

SUPREME COURT OF QUEENSLAND

CITATION: *M & H Noble P/L v Paulmarg P/L* [2009] QSC 265

PARTIES: **M & H NOBLE PTY LTD ACN 060 377 344**
(applicant/plaintiff)
v
PAULMARG PTY LTD ACN 106 115 557
(defendant)

FILE NO/S: S10936 of 2007

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 4 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 25 May 2009

JUDGE: Martin J

ORDER: **That Red Rooster Foods Pty Ltd be joined as second defendant to the plaintiff's claim.**

CATCHWORDS: PRACTICE – JOINDER OF PARTIES – Where applicant has commenced proceedings against respondent for specific performance of an agreement to lease – Where applicant seeks joinder of third party – Where third party objects to joinder on ground that joinder is not desirable, just and convenient – Whether joinder is desirable, just and convenient – Whether proposed pleadings disclose a tenable cause of action.

TRADE PRACTICES – MISLEADING AND DECEPTIVE CONDUCT – UNCONSCIONABILITY – Where applicant seeks joinder of third party – Where applicant alleges third party engaged in unconscionable conduct – Meaning of unconscionable – principles discussed.

Property Law Act 1974 (Qld), s 59
Trade Practices Act 1974 (Cth), s 51AC
Uniform Civil Procedure Rules (Qld), r 69(1)(b)

Canon Australia Pty Ltd v Patton (2007) 244 ALR 759
General Steel Industries v Commissioner for Railways (1964) 112 CLR 125
Hurley v McDonald's Australia Ltd (2000) ATPR 41-741, [1999] FCA 1728

COUNSEL: S Couper QC for the applicant/plaintiff
 L J Nevison for the defendant
 T Sullivan SC for the respondent Red Rooster Foods Pty Ltd

SOLICITORS: Forbes Dowling for the applicant/plaintiff
 Ferguson Cannon Lawyers for the defendant
 Deacons Lawyers for the respondent Red Rooster Foods Pty Ltd

- [1] This is an application by the plaintiff (“Noble”) to join Red Rooster Foods Pty Ltd (“Red Rooster”) as the second defendant in these proceedings.

Background

- [2] In 1993 Red Rooster became the lessee of property at 67 Kingaroy Street, Kingaroy. At about the same time, Noble commenced trading at that site as Red Rooster Kingaroy. Noble (as franchisee) and Red Rooster (as franchisor) are the parties to a franchise agreement with respect to the business conducted at that site.
- [3] The current registered owner of the premises is the defendant (“Paulmarg”). The lease of the premises had an initial expiry date of 30 November 2007 with two options for renewal of 10 years each. The option to extend the lease term beyond 30 November 2007 was not exercised by Red Rooster. In September 2007 Paulmarg’s solicitors requested Noble to vacate the property upon expiration of the then current lease term on 30 November 2007. On 29 November 2007, McMeekin J granted an interlocutory injunction restraining Paulmarg from alienating, leasing or otherwise dealing with the site.
- [4] Noble filed a claim and statement of claim on 14 May 2008. A defence and counterclaim was filed on 20 June 2008, with a reply and answer filed on 18 July 2008. Since then there have been a series of steps taken in the action until the filing of this application.

The application

- [5] The application is made under r 69(1)(b) of the *Uniform Civil Procedure Rules*. That rule provides:
- “(1) The court may at any stage of a proceeding order that--
- ...
 (b) any of the following persons be included as a party--
- (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;

- (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.”

