SUPREME COURT OF QUEENSLAND

CITATION:	*Summer Swim Pty Ltd v Sam Riley Promotions Pty Ltd* [2019] QSC 70
PARTIE:	**SUMMER SWIM PTY LTD** ACN 167 452 879 (plaintiff) **v** **SAM RILEY PROMOTIONS PTY LTD** ACN 071 286 523 (defendant)
FILE NO/S:	No BS4700 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4, 5, 6, and 7 March 2019
JUDGE:	Boddice J
ORDER:	**I shall hear the parties as to the form of orders and costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – PARTICULAR PARTIES – VENDOR AND PURCHASER – where the plaintiff purchased a swim school from the defendant – where the contract stipulated that the defendant would offer the plaintiff training and support for six months after the sale – where training was offered but not provided – whether the defendant's failure to provide training and support constituted a breach of the contract – whether the plaintiff's business failed as a consequence of the defendant not providing training and support *Alexander v Cambridge Credit Corporation Pty Ltd* (1987) 9 NSWLR 310 *Concrete Pty Ltd v Parramatta Design and Developers Pty Ltd* (2006) 229 CLR 577 *Mackay v Dick* (1881) 6 App Cas 251 *Mantonella Pty Ltd v Thompson* [2009] 2 Qd R 524; [2009] QCA 80 *Secured Income Real Estate (Australia) v St Martins Investments Pty Ltd* (1979) 144 CLR 596

COUNSEL:	A Brown (self-acting, director), for the plaintiff B W Wacker, for the defendant
SOLICITORS:	Frigo Adamson Legal for the defendant

[1] On 25 September 2014, the plaintiff completed the purchase of a swimming school at Capalaba. At the date of purchase, it was a successful business providing swimming lessons and facilities to hundreds of children and families under the banner of Sam Riley Swim Schools (***"SRSS"***).

[2] By March 2015, the number of customers had fallen to but 30. The manager and instructors had resigned and the rent for the premises was in arrears. On 26 March 2015, the swimming lanes went silent. The plaintiff's business closed permanently.

[3] The plaintiff claims the business closed as a consequence of the defendant's failure to comply with its contractual obligations. It claims damages for losses occasioned by it as a consequence of the purchase and subsequent failure of the swimming school. The defendant denies it breached its contractual obligations. It also denies the business failed as a consequence of any such breach.

[4] At issue is whether the plaintiff's business failed as a consequence of the defendant not providing training and support, as it was contractually obliged to do, and by poaching customers, as it was contractually obliged not to do.

Background

[5] The plaintiff's sole director is Alex Brown, a 62 year old experienced swimming coach. The plaintiff was incorporated in order to undertake the purchase of the defendant's swimming school at Capalaba in 2014. The plaintiff borrowed the necessary funds to complete that purchase.

[6] Prior to 2014, the defendant operated the swimming school at Capalaba as well as several other swimming schools in the greater Brisbane region in partnership with David Robert Noonan. SRSS was operated under a business model which provided a centralised system of training and support for each individual swimming school, its managers and instructors. This business model ensured consistency in the programmes offered to customers at the various swimming schools.

[7] In 2013, Brown entered into negotiations for the purchase of the SRSS at Springwood in the State of Queensland. Those negotiations advanced to a point where there were agreed terms, including price. However, late in the negotiations, SRSS determined not to proceed with that transaction.

[8] In 2014, Brown commenced negotiations for the purchase of the SRSS at Capalaba. Initially, those negotiations were through a franchise broker, Mike Craig, on the basis the sale would be by way of franchise agreement with the swimming school to remain under the SRSS banner.

[9] As part of those initial negotiations, Craig provided Brown with the business profile for SRSS Capalaba. It stated the swimming school was "currently running at 60% to 70% capacity. There are currently 570 lessons run each week, a motivated owner could easily increase to maximum capacity of 900 classes per week."[1]

[10] As the negotiations progressed, Noonan indicated any sale was to be without the benefit of the SRSS banner. However, he indicated a purchaser would receive the benefit of ongoing training and support from SRSS to ensure continued consistency in both the management of the swimming school and the provision of services to its customers.

Contract

[11] A central condition of the contract for sale was Special Condition 4. It provided:

"4. The following items are to be supplied to the Buyer for a 6 month period after settlement by the Seller:

4.1 Every fortnight between 9am and 2pm the Sam Riley Swim School training and development manager will come to the swim centre to work with all instructors in their training and development and provide support to the new owner on how to further develop their team of instructors.

4.2 Every fortnight between 9am and 2pm – alternative week to the training and development manager the Sam Riley Swim School operations/management support manager will come down and provide day to day operations and management support to the new owner.

4.3 Subject to approval being received by the new owner the Seller (Sam Riley Swim School) will continue to provide their weekly swim school analysis to the new owner. This report includes information/previous year's comparisons on KPIs such as level bookings, accounts outstanding, cancellations, wages verses rostered/approved hours – admin as well as teaching, class efficiency levels. Currently this information is particularly important for ensuring the business is managed efficiently and that any problems are addressed before they become a problem. This information is also monitored against the other swim schools to ensure normal seasonal trends are consistent, and not because of any other reasons.

4.4 The Seller will provide 2 weeks in pool training on how their programme works, and why they do the things they do in their programme. The Seller will also provide level one and level two – full management training over 2 days – on how to use the booking and payment programme – Splash.

4.5 The Seller will once every month, for approx. 2 to 3 hours – provide their full management support team – operations manager, training and development manager and managing director – who will provide feedback

[1] Exhibit 1, Document 249.

on KPIs for the business and areas to focus on – including marketing suggestions, team training support, efficiencies within the business, etc.

4.6 For areas such as day to day management the Seller would make recommendations on how to improve and grow the business and then it would be up to the buyer what is implemented."[2]

[12] Non-compliance with Special Condition 4 is one of two issues relied upon by the plaintiff for its claim for damages. The other issue is non-compliance with Special Condition 6, which provided an "agreement by the Seller not to solicit or encourage customers from Sam Riley Capalaba to leave the Capalaba pool or switch to any other Sam Riley Swim School". [3]

Pleadings

[13] The plaintiff alleges the defendant breached Special Condition 4 as it did not, within the six month period of completion of the contract, supply any of those services. Further, it breached Special Condition 6 by encouraging or counselling its former manager, Hayley Meerten, to resign from her employment with the plaintiff and to commence employment with the SRSS at Manly. As a consequence, customers of the plaintiff's Capalaba swimming school were encouraged to switch to SRSS Manly.

[14] The plaintiff further alleges that as a consequence of those breaches of contract, it suffered loss and damage, as the only people able to operate the swimming school on behalf of the plaintiff were Meerten or the assistant manager, Kathryn Waitai, who also resigned her employment. As the plaintiff was unable to reopen its business without the provision of the services required by Special Condition 4, the plaintiff was unable to meet its obligations under the lease, or pay employee wages and other expenses.

[15] In its defence, the defendant pleads SRSS was at all material times ready, willing and able to provide the training and support required by Special Condition 4, but the obligation to do so was waived by the plaintiff's refusal to schedule training in response to requests on 26 September 2014 and subsequently between mid-October 2014 and early December 2014. Further, in about mid to late December 2014, the plaintiff declined the SRSS' offer of assistance.

[16] The defendant alleges that in those circumstances the plaintiff is estopped from asserting a breach of Special Condition 4 between September 2014 and January 2015 and that thereafter it was impossible for the SRSS to perform its obligations under Special Condition 4 as Brown, who had been seriously ill from November 2014, failed to pay the wages of plaintiff's employees either on time or at all, failed to respond to requests for guidance and assistance from the plaintiff's employees, failed to attend the swimming school on any regular or systematic basis and engaged in erratic and disconcerting behaviour towards the plaintiff's employees.

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[2] Exhibit 1, Document 1.
[3] Exhibit 1, Document 1.

[17] The defendant alleges the collapse of the plaintiff's business was a consequence of Brown's illness, hospital admissions and conduct, not any breach of Special Condition 4. Further, Meerten's resignation from her employment with the plaintiff was by reason of Brown's conduct and not as a result of any encouragement or counselling by SRSS. Any loss or damage suffered by the plaintiff was caused by Brown's conduct of the plaintiff's business, not any breach by SRSS of Special Condition 4 or Special Condition 6.

