistake to have the Carneses on the Office of Business Affairs document and that would be why they crossed out. Mr Kent said his contribution was two or three thousand dollars to the four bikes brought to the Northern Territory but he did not have access to the documents and receipts which were with his accountant. Mr Kent could not recall the significant purchases. He could not recall the largest amount. Of the tools still missing, he said the welder was missing plus four or five other items. Of the other items he thought were missing, he was asked if they had been recovered and he said he thought they may have been recovered. He said money from the pedi-cab business bought those assets. He said one of the socket sets was his own and he brought it into the business to the value of \$200 plus bolts, screws and wires, plastic shelves and a cupboard. He agreed none of these items were in the books of the business and he could have taken them back. He confirmed he thought the bikes were worth \$2,000 each. In relation to the bank transfer document (Exhibit 21) Mr Kent acknowledged this relates to \$2,972 being transferred to Mrs Greaney but he says he did not transfer it. It was suggested to him that the money was

transferred by the Carneses to Mrs Greaney and Mr Kent said that he didn't know that. He agreed that his name was on the transfer but didn't agree that Mario Carnese was with him to arrange the transfer. He acknowledged Mario Carnese's signature was on the transfer and said "it looks like he has used my name". Mr Kent acknowledged that in a statement to police on 12 September 2005 he acknowledged that Mario Carnese had made a contribution out of his own pocket to the bikes. Mr Kent said he was referring to the first lot of bikes and in any event he had since found out from Mr Greaney that this wasn't the case.

Evidence Given on Behalf of Mario and Rocco Carnese

Mario Carnese

38. Mario Carnese gave evidence that he currently runs a business, ATM Hire Solutions and Austop Security. He said he, his brother Rocco Carnese and Wayne Greaney ran Austop; that "Boyzee" had a criminal record and he couldn't be a Director. In relation to Pedi-Power he said he put most of the capital in to get them started. Mr Carnese agreed that Wayne Greaney came up with the idea and also came up with the idea that he could build them quite cheaply in New Zealand. Mr Carnese says Mr Greaney asked he and Rocco Carnese if they wanted to be involved in the project and contribute money. Mr Carnese said he did internet searches and found out that a Brazilian Company made pedi-cabs for around US \$4000 and Wayne Greaney said he could have them built cheaper in New Zealand. Mr Carnese said that he and Rocco sent \$3,000 for the New Zealand operation. He said Mr Greaney sent \$3,000 and then because that money was stolen Mr Greaney paid an extra \$3,000. Mr Carnese said he didn't go to New Zealand for a holiday; he was there to start the bike business. This is in relation to the first six bikes in New Zealand. He said the welding was mainly done by Wayne whereas he and Boyzee were doing the upholstery, woodwork and painting. Over objection (on a *Browne v Dunn* basis) Mr Carnese gave

evidence that he stayed longer because the bikes were ready in various stages and he had to contribute more money because they were incomplete. Mr Carnese said Mr Greaney had put most of the money in for the six bikes. (11 August 2006 T39). Mr Carnese said he worked the bikes driving them around, taking tips from people and taking them to different nightclub spots. Of the first six bikes he said they were all completed save for one. Mr Carnese stated that after Mr Greaney, Ms Milner and others had left New Zealand he paid for some steel for the bikes and worked with Willie and others in New Zealand on the bikes; he said he was involved with discussions concerning fibreglass cabins and changes in the design. He said that Rocco Carnese couldn't go to New Zealand because he was looking after Austop back in Darwin. Over objection, (as much of his evidence was) Mr Carnese said he went back to New Zealand in 2003 to pay Willie and the bike man; he said he paid Willie \$700 NZ per bike; he said he paid "the bike man" \$4000 - \$5000 NZ. Mario Carnese said it wasn't a holiday for him to go to New Zealand, he said he stayed at Mr Greaney's parents house for two weeks, bought groceries in the sum of \$200 per week and gave Mrs Greaney \$500 cash for staying there. He said it wasn't a holiday as it was winter in New Zealand and he was working. He said the previous time he was in New Zealand with Boyzee they gave her a gift voucher for a restaurant in Tauranga for \$300 or \$400.