The submissions

- [6] Noble does not seek to rely on r 69(1)(b)(i). It is not suggested that the presence of Red Rooster before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding. Rather, it is argued that Red Rooster’s presence would be desirable, just and convenient within the meaning of r 69(1)(b)(ii).
- [7] The claim presently formulated against Paulmarg is for specific performance of an agreement to lease in respect of the premises. In the proposed amended statement of claim Noble would plead two causes of action against Red Rooster. (There were three causes of action identified in the pleading but one was not pursued at this application.) In the first it would allege that Red Rooster had, pursuant to an existing lease of the premises, an entitlement to exercise an option to renew for 10 years. The plaintiff asked Red Rooster to exercise that option to renew but Red Rooster refused. Had the option been exercised then the premises would have been secured for the benefit of both Noble and Red Rooster. Noble would allege that Red Rooster’s conduct in the circumstances was unconscionable within the meaning of s 51AC of the *Trade Practices Act 1974* (“TPA”).
- [8] The second cause of action sought to be raised against Red Rooster is in the alternative and is raised against Paulmarg also. It would be alleged that Red Rooster acted as an agent of Noble in negotiating for a new lease with Paulmarg. By reason of its relationship as an agent, Red Rooster owed fiduciary duties to Noble. Instead of exercising the option to renew, Red Rooster acquired for itself a binding agreement for lease of the premises and in so doing contravened its fiduciary duty. Noble asserts that Paulmarg is bound by an agreement for lease and that Red Rooster holds its interest pursuant to the agreement for lease on constructive trust for Noble.
- [9] Paulmarg opposes the joinder of Red Rooster on a number of grounds. One of the bases is that it is not “desirable, just and convenient” to join Red Rooster because of the delay which has occurred throughout the life of this proceeding. Some time ago Paulmarg sought to discharge the interim injunction referred to above on the basis that it had been in place for just over three months and Noble had not filed a statement of claim or taken any other step since the making of the order granting the injunction. The application to discharge was met by Noble filing a statement of claim and directions were made shortly after that on 19 May 2008, in order to provide a timetable to ready the matter for trial. Those directions have been complied with. According to Paulmarg, the matter has been ready to be set down for trial since September 2008 but Noble has refused to sign the request for trial date and, on 2 March 2009, filed this application for joinder. The matter was not ready to

proceed when it originally came on because Noble had not served Red Rooster and there have been two further adjournments since then.

- [10] Red Rooster's argument against joinder is that because the proposed pleadings do not disclose a tenable cause of action against it, then it is not desirable, just and convenient for it to be joined. The respondent approached this argument on the basis that the principle applicable in *General Steel Industries v Commissioner for Railways*¹ was the appropriate measure. In other words, the respondent argues that in order for Red Rooster to succeed it bears the onus of demonstrating that the case proposed by Noble against it is manifestly groundless or untenable.
- [11] One issue which was briefly explored was the prospect that, instead of seeking to join Red Rooster as second defendant, it would be open to Noble to commence a separate action against Red Rooster and, in the future, seek to have the two actions heard together. While that is able to be done, it would still result in consideration by this court of the proposed cause of action as Red Rooster argued that, in any separate action, it would seek to have such an action struck out on the same grounds that it advances in this application. It is a sensible use of the parties' time, then, for this matter to be dealt with now.
- [12] In order for the arguments with the parties to be understood it is necessary to set out the provisions of the proposed statement of claim dealing with the causes of action the subject of argument.

The unconscionable conduct claim

- [13] This claim is contained within paragraphs 24 to 36 of the proposed statement of claim. It reads:
- “24. The Second Defendant:-
- (a) was in the business of operating as franchisor a national franchise in restaurant and fast food businesses which traded under the name and style of Red Rooster; and
- (b) entered into franchises with its franchisees at sites which were variously:-
- (i) owned by the Second Defendant;
- (ii) leased by the franchisees from third party owners;
- (iii) leased by the Second Defendant from a third party owner;
- (iv) leased by the franchisee as owner to the Second Defendant.
25. The franchise business referred to in paragraph 1(b) hereof:
- (a) had been operated successfully by the Plaintiff on the property since 1993; and