[18] Finally, the defendant counter claims for a sum of $60,000, paid by the defendant in settlement of a claim by the landlord pursuant to a guarantee provided by the defendant for the payment by the plaintiff of its obligations under that lease.

[19] By way of reply, the plaintiff denies the defendant was ready, willing and able to provide the services required by Special Condition 4; denies the plaintiff waived compliance with Special Condition 4; denies the plaintiff declined the offer of training and support and denies Brown's illness led to the failure of the plaintiff's business. Any failure to pay employees on time was due to the non-provision of the requisite training, the resignation of Meerten and because the plaintiff was unable to properly manage its business as a consequence of the breaches of Special Conditions 4 and 6. The plaintiff asserts an entitlement to set off the amount claimed by way of counter claim against the damages recoverable from the defendant.

Objections

[20] At the commencement of the trial, rulings were made as to the admissibility of certain documents in the trial bundles prepared by the plaintiff and defendant. The admissibility of documents 95 to 167 (inclusive) and 250 of the plaintiff's documents was reserved.

[21] Having considered those documents in the context of the evidence, I am satisfied each of those documents is relevant. I overrule the defendant's objections to the admission of those documents into evidence. They will form part of Exhibit 1.

Evidence

[22] In 2013, Brown saw an advertisement for the sale of the SRSS in Springwood. Brown approached the broker and commenced negotiations for its purchase. During those negotiations, Brown came to learn that David Noonan ran the swimming school business, known as SRSS.

[23] Negotiations continued between May 2013 and September 2013. On 18 September 2013, a price of $300,000 was agreed for the purchase of the SRSS, Springwood. However, in October 2013, negotiations were called off by Noonan.

[24] In 2014, Brown commenced negotiations for the purchase of SRSS, Capalaba, as part of a franchise agreement. When the negotiations changed to an outright purchase, Brown expressed concern that any new owner would not be able to provide parents with the

Sam Riley brand for teaching and that there was a risk instructors would transfer to the SRSS located nearby in Manly. In that event, there was a risk of a mass exodus of customers.

[25] In response to that concern, Noonan advised that SRSS would be willing to work with Brown to ensure a smooth transition and to assist in ensuring he had a great programme in place and there was minimal effect on existing families. The defendant would also agree to a clause ensuring the defendant did not poach any families from Capalaba to Manly and that "same goes with staff".[4]

[26] On 10 June 2014, Noonan sent an email to Craig setting out the support SRSS would offer to the new owner of its Capalaba swimming school.

> "1. 9am to 2pm once every fortnight our training and development manager would come to the centre to work with all instructors on their training and development and provide support to the new owner on how to further develop his team of instructors
>
> 2. 9am to 5pm, once every fortnight – alternate week to the T&D Manager our operations/management support manager – who has worked for the business for over 5 years and has been in the industry for over 15 years – would come down and provide day to day operations and management support to the new owner
>
> 3. Subject to approval being received by the new owner we would continue to provide our weekly swim school analysis to the new owner. This report includes information/previous years comparisons on KPIs such as level bookings, accounts outstanding, cancellations, wages vrs. rosters/approved hours – admin as well as teaching, class efficiency levels, etc. We find this information particularly important for ensuring our business is managed efficiently and that any problems are addressed before they become a problem. This information is also monitored against the other swim schools to ensuring normal seasonal trends are consistent, and not because of any other reasons.
>
> 4. We would provide 2 weeks in pool training on how our program works, and why we did the things we did in our program. We would also provide level one and level two – full management training over 2 days – on how to use our booking and payment program – Splash.
>
> 5. Finally, once every month – for approximately 2-3 hours – our full management support team – operations manager, training and development manager and managing director – would provide feedback on KPIs for the business and areas to focus on – inc. marketing suggestions, team training support, efficiency within the business, etc.
>
> The above is the full support our swim school managers and swim school team receive each month. For areas such as day to day management, we

[4] Exhibit 1, Document 102.

> would make recommendations on how to improve and grow the business and then it would be up to the new owner what is implemented."[5]

[27] Following this indication, a draft contract was forwarded to Brown. After request for variations and additions, a final contract was executed by the parties in early August 2014. Settlement took place on 25 September 2014. The plaintiff commenced operation of its swimming school on 26 September 2014, under the name Capalaba Swim Stars.

[28] As part of the sale, the manager of SRSS Capalaba, Hayley Meerten, ceased employment with SRSS and commenced employment with the plaintiff as manager of Capalaba Swim Stars. The swimming instructors previously employed by SRSS also commenced employment with the plaintiff in their previous roles. The hours of business of the swimming school, together with its swimming programme continued in its pre-existing form.

[29] At the time of the purchase, the swimming school had approximately 470 students. It operated between 8.00 am until 6.00 pm Monday to Friday, and 7.00 am to noon Saturday. The swimming school did not operate on Sundays under Brown's ownership. Most classes were held before noon or after 3.00 pm.

[30] The plaintiff took seven staff from the defendant when it commenced operation of its swim school. Those staff were Meerten and the instructors, Naomi Connerty, Emily Fowler, Merrilyn McLean, Alisha Krugar, Kathryn Waitai (who also operated on the front desk) and Matthew Randall.

[31] When the plaintiff took over the swimming school, Brown changed the labels on the programme and the names of the classes. He did not accept he changed the programme. When shown an email he had sent to Meerten dated 18 September 2014, in which he outlined new names for new swim levels, Brown did not accept the words "there is a new level after Stylers, as the SRSS program has a level after Stylers 4 (Dolphins) that some SRSS do operate" constituted a new programme. Brown was authorised to use the Sam Riley programme. He added an existing level that had not been used for some time. It was "an unused level" that he brought back.[6]

[32] Brown had seen on the website that Sam Riley had a programme called "Dolphins" after the "Stylers". He had never been trained in Dolphins or Stylers, but thought that because they were offered to use the entire programme, he might as well add that as a progression. They needed to have "a full spectrum of Sam Riley".[7] Brown accepted that in the email he had said "I have seen many swim schools with a pool size of ours run classes for their most advanced swimmers that way."[8] Brown had seen hundreds of swimming pools.

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[5] Exhibit 1, Document 105.
[6] T2-36/25.
[7] T2-37/25.
[8] T2-37/34.

[33] At 9.31am on 26 September 2014, the day following completion of the contract of sale, Noonan sent an email to Brown in the following terms:

> "I hope all went well yesterday and you are in and up and running your very own learn to swim school, congratulations.
>
> I wanted to let you settle in a bit so don't stress, but so we can schedule our end could I ask you to start thinking about when will be the best time for us to come down once a week and start working with you. Normally we find later in the week to be better for us and in the morning with a 9am start through to 3pm is the better time for our experience, but let me know what will work for you and we can see what fits in with Trish and Kellie.
>
> One other thing, we have a family who is a member of our Springwood swim school and their eldest child stopped lessons due to sickness and they have a credit for a bit over $110 at Springwood and have now changed over to Capalaba for lessons. I am happy with ones like this to send you through the credit, so can you confirm they have booked into lessons and how best to forward that credit to you.
>
> Any questions, let me know."[9]

[34] "Trish" referred to Patricia Pratt, the operations manager for SRSS. "Kellie" referred to Kellie Wilson, the training and development officer for SRSS. They were the SRSS staff members providing the training and support, the subject of Special Condition 4.

[35] At 4.16pm that afternoon, Brown responded to Noonan by the following email:

> "It is good to hear from you. Many thanks to you, Sam, Sue and Mike for helping to guide this through to Completion Thursday. With the re-signing of Direct Debit customers and the change over to the new swim school, we are quite full on…
>
> Hayley has come in today to help Kat…
>
> I would imagine it will be very busy for several days,
>
> not only with the DD issue,
>
> but also to allow Hayley and Kat the time to sit with each customer,
>
> and answer all their questions.
>
> So in regards to the training on offer,
>
> it will be a few weeks before the
>
> "dust settles"
>
> and we are ready for that.
>
> (we have also had issues with th[e] phones, will will take a few days for Conmander to sort out)
>
> In the meantime,
>
> no doubt there will be occasional communications about a few things.

[9] Exhibit 1, Document 4.

