SUPREME COURT OF QUEENSLAND

CITATION:	*Om Business Group Pty Ltd & Ors v Nestle Australia Ltd & Anor* [2021] QSC 183
PARTIES:	**OM BUSINESS GROUP PTY LTD** **ACN 147 861 229** (first plaintiff) **PRATAP NARSEY** (second plaintiff) **VINEET MANOT** (third plaintiff) **v** **NESTLE AUSTRALIA LTD** **ACN 000 011 316** (first defendant) **AUSTRALASIAN FOOD GROUP PTY LTD** **ACN 154 314 913** (second defendant)
FILE NO/S:	BS No 7109 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	5 August 2021
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2021
JUDGE:	Davis J
ORDERS:	**1. Paragraphs 8, 9 (as to the words "breach of the Franchise Agreement"), 10(d), 10(e) and 10(f) of the statement of claim are struck out.** **2. The following question shall be heard and determined separately from, and before, any other issues in the proceeding:** **Whether the plaintiffs are barred, by reason of sub-sections 236(2) and 237(3) of the *Australian Consumer Law*, or otherwise, from obtaining any of the relief sought in this proceeding under the *Australian Consumer Law*.** **3. The plaintiffs are barred, by reason of sub-sections 236(2) and 237(3) of the *Australian Consumer Law* from obtaining any of the relief sought in this proceeding under the *Australian Consumer Law*.**

4. The parties will be heard on the question of costs.

CATCHWORDS: PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - ENDING PROCEEDINGS EARLY - SUMMARY DISPOSAL - SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT: STAY OR DISMISSAL OF PROCEEDINGS - where the defendants made application to strike out parts of the claim - where the defendants made application for determination summarily of part of the claim - where the plaintiffs claim breaches of contract and fiduciary obligations - where no facts are pleaded in support of those claims - where the plaintiffs also claim relief under the *Australian Consumer Law* - whether that claim is barred by a time limitation - whether that issue should be determined summarily

Australian Consumer Law, s 236, s 237
Uniform Civil Procedure Rules 1999, r 171, r 293, r 483

Agar v Hyde (2000) 201 CLR 552, cited
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17, followed
Chan v Zacharia (1984) 154 CLR 178, cited
Commonwealth of Australia v Cornwell (2007) 229 CLR 519, cited
Eaton v Rare Nominees Pty Ltd (2019) 2 QR 222, cited
Han Jing Pty Ltd v Nestle Australia Ltd [2021] FCA 143, followed
Hawkins v Clayton (1998) 164 CLR 539, cited
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, followed
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640, followed
Jobbins v Capel Court Corporation Ltd (1989) 25 FCR 226, cited
Joey Construction Pty Ltd v IT Environmental (Australia) Pty Ltd [2018] FCA 534, followed
John Alexander's Clubs Pty Ltd v White City Tennis Club Limited & Ors (2010) 241 CLR 1, followed
Karedis Enterprises Pty Ltd v Antoniou (1995) 59 FCR 35, cited
Magman International Pty Ltd v Westpac Banking Corporation (1991) 32 FCR 1, cited
Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd (2015) 237 FCR 534, cited
Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd [2015] 1 Qd R 476, cited
Queensland v Takeovers Panel (2015) 320 ALR 726, cited
Reilly v Australia and New Zealand Banking Group Limited (No 2) [2020] FCA 1502, cited
Rich v CGU Insurance Ltd (2005) 79 ALJR 856, followed
Wardley Australia Ltd v Western Australia (1992) 175 CLR

514, followed

COUNSEL: V Manot, the third plaintiff, for himself and by leave for the other plaintiffs/respondents
R Craig QC with MR McRobert for the applicants/defendants

SOLICITORS: V Manot, the third plaintiff, for himself and by leave for the other plaintiffs/respondents
Norton Rose Fullbright for the applicants/defendants

[1] Nestle Australia Ltd (Nestle) and Australasian Food Group Pty Ltd (AFG) which I will refer to together as "the defendants" have been sued by Om Business Group Pty Ltd (Om), Pratap Narsey and Vineet Manot (all collectively "the plaintiffs"), in relation to a franchise agreement concerning Movenpick brand ice-cream. The defendants bring an application seeking to strike out parts of the statement of claim and to achieve other orders having the effect of summarily determining that part of the claim reliant upon the *Australian Consumer Law* (ACL).

