SUPREME COURT OF QUEENSLAND

CITATION:	*Little Images Pty Ltd v Fresh View Venture Pty Ltd & Ors* [2011] QSC 402
PARTIES:	**LITTLE IMAGES PTY LTD** **ACN 099 485 113** (Plaintiff) v **FRESH VIEW VENTURE PTY LTD** **ACN 112 323 654** (First Defendant) and **GARY TEIK LOON YOU** (Second Defendant) and **SHIRLEY CHENG SIM OH** (Third Defendant) and **INFOLINK HOLDINGS PTY LTD** **ACN 081 802 922** (Fourth Defendant)
FILE NO/S:	BS 11800 of 2007
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	20 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	26-30 September 2011
JUDGE:	McMurdo J
ORDER:	**Judgment for the plaintiff against the second and third defendants in the sum of $303,860.78**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – WHAT AMOUNTS TO REPUDIATION – where the first defendant and the second and third defendants, as guarantors, entered into a

franchise agreement with the plaintiff for the operation of a photography business – where the agreement was for a term of 5 years – where the defendants purported to terminate the agreement and continue their photography business under a new name – whether the plaintiff breached the agreement – whether the defendants were entitled to terminate the agreement – whether the defendants repudiated the agreement

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – STATEMENTS AS TO FUTURE MATTERS AND PROMISES – where the plaintiff made representations as to future matters – whether the plaintiff made misrepresentations to the defendants which induced them to enter into the franchise agreement

TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – CONSTRUCTION OF AGREEMENTS – PARTICULAR AGREEMENTS – where the plaintiff seeks to restrain the defendants from continuing its photography business – whether the plaintiff should be granted an injunction

INTELLECTUAL PROPERTY – CONFIDENTIAL INFORMATION – INFORMATION PROTECTED – where the plaintiff argues the defendants used customer details as a ‘springboard’ – where the plaintiff argues the defendants used software it had developed – whether the software was confidential information

Trade Practices Act 1974 (Cth), s 45B, s 52, s 53
Trade Practices (Industry Codes – Franchising) Regulations 1998 (Cth)

Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26, cited
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115, applied
Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd [1894] AC 535, cited
Peters (WA) Ltd v Petersville Ltd (2001) 205 CLR 126, cited

COUNSEL: C Muir for the plaintiff
S Cooper for the second, third and fourth defendants
No appearance for the first defendant

SOLICITORS: Rostron Carlyle Solicitors for the plaintiff
Holding Redlich Lawyers for the second, third and fourth defendants
No appearance for the first defendant

[1] This is a dispute about a franchise for the operation of a photography business under the name "Little Images". The business was conducted from a studio at Mt Gravatt under a franchise agreement which commenced on 15 February 2005. By March 2006, the agreement had been terminated. Each side says that it was the party which terminated and in consequence of the other's breach or repudiation.

[2] The plaintiff, which was the franchisor, sues to recover outstanding royalty fees and other amounts which it says fell due during the life of the agreement. It sues for damages for the loss of the contract. It also seeks an injunction, to enforce a restraint of trade provision in the franchise agreement. All of this relief is claimed against the first, second and third defendants. On one view of the franchise agreement, they were each franchisees. On another view, the first defendant was the franchisee and the second and third defendants guaranteed its performance of the contract.

[3] From March 2006, the first defendant continued to carry on a photography business on these premises but under the name "Picture Moments". That business was conducted by the second and third defendants through the fourth defendant. The plaintiff contends that the defendants have wrongfully used confidential information which was obtained during the operation of the franchise. The plaintiff claims from them compensation or an account of profits upon that basis.

[4] Then there is a counterclaim. The second and third defendants claim that they were induced to enter into the franchise agreement by conduct of the plaintiff which was in contravention of s 52 of the *Trade Practices Act 1974* (Cth). They claim relief, pursuant to s 87 of that Act, to set aside the franchise agreement or to otherwise exempt them from liability under it.

Before the contract

[5] The plaintiff company was registered in February 2002. Its only director is Mrs Farley but it was effectively directed also by her husband, Mr Farley, who seems to have had most to do with this franchise. From that year, the plaintiff began a business, which included photographic work in schools. That business is of little relevance to the present proceeding, which involves a franchise for a substantially distinct market from studio photography.

[6] Mr and Mrs Farley conducted the first Little Images studio from their home in Mansfield before moving the studio to premises at Herston. From this time, the plaintiff claims that it began to develop, through the efforts of Mr Farley, software which facilitated the conduct of the studio business. That software produced what were called "daily run sheets" which were effectively timetables, for visits by customers for sittings or viewings. It also produced things such as invoices and other documents which were given to the customer. This became the system used by the defendants under their franchise and which they continued to use, even through the fourth defendant, after its termination. Ms Worsley, a photographer

employed at various times by the plaintiff and then the first defendant at the Mt Gravatt studio, described it as better than most systems of this kind and easy to use.[1]

[7] In early 2004, the plaintiff leased premises at Alderley, from which a Mrs Donaldson conducted a photographic studio under what was described as an informal franchise arrangement. Mrs Donaldson's husband had assisted the Farleys with the Little Images school photography business. He had extensive experience in what he described as the franchising industry, having worked for a number of companies with large franchising networks such as Caltex. Mrs Donaldson's business ended towards the end of 2005, due to her illness. It seems that she paid royalties and an initial fee to the plaintiff. But the Donaldsons conducted their own marketing and did not contribute to a marketing fund, which is a subject of considerable debate between the present parties.

[8] In June 2004, the plaintiff agreed to lease what became the studio at Mt Gravatt. It was granted a lease for five years commencing 1 July 2004 and commenced business there almost immediately. It employed Ms Worsley from September 2004 until she went overseas at the end of that year. Ms Worsley effectively conducted the studio, working both as a photographer and business manager. At that time, no one else worked there.

[9] The second defendant and the third defendant are husband and wife. Prior to the relevant events, each had considerable business experience. In 2004, he conducted a business called Kwik Kopy from a shop in the same building where the studio was located at Mt Gravatt. He is an engineer with experience, he said, in computer programming.[2] The third defendant had retired from the work as an IT systems analyst in 1999 to look after her children and after having suffered a permanent cervical disc injury in a motor accident which prevented her from sitting for long periods. They became interested in a photography business and began to discuss that with Mr Farley. The outcome was the franchise agreement, in the form of document prepared by Mr Farley. It was signed by the second and third defendants on Christmas Eve 2004. The plaintiff's signature is undated. It provided for the commencement of the franchise on 15 February 2005.

The franchise agreement

[10] The first page of the document contained its title and the names of the plaintiff and the first defendant. The names of the second and third defendants did not there appear. However within a two page schedule, forming part of the document, these names appeared against the word "Franchisee":

> "Garry T L You and Shirley C S Oh
> Fresh View Venture Pty Ltd as trustee for the
> G & S Trading Family Trust"[3]

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1 T 3-5.
2 T 4-9, 12.
3 Exhibit 15.

Also in the schedule, the names of the second and third defendants appeared against the word "Guarantors". By cl 68, "the Guarantor" guaranteed the performance of "your (an apparent reference to the franchisee) obligations under this Agreement" and indemnified the franchisor against any loss from the franchisee's non-performance. The second and third defendants signed for themselves, as did the plaintiff. There was no signature on behalf of the first defendant. Nevertheless, it is clear enough that the first defendant was an agreed franchisee and, I conclude, the agreed franchisee. It is now deregistered. Although there are very many issues in this case, the outcome is not affected by whether the second and third defendants were franchisees or guarantors. I shall refer to the first defendant as the franchisee.

[11] By cl 5, the franchisee was granted a "non exclusive Franchise … during the Term".[4] The amounts to be paid by the franchisee were described in cl 10 as various kinds of fees. In this and other respects, the terms of this agreement suggest that they were heavily borrowed from some template, rather than being drafted by a lawyer and according to the specific circumstances of this transaction. This was, of course, the first "studio franchise" which was granted by the plaintiff. As it happened, it proved to be the last. Thus, for example, the first of the agreed fees was a "Start Up Fee", a term which was defined by reference to Item 6 in the schedule, which recorded "$nil".