¹ (1964) 112 CLR 125

- (b) was the subject of a written agreement the term and conditions of which commenced on 1 March 2001 and expired on 29 November 2007 without option for renewal of that term.
26. In early 2006, the Second Defendant informed the Plaintiff that:-
- (a) it had changed its policy regarding the holding of any interest in properties out of which its franchises were operated; and
 - (b) it did not intend in respect to the property to exercise its option of renewal as lessee for a further term of 10 years (which option was required to be exercised by 31 August 2007);
 - (c) that the Plaintiff would have to negotiate a new lease after 30 November 2007 directly with the First Defendant;
 - (d) that any further term of franchise as between the Plaintiff as franchisee and the Second Defendant as franchisor was dependent upon the availability of suitable premises at Kingaroy from which to continue to conduct the franchise business.
27. On 14 July 2006, the Plaintiff secured the formal written agreement of the Second Defendant to the grant of a new 10 year franchise agreement with a further option of 10 years in respect of the property to commence on the expiration of the current franchise on 29 November 2007 subject to the following requirements:-
- (a) financial commitment as applies to a new Red Rooster franchise being met;
 - (b) the Plaintiff to enter into a new lease with the lessor with an assignment and reentry provision;
 - (c) the carrying out of refurbishment and update works at the premises to a value of not less than \$150,000.00 plus GST with such works being approved by the Second Defendant prior to commencement, and if the services of the Second Defendant's architects, designers and property department are used the costs so incurred to be payable on an actual cost recovered basis.
28. By 21 August 2007:
- (a) the Second Defendant had informed the Plaintiff that another potential site proposed by the Plaintiff for the conduct of the Red Rooster Franchise was unacceptable;
 - (b) the Second Defendant knew that the property was the only suitable and available site for the conduct of a Red Rooster Franchise in Kingaroy or the surrounding area;
 - (c) the Second Defendant knew that the First Defendant was insisting upon terms of a lease which were unacceptable to the Plaintiff;

- (d) the Second Defendant knew that in order to be able to conduct a franchise in accordance with the franchise agreement offered by the Second Defendant on 14 July 2006, the Plaintiff would need to operate from the property.
29. In the premises, the condition referred to in paragraph 27(b) was a condition:
- (a) not required for the legitimate interests of the Second Defendant;
 - (b) which would be likely to prevent the Plaintiff from being able to fulfil the Second Defendant's requirements to obtain a new franchise agreement;
 - (c) which could, with no detriment to the Second Defendant, be replaced by a condition that upon the Second Defendant exercising the option in the existing lease, the Plaintiff enter into a licence agreement with the Second Defendant or take an assignment of lease from the Second Defendant.
30. On or about 21 August 2007, the Plaintiff by its solicitor Andrew Kelly, in a conversation with Darryl Mossop on behalf of the Second Defendant, requested that the Second Defendant exercise the option to renew the lease.
31. The Second Defendant by Darryl Mossop refused to exercise the option.
32. If the Second Defendant had exercised the option it would have:
- (a) secured the use of the property for the benefit of both the Plaintiff and the Second Defendant;
 - (b) been able to assign the benefit of the lease to the Plaintiff.
33. The Second Defendant was at all material times a corporation within the meaning of the *Trade Practices Act 1974*.
34. The conduct of the Second Defendant referred to in paragraphs 26, 27, 28 and 31 herein was conduct in trade or commerce in connection with the supply or possible supply of services, namely the services comprised by or flowing from the proposed franchise agreement with the Plaintiff.
35. The Second Defendant's (sic) said conduct was in all the circumstances unconscionable.
36. In the premises, the Second Defendant contravened s.51AC of the *Trade Practices Act 1974*."

[14] The argument raised by Red Rooster is that the conduct referred to in paragraphs 26, 27, 28 and 31 does not constitute conduct which is unconscionable within the meaning of the *Trade Practices Act 1974* ("TPA"). It bases this submission on these points:

- (a) There is no pleaded obligation on the part of Red Rooster to grant a new franchise agreement;
- (b) Red Rooster was prepared in July 2006 to grant a franchise agreement subject to three conditions; and

- (c) One of those conditions was that Red Rooster no longer wanted to be the lessee of the particular premises.

