IN THE SUPREME COURT OF QUEENSLAND **No. 1279 of 1990**

Brisbane

BETWEEN:

BRIDGESTONE AUSTRALIA LIMITED Plaintiff

AND:

GAH ENGINEERING PTY LTD First Defendant

AND:

PETER GORDON BEEHAG and PATRICIA ANN BEEHAG Second Defendants

REASONS FOR JUDGMENT - MOYNIHAN J.

Judgment delivered 14 February 1997

CATCHWORDS:

Franchise - implied obligation not to unreasonably withhold consent to transfer - satisfaction of debt - s52 *Trade Practices Act* 1974 (C'th) - discharge of guarantee by material alteration.

Counsel:	Mr J. Batch for the plaintiff Mr D. A. Kelly for the first and second defendants
Solicitors:	Thynne & Macartney for the plaintiff Nicol Robinson & Kidd for the first and second defendants
Hearing Dates:	11-14 June 1996

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Introduction

This action arises out of the acquisition and conduct of a Bridgestone Tyre franchise at Underwood. The plaintiff sues the first defendant for $288,601.25. This is made up of $198,532, the unpaid balance for goods sold and delivered and interest of $28,773.90 on that balance together with a loan of $50,000 and $11,295.26 interest on that loan. The second defendants are sued under their respective personal guarantees of the liability of the first defendant. They are directors of the first defendant which is part of a family trust arrangement.

I am satisfied that the plaintiff has made out its case for the unpaid balance of the account for goods sold and delivered, in respect of the loan and for the interest on each. I am satisfied it also has proved the execution of and other formalities in respect of the guarantees. It will be necessary to deal with other issues in respect of the guarantees in due course.

The defendants raise four issues to meet the plaintiff's claim against them. First, that the plaintiff is in breach of an implied obligation not to unreasonably withhold its consent, pursuant to cl.6.1 of the franchise agreement between it and the first defendant, to the first defendant's proposed assignment of its rights under the agreement. Secondly, the plaintiff took over the first

defendant's Underwood business in full satisfaction of the first defendant's indebtedness to it. Thirdly, the first defendant alleges the plaintiff made representations contrary to s.52 of the *Trade Practices Act* causing the sale of the franchise to go off. There is a counterclaim founded on this allegation. Fourthly, that the second defendants' guarantees were discharged by a material alteration effected on 23 June 1989.

Background

The plaintiff (I will refer to the company, including its senior management as "Bridgestone") is one of Australia's major distributors of motor vehicle tyres. At the times relevant to these proceedings, at a retail level, its tyres were sold, and associated services provided, by a mix of outlets:

- retail outlets owned by Bridgestone;
- franchise dealers;
- major dealers.

Some aspects of Bridgestone's marketing approach, particularly in relation to franchises, were in an embryonic stage in 1987 or, perhaps more accurately, the plaintiff was moving to put more emphasis on the franchise component of the outlets marketing its products.

Franchisees were given discounts and supported in marketing, training and business operation. Major dealers were supported essentially by discounts which were a function of turnover and were greater than those provided to franchisees. I accept the evidence that Bridgestone considered it detrimental to the efficacy of this approach ("market strategy") that a major dealer should become the holder of a franchise. The reasons essentially were that this would permit a double advantage because a major dealer acquired stock at a major dealer discount and could then retail it through a franchise outlet with the additional

benefits this entailed. Such an outcome could operate adversely to other franchise holders who did not have the benefit of major dealer discounts. In this context Bridgestone wanted to have a spread of distributors rather than being confined to relying on a limited number of major retailers.

On 7 October 1987, the first defendant entered into a franchise agreement with Bridgestone in respect of the Bridgestone Tyre Centre at Underwood. This reflected the defendant's acquisition of the business conducted at Underwood from the previous operator and franchise holder. A fresh franchise agreement was however entered into rather than an assignment of the previous operator's rights under its franchise agreement being effected. The second defendants signed guarantees of the first defendant's performance on 24 and 27 October respectively.

Nothing now turns on it, but it seems that the second defendants (rather than the first) took the lease of the business premises on assignment from the previous franchise operator and the defendant Peter Beehag (rather than the first defendant) took an assignment of the previous operator's interest as a consequence of its registration under the *Business Names Act* 1962 of the name Bridgestone Tyre Centre Underwood. That the Beehags, rather than the first defendant, took the assignments was apparently because of a delay in the first defendant's being recognised in Queensland under the provisions of the *Corporations Law* - it was incorporated in Victoria.