[12] There was the so-called "Franchise Fee" which was defined to mean:

> "The Franchise Fee is the fee which You pay Us (in addition to the Royalty Fees) for the right to use the Business name, Trade Marks and to receive the other benefits We will provide in accordance with this Agreement, including the ongoing advice and assistance We give You from time to time throughout Your Franchise. The amount of the Start Up Fee will be credited to the Franchise Fee."[5]

Item 7 of the schedule specified the amount "$30,000 + GST" as the Franchise Fee. It appears that this amount was paid.

[13] The franchisee was also to pay "the Training Fee" which was defined as follows:

> "The Training Fee is the amount You are required to pay Us for providing You with initial training on how to operate a Franchise. The amount of the Training Fee is set out in item 8 of the Schedule Items. The initial Training Fee is included in the initial Franchise Fee."[6]

In Item 8 of the schedule, against "Training Fee" was this:

> "$5,000 (included in the initial Franchise fee)"

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4 Five years commencing 15 February 2005 according to items 15 and 16 of the schedule and cl 1 and cl 7.

5 Exhibit 15, cl 1.

6 Ibid.

[14] There was a so-called "Equipment Fee", which was payable also according to cl 21, for the plaintiff's provision of what was described as "the Approved Equipment". That was defined as follows:

> "A list of the Approved Equipment is provided in the Manual. This includes equipment required to fit out, set up and run your Little Images Studio."[7]

I shall return to the question of what constituted "the Manual".

[15] The franchisee was to pay royalty fees, in the amount of 12 per cent of the franchisee's gross sales.[8] Every week the franchisee was to report its gross sales and to pay the required royalty on that amount. The royalty fees were also defined as follows:

> "The Royalty Fees are the fees, which You pay Us (in addition to the Franchise Fee) for the right to use the Trade Marks. They are also for the ongoing advice and assistance We give to You from time to time throughout your Franchise. The Royalty Fees are calculated as a percentage of your Gross Income. The relevant percentage is set out in item 12 of the Schedule Items."[9]

[16] Next there was an obligation to pay what were described as the "Marketing Fees", more particularly the "Local Marketing Fee" and the "National Marketing Fee". Each was agreed in an amount of four per cent of gross sales and was to be paid weekly with the Royalty Fees.[10] Clause 14(a) provided for a so-called "National Marketing Fund" as follows:

> "We operate a National Marketing Fund. The contributors to the fund are the franchisees of the Little Images Studio Franchise.
>
> You will pay the National Marketing Fees to Us at the same time as the Royalty Fees, payable under clause 11.
>
> If We own or operate a business substantially the same as the Franchise, then We will contribute to the fund in the same way You do.
>
> The National marketing Fund will be controlled and administered by Us, in consultation with you, and governed by the relevant provisions of the Code.
>
> The Fund will be subject to audit by an independent and registered company auditor within 3 months after the end of each financial year.

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7 Ibid.

8 Clause 11 provided that the relevant percentage was that set out in Item 12 of the schedule, apparently an intended reference to Item 13 of the schedule.

9 Exhibit 15, cl 1.

10 Ibid, items 14 and 15.

> The audited financial statements of the advertising fund will be made available to you either by inspection or delivery within 30 days of receipt of such request.
>
> The marketing fund will be used solely with respect to expenses incurred in relation to the marketing, advertising and promotion of the franchise."

Clause 14(b) was in identical terms, except that it referred to the Local Marketing Fund and the payment of the Local Marketing Fees.

[17] Included within the contract document was a single page headed "Warranties Schedule". This page is relevant for many of the arguments, but at this point it can be noted that, by its paragraph 6, it recorded this:

> "The allocation of the initial marketing fees of $10,000 is 50% local marketing fund and 50% national."[11]

No other part of the agreement referred to such "initial marketing fees". In particular, there was no provision to the effect that they were to be included within the Franchise Fee. As it happened, the parties treated them as so included and the plaintiff paid $5,500 (apparently $5,000 plus GST) to each fund. The plaintiff sent a tax invoice addressed to the second defendant, dated 27 January 2005, in an amount of $30,000 plus GST, broken up as follows:

"Mt Gravatt Little Images Studio Franchise

Training	$5,000
National Marketing	$5,000
Local Marketing	$5,000
Franchise Fee	$15,000."[12]

The defendants' complaints

Competition

[18] Perhaps the principal complaint by the defendants is that the plaintiff subsequently opened studios at Alexandra Hills and Sunnybank Hills with actual or potential consequences for the Mt Gravatt business. Critical to those arguments is cl 6 of the franchise agreement which must be set out in full:

> "6. Your Franchise is Studio based and limited to the Location and to a maximum number of clients per week. You must not operate your Franchise outside the Location, except in accordance with clause 6(b).

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11 Ibid, p 38.
12 Exhibit 19.

> You may operate Your Franchise outside the Location only with Our prior approval (which will not be unreasonably withheld).
>
> You acknowledge that:
>
> (a) Subject to this Agreement, the Location is exclusive to You;
>
> (b) Despite clause 6.3(a), we reserve the right to permit other franchisees to operate within the Location for marketing purposes only, in accordance with the terms of this Agreement;
>
> (c) Other franchisees may operate a business that is substantially the same as Your Franchise, subject to the limits of each franchisee's Location;
>
> (d) We, or one of our associates, may operate a business that is substantially the same as Your Franchise;
>
> (e) The number of sittings that are permitted to be taken at your studio –
>
> - A minimum of 20 sittings per week
> - A maximum of 25 sittings per week
> - Calculated at an average over a one year period with no quarter averaging over or under 20% of this range.
>
> (f) We, or one of our associates, may establish other franchises that are substantially similar to Your Franchise;
>
> (g) You may not operate another business substantially the same as Your Franchise outside the Location without Our prior written consent; and
>
> (h) We may alter the Location of Your Franchise."[13]

By cl 1, the term "Location" was defined as follows:

> "Location means the geographical location at which you are authorised to operate your Franchise. The name of the Location is described in item 5 of the Schedule Items."[14]

In Item 5 of the schedule, against "Studio Location", was this:

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[13] Exhibit 15, p 10.

[14] Ibid, p 5.

> "6/224 Wishart Road, Wishart, 4122.
> Marketing in Garden City Shopping Centre"[15]

(This is what I have described as the Mt Gravatt Studio).

[19] At this point several things should be noted about the franchisee's protection or otherwise from competition. The first is that the franchisee was to operate only from this address, or another address as directed or approved by the franchisor. Secondly, there was no grant of an exclusive right to conduct a Little Images studio within a certain area, such as within a certain suburb. Thirdly, the franchisee was to conduct its business within a narrow range of 20 to 25 sittings per week. It is at least arguable that the plaintiff was bound not to permit another franchisee or itself to open the studio if the consequence would be that the defendants would be unable to enjoy that range of business. However, the Alexandra Hills studio, which was opened in about April 2005, is not shown to have had that effect. Nor was that the consequence of the opening of the Sunnybank Hills studio in late 2005. According to Ms Worsley, from her return to work at this studio (working for the defendants) from late April 2005 until well after the termination of the franchise, the Mt Gravatt studio was always busy, more often than not requiring her to work more than a full working day. In his final submissions, counsel for the defendants conceded that there was no demonstrated impact upon this studio from those at Alexandra Hills and Sunnybank Hills, but suggested that it was likely that Sunnybank Hills would have had an impact had the defendants continued their business as a Little Images studio. I will return to that question.

[20] The Warranties Schedule was a page, consisting of 13 paragraphs or clauses and containing no indication that it was drafted by a lawyer or taken from a document which was so drafted. For example, its paragraph 13 provided that the initial term of five years would be extended, although not at the option of one or other of the parties. That provision is of no particular significance for this case. But several other parts of this Warranties Schedule are critical for the defendants' arguments and it is convenient to set out the terms of them as I deal with those arguments.

[21] The first and most important of these provisions is paragraph 7 of this page which provided:

> "7. Until a master franchisee is engaged for this region, the franchisor will provide support for this franchisee to reasonable extent."[16]

The defendants say that this term was breached in many ways, but most importantly by the plaintiff's opening the Alexandra Hills and Sunnybank Hills studios. At this point, it is necessary to say something of the ways in which the Little Images studios were promoted for business.