I will check with Hayley about that family and get back to you." [10]

[36] Brown said his reply was only to temporarily delay training for a few weeks. The swimming school had 500 customers. Overnight it had changed the outside signage. It needed to provide information to customers. There were issues in relation to the direct debit system. The offer of 26 September 2014 related to weekly training as set out in Special Conditions 4.1 and 4.2 Special Conditions 4.3, 4.4, 4.5 and 4.6 provided very important training to help a new owner. It included training on how to improve and grow the business. That could "cover many, many things, including the time I had trouble paying the staff."[11] That training included information that could have been emailed by the defendant. For example, the defendant could have emailed a job description for the manager and documents to provide training to the manager.

[37] The plaintiff operated Capalaba Swim Stars with the same management and staff throughout October 2014. Brown was shadowing other teachers trying to learn the programme. He taught some classes by himself. He was not a full time teacher. He would jump in and out of the pool to teach some classes. He was at the pool for a minimum of 12 hours each day in September and October 2014. During this period, Brown undertook some management responsibilities, previously the responsibility of Meerten.

[38] Neither Noonan nor any other SRSS employee contacted Brown during October 2014 to see if it was now convenient to commence training and support, pursuant to Special Condition 4. Pratt gave evidence it was not her role to contact Brown about training and support. Whilst she knew she and Wilson would be providing training and support, Noonan had been in contact with Brown to offer that training and support. She was told Brown was not ready for them to support him at that stage. Pratt knew Noonan was continuing to be in contact with Brown. At no stage did Brown direct he was ready to receive that training and support.

[39] On 6 November 2014, Brown attended his general practitioner complaining of severe headache. After undertaking some investigations, his general practitioner referred Brown to the Redland Hospital on 7 November 2014. Brown attended the hospital on that date. He was assessed and discharged with a medical certificate excusing him from attendance at work for five business days. Notwithstanding that certificate, Brown gave evidence he returned to the swimming school.

[40] On 13 November 2014, Brown suffered a significant medical event. He was transported by ambulance to the Royal Brisbane and Women's' Hospital (***RBWH***). Brown gave Meerten's contact details as his emergency contact. Meerten attended the hospital after being contacted by medical staff. She was unable to communicate with Brown as he was on a ventilator. Meerten returned several days later. Brown remained in hospital until 5 December 2014. On occasion, he required admission to the intensive care unit.

[41] Several days after his discharge from hospital on 5 December 2014, Brown suffered a relapse. He was readmitted to RBWH. He remained in that hospital until 12 January

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[10] Exhibit 1, Document 4.
[11] T2-21/5.

2015 when he was transferred to the Princess Alexandra Hospital where he remained an inpatient until June 2015. During that extended period as an inpatient, he was the subject of orders by the Queensland Civil and Administrative Tribunal (***"QCAT"***).

[42] On 5 February 2015, QCAT appointed the Public Trustee of Queensland as administrator of all of Brown's financial matters. On 20 March 2015, QCAT appointed the Public Guardian as guardian for Brown for decisions about specified personal matters. On 8 July 2015, QCAT determined Brown had capacity for all personal matters but did not have capacity for all financial matters. The appointment of the Public Trustee as administrator for financial matters remained in place until 10 June 2016, when QCAT determined Brown had capacity for all financial matters.

[43] After Brown was readmitted to hospital on 13 November 2014, Meerten made contact with the swim school's bookkeeper in an effort to ensure payment of staff. Meerten sent Brown an email on 17 November 2014 advising of the steps she had taken to arrange for payment of the staff. That email noted Brown would have to arrange for the transfer of those funds. No such arrangements were put in place by Brown. As a consequence, none of the staff were paid their entitlements on the next due date, 21 November 2014, including Meerten.

[44] When staff did not receive those payments, Meerten again visited Brown in hospital. Meerten gave evidence she advised Brown she was concerned staff had not been paid and staff were anxious about non-payment. Meerten told Brown other accounts were outstanding. She asked if she could contact the bookkeeper or some other person to help keep running the business. Meerten said Brown responded "people have to understand that these are my personal accounts and they'll just have to wait because I'm in hospital".[12]

[45] Brown recalled Meerten attending hospital in late November 2014 but could not recall a conversation about non-payment of wages. He could not recall if Meerten said staff were threatening to resign. He denied there was a conversation about creditors chasing payment. He denied saying people would have to wait. Brown said there was a discussion about the staff getting organised so he could send the time sheets to the bookkeeper who would make up the pay slips and inform him how much to pay, using his mobile phone from his bank account. Meerten had to send the time sheets to the bookkeeper so he could pay the net amount for each employee.

[46] Brown said he was trying to coordinate Meerten sending the time sheets to the bookkeeper, who would deduct the deductions and tell him the net amount to pay each employee. Brown attributed the failure to pay the staff to the lack of training and support by SRSS to help him with those payments. Meerten denied she needed training or support; the only problem was that Brown did not make the payments. Pratt also denied Meerten needed training or support in respect of payments. Pratt said Meerten had been submitting wages records for years.

[47] Meerten said she was in quite reasonable contact with SRSS. She did not need support to be able to run the swimming school. She needed to pay its bills. Meerten had

[12] T4-6/10.

prepared the necessary time sheets. Normally the time sheets were taken by Brown to arrange for payment. She did not email any time sheets to Brown whilst he was in hospital. Instead, in her conversation with Brown at the hospital, she told Brown she had all the time sheets. Brown said he did not want them at that point.

[48] Brown denied any such conversation took place. Brown accepted he subsequently did pay staff for the fortnights ending 21 November 2014 and 5 December 2014, whilst he had remained in hospital. Brown said he had received some time sheets, but late. He was also given information verbally over the phone. He had enough information to make some payments but not all.

[49] Meerten said that following this visit to the hospital she spoke to the bookkeeper who said she did not have access to the accounts and could not help. Meerten also met with the staff. She told them she did not know when they would be paid. She did not tell any staff to leave; but did tell staff they had rights. By that, Meerten meant Fair Work Australia.

[50] In mid to late November 2014, Noonan was made aware by Pratt that Brown was not paying wages to his staff and that Brown had been very erratic in turning up to work. Noonan sought to contact Brown. When he was able to do so, Brown acknowledged he had some medical issues. Brown said he had been in and out of hospital. Noonan gave evidence he told Brown he was concerned staff had not been paid and asked if there was anything SRSS could do. Noonan offered for SRSS to provide training to help with the financial side. Brown replied, "No. everything is okay". Brown said he would make sure the wages were paid. In evidence, Brown denied this conversation ever took place.

[51] By late November 2014, Meerten was very concerned about the non-payment of wages. She had no control over the payments. Meerten had mortgage commitments and child care expenses. Fair Work Australia advised her she could not leave the employment immediately as that would be abandoning her position. They gave her advice on the appropriate steps.

[52] On 1 December 2014, Meerten gave Brown written notice of her intention to resign, effective 13 December 2014, being the last day before the Christmas break. She gave as her reasons that she was "unable to continue working full time and I will be staying at home looking after my family".[13] Meerten said the non-payment of her wages meant she could not meet her child care expenses. She needed to stay at home to care for her child.

[53] Those outstanding wages were subsequently paid by Brown on or around 8 December 2014. At the time of those payments, Brown also paid the wages owing for the fortnight ending 5 December 2014. By that time, Meerten had obtained employment with SRSS at Manly. That employment, obtained on 3 December 2014, was the basis for Brown's assertion that the defendant had encouraged and counselled Meerten to leave the plaintiff's employment.

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[13] Exhibit 1, Document 9.

[54] Meerten gave evidence she did not contact the defendant prior to her resignation. On 2 December 2014, the day after her letter of resignation, she contacted Pratt and told her what had happened and that she was going to stay at home. Pratt mentioned that the manager of SRSS Manly had resigned and they were looking to fill the position. Meerten applied and SRSS offered her employment at Manly. Meerten accepted that employment on 3 December 2018.

[55] Meerten said she took no steps to encourage customers to leave the plaintiff's swimming school and to transfer to SRSS Manly. She told no customer what she was doing and went off social media. Noonan gave evidence that SRSS felt an obligation towards Meerten. She had agreed to leave their employ to continue as manager of the plaintiff's swimming school. The loss of that employment gave rise to a moral obligation on the defendant's part to look after Meerten.

[56] Brown accepted the business did not pay staff on time for the fortnight ending 21 November 2014. He accepted Meerten asked how she could arrange to pay the staff. Brown said they were trying to organise her to coordinate with the bookkeeper. Those payments were made when the next pay cycle was due for the fortnight ending 5 December 2015. Brown paid double payments to each staff member, being payment for the fortnights ending 21 November 2014 and 5 December 2014. The payment amounts were different for each fortnight because the staff members worked different hours each week. Whilst Meerten was full time, she received different payments because she worked some overtime for holidays.