- [15] It was put this way by Red Rooster: “There is simply nothing unconscionable about offering to enter into a contract which it was not obliged to enter into on stipulated conditions.” In other words, Red Rooster had, on the pleading, set some conditions which, if satisfied, would result in it entering into a new franchise agreement. The failure by Noble to satisfy those conditions could not, on Red Rooster’s argument, amount to unconscionable argument.
- [16] The basis for unconscionability of those conditions is addressed only in paragraph 29 by assertions that the second condition, i.e., paragraph 27(b), was unnecessary and likely to prevent Noble from being able to fulfil Red Rooster’s requirements to obtain a new franchise agreement.
- [17] Mr Sullivan SC, for Red Rooster, submitted that it was untenable to suggest that Red Rooster was acting unconscionably because Noble had been unable to meet the conditions set by Red Rooster for the granting of a new franchise agreement.
- [18] The meaning of the word “unconscionable” as used in s 51AC of the TPA has been the subject of consideration in a number of authorities. In *Hurley v McDonald’s Australia Ltd*² the Full Court of the Federal Court said:³
- “For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated ... Whatever ‘*unconscionable*’ means in s 51AB and s 51 AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable ... The various synonyms used in relation to the term ‘*unconscionable*’ import a pejorative moral judgment ...”
- [19] More recently, in *Canon Australia Pty Ltd v Patton*⁴ the New South Wales Court of Appeal adopted the remarks of Spigelman CJ (when referring to a different statutory provision) as applicable to the meaning of unconscionability under s 51AC. Those remarks were:
- “Unconscionability is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what is “fair” or “just”, it could transform commercial relationships ...”
- [20] Section 51AC of the TPA does not, though, leave the word “unconscionable” without any standards or circumstances against which conduct can be assessed by the court. Section 51AC(3) lists a number of matters to which a court may have regard when considering whether or not there has been a contravention of the

² (2000) ATPR 41-741, [1999] FCA 1728

³ At [22]

⁴ (2007) 244 ALR 759

section. One of those matters to which the court's attention is directed is contained in s 51AC(3)(b), namely:

“(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier.”

- [21] This is a ground pleaded by Noble in paragraph 29(a) of the proposed pleading. It is a matter upon which there would need to be evidence to determine whether or not the condition referred to in paragraph 27(b) of the proposed statement of claim was required for the legitimate interests of Red Rooster.
- [22] If evidence was accepted that the condition complained of did constitute something which was not reasonably necessary for the protection of Red Rooster's legitimate interests then Noble may have a case on unconscionability. In the light of that, I need go no further. The principles in *General Steel* do not require me to dismiss this part of the claim as untenable when there are matters of evidence which need to be considered and determined.

The fiduciary duty claim

- [23] This claim is contained within paragraphs 37 – 55 of the proposed statement of claim as follows:
- “37. On 1 October 2007, the Defendant by email advised the Plaintiff of the details of [the] franchisee lease proposals describing them as options 1 and 2 as follows:
- ‘Option 1** 85,000 net, \$150,000 Lessor contribution, CPI, 5 x 5 x 5 x 5, reviews to market at each option, lease directly with, Franchisee, 2 months security bond.
- PLUS
 - Allowing the franchisee to continue to trade end of February 2008 on current terms
 - Building works to commence 1st March and to be completed by end of March.
 - No rent will be payable by the franchisee during the construction period.
 - Once the store reopens the new lease terms will take effect
- Option 2** 65,000 net, no contribution, CPI, 5 x 5 x 5 x 5, reviews to market at each option, lease directly with, Franchisee, 2 month security bond.
- PLUS
 - Allowing the franchisee to continue to trade end of February 2008 on current terms
 - Building works to commence 1st March and to be completed by end of March.
 - No rent will be payable by the franchisee during the construction period.

- Once the store reopens the new lease terms will take effect'

commenting further that both options were:

"... workable. Option 1: The landlord renovates the exterior to a cost of \$150,000 with the tenant renovating the internals. Option 2: The tenant renovates exterior and interior.

We are committed to keeping the Kingaroy store at the current site and these options allow us to maintain this operation with minimal disruption to trade.'