The plaintiff had never intended that anyone else obtain an interest in the Bridgestone name. Peter Beehag's "predecessor in title" had however become registered under the *Business Names Act* 1962 in relation to the name. The Act is not concerned with conferring rights akin to ownership of a name. The effect of registration is to make lawful the use of a name in circumstances which the Act might otherwise make it unlawful to do so. The Act is designed to regulate individuals or corporations carrying

on business under names other than their own. From Bridgestone's point of view the previous owners registration was an anomaly which arose because the Queensland legislation differed from that in the other Australian states and territories. Peter Beehag's registration occurred without Bridgestone's knowledge or consent and no payment was received by Bridgestone. The assignment would seem to have been of whatever entitlements arose as a consequence of registration under the *Business Names Act* and as I indicated this does not confer ownership or kindred rights against the plaintiff as distinct from making the use of the name lawful. Bridgestone does not seem to have appreciated the limited consequences of registration but was in any event keen to have what it saw as full control and entitlement to the use of the Bridgestone name by becoming registered under the Act itself. This, together with the market strategy I referred to earlier, was an important consideration in subsequent events.

The first defendant commenced trading out of the Underwood store on 21 September 1987. The second defendant, Peter Beehag was a "hands-on owner operator" involved in the conduct of the business on a day-to-day basis. The second defendant, Peter Beehag's wife Patricia Ann Beehag, had no involvement of any significance in the conduct of the business.

In twelve months trading, the business did not live up to Peter Beehag's expectations and he placed it in the hands of brokers for sale in about mid-1988. Towards the end of that year, the second defendants went on a Bridgestone sponsored tour of Asia. On that trip they met Gordon Smith whose company D.T.S. Automotive Group Pty Ltd (D.T.S.) was a large Bridgestone major dealer particularly in the A.C.T. It was interested in expanding into the south-east Queensland market. The defendants (effectively Peter Beehag) entered into negotiations for D.T.S. to acquire the Underwood business. The negotiations were protracted.

On 29 May 1989 D.T.S. purported to exercise an option to acquire the business from the first defendant. The first defendant adopted the position that it was not bound by the exercise. On 25 June 1989 it "withdrew the business from sale" and on 24 July asserted D.T.S. had been informed on more than one occasion that the business had been withdrawn from sale.

On 18 October 1989, D.T.S. sued the parties to these proceedings in the Federal Court in the A.C.T., to enforce an option agreement against the first defendant and alleging that the defendants in that action (the plaintiff and the defendants here) had engaged in conduct in breach of the *Trade Practices Act* 1974 (Commonwealth) to defeat D.T.S.'s endeavours to acquire the Underwood business. On 24 January 1990, the defendants to these proceedings put in issue the existence and terms of the alleged option, the validity of its exercise and alleged, among other things, that any option had a term as to the plaintiff's consent.

Bridgestone had three concerns arising out of the Federal Court proceedings. First, D.T.S., a major dealer, should not acquire the first defendant's franchise. Secondly, the allegations of contravention of the *Trade Practices Act* made against Bridgestone. Thirdly, to be registered under the *Business Names Act* in respect of the Bridgestone Underwood name rather than Peter Beehag or D.T.S.

It is fair to say that during negotiations for D.T.S. to acquire the first defendant's business, Bridgestone made known that it opposed D.T.S.'s acquiring the franchise and becoming registered in respect of the Bridgestone Underwood name. D.T.S on the other hand were keen to be registered in respect of the Bridgestone name.

After the Federal Court proceedings were instituted negotiations continued between the plaintiff and D.T.S. and between the first defendant, D.T.S. and Bridgestone. Ultimately a compromise was reached on terms recorded in an

agreement of 27 August 1990 and in accordance with its terms, the Federal Court proceedings were discontinued.

The first defendant had, in the meantime, suffered increasing financial difficulties and Bridgestone took over the operation of the Underwood business on 9 March 1990 in circumstances to be adverted to later. It continued to operate it until D.T.S. took it over after the compromise of 27 August. There was provision for Bridgestone's agreement to license D.T.S. to use and operate under the business name "Bridgestone Tyre Centre Underwood", as I understand the evidence in the event, no licence was ever given.