[57] By the time of this pay cycle, two of the original seven employees had resigned their employment. They both left of their own accord. Brown also paid, around this time, the rent payment for the month of December. He did not accept that payment was also a late payment.

[58] After Pratt advised Noonan of Meerten's resignation and that other staff members remained concerned about when and how they would be paid and whether Noonan could help, Noonan again sought to make contact with Brown. He did not successfully do so until about a week prior to Christmas. Noonan gave evidence that Brown was mumbling and rambling a little bit, but saying his expectation was that he would be out of hospital after Christmas. Noonan said he again offered to provide training but Brown said that would not be needed because he would be back in the New Year when things started back up again. Brown denied this conversation ever took place.

[59] Noonan said his priority in making these telephone calls was to see that any new staff be SRSS trained because ensuring the swimming programme and how it was taught continued to be of a high standard was one of SRSS' main priorities. There was also a financial concern. SRSS had obligations in guaranteeing the lease for the premises.

[60] Brown did not accept Noonan contacted him by telephone in December 2014, offering to assist in managing the plaintiff's business. That conversation did not take place in 2014. In 2015, once the swimming school had died, Noonan offered to re-open it to give customers their prepaid lessons. Brown denied he had refused Noonan's offer of

assistance saying he would be back on board in 2015 when the pool was due to re-open on 12 January 2015.

[61] More resignations followed in December and January 2015. On 12 December 2014, Kathryn Waitai tendered her resignation as swim instructor and customer clerk, effective 2 January 2015. On 13 January 2015, Alisha Krueger tendered her resignation, effective immediately. Other instructors previously employed by the defendant also did not return when the swimming school was set to reopen on 12 January 2015, after its Christmas break. The remaining staff were students at Moreton Bay College and only worked Saturdays and after school.

[62] By January 2015, SRSS was starting to receive telephone calls from upset families, querying when the Capalaba swimming school would reopen. These families had paid for lessons in advance. Noonan again contacted Brown. Noonan arranged to meet with Brown on or about 12 January 2015. Brown sent an email on 13 January 2015 apologising for not being able to attend that meeting because he was hospital. Two days later Brown sent a second email to Noonan. It said:

> "We had tried to set up a meeting last week at 10a.m.
>
> but my schedule did not allow that.
>
> I am still keen for training…
>
> to my mind the priority would be staff training…
>
> would that be possible sometime this week or next?
>
> Thanks… Alex
>
> (We would be free nonteaching hours this week or next week or similar)
>
> Thanks…"[14]

[63] Brown accepted he had anticipated leaving hospital on 12 January 2015. Brown accepted he had said in his email of 13 January 2015 that he was trapped in hospital and was not sure when he would be released. It was also up in the air which hospital he would be going to from RBWH. Brown accepted the purpose of the meeting on 12 January 2015 was to discuss what could be done to keep open the plaintiff's swimming school. Brown said by that stage the defendant was making "some attempts four months too late to help the swim school".[15] It was "a lame duck offer of training that is too late… they're giving CPR to a dead body".[16]

[64] On Monday, 19 January 2015, Noonan replied by email in the following terms:

> "Sorry for the delay coming back to you.
>
> So that Trish and I can get an understanding of what's required, can we meet on Thursday at 12pm at Capalaba please? From there we can talk to our team and do some planning and get the training in place.

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[14] Exhibit 1, Document 14.
[15] T2-66/20.
[16] T2-67/10.

> Also, from your email last week, are you back on deck and the swim school is open now? We've had a lot of phone calls as to why it didn't reopen last week and obviously I was concerned for you. If that happens again just let me know and if I can help I will, but also I can let our team know what's happening and they can pass that on to the parents when they call.
>
> Let me know how you are for Thursday"[17]

[65] On 20 January 2015, Brown replied to Noonan's email stating:

> "Thanks for the invitation to see you.
>
> Sadly I have massive restrictions on what I can do because I am in hospital!
>
> I am trying to get a power of attorney/patient advocate arrangement but they are very unflexible.
>
> At this stage I cannot find a solution…..
>
> I can at least send my staff to the training.
>
> (which is the main thing)."[18]

[66] After Brown did not attend the arranged meeting on 22 January 2015, Noonan sent a text message to Brown:

> "Alex, I've tried to call you and email you without a response, I really do want to help you and make sure YOUR business doesn't fail, it's in both our best interests that never happens. At the moment you are backing yourself further and further into a hole, you can still come out of this with some credibility and a business, rather than a debt for the rest of your life and never able to operate a business again. Please contact me urgently, there are reports A Current Affair and the local paper are coming to the swim school tomorrow, we can help with that and put a manager and teachers in there tomorrow that aren't known as Srss people but o need your permission and for you to call me, hiding is only making this worse
>
> Please call me – david noonan"[19]

Brown did not contact Noonan in response to that text message.

[67] Noonan said he had been made aware parents were distressed and upset they were going to lose their money. They were on an automated direct debit system, with the potential those debits would continue to come out of their accounts. Families had built up "a fair bit of press and had asked A Current Affair to come down there."[20] Noonan subsequently attended the plaintiff's swimming school on 3 or 4 February 2015. He understood the local newspaper was meeting angry parents. He attended to provide some support for those families. At that stage, he made some comments to the media.

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[17] Exhibit 1, Document 15.
[18] Exhibit 1, Document 16.
[19] Exhibit 1, Document 17.
[20] T3-78/10.

[68] On 28 January 2015, SRSS' solicitor contacted the solicitors who had acted for the plaintiff in the purchase of the business. In their email, they stated:

> "We understand your client Alex Brown is experiencing ill-health and is presently in hospital. Our client has been contacted by the landlord who is concerned that the business is presently closed – the landlord is being contacted by customers, who have paid for lessons in advance to find out information. We also understand employees of the business have left.
>
> Our client has asked us to contact you to see if there is anything it can assist with in helping your client at what must be a difficult time. Could you kindly pass on this offer. If needed your client can make contact David Noonan on [mobile number]."[21]

[69] Noonan physically met with Brown and Pratt at the plaintiff's swimming school on 2 February 2015. Brown attended late, having left the hospital without permission. Noonan described Brown has having bandages on his legs and arms; an intravenous tube hanging from one arm and several cuts to his head. Noonan said Brown was visibly unwell and had difficulty walking. Brown denied ever having that appearance.

[70] Brown accepted that following this meeting on 2 February 2015, he was returned to hospital by the police. Brown said he had left the hospital under his own authorisation to live at home for a few days. During that time, he met Noonan. When the hospital noticed he was missing, they asked police to search for him. The police returned him to hospital.

[71] Noonan gave evidence that after a lengthy conversation on 2 February 2015, Brown agreed to SRSS re-opening the plaintiff's swimming school. SRSS made an assurance they would try to re-engage the previous instructors. They discussed the hope that Brown would be able to pay some of their outstanding wages. The rent was also significantly in arrears. There was a discussion about whether or not Brown would pay wages down the track. The priority was to make sure the staff were paid so they could give a continuation of the lessons.

[72] Brown sent an email to Noonan's personal assistant on 4 February 2015, headed "Letter of permission", in the following terms:

> "To whom it may concern:
>
> This letter confirms that Alex Brown gives permission to David Noonan to operate his business known as Capalaba Swim Stars to temporarily assisst with the business and its various activities.
>
> David will be allowed to manage day to day operations, and be allowed to access all types of information as required to run the business.
>
> For the period of the assistance David will be allowed access… to the business bank accounts so David can contribute guidance in financial areas.
>
> David's access to the bank accounts is strictly for business purposes, with all banking transactions to be approved by Alex.

[21] Exhibit 1, Document 19.

> The overall goal of this partnership is to get the Swim School operating efficiently with good quality swim lessons for parents and children.
>
> Alex Brown". [22]

[73] The reference to bank accounts was a reference to Brown giving SRSS authority to effectively run the business. Noonan said Brown subsequently sent through some access to the business accounts, but he was unable to open them. He never had a chance to see those bank accounts. Brown accepted he operated the business bank accounts. He was the only person who could transact on the overdraft account in 2014. He considered giving Noonan access but ultimately did not authorise his access to the overdraft account. Sue Noonan, David Noonan's mother and personal assistant, expressed reservations about one party having access to another party's bank account. Consequently, Brown did not proceed to provide that information.

