

SUPREME COURT OF QUEENSLAND

CITATION: *Rabade Enterprises Pty Ltd v SPAR Licensing Pty Ltd* [2019] QSC 204

PARTIES: **RABADE ENTERPRISES PTY LTD ACN 168 523 073**
(applicant)
v
SPAR LICENSING PTY LTD ACN 002 965 193
(respondent)

FILE NO: SC No 8021 of 2019

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 16 August 2019

DELIVERED AT: Brisbane

HEARING DATE: 8 August 2019

JUDGE: Boddice J

ORDER:

- 1. It is declared that, upon the proper construction of clause 3 of the franchise agreement dated 1 July 2014 (Agreement), the Agreement was able to be terminated at the expiration of the term of the Agreement on 30 June 2019 by either party giving reasonable notice, provided such notice is given before the expiry of the five year term.**
- 2. It is declared that, the applicant validly terminated the Agreement effective from the expiration of the term of the Agreement.**
- 3. The respondent pay the applicant's costs of this application.**

CATCHWORDS: INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – COMMERCIAL AND BUSINESS TRANSACTIONS – GENERALLY – where the applicant seeks declaratory relief in respect of a franchise agreement entered into between the applicant and the respondent – where the agreement specified a term of five years, from its commencement date, with a holding over period in the event of the agreement not having been terminated in accordance with its terms at the expiry of that five year period – whether, on its proper construction, the

agreement expired on 30 June 2019 or whether its terms continue to operate until the giving of 12 months' written notice of the termination of the agreement

Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth)

Electricity General Corporation v Woodside Energy Ltd
(2014) 251 CLR 640

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd
(2015) 256 CLR 104

COUNSEL: T Jackson for the applicant
A Musgrave for the respondent

SOLICITORS: Haseler Law for the applicant
Braur Law for the respondent

- [1] The applicant seeks declaratory relief in respect of a franchise agreement entered into between the applicant and the respondent. At issue is whether, on its proper construction, the agreement expired on 30 June 2019 or whether its terms continue to operate until the giving of 12 months' written notice of the termination of the agreement.

Background

- [2] On 1 July 2014, the applicant and the respondent entered into a written franchise agreement by which the respondent granted the applicant a licence to use the intellectual property of SPAR when operating a retail grocery business. The agreement also provided for the provision of other services.
- [3] The agreement specified a term of five years, from its commencement date, with a holding over period in the event of the agreement not having been terminated in accordance with its terms at the expiry of that five year period.
- [4] On 7 June 2018, the applicant wrote to the respondent seeking information about the costs if it were to “move away from SPAR”. In that email, the applicant expressed an intention to “move away from SPAR from 15 August 2018”.¹

¹ Affidavit of W T Haseler, “WTH-1” p 47.

- [5] On 27 February 2019, the respondent wrote to the applicant in relation to entry into a “Franchise Agreement Renewal”. The respondent advised the current franchise agreement “will lapse on 30/06/2019”.² It enclosed with the letter a disclosure document in respect of the proposed renewal agreement.
- [6] On 8 March 2019, there was an exchange of correspondence between the respondent and the applicant. In its correspondence, the respondent invited the applicant to provide 12 months’ notice of termination of the franchise agreement in accordance with the holding over provision in the agreement. In response, the applicant asserted it had “already given the notice”.³
- [7] On 30 April 2019, the applicant advised the respondent in writing of its intention to “mov[e] out” from SPAR “at the end of our Franchise Agreement, which is 30 June 2019”.⁴ The applicant further advised that as agreed the applicant would “still be drawing stock from the ware house till we have finalised the change over to another banner. Please let me know if there are any issues or concerns about this. I intend to draw stock out of the warehouse until mid August 2019”.⁵
- [8] Following the exchange of that correspondence a dispute arose between the applicant and the respondent as to whether the applicant was still subject to its obligations under the franchise agreement entered into with the respondent on 1 July 2014.