[2] The defendants' application also seeks orders for security for costs as an alternative to fulfilment of their real ambition which is to effectively bring the proceedings to a conclusion summarily. The application for security for costs was adjourned pending the outcome of the rest of the application.

Background

[3] In 2012, Nestle, as franchisor, entered into a franchise agreement with Om. The franchise agreement gave Om the right to operate a Movenpick ice-cream store at the Brisbane Emporium in Fortitude Valley. The performance of the obligations of Om under the franchise agreement were guaranteed to Nestle by Mr Narsey.

[4] From about 18 June 2012 until the 2016-17 financial year, Om conducted a Movenpick Ice Cream business at premises at the Brisbane Emporium pursuant to the franchise agreement. The business did not do well. The plaintiffs allege that losses were suffered and claim, in summary:

(a) the cost of fit-out and initial stock of $310,000;

(b) various trading losses over the period 2012 to 2017;

(c) damages to compensate Mr Narsey and Mr Manot for the loss of opportunity to generate income over the period during which they were devoting their efforts to the failing ice-cream business;

(d) "legal expenses compensation" in an amount of $25,000;

(e) "loss of goodwill at the end of franchise term due to breach by the franchisor of the franchise agreement" of $250,000.

[5] Paragraph 1 of the statement of claim alleges that:

(a) Om is a duly incorporated company whose directors are Mr Narsey and Mr Manot;

(b) Om conducted the ice-cream shop from about 18 June 2012;

(c) "the defendant", which is probably a reference to Nestle, was a corporation and "national franchisor of a franchise network of ice-cream stores under the style and/or business name of Movenpick";

(d) "the defendant", again probably a reference to Nestle, was engaged in trade or commerce;

(e) Renato Maiale and Dennis Korrey were authorised to act on behalf of "the defendant", which again is probably a reference to Nestle.

[6] Paragraph 2 of the statement of claim:

(a) pleads the franchise agreement but not the guarantee given by Mr Narsey;

(b) refers to clause 10 of the franchise agreement which obliged Nestle to comply with the Franchising Code of Conduct.

[7] Paragraph 3 of the statement of claim alleges that representations were made on Nestle's behalf by Mr Maiale and Mr Korrey. Some of the representations clearly concern future matters, eg estimates of future profitability. Some concern existing facts, eg the turnover of a Movenpick store then operating at "The Barracks". Some are probably representations as to the present state of mind of those controlling Nestle even though that intention is relevant to matters in the future, eg Nestle "would look after them" (seemingly a reference to all plaintiffs), and that Nestle would provide assistance with marketing, etc.[1]

[8] Paragraph 4 of the statement of claim alleges reliance as being "… in deciding to enter the franchise agreement and so operate the franchise …".[2]

[9] Paragraph 5 pleads an admission allegedly made by Mr Maiale (presumably on behalf of Nestle) that Nestle misled the plaintiff (apparently Om) "in relation to selling Carindale to it, in order to induce it to purchase the Movenpick Emporium franchise". That relates to a franchise to operate a Movenpick store at Carindale.[3]

[10] Paragraph 6 alleges the falsity of the representations.[4]

[11] Clauses 7, 8, 9, 10 and the prayer for relief are all significant to the present application. Paragraphs 8, 9 and 10 are the paragraphs the subject of the defendants' strike out application. Paragraphs 7 to 10 and the prayer for relief are as below. The parts which are sought to be struck out are emphasised:

> "7. CAUSES OF ACTION Unconscionable conduct (i) The conduct alleged in paragraph 6 herein was conduct of the Defendant. (ii) The conduct pleaded in paragraph 6 was: a. In trade or commerce; b. Engaged in by the Defendant within the meaning of that term as defined in section 4(2) of the CCA[5]; c. Was in all circumstances unconscionable in contravention of sections 20 and 22 of the Australian Consumer Law contained

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1 See paragraph [40] of these reasons.
2 See paragraph [42] of these reasons.
3 See paragraphs [44]-[46] of these reasons.
4 See paragraph [41] of these reasons.
5 A reference to the *Australian Consumer Law*.

in Schedule 2 of the CCA. (iii) By reason of the conduct pleaded herein the Plaintiff has suffered loss and damage.