[74] Brown accepted Noonan wished for wages to be paid by the plaintiff. Brown did not accept his offer to provide access to the financial accounts of the plaintiff meant the plaintiff agreed to pay the wages of staff whilst the business was operated by the defendant. He was giving access to the accounts to pay things like rent on the lease. At that stage there were only 30 swimmers in the swimming school. The defendant "gave me a wages bill of $20,000 for 30 swimmers".[23] Brown did not make arrangements to pay the staff because he found that wage demand quite unrealistic.

[75] In mid-February 2015, SRSS commenced operating the plaintiff's swimming school. Pratt tried to contact its former staff. None of the experienced staff were prepared to return to the centre. Only one junior ex-staff member was willing to come back and only because SRSS had a relationship with her aunt and guaranteed they would pay her wages. She was effectively an office junior. All other staff involved in the reopening of the business were employees of SRSS. Pratt did the majority of the day to day running of the business. SRSS bore 100% of the cost of those staff.

[76] Brown said he was not very involved with the reopening of the swimming school. There were a lot of issues around wages, power and electricity. He was hoping his own staff would be able to provide teaching for the swim classes. He could not recall if he agreed to pay the defendant to operate the swimming school for February and March 2015.

[77] On 22 February 2015, Brown sent an email to Noonan enquiring about details of the staff roster for the swimming school, including who was teaching each day and who was on the front desk each day. Noonan sent the following response:

> "Alex, we've already sent that through to you, only our staff are teaching there and covering out of the pool. The only exception to this is Rebecca assist out of the pool on Saturday mornings.
>
> No other teachers from the list you have [given] me either returned our calls or would teach at the swim school as they have wages owing."[24]

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[22] Exhibit 1, Document 20.
[23] T2-73/44.
[24] Exhibit 1, Document 21.

[78] On 23 February 2015, Brown sent an email to Noonan:

> "I am very surprised none of the teachers continued…
>
> they were so keen last time I spoke to them.
>
> When we switch management to me I will need staff…it would be easier for the customers to stay with the same teacher……..
>
> I would be happy to continue to employ the existing teachers
>
> as you tell me I have no returning teachers……
>
> and I cannot magically hire and train new teachers while I am in hospital
>
> Can you let the teachers know they are welcome to stay on under similar working conditions" [25]

[79] Noonan replied that afternoon. He stated:

> "Trish spent a lot of time trying to contact them with no luck, we desperately needed them to work and they weren't interested or just didn't return calls, so we could only use ours and with the understanding it would be short term for all.
>
> Using the existing teachers isn't an option going forward, I am happy to work with you in trying to find some but at the moment while I understand your not well, we're not getting paid for any of the wages so we wont be assisting to find any teachers.
>
> Do you have an approximate date for your return? I know the public trustee has been appointed, what's the plan for your return and them coming out?
>
> Finally, our position at the moment is that we will be finishing up there by 22nd March, once the lessons owed to parents have been completed in full. We cant keep on pouring money into wages and not being reimbursed as we agreed upon, so something needs to be sorted out urgently, I was happy to help but at the moment I feel we're being taken advantage of.
>
> An update on your position and plants going forward plus the wages to do being paid would be greatly appreciated" [26]

[80] On 10 March 2015, the Public Trustee advised SRSS it was unlikely Brown would be able to take over the running of the swimming school on 21 March 2015 due to his health. The Public Trustee asked if SRSS were able to continue running the school.

[81] On 17 March 2015, Brown contacted SRSS seeking information about how many swimmers were presently at the swimming school. SRSS advised Pratt would be at the school that morning and would advise the number. SRSS continued:

> "However please note we have had no choice but to condense classes to contain costs and have not been able to accept any new bookings or payments as we do not have the necessary legal authority.

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[25] Exhibit 1, Document 21.
[26] Exhibit 1, Document 21.

> At the present time all customers have been advised that we will be closing the centre until further notice after completion of lessons on Saturday, 21/3/15. We have not received payments for any ongoing bookings."[27]

[82] On 19 March 2015, Brown sent an email to Noonan in the following terms:

> "I am aware of your wish to transfer the swim school back to me,
>
> and I am looking forward to that happening.
>
> You are also probably aware that my hospital ward places a lot of restrictions on access to outside activities.
>
> The ward "police"/admin staff place such strict limitations on our access to outside activities that most patients refer to it as a jail or prison.
>
> There was even lot of reference to it as a jail yesterday in a seminar put on the ward staff, and the staff leading the seminar acknowledged that perception of the ward is shared by many [patients].
>
> So because I have been here since November, I have experienced that restrictiveness [regularly], especially in limiting my access to the swim school.
>
> This has greatly hampered my ability to do the simple task of hiring new staff. to replace your teaching staff.
>
> I have not been happy with this, and have been discussing this with my solicitor.
>
> He acknowledged this is severely limiting my ability to be involved in the swim school. There does not appear to be any end in sight to this "jail environment", limiting my involvement with the swim school.
>
> He made 2 suggestions he has seen from his experience in selling and buying businesses.
>
> (1) To ask for the further extension of your assistance in keeping the swim school open. There may be an option to include some of my training in that period of time.
>
> (2) He has also seen some businesses resold to the vendor, because the buyer is not able to take over the business for various reasons.
>
> I am aware you were hoping to downsize with the sale of this swim school,
>
> but I respectfully ask that you consider these two options"[28]

[83] On the evening of 19 March 2015, Noonan replied to that email:

> "I'm sorry to hear about your medical issues and frustrations, I can only imagine what it would be like.
>
> We're not interested in continuing under the current set up at Capalaba, we're just throwing money away with no payments to date and we're out of pocket around $20,000 in wages, etc…

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[27] Exhibit 1, Document 24.
[28] Exhibit 1, Document 25.

> We also received the notice to evict on Monday from the landlord and informed the public trustee. It gives you 14 days to sort out the outstanding lease payments, which ends 1st April.
>
> At the moment we have approx. 30 children doing lessons, just so we can finalise their lessons and while a handful of parents have enquired about continuing, they have made it clear, they would only do so with us.
>
> Alex, as much as it upsets me to say this for you and for all the work we put in over the years to build this business, the business is worth nothing and anybody who comes in there in the future is going to have an almost impossible task of rebuilding it after all the negative publicity over the last couple of months. We have a legal guarantee in place for the lease, so unfortunately, the lease once the eviction is complete falls back on us.
>
> My position is this, we have spent $20,000 on the business over the last 2 months in wages and repairs and maintenance. The heater is in need of a considerable amount of work to be spent on it and it also needs the pump replaced as it was running dry for so long over the Christmas period. The quote we've had is $3,000 to get that back up and running again. When we sold the business to you the plant and equipment made up approx. $25,000 of the buying price, the rest was good will.
>
> I have spoken to Sam, based on the fact that the business is now worth nothing, and will take a considerable amount of money to build back up again before it ever potentially sees a profit, plus the fact we've then lost another $20,000 over the last couple of months, the most we'd be willing to pay to buy the business back is $5,000. This is a good will gesture only, as I have said the business is worth nothing and has a long expensive path to being rebuilt.
>
> I am sorry there is nothing more we can do, but we can't continue to throw good money away in the hope you'll be out soon."[29]

[84] On the following day, Brown responded to Noonan:

> "Thanks for getting back to me about the swim school.
>
> Last year when I bought the swim school,
>
> it was one of the happiest days in my life!
>
> Yesterday, reading your email, it was one of the saddest days of my life.
>
> However, as you report it, that is the current state of the swim school.
>
> Certainly, the location and the excellent state of the facility,
>
> give it great potential for the future!
>
> However, we will accept your offer for re-purchase.
>
> It can be a good swim school again.
>
> It is just so disappointing to be so restricted by… a hospital!"[30]

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[29] Exhibit 1, Document 26.
[30] Exhibit 1, Document 27.

[85] Brown accepted he had agreed to the defendant's offer to purchase the business for $5,000. He had initiated that offer. It was difficult to operate a business from a hospital. By March 2015 "the lease was pretty well broken", the landlord came in a few days later and shut down the premises.[31] The landlord repossessed the leased premises.

[86] SRSS continued to operate the business until 21 March 2015. That period was chosen so as to ensure the obligations were met for all prepaid lessons. After SRSS ceased running the plaintiff's business, Brown contacted Noonan seeking help to provide staff that could continue to run the business on his behalf. Noonan said by that stage SRSS could not continue to incur the costs associated with running the business.

