DISTRICT COURT OF QUEENSLAND

CITATION:	*Chaskel's Emporium Pty Ltd v Capercorp Pty Ltd & Anor* [2015] QDC 115
PARTIES:	**CHASKEL'S EMPORIUM PTY LTD (ACN 101 786 930)** (plaintiff) v **CAPERCORP PTY LTD (ACN 121 441 414)** (defendant) and **WILLIAM JACK KLUSKA** (defendant-by-counterclaim)
FILE NO:	4583/13
DIVISION:	Trial (Civil)
PROCEEDING:	Claim and Counterclaim
ORIGINATING COURT:	Brisbane District Court
DELIVERED ON:	20 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24 and 25 March 2015
JUDGE:	Dorney QC DCJ
JUDGMENTS AND ORDERS:	**1. As to the claim, there is judgment for the defendant against the plaintiff.** **2. As to the counterclaim, the judgment of the Court is that the plaintiff and the defendant-by-counterclaim pay to the defendant the amount of $78,037.51, including interest to this day (to be assessed).** **3. All parties have leave to file, and serve, written submissions on interest and costs by 4pm 27 May 2015.**
CATCHWORDS:	Consumer legislation – misleading and deceptive conduct – future matter – reasonable grounds – reliance – damages and other relief
LEGISLATION CITED:	*Competition and Consumer Act* 2010, Schedule 2, the *Australian Consumer Law*, s 4, s 4(1)(b), s 18, s 236, s 237, s 237(2), s 243

Evidence Act 1977, s 95

Trade Practices Act 1974, s 4

CASES CITED: *ACCC v Top Snack Foods Pty Ltd* [1999] FCA 752

ACCC v TPG Internet Pty Ltd (2013) 250 CLR 640

Banque Commerciale SA (en Liqn) v Akhil Holdings Ltd (1990) 169 CLR 279

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304

Digi-tech (Australia) Ltd v Brand & 5 Ors [2004] NSWCA 58

Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd [2014] NSWCA 158

Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199

Galafassi v Kelly (2014) 87 NSWLR 119

General Newspapers Pty Limited & Ors v Telstra Corporation (1993) 45 FCR 164

Google Inc v ACCC (2012) 249 CLR 435

Henderson v McSharer [2015] FCA 396

Henville v Walker (2001) 206 CLR 459

IOOF Australia Trustees (NSW) Ltd v Tantipech [1998] FCA 924

Jacques v Cut Price Deli Pty Ltd [1993] FCA 199

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115

L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1) (1981) 150 CLR 225

LM Investment Management Limited (in liq) v Bruce [2014] QCA 136

Marks v SIO Aust Holdings (1998) 196 CLR 494

Musca & Ors v Astle Corporation Pty Ltd [1988] FCA 114

Netaf Pty Ltd v Bikane Pty Ltd (1990) 26 FCR 305

Nielsen v Hempston Holdings Pty Ltd & Anor (1986) 65 ALR 302

Sellars v Adelaide Petroleum NL (1992-1994) 179 CLR 332

Shevill v Builders Licensing Board (1982) 149 CLR 620

Smith v Advanced Electrics Pty Ltd [2005] 1 Qd R 65

Tenji v Henneberry & Associates Pty Ltd (2000) 98 FCR 324

The Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64

Traderight (NSW) Pty Ltd v Bank of Queensland Ltd [2015] NSWCA 94

Walcan v Superior Coffee & Cakes Pty Ltd [2002] FCA 1211

Watson v Foxman (1995) 49 NSWLR 315

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SOLICITORS: Cronin Litigation Lawyers for the Plaintiff

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Cronin Litigation Lawyers for the Defendant-by-Counterclaim

Introduction

[1] It is not disputed that the plaintiff, Chaskel's Emporium Pty Ltd ("Chaskel's Emporium"), and the defendant, Capercorp Pty Ltd, ("Capercorp"), entered into a written agreement, dated 22 February 2011 and entitled "Franchise Agreement – Pizza Capers Kingscliff" ("Franchise Agreement"). What is primarily in dispute in the claim is whether alleged oral and written representations were made by authorised representatives of Capercorp to a Chaskel's Emporium representative prior to the Franchise Agreement, concerning "projected weekly sales" and concerning what has been termed by Chaskel's Emporium as the "Financial Model" (which I accept is a sufficiently neutral term for the relevant document) and, to the extent each was made, the effect and consequences of such.

[2] The counterclaim concerns alleged debts owed by Chaskel's Emporium to Capercorp and alleged loss and damage claimed to result from Chaskel's Emporium's "repudiation" of the Franchise Agreement, with the defendant-by-counterclaim, William Jack Kluska being alleged to be liable, also, under a Deed of Guarantee and Indemnity (also dated 22 February 2011).

Background facts

[3] Before enumerating the background facts, it is necessary to deal with certain evidence which was led but now about which the plaintiff takes issue concerning its relevance.

[4] The background to the argument is that, on the first day of the trial, Capercorp sought to amend its defence and counterclaim and, while some amendments were allowed, an amendment to paragraph 12(a) was disallowed. That amendment had sought to allege that Capercorp had reasonable grounds for providing the information contained in the Financial Model on the basis of "model staff *rosters* and *conversations* between Mr Scott Geiszler and franchisees as to their trading figures" (emphasis added).

[5] Despite the disallowance of that amendment, Chaskel's Emporium, while objecting, successfully, when Mr Geiszler was giving evidence concerning what regard he had to such excluded conversations, did not object to evidence of the trading figures of franchisee stores contained in the various "battle data" documents. It should be noted that Mr Williams, Capercorp's accountancy expert, upon referring to such data, made certain assumptions about the trading figures of such franchisee stores. Again, no specific objection was taken to such a reliance. Rather, the plaintiff's own expert, Mr Green, devoted a section of his report to a review of the "battle data", including franchise stores.

[6] Nevertheless, the following matters occurred as well:

- when the objection to Mr Geiszler's evidence was taken and upheld by me, ruling that "(h)e's limited to historical trading figures (relating to corporate stores)", counsel for Capercorp conceded that he was content "for the parts that stood outside the pleading to be treated as irrelevant";
- Chaskel's Emporium contended that it chose to conduct only limited cross-examination as to the accuracy of those trading figures for such franchisee stores and that, apart from the evidence of Mr Graham, a

franchisee (who began in early 2009 and was still trading), it led no other evidence exploring the accuracy of such figures;

- Chaskel's Emporium, in its written submissions, also contended that the issue of whether it was reasonable to rely upon such data from some franchise stores was not explored at the trial and that certain other related issues involved the same reticence; and
- Chaskel's Emporium contended that it was relevant that Capercorp did not make an application for leave to further amend its defence when that evidence did come out at trial.

[7] In *Banque Commerciale SA (en Liqn) v Akhil Holdings Ltd*,[1] Mason CJ and Gaudron J stated that the rule that, in general, relief is confined to that available on the pleadings is one which secures a party's right to the basic requirement of procedural fairness and that, accordingly, circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those which the parties have deliberately chosen some different basis for the determination of the respective rights and liabilities: at 286–287. After stating that rule, they then noted that, ordinarily, the question of whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted and it may be that, in a clear case, the acquiescence by one party and the course adopted by the other will be sufficient to ground such an inference: at 287.

[8] The limited basis upon which Capercorp relies upon the evidence "of the performance of the franchise stores" is set out, primarily, in paragraph 20 of its written submissions. As can be seen from that confined submission, evidence from the master battle data documents has been used by Capercorp to support the argument that matters stated in the Financial Model were based on "reasonable grounds", and was reflective of evidence from both Mr Russo and Mr Geiszler of Capercorp that they "kept themselves aware of the franchisees' trading figures".

[9] Since Chaskel's Emporium did not object to the master battle data documents (in whole or in part), I intend to proceed to determine this case on the basis that such acquiescence grounds an inference that particulars of such trading figures can be used as supporting a basis of establishing "reasonable grounds". Quite obviously, to the extent that the figures have been challenged and undermined, either partly or completely, that will also be taken into account.

Other relevant facts

[10] The Financial Model referred to was a document emailed by Capercorp to Chaskel's Emporium on 21 January 2011 and, thus, prior to the Franchise Agreement. The exact nature of that document, and its effect, will be explored in considerable detail later.