Application

- [9] By originating application, filed 29 July 2019, the applicant sought the following orders:
1. A declaration that, on the proper construction of clause 3 of the SPAR Franchise Agreement (“**Agreement**”), the term of the agreement was for five years and expired on 30 June 2019;

² Affidavit of W T Haseler, “WTH-1” p 49.

³ Affidavit of W T Haseler, “WTH-1” p 48.

⁴ Affidavit of W T Haseler, “WTH-1” p 209.

⁵ Affidavit of W T Haseler, “WTH-1” p 209.

2. A declaration that, on the proper construction of clause 3 of the Agreement, the applicant validly terminated the Agreement at the expiration of the term.

The Agreement

[10] Relevantly, the franchise agreement contained the following terms:

“2. GRANT OF FRANCHISE

2.1 Grant of Franchise

The Franchisor grants the Franchisee and the Franchisee accepts a non-exclusive licence to use the Intellectual Property, including the Marks, SPAR Trade Names and SPAR Trade Marks and the right to operate and conduct the Business from the Premises in accordance with the SPAR Licensing System, subject to the terms and conditions in this Agreement.

2.2 Conduct of the Business

The Franchisee must conduct the Business in accordance with:

- (a) the SPAR Licensing System;
- (b) the SQS;
- (c) the SPAR principles and operational standards (as advised by the Franchisor from time to time);
- (d) the advice, assistance and the reasonable directions of the Franchisor;
- (e) any Special Conditions that the Franchisor and the Franchisee have agreed to prior to the signing of this Agreement;
- (f) all applicable legislation, regulations and codes which apply from time to time to the conduct of the Business; and
- (g) all decisions of the SPAR Guild National Council.

3. COMMENCEMENT AND TERMINATION

3.1 Term

This Agreement commences on the date of this Agreement and will expire 5 years from that date, unless terminated earlier in accordance with this Agreement.

3.2 Holding Over

If at the expiry of the Term this Agreement has not been terminated in accordance with its terms, then the terms of this Agreement will

continue to operate until 12 months' after either the Franchisee or the Franchisor gives the other notice in writing of the termination of this Agreement.

3.3 New Franchise

Subject to:

- (a) the Franchisee not being in breach of this Agreement;
- (b) the Franchisee having paid the Documentation Fee;
- (c) the Franchisor successfully negotiating any new Banner Agreement and any rights to intellectual property as are necessary; and
- (d) this Agreement not having been previously terminated,

the Franchisor will, at the request of the Franchisee, on the expiry of this Agreement, offer a new franchise to the Franchisee pursuant to the Franchisor's then current franchise agreement.

3.4 Early Termination

Notwithstanding any other provision in this Agreement, the Franchisee acknowledges and agrees that if during the Term, the Franchisor gives or receives a notice stipulating that the Franchisor's authority to licence the use of the Intellectual Property is to be terminated 12 months from the date of that notice, the Franchisor must within 3 months of receipt of that notice, notify the Franchisee. At any time thereafter the Franchisor may, by giving the Franchisee a minimum of 6 months' notice in writing either:

- (a) require the Franchisee to cease to use the Intellectual Property and require it to use any New Intellectual Property in the running of the Business; or
- (b) terminate this Agreement, in which case, upon the expiry of that termination notice, this Agreement will terminate as if the Term had expired and clauses 3.2 and 3.3 were deleted from this Agreement.

...

19. TERMINATION

19.1 Termination with notice

- (a) The Franchisor may terminate this Agreement if the Franchisee commits a breach of this Agreement, and the Franchisor gives a notice in writing to the Franchisee:
 - (i) specifying the breach;

- (ii) that the Franchisor proposes to terminate this Agreement because of the breach;
 - (iii) what the Franchisor requires from the Franchisee in order to remedy the breach; and
 - (iv) which specifies a reasonable time within which the Franchisee must remedy the breach,
and the Franchisee fails to remedy that breach within the specified time.
- (b) The Franchisee will be in breach of this Agreement on the Franchisee ceasing to trade under the Trading Name as approved by the Franchisor unless the Franchisee, in accordance with the terms of clause 17, Transfer this Agreement and the Franchisor consents to such Transfer.
 - (c) For the purposes of clause 19.1(a)(iv), the Franchisor will not be required to allow the Franchisee more than 30 days to remedy the breach.