39. In relation to arranging the four bikes to be shipped back to Darwin he said they didn't document anything because they were all friends but as Wayne Greaney and Boyzee worked on the wharf and Michael Greaney had worked on the wharf in New Zealand, they were primarily involved. They looked at the costings and the first costings were \$4,000 which was expensive. He said they were advised by Michael Greaney that the bikes could be brought back in the wings of the cargo ships which was cheaper. He said he, Rocco, Wayne and Boyzee picked up the bikes in Darwin and took them to his brother-in-law's shed to be stored and finished. He said Rocco was running

Austop security and he bought the paint. Wayne Greaney organised Conrad to paint the bikes and Nick Samiotis to do the wiring but due to dissatisfaction with Mr Samiotis they obtained the services of George Georgio. He said Rocco Carnese purchased the paint and Boyzee and he purchased the bike pumps, helmets and other ancillary things. He said Steven Kay organised the shed where the bikes were stored and originally he and Rocco had keys as well but the locks were changed.

40. Mario Carnese said in relation to obtaining the bikes back he tried to deal with it diplomatically by talking to Boyzee and then Boyzee contacted Ms Milner in relation to a possible mediation. Mr Carnese described how he and Rocco and Anthony Tran, (who he said was an “independent witness”), and Andreas Andreaou happened to be at the shed. He said Rocco identified himself to the man in the shed who opened the door and Mario told Anthony Tran not to get involved “just to make sure as a witness that is to say there were no threats made, there was no intimidation” (T 11/08/2006 at 53). He said Rocco told the bike man that he hadn’t been paid in two years and they were taking back their property which was four bikes and a red syndchrome toolbox and they had other tools there that weren’t in their toolbox. Mario said he told the bike man to give Boyzee a ring, knowing Boyzee never answers and then Rocco told him to text Boyzee. He said they loaded the bikes onto the truck and took them to Rocco Carnese’s house at Anglesea Road Humpty Doo. They went away and the police removed the bikes on 15 September. He said the money that was spent on the bikes was his own personal money and not that from Austop.
41. In cross-examination Mario Carnese said Mr Kent was never a Director as he was knocked back immediately; he said because they were all friends they still kept everybody “as equal” (T 11/08/2006 at 59). Mario Carnese agreed with Ms Truman’s suggestion that as a Registered Bailiff himself, he understood that he could not go along and seize peoples’ goods and could not break in to someone’s property. As to his involvement with Pedi-Power

in Darwin he said he wasn't registered on the form and was told for taxation reasons not to put his name down and to keep it separate. He said he was not aware of signing any papers indicating that he was noted as a person operating Pedi-Power in the Northern Territory. He agreed with Ms Truman that when Wayne Greaney asked him to put some money in, that related to the first six bikes (on his evidence). It was clarified that the money put in was \$3,000 from himself and Rocco together (T 11/08/2006 at 62). He agreed he was not noted in terms of the operation of the New Zealand business but said his home address was noted. He agreed he accepted that Wayne Greaney put in most of the money and the work. He said that the reason he stayed the extra two or three weeks in New Zealand was to help get the next lot of bikes ready which were the additional four bikes that came to Darwin. He said that Wayne Greaney specifically asked him to stay there. He said Wayne Greaney was aware that he would put some money into those four bikes (T 11/08/2006 at 65). In relation to discussions about design with Mr Greaney, Mr Carnese said these discussions occurred at Rui's Gym on his internet (T 11/08/2006 at 66). He agreed when he left New Zealand the four bikes weren't in any substantial stage of construction but the frames had been welded. He said the construction had been stalled because Willie was waiting on parts and had run out of steel. He agreed that if the shortages and stallings were occurring then Wayne Greaney would have known about it: (T 11/08/2006 at 67). Mario Carnese confirmed that Wayne Greaney would have known that he was going back to New Zealand to make payments on the bikes because the construction had stalled (T 11/08/2006 at 70). He reiterated that he did not recall the precise amount but that he gave Willie \$700 NZ per bike that was roughly \$3,000 (T 11/08/2006 at 70). He says he is unaware on whether Wayne Greaney was present for conversations about paying between \$4,000 or \$5,000 and says he mainly spoke to Boyzee. He said there was a verbal agreement between him and Mr Greaney that the money he expended would be repaid. He said Boyzee was present and Rui and Anthony Tran may have been present. He