[11] While there was initially some dispute about the timing of when Chaskel's Emporium entered into the relevant lease of premises at Kingscliff (from which it conducted the franchise business), it was finally accepted that the lease was signed on 31 January 2011, with an undated copy of that signed lease sent to the solicitors for the lessor by letter dated 7 February 2011.

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[1] (1990) 169 CLR 279.

[12] Other events on other dates which were not in contest were:

- Chaskel's Emporium, through Mr Kluska, signed the Schedule of the Landlord's Terms dated 26 August 2010 (although Mr Kluska could not recall when he signed the document);
- Mr Kluska, who was the sole controlling mind and operative body of Chaskel's Emporium, began training as a Pizza Capers' franchisee on about 11 January 2011;
- Mr Kluska arranged for the relevant electricity account for the leased premises to be transferred to Chaskel's Emporium on 19 January 2011;
- Mr Kluska caused Chaskel's Emporium to register the business name "Pizza Capers Kingscliff"; and
- Mr Kluska opened, on behalf of Chaskel's Emporium, a bank account in that business name on 20 January 2011.

[13] Finally, it is not in dispute that Chaskel's Emporium ceased trading under the business name "Pizza Capers Kingscliff" on 10 November 2013 and in mid-November 2013 removed its signs from the leased premises and ceased to carry on business as a franchisee of Capercorp. It is not in dispute that by letter dated 20 December 2013, Capercorp purported to accept Chaskel's Emporium's "repudiation" of the Franchise Agreement.

Relevant legislation

[14] In its further amended statement of claim, Chaskel's Emporium relied upon the following provisions of the *Competition and Consumer Act* 2010, Schedule 2, the *Australian Consumer Law* ("*ACL*"): s 18 (dealing with misleading or deceptive conduct); s 236 (referable to recovery of loss and damage); s 237 (dealing with compensation orders); and s 243 (dealing with, among other relief, declarations avoiding contracts).

[15] Because of the way that the pleadings have determined the issues concerning the *ACL*, s 4 of that legislation became relevant because both parties accepted that the content that the Financial Model contained representations "with respect to (a) future matter", thereby bringing into force the effect of s 4(1)(b) (namely, that if Capercorp did not have reasonable grounds for making any such representation, such representation is "taken to be" misleading; and the onus that flowed therefrom).

"Misleading or deceptive" conduct

[16] Primary reliance was placed upon *Butcher v Lachlan Elder Realty Pty Ltd*.[2] Its present relevance, as discussed by Gleeson CJ, Hayne and Heydon JJ, is with respect to two factors.

[17] The first factor is that, when monetary relief is sought by a plaintiff who alleges that a particular misrepresentation was made to an identified person, of whom the plaintiff (or its representative) was one, the plaintiff must establish a causal link between the impugned conduct and the loss that is claimed and that "depends on analysing the conduct of the defendant in relation to that plaintiff alone": at 604 [37]. That judgment went on to hold that, in such circumstances, it is necessary to consider the character of the particular conduct of the particular representor in

[2] (2004) 218 CLR 592.

relation to a particular representee, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may have taken to have known, because it is crucial to examine the role of the person who engaged in the conduct of supplying the information: at 604–605 [37]. It was later added that it is important that the conduct being impugned "be viewed as a whole", which included disclaimers and other qualifying circumstances: at 605 [39].

[18] The second factor is the principle that the corporation could contravene a provision such as s 18 of the *ACL* "even though it acted honestly and reasonably": see *Butcher* at 605 [38]; and *Google Inc v ACCC*[3] at 443 [9].

[19] In the later case of *Campbell v Backoffice Investments Pty Ltd*,[4] Gummow, Hayne, Heydon and Kiefel JJ, adopting what McHugh J pointed out in *Butcher* with respect to the equivalent of s 18 of the *ACL* in determining whether a contravention has occurred, stated that "the task of the court is to examine the relevant course of conduct as a whole" with the contravention to be "determined by reference to the alleged conduct in light of the relevant surrounding facts and circumstances" and to be "an objective question that the court must determine for itself": at 341–342 [102]. In particular, McHugh J had emphasised that, where the alleged contravention related primarily to a document, the effects of the document must be examined in the context of the evidence as a whole, with the Court not being confined to examining the document in isolation, but having regard to all of the conduct of the corporation in relation to the document "including the preparation and distribution of the document and any statement, action, silence or inaction in connection with it": at 342 [102].

[20] Two further important matters are: that the impugned conduct must have "a tendency to lead into error"; and that the particular facts need to be considered in the light of the "ordinary incidents and character of commercial behaviour": see, respectively, *ACCC v TPG Internet Pty Ltd*[5] at 651 [39]; and *General Newspapers Pty Limited & Ors v Telstra Corporation*[6] at 177–178.

[21] Since some of the representations forming part of the alleged impugned conduct have concerned oral statements, it is necessary to bear in mind the warning given in *Watson v Foxman*[7] concerning "impressionistic evaluation" and "subconscious reconstruction": at 318–319.

[22] To the extent that it is still an issue here – as it was in *Jacques v Cut Price Deli Pty Ltd*[8] – whether any representation was, in fact, made "in trade or commerce", noting that in that case it was held that it was (where it involved representations made in the course of a sale of a franchise for a delicatessen), there is little doubt about that element being met here. No party has made any contention to the contrary.

"With respect to any future matter"

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[3] (2012) 249 CLR 435.
[4] (2009) 238 CLR 304.
[5] (2013) 250 CLR 640.
[6] (1993) 45 FCR 164.
[7] (1995) 49 NSWLR 315.
[8] [1993] FCA 199.

[23] Both parties have conducted the trial of this proceeding on the basis that the representations in question, particularly those arising from the Financial Model, fall within s 4 of the *ACL*. As *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd*[9] has recently reiterated, attention is directed to whether the representor can show, among other things, facts (existing at the relevant time) which are objectively reasonable and which support the representations made: at [189].

[24] Thus, particularly when considering the recent decision in the New South Wales Court of Appeal of *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd*,[10] note should be taken of the conclusion there that there were certain "target statements" which were held *not* to be representations "with respect to a future matter".

[25] The major decision in *Traderight* was given by Barrett JA, with whom Bathurst CJ and Beasley P agreed. Barrett JA held that the primary judge's characterisation, which he held to be correct, was that the representation in question "could not have been anything more than a statement of hypothetical possibility, as distinct from a statement of what a particular (franchisee) was likely to achieve": at [147]–[148]. Dealing, though, with the issue in general terms, he held that a statement of opinion, including a prediction (such as a forward "estimate" in relation to the financial performance of a business), may be a statement with respect to a future matter as contemplated by the analogue to s 4 as contained in *Trade Practices Act* 1974 (Cth); and that such a statement may well carry with it an implied representation that the person making it holds the opinion: at [149].

[26] More directly on point is the earlier decision in the New South Wales Court of Appeal of *Digi-tech (Australia) Ltd v Brand & 5 Ors*.[11] The decision there was of the whole Court (being Sheller, Ipp and McColl JJA). After noting that the representor recognised that it bore the onus of proving that it had a reasonable basis for the statements (at [73]), it was held that, while the wording of the provision is not complex and that it is not difficult to understand, it was undesirable to apply "past judicial pronouncements as to factors relevant in other cases as some sort of code of conditions that has to be satisfied for the section to apply in every case": at [107]. As the Court went on to observe, the ordinary meaning of the language used "is plain enough to provide a key to whether it applies in a particular case". But the main feature which is useful for present purposes in *Digi-tech* is the examination of what weight should be given to the meaning of the word "potential" as it was used in what was described there as a "Profit Potential Representation". After referring to the meanings in the Oxford English Dictionary definitions of both its use as an adjective and a noun, the Court held that, as is apparent from the Dictionary, "potential" can be used in the sense of "resources that can be used or developed" and that, in that sense, "potential" may well relate to future matters: at [110]. The Court held, further, that when "potential" is used in the sense of "that which is possible, opposed to what is actual; a possibility", a strong inference will arise that it relates to future matters (namely, the future materialisation of what is presently thought to be possible): at [111]. Barrett JA then referred to an example of "such usage" by Gibbs CJ in *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)*[12] at 233, which was that a prospective tenant of a site for a filling station may reasonably rely upon a statement made by an employee of an oil company, the

[9] [2014] NSWCA 158.
[10] [2015] NSWCA 94.
[11] [2004] NSWCA 58.
[12] (1981) 150 CLR 225.

owner of the site, as to the potential throughput of the filling station and that the oil company had a duty to use reasonable care to see that the information is correct: at [112]. The Court then stated that the "estimate" as to future "throughput" (being the annual consumption of petrol) was correctly referred to as a "forecast"; and that Gibbs CJ in using the word "potential" was using it in that sense: also at [112].