38. On 2 October 2007, the Plaintiff advised the Second Defendant of its choice of the second franchisee lease proposal (described as Option 2) and later that day the Second Defendant obtained the First Defendant's verbal agreement to that proposal.
39. On 3 October 2007, the Second Defendant on behalf of the Plaintiff requested the First Defendant's solicitors to forward to the Plaintiff a new lease based on the verbal agreement referred to in paragraph 38 hereof for review by the Plaintiff.
40. Between 1 November 2007 and 16 November 2007 the Second Defendant continued to negotiate with the First Defendant.
41. On 20 November 2007, the First Defendant signed a memorandum or note within the meaning of s 59 of the Property Law Act 1974 (Qld) of a contract between the First Defendant and the Second Defendant whereby the First Defendant agreed to lease the property to the Second Defendant commencing 1 December 2007 for a term of 10 years with two further consecutive options of 5 years each at a rent of \$90,000.00 per annum plus GST subject to annual review.
42. By email letter dated 28 November 2007, Mr Dingli, on behalf of the Second Defendant, wrote to the Plaintiff:-
- (a) incorrectly labelling this letter 'Without Prejudice' when it was not a communication to avoid or settle litigation as between the Second Defendant and the Plaintiff; and
 - (b) stating, inter alia:
'Dear Michael and Helen,
Lease Proposal- Kingaroy Red Rooster
We refer to the above.
We confirm your discussions with Gary Martin in relation to a lease proposal we are endeavouring to finalise with the landlord to secure the tenancy of the abovementioned premises.
Briefly, the Landlord has indicated a willingness to finalise a new lease of the abovementioned premises with us on the following terms and conditions (although we point out that there is no binding Offer to lease in place at this point in time).

...

Lessee

Red Rooster Foods Pty ACN 008 754 096 (trading as Red Rooster) of 1 Whipple Street, Balcatta, Western Australia

...

Base Rent

For the period: 1 December 2007 to 28 February 2008: A net rent of \$63,022.00 per annum + GST, payable monthly in advance by way of Electronic Funds Transfer.

For the period: 1 March 2008 until 28 February 2009: A gross rent of \$90,000 per annum + GST, payable monthly in advance by way of Electronic Funds Transfer (inclusive of all rates, taxes and outgoings which I understand to be in the vicinity of \$4,250)

The Lessor will issue a GST invoice to the Lessee in accordance with current GST legislation.

Rent reviews

The Base Rent shall be adjusted on 1 March 2009 and thereafter annually on the anniversary of that date by the increase in the CPI Weighted Average Eight Capital Cities over the preceding 12 months, (ie: annual) save and except on 1 March 2018 and 1 March 2023 when the Base Rent shall be reviewed to market.

...

Assignment & subletting

So long as Red Rooster Foods Pty Ltd is lessee any change in ownership of shares in the company will not be deemed an assignment.

So long as Red Rooster Foods Pty Ltd is lessee an assignment to a subsidiary of that company or to a franchisee of the Lessee will not require the Lessor's consent provided that in the event of an assignment to a franchisee the franchisee must provide the Lessor with an unconditional bank guarantee for an amount equivalent to 3 months of the then current rental.

The Lessor's consent to any other assignment, subletting or licence shall not be unreasonably withheld and in the event of an assignment Red Rooster Foods Pty Ltd is released from all future liability under the Lease.

Franchise

The Lessor acknowledges and agrees that so long as Red Rooster Foods Pty Ltd or any subsidiary of the Lessee is lessee then the Lessee may at any time licence the use of the Premises to a franchisee of the Lessee or any subsidiary of the lessee without the

Lessor's consent provided that the Lessee remains responsible for all payments under the Lease.

...

Lessee's Works

The lessor acknowledges that the Lessee (or its franchisee) intends refurbishing the Premises as soon as practicable following the Lease Commencement Date (if it has not already done so) at the Lessee's (or its franchisee's) cost and expense to a value of not less than \$150,000 plus GST ("the Lessee's Works"). The Lessee shall decide the scope and extent of the Lessee's Works in its absolute discretion and shall provide the Lessor with plans and specifications for those Lessee's Works for approval by the lessor (which approval shall not be unreasonably withheld or delayed).

The Lessee (or its franchisee) shall carry out the Lessee's Works at the Lessee's (or its franchisees) (sic) cost and will ensure appropriate insurance cover is in place during the course of the Lessee's Works.

Additional Costs

The Lessee shall pay the Lessor's reasonable legal costs in preparing and negotiating a draft lease with M & H Noble Pty Ltd (Michael and Helen Noble) up to a limit of \$10,000 + GST subject to the presentation of tax invoices evidencing the legal costs incurred by the Lessor.