said the verbal agreement between them was that he would put most of the money in and if it worked out he was to be paid back the money that he put in first and then the profits were to be divided; if the business failed they were to sell the assets and he would recuperate some of the money. Mario Carnese said he would be paid back approximately \$3,500 to \$4,000 per bike. He said Rocco Carnese purchased paint for the bikes and he was involved in rubbing back the steel work. He said Wayne Greaney was present while they were working on the bikes. Mario Carnese also said there was an arrangement that Rocco Carnese would basically run Austop and Boyzee would run the bikes but they were all equal partners. Mario Carnese said he didn't try to enforce his agreement that he would get \$3500 to \$4,000 per bike in Court as they were all friends and he wanted to work it out diplomatically through mediation. He disagreed that he had not been involved with the bikes once they had commenced operation. He said he organised some of the first riders and attempted to organise sponsorship. He said he had stepped back because there was a falling out. Mr Carnese reiterated his version of collecting the bikes and assorted goods from the shed. He denied suggestions that he did not expend a substantial financial amount into Pedi-Power in the Northern Territory; he denied that his involvement was simply as a friend.

42. Over objection I allowed Mr Carnese to be recalled for the purpose of tendering two records of transfer from ANZ Bank. These documents now comprise C21 and C22. One is dated 19/11/2002 for NZ \$2,972 to Ngaire Greaney signed by James Kent on 19 November 2002, it is a telegraphic transfer receipt from the ANZ Bank. The second, the applicant is named as Wayne Greaney, signed by him for the sum of \$3,000 and sent to Ngaire Greaney on 1/8/2002. In relation to the transfer signed by James Kent, Mario Carnese said that came about given an agreement between the four men that they would all send \$1,500 each and Mario and Rocco went with Boyzee and Wayne Greaney to the ANZ Bank and sent the money over. Mr

Carnese said his signature appears under James Kent's name because he completed this transaction with Boyzee. Because it was Mr Carnese's money Boyzee passed the application to him and Mr Carnese signed the document. In relation to the other transfer document he said Wayne Greaney did that and the recipient is Ngaire Greaney being Mr Greaney's mother. He rejected assertions that he had no authority to sign the bank transfers.

43. In further cross-examination it was suggested to him that he only did minor work in New Zealand on the first six bikes. He said he did upholstery and timber work. Of mechanical work he said he did some pop riveting. In further cross-examination Mr Carnese said he contributed to the paint of the Darwin bikes, the equipment and his brother-in-law's shed. He said they also paid for the upholstery. He denied any suggestion that Austop owed money to Wayne Greaney at the time that the quarantine release was paid for by Austop cheques. In cross-examination about the Cool Spot meeting Mr Carnese said that he and Rocco believed they owned close to 90% of the bikes; he said they wanted the bikes so Mr Greaney could keep the business. He said Ms Milner told them they could keep the business and Mr Greaney and her keep the bikes. Mr Carnese said he told her that was unfair because they had actually paid the majority from Austop. He said Ms Milner suggested perhaps Mr Greaney should keep Austop and he (Mario Carnese) keep the bikes. He was asked whether he had suggested that they keep two bikes but he said it was Ms Milner who suggested that they take two bikes. Mr Carnese said he didn't agree with that because he had put most of the money in.

Rocco Carnese

44. Rocco Carnese gave some background evidence on the Company Austop. He said the four of them drew wages for the hours that they worked; their

phones and phone bills were paid for plus fuel, uniforms, firearms, computers, whitegoods and other items. He said James Kent worked occasionally after his crowd controllers licence was returned. He denied that Austop Security owed Wayne Greaney money and stated that Wayne's initial contribution was \$2,000. He said that between the four of them \$6000 was sent through to Mr Greaney's mother. He agreed that the bikes were to be built in New Zealand because it would be cheaper and Wayne Greaney knew people who could build them. Mr Carnese said the fee due to Patricks noted in the receipt from Patricks International Freight (Exhibit C11) was paid by an Austop cheque. He also tendered Exhibit C12 – *Brakebolt* delivery order that he said was paid by an Austop cheque. Similarly, records of purchase were tendered from Super Cheap Auto's (Exhibit C14); Dulux Trade Centre (Exhibit C15) and the general ledger of Austop (Exhibit C16). Rocco Carnese's evidence is similar to Mario Carnese's in that he said he put in \$1,500 of his personal money and has never seen a return.