[27] Later, the Court held in *Digi-tech* that, by stating that there was a "potential" for high revenue and profit, the representor was using "potential" in the sense of "that which is possible, opposed to what is actual; a possibility". It thereby expressed its belief and opinion, implicitly in the form of a forecast or "estimate", as to the high revenue and profit (to the degree set out in the particulars) that could well be made in the future, with that view being based on the ordinary meaning of the words used in the particular context: at [113]. It was in those circumstances that it was held that the Profit Potential Representation was a representation with respect to a future matter.

"Reliance"

[28] One important consideration undertaken in *Traderight* was on the issue of reliance. Barrett JA, relying on an extract from *Butcher,* held that only if monetary relief (or some other order) is sought by a plaintiff who alleges that a particular misrepresentation was made to him or her or it does that plaintiff need to establish a causal link between the impugned conduct and the loss that is claimed, which need arises from the word "by" in the phrase "by conduct": at [161]. It should be noted that s 236 now uses the words "because of the conduct". But it has not been submitted that any different approach to causation and reliance, particularly from that set out in *Henville v Walker*,[13] could be applicable. Barrett JA then held that, in short, a finding that a representee, in a one-on-one representation case, has not relied on the representation is immaterial to the question whether the making of the representation constitutes conduct within what s 18 of the *ACL* covers.

[29] As earlier summarised by the Court in *Digi-tech* with respect to the claim for damages, persons who claim such damages on the ground that they entered into a transaction induced by the misrepresentation of other persons "must prove that they relied upon such misrepresentations" and, therefore, by that conduct they suffered loss or damage because, if it were otherwise, representees could succeed even though they knew the truth, or were indifferent to the subject matter of the representation: at [159].

Disclaimers

[30] *Campbell* has, recently, instructed that neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before the contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained, it being important to point out that whether the conduct is misleading or deceptive is a question of fact to be decided by a reference to all of the relevant circumstances, in which the terms of the contract "are but one": at 348 [130].

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[13] (2001) 206 CLR 459.

[31] In the Queensland Court of Appeal, in the decision of *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd*,[14] Keane JA, in summarising the applicable legal principles, held that it is well established (relying on cited authority) that "exclusionary and disclaimer clauses cannot override the statutory prohibition against misleading and deceptive conduct or prevent the grant of appropriate statutory relief when loss or damage is, as a matter of fact, caused by a contravention of the statute": at [82]. He further stated that it has been recognised, nevertheless, that disclaimers can be effective "if the clause actually has the effect of erasing whatever is misleading in the conduct" (citation included): at [83]. As he went on to note, in other words, if the effect of a disclaimer is to make clear something that, if allowed to remain vague or ambiguous, could have led the person into error, then disclaimers can have that effect: also at [83]. In determining what might be effective, Keane JA held that if a disclaimer is to function in such a way "it must be worded unambiguously, feature prominently and it must be communicated to the reader that the disclaimer is relevant to the information it is seeking to qualify": also at [83].

[32] In *Walcan v Superior Coffee & Cakes Pty Ltd*,[15] Kiefel J (then of the Federal Court of Australia) held, after reference to *IOOF Australia Trustees (NSW) Ltd v Tantipech*,[16] that the fact that an applicant initially says that it was not induced by particular representations may bear upon the question whether that applicant should be believed when a later assertion is made that the applicant was: at [72].

Repudiation

[33] It is not in contest that Chaskel's Emporium ceased trading in mid-November 2013 (as stated above). It is alleged by Capercorp that such was a "repudiation" of the Franchise Agreement, since Chaskel's Emporium "evinced an intention no longer to be bound" by it.

[34] The relevant principles have been recently discussed by the New South Wales Court of Appeal in *Galafassi v Kelly*.[17] Gleeson JA, with whom Bathurst CJ (on this aspect) and Wood JA (generally) agreed, outlined the following principles:

- for the conduct of a party to constitute a renunciation of its contractual obligations, it must be shown that the party is either unwilling or unable to perform its contractual obligations (that is, it has evinced an intention to no longer be bound by the contract or has stated that it intends to fulfil the contract only in a manner substantially inconsistent with its obligations and in no other way): relying upon, among other cases, *Shevill v Builders Licensing Board*[18] at 625–626; and *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*[19] at 135 [44];
- where an inability to perform is declared, the conduct amounts to a refusal to perform and the innocent party need not prove that the other party was actually unable to perform as a matter of fact;

[14] [2005] QCA 199.
[15] [2002] FCA 1211.
[16] [1998] FCA 924.
[17] (2014) 87 NSWLR 119.
[18] (1982) 149 CLR 620.
[19] (2007) 233 CLR 115.

- a renunciation can be made either by words or conduct, provided that it is clearly made, with the test being whether the conduct of one party is such as to convey to a reasonable person, in a situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it;
- insofar as factual inability to perform is concerned, what needs to be shown is that the party in question has become wholly and finally disabled from performing the essential terms of the contract altogether; and
- it is well accepted that factual inability must be proved "in fact and not in supposition";

: at 133 [61]–[64].

[35] Given that analysis, particularly paying heed to the proper use of terminology as explained in *Koompahtoo*, the correct description of that which Capercorp relies upon is renunciation.

[36] Given the acceptance of what occurred by Chaskel's Emporium's actions – and apart from the relief that it has sought pursuant to s 243 of the *ACL* – at the very latest, the Franchise Agreement was terminated by its accepted "repudiation" in late December 2013.

Damages and avoidance

[37] Considering, first, the claim made by Chaskel's Emporium, it is, in the particular circumstances, appropriate to follow the general principles outlined in *Netaf Pty Ltd v Bikane Pty Ltd*.[20] There, it was held that, where a person (in that instance, a purchaser) has been induced by misleading conduct, it is not enough in order to recover losses subsequent to the induced consequence to prove that but for the misleading conduct, or as a partial consequence of it, the agreement would not have been made, because that is so, inevitably, in any successful application of that kind; and, furthermore, it is not the law that in every such case the party held to have been engaged in misleading conduct (who may have acted quite innocently) becomes the insurer of the other's success and prima facie liable to indemnify against the consequences of the purchase: at 308. As the judgment went on to note, accepting what the first instance judge had stated, to recover a loss sustained in a business, more must be shown than that it was sustained in the conduct of the business, because to show only that is to establish what is perfectly consistent with the loss having risen from misguided management decisions or even total neglect: also at 308. As summarised there, it must be able to be held, on the whole of the evidence, that subsequent losses were "inherent in the misrepresented business": also at 308.

[38] What is also important to bear in mind is that the fact that, even though there may have been an opportunity to take action that might have averted further losses, that does not necessarily mean that it is unreasonable to have failed to do so, since the critical question is whether it was unreasonable to continue to allow the company to trade: see the discussion by Pincus J in *Nielsen v Hempston Holdings Pty Ltd & Anor*[21] at 312-313.

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[20] (1990) 26 FCR 305.
[21] (1986) 65 ALR 302.

[39] With respect to the counterclaim, the amounts sought by the counterclaimants are for both royalties and marketing and promotion levies allegedly payable pursuant to the Franchise Agreement, including over the remaining 114 weeks of the 5 year term.