Breach of an implied obligation not to unreasonably withhold consent to a transfer of the Bridgestone Underwood Franchise

The defendants are to my mind faced with formidable obstacles in making out this claim as a basis for resisting the plaintiff's action. I accept that for the reasons which I have previously mentioned, Bridgestone was resistant of one of its major dealers, D.T.S. obtaining franchise rights in respect of Bridgestone Underwood and acquiring Peter Beehag's rights (whatever they may have been) consequent upon his registration under the *Business Names Act*. To my mind these were genuine and legitimate commercial concerns. I am far from satisfied that Bridgestone had any additional ulterior motives for refusing to consent to the transfer of the Underwood franchise. In particular I am not satisfied that Bridgestone adopted its attitude so as to drive the first defendant out of business so that it could take advantage of the situation. Bridgestone ultimately decided it could no longer support the first defendant as its finance situation deteriorated and took over the business.

It is moreover far from clear that any refusal by the defendant led to the loss of a sale to D.T.S. by the first defendant. As I have already mentioned D.T.S. sued to enforce its claim of a binding contract with the first defendant for the acquisition of the Underwood business in

the Federal Court and the defendant's defended those proceedings which were ultimately discontinued as a result of a compromise. The evidence fails to satisfy me that, putting aside the question of the plaintiff's consent, there was a concluded enforceable contract between the first defendant and D.T.S. for the latter's acquisition of the Underwood business.

Against this background I turn to consider what implied obligation arose in respect of consent and if it did, whether the plaintiff unreasonably withheld its consent.

As I have said, when the Underwood business was acquired the defendants entered into a fresh franchise agreement rather than take an assignment of any previous agreement. The consideration there recited was the mutual rights and obligations arising under the agreement. Clause 1 dealt with background and purpose and specifically recited the plaintiff's entitlement to and interest in the Bridgestone names which were said to signify “a distinctive standard of excellence in the manufacture and distribution” of Bridgestone products and the benefits and advantages to a franchise holder (dealer) in being associated with those names. Clause 3.2.4 was a license for a franchise dealer to use a business name incorporating the words Bridgestone Tyre Centre but provided there was to be no registration by the dealer without the plaintiff's prior written approval. Clause 3.4 acknowledged the plaintiff's ownership of the Bridgestone name and placed restrictions on the dealer's use of it. It provided that the dealer's right to use the name ceased on termination of the agreement. The plaintiff's ownership of and control over Bridgestone trade names and all other symbols etc owned by Bridgestone were reinforced by cl.3.5. The franchise agreement was for three years and thereafter from year to year subject to termination on notice in terms of cl.5. On termination, the dealer was obliged to obliterate all Bridgestone names and marks.

Had the assignment of the previous franchisee's rights in relation registration under the *Business Names Act* been to the first defendant, it is arguable that whatever rights were acquired were subsumed or superseded by the terms of the franchise agreement. In any event, as I have already indicated, it is in my view unlikely that Beehag obtained a right as against the plaintiff to use the Bridgestone name. Indeed there is merit in the plaintiff's submission that it could have enforced its interest in the name against him; see for example *BM Auto Sales Pty Ltd v. Budget Rent-A-Car System Pty Ltd*[1]; *Turner v. General Motors*[2]; *Westinghouse Electric v. Thermoport*[3]; and *Tec & Tomas (Aust) Pty Ltd v. Matsumiya Computer*[4].

It was not, in any event, said that there was an express or implied term binding on Bridgestone that the rights Peter Beehag acquired were assignable. Rather, cl.6.1 of the franchise agreement between the plaintiff and the first defendant was relied on as founding the implied right in that first defendant that Bridgestone should not to refuse its consent to an assignment the franchise.

The clause relevantly provided:

> "Except with the written consent of Bridgestone Australia first had and obtained the Dealer's rights under this agreement may not be assigned to any other person."

I have already referred to the provisions of the franchise agreement emphasising the plaintiff's "ownership" of the

1 (1976) 12 A.L.R. 363 at 369

2 (1929) 42 C.L.R. 352

3 [1968] W.A.R. 39

4 (1984) 2 I.P.R. 81

Bridgestone name and giving the first defendant a licence to use it for the purpose of the franchise agreement, subject to the terms of that agreement.

I am not persuaded that it is necessary to imply a term that consent to an assignment of the franchise agreement would not be unreasonably withheld in order to give effect to the agreement. The restriction on assignment reflects caution, perhaps in abundance, in respect of protecting the plaintiff's legitimate interest. The nature of the interest arising under the agreement may be doubted. This is particularly so when it is appreciated that a franchise arrangement is not a right of property in the conventional sense and involves a close relationship akin in some respects to a partnership requiring cooperation and good faith to work effectively; *The Body Shop International Pty v. Rowle* (1992) 27 I.P.R. 255.