45. In cross-examination Mr Carnese disagreed with the prosecution that the four original owners of Austop Security could use Austop accounts not only for business reasons but for anything they needed personally. He was cross-examined about a new business "Austop Imports". He told the Court this business commenced and operated with the knowledge and consent of Wayne Greaney and Boyzee. He was cross-examined about his evidence where he indicated that Wayne Greaney had left Austop and kept possession of a number of items including a computer, computer speakers, fridge, washing machine and Aboriginal painting. It was suggested those items were not assets of Austop but he disagreed. He disagreed they were items Mr Greaney had purchased personally. He disagreed with any suggestion that there was an understanding that personal items could be purchased and kept by individuals. He said he believed the money represented in the ANZ transfers was being sent over to finance construction of the bikes and it was

initially sent to Wayne Greaney's mothers account. In relation to arrangements concerning the bikes that were brought to Australia he couldn't recall when and where any discussions took place about those arrangements saying it was "more than likely at the Gym". He said the arrangement was that once the business was up and running they would get their money back in equal shares. He disagreed with the proposition that Mario Carnese went to New Zealand because of a girl. Mr Carnese said the shipping documents were in Wayne Greaney's name because he worked at P&O and it would be cheaper. He disagreed that it was in Wayne Greaney's name because they were Wayne Greaney's bikes. It was suggested to him that the reason he paid Truman's Upholstery with an Austop cheque was because that represented money that Austop owed Mr Greaney. He disagreed that Patricks was paid with an Austop cheque because Austop owed money to Mr Greaney. He said the phone number on the document was his. In relation to the majority of payments made via Austop cheques, it was suggested that those amounts represented amounts that Austop owed Mr Greaney. Mr Carnese disagreed. It was suggested to him that the various items drawn on Austop cheques in the Austop business records were personal items but he said they were all to do with running the business. He agreed the two businesses of Austop and Pedi-Power were kept separate. It was suggested to him that he would not allow access to the Austop documents – he said that was a lie. He disagreed that he prepared documents for Austop without consultation with Wayne Greaney or Boyzee. He said his contribution to pedi-cabs was financial; he added that he did a little bit of work in the sheds. Under cross-examination he said everyone would have their money returned. He said everybody would share the proceeds once they had been paid back their original money. He agreed Wayne Greaney did the predominant amount of work.

Mr Andreas Andreaou

46. Mr Andreaou gave evidence that although the events were vague to him he remembers a meeting at the “Cool Spot” in November 2004 and says he was pretty sure that Mario Carnese arranged for Rocco Carnese to approach him to see if he could be a negotiator or a mediator. He said he doesn’t remember the details of how he was approached. He said present at the meeting was “Milo” (Ms Milner), himself and Mario Carnese. He said he made his role clear as a mediator/conciliator and that he was independent, objective and impartial. He explained he had no interest in the outcome but he was trying to resolve the dispute between two mutual friends. He said the nature of the conversation centred on the pedi-cab bikes; he said the mediation went for about two hours and about 70% of it related to the pedi-cabs. He said both parties were going to go away and get documentation to support their positions and meet at a later date but that didn’t happen. He said from Milo’s side she was going to itemise their costings in terms of time and labour and from Mario’s side he was going to obtain his document referring to costings. He said he received a phone call from Mario to prompt him to set up another meeting and he used to see Milo by occasionally bumping into her and he mentioned it to her. He said he is unsure whether he called her or not but he knows that he contacted her in some form. He said it had been indicated that they would meet without him. He said the other 30% of the conversation on the day of the mediation was focussed on the trip to New Zealand. He agreed to a suggestion in cross-examination that Ms Milner had said she couldn’t go back to Mr Greaney or Boyzee without some substance of what was being discussed or what the proposals were. He agreed he was good friends with Mario Carnese. He said he used to socialise with Michaela Milner but that she has now left Darwin. He agreed he did not socialise with her as often as he would socialise with Mario Carnese. He said he didn’t recall her saying there was no need for a mediation. He said the Austop business may have been discussed but he didn’t recall. He said it was incorrect that what was being

discussed was more in relation to money owed at Austop and not the Pedi-Power business. He disagreed that Mario Carnese's main area of discontent was with Austop. He said he didn't recall that Ms Milner had indicated that neither Boyzee nor Mr Greaney had wanted to purchase the Austop business.