8. Fiduciary Duty (i) On and from 18 June 2012, the Defendant, as national franchisor, has owed the Plaintiff as a franchisee a fiduciary duty not to: a. Allow its interests to conflict with the interests of the Plaintiff; b. Exercise its powers as franchisor; i. With intention of furthering its own business interests at the expense of the Plaintiff; or ii. So as to gain a profit or advantage for itself or its associates in circumstances where its interests conflicted with those of the Plaintiff. c. Unreasonably and for an extraneous purpose. (ii) In respect of the Franchise, the Defendant has engaged in the impugned conduct pleaded herein. (iii) Each of the impugned conduct pleaded, either on its own, or in combination, was engaged in by the Defendant.

9. Breach of the Franchise Agreement By reason of the matters pleaded in paragraph 6 herein, the Plaintiff has suffered loss or damage and is likely to continue to suffer loss or damage in the future, the best particulars of which are included but not only to the following losses: Particulars: (i) The Brisbane Franchisee incurred approximately _310,000 to establish the Brisbane Franchise which included the costs to fit out the Brisbane Franchise Operation and the costs of purchasing equipment and stock necessary to operate the 'Brisbane Franchise Operation. (ii) The Brisbane Franchisee has suffered losses in the operation of the Brisbane Franchise Operation of: A. in 2012, _68,753; B. in 2013, _32,061; C. in 2014, _57,759; D. in 2015, _12,884; E. in 2016: _5,977; and F. in 2017: _10,981; and (iii) Mr Narsey / Mr Manot have been required to work varying hours every week in the Brisbane Franchise Operation without pay and have, as a consequence, foregone wages that they otherwise would have earned from other sources. A typical store operation roster has been used to calculate the loss of income. The total loss, including the loss of income, for the franchise term was _1,229,409 (iv) Interest on losses as per court pre-judgement rate as at 30/06/20 is _361,655 (v) Before signing-up for the Movenpick franchisee representation was made by Nestle respresentatives that would earn at least _100,000 PA. Loss of opportunity over 5 years franchisee term is _500,000 (vi) Legal expenses compensation _25,000 (estimate) (vii) Loss of goodwill at the end of franchisee term due to breach by the franchisor of the franchisee agreement _250,000

10. Relief The Plaintiff seeks the following relief: a. A declaration that: i. In trade or commerce in connection with the Franchise, the Defendant engaged in conduct that was, in all the circumstances unconscionable in contravention of section 20 and/or section 22 of the Australian Consumer Law; b. Damages pursuant to section 236(1) of the Australian Consumer Law to be assessed, for contravention of section 20

> and/or 22 of the Australian Consumer Law; c. Further, or in the alternative, compensation pursuant to section 237 of the Australian Consumer Law in an amount the Court thinks appropriate for contravention of section 20 and/or section 22 of the Australian Consumer Law; d. An order that the Defendant account to the Plaintiff for all profits and other benefits derived by it as a result of its breach of fiduciary duty; e. Damages for breach of the Franchise Agreement, to be assessed; f. Equitable compensation for breach of fiduciary duties and/or unjust enrichment; g. Further or other orders the Court deems necessary; h. Costs. i. Interest on any damages or compensation recovered pursuant to statute.
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> The plaintiff claims the following relief: Particulars: (i) The Brisbane Franchisee incurred approximately _310,000 to establish the Brisbane Franchise which included the costs to fit out the Brisbane Franchise Operation and the costs of purchasing equipment and stock necessary to operate the Brisbane Franchise Operation. (ii) The Brisbane Franchisee has suffered losses in the operation of the Brisbane Franchise Operation of: A. in 2012, _68,753; B. in 2013, _32,061; C. in 2014, _57,759; D. in 2015, _12,884; E. in 2016: _5,977; and F. in 2017: _10,981; and (iii) _Mr Narsey / Mr Manot have been required to work varying hours every week in the Brisbane Franchise Operation without pay and have, as a consequence, foregone wages that they otherwise would have earned from other sources. A typical store operation roster has been used to calculate the loss of income. The total loss, including the loss of income, for the franchise term was _1,229,409 (iv) Interest on losses as per court pre-judgement rate as at 30/06/20 is _361,655 (v) Before signing-up for the Movenpick franchisee representation was made by Nestle respresentatives that would earn at least _100,000 PA. Loss of opportunity over 5 years franchisee term is _500,000 (vi) Legal expenses compensation _25,000 (estimate) (vii) Loss of goodwill at the end of franchisee term due to breach by the franchisor of the franchisee agreement _250,000 Further particulars will be provided prior to trial."