[22] Most commonly, Mr Farley would use a space within the walkways of a shopping centre, to which customers would be attracted by the prospect of winning a prize in

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15 Ibid, p 1.
16 Ibid, p 38.

a competition. Potential customers would write their names and contact details on pieces of paper to enter the competition, which Mr Farley called "leads". These promotions occurred at shopping centres every couple of months. This explains the terms of paragraph 8 of the Warranties Schedule which was in these terms:

> "8. Three times a year, the franchisee is expected to conduct one-week promotions at shopping centre sites in the vicinity of the studio and allocated by the franchisor. Only one person is needed to do the promotion and could be an employed staff, while the props will be lent free of charge by the franchisor/master franchisor. The expense is shared half each by this franchisee and the local marketing fund, provided this franchisee has achieved $4000 in average weekly sales, otherwise the expense is fully borne by this franchisee. This condition of $4000 average sales is waived in the first year."[17]

There were similar promotions at an event described as the Annual Baby Show at the Brisbane Convention Centre.

[23] Another source of business was by referrals from an entity called Twinkle Toes. This business made for parents plaster casts of the hands and feet of their babies. The casts were often supplied in a frame which would also accommodate a photograph, and in that context, it would refer customers to the Little Images studio or studios. It was situated at Stretton, closer to the plaintiff's studios at Alexandra Hills and Sunnybank Hills than the defendants' studio.

[24] It may be accepted that the amount of potential business for all of these studios was not unlimited and that inevitably there were some "leads" which were the source of potential business, both for the plaintiff's studios and the defendants' studio. It must also be accepted that the opening of the plaintiff's studios would have had some tendency to divert potential customers from the defendants' studio, upon referrals from the Twinkle Toes business. In those ways, the studios conducted by the plaintiff were to some extent in competition with the defendants' business. But as noted already, this did not leave the defendants' studio without sufficient work.[18] Nor is it demonstrated that this would have been the consequence of this competition, had the franchise not been terminated. There is no suggestion that the plaintiff promoted its studios as being in some way superior to that at Mt Gravatt.

[25] The defendants' argument must overcome the difficulties presented by the terms of the franchise agreement which I have set out and discussed at [18]-[19]. I have said that it is arguable that the plaintiff was precluded from acting in a way which would prevent the franchisee from performing its obligation to achieve a minimum of 20 sittings per week. But it is another thing to say that the plaintiff was precluded from opening another studio which, in an individual case, might divert what would otherwise have been the defendants' customer. The terms of cl 6 of the franchise agreement provide no indication of that intention. Therefore the defendants are

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[17] Ibid.

[18] See [19] above.

driven to rely upon paragraph 7 of the Warranties Schedule. That was to operate only until “a master franchisee is engaged for this region”. It anticipated the prospect that another entity would be placed between this franchisor and franchisee, although the terms of the franchise agreement otherwise made no provision for that event. It made no provision for the substitution of a new franchisor by the novation of this agreement or otherwise. That limitation of the operation of cl 7, until the engagement of a master franchisee, makes the defendants’ argument yet more difficult to accept. It is an unlikely intention to attribute to the parties that the franchisee should be immune from the potential impact of another Little Images studio, but not once a master franchisee was appointed.

[26] The obligation to “provide support for this franchisee” was a positive obligation to provide assistance, such as by advice, rather than a promise not to do something which might have some potential impact upon goodwill. When put against cl 6 of the agreement, this promise to provide support to the franchisee cannot be understood in the way for which the defendants contend. The opening and conduct of the Alexandra Hills and Sunnybank Hills studios was not a breach of this term or otherwise a breach of the contract.

Marketing funds

[27] The defendants make a number of complaints about the marketing funds. One such complaint is that the plaintiff failed to have each fund audited within three months from the end of the relevant financial year, which was that ending 30 June 2005. That breach is proved. The audit was conducted but the auditor’s report was dated 28 December 2005, outside the period of three months as agreed in cl 14(a) and (b). The audited accounts were sent by Mrs Farley to the defendants’ lawyers on the same day.[19] There appears to be no complaint that the audit was not that required by the franchise agreement, save for its lateness.

[28] The plaintiff argued that the second and third defendants had agreed that an audit was not required. I reject that contention which is inconsistent with the contemporaneous documents, and in particular, with the minutes of a meeting attended by Mr Farley and the second and third defendants on 6 September 2005[20] and a letter from the third defendant of 3 October 2005.[21] Nor do I accept that the plaintiff was prevented from having the audit conducted within the time required, by some conduct on the part of the third defendant. The audit seems to have required a simple exercise of reconciling documents relating to a few bank accounts, involving a small number of relevant transactions. It does appear that some documents, in the nature of weekly returns from the franchisee for royalty and marketing fees, were being sought by Mrs Farley from the third defendant in late November 2005. But as the third defendant then put to Mrs Farley, and as she maintained in her evidence, she had previously provided these forms to Mr Farley, when they were due in March and April that year. I accept that evidence. It is more likely that the plaintiff had misplaced those few returns than that, at this early stage

[19] Exhibit 47.
[20] Exhibit 35.
[21] Exhibit 36.

of the franchise, the defendants had failed to provide them and the plaintiff had overlooked their absence.

[29] There is also a complaint that the plaintiff did not contribute to each of these funds, as was required by that part of cl 14(a) and (b) which provided:

> "If We own or operate a business substantially the same as the Franchise, then We will contribute to the fund in the same way You do."

The defendants point to what they say was their initial contributions of $5,000 to each fund and the absence of a like contribution from the plaintiff when it opened its studios. The plaintiff's response is that the franchise agreement did not require it to make that same initial contribution, but rather to provide contributions from the turnover of its studios at rates corresponding with the weekly marketing contributions required of this franchisee. The evidence establishes that some contributions were made in relation to the Alexandra Hills studio at least.[22] There was no attempt by the defendants to prove that the plaintiff's contributions were deficient, save for the suggested requirement of a like initial contribution of $5,000 to each fund.

[30] The plaintiff's promise to make a like contribution to the funds appears, in each case, in the clause that required the payment of recurrent marketing fees, week by week, by the franchisee. It is that contribution by the franchisee which the franchisor agreed to match. The complication, of course, is paragraph 6 of the Warranties Schedule, which whilst referring to "initial marketing fees of $10,000", did not require them to be paid. Nor was there another provision of the agreement, whether within the Warranties Schedule or otherwise, which so provided. The true agreement in this respect was probably contained not only within the contract document, but also within what the parties had said to each other. It seems to be common ground that, according to what the parties agreed at the outset, the plaintiff would cause $10,000, from the Franchise Fee of $30,000, to be placed in these distinct marketing funds. The defendants' argument is that having agreed to spend some of its Franchise Fee in that way, the plaintiff further promised to spend a further $10,000 of its own money each time it opened another studio. But a promise to that effect does not appear in the franchise agreement. The better view is that the promise within each of cl 14(a) and (b), to "contribute to the fund in the same way You do", was a reference to the franchisee's recurrent contribution as was required by the immediately preceding sentence within each such clause. Consequently, there is no demonstrated breach in the nature of a failure by the plaintiff to contribute to the marketing funds.

[31] The next complaint is that there was a failure to provide reasonable support to the franchisee by the way in which the Local Marketing Fund was spent. The defendants complain, in particular, about promotions at the Capalaba Park Shopping Centre in April 2005 and at the Victoria Point Shopping Centre in June 2005. These cost, respectively, $440 and $550. Mr Farley conceded that at least most of the

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[22] See in particular the document headed "Deposits into bank accounts" forming part of exhibit 110.

leads from the Victoria Point promotion went to the Alexandra Hills studio.[23] I would infer the same in relation to the Capalaba promotion. But I do not accept that this involved a breach of the franchise agreement.

[32] At one point in the defendants' argument, it seemed to be suggested that this Fund could be spent only for the promotion of the Mt Gravatt studio. Within each of cl 14(a) and (b), it was provided that the Marketing Fund would be "used solely with respect to expenses incurred in relation to the marketing, advertising and promotion of the franchise". But that cannot be read as a reference only to the franchise granted by this agreement, i.e. to the Mt Gravatt studio. For example, that would be inconsistent with the requirement that there be a like contribution to the same fund in the event that other studios were opened. The term "Franchise" was defined in the agreement as follows:

> "Franchise is the name given to the rights, which We grant to Franchisees to conduct a business in accordance with our established business format."[24]

That is the sense in which the term "franchise" is used in cl 14(a) and (b): the Fund was to be used solely for promoting a network of franchised studios.