The requirements for implying a term in a business contract, particularly one with detailed provisions as to the rights and obligations to which it gives rise have been extensively canvassed in cases such as *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales*[5]; *Re Hospital Products Ltd v. United States Surgical Corp*[6]; *Moorgate Tobacco Co Ltd v. Philip Morris Ltd*[7]; and *Esso Australia Resources Ltd v. Plowman*[8]. The term it is sought to imply here is not necessary for the business efficiency of the franchise agreement, arguably it conflicts with the

5 (1982) 149 C.L.R. 337

6 (1984) 4 I.P.R. 291 (F.C., H.C.A.)

7 (1984) 3 I.P.R. 545 (F.C., H.C.A.)

8 (1995) 69 A.L.J.R. 404

express terms canvassed earlier; c.f. *Helicopter Sales (Australia) Pty Ltd v. Rotorwork Pty Ltd*[9]. I am therefore not prepared to imply it.

The decision of the New South Wales Court of Appeal in *Renard Constructions (N.E.) Pty Ltd v. Minister for Public Works* (1992) 26 N.S.W.L.R. 334 indicates a rich diversity of approaches to the implication of a term of the kind relied on here. The defendants placed considerable reliance on the case.

The relevant issue in *Renard* was whether a principal under a building contract was required to act reasonably in forming the opinion that a contractor should be required to show cause why certain contractual powers should not be exercised and then in the exercise of those powers. The trial judge had determined that nations of reasonableness could not be imported to limit the exercise because the test for the implication of terms laid down in cases such as *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales*[10] and *Secured Income Real Estate (Australia) Ltd v. St Martins Investments Pty Ltd*[11] were not satisfied.

In separate reasons, the Court of Appeal agreed that the contractor should succeed but did so on different bases. Priestly J.A. was of the view that an obligation of reasonableness should be implied. Handley J.A. thought that the clause in issue was to be construed as requiring the principal to act reasonably and honestly in forming the relevant opinion. Meagher J. A. thought that there was no basis for the implication of a term, but thought that the

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9 (1974) 132 C.L.R. 1 at 11-12 (per Stephen J.)

10 (1982) 149 C.L.R. 337

11 (1979) 144 C.L.R. 596

exercise of the power miscarried if the principal's decision was based on a "fundamental misunderstanding of relevant matters .. and was grounded on 'misleading, incomplete and prejudicial information'."

Assuming Bridgestone to have been obliged to act reasonably and honestly or bona fide I am not satisfied it failed to do so. As I have indicated I am satisfied that Bridgestone did not wish a major dealer to acquire a franchise and it did not wish to see D.T.S. acquire Peter Beehag's "rights" to the Bridgestone name. This was founded on the legitimate commercial considerations of Bridgestone's market strategy and of regaining what it regarded as complete control over the Bridgestone name. It is true that the compromise of 27 August 1990 may have eroded these considerations to some degree in that D.T.S. did take over the Underwood business, and as I have said there was provision for a licence in respect of the name but it was not taken up. I am satisfied the compromise and the takeover by D.T.S. reflected a decision by Bridgestone in its legitimate commercial interest to extricate itself from the situation brought about by the Federal Court proceedings and the first defendant's financial difficulties. It has not been established it acted unreasonably or dishonestly or without bona fides in resisting a transfer of the Underwood franchise to D.T.S.

The plaintiff took over the Underwood business in full satisfaction of the first defendant's indebtedness and representations contrary to s.52 of the Trade Practices Act

It is convenient to consider these grounds together. The first turns on the effect to be given to discussions between Bridgestone's state manager and Peter Beehag in January/March 1990.

The second is based on allegations to the following effect. On or about June 23 1989, Bridgestone is alleged to have represented, without reasonable grounds, that if the first defendant continued to conduct Bridgestone Tyre

Centre Underwood, it could expect increased support from Bridgestone.

The representations are alleged to have been relied on by the first defendant by its -

(a) not pursuing the sale of the business to D.T.S.;

(b) continuing to conduct its business between in or about June 1989 and in or about March 1990.