[40] The recovery of such sums, depends, of course, on the weekly amounts which might be so payable (which is a factual matter) and depends upon whether Chaskel's Emporium is given the relief it seeks in terms of having the Franchise Agreement avoided. Any such avoidance is entirely at the discretion of the Court: see *Marks v SIO Aust Holdings*[22] at 532-533 [109]. In considering such relief, Gilmore J in *Henderson v McSharer*[23] referred to a number of decisions: at [882]–[884]. The first was *Tenji v Henneberry & Associates Pty Ltd*[24] and the second was *Musca & Ors v Astle Corporation Pty Ltd*.[25] The first stressed that an order for the avoidance of a contract under an analogue provision of the *ACL* is to be equated only in a limited sense to that of an order for recission in equity, because the orders under statute "have their effect entirely by operation of the statute", with the second element of importance being that it is the compensatory principle that informs the exercise of such power, including the prevention or reduction of the loss or damage: see s 237(2) of the *ACL*. Additionally, it was held that the question whether there had been a disaffirmation of the contract by the party suffering loss will generally be relevant. And, as French J said there, while avoidance "must serve a compensatory purpose", it "may serve other purposes in doing justice between the parties": at 333-334 [20]. He also held that there "are cases in which a party who enters a contract as a result of misleading or deceptive conduct may be compensated in a pecuniary sense by an award of monetary damages but is left nonetheless with a continuing burden of unforeseen risk, a transaction soured by events that surrounded it, and a property, once a suppository of hope for the future, that is now an albatross around its neck": also at 333-334 [20]. Unlike the general law, the statutory remedy is directed to the victim of the perpetrated conduct.

[41] In the second case, French J held that, in circumstances of that case, the applicants "would not have entered the … agreement" and that since there was no hypothesis suggested or which presented itself "whereby they might have entered into (the agreement) upon terms other than those in fact agreed", no question "therefore arises as to the appropriateness of (any other) order … (than) an order declaring it to have been void *ab initio*": at 24-25.

Representations alleged

[42] Chaskel's Emporium contended that there were 4 discreet representations. As set out in its written submissions, they were:

- an oral representation to the effect that a Pizza Capers store in Kingscliff was likely to achieve weekly net sales of $10,000.00 per week ("first representation");
- the terms of the written Financial Model ("second representation");
- oral representations concerning the Financial Model ("third representation"); and

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[22] (1998) 196 CLR 494.
[23] [2015] FCA 396.
[24] (2000) 98 FCR 324.
[25] [1988] FCA 114.

- written information contained in the "disclosure document" concerning the basis for the information contained in Financial Model ("fourth representation").

[43] Mr Kluska gave evidence that the first representation occurred in the course of him driving Mr Russo and Mr Davies, of Capercorp, around the Kingscliff area. The representation was that Mr Russo said words to the effect that he believed a store of that kind in Kingscliff would get around $10,000.00 per week in sales.

[44] Before turning to Mr Russo's evidence, Mr Davies, who at the relevant time was a franchise development manager for Capercorp and whose job involved interviewing franchisees and looking for sites for franchisees, stated that he could not recall anything that was said on that occasion. All that he did concede was that it was "possible" that Mr Russo (who was, at the relevant time, the governing mind of Capercorp and had adopted a role of "franchising site selection" and was "in charge" of "the overall business") told Mr Kluska the figures for the average weekly sales of the lowest performing corporate store, the average weekly sales of the highest performing corporate store and the average weekly sales of the stores in the group. Having listened to the whole of his evidence, I concluded that he did not assist either the plaintiff or the defendant in the resolution of what Mr Russo was said to have said.

[45] As for Mr Russo, while he did not recall everything that was said in the course of that conversation, he conceded that it was his practice to say that which Mr Davies had said that he "possibly" said about those average weekly sales.

[46] Although Mr Russo accepted in cross-examination that he would have known the average weekly sales of the stores in the group were, at the relevant time, approximately $12,500.00 per week, it was never the case advanced by Chaskel's Emporium in its pleading that that was a particular representation alleged, particularly in the absence of any pleaded reliance then on it. Further, as to evidence that certain entries in Exhibit 11 nominated a "target" of $10,000.00 for some stores, I find that the identification of the same sum is simply coincidence in this case.

[47] As for accepting Mr Kluska's evidence as to the $10,000.00, I find that it has the hallmarks of a reconstructed recollection. The basis for that conclusion involves:

- that Mr Kluska in a written Deed of Prior Representations dated 22 February 2011 acknowledged that there was no representation of that kind which had been made to him;
- that Mr Russo gave evidence (which I accept) that he would have not allowed Capercorp to enter into the Franchise Agreement if Mr Kluska had written in that Deed that he was relying upon such an oral representation by him, a proposition with which Mr Gieszler (Capercorp's manager in charge of operational matters, menu planning and marketing) agreed; and
- that Mr Kluska failed to make any reference to such an alleged representation when he might reasonably have been expected to do so (such important occasions including: when he was executing the relevant Deed, with respect to which he could not explain why he did not include such an oral representation then; when he was complaining about his own actual level of weekly sales, with respect to which he

> did not mention such a figure; when he completed a Notice of Dispute under the Franchising Code of Conduct, with respect to which he eventually stated that he was told merely to "list relevant points as you see fit", adding, in re-examination, an explanation which did not assist as an explanation for omission; and up until when the statement of claim was amended, being just prior to trial, to make this particular oral representation).

[48] I reach this conclusion comfortably because I accept Mr Russo's evidence that it was not his practice to give such an estimate and, as well, that he did not have enough information to make an estimate about what a Pizza Capers in Kingscliff might turn over, being adamant that such a course was definitely something that was never mentioned in front of franchisees.

[49] Consequently I do not accept that the first representation was made. It is unnecessary for me, therefore, to make a finding on estoppel (as outlined in the defendant's written submissions and contended to follow from the Deed of Prior Representations).

[50] Before I turn to the Financial Model and the representations concerning it, there was the fourth representation which was referable to the information contained in the Disclosure Document (which became an exhibit). That document was stated to have a "preparation date" of 28 January 2011. The clauses relied upon by Chaskel's Emporium were clauses 19.1, 19.3, 19.5(a) and 19.5(b).

[51] With the greatest respect to the argument, even though Mr Kluska gave evidence that he relied upon that document, it is difficult, if not impossible, to see that it is not simply something that was a relevant aspect of determining the content of the Financial Model and what weight might be given to the figures contained in it. It does not imply that there was some direct transcription of figures or that such figures were not adjusted for franchisee application. Rather, the "forecast" is only "based on" such figures. It is part of the overall conduct to be considered and is, thereby, intrinsically linked with a determination of the effect of the Financial Model. In any event, it merely reinforced the representation by Capercorp that it was "based on historical data obtained by" Capercorp.

[52] Consequently, one can then finally turn to the Financial Model and what was alleged to be the third representation (namely, that there were oral statements made by Mr Davies to Mr Kluska that the information contained in the Financial Model was both based on the performance of the corporate stores and was "up to date").

[53] Mr Davies, while admitting the former, described the latter, first, as a "possibility" only (but he "did not know"), explicitly stating that he did not, and could not, recall it. His later statement that he said that he believed or understood the information to be up to date was, then, stated to be explicable by his confusion between "historical" as being based on previous figures and "up to date" as being checked. Further, this alleged representation did not appear in the 2011 Deed or in the original pleadings.

[54] Again, what Mr Davies did admit simply goes to the nature of the conduct concerning the representations contained in the Financial Model (apart from any effect it might have on the resolution of the issue of "reasonable grounds").

[55] All surviving representations, then, lead back to the second representation (i.e. the Financial Model).

[56] Before considering the content of the Financial Model, it is necessary to discern what it was represented as doing. The email from Mr Davies to Mr Kluska of 21 January 2011 stated that the "Subject" was "PC potential weekly sales". The two page document itself was entitled "Potential Weekly Results". The pdf attachment (containing the Financial Model) was entitled "Business Overview Financial Hypothetical figures 2010_10.pdf".

[57] In terms of how Mr Kluska, on behalf of Chaskel's Emporium, understood the document, his email to Mr Davies of 2 May 2012 stated that he was "just going thru hypo figures", later asking whether a roster could be provided that could equate to the wages shown "as per the hypothetical budget".

[58] While it is a matter of objective determination that is important at this stage of discerning the meaning of the representation, because it is to be done in a commercial context and because Mr Kluska was an experienced businessman (on his own evidence) – although not experienced in any franchise of this nature – it is important to understand that the way in which Mr Kluska as such a business orientated representee appreciated what was the context of the Financial Model.