[33] Inevitably, the application of these marketing funds might have unequal benefits across different studios, at least because the place of the promotion would be closer to one studio than to others. The fact that these two promotions were likely to have benefited another studio does not mean that the funds were misapplied, in breach of cl 14. Nor does that mean the plaintiff failed to provide reasonable support to the franchisee at Mt Gravatt. To the extent that the discharge of that obligation was relevant to the disposition of the marketing funds, it required the franchisor to consider the need for support in the form of a promotion of the Mt Gravatt studio. But the defendants have failed to establish that they were denied support in that way. As I will discuss, this was a profitable business in the hands of the defendants. Again, there is Ms Worsley's evidence that the Mt Gravatt studio was always busy.[25]

Training

[34] The defendants say that the plaintiff did not provide the training which the agreement required. Paragraph 1 of the Warranties Schedule provided that the "initial training period" was to be four weeks. Apparently, this was the training for which "the initial Training Fee", as referred to in the definition of "the Training Fee", was to be paid. Clause 30 of the franchise agreement provided, in part, as follows:

> "Before the Start Date, You and Your Nominated Representative must undertake a training program that We have designed for our Franchisees. The cost of that initial training program is covered in

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23 T 2-29.
24 Exhibit 15, cl 1.
25 T 3-9.

the Training Fee. We will nominate the time, place and duration of training program.

We may provide such other training as We (in our absolute discretion) deem necessary from time to time for the successful operation of the Franchise. If We elect to conduct further training, the maximum amount You will be required to pay will be the Additional Training Fee."[26]

[35] The specific complaint, as explained by the third defendant in her evidence, was that she as the Nominated Representative[27] was not trained in photography and photo editing. However, the required training was not in those respects, but in how to operate a franchise. By cl 3 of the Warranties Schedule, the parties agreed as follows:

> "3. As this franchisee is employing a full time photographer, this franchisee and the nominated representative are not expected to be at the studio full time. This franchisee and the nominated representative will put in a total of at least 20 man-ours (sic) a week, out of which some of the time could be working from home."[28]

Consequently, it cannot be thought that there was an agreement to train the third defendant, or any of the defendants, as a photographer or photo editor. Moreover, the agreement expressly acknowledged that the photographer for the Mt Gravatt studio would be employed by the franchisee. And there was no breach of the agreement by failing to provide the required initial training. There is no complaint of a failure to provide ongoing training. No Additional Training Fee was charged.

The manual

[36] The next matter involves the franchisee's Manual. The term "Manuals" was defined as follows:

> "The Manuals are the operational documents that contains some of the procedures and standards that We prescribe for operating your Franchise."[29]

Clause 26 of the franchise agreement provided:

> "26. MANUALS
>
> During the Term, We will lend You a copy of our Manuals. This will be in the form of a soft copy posted on Our website. This manual will be updated from time to time.

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26 Exhibit 15, p 22.
27 By item 17 of the schedule to the agreement.
28 Exhibit 15, p 38.
29 Ibid, cl 1.

> The Manuals remain our property at all times and You must not copy or allow the Manuals to be copied by any person.
>
> You have no rights or interest in the Manuals other than the right to use them as a reference source for operating your Franchise.
>
> The Manuals describe how You must do certain things in operating your Franchise and You are required to follow the Manuals at all times where a particular matter is included in them.
>
> From time to time We may add to or amend the Manuals and You are required to comply with the amendment or addition from the time You receive notice of it.
>
> You must meet the Performance Criteria specified in the Manuals. If You do not meet the Performance Criteria, We may terminate this Agreement."[30]

[37] In each of those provisions, the manual was described in terms of a prescriptive document, directing the franchisee how to operate its business, rather than an informative document primarily for the franchisee's assistance. However, paragraph 5 of the Warranties Schedule added this:

> "5. At the time of signing the agreement the manual does not exist. It is understood the manual will be mutually drawn up by the franchisor and franchisee. The manual will have reasonably achievable goals and performance criteria in accordance to (sic) acceptable business practices. The manual will contain information, guidelines and procedures for the proper functioning of the business, and for the good of the franchise system and brand name."[31]

According to that term, both sides were responsible for the production of this document. Yet the defendants' case is not so much that they were prevented from making their contribution, but that the plaintiff provided a manual, if at all, far too late.

[38] According to the evidence of Mr Farley and Mr Donaldson, a draft of the manual was provided to the second and third defendants at their regular meetings in either August or September 2005. The second and third defendants agree that something was provided in September but, at one stage at least, there is a dispute as to what was then provided. The defendants say that they were provided with a document consisting of five pages of text and three pages of index, from which it appeared that most of the text was yet to be written.[32] This document corresponds with what appears in the minutes of the meeting of 6 September 2005, which records that an "[o]utline of the manual in the form of [a] contents page and a draft of one section was submitted by [Mr Donaldson]".[33] That item in the minutes was shown as

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30 Ibid, p 20.
31 Ibid, p 38.
32 Exhibit 155.
33 Exhibit 35.

requiring “action by” Mr Farley. According to the evidence of Mr Donaldson and Mr Farley, a complete draft was prepared and offered to the defendants at a subsequent meeting, which Mr Donaldson said was in October 2005.[34] He said that he had a definite recollection that at this meeting, Mr Farley put the draft in front of the defendants and said that they could take it away, but that they declined to do so. That draft was identified as the document which became exhibit 89. I accept the evidence of Mr Farley and Mr Donaldson on this question. It is relatively unlikely that this draft manual was fabricated after the event, in order to assist the plaintiff’s case. Nor is it likely that it was prepared during the life of the franchise but that, through oversight or otherwise, it was not provided to the defendants. The September minutes record that a full draft was to be prepared and the presentation of such a draft at the October meeting was then not an unlikely event.

[39] When cross-examined, the second defendant admitted that there was a draft manual which was on the table at the October meeting but said that no-one had referred to it. He claimed that sometime after that meeting, when he read the plaintiff’s claim that the manual had been made available to them, the second defendant told his wife that he realised that the draft manual must have been on the table. I cannot accept that account. It is very unlikely that having gone to the trouble of preparing the document, neither Mr Farley nor Mr Donaldson would have mentioned it at the meeting. What is more likely is that the second and third defendants by that stage were not interested in the document because they were looking to withdraw from the franchise. It was in that month of October 2005 that the defendants stopped paying royalty and marketing fees. Moreover, whilst the defendants prepared the documents put forward as the minutes of their meetings with Mr Farley and Mr Donaldson in August and September, no minutes of the October meeting are available. I find that the full draft of the manual was presented to the defendants at the October meeting but that they declined to take it away.

[40] The question then is whether this involved a breach of contract by the plaintiff. The franchise was granted on 15 February 2005. The defendants say that by necessary implication, the manual was to be provided within a reasonable time. I accept that such a term must be implied. Paragraph 5 of the Warranties Schedule required the manual to be drawn up by both sides. But because the document was to prescribe standards to be met by the franchisee and also to provide the franchisee with information and guidance, necessarily the drafting of the document had to be initiated by the plaintiff. More than a reasonable time had passed by October 2005. A breach of contract is therefore established. But the plaintiff remedied that breach at the October meeting.

Equipment

[41] Clause 17 of the franchise agreement was headed “Technical Support”. It provided, in part, as follows:

> “We will provide You with:

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34 T 2-57.

(a) technical support;

(b) any and all improvements in service and equipment;

(c) regular communications regarding matters of relevance to the Franchisee; and

(d) ongoing training at reasonable rates for You and Your staff.

…"[35]

The defendants allege that this term was breached in that the plaintiff failed to provide them with "improvements in … equipment", by not providing them with a new computer and a new camera. Amongst the items in the studio when the franchisee took over were a computer and a camera. But at some point the plaintiff agreed that they should be replaced. On or about 23 December 2005, the computer was replaced, as is shown by the receipt which the second defendant signed that day.[36] The same document indicates that a replacement camera was then available to the defendant but that the defendant had not taken possession of it. It was conceded by the second defendant that a replacement camera was then offered.[37] The complaint is that it took the plaintiff too long to supply or to offer to supply these items, involving a breach both of cl 17 and the obligation to provide reasonable support to the franchisee.