Assuming that we can finalise a head-lease on this basis, (the terms of which are acceptable to yourself) we would require you to enter into a new franchise agreement immediately on our standard terms and conditions and incorporating those requirements listed in bullet point form in our letter to you dated 14 September 2006 (with the exception of the second bullet point which required you to enter into a new lease with the Landlord not ourselves (as we would be taking the Head-Lease under this proposal not you)). These were that the Franchise was subject to:

1. financial commitment as applies to a new Red Rooster Franchise being met
2. carrying out refurbishment and update works at the premises to a value of not less than \$150,000 plus GST. Refurb and update works must be approved by the Franchisor prior to commencement. Should you wish to use the services of the Red Rooster architects, designers and property department cost (sic) incurred are to be payable on an actual cost recovering basis.

We would also require you to enter into our standard licence granting occupation to you of the Premises on the same terms and conditions as those granted to us in the New Lease (in other words, anything that we are required to pay under the Head Lease must be paid by you.) This would include a requirement for you to refurbish the premises and pay those "Additional Costs" referred to. Whilst we acknowledge that your payment of those "Additional Costs" is unfortunate, the Landlord has indicated that he is unwilling to negotiate unless such a provision is included.

We require you to signify whether the above proposal is agreeable in principle by no later than 9am tomorrow morning (your time) in which case we will revert to the Lessor with a view to endeavouring to secure a Head-Lease by close of business tomorrow.

Please note (and as advised by Tracy Steinwand in her emails to you) irrespective of whether your injunctive proceedings are successful or not, if we cannot finalise arrangements between ourselves your current franchise agreement ends tomorrow and you are not permitted, following the date of expiry to trade as Red Rooster or use any of our systems or trademarks or access any products.

In other words no matter whether your proceedings against the Landlord are successful or not the Franchise Agreement is a completely separate and distinct matter and expires on 29 November 2007 and without a new arrangement in place you cannot trade as Red Rooster thereafter.

We trust that the above arrangement is satisfactory to you and look forward to hearing from you before 9am in respect of our proposal.

Please note that this letter does not constitute an offer capable of acceptance but simply a proposal with a view to endeavouring to secure our tenure and that of your own at the site. It is of course dependent upon the landlord but as noted above the landlord has signified to us a willingness to negotiate on those terms (so we are optimistic a Head-Lease can be concluded).

We look forward to hearing from you.'

43. Later on 28 November 2007, Mr Martin on behalf of the Second Defendant, telephoned Mrs Noble on behalf of the Plaintiff and inter alia stated words to the effect that:
- (a) '(the Plaintiff) should think about accepting the deal put forward to Paul from himself' (by which he meant that the Plaintiff should agree to the Second Defendant becoming the Head Lessee on the terms

set out in the proposal referred to in paragraph 50 hereof);

- (b) 'that the Plaintiff's sales should result in a net profit of \$200,000 so every year the Plaintiff would lose only \$30,000 as a result of the increased gross rental of \$90,000';
- (c) 'that if the Plaintiff didn't agree to the lease proposal between the First Defendant and the Second Defendant (referring to the proposal set out in paragraph 50 hereof), they (the Second Defendant) was bound to take it up as they had already agreed with the First Defendant that the Second Defendant would hold the head lease'

('the first telephone conversation on 28 November 2007').

44. Later on 28 November 2007, in another telephone conversation between Mr Martin on behalf of the Second Defendant and Mrs Noble on behalf of the Plaintiff, Mr Martin inter alia in effect stated:

- (a) 'that if the Plaintiff did not agree to the deal (referring to the proposal set out in paragraph 50 hereof), the Plaintiff was left with no franchise agreement and therefore could not trade after Thursday'; and
- (b) stressed 'that taking up the proposed lease was a certainty and was where the business was'

('the second telephone conversation on 28 November 2007').

45. Later on 28 November 2007 in another telephone conversation between Mr Martin on behalf of the Second Defendant and Mrs Noble on behalf of the Plaintiff, Mr Martin, inter alia, stated words to the effect that the Plaintiff should make a counter offer on the amount of rent of not much less than \$7,000 below the \$90,000 gross ("the third telephone conversation on 28 November 2007").