I mentioned earlier that trading at Bridgestone Underwood did not live up to Peter Beehag's expectations. By June 1989 the business was experiencing trading difficulties to the extent that Bridgestone became involved in endeavours to support the business and restore its viability. It is unnecessary to canvass all these matters in detail. Eventually, however, after a great deal of discussion and negotiation the plaintiff's then financial controller wrote a letter of 23 June 1989 ("the 23 June letter") to the first defendant and Peter Beehag in the following terms:

> "Further to our discussions today, we are pleased to confirm our offer of financial assistance as follows:
>
> 1) Bridgestone offer to transfer $50,000.00 from Bridgestone Underwood trading account to a separately nominated loan account.
>
> 2) The loan amount of $50,000.00 will be repaid in full on 30th June, 1990 (or earlier if Bridgestone Underwood elect to do so).
>
> 3) Interest will be charged at Bridgestone's borrowing cost, i.e. ANZ Bank Prime Rate plus 0.5% facility fee (current 19.75% + 0.5%) on a monthly basis and paid monthly on 30 day terms. The interest charge shall be made on the outstanding balance of the loan account <u>and any other overdue amounts</u> on the trading account. Interest charges shall commence from 1st July, 1989.

4) Bridgestone Underwood will be required to pay all trading accounts on 60 day terms in accordance with the Franchised Dealer agreement.

5) It is understood that within the term of this loan agreement Mr P. Beehag agrees to sell his other business interests.

6) In consideration for the above, Bridgestone Underwood agree to transfer ownership of the registered business name "Bridgestone Tyre Centre Underwood" to Bridgestone. The title of this business name is held by Mr Peter Beehag.

> Peter, if you are in agreement with the above, please sign the duplicate copy of this letter and our legal department will arrange for the documentation for transfer of the business name.
>
> You will note that it is required to be signed twice - once on behalf of GAH and once for yourself personally (as the business name is registered in your personal name)."

As I have indicated the letter was the outcome of discussion and negotiation and Beehag signed it as directed.

In the negotiations, as the letter reflects, Bridgestone indicated it would give the first defendant increased marketing training and administrative support in its conduct of the business. I am not satisfied there was agreement as to specific commitments (for example, as to particular sums) in respects of these matters.

I am satisfied that in entering into these arrangements Bridgestone was genuinely seeking to support the first defendant so it could trade its way out of its difficulties. It had not decided, "to end its relationship with" the first defendant at that time. It seems clear enough in retrospect that the financial position of the first defendant was deteriorating to an extent which required the injection of more funds, greater financial assistance and perhaps more support in training, business

operations and marketing than was contemplated by the parties at the time of the 23 June letter but, as I have indicated, the arrangements were a genuine and reasonable endeavour by Bridgestone to support the first defendant to trade its way out of its difficulties.

The arrangements reflected in the 23 June letter were put in place. Peter Beehag, in his evidence, expressed dissatisfaction with the level of the support Bridgestone gave but in my view that reflects disillusionment brought about by the subsequent failure of the business and the bringing of this action rather than evidencing lack of good faith or breach by Bridgestone of any obligation to support the plaintiff.

The first defendant's financial position continued to deteriorate at an increasing rate in hard economic times and a competitive market. By December 1989 the first defendant was clearly in serious financial difficulties and by February 1990 Bridgestone had decided that it was not prepared to continue to support the first defendant but that it should cut its losses and seek to extricate itself as best it could for its involvement with the first defendant. This was a legitimate and justifiable business decision.

Bridgestone put in place steps to terminate its franchise agreement with the first defendant and to take over the Underwood business. Its state manager (Thomas) was the main point of contact with the first defendant (essentially Peter Beehag) throughout its operation of the franchise and particularly in making arrangements for its termination and for Bridgestone's takeover. He was personally sympathetic to the Beehags predicament, he had been keen to support them in the operation of the franchise. For these reasons he remained perhaps more optimistic as to its prospects than his more senior management. I am satisfied he was genuine in his support and that neither he nor any other officer of Bridgestone

was “falsely building up the Beehags hopes” of continuing support for some ulterior purpose.

Thomas was the plaintiff's principal point of contact with Peter Beehag in working out and implementing arrangements for the defendant's departure and the plaintiff's takeover. I think it is likely that on about 6 March, Thomas had a conversation with Peter Beehag, part of which Mrs Beehag heard. The situation was, as Thomas said, “fairly nerve-racking for everybody”. Bridgestone was to take over the business, buy the plant and equipment and take back the stock. In the course of conversation Thomas most likely spoke in terms of the Beehags cutting their losses and getting on with their lives. In doing so he was seeking to be supportive and to help them accommodate to a painful situation, there was nothing promissory in what he said. Nothing was specifically said about the effect of the takeover or the first defendant's indebtedness to Bridgestone.