[42] I am not persuaded that the supply or offer of these items was so slow as to involve a breach of contract. It is significant that when the third defendant wrote a lengthy letter to Mr Farley on 6 November 2005, making very many complaints as to the plaintiff's performance, the new camera was not mentioned and the new computer was raised only indirectly.[38] The complaint there was that there was a delay in the provision of what was referred to as an "online system". This was the subject of paragraph 4 of the Warranties Schedule, by which it was agreed that the plaintiff would "…make available in 2005 an Internet based customer database and leads allocation system".[39] In her letter, the third defendant complained that the "promised online system [was] very much delayed", detracting from the defendants' confidence in moving over to the system. She wrote:

> "We are still waiting for you to point us to the online system where we are able to test it ourselves. You claim you need to install a new computer for us in order to do that and yet it has not been done."[40]

There is no pleaded complaint about the online system.

[43] In a letter from the defendants' solicitors to the plaintiff of 15 December 2005, there was a complaint that the plaintiff had been requested to provide a replacement computer and camera, although it was not specified when this request had been

35 Exhibit 15, p 16.
36 Exhibit 45.
37 T 3-81, 82.
38 Exhibit 38.
39 Exhibit 15, p 38.
40 Exhibit 38.

made.[41] This appears to have been the first written complaint as to the camera and, apart from that indirect reference to a new computer for the purpose of testing the online system, the first written complaint about the computer. Those complaints were answered some eight days later. I am not satisfied that there was an unreasonable delay in the provision, or the offer to provide these items. No breach in respect of them is proved.

Plaintiff non-responsive

[44] Lastly there is an alleged failure by the plaintiff to respond to the defendants' expressed concerns or complaints. These included the opening of the Alexandra Hills and Sunnybank Hills studios, the request for a new camera and computer, the progress of the draft manual and the disposition of the marketing funds. They complained that Mr Farley was too slow to respond to emails. They point to concerns raised at the monthly meetings on 9 August and 6 September 2005 and the complaints made in their letters of 6 and 23 November 2005.[42] There was no term which specifically required the plaintiff to respond to such concerns or complaints. The defendants' argument is that the plaintiff was bound to do so pursuant to its agreement to provide reasonable support for the franchisee, under paragraph 7 of the Warranties Schedule. This breach is not proved. To the extent that the complaints by the defendants had merit, such as with the late audit of the Marketing Funds and the late provision of the manual, the plaintiff did respond by remedying the breach. Any tardiness in, for example, responding to emails was not a breach of contract unless it corresponded with some failure to provide to the franchisee something which was required by the agreement, and it was not a failure to provide support if the result of that tardiness was not to materially affect the franchisee's business. The defendants have not attempted to establish that there was such an impact.

Reasonable support

[45] Many of the defendants' complaints were argued in terms of a failure to provide reasonable support, in breach of paragraph 7 of the Warranties Schedule. The delays in the provision of audited accounts and a manual did not involve also a breach of that term. Nor was that term otherwise breached.

Towards termination of the contract

[46] I mentioned the letters from the third defendant to the plaintiff of 6 and 23 November 2005 which made most of the complaints argued as well as several others. By this stage, the weekly returns were no longer being provided to the plaintiff and nor were royalty and marketing fees being paid. By late November, the defendants had decided to conduct their business outside the franchise. In her diary for 25 November 2005, the third defendant made a note to that effect.[43] From about 5 December 2005, the franchisee was sending its printing work to another

41 Exhibit 43.
42 Exhibit 41.
43 Exhibit 156.

firm. This was a breach of cl 12 of the franchise agreement which provided, in part, as follows:

> "You must:
>
> (a) only supply customers with the Approved Products and Services;
>
> …
>
> We will:
>
> …
>
> (c) provide the facilities for the production of the Approved Products and Services and You will deal exclusively with Us in this regard."[44]

Clause 1 contained this definition:

> "The Approved Products and Services are the range of products and services that you will supply to customers, which are listed in the Manual."[45]

The manual did not contain a list of approved products and services so called. But it did provide for the supply to customers of printed images and it also provided that all images were to be sent to the plaintiff for printing and that printing elsewhere was not allowed without the plaintiff's prior consent.[46] Therefore, it required all of the photos sold through the defendants' studio to be printed by the plaintiff.

[47] The defendants argue that cl 12 had no effect at all. They argue that cl 12 was meaningless because it referred to Approved Products and Services by reference to a document (the manual) which did not exist. However, the parties specifically acknowledged, within the franchise agreement, that at the time of signing the agreement the manual did not exist and that it was to be prepared.[47] Therefore, cl 12 was not meaningless. It referred to the proposed manual which was to be "mutually drawn up". As it happened, the franchisee made no contribution to it. But nor did it object to any part of the manual and the defendants cannot say that the manual was deprived of what would have been its contractual effect because they declined to participate in its preparation. The result is that the franchisee was in breach of cl 12, by sending its photographs for printing elsewhere from early December 2005.

[48] On 14 December 2005, the defendants changed the locks on the studio. Shortly afterwards they discussed with Ms Worsley whether she wished to work for them when it ceased to be a Little Images studio. On 16 December 2005, the defendants caused to be registered the business name "Picture Moments" as the proposed new

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44 Exhibit 15, pp 13-14.
45 Ibid, pp 2-3.
46 Paragraphs 3.1.7 and 6.2 on pp 25 and 42 of exhibit 89.
47 Paragraph 5 of the Warranties Schedule.

name for their studio.[48] Even from this point, they began to use that name in some ways, and in particular in their dealings with their new printer.[49] But all of this was kept from the plaintiff.

[49] On 15 December 2005, solicitors for the defendants wrote to the plaintiff making several allegations of breaches of contract and contraventions of ss 52 and 53 of the *Trade Practices Act 1974* (Cth). They also alleged that the contractual limitation upon the number of sittings per week contravened s 45B of that Act, upon the basis that it had the effect of substantially lessening competition in a market. This letter was expressed to be written pursuant to regulation 29 of the *Franchising Code of Conduct* ("the Code").[50]

[50] Clause 40 of the franchise agreement referred to Part 4 of the Code as setting out a procedure "…that must be followed to help resolve disputes" and provided that "that procedure will apply to any disputes which arise between You and Us in connection with your Franchise".[51] This corresponded with cl 26 of the Code, within Part 4, which required a franchise agreement to provide for a complaint handling procedure that complied with cl 29 and cl 30 of the Code. Clause 27 of the Code was in these terms:

> "A party to a franchise agreement who has a dispute with another party to the franchise agreement may start the procedure under clause 29."

Clause 29 provided that the complainant was to inform the respondent in writing of the nature of the dispute, the outcome wanted by the complainant and the action which the complainant thought would settle the dispute. It required the parties to then endeavour to resolve the dispute, failing which there would be a mediation. This procedure was optional, according to cl 27 of the Code. But in cl 40 of the franchise agreement, the parties said that it was a procedure which must be followed. The parties may have there misstated the effect of Part 4 but they appear to have agreed that the procedure was mandatory in their case.

[51] The solicitors' letter of 15 December 2005 said that the defendants wanted various things done by way of performance of the agreement and that if they were done, the dispute would be resolved. They advised that the defendants were prepared to attend a mediation under cl 29 of the Code.

[52] On 22 December 2005, Mr Farley for the plaintiff addressed a notice to remedy breach, given pursuant to cl 21 of the Code, to the defendants.[52] Clause 21 required a franchisor to provide to the franchisee reasonable notice of its proposal to terminate the franchise agreement because of the latter's breach, providing it with an opportunity to remedy that breach. The breaches set out in the notice were the

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48 Exhibit 2.
49 Exhibit 153.
50 *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Cth).
51 Exhibit 15, p 26.
52 Exhibit 44.

failures to provide weekly reports and pay royalty fees from 31 October. It required the breaches to be remedied within seven days.

[53] On 27 December 2005, the plaintiff gave another notice to remedy breach, complaining that the franchisee had failed to provide a profit and loss statement for the period ending 31 March 2005.[53] That was required by 30 May 2005, according to cl 28 of the franchise agreement.