[59] Furthermore, before examining the document itself in detail, it is not in dispute that Mr Davies had told Mr Kluska that the document "was based on the performance of the corporate stores" and that "the only things available to (Capercorp) were those relating to those stores owned and operated by Caper Enterprises Pty Ltd … (and that the figures) were historical in nature". Accepting, as I do, that Mr Davies was both a credible and a reliable witness, I accept that he also said that, at the time that he sent the document to Mr Kluska, he "would have said that they should not be relied upon, but they're just an indication as to what you can expect", adding that such was his practice when dealing with prospective franchisees. That is not inconsistent with the meaning that I have derived from the document itself, as a whole.

[60] Besides the facts that I have already mentioned concerning the document itself and Mr Kluska's "business" appreciation of it, it also contained a note at the foot of the first page (which Mr Kluska admitted that he read) which stated that "(all) figures quoted are examples only – as always you should seek your own independent, professional financial, accounting and legal advice before making any decisions". Additionally, such footnotes stated that "(e)ach franchisee will have their own circumstances affecting these costs. You will need to make an assessment of your specific situation and add costs pertinent to your own situation in this section". Those footnotes also stated that "All labour figures are based on a franchisee working full-time hours (45 plus) within the store. If you intend to run your store under full or partial management higher labour costs, superannuation, sick leave, annual leave and Work cover costs will be accrued".

[61] And, lastly, the footnotes also stated that "(o)utgoings could possibly be increased".

[62] Turning to the tables in the document itself, what was in bold type is "**Sales (net)**". That was contained in the third row of the two page table. For net sales of, for example, $5,000.00 and $10,000.00, the row entitled "Total Franchisee earnings" had the respective figures of $1,886.30 and $2,410.70. The total of "Staff Wages"

and "Manager/franchisee Wages" was 25%. The total for "Electricity" and "Gas" was 2.46%, each being 1.23%. The total for "Annual leave", "Superannuation", "Sick Leave" and "Work Cover" was 1.42%. Lastly, at least for the moment, "C.O.G.S." (meaning the "cost of goods sold"), was 30%.

[63] Considering the apparent ease with which Mr Kluska read the footnotes, it is easy to decide that they were prominent enough to be easily seen and read – being in no smaller typeface than other words contained in the Financial Model – and for an objective reader to comprehend as being an integral part of the Financial Model.

[64] As discussed above, it is also accepted that there were contemporaneous oral representations about the Financial Model being based on "historical data" for "corporate stores".

[65] What needs to be decided is what the whole of the conduct means in terms of the objective nature of the accepted representations.

[66] Of major significance is the title to the Financial Model. It is indisputable that it refers both to "potential" and "results". I find that, objectively, "results" refers to the "Est. SURPLUS" that "results" from the application of all other calculations, despite Mr Kluska's own (subjective) evidence which confined the results to either "gross" or "net" sales. It must be material that all adjustments, up and down, after the surplus, suggested that the representee make some overall calculation for the "Your Total" figure. Some significant emphasis was placed by Capercorp on the pdf attachment title containing the word "hypothetical" and the subsequent use of that word by Mr Kluska nearly two and a quarter years later. But, objectively, one would have looked at the two page document noting both its title and the "disclaimers", and the denotations used for income and expenditure, in the context that they were derived from actual historical figures. In the words of Mr Russo – which I accept to be objectively realistic in a commercial context – the purpose of the Financial Model was for a potential franchisee who "had to start working on doing business plans to present to banks … and (t)his was going to give them an idea of how to do projections and what things are potentially going to cost them … (a)nd potential costs".

[67] Turning, then to "potential" as used there and guided by *Digi-tech* (at least as to the discussing of its dictionary meanings in a not dissimilar set of commercial circumstances), I conclude that there is a strong inference that it does relate to future matters, being the future materialisation of what is presently thought to be possible in that sense, at least, of an estimate based upon what had occurred in the past, whilst understanding the limitations on such an estimate generally and as contained in the various footnote disclaimers.

[68] Quite obviously, in a commercial context, such an estimate would also have to be based on an understanding that the business was to be conducted with reasonable business efficiency, a conclusion which Mr Green, as an expert forensic accountant, accepted. Equally, there was no representation (in what I have found) as to what a particular business established by a particular person in a particular locality could or would achieve, much less how much effort was necessary, or what business acumen was to be used in the business.

[69] With respect to use of percentages such as 30% for the cost of goods sold and 15% and 10% for staff and management wages, it is a necessary concomitant of such

"estimating", particularly in the context of the words contained in the footnotes, that the percentages could not be taken, objectively, to be precise as to the figures used.

Expert evidence

[70] Both Chaskel's Emporium and Capercorp called expert forensic accounting evidence. Intriguingly, there is little reference to such experts in the written submissions of both parties, although some reference was made to such evidence in oral submissions.

[71] The reason that it is somewhat intriguing is because, in the instructions given to each expert, the report sought was requested to be directed to an assessment of whether the figures contained in the Financial Model, having regard to the costs of similar businesses at the material time, were "projections" that were "generally maintainable or typical of what (was) potentially achievable by franchisees".

[72] Therefore, on the face of the experts' instructions, there would appear to be a relevance as to whether the Financial Model, at least insofar as it alone was concerned, was made on "reasonable grounds".

[73] No particular criticism was made of the qualifications or experience of either expert and no particular challenge was made to the relevance of the opinions sought in the reports.

[74] Mr David Williams, a director of SVV Partners Forensics, in his report dated 15 December 2014 concluded that:

- the Financial Model demonstrated, within reasonable limits, potentially achievable trading results based on "nomina(ted)" gross sales figures;
- the Financial Model was a ready reference tool demonstrating possible costs to sales ratios, based upon "nomina(ted)" gross sales; and
- the Financial Model was "not" a projection of weekly sales "growth" that could have been achieved by a potential franchisee such as Chaskel's Emporium.

[75] The report of Mr Paul Green, of Vincents Chartered Accountants, dated 3 March 2015, concluded that:

- the actual data "based on corporate stores owned by (Capercorp) and franchise stores" provided higher percentage costs for both labour and COGS than those provided under the Financial Model;
- as for the assessment of likely expenses of a business derived from the battle data:
    - based on an analysis of the actual data in relation to corporate stores and franchise stores, the Financial Model provided the highest return of profits;
    - the reduction in the labour and COGS percentages as set out in the Financial Model "is" significant to the prospective investor "as the net profit returns for the business are highly sensitive to modest changes" to labour, COGS and other direct costs;
    - at the "highest" level of actual average weekly sales actually achieved by Chaskel's Emporium (i.e. approximately $8,000.00 per week) the net profit "would be" $332.70 per week, which when compared to the Financial Model, yields of a "material reduction" in such net profit of $588.80 per week;

- on the assumption that projected net profit was 10% of sales revenue, a cumulative increase in labour, COGS and, or alternatively, other variable expenses of 3% "results" in a reduction of 30% in net profits and a "significant" loss of business value in an open market; and
- in the event that the business underlying an investment provides no more return than a minimum wage to the franchisor who expends capital to invest, "an alternative investment which provides more acceptable returns ought to be preferred".

[76] Quite obviously, Mr Green, in his latter expression of opinions, has gone beyond any analysis of "reasonable grounds". As for the second last opinion expressed, Mr Williams took the view, in cross-examination, that what was being engaged in by Mr Green was simply an arithmetic exercise. There is nothing in my analysis of it, as illuminated for me in oral submissions, that, to my mind, takes it beyond that.

[77] I conclude that, apart from those experts identifying features which have become part of the eventual written submissions, as arguments, there is little that either expert presented to me from which I would take any conclusions as influential in the eventual decision I make. It seems to me that the best approach is to take the "battle data" figures and subject them to the analysis that both parties with assistance from the experts have undertaken.

Reasonable basis?

[78] With respect to the information contained in the Financial Model, both of Capercorp's major corporate figures in administration of it, Mr Russo and Mr Geiszler, had significant experience in the management of these and other pizza stores which, having been largely corporate, were then being offered to franchisees. They had systems of reporting and systems of monitoring. The documents tendered in evidence show that the financial information from both corporate and franchisee stores were converted into percentages of net sales figures. Additionally, Capercorp, through its systems, used such information for their own purposes of supervision.