The Beehags signed a number of documents designed to effect their departure and Bridgestone's takeover of the business. One such document, dated 7 March 1990 provided-

> “We, Peter and Ann Beehag, hereby agree to the purchase of the business known as ‘Bridgestone Tyre Centre Underwood’ by Bridgestone Australia for a sum to be agreed. Such consideration being for:—
>
> Assignment of lease
>
> Release of overdraft
>
> And a sum to be agreed for goodwill of business, known as ‘Bridgestone Tyre Centre Underwood’.” (Ultimately nothing was paid for goodwill.)

The Beehags also signed documents relating to the assignment of the first defendant's lease and dealing with the bank overdraft and security.

On 8 March 1990 Thomas wrote to the first defendant in these terms-

> "Following our discussions and in reference to the three proposals outlined in your letters to us, I wish to advise you, that Bridgestone Australia Ltd. cannot and has not accepted any of these proposals.
>
> Bridgestone Australia Ltd is of the understanding that you wish to vacate your current premises at 2928 Pacific Highway, Underwood, Queensland and that G.A.H. Engineering Pty Ltd is willing to offer for sale, to Bridgestone Australia Ltd., certain owned stock, plant and equipment.
>
> Bridgestone Australia Ltd is willing to discuss and agree to assignment of the lease on the property at 2928 Pacific Highway, Underwood, Queensland and is prepared to purchase certain owned stock, plant and equipment from G.A.H. Engineering Pty Ltd at mutually agreed values, and that any consideration for such, shall be paid directly to the bank account of G.A.H. Engineering Pty Ltd trading as Bridgestone Tyre Centre Underwood."

The defendants and Thomas subsequently signed a letter prepared by Bridgestone in these terms-

> "I refer to our discussion today with staff from Bridgestone Australia Ltd. and confirm my request for the following:
>
> 1. <u>Property Leasing Arrangements</u>
>
>   We Peter and Ann Beehag hereby agree, forthwith, to assign the lease on the property known as the Bridgestone Tyre Centre, Underwood at 2928 Pacific Highway, Underwood in the State of Queensland, subject to the consent of the Landlord - Tabuan Pty Ltd as Trustee for the William Chow Family Trust.
>
> 2. <u>Stock, Plan and Equipment</u>
>
>   G.A.H. Engineering Pty Ltd agrees to sell to Bridgestone Australia Ltd any owned stock, plant and equipment that Bridgestone Australia Ltd may wish to acquire at values to be mutually agreed.

3. <u>Consideration for Stock, Plant and Equipment</u>

> G.A.H. Engineering requests that any consideration by Bridgestone Australia Ltd in respect of (2) above, is to be paid directly to the bank account of G.A.H. Engineering Pty Ltd trading as Bridgestone Tyre Centre Underwood at the Westpac Bank, Garden City, Kessels Road, Queensland."

On 9 March Bridgestone formally terminated its franchise agreement with the first defendant and took over the operation of the Underwood business.

I accept that Thomas did not conceive that he had any authority to conclude an agreement with Peter Beehag involving waiving the first defendant's indebtedness to Bridgestone and that he did not contemplate anything other than that indebtedness continuing after Bridgestone's takeover. I am satisfied that Thomas did not say anything during his discussions purporting to release the first defendant from its indebtedness to the plaintiff and that there was no agreement to that effect.

Discharge of the second defendant's guarantees by material alteration

It is submitted that the arrangements reflected in the letter of 23 June 1989, the terms of which were set out earlier, were made without the consent of the second defendants and materially altered the franchise agreement of 7 October 1987 (the first defendant's performance of which was guaranteed by the second defendants) thereby discharging their sureties.

I accept that the sureties were in respect of the first defendant's obligations arising under the franchise agreement. It is true that the instruments, identical in their terms, were executed after the franchise agreement but simply as a matter of machinery.

The consideration for each surety was expressed to be Bridgestone's:

> ". . . having supplied or at our request agreed to supply and to continue to supply (the first defendant) with goods and services from time to time."

Clause 1 made the surety answerable in respect of neglect or omission by the first defendant to pay for goods and services "according to the terms agreed on between you and it" notwithstanding that the sureties had no notice of the failure.

Each surety was expressed to be "a continuing guarantee" for "the whole debt which shall be contracted by the debtor with you in respect of goods and services supplied or to be supplied to it as aforesaid". The franchise agreement (by cl.7 of an addendum of 7 October 1987) provided -

> "... the Dealer's option herein shall cease and determine in the event that the Guarantor, if any, who shall have guaranteed the due compliance of the Dealers obligations under this Agreement failed to execute any further guarantees substantially in the form and in terms which the said Guarantor was guaranteed this Agreement in respect of the original terms within fourteen (14) days of delivery of such guarantee to them."