[54] On the following day, Mrs Farley wrote to the defendants' solicitors, enclosing the audited accounts for the Marketing Funds and advising that a copy of the manual was again available for collection. She also advised that the plaintiff was willing to participate in a mediation.[54]

[55] On 29 December 2005, the defendants' solicitors wrote to the plaintiff's solicitors, advising that the defendants were overseas and would not be able to respond to the Notice to Remedy until late in January 2006.[55] They wrote again on 4 January 2006, arguing that the plaintiff was not entitled to terminate the franchise agreement and that if it attempted to do so, the defendants would bring an urgent application for an injunction to restrain that step.[56] Another letter to the same effect was written on 19 January 2006.[57]

[56] On 25 January 2006, the defendants' solicitors wrote disputing the breaches set out in the Notices and the plaintiff's entitlement to terminate.[58] On 3 February 2006, the defendants gave the Notice to Remedy Breach which ran to some 18 pages and contained, for the most part, the allegations which are now made by the defendants in these proceedings.[59]

[57] On 1 March 2006, a mediation was conducted. Two days later, the franchisee purported to terminate the franchise agreement.[60] The plaintiff has treated that as a repudiation, and has treated the contract as at an end.

Who terminated the contract?

[58] The defendants argue the franchisee and they, as guarantors, were entitled to terminate on the basis of a sufficiently serious breach of a non-essential term of the contract. Ultimately, that argument focussed upon the alleged failure to provide reasonable support to the franchisee by opening the other studios, using the Marketing Funds for promotions directed to those studios rather than to Mt Gravatt and the failure to make the necessary contribution to those funds in consequence of

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53 Exhibit 46.
54 Exhibit 47.
55 Exhibit 50.
56 Exhibit 52.
57 Exhibit 55.
58 Exhibit 57.
59 Exhibit 58.
60 Exhibit 65.

opening the other studios. The defendants also rely upon other breaches as I have discussed. But the argument was not put in terms that the plaintiff had repudiated the contract in the sense of a renunciation of the contract, or in other words, that the plaintiff had evinced an intention to no longer be bound by the contract or to fulfil it only in a manner substantially inconsistent with the plaintiff's obligations.[61]

[59] The defendants' argument accepted that the existence of their right to terminate depended upon a breach or breaches by the plaintiff which have the effect of depriving the franchisee "…of substantially the whole benefit which it was intended that [it] should obtain from the contract…".[62] In other words, the defendants sought to prove that the plaintiff's breaches of contract were ones "going to the root of the contract".[63]

[60] I have concluded that there were some breaches, namely the lateness in the provision of a manual and audited accounts for the Marketing Funds. These breaches, even taken together, did not go to the root of the contract. The nature and degree of the breach was not serious. And neither is shown to have been deliberate, as distinct from being the result of inattention. Nor did either breach cause any adverse consequences for the franchisee and its business. It could not be said that those breaches affected the mutual confidence between the parties in the operation of the franchise relationship.

[61] Consequently, the defendants were not entitled to terminate the contract as they purported to do on 3 March 2006. They thereby repudiated the contract entitling the plaintiff to terminate. Subject to the defendants' case under the *Trade Practices Act*, the plaintiff is entitled to damages for the loss of the bargain.

[62] It is unnecessary then to consider the plaintiff's arguments that the defendants were disentitled to terminate because of their own breaches of contract or because they had elected to affirm the contract. On that latter question, it should be noted that the defendants acted upon the expressed basis that they were obliged to follow dispute resolution procedure within Part 4 of the Code. The fact then that they followed that procedure, culminating in the mediation, would affect the characterisation of their conduct throughout the relevant period.

Alleged misrepresentations

[63] The defendants pleaded many alleged misrepresentations which were said to have induced them to enter into the contract. Ultimately, not all of them were pressed.

[64] The second defendant's evidence was that prior to entering into the franchise agreement, he was told by Mr Farley that:

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61 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 135 [44].

62 Ibid at 138 [49] citing Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 69-70.

63 Defendants' written submissions, paragraph 64 citing *Koompahtoo* at 140 [54].

(a) the business was designed to be run by one person and that the third defendant would be required only to oversee that employee;
(b) the employed photographer would have to be paid a base salary of $540 with a potential commission of up to $120, based upon a 40 hour week;
(c) the plaintiff would provide a manual for the business; and
(d) the plaintiff would provide training to the franchisee.

The third defendant gave evidence that Mr Farley told her that:

(a) she would not need to be involved in running the business which would be run by an employed photographer; and
(b) the cost of employing a photographer would be $540 plus a bonus of up to $120.

Arguably, there is a difference between what each of them was told as to the required involvement or otherwise of the third defendant. But there is no difference in the result, because the representations, if made, were not in contravention of s 52.

[65] As to the first of them, I would accept that Mr Farley made some representation as to the limited involvement which would be required of the third defendant. I do not accept that it was a representation in terms of that related by the third defendant. She cannot have thought that she would have no involvement in running the business. The second defendant explained what was said to him about the need to oversee the photographer in this evidence:

> "And did you say anything to Mr Farley about Shirley's involvement in the business?-- Yes. I told him that I may be interested in buying a franchise for the studio photography from him and it's for my wife, Shirley, and I told him that she will not be able to run the business, and she is actually not really interested in running a business and we have to employ people to run it, and all she could do is to come in and check – check the store and make sure that the people are there and doing their job.
>
> And how did Mr Farley respond to that information?-- He said the studio he has is actually run – designed to be run by one person, a one person studio, and this person is a photographer and a manager, and he or she will be running the whole thing, and all Shirley needs to do is to come in and make sure that the – maybe a few days a week, just to make sure that the staff is doing the work, and in fact he told me that the studio he had next-door to Kwik Kopy is – he employed one person, one photographer, who is also a manager, and she does everything, and he only comes in sometimes, Leigh Farley."[64]

The best indication of the effect of what was said by Mr Farley is what was agreed in the Warranties Schedule in which paragraph 3 was in these terms:

> "3. As this franchisee is employing a full time photographer, this franchisee and the nominated representative are not

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[64] T 3-46.

> expected to be at the studio full time. This franchisee and the nominated representative will put in a total of at least 20 man-ours (sic) a week, out of which some of the time could be working from home."[65]

To the extent that the relevant representation, as related by the second or third defendant was different in effect from that term, the defendants were unable to explain why they agreed to the term. Of course, it is not uncommon for a person to enter into a contract, on the inducement of a representation which was inconsistent with a contractual term. But in this case, it was the representee who drafted the relevant term. That appears from the document which became exhibit 151, which the second defendant said that he prepared as "a list of different things that were discussed … things I was concerned about".[66] Paragraph 4 of that document is all but identical with paragraph 3 of the Warranties Schedule (including in its misspelling). I find that what was said about the need for the franchisee's participation, and more particularly that of the third defendant, was effectively what was agreed in that paragraph 3. That was a representation as to a future matter so that it was misleading or deceptive unless there were reasonable grounds for it.[67] The evidence demonstrates that there were reasonable grounds for this representation. In the hands of the plaintiff, the business was being managed by Ms Worsley. But more importantly, the evidence of the third defendant herself, given in chief, was that she spent about 15 hours a week in the business.[68] In cross-examination, she suggested that this did not include some other work (apparently overlooked by her in her evidence in chief); but she did not go so far as to say that she was having to work more than 20 hours per week.[69] I infer that the time which she was required to spend corresponded with that which had been required of Mr Farley during the plaintiff's ownership of this business. Accordingly, there were reasonable grounds for the representation.

[66] The next of the alleged representations concerns the cost of employing the photographer/manager. As to whether such a representation was made, there is strong support for the defendants in notes made by Mr Farley during the negotiations leading to the franchise agreement. In particular, he wrote against "full time 40 hrs" the sum of "$540" under which he wrote "$120". On the same page he showed the total ($660) and amounts added for superannuation and GST, totalling $786.[70] The calculation of most of those amounts appears from another page of the notes.

[67] These notes provide a good indication of what was said by Mr Farley. I accept that he represented that the likely cost of employing a photographer to work 40 hours would include those components of $540 and a bonus of about $120. But more probably than not, he also referred to the allowances for superannuation and GST which he calculated, correctly or otherwise, to result in a weekly cost of $786. The

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65 Exhibit 15, p 38.
66 T 3-51.
67 *Trade Practices Act 1974* (Cth), s 51A(1).
68 T 4-34, 35.
69 T 4-68.
70 Exhibit 8.

question then is whether there was a reasonable basis for that statement, it being one as to a future matter.