19.2 Termination without notice

The Franchisor is not required to comply with clause 19.1 and may terminate this Agreement immediately and at its complete discretion if the Franchisee:

- (a) no longer holds a licence that the Franchisee must hold to carry on the Business;
- (b) becomes bankrupt, insolvent, under administration or an externally administered body corporate;
- (c) voluntarily abandons the Business or the franchise relationship;
- (d) is convicted of a serious offence;
- (e) operates the Business in a way that endangers public health or safety;
- (f) is fraudulent in connection with the operation of the Business; or
- (g) agrees to the termination of this Agreement.

19.3 Cross default

Where another agreement exists or comes into existence between the Franchisor and the Franchisee then any breach, by either the Franchisee or the Franchisor, of any term or condition:

- (a) of any such other agreement will be deemed to constitute a breach of this Agreement and will entitle the party not in breach

to all of the consequential rights and remedies contained in this Agreement; and

- (b) of this Agreement will (unless the other agreement specifies to the contrary) be deemed to constitute a breach of such other agreement and the consequential rights and remedies therein contained or implied.

19.4 Additional acknowledgement

The Franchisee acknowledges that this Agreement does not contain any express provision for the Franchisee to terminate this Agreement during the Term.”⁶

- [11] Clause 18 of the Agreement specified the circumstances in which the applicant would be in breach of the Agreement. Clause 20 specified the consequences of termination of the Agreement. Those consequences included an obligation on the applicant “within 7 days of the effective date of termination or expiration of this Agreement” to pay outstanding accounts, to return relevant materials and to cease use of signage and trademarks.⁷

Submissions

- [12] The applicant submits that the contents of clause 3 of the Agreement support a conclusion that it was the common intention of the parties at the time the Agreement was entered into that the Agreement could come to an end at the expiry of the five year term. Accordingly, it was open to the applicant to exercise that right prior to expiry of that term. That conclusion is supported by the words “will expire in” in clause 3.1 and “or expiry of the Agreement” in clause 20.
- [13] The respondent submits that the cumulative effect of clauses 3.1 and 3.2 supports a conclusion that the parties’ common intention at the time of entering into the Agreement was that the Agreement would continue for an initial term of five years, with there being no right for the applicant to terminate during that initial term, and that thereafter the applicant continued to be bound by the terms of Agreement until it had given 12 months’ written notice of termination of the Agreement.

⁶ Affidavit of W T Haseler, “WTH-1”.

⁷ Affidavit of W T Haseler, “WTH-1” p 121.

- [14] The respondent submits that the use of the words “expire” or “expiry” are relevant only to the length of the initial term. They do not support a conclusion that it was the intention of the parties that the applicant have a right to end the agreement at the conclusion of the initial five year period.
- [15] The respondent submits that such a construction would not be in accord with reasonable business practice as a franchise agreement is of such a nature that a period of 12 months’ notice prior to cessation of that agreement and in accordance with clause 3.2 is reasonable in the circumstances. The respondent relies, in support of that submission, on the terms of the existing Franchising Code of Conduct issued under the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth).

Discussion

- [16] The principles for construing contracts are well established and not in dispute. The rights and obligations of a party to a contract are to be determined objectively, by reference to the contract’s text, context and purpose.⁸
- [17] In the case of a commercial contract, the meaning of its terms are to be determined by asking what a reasonable business person would have understood those terms to mean, with the answer to that question arising from a consideration of the language of the contract, the circumstances addressed by the contract and the commercial objects to be secured by the contract.⁹
- [18] A consideration of the circumstances and commercial objects requires an understanding “of the genesis of the transaction, the background, the context [and] the market in which the parties are operating” with an assumption that the parties intended to produce a commercial result.¹⁰ That construction necessitates an answer which avoids “making commercial nonsense or working commercial inconvenience”.¹¹

⁸ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46].