Each surety contained what is commonly referred to as a principal debtor clause. It will be necessary to consider this clause later.

The considerations canvassed support the conclusion that the guarantees were of the obligations arising under the franchise agreement. I turn to consider whether the letter of 23 June 1989 effects a material alteration of the relationship reflected in the franchise agreement.

The arrangements of 23 June were in accordance with the plaintiff's "Dealership Assistance Policy". This was a separate arrangement from a "Franchise Dealer Agreement". The policy was designed to support dealers by giving access to cheap finance. The franchise agreement on the other hand made no provision for the payment of interest on the

trading account or for loan arrangements. There is nothing in the surety instrument to indicate an intention that the second defendant, absent their consent, should be required to undertake liability for these obligations which were in addition to those which arose under the franchise agreement; c.f. *Burnes v. Trade Credits Ltd*[12] where there was an increase in interest rates and an extension of the term of a mortgage.

As I understand the cases in the present circumstances, a variation is not material when it "cannot be otherwise than beneficial to the surety" or when "by its nature, it cannot in any circumstance increase the surety's risk". The "mere possibility of detriment" is enough to discharge the surety; *Holme v. Bunskill*[13], *Ankar Pty Ltd v. National Westminster Finance (Australia) Ltd*[14]. It is said at p.559 of *Ankar* that-

> "The rule does not permit the courts to inquire into the effect of the alteration. The consequence is that, to hold the surety to its bargain, the creditor must show that the nature of the alteration can be beneficial to the surety only or that by its nature it cannot in any circumstances increase the surety's risk, e.g., a reduction in the debtor's debt or in the interest payable by the surety. The mere possibility of detriment is enough to bring about the discharge of the surety.
>
> The foundation of the rule is that the creditor, by varying the principal contract or extending time, has altered the surety's rights without consulting it though the surety has an interest in the principal contract, and that the creditor cannot be permitted to do: .."

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12 (1981) 34 A.L.R. 459 at 460

13 (1877) 3 Q.B.D. 495 at 505

14 (1986-87) 162 C.L.R. 549 at 559

There is, in my view, merit in the qualification canvassed by Kirby P. in *Corumo Holdings Pty Ltd v. Itoh Ltd*[15] when he said -

> "The 'mere possibility of detriment' to which the High Court refers in *Ankar* is a 'possibility of detriment' in the circumstances of the parties. It is not a possibility of detriment in circumstances other than those in which the parties find themselves. Thus one can put out of consideration, speculation, the possibility of windfall games or hypothetical claims in subrogation. . ."

See also *Bond v. Hong Kong Bank of Australia*[16].

It is true that the arrangements in the 23 June letter may have, for example, extended terms for payment. The arrangements gave the first defendant the opportunity to trade its way out of financial difficulties. The changes in the relationship between Bridgestone and the first defendant were not unequivocally beneficial to the second defendants. They faced a real risk of increased exposure if there was no turnaround, if losses continued or the first defendant did not adhere to the altered arrangements reflected in the 23 June letter. The alterations brought about sufficient possibility of detriment to constitute then material alterations, they were not "only beneficial". It follows that in my view the arrangements reflected in the letter of 23 June were material in the relevant sense.

The second defendants however cannot complain if, as sureties, they consented to the alterations. In this respect it is necessary to consider each of their positions separately.

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15 (1990 - 1991) 5 A.C.S.R. 720 at 730

16 (1991) 25 N.S.W.L.R. 286 at 308 per Kirby J.

Mrs Beehag was a director of the first defendant. She did not play an active role in the conduct of its affairs. She relied on her husband for that, indeed she did so in all aspects of matters bearing on the business. I accept that there was not a great deal of discussion between them concerning the business. She knew that there were increasing financial difficulties only in general terms. She played no part in the discussion leading to the arrangements reflected in the 23 June letter.

I accept that Peter Beehag did not tell her about the discussions or arrangements prior to his signing the 23 June letter, or for that matter later. I am not persuaded she consented to the 23 June letter arrangements so as to preclude her from relying on them to discharge her from her obligations as surety.

The position with respect to Peter Beehag is more complex. He was a director of the first defendant. He was a full participant in negotiations reflected in the 23 June letter and in implementing the arrangements it reflected. The decision that the first defendant continue trading was his, Mrs Beehag played no part in it. On the other hand I think it unlikely that any of those involved in the discussions leading to the letter of 23 June (particularly Peter Beehag) adverted to the existence of the sureties. They are not referred to in any of the documentation. Peter Beehag signed the 23 June letter in his capacity as a director of the first defendant and as the person registered under the *Business Names Act* in relation to the Bridgestone Underwood name not as a surety.