[68] The evidence of what the plaintiff had paid to Ms Worsley is not extensive. The only documentary evidence is a record of an electronic bank transfer to Ms Worsley of $439 in September 2004.[71] When asked whether that was her salary when she was working for the plaintiff, she said:

> "…I think that sounds about right. It would be about the right wage."[72]

That was also Mr Farley's evidence although again it was prompted by that document.[73] In the cross-examination of Ms Worsley, counsel for the defendants suggested that when Ms Worsley was approached to work for them, she said to the third defendant that she was not happy to work for the same wage as she had received from the plaintiff. Ms Worsley answered that that was "definitely possible" and added words to the effect that she had worked very hard for the plaintiff with the implication that she was underpaid.[74]

[69] From that evidence, it sufficiently appears that Ms Worsley was paid substantially less than what she received in the employ of the defendants. The evidence of Ms Worsley and Mr Farley as to what she was being paid by the plaintiff is not contradicted by that which is relied upon by the defendants, which is that they had to pay Ms Worsley considerably more. Although the evidence is not extensive, it sufficiently establishes that Ms Worsley was receiving something of the order of $439 net per week. She left the plaintiff's employ at the end of 2004. Her employment by the plaintiff for that remuneration provided a reasonable basis for Mr Farley's representation.

[70] The third of the alleged representations is that the plaintiff would provide a manual for the business. This was represented, although the best indication of what was said is within paragraph 5 of the Warranties Schedule. To the extent that this was a representation rather than a contractual promise, it was a statement as to a future matter. There was a reasonable basis for it. Especially with the assistance of Mr Donaldson, with his long experience in franchising, he was able to produce such a manual. The fact that the plaintiff took so long to do so does not prove otherwise. The plaintiff has proved that there was a reasonable basis for this representation.

[71] The last of the representations alleged is that the plaintiff would provide training to the franchisee. This representation was probably made, considering the provisions of the franchise agreement which dealt with training. But training was provided. The defendants' case is that a representation that there would be training meant training as a photographer and photo editor. That could not have been the effect of the representation. The terms of the franchise agreement prove otherwise. This

71 Exhibit 12.
72 T 3-5.
73 T 1-63.
74 T 3-16.

allegation fails for effectively the same reasons as does the claim that the plaintiff failed to provide the agreed training.

[72] The outcome is that none of the representations ultimately relied upon by the defendants is proved to have been in contravention of the *Trade Practices Act*. There is no basis for disturbing the entitlement of the plaintiff to damages for breach of contract or to other relief based upon the franchise agreement.

Restraint of trade

[73] Clause 44 of the franchise agreement provided as follows:

> "44. RESTRICTIONS ON COMPETITION
>
> While this Agreement is current You and Your Nominated Representative are required to spend Normal Business Hours operating the Franchise. This includes promoting the Franchise in an effort to generate new business.
>
> Because You and Your Nominated Representative are required to spend Normal Business Hours operating the Franchise, neither You nor Your Nominated Representative may, while this Agreement is current, be Involved with any other business, activity or undertaking during Normal Business Hours without our prior written consent. We are entitled to withhold our consent if in our opinion your involvement in the other business, activity or undertaking may have an adverse impact on the performance of your Franchise.
>
> During the Restraint Period and within the Restraint Area, You agree not to be Involved with any business, activity or undertaking which is similar to your Franchise or provides similar goods or services to the Approved Products and Services.
>
> Clause 44 will be read as if each Restraint Period were combined with each Restraint Area to create separate and discrete clauses each being severable from the others. If any combination is taken to be invalid or unenforceable it will be omitted from this Agreement without effecting the other combinations.
>
> You will, at our request, procure the Principals and the Nominated Representative to execute a restrictive covenant on terms similar to clauses 44."[75]

The term "Restraint Period" was defined as follows:

> "Restraint Period for the purpose of clause 44 means:
>
> (a) 3 years after this Agreement ends;

[75] Exhibit 15, p 28.

(b) 2 years after this Agreement ends;

(c) 1 year after this Agreement ends; or

(d) 6 months after this Agreement ends."[76]

The term "Restraint Area" was defined as follows:

"Restraint Area for the purpose of clause 44 means:

(a) The whole of Australia;

(b) The states of Queensland, New South Wales, Western Australia, South Australia and Victoria;

(c) Any territory in which We have granted a Franchise; or

(d) The Area."[77]

[74] The statement of claim seeks an injunction restraining the defendants from "continuing with any business, activity or undertaking which is similar to the Franchise in accordance with cl 44 of the Agreement". The plaintiff by its written submissions conceded that there should be at least some "blue pencilling" of the clause and, in particular, the definitions of Restraint Area and Restraint Period. But the way in which this should be done was not developed in the argument.

[75] To obtain any relief on this ground, the plaintiff must prove that even the most limited restraint, as a result of the blue pencilling exercise, is reasonable as between the parties.[78] Going to the definition of restraint area, a restraint across "the whole of Australia" or all of the mainland States is clearly too broad and there was no attempt here to justify a basis for it. At the time of the franchise agreement, the only other location was the Little Images studio at Alderley. Others may have been planned and the franchise agreement anticipated a growing network. But it is inconceivable that such a broad restraint in terms of the whole of the country or the mainland States could be reasonable. Even by blue pencilling all of paragraph (b) of the definition, leaving only the word "Queensland", the restraint area would be too broad. For example, it is far from established that the goodwill of this franchisor needed the protection of a restraint upon the former franchisee from working as a photographer in far North Queensland.

[76] As for the expression "any territory in which We have granted a Franchise", the defendants argued that this is meaningless because at the time of the franchise agreement there was no territory that fell within that subparagraph. However, that seems to be a reference to a territory, in the sense of an area within the Commonwealth which is not within a State. Further, the reference was prospective in the sense that it applied to any territory in which the plaintiff had granted a

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76 Exhibit 15, cl 1.

77 Ibid.

78 *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 at 565; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 139.

franchise within whatever became the Restraint Period. Thus the clause was not meaningless. But it is not established that a restraint across every (or any) territory was reasonable between the parties.

[77] That leaves "The Area" in paragraph (d) of the definition. The difficulty here is that this was not a defined term in the franchise agreement. It appears that this is a reference to a term appearing in a draft of the franchise agreement,[79] but that the parties chose to use the term "Location" in the concluded document. The plaintiff did not argue that "The Area" should be read as the Location.

[78] Accordingly, there is no way in which the application of the "blue pencil" could result in a definition of the Restraint Area which is proved to have been reasonable between the parties. This part of the plaintiff's claim fails.

Confidential information

[79] Clause 27 of the franchise agreement provided as follows:

> 27. CONFIDENTIAL INFORMATION
>
> You, the Principals, Your Nominated Representatives and staff:
>
> (a) are required to keep Confidential Information confidential and secure at all times; and
>
> (b) may use Confidential Information only for the purpose of operating your Franchise.
>
> After your Franchise ends, You must cease using Confidential Information immediately.
>
> During your Franchise and after it ends, You must not disclose Confidential Information to any person without our prior written consent.
>
> You will, if requested to do so by Us, procure Your Nominated Representative, Principals and staff to enter into a confidentiality agreement with Us.
>
> We may use any information You provide for any purpose associated with the Franchise."[80]

The term "Confidential Information" was defined as:

> "… any information relating to our business, which is not available in the public domain, and includes customer details."[81]

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79 Exhibit 14, p 3.
80 Exhibit 15, p 21.
81 Ibid, cl 1.

[80] There are two parts of the plaintiff's case in this respect. The first is that customer details were used by the second and third defendants in the new business, providing a "springboard" in the commencement of that business. In particular, the second defendant used customer details taken from the Little Images database to write to customers advising them of the change of business, a matter which the defendants concede. To that extent, the misuse of information, contrary to cl 27, is proved.