Rui Mu

47. Mr Mu gave evidence that he knows the Carneses and he sees them at his gymnasium. He says he knows Boyzee and Wayne and Michaela. He said they were all members of his gym. He says he was aware they were in business together and he had heard discussions about the pedi-bikes; he said he was at the counter and he was friendly with all of those persons; he heard them talk about getting a bike built in New Zealand; he said Mario Carnese went behind the counter and had a look on the internet and made a picture and they had a discussion; he said Wayne, Boyzee and Rocco were also there. He said Mario was the one mainly on the internet. He said there was more than one discussion about building the bike; he said most of the boys don't have money so Mario said he would contribute with the funds. It was said that after they made a profit they will just pay him back. He said he was aware that they split the business and there were some personal issues. He said in cross-examination these discussions happened more than once because the boys were always in the gym; he said they had a friend in New Zealand to build the bikes. He said he didn't know exactly when those discussions took place. He said he saw the picture from the internet which was a draft that they had printed out from the internet. He said he didn't see who had done the drawing but he had guessed Mario because he was the one there although he himself wasn't present when it was printed from the internet.

Heath Adam Ryan

48. Mr Ryan gave evidence that he knew all the main parties. He said he met Boyzee and Wayne Greaney through Rocco and Mario. He said he hasn't

spoken to them for a few years but there has been no hassles. He said he would socialise with them and they all worked together. He said Boyzee utilized premises at Bens Automotive (where Mr Ryan worked) for business and for himself. He said when the group “got into” the bikes they researched about parts for them and ordered the parts and fabricated the metals. He said fabrication of the parts was done at Bens Automotive. He said he thought the bikes were being assembled at a brother-in-laws shed in Winnellie; he said he went there at one stage when they were painting the framework and the guards. He said a guy called Conrad was painting and Mario and Rocco were assisting him with the frames. He said he thought the four persons were all partners in the bike venture; he said they were once all talking about it at the workshop and Mr Kent was part of those conversations talking about who was initially paying for the bikes and who was going to do the work. He said Mr Kent purchased items through Bens Automotive; he said he purchased two sets of LED lights, 12 volt and they were paid for by EFTPOS. He said only Rocco and Mario had held an account with him. He said if the cost was too much for Boyzee to carry on a particular day it was going to be put on Rocco’s account and then worked out later. He said flat bar steel was provided by Bens Automotive and that went on Rocco’s account for about \$50. He said from his discussions with Mr Kent that ownership of the bikes was all a partnership and everyone was contributing their own little bit. He said he saw all the guys in Edmunds Street and they were all talking about how well it was going and how financially it was looking pretty good. He said he already knew they were in partnership in another business and the way they discussed this bike situation made it clear it was a partnership. In cross-examination Mr Ryan agreed that Rocco Carnese was one of his best friends and he was best man at his wedding. He said he doesn’t have as much to do with him any more. He said he hasn’t discussed a great deal of the proceedings with Mario or Rocco. He said he didn’t want to get involved. He said when he visited the

shed where Conrad was painting that neither Wayne nor Boyzee were there. He was there for around half an hour.

Biagio Spinella

49. Mr Spinella gave evidence about his shed at 34 Bishop Street, Unit 10; it is a shed used to store the gear for his fishing business; he said it is very secure and he has to be able to give access to fishery inspectors. He said only his wife and Bruce, (one of his skippers), have a key. In relation to Rocco Carnese he said his wife gives Rocco a key when he is out to sea and if they need to access some gear or equipment Rocco usually does that for him. He said in relation to the pedi-cab bikes, Rocco and Mario approached him to be able to use the shed to build the bikes; he gave Rocco a key but it was on strict conditions that he would not give the key to anyone else, make sure it was locked when he left and then give the key back to his wife. He said he never saw Wayne Greaney or Boyzee at his shed. He agreed in cross-examination he wasn't monitoring them every time they used the shed. He reiterated that it was only Rocco and Mario that he spoke to about the bikes.

Consideration of the Issues

50. The four primary witnesses (three of whom are parties and Mr Kent) were once good friends and business colleagues. The breakdown of the friendships and the business relationships is an unfortunate setting in which to attempt to ascertain the truth or if not the truth, the probabilities of the correctness of assertions of ownership over the pedi-cabs. The atmosphere of animosity between the parties has generally led me to the view that the parties have tended to overstate their own involvement in the production of the pedi-cabs and understate the involvement of the other party. There is no one that can be considered a genuinely neutral witness.