[87] Noonan denied SRSS ever refused to provide the requisite training and support in accordance with Special Condition 4. Noonan also denied SRSS ever made any attempts to encourage customers of the plaintiff's swim school to move to one of SRSS' other swimming schools. They also did not, at any stage, encourage Meerten or any other staff to leave the plaintiff's employ and to return to employment with SRSS.

[88] In March 2015, notice was given by the landlord of its intention to foreclose on the lease towards the end of March because the plaintiff had not paid the necessary rent. The landlord re-took possession of those leased premises. Subsequently, SRSS received a letter of demand from the landlord claiming the outstanding rent for the period of the lease. After discussions, a settlement figure was reached, whereby SRSS paid $60,000 in settlement of the claim for outstanding rent.

[89] Brown reiterated his willingness to accept the offer to re-purchase the swimming school in an email dated 26 March 2015. Brown indicated his solicitor was happy to draft a new contract and asked whether Noonan would want his solicitor to draft that contract. On advice, SRSS did not proceed with the repurchase of the plaintiff's swimming school.

[90] On 9 April, 2015, Brown sent an email to Reece at City Venue Management in relation to the sale of the plaintiff's swimming school. In it, he said his admission to hospital in November 2014 affected the operation of the swimming school as some new staff did not want to work without him; that customers were not happy the swimming school did not open for a few weeks; that Noonan was aware and offered to temporarily manage the swimming school to keep it operating; that he accepted and Noonan's staff had been running it for the past few months, but that Noonan was not willing to take on new swimmers and eventually could no longer help out and planned to remove his staff at the end of March; that he needed to hire new staff and wanted to encourage his own staff back, but that the hospital still refused to allow him access to the swimming school so he could not hire new staff and that in the end because he could not get new staff and Noonan was pulling out, the swimming school was closed at the end of March 2015.

[91] Brown said that he did not have a lawyer beside him. He was a frustrated patient in hospital. He was suicidal, bored and unhappy in hospital. He was losing his business. He had made a submission in March 2015 to have the Public Trustee removed as he had financial capacity, but QCAT did not remove the Public Trustee at that time. He

[31] T2-78/28.

remained "chained to him" for another three months.[32] He did not have legal capacity to make legal decisions and make legal documents or legal observations at that time. Brown accepted he had not disclosed that email in the proceedings. He denied he did not disclose it because it would significantly hinder the plaintiff's case.

[92] On 8 July 2015, QCAT declared Brown did not have capacity for financial matters. Brown made submissions at the hearing as to his capacity. In those submissions, he indicated his intention was to sell the plaintiff's business in order "to pay off business related debt and to otherwise get my finances under control (which they were prior to my illness)".[33] At that time, the business was not being used by anyone.

[93] In a subsequent application to remove the Public Trustee as his administrator for financial matters, Brown assisted a friend, Meaghan Lane, to draft a letter dated 15 March 2016. In that letter, it was recorded Brown had "negotiated with the two largest Australian Swim School operators to bid on purchasing my swim school, to sell it to pay off debts, but Public Trustee would not help allow the sale to proceed".[34] Brown had discussions and exchanged emails with others about their preparation to take over the running of his swimming school. Brown said he was trying to salvage something from the disaster.

[94] Meaghan Lane was a patient in the Princess Alexandra Hospital in February/March 2015. Whilst there, he met Brown. Lane recalled Brown was allowed to do a number of things without supervision. He was let out of the hospital many times to attend the local shopping centre. He would pay the money and walk back across the road. Lane wondered why Brown was in hospital. It seemed to Lane that Brown had different arrangements to everyone else at the time. Land thought Brown was an undercover nurse.

[95] Lane never noticed any injuries on Brown's body. Brown talked like any normal person. He was clear, concise, accurate and polite. They had good conversations of high level skill. He was doing lots of work looking up business material to resolve his situation. Lane had his own business but Brown was "another level ahead at that point in time".[35] He could research and find resources on the computer. In Lane's view, Brown had capacity and an understanding to operate a business. Lane said Brown was frustrated that he could not resolve and fix the problems in his swimming school. Brown tried so hard while in hospital to deal with those problems.

Expert evidence

[96] David Williams assessed the value of the economic loss suffered by the plaintiff as a result of the alleged breach of contract by the defendant, under two scenarios. The first scenario assumed a constant income generation from the date of purchase of the swim school, with costs at a similar level to those incurred when the defendant ran its swim school. On that scenario, Williams assessed the plaintiff's loss to be $901,581.00

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[32] T2-89/35.
[33] Exhibit 2.
[34] Exhibit 3.
[35] T2-96/27.

[97] The second scenario was based on a steady increase in income over the remaining years of the life of the lease of the premises. This scenario was largely based upon an acceptance of forecasts of future growth provided by Brown. Under this scenario, Williams assessed the plaintiff's total loss to be $1,475,136.00. In Williams' view, this scenario was the more likely scenario as the income levels forecast by Brown were reasonably achievable.

[98] Brown projected the business would earn $9,000 more per month from December 2014 than it had actually earned in the period September, October and November 2014. The plaintiff was doing extensive marketing to build the number of swimmers up. That marketing had already resulted in five additional swimmers per week. Each new swimmer brought in $825 per year. The defendant had made a representation in its business profile that a motivated owner could easily increase the swim school numbers by almost 50%. Brown accepted the forecast prepared by him also contained a forecast of expenses for instructors which was over $50,000 less than had been expended by the defendant. The defendant had different arrangements for manager's expenses as they could share them between swim schools to get the best tax position.

[99] In evidence, Williams said his acceptance of those projections was based on an acceptance that there was an unused capacity and evidence of an increase in customers. Williams also accepted that his calculations were based on an acceptance that all lease options would have been exercised by the plaintiff.

[100] Williams calculated the net present value of the future cash flows to 25 January 2019, based on a discount rate of 5%. Williams considered 5% to be an appropriate discount rate, as he considered the business to be a low risk business that had operated successfully for many years. Williams accepted that a proper approach of the task required of him, was to calculate the net present value of the future cash flows as at the date of breach of the contract, not 25 January 2019. Williams said he was not instructed to calculate losses at that date.

[101] Matthew Ashby, adopted a different methodology to Williams in his assessment of the plaintiff's loss as a consequence of the alleged breaches of contract. In his opinion, Williams did not appropriately measure the plaintiff's alleged loss. Williams adopted a discount rate of 5% which was unsupported and too low. In Ashby's opinion, the discount rate was closer to 30% due to the risks associated with this type of business.

[102] Further, Williams adopted a level of future profits in his first scenario which may be conservative and in the second scenario which may be too high. His calculations also inappropriately assessed the loss to 25 January 2019. The appropriate date of assessment was the breach date, namely 12 January 2015.

[103] In Ashby's opinion, the claimed loss of profit component would equal a loss of business value component. In a supplementary report, Ashby assessed the net present value of loss profits was $213,919, being $1,919 greater than the purchase price.

Findings

[104] There is no doubt the contract of sale entered into between the plaintiff and the defendant included a term by which the defendant agreed to provide ongoing training and support to the plaintiff for a period of six months from settlement. The nature and extent of that training and support was identified in Special Condition 4 of that contract. There is also no doubt a further condition of the contract of sale was that the defendant would not solicit or encourage customers to leave the plaintiff's business for any other SRSS facility. The terms of that condition were set out in Special Condition 6 of the contract.

[105] Brown gave evidence that he relied on the defendant's promise not to poach customers or staff and to offer six months training when signing the contract on behalf of the plaintiff and in paying the purchase price to the defendant. Brown noted SRSS had repeated those promises in a letter to customers and staff at the time of sale. That letter, sent on 17 September 2014, stated:

> "One of our priorities in agreeing to sell Capalaba to Alex was to ensure that there would be minimal change to your child's lessons. With this in mind we are happy to confirm that the whole team – teachers and Hayley the swim school manager – will remain at the centre. In addition to the existing team remaining, Alex is undergone extensive training in how we run the business., and we have also agreed as part of the sale to continue to provide Alex and his team with ongoing training and support in the existing program (the way we teach your child to swim) and management of the business for the next 6 months."[36]

Brown alleged this document contained the same promises and could be called a collateral contract between the plaintiff and the defendant.