The issues of Peter Beehag's consent is one of fact and inference from fact. As to the need for clear evidence of consent see *Byrnes v. Trade Credits Ltd*[17]. In *Winstone*

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17 (1981) 34 A.L.R. 459 per Lord Keith at 462

Ltd v. Bourne[18] it was held that the sureties were at all times aware of their obligations as sureties, participated in discussions leading to the variations in issue and as directors asserted to them. It was held in the circumstances of that case that the sureties not only knew but impliedly assented to the effect of the modification to the principal contract. In *Wren v. Emmett Contractors Pty Ltd*[19] Menzies J. said-

> "It seems to me that if the defendant as controlling director . . . arranged an extension of time for the payment of what was due by the company under its contract with the plaintiff he cannot be heard to say, when sued upon the guarantee, the extension was given without his consent. Mere knowledge of the variation of a contract or the giving of time does not of itself amount to consent, but for a guarantor on behalf of the principal debtor to bespeak time to pay what is owing betokens his concurrence with the giving of time to pay. Were this not so the law would be out of touch with reality."

(Menzies J. was dissenting in an appeal in which the majority ordered a new trial on other grounds) but does not effect the force of what says in the passage set out.) I have bourne such considerations in mind.

In the present case I do not think it can be said that Peter Beehag had his obligation as a surety in mind when negotiating the arrangements reflected in the 23 June letter. He was an engineer and small businessman engrossed in endeavours to salvage the business which was his and his family's livelihood. The effect of the alterations to the agreement between Bridgestone and the first defendant were rather more complex than simply, for example, an extension of the time for the payment of the principal debt or an increase in the interest rate. In all the circumstances I

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18 (1978) 1 N.Z.L.R. 94

19 (1969) 43 A.L.J.R. 213 at 220

am not prepared to conclude that Beehag gave any consideration to the effect the alterations had on his position as surety so as to found an inference that he consented to them in his capacity as surety or that he agreed that his obligations as surety be extended to the alterations.

It remains to consider whether the principal debtor clause deprives the sureties of what would otherwise be their right to have their guarantee discharged by material alterations. The clause provides-

> "In order to give effect to this guarantee, I declare that you shall be at liberty to act as though I was the principal debtor and I hereby waive all and any of my rights as surety which may at any time be inconsistent with any of the above provisions."

In the *Fletcher Organisations Pty Ltd v. Crocus Investments Pty Ltd*[20] an issue was whether a principal debtor clause constituted the waiver of a surety's rights when the creditor released a co-surety. The co-surety seeking to be treated as discharged was held to have contracted out that right. As has already been mentioned, the surety instruments in the present case made no provision for any variation in the arrangements between the principal debtor and the creditor. The position was otherwise in *Fletcher*. Sureties should be interpreted strictly against the creditor, see for example *Corumo Holdings Pty Ltd*[21] (supra), *Tricontinental Corporation v. H.D.F.I. Ltd*[22]. Bearing in mind cl.7 is, in my view, to be construed as operating only so long as the obligations

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20 (1988) Qd.R. 517

21 at 728

22 (1990) 91 N.S.W.L.R. 689 at 706

sought to be enforced against the surety remained as they were when the surety was entered into; cf. *Dunlop New Zealand v. Dumbleton*[23] and *Bank of New Zealand v. Baker*[24]. In the latter Ostler J. (at p.474) said-

> "In my opinion this contract is indistinguishable in its nature, and must be treated also as one of suretyship with special clauses. If this is so, then all the principles of law contrived for the protection of sureties are applicable in this case for the protection of the defendant, except insofar as he has expressly contracted himself out of them, for it is clear that a surety may contract himself out of all or any of his rights."

By the same token Ryan J. in *Fletcher*[25] said-

> ".. it was a condition of the guarantor undertaking the liability of a surety that the securities set out in the Heads of Agreement would be obtained by the creditor and maintained by it subject to the terms of the deed of guarantee."

It follows that in my view the principal debtor clause does not constitute a waive of what would otherwise be of the effect of a material alteration.

The plaintiff is entitled to judgment for the unpaid balance for goods sold and delivered, for the amount of the loan, and interest against the first defendant. I dismiss the plaintiff's action against the second defendants and the first defendant's counterclaim.

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23 (1968) N.Z.L.R. 1092 at 1097

24 (1926) 45 N.Z.L.R. 462

25 at 539

I will deal with costs after submissions have been received.