51. Although I took the view that Mr Greaney gave his evidence in a straightforward manner and in a significant part, I tended to believe him, aspects of the competing evidence were strong and has made me question whether the situation was as straightforward as Mr Greaney had made it out to be. His bold statements that neither of the Carnese's had anything to do with the financing or construction of either sets of bikes, (save for some acts of friendship by way of minor works and donations by Mario Carnese and arrangement for storage and other minor matters by Rocco Carnese), is undermined significantly by other evidence. I am sure Mr Greaney believes their contribution was minimal, but that belief is displaced by other evidence, in particular the documentary evidence. Having said that, in my view the preponderance of evidence favours a conclusion that Mr Greaney did make the greatest contribution to the construction of the pedi-cabs. I should say that a number of witnesses and even counsel seemed to place great significance on drawing a distinction between when a cheque was drawn from Austop as opposed from "personal" funds. In my view, a contribution is a contribution, if it came from Austop, in effect it came from the parties and is still a contribution made by all parties who were Directors of Austop. Mr Greaney's case made much of the fact that whenever he used Austop funds, it was really money that Austop owed him. He has produced no evidence of why Austop owed him money or how much, indeed there is evidence to contradict this assertion. As for using the Austop income for personal goods, I would have thought there were taxation issues that need to be considered by the parties. I am not making adverse findings here, but evidence of purchasing individual personal items directly from the proceeds of the company appears irregular.
52. Mr Greaney's evidence was substantially supported by the evidence of Ms Milner, but Ms Milner was not a direct participant in all of the discussions and much of her evidence (which I accept) concerns conclusions she has made about the business in the context of being in a relationship with Mr

Greaney. In terms of the evidence about the informal “mediation”, Ms Milner’s recollection was that it was primarily about Austop, whereas Mr Andreaou’s evidence was it was primarily about pedi-cabs. I see this as a matter of differing perceptions and the probabilities favour a conclusion that both topics were discussed.

53. The fact of the Carneses taking unilateral action in seizing the pedi-cabs places them in a poor ethical light however, as is common ground, police charges did not proceed and on behalf of the Carneses, it is submitted that their seizure of the pedi-cabs emphasises their strongly held belief that they owned the pedi-cabs. In my view, it is thuggish behaviour, especially in circumstances where they concede that Mr Greaney has a valid claim to ownership of some proportion of the bikes, just not full ownership. I take the initial seizure of the bikes as a neutral fact that favours neither party.
54. A great deal of the detail of the evidence given by the Carneses’ was not put to Mr Greaney and was in fact received over objection and I determined to make rulings about that at the completion of the hearing. Although a great deal of the detail of the evidence of the Carneses was not put to Mr Greaney, Mr Greaney had generally denied the contribution of the Carneses’. Save for one exception of significance, I will still admit those parts of the evidence of the Carneses that was admitted provisionally, however, in my view the evidence given that was not put to Mr Greaney that could have been put to him is of very low weight save for where I have been able to find other evidence, such as in documents or from other witnesses that support the testimony. The Carneses case grew with each day of the hearing. The evidence of the Carneses in my view was exaggerated to the point of losing significant credibility. There is still support for their case in the documents and from observations of some other witnesses.
55. The one part of the evidence I am going to disregard completely that was given by the Carneses but not put to Mr Greaney is the document

“Telegraphic Transfer Receipt” to Ngaire Greaney from Wayne Greaney dated 1 August 2002 for AUD3,000 (Exhibit C22). Mario Carnese’s gave an explanation of that document that strongly supports his own case (of financial contribution to the pedi-cabs) but the way it has been raised does not give Mr Greaney “a sporting chance” of giving an explanation for his own document. I put the other bank transfer in Mr Kent’s name (Exhibit C21) signed by Mario Carnese for AUD\$3,000 in a different category and allow that as Mr Kent was cross-examined significantly on that document. In general though, even allowing for the fact that people can miscommunicate with their lawyers, can be misunderstood, or be unprepared and allowing for the fact that this is a slightly unusual proceeding, in my view the fact that so many matters were not put in cross-examination of Mr Greaney and then loomed large in their own case indicates exaggeration on a grand scale and detracts from the credit of their case. That does not mean I reject everything in their case. Taking the evidence as a whole – with all the major qualifications I am compelled to make, I do find the Carneses have made a contribution to the assets but not nearly as significant as Mr Greaney’s contribution. Mr Greaney’s case is significantly weakened by Mr Kent’s evidence – primarily his memory is so poor that much of his evidence cannot be relied on.