[106] I accept Brown's evidence that he relied upon the terms of those conditions when entering into the contract. Their importance to the sale of the defendant's Capalaba business was evidenced by the contents of the letter the defendant sent to its customers shortly before the completion of that contract.

[107] It is not in dispute that the defendant did not provide to the plaintiff the training and support it agreed to provide for a period of six months. The question is whether the defendant's failure to do so constituted a breach of Special Condition 4 and, if so, whether that breach was causative of the failure of the plaintiff's swim school.

[108] The defendant's email of 26 September 2014 contained a clear offer by the defendant to commence the training and support it had agreed to provide to the plaintiff. I do not accept Brown's assertion that the offer was limited to training under clauses 4.1 and 4.2 of the contract. Whilst the email referred to attending the swimming school once a week, the request was so the defendant "can schedule our end". I accept Noonan's evidence that, had Brown accepted that offer, a structure would have been put in place to commence training in respect of all aspects of Special Condition 4.

[109] Brown's response on the same date amounted to a clear and unequivocal rejection of that offer of training. His email in response expressly referred to "the training on offer".

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[36] Exhibit 1, Document 234.

His response that it "will be a few weeks before the 'dust settles' and we are ready for that" amounted to an indication that the defendant was to await his further communications. I accept it was reasonable for the defendant, in those circumstances, to not immediately pursue the further provision of training and support in accordance with Special Condition 4. As Pratt said, whose evidence I accept, it was not a matter for Pratt or Wilson to further pursue the plaintiff. Noonan had been communicating with the plaintiff and Brown's response was clear.

[110] Brown denied Noonan ever made additional offers of training in telephone calls in November or December 2014. In support of his contention that no such telephone calls occurred, Brown relied on the absence of any calls in the telephone records for both Noonan and Brown's mobile telephones. Noonan explained the absence of such records. At the time, he was working out of SRSS's central office at Mansfield. He would use an office telephone. The records for that telephone were destroyed in a flood about a year before the trial. Attempts to obtain those records from the telephone service provider were unsuccessful.

[111] Brown also relied on the absence of any further email offering training and support. Prior to settlement, there had been regular emails communications. Noonan accepted he did not send any confirmatory email. Noonan had spoken to Brown directly. It was not a conversation to have by email. Further, there was no need to email teacher training sheets as a detailed copy of every lesson plan was held at the plaintiff's swimming school.

[112] I do not accept Brown's evidence the defendant made no further offers to provide training. I find Noonan did make the telephone calls to Brown in late November 2014 and December 2014. I accept those telephone calls included offers to provide training and support. I accept that on each occasion Brown declined those offers. It was understandable he would do so. He was unwell and an inpatient in hospital.

[113] The lack of telephone records to support Noonan's assertions do not cause me to doubt the accuracy of Noonan's evidence. I accept his explanation for the non-existence of telephone calls on his mobile records. I also accept his explanation for the lack of records in relation to the office telephone.

[114] In reaching that conclusion, I have particular regard to the conduct of the defendant subsequent to those telephone conversations with Brown. That conduct included arranging, on two separate occasions in January 2015, meetings with Brown, neither of which were attended by Brown as a consequence of his continued hospitalisation. I accept those meetings were for the purposes of trying to provide ongoing support to help the plaintiff re-open its swimming school.

[115] The contents of Noonan's text message of 22 January 2015 is also entirely consistent with that conclusion, as is the subsequent meeting organised by Noonan and Pratt, attended by Brown on 2 February 2015. Brown's letter of permission, sent shortly after that meeting, is entirely consistent with all of these arranged meetings being for the purposes of the defendant providing ongoing assistance to allow the plaintiff's swimming school to commence operation in 2015. I accept Noonan's evidence that that

assistance would have been in the nature of training and support in accordance with the defendant's obligations under Special Condition 4 of the contract.

[116] These conclusions are further supported by the defendant's conduct in February and March 2015 in re-opening the plaintiff's swim school at the defendant's own expense to ensure customers who had prepaid lessons would receive value for those payments. There was good reason for the defendant to undertake that course of action. It was in its interests to ensure customers received value. These customers had been customers of SRSS' swim school. The defendant also had its obligations in relation to the guarantee of the lease of the premises; obligations it ultimately met by way of settlement of the claim by the landlord in respect of unpaid rent.

[117] The lack of email communications also does not cause me to doubt the accuracy of Noonan's evidence. Whilst it had been the practice of the parties to communicate by email in the course of contractual negotiations, the further offers of training and support in November and December 2014, occurred in the context of Noonan's knowledge of Brown's ill health. It is understandable, in those circumstances, that Noonan took the approach of personal contact, rather than written communications.

[118] Noonan's description of Brown at the 2 February 2015 meeting also does not cause me to doubt the accuracy of his evidence. Whilst that description does not accord with the nurse's report of Brown's appearance upon his return to hospital that day, Noonan's account of the outcome of the meeting is supported in material respects by Brown's own email of 4 February 2015.

[119] I find the defendant was at all times ready, willing and able to comply with Special Condition 4 of the contract. However, Special Condition 4 could only be complied with if there was cooperation by both the plaintiff and the defendant. The agreement imposed an implied obligation on the plaintiff, through Brown, to do all that was reasonably necessary "to secure performance of the contract".[37]

[120] In *Mantonella Pty Ltd v Thompson,* this principle was described thus:

> "In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*, Mason J said in respect of this principle:
>
> > "As Lord Blackburn said in *Mackay v Dick:*
> >
> > > 'as a general rule…. where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no expressed words to that effect.'

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[37] *Secured Income Real Estate (Australia) v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607 per Mason J.

> It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to cooperate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. As Griffith CJ said in *Butt v M'Donald*:
>
> > 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.' [Footnotes deleted]." [38]

[121] A proper construction of the defendant's obligations under Special Condition 4 is that not only must the defendant be ready, willing and able to provide the necessary training and support, but the plaintiff must likewise be ready and willing to do all that is reasonably necessary to allow the carrying out of that training and support by the defendant.[39]

[122] I do not accept the plaintiff's contention that it was open to the defendant to arrive unannounced at the plaintiff's swimming school to provide the necessary training or that there was an obligation on the defendant to forward relevant documentation and provide relevant staff in satisfaction of the obligation to provide training and support, notwithstanding Brown's specific instruction by email of 26 September 2014 that training not commence at that time. Properly construed Special Condition 4 required the provision of training in the context of an availability of the plaintiff's premises, facilities and employees. The defendant had no ability to force the plaintiff to make available its premises, facilities or employees.

[123] Brown accepted he never emailed or telephoned the defendant again to indicate he was ready for training. Whilst Brown said he did telephone Michael Lamb, the SRSS accountant, at one point about being ready for training. I do not accept Brown's evidence on this issue. Brown could not remember precisely when, but it was "during that timeframe".[40] It is inconsistent with all of his written communications with the defendant at the time and subsequently. Lamb gave evidence that when he did speak to Brown, Brown never raised training and support with him. I accept Lamb's evidence on this issue.

[124] I find the plaintiff was never ready and willing to do all that was necessary on its part to allow the defendant to provide the requisite training and support. The plaintiff indicated its lack of readiness and its unwillingness by written communication of 26 September 2014 and oral communications by its sole director, Brown, in the telephone conversations with Noonan in late November 2014 and December 2014.

[125] In such circumstances, the defendant was relieved of compliance with its obligations until the plaintiff exhibited the requisite readiness and willingness. After March 2015, it

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[38] [2009] 2 Qd R 524 at [59].
[39] *Mackay v Dick* (1881) 6 App Cas 251 at 263. See also *Concrete Pty Ltd v Parramatta Design and Developers Pty Ltd* (2006) 229 CLR 577 at 584 per Gummow ACJ.
[40] T2-41/6.

was impossible to provide ongoing training and support as the plaintiff's business had closed permanently.

[126] The defendant's failure to provide the requisite training and support in accordance with Special Condition 4 of the contract was not a breach of contract in all the circumstances.

[127] There is also no evidence to support a finding that the defendant breached Special Condition 6 of the contract by encouraging customers of the plaintiff's swimming school to transfer to one of SRSS' facilities. There is no evidence of any customer of the plaintiff's swimming school transferring to SRSS, let alone doing so due to the encouragement of SRSS.