46. On 29 November 2007, in a telephone conversation between Mr Martin on behalf of the Second Defendant and Mrs Noble on behalf of the Plaintiff, Mr Martin stated "that the Second Defendant was now committed to the head lease and that the rent would be \$90,000 and they would not be subsidising the Plaintiff's rent".

47. By its conduct referred to in paragraphs 36 to 45 herein, the Second Defendant acted as agent of the Plaintiff for the purpose of procuring a lease of the property from the First Defendant.

48. As a consequence, the second Defendant owed to the Plaintiff fiduciary duties:

- (a) not to place itself in a conflict between its own interests and its duty to the Plaintiff;
- (b) not to benefit from its position as agent and the opportunities arising from the negotiations on behalf of the Plaintiff.

49. By reason of the matters referred to in paragraphs 41 herein, the Second Defendant has a legally binding agreement for lease of the property from the First Defendant as lessor.
50. The said agreement was obtained by the Second Defendant in breach of its duties referred to in paragraph 48 herein.
51. In the premises the Second Defendant holds its rights as lessee pursuant to the said agreement for lease on constructive trust for the Plaintiff.
52. Further, in the premises, the Plaintiff is entitled to orders giving it the benefit of the said agreement for lease.
53. In the premises, the Plaintiff has sufficiently fulfilled the requirement of the Second Defendant for a lease of premises from which to conduct a Red Rooster Franchise.
54. In the premises, the Plaintiff is entitled to a franchise agreement pursuant to the offer made on 14 July 2006, accepted by the Plaintiff.
55. If the First Defendant is not bound by the agreement to lease referred to in paragraph 11 herein, the First Defendant is bound by the agreement for lease referred to in paragraph 41 herein, and is obliged to specifically perform the said agreement.”

[24] Mr Sullivan SC argued that the first flaw in this part of the proposed case arises out of the reference to the “signed ... memorandum or note” in paragraph 41 of the proposed pleading. That document became exhibit 1 in this application. It contains the following:

“Notwithstanding and without prejudice to our client’s position as outlined above, our client, Red Rooster Foods Pty Ltd is prepared to offer to lease the Red Rooster Kingaroy premises on the following basis: ...’

“If the above proposal is agreeable in principle then our client will send you a formal offer capable of acceptance incorporating the terms of the above proposal.”

[25] Mr Sullivan SC argued that the document discloses that it is only a “proposal” of which agreement “in principle” was sought and that, as such, it does not constitute or record a contractual agreement.

[26] In response to that, Mr Couper QC said that all that is required for the purposes of s 59 of the *Property Law Act 1974* (Qld) is that there be a “memorandum or note” and that exhibit 1 satisfies that description. That, again, is a matter which is arguable and should be determined at trial.

[27] The second aspect of Mr Sullivan’s argument with respect to this part of the claim is that the agency, if there was one, did not continue past 16 November 2007. He bases that on material in an affidavit by a Mr Robinson who was a solicitor for the plaintiff. The matters raised with respect to whether or not the partnership endured

are, again, questions of fact which would need to be determined at a trial and should not be the subject of determination at this point.

Desirable, just and convenient

- [28] On behalf of Paulmarg, it is argued that the history of this matter requires that the real question is whether Red Rooster is an “indispensable” party requiring joinder. I do not accept that that is, even with the delays which have occurred, a prerequisite to allowing Red Rooster to be joined as a second defendant. The test in r 69(1)(b)(t) is whether or not it is desirable, just and convenient to join another party in order to enable the court to adjudicate effectually and completely on all matters in dispute “connected with the proceeding”. There is no doubt that the assertions made by the plaintiff, if established, are connected with the proceeding. The concern by Paulmarg can be dealt with by ensuring that directions are put in place which require Noble to act expeditiously in the pursuit of its claim and to that end I will make directions if the parties require it.

Order

- [29] I order that Red Rooster be joined as second defendant to the plaintiff’s claim. I will hear the parties on costs.