56. A clear example of the exaggeration of the Carneses is their assertion that they were responsible for finding the accommodation for the bikes near Westlane Carpark. All the evidence, including evidence from documents and other witnesses indicates they had nothing to do with those arrangements and nothing to do with the ongoing operation of the business.
57. Both parties alleged that the opposing party could have called further witnesses to prove or disprove the many and varied assertions. In my view given the issues of distance, cost, the time since the original dispute, there is no reason to draw adverse inferences from either party on this basis.

58. The evidence tending to indicate that Mr Greaney does not own the pedi-cabs outright and unencumbered includes the following findings I have made based not only on the Carneses evidence but other supportive evidence:

- The contribution of AUD \$3,000 made by transfer on 19 November 2003 to New Zealand, in Mr Kent's name, signed by Mario Carnese to Mr Greaney's mother.
- The length of time spent in New Zealand by Mario Carnese, across two trips and longer than the other participants – I don't accept it was only a holiday.
- The context of the Austop Business and the payments made from Austop – effectively a contribution from all the directors of Austop, including the Carneses (eg. see C13, C14, C15, C17 and C10).
- Purchase of bike parts by the Carneses, primarily from Bens Automotive.
- The work done by Mario Carnese (although minor and primarily unskilled).
- Arrangement of storage of the four pedi-cabs at Biago Spinella's shed.
- The scratching out of the Carneses name on the Business name application.
- The use of the Austop address or email on various pedi-cab associated documents.

59. All of this adds to the conclusion that the various contributions were not done on the basis of favours or friendships. In my view the evidence is not strong enough to find there was a contract concluded between the parties, but to suggest that the Carneses had no interest in the pedi-cabs given the work done by Mario Carnese and financial contribution from them would amount to unjust enrichment. In my view the Carneses would have an interest enforceable by way of unjust enrichment or an action based on the equitable doctrine of restitution. Conversely, had the Carneses retained

possession of the pedi-cabs, Mr Greaney would likely have an action based on the same doctrine: (*Pavey v Mathews Pty Ltd v Paul* (1987) 162 CLR; *Baltic Shipping Co v Dillon* (1993) 176 CLR 244).

60. I readily accept, save for the matters I have mentioned above that Mr Greaney did contribute far more significantly to the pedi-cabs than the Carnese's did. I accept he worked tirelessly, that he primarily conceived the design, organised the labour in New Zealand, organised the use of the pedi-cabs in Darwin and was responsible for the generation of the income derived from the use of pedi-cabs. I reject the submission that there was no link between the six pedi-cabs in New Zealand and the four pedi-cabs in Darwin but I certainly accept Mr Greaney is entitled to the larger share of the assets being the pedi-cabs.
61. Mr Greaney's evidence was that the pedi-cabs were worth between \$3,000 and \$4,500 each. He has clear evidence, (tendered through Ms Milner), of having expended \$9,528 (Exhibit C6). All matters considered, in my view the ownership of the pedi-cabs should be proportionated as %75 to Mr Greaney and 25% to the Carneses' (jointly). Mr Greaney claimed for the "Miscellaneous Box items" in his application – given the preponderance of evidence that he was operating the business, I will order the return of those items to him. They are not part of the Carneses' application. To circumvent any dispute on which on the pedi-cabs will be returned to each party, I will order the Carneses will have the right to choose, acknowledging their application was first in time to be filed.
62. Given the broad powers pursuant to s 130B *Justices Act* I order as follows:
 1. The delivery of one pedi-cab the subject of this application to Mario Carnese and Rocco Carnese or their authorized agent.
 2. The delivery of three pedi-cabs the subject of this application to Christopher Wayne Greaney or his authorized agent.

3. That Mario Carnese and Rocco Carnese or their authorized agent choose the pedi-cab referred to in paragraph 1 of these orders, provided it is chosen within 7 days the remaining three pedi-cabs will be delivered to Christopher Wayne Greaney pursuant to paragraph 2 of these orders.
4. That the miscellaneous boxed items seized by police on 15 September 2005 be delivered to Christopher Wayne Greaney or his authorized agent.
63. I will request the Court Registry forward a copy of these reasons to the Commissioner or his legal representative.

Dated this 7th day of November 2007.

Jenny Blokland
CHIEF MAGISTRATE