[128] Brown contended an inference could be drawn that the defendant had poached customers from the following circumstances. The swimming school had only one entrance for the public. All persons entering the swimming school had to pass by the manager. Every customer paid the manager. Every customer was assigned a class by the manager. For this reason there was a lot of individual contact with the manager of the swimming school. By poaching Meerten in December to their Manly school, SRSS encouraged customers to leave the plaintiff's swimming school.

[129] Brown explained the connection by saying that in addition to that daily contact, Meerten had school aged children and lived locally. She would regularly see local families in that environment. Her personal service of every customer, together with this personal local relationship, would entice customers away because swimming schools are personal service businesses. He gave as an example, "for years I've been going to a hair salon to get my hair cut. My stylist suddenly moved to another salon. I followed her and discovered most of the customers had followed her as well, because for a personal service like swim teaching or hair cutting, you're having an alliance and a loyalty to your service provider. And if that person moves, you'll often follow with them."[41]

[130] There is no evidence to support the inference that such customers did transfer as a consequence of the defendant's re-employment of Meerten at SRSS Manly. Such an inference could only arise if there was evidence Meerten had encouraged customers to follow her to another swimming school. I accept her evidence that she did not do so.

[131] Most importantly, there is no evidence Meerten was "poached" by the defendant from her position as manager of the plaintiff's swimming school. I accept Meerten's evidence that her resignation from the plaintiff's employment occurred in circumstances where there had been no contact by any person on behalf of SRSS seeking to encourage or procure her to leave the employment of the plaintiff.

[132] There is compelling support for Meerten's evidence that her resignation from the plaintiff's employment was solely as a consequence of the plaintiff's failure to pay her the wages due to her in accordance with her employment contract. I accept Meerten's evidence she attended Brown at hospital for the specific purpose of seeking to have the

[41] T2-18/25.

wages of the staff, including her own wages, paid by Brown. I accept Brown declined to do so. I do not accept Brown's denials to the contrary.

[133] I also do not accept Brown's assertion that he was unable to make that payment as a consequence of Meerten's failure to provide him with the requisite timesheets. I accept Meerten did offer Brown access to the requisite timesheets. That conclusion is supported by her earlier email to the bookkeeper seeking to arrange for ongoing payment of wages. I accept she did contact the bookkeeper again in an effort to try to have the bookkeeper arrange payment through Brown.

[134] In coming to this conclusion it is significant to note that Brown was able to make the necessary payments in December 2014, notwithstanding that he had remained in hospital. His ability to do so is entirely consistent with a conclusion that Brown had access to the requisite timesheets and his failure was as a consequence of his refusal to pay the wages as and when they were due. That refusal included Meerten's specific request when she attended upon Brown in hospital in late November 2014.

[135] Whilst Meerten's almost immediate re-employment by the defendant at its SRSS Manly facility raised the possibility Meerten had prior discussions with employees of the defendant prior to resigning from her employment with the plaintiff, I accept the evidence of Meerten and Pratt as to the circumstances under which Meerten received the offer of employment at SRSS Manly. Meerten was distressed by the financial hardship caused by the non-payment of her wages. As a consequence of that financial hardship, she was unable to meet her childcare costs, necessitating she leave her employment so she could care for her child at home.

[136] I accept that Pratt, upon being told by Meerten subsequent to her resignation of her circumstances, advised Meerten of the vacancy at SRSS Manly. There was good reason for SRSS to want to assist Meerten in her predicament. As Noonan observed, Meerten had been a valued employee who had lost her employment with the plaintiff through no fault of her own.

[137] I find the defendant did not breach Special Condition 6 of the contract of sale.

[138] Even if I had found the defendant had breached Special Conditions 4 and/or 6 of the contract of sale, I would not have been satisfied that breach of contract was causative of the plaintiff's loss and damage as a consequence of the closure of its swimming school.

[139] Having regard to the relevant principles of causation,[42] and applying the test of causation in a practical common sense way, I find the failure of the plaintiff's swimming school was solely due to the unfortunate deterioration in the health of Brown. Brown's hospitalisation from mid-November 2014 to June 2015 was the direct cause of the failure of that business. Brown's inability to perform his duties as director of the plaintiff meant the plaintiff failed to pay its staff in accordance with its employment obligations. As a consequence, Meerten and its experienced instructors left the plaintiff's employ throughout December 2014 and January 2015. The loss of

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[42] *Alexander v Cambridge Credit Corporation Pty Ltd* (1987) 9 NSWLR 310 at 314-315.

those employees was not as a consequence of a lack of training and support by SRSS. I accept Meerten had the requisite skills to be able to pay those employees. The failure to do so was as a consequence of a lack of available funds. That lack of funds was due to Brown's own inaction.

[140] I find further that the loss of those experienced employees directly impacted upon the plaintiff's ability to reopen its swimming school in January 2015. It is significant that the plaintiff's swimming school failed notwithstanding the efforts of the defendant, at its own expense, to operate the swimming school for the purposes of ensuring that swimmers received value for monies prepaid for swimming lessons in February and March 2015.

[141] The closure of the swimming school was also a direct result of the plaintiff's inability to meet its obligations in accordance with the lease of the premises. Once the landlord took steps to re-enter those premises, it was impossible for the swimming school to continue to operate at those premises. That impossibility was a consequence of the plaintiff's own actions.

[142] The conclusion that the failure of the swimming school was as a consequence of Brown's failing health is consistent with Brown's own observations in the email of 9 April 2015. Brown directly attributed the failure of the plaintiff's business to Brown's hospitalisation. There was no suggestion the defendant's actions caused the failure of the business. To the contrary, Brown acknowledged the significant assistance afforded by the defendant in attempting to keep open the plaintiff's swimming school.

[143] In coming to this conclusion, I have had regard to the fact that Brown, at the time of the preparation of that letter, was subject to an order by QCAT that he lacked capacity in financial matters. That order does not, however, mean Brown lacked capacity to give a coherent, rational explanation for the failure of his swimming school.

[144] The letter of April 2015 contained many factually accurate assertions in relation to the events which had led to the failure of the plaintiff's swimming school. In that letter, Brown made statements that no families had left with the new owner, other than one or two who were moving to a distant suburb in greater Brisbane and that the first two months were like a dream come true, but that unfortunately in November he had been admitted to hospital and the hospital did not allow him access to the swimming school, which had affected the operation of the swimming school. Brown did not make any mention about the failure of the swimming school being as a result of a lack of training being provided by the defendant.

[145] These conclusions render it unnecessary to consider the differences in the opinions expressed by the financial accountants. Had it been necessary to do so I would not have accepted Williams' conclusions as to the extent of the plaintiff's losses. Those conclusions were premised on forecasts provided by Brown which did not have factual bases. Those forecasts substantially increased the projected monthly earnings of the swimming school and significantly reduced the expenses associated with the provision of instructors to that swimming school. Further, the losses were calculated not at the

date of breach and were based on a discount rate which did not properly reflect the risks associated with the business.

[146] I would have preferred and accepted the opinion expressed by Ashby. That opinion provided a sound basis for a conclusion that the loss occasioned to the plaintiff, in the event there had been a breach of contract, was only slightly more than the value paid for the business.

Counter claim

[147] The defendant's counterclaim is for the sum of $60,000 paid in settlement of the landlord's claim for lost rent. The evidence establishes the defendant paid that sum, in settlement of its legal obligations pursuant to a guarantee entered into in relation to the performance of the plaintiff's obligations under the lease.

[148] I find the plaintiff failed to comply with its obligations under that lease. As a consequence, the landlord was entitled to make the claim against the defendant pursuant to that guarantee. I accept the sum of $60,000 was paid by the defendant pursuant to that obligation.

[149] The plaintiff has pleaded no positive defence to the recovery of that sum, absent an entitlement to set off that sum against any award in the event its claim succeeded.

[150] As the plaintiff's claim has failed, there is no reason why the defendant ought not to receive judgment in its favour on the counterclaim.

Conclusions

[151] The plaintiff has failed to establish the defendant breached either Special Condition 4 or Special Condition 6 of the contract of sale.

[152] Even if the defendant had breached those conditions, the plaintiff has further failed to establish that either breach was causative of the plaintiff's loss occasioned by the closure of the plaintiff's swimming school.

[153] The plaintiff's claim fails.

[154] The defendant's counterclaim succeeds.

Order

[155] I give judgment for the defendant against the plaintiff in the plaintiff's claim and in the defendant's counterclaim.

[156] I shall hear the parties as to the form of orders and costs.