⁹ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [47]; see also *Electricity General Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35].

¹⁰ *Electricity General Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35].

¹¹ *Electricity General Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35].

- [19] In considering the proper construction of clause 3.1 it is relevant to consider the contents of clause 3.2 in the context of the Agreement as a whole. Other relevant provisions in the Agreement include the definition of “term” in clause 1, which is defined to mean “the term of this Agreement described in clause 3.1”, clause 19.4, which contains an acknowledgment by the Applicant that “this Agreement does not contain any express provision for [the Applicant] to terminate this Agreement during the Term”, and the survival of any clause, as prescribed by clause 28.12.¹²
- [20] Consideration must also be given to the express use of the term “expiration of this Agreement” in clause 20, in the context of the consequences of any termination of the Agreement.
- [21] Consideration must be given of the nature and purpose of the Agreement. Its purpose is to provide a licence to the applicant to use the respondent’s intellectual property and other services and facilities offered by the respondent in the context of the respondent having a trade brand which is intended to provide a significant competitive edge to the applicant in the operation of its retail grocery store in exchange for a licensing fee. Such an agreement is plainly commercial in nature.
- [22] Finally, it is relevant to have regard to the fact that in the context of that commercial relationship the parties agreed to entry into a written agreement which by its terms was for a specified period of five years from the commencement date of the Agreement with a designated holding over period in the event that the Agreement had not been terminated in accordance with its terms at the expiry of that term.
- [23] Allowing for all of those matters, a reasonable business person understanding the nature and context of the agreement being entered into would understand this Agreement as being for a specified term of five years from 30 June 2014, with a right for either party to give notice of its intention to conclude the Agreement at the expiry of that term, provided such notice is given before the expiry of the five year term.
- [24] That interpretation is consistent with the Agreement’s use of the words “expiry” or “expiration”, in the context of a specification of the meaning of “term” in the

¹² Affidavit of W T Haseler, “WTH-1”.

Agreement. To interpret the Agreement as not providing any right to give notice that the Agreement will not continue after expiry of the term would render obsolete the express use of those words “expiry” or “expiration” in the Agreement.

- [25] This conclusion is also consistent with the terms of the holding over clause in clause 3.2. A reasonable business person would have understood that clause to mean that in the event that no notice has been given that Agreement will end at the conclusion of the five year term, the parties agreed the Agreement would continue to operate until 12 months after either party gave written notice of termination of the Agreement to the other.
- [26] There is good reason why reasonable business people would accept that if no notice had been given, prior to expiry of the term, of an intention to terminate the Agreement, there was an obligation on the parties to continue that Agreement on the same terms unless one party gave to the other party reasonable notice, which, in the circumstances of the nature and purpose of the Agreement, was specified to be 12 months’ notice.
- [27] This conclusion is also consistent with the contents of clause 19.4 of the Agreement. That clause merely contains an express acknowledgment that neither party has a right to terminate the Agreement during “the term”. Such a clause records that each party agreed that the Agreement would last for the period of the specified term, namely five years, absent an entitlement to terminate for breach in accordance with clause 19 of the Agreement.
- [28] Clause 19.4 by its terms, is not inconsistent with an entitlement for a party to give notice that the Agreement will cease at the expiry of that term. Clause 3.2 also does not contain such a prohibition. It expressly recognises that the holding over period only commences to operate if the Agreement has not been terminated in accordance with its terms at the expiry of that term.
- [29] A proper interpretation of the Agreement allows for expiry of the Agreement at the conclusion of the five year term, provided notice has been given by the party prior to the expiration of that five year term.

Conclusions

- [30] A proper construction of the contract supports the granting of a declaration in accordance with the terms sought by the applicant. The respondent's reliance upon the contents of a Code of Conduct introduced subsequent to the entry into of this Agreement by the parties cannot alter the construction of the contract as that Code of Conduct could not have been in the minds of reasonable business people at the time of entering into that contract

Orders

- [31] I shall hear the parties as to the form of orders, and costs.