[81] Secondly, the plaintiff argues that its software application which stored customer details and produced various documents for the operation of the business was itself confidential information. This was the system, developed by a computer programmer who had been commissioned by Mr Farley, which I have described at [6]. It was used by the defendants in their new business. Undoubtedly, it was beneficial to them. But there is a difficulty in identifying that which constituted the relevant *information*. The statement of claim sought relief for breach of a copyright alleged to have existed in the plaintiff's databases, but that was not pressed. What is sought to be protected here is not an alleged copyright but the misuse of information. I am not persuaded that the relevant system, involving the storing and use of customer details, was confidential information within cl 27. And if it was, it is not demonstrated that there was any substantial damage to the plaintiff or benefit to the defendants from its use by the defendants in the new business. Ms Worsley said that it was a good system. It is another thing to say that it resulted in a higher turnover or a significantly lower operating cost to the business. No attempt was made in the plaintiff's case to quantify such differences.

[82] The parties agreed to the appointment of a forensic accountant, Mr Vincent, to address a number of questions concerning the quantification of the plaintiff's claims. His reports were tendered without objection and he was not required to give oral evidence. He identified the patronage of the defendants' new business at Mt Gravatt from customers who had been on the Little Images database in March 2006. His unchallenged evidence is that the sales revenue generated from these customers by the defendants was $24,424, which after allowance for costs and expenses, would result in a net profit from those customers of $5,152.[82] Perhaps some of these customers would have gone to the defendants' new business in any event, that is to say without the use of the customer details. At least some of them might have returned to the same studio even without some contact from the new business. The profits in this respect were for the most part derived by the first defendant (which is now deregistered) and subsequently by the fourth defendant. The evidence does not permit any precise apportionment between them. I am not persuaded to award a sum or sums for the profits from this use of the information. I would accept that the wrongful use of customer details deprived other Little Images studios of some business. That is a compensable loss. On any view, the amount is small. I am persuaded to award, inclusive of interest, $5,000 upon this ground. That will be awarded against the second and third defendants, as guarantors, as damages for breach of contract.

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[82] Exhibit 131, p 8.

Relief

[83] It is uncontested that the franchisee failed to pay royalties for the period from October 2005 to March 2006 in the amount of $10,543.68 and marketing fees over the same period in the amount of $7,029.12. It is also uncontested that the franchisee failed to pay for printing work done in November and December 2005, in amounts totalling $3,369.30. Those amounts were due to the plaintiff prior to the termination of the franchise agreement.

[84] It was submitted that the obligation to pay at least the royalties and marketing fees was dependent on the plaintiff's performance of the contract and that by reason of the many alleged breaches of contract by the plaintiff, it was said that these amounts did not become due. I have largely rejected the defendants' arguments about the plaintiff's performance. In two respects the plaintiff breached the contract before remedying that breach. It cannot be said that the parties agreed, in effect, that the provision of the consideration by the franchisee under this agreement was dependent upon the complete performance at all times by the franchisor of its contract. The franchisee was receiving substantial benefits to which it was entitled under the contract. It was receiving the benefit of the "Little Images" goodwill as promoted by Mr Farley. The business was a profitable one by the time of the termination of the franchise agreement. In the (part) year ended 30 June 2005, the franchisee traded at a loss of $10,520.[83] But in the following year its net profit was in excess of $40,000.[84] This appears to be the profit confined to the Little Images business, or in other words for a part of that year, because there is a separate profit and loss statement for the franchisee for that year which records a profit of $4,670.67,[85] which I infer is the profit for the new business (that profit and loss statement contains no expense for royalties, as distinct from that within exhibit 136 showing the profit of $40,557 after expenses which included royalties).

[85] The plaintiff claims damages upon the basis of lost royalties and profits from printing the franchisee's product. Mr Vincent has assessed the plaintiff's losses on alternative bases. In essence, the argument here involves the appropriate basis. There are three alternative bases. The fourth was that already discussed in relation to the confidential information claim, which calculated the loss of profits from the customers who had been on the Little Images database and who patronised the Mt Gravatt studio under the new business. Under each basis the calculation is the loss of profits from the termination of the franchise agreement in March 2006 until the expiry date of the initial five year period in February 2010.

[86] The first basis is upon the gross sales made by the Picture Moments business. Mr Vincent had weekly sales reports for that business from March 2006 to August 2009 and estimated the sales revenue from that point to February 2010 based upon the sales actually generated during the corresponding months over the prior three years. He recalculated the total sales to exclude GST and then applied a royalty fee

83 Exhibit 136.
84 Ibid.
85 Exhibit 137.

of 12 per cent, as per the franchise agreement. The resultant royalties were $137,922.[86]

[87] Upon the same basis he assessed the lost profits from not having the printing work. There were two different calculations in this respect. One involved the assumption that the plaintiff would have printed all of the products listed in the manual. The other assumed that the plaintiff would have done all of the printing required from this business, including some sizes of products which were not contained in the manual. The lost profits under the former were assessed at $144,940 and under the latter alternative, $172,912.[87]

[88] The second basis was upon the assumption that the turnover of the new business would have been that of the old business but increased according to the growth in the Australian economy from March 2006. On this assumption, the royalties, again at 12 per cent of turnover, would have been $82,247. The printing profits, by printing as per the manual, would have been $120,210 and upon the alternative basis, $122,192.

[89] The third basis is upon a turnover calculated by reference to that achieved from other Little Images studios within the same period. For this calculation, Mr Vincent was provided with a spreadsheet setting out the sales and amounts collected by the plaintiff for each of its five studios at different times within the subject period as follows:

- Alderley — September 2005 to September 2009
- Alexandra Hills — November 2005 to September 2009
- Sunnybank Hills — February 2006 to December 2007
- Meadowbrook — February 2008 to March 2009
- Shailer Park — July 2008 to February 2009

None of those studios was the subject of a franchise during those times. It appears also that the Meadowbrook and Shailer Park studios had not operated on a fully functional basis and at least for that reason their figures may be unrepresentative. The turnover from these stores, overall, was comparatively low. Upon this assumption there were lost royalties of $29,493. As for printing, Mr Vincent explained a number of difficulties in calculating the lost income from printing under this third basis. His assessment was a loss of at least $42,643.

[90] Not surprisingly the defendants submitted that the third basis was the appropriate one, which the plaintiff disputes. The other Little Images studios might be thought to provide the best comparison, especially as the defendants set about changing the nature of the business once they were free of the franchise. An assessment under at least the first basis might not give effect to the difference between the products

86 Exhibit 131, p 6.
87 Ibid, p 7.

offered by “Picture Moments” and those offered through a Little Images studio. However, I accept that there are other aspects which make it inappropriate to proceed under the third basis. Some of these other Little Images studios were not fully operational. The Mt Gravatt studio appears to have been quite successful even before the end of the franchise. Other Little Images studios might have been affected by their locations. The defendants did not remain in precisely the same premises but throughout the subject period they were within some part of the same shopping centre.

[91] The second basis is more appropriate than the first, because of the differences between the two styles of business and their products. As to that second basis, the defendants argue that it ignores the potential for adverse changes such as the departure of Ms Worsley who was important for the successful operation of the Mt Gravatt studio. I accept that Ms Worsley was important to that business. I do not accept that this makes the second basis inappropriate. More generally, it is necessary to consider contingencies which would adversely affect the business. There was also some theoretical prospect that the business, as a Little Images studio, would have developed (more quickly than the Australian economy overall) as the studio became better known.

[92] I am persuaded to use the second basis but making some small discount for adverse contingencies. I am not persuaded to assess the lost printing revenue except according to the products set out in the manual during the franchise. Under the second basis, the total of the lost royalties and lost printing (as per the manual) is $202,457. I will discount that by five per cent, resulting in $192,334. I will allow interest on that sum at five per cent from 6 March 2006 to 15 February 2010 (an amount of $37,939.86) and at 10 per cent from 15 February 2010 to the date of this judgment (an amount of $35,515.82). Accordingly, the total for damages for loss of bargain together with interest is $265,789.68.

[93] As at the date of termination of the franchise, there were those sums due to the plaintiff totalling $20,942.10. Interest will be allowed on that sum at 10 per cent from 6 March 2006 to the date of this judgment, an amount of $12,129.

[94] As guarantors of the franchise’s performance, the second and third defendants are liable for the amounts as discussed, being $265,789.68, $20,942.10, $12,129 and $5,000, a total of $303,860.78. There will be judgment for the plaintiff against the second and third defendants for that sum. The claim against the fourth defendant must be dismissed.