[79] The totality of the evidence shows that the information in the Financial Model was very significantly based on the corporate stores' financial information. Necessarily, since what was being proffered were estimates for potential *franchisees*, it was necessary to make adjustments (for instance, to the labour percentage) because, according to the evidence of Mr Geiszler, lower management costs would be applicable to a franchisee because of the absence of area managers and accounts staff (employed full time) and head office staff (employed full time), which would include superannuation, annual leave, sick leave and WorkCover premiums. While Chaskel's Emporium contended that it was impermissible to look at such evidence, it was not objected to and, anyway, it would be unreasonable not to do so when there were such obvious differences in the way of conducting corporate and franchisee stores. Although it is understandable that Capercorp did not, as a fact, rely on the figures that they did have for franchisees, in this part of the analysis it is appropriate to have regard to what effect they do have on the consideration of whether the basis of the representations was truly reasonable.

[80] Having listed those general matters, it is then necessary to consider what information was available to be used as the subject of the extrapolations that appear as the figures in the Financial Model.

[81] The evidence of Mr Davies was the stores that were identified on particular specified pages of the "battle data" spreadsheet to his affidavit filed 24 March 2015 were corporate stores. The spreadsheet itself was for the period of 10 months from July 2009 to April 2010. The only other "battle data" information was that for the short period from 3 October 2010 to 24 October 2010 (detailed in the expert report of Mr Green).

[82] With respect to the absence of other "battle data", an affidavit of Mr Jones, filed 12 September 2014, who was then the Managing Director of Capercorp, deposed to the fact that, in early 2012, shares in Capercorp and assets relating to the Pizza Capers franchise system were acquired by corporations within the Retail Food Group of companies and that the former directors were no longer officeholders or employees of Capercorp. The affidavit deposed to enquiries made concerning disclosable relevant business records of Capercorp. He was not able to locate any "battle data" for the weeks ending during the period 1 July 2009 to 31 December 2010 (other than that "battle data" which has been the subject of evidence). Further affidavits filed on 5 February 2015 and 2 March 2015, respectively, deposed to further searches of books and records which revealed nothing further for, in particular, that period from 1 July 2009 to 21 January 2011.

[83] The evidence led by Capercorp about the production of the Financial Model came, in large part, from Mr Davies. He was responsible for maintaining the electronic master battle data documents over the relevant period. His evidence was that he did not himself prepare the adjustment concerning the stated percentage for labour for franchisee purposes from the data relating to corporate stores; and could not say who did prepare the same. Although Mr Russo's evidence was to the effect that anyone could have changed any figures in the spreadsheet constituting the master battle data, there is no basis in the evidence for any reason to infer that the data was prepared in a way that suggested material inaccuracy, much less that there was falsity in those figures. As for the evidence led by Chaskel's Emporium, through Mr Elliott, concerning evidence about a conversation that he had with Mr Geiszler about Mr Elliot working on a "projected financial review" and having a conversation about the figures in it to the effect that the model was not reflective of "corporate stores", it should be noted that Mr Elliot only worked for Capercorp until early 2007. Furthermore, his evidence was to the effect that Capercorp only started offering franchise stores in late 2006. As well, in cross-examination, he conceded that in the figures submitted by corporate stores in their weekly control sheets there was included a component for head office costs in the labour amount and percentage, being "an estimation" of head office costs. This was a "flat figure" because there "was no set flat rate for each manager".

[84] Capercorp submitted that Mr Elliot's evidence could not be relied upon because of the rule in *Browne v Dunn*, referring, in particular, to a discussion of the issue by Fryberg J in *Smith v Advanced Electrics Pty Ltd*;[26] at 81-82 [46]-[49]. But in this case Mr Elliot gave evidence in the plaintiff's case and Mr Geiszler – to whom Mr Elliot's evidence was not put in cross-examination – was called by the defendant which by then knew the detail of such evidence. As observed by Fraser JA in *LM Investment Management Limited (in liq) v Bruce*,[27] the rule is a rule of practice designed to secure fairness to witnesses: at [40]. He also referred, in particular, to

[26] [2005] 1 Qd R 65.
[27] [2014] QCA 136.

Lord Herschel LC's observation in *Browne v Dunn* that the rule applied "upon a point which it is not otherwise perfectly clear that [the witness] has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling… (but) there are cases in which that notice has been so distinctly and unmistakeably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it": (with relevant citation) at [41]. He later added that, if the rule in *Browne v Dunn* is breached, the party affected by the breach "ordinarily should take that point at the hearing" (with reference to authority): at [56].

[85] Given all the factors that I have mentioned, I do not intend to ignore the evidence given by Mr Elliot. But because the propositions were not put to him, particularly in circumstances where there is no clear relationship between the documents which became Exhibits 8 and 9 and the actual Financial Model in this case – other than similarity – and particularly given the significant lapse of time between the two sets of documents, I intend to give Mr Elliot's evidence little weight.

[86] As to any reference to the figures being "up to date" by Mr Davies in his conversation with Mr Kluska (in the sense explained by Mr Davies of his belief that they had "been checked"), I will look at the relationship between the figures in the Financial Model and those provided in evidence for the period from mid-2009 to mid-2010, informed by the additional information for the short period in October 2010 – noting that no fault appears to be able to be attributed to any particular party, and particularly not Capercorp, for the non-production of any additional contemporaneous documentation – and engage in a comparative analysis. I accept the general accuracy of the master battle data and I accept, in particular, the accuracy of what is contained generally in the data for periods that I have just mentioned. In light of what has been able to be disclosed, I find that there is an acceptable basis upon which to make the judgment about reasonableness, or not, for the figures contained in the Financial Model.

[87] I accept that the documents for the period from July 2009 to mid-May 2010 show:

- average weekly sales per "corporate" store of $4,266.17;
- average weekly cost of labour per "corporate" store of $1,308.72;
- average weekly percentage for labour per "corporate" store of 30.91%; and
- weekly COGS per "corporate" store of 31.16%.

[88] I also accept that other documentary based figures record similar percentages for labour and COGS for all corporate stores, it being significant that the plaintiff's own written submissions state that other labour figures are consistent with the 2009-2010 figures.

[89] Additionally, concerning corporate stores only, I accept that Capercorp had set a target of 28% for labour, that Mr Russo gave evidence that the labour target for such stores was between 28% and 30%, that Mr Geiszler had submitted to Fair Work Australia that the corporate stores' target was 28% for labour, and that Mr Russo stated that, in working out the labour component for the Financial Model, he had no reference to any other documentation. The difficulty with simply transposing those particular figures for labour into an analysis of the Financial Model is that it is clear that such labour figures were adjusted for the Financial Model *because* the Financial Model was for franchisee stores and not corporate stores. This confusion was

exacerbated by questions posed to Mr Kluska in his evidence-in-chief concerning Mr Green's rejigging of the "Financial Model" to reflect "corporate" stores' figures: at page 131 of Mr Green's report. Despite both Mr Green and Mr Williams including in their respective reports materially different figures derived from "franchisee" stores (at page 21 and page 10, respectively), the plaintiff's focus remained steadfastly on the "corporate" stores' figures despite the requirement for adjustment.

[90] Further, and understandably (from a pre-adjustment viewpoint), from an examination of particular corporate stores in the 2009-2010 period, some achieved a wages percentage as low as 24.97%. Similarly, some corporate stores achieved a COGS percentage as low as 28.40%. In the three week period to 24 October 2010, a corporate store was able to achieve a wages percentage of 25.58%, even though this was in that period where the award wage increase applied. Even the 2005 figures showed certain corporate stores achieving wages percentages of less than 25%.

[91] There was no evidence which did gainsay Mr Gieszler's statement in his email to Mr Kluska of 7 September 2012 that corporate stores were subject to "many labour costs" which an owner/operator franchisee was not. Dealing with the evidence of one franchisee, Mr Graham, and what he did, I find that such an isolated example is not determinative of potential error or gives rise to significant doubt, because there is no evidence that the managers of other corporate stores, or even franchisees themselves, adopted a similar practice of including only "raw" labour figures in their control sheets. But it is significant that Exhibit 10 (which he produced, as the late 2008 version of the Financial Model) is substantially the same as the one Mr Kluska received.

[92] On the issue of the evidence of the performance of franchisee stores – which I dealt with earlier – I intend to rely upon them only as an indication of whether it was reasonable or not, objectively, for Capercorp to rely upon adjusted corporate stores figures (particularly for labour) in the way that it did. For that purpose only, it is noted that the 2009-2010 "battle data" figures show that many stores achieved a wages percentage well below 25% for those where calculations are included and, for such franchise stores where the spreadsheet does not make that calculation, I accept that manual calculations show, again, that many stores achieved a wages percentage which varied from 16.16% to 22.69% over periods of between 39 and 41 weeks. This is in the context that Mr Russo and Mr Geiszler were aware of franchisees' trading figures at the relevant time. As for award wages increasing from time to time, of which there was cogent evidence at trial, not only do the footnotes in the Financial Model note that outgoings "could possibly increase" but also the expert evidence of Mr Green was to the effect that, although the dollar amounts of sale figures and expense items do change over time, they generally increase in proportion to increases in the cost of living and, for that reason, he agreed that "the ratios between those items will generally remain stable and, therefore, meaningful". The evidence of Mr Geiszler upon this point was that the percentages for labour were "reasonably static" and that the potential weekly results document was not updated to reflect increasing labour costs because "the percentages remain constant". Similar evidence was given to that effect by Mr Nixon in emails of 16 May 2012 and 24 May 2012, in circumstances where Mr Geiszler gave evidence that he "would tend to agree" with Mr Nixon that the figures remained accurate.

[93] Chaskel's Emporium placed much reliance in its submission on the assertion that the Financial Model was not updated. Although Mr Russo and Mr Geiszler did give conflicting evidence about who was responsible for such updating, the inference is not open, as the more probable inference, that the Financial Model was not the subject of consideration by Capercorp over time or, even if it was not, that the content of it did not reflect the evidence that did exist in 12 to 24 months before it was given to Mr Kluska.

[94] As to the fact that:

- Mr Geiszler accepted that the labour percentage recorded in the Financial Model was prepared prior to the increase in award wages which commenced on 1 July 2010;
- Mr Geiszler accepted that he made a statement to Fair Work Australia that such an increase resulted in the corporate stores "only being able to maintain an overall labour cost percentage of 32%"; and
- there was evidence from the expert, Mr Green, that the award wage increase on 1 July 2010 was 4.3%;

the absence of any evidence of any increase in pizza prices or store revenue is not necessarily destructive of the conclusion earlier reached that relative percentages did not increase in any significant way, especially where there were material differences between the labour costs of corporate and franchisee stores.

[95] On the basis of what I have accepted, given the adjustment for labour which was adopted by Capercorp, I find, on balance, the evidence does establish that the percentages stated in the Financial Model were ones which were relevant to an "estimate" in the context of "potential" weekly results obtainable, subject to the effect, if any, of Chaskel's Emporium's own experience as franchisee.

[96] Although Chaskel's Emporium did not rely upon the actual experience by it as the franchisee of the Kingscliff Pizza Capers store there, Capercorp did refer to Chaskel's Emporium's own trading history as confirming that the contents of the Financial Model "was supported by reasonable grounds".

[97] But it must be noted that the particular part of the trading history relied upon was not the original wages percentage of 48.3% for the period from March to June 2011, or the 30.3% for the 2012 financial year but, rather, the figures of 22.5% for the 2013 financial year and the 15.8% for the period from July to November 2013. While Capercorp characterised the latter figures indicating that the business was "initially conducted" in a "highly inefficient manner" and that the latter figures showed that it "almost reached the potential wages percentage represented" by Capercorp by optimising his business practices, an analysis – mentioned by Capercorp but dismissed as not affecting that conclusion – shows that for the latter two financial periods identified, Mr Kluska gradually reduced staff working at the Kingscliff store to the stage that, when he achieved 15.8% for the wages component, he was not drawing a wage, he was working in the store approximately 80 to 90 hours per week, he was underpaying his children who worked in the store and he was suffering trading losses. I do not accept that it is possible to conclude from Mr Kuska's initial acceptance that "he'd come very close to matching the target" "after some lapse of time" and later saying "for the first time" that his children had worked in the business at a reduced rate undermines any of the conclusions that I have just stated. This is because the former of those conclusions

accepted a fact – even though it distorted the reality of what the percentages represented. The latter I do not accept as something that was untrue.

[98] Hence, I do not think the experience of Chaskel's Emporium is of any relevance as a matter of fact. Even if it were to be of relevance in that way, in the absence of any cogent evidence about why there was a lack of success in conducting the Kingscliff store, it is open to infer that it may well have been due to other causes (such as "misguided management decisions"). Additionally, without some analysis of that kind, the plaintiff's experience runs counter to the "results" that the "battle data" figures concerning franchisees seem to demonstrate and Mr Graham's own experience as franchisee.

[99] Consequently, for those reasons just canvassed and on the conclusion that the "disclaimers" have the effect of qualifying how the Financial Model works as an "estimate", I conclude that relevant "reasonable grounds" have been shown.

Reliance

[100] Although it is not necessary on the conclusions that I have reached to move to this particular issue (because of the lack of a connection between breach and reliance before reliance is to be considered), for obvious reasons, I will still reach some conclusions on the matter of reliance.

[101] I reject the argument that the Court ought to conclude that Mr Kluska, as the relevant representative of Chaskel's Emporium, had already decided to get into the Franchise Agreement before the Financial Model was given to him.

[102] It is not in dispute that the Financial Model was given as an attachment to an email dated 21 January 2011. The fact that Mr Kluska had signed a Schedule of Landlord's Terms that was dated 26 August 2010, that he began training as franchisee on or about 11 January 2011, that he arranged for the electricity account to be transferred to Chaskel's Emporium on 19 January 2011 and the fact that he both registered the business name for Kingscliff and opened a bank account in that name on 20 January 2011 simply means, in the whole of the context of relevant facts, that Chaskel's Emporium was taking significant preliminary steps. But from the very fact that the statutorily required Disclosure Document was not given to Mr Kluska, on behalf of Chaskel's Emporium until late January 2011, and that Mr Kluska's own evidence – which I accept at least on this score – was that after paying the $10,000.00 deposit on the Franchise Agreement on about 3 February 2011 he had "decided to absolutely pursue this franchise and acquire the franchise", I accept that the Financial Model was something which occurred prior to the Franchise Agreement and did have an affect on the plaintiff entering into that Agreement. In particular, I accept his answer, in a clarification in re-examination about documents that he had signed prior to that time, that he could have closed the corporate bank account, that there was no cost in the transfer of the electricity account and that anything concerning the lease "would have reverted … back to the landlord".

[103] Turning to, then, Mr Kluska's evidence about his assertion that he did rely upon the Financial Model, he gave evidence that:

- his golden rule was to require a return on investment of 33.3%;

- he could not make such a decision about any return until he had received the Financial Model and the costings to set up the store so he could make that calculation;
- he had experience as an accountant and in running other small businesses;
- cross-examination of him did not shake his evidence that he used the method identified and that he required such a return;
- he calculated that return on 28 January 2011 when he had received that final costings of $291,800.00 (exclusive of GST);
- on sales $10,000.00 (net of GST), his return on investment according to the Financial Model was $2,410.70, such that, when that sum was multiplied by 52 and divided by the set up costs, he had a projected return on investment of 42.96%; and
- he stated that his projected return gave him a buffer of almost 10%, giving him comfort should there have been an "exaggeration" in the $10,000.00 sales projections, on a sales projection of $8,500.00, it was still above minimum of 33.3%.

The rejection of Mr Kluska's evidence about the representation made to him of $10,000.00 does not flow automatically through to this evidence. Rather, it is this particular evidence – which I accept – which I find did lead to Mr Kluska's "erroneous" belief that the rejected representation did occur. Thus, I do accept that he did rely upon the Financial Model in order to enter into the Franchise Agreement.

Plaintiff's loss and damage

[104] Although it is unnecessary for me to move to this issue, I will make findings – insofar as I am able – with respect to it.

[105] Although there was no challenge in the written and oral submissions of Capercorp to the calculation of what Chaskel's Emporium designated as its "trading losses", totalling the (revised) sum of $183,659.58 (see Exhibit 3), it is still necessary for the Court to consider whether that loss could be recoverable. While it is true that no specific challenge was made, Capercorp's written submissions did set out to analyse the real cause of the failure of "the business conducted by Chaskel's Emporium" at Kingscliff. It contended that the proper inference is that such a cause "was the gradual decline in sales". That contention was based upon, amongst other things, the profit and loss statements of Chaskel's Emporium dated, respectively, 22 July 2011, 18 July 2012, 27 July 2013, and April 2014. Emphasis was also placed on Mr Kluska's own evidence, particularly in cross-examination, to the effect that he acknowledged that there were "economic factors" – although he did also blame "poor marketing" (by Capercorp not "doing advertising"), noted that there "was no promotion" and observed that there was "a lot of changes within the RFG Group" – though he denied that the competition from other pizza outlets in Kingscliff had any effect.

[106] Were it necessary to decide the full extent of the loss and damage, it does not necessarily appear to be logical that the full sum of $291,800.00 (excluding GST) paid to Capercorp pursuant to the Franchise Agreement should be recoverable as well as all the trading losses up until 10 November 2013 (whilst giving effect to the other alleged losses, and off-sets), especially where I am left in considerable doubt

as to the reasons why there was such a significant disparity between Chaskel's Emporium's costs percentages for the whole of the time in question (even bringing into account the change from significant to almost no full time paid staff employment). Other authorities on "purchase" based cases appear to consider the difference between the price paid and "true value", of which there was no evidence here (even to the effect of "nil" value in those circumstances). For example, in *ACCC v Top Snack Foods Pty Ltd*[28] Tamberlin J, relying on evidence from an "experienced" "financial advisor", allowed claims for capital payments under a franchise because he considered that the franchise businesses had "no value" and that, therefore, the capital investments were "totally lost": at [80]-[82]. But, given the absence of any constructive deconstruction of the bases relied on, there was no evidence other than that consonant with the claim.

Relief by avoidance of Franchise Agreement

[107] If I had been convinced that the plaintiff had a viable cause of action, since I have concluded that there was reliance and since there is, on any regime of calculation, a significant loss, I would have concluded that, in the circumstances of the disaffirmation of the Franchise Agreement, applying the proper compensatory factors would mean that such a misled or deceived representee should not continue to be liable to the rigors of the actual Financial Agreement. I would, thus, have permitted recovery which would have avoided the Franchise Agreement at least on and from the date of the acceptance by Capercorp of Chaskel's Emporium's "renunciation" in mid-December 2013.

[108] That, necessarily, would have precluded Capercorp from seeking any further sums pursuant to its counterclaims.

Counterclaims

[109] There are two aspects to the defendant's counterclaims. The first is the claim to recover royalties and marketing levies and the second is damages. In addition, there is the claim against the defendant-by-counterclaim as guarantor.

[110] Turning, initially, to the royalties and marketing levies, it is not in dispute that there were 114 weeks remaining in the terms of the Franchise Agreement when Capercorp accepted Chaskel's Emporium's renunciation. It is also not in dispute that pursuant to the Franchise Agreement itself up until that renunciation – such amounts having been proved pursuant to computer statements tendered under s 95 of the *Evidence Act* 1977 – the royalties owing totalled $32,658.02 and the marketing and promotions levies owing totalled $35,379.49.

[111] As to the first aspect, Chaskel's Emporium raised the issue that the actual marketing and promotion levies were levied by different legal entities, namely, Capercorp Advertising Pty Ltd and by RFGA Management Pty Ltd. This was argued to have the consequence that the correct legal entities had not sued in this proceeding. Nevertheless, the obligations imposed on Chaskel's Emporium by clauses 6(a)(ii), 7(a) and 7(b) of the Franchise Agreement were not expressed to be contingent upon the issue of an invoice but, rather, an obligation to pay an amount due each week.

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[28] [1999] FCA 752.

[112] Ms Waters, the business project specialist for the Retail Food Group, was called to give evidence by Capercorp. She explained that the "marketing fund" was previously held by Capercorp Advertising Pty Ltd and was, now, held by RFGA Management Pty Ltd. Whatever the internal arrangements between Capercorp and these other companies might be (including any uncommunicated assignment), the primary obligation is one that I find to have arisen pursuant to the clear terms of the Franchise Agreement. In such circumstances, Chaskel's Emporium has not cast any doubt on Capercorp's continuing right to receive these sums.

[113] Therefore, in so far as past sums being calculated upon gross receipts (excluding GST) for each business week, plus GST, I will allow the sums that I have already identified.

[114] But, as to the remaining 114 weeks, Capercorp seeks to recover for such royalties and levies on the basis of an averaging of the gross receipts (excluding GST) for the 139 weeks ending 13 March 2011 to 10 November 2013, calculating, thereby, a royalty payable of $430.40 per week and a marketing and promotions levy of $466.27 per week.

[115] If nothing else is clear, it is clear that Chaskel's Emporium gross receipts were declining, particularly the period from 1 July 2013 to 10 November 2013. While it may well be that such decline was due to an inefficiently run business, it must be noted that both the royalty and the levy were based upon gross receipts and not upon any averaging over time. It is that obligation to which attention is directed.

[116] In *Sellars v Adelaide Petroleum NL*[29] the High Court considered, in the context of misleading or deceptive conduct, the issue of damages for deprivation of a commercial opportunity. In the plurality judgment of Mason CJ, Dawson, Toohey and Gaudron JJ, it was remarked that, where there has been an actual loss of some sort, the "law" does not permit difficulties of estimating the loss in money to defeat an award of damages, since the damages will then be ascertained by reference to the degree of probabilities, or possibilities, inherent in the plaintiff succeeding had the plaintiff been given the chance which the contract promised: at 349. After noting that *The Commonwealth v Amann Aviation Pty Ltd*[30] concerned damages for breach of contract, the plurality stated that acceptance of the principle enunciated in the series of High Court cases (some of which were considered in *Amann*) requires that the damages for deprivation of a commercial opportunity, where the deprivation occurred by reason of breach of contract, tort or contravention of the analogue to s 18 of the *ACL*, should be ascertained by reference to the Court's assessment of the prospects of success of that opportunity had it been pursued: at 355. Finally, where a plaintiff shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value is ascertained by reference to the degree of probabilities or possibilities: also at 355.

[117] Although the issue here is simply breach of contract, the widespread application of the principle demonstrates the correctness of its application here.

[118] No attempt was made by either the plaintiff-by-counterclaim or the defendants-by-counterclaim to establish what the probabilities and possibilities were here, even

[29] (1992-1994) 179 CLR 332.
[30] (1991) 174 CLR 64.

though it was obvious about what the nature of the decline was which was occurring in the beginning of the financial year 2013-2014. There was almost no chance, on the evidence presented, of an increase in the gross receipts. Instead, there was every prospect that the outcome be the kind of outcome which did, in fact, happen (namely, a commercial inability to continue the business at the Kingscliff store).

[119] Given that there is no help from the evidence presented, the best that can be done, taking the *Malec* principles into account, is to find that a sum in the order $10,000.00 is the sum recoverable, being based upon the "chance" of some 15 weeks only occurring before a likely total demise, based upon the rate applicable to the period from 1 July 2013 to 10 November 2013 (being a yield for a combined royalty and levy of $670.00/week). This would have taken the Kingscliff business to an approximate 3 year anniversary. Such an approach is based on the actual obligations of the parties and does not build in a factor such as the benefit of the doubt being given or some factor based upon a wrong arising from the renunciation needing to be set right. The outcome is based upon the outlined principle of relying on the facts as found.

[120] The second part of the counterclaim depends on the effect of the obligations arising under the Guarantee. No evidence has been presented to the Court of any kind which suggests that the obligations under the Guarantee do not apply to the amounts which Chaskel's Emporium itself is otherwise liable to pay. Accordingly, the judgment for the counterclaim will be against Mr Kluska additionally.

Interest and costs

[121] I will give leave to both parties to file, and serve, written submissions on interest and costs within an appropriate 7 day period following the handing down of this decision.