[12] There are enormous difficulties with the statement of claim. Some of those difficulties are:

(a) AFG is mentioned nowhere in the statement of claim apart from the heading. It is not alleged to be a party to the franchise agreement and it is not alleged to be a party concerned in the making of any representations;

(b) Mr Narsey is not a party to the franchise agreement but is a guarantor of it. That though is not pleaded;

(c) Mr Manot is not a party to the franchise agreement and is not a guarantor, yet he is a plaintiff;

(d) while representations are alleged to have been made to Mr Narsey and Mr Manot, the only act pleaded in reliance upon the representations is their

entering into the franchise agreement and operating the franchise business both of which were done by Om not by Mr Narsey or Mr Manot.

Application to strike out allegations in the statement of claim

[13] The defendants' application is in these terms:

> "1 Pursuant to rule 171 of the *Uniform Civil Procedure Rules* 1999 (Qld), that paragraphs 8, 9 (as to the words 'Breach of the Franchise Agreement'), 10(d), 10(e), 10(f) of the statement of claim dated 30 June 2020 be struck out."

[14] The complaint is that paragraphs 8, 9, 10(d), 10(e) and 10(f) allege breach of a fiduciary duty and breach of the franchise agreement. The defendants submit those pleas are bad as there is nothing pleaded which supports them.

[15] The parties' contract is their bargain which governs rights and obligations as between them. Just as a contractual relationship may give rise to tortious duties, so might fiduciary obligations arise. However, in *John Alexander's Clubs Pty Ltd v White City Tennis Club Limited & Ors*,[6] the High Court, following Mason J (as his Honour then was) in *Hospital Products Ltd v United States Surgical Corporation*,[7] observed:

> "91 In the *Hospital Products* case, Mason J spoke in terms consistent with the later discussion of the case by Justice Lehane, and added an important statement of principle which, JACS correctly submitted, governs the present appeal. His Honour said of cases where contract provides the foundation for a fiduciary relationship:
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> > 'In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.'"

[16] In *Hospital Products*, Mason J held that the critical feature of a fiduciary relationship "… is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense".[8] While some relationships arising from contractual agreements are recognised as raising

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6 (2010) 241 CLR 1.

7 (1984) 156 CLR 41.

8 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 and *John Alexander's Clubs Pty Ltd v White City Tennis Club Limited & Ors* (2010) 241 CLR 1 at [86], [90] and *Eaton v Rare Nominees Pty Ltd* (2019) 2 QR 222 at [32].

fiduciary obligations,[9] the relationship between franchisor and franchisee is not one of them.[10]

[17] The franchise agreement is an arms-length contractual bargain in which there is, in my view, nothing, whether pleaded or otherwise in the material, to suggest that a fiduciary relationship has been established. The allegations of breach of fiduciary obligations made in the statement of claim ought to be struck out.

[18] The allegations of a breach of the franchise agreement also have their difficulties. No provision of the franchise agreement said to have been contravened is identified in the statement of claim. The conduct which is complained of generally in the statement of claim is that described as the "representations" in paragraph 3 of the statement of claim. That conduct occurred before the franchise agreement was entered into. Therefore, that cannot form the foundation of an allegation of breach of the franchise agreement.

[19] Some of the conduct alleged in paragraph 3 of the statement of claim might be categorised not so much as a representation but as an agreement. For example:

> "c. Nestle would promote the Movenpick brand and the Emporium Movenpick outlet so as to ensure that the franchise business would be profitable: particulars in meetings between 24/3/11 and 11/4/12 by Renato and Dennis to Pratap and Vineet."

[20] However, no such provision appears in the franchise agreement and the franchise agreement contains an "all terms" clause:

> "**21.4 Entire agreement**
>
> 21.4.1 This agreement embodies the entire understanding and agreement between the parties as to its subject matter.
>
> 21.4.2 All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this agreement are merged in and superseded by this agreement."

[21] Nothing is pleaded to support a claim for damages for breach of contract or a claim for compensation for breach of fiduciary obligation. There is nothing in the material before me to suggest that there are bases upon which such claims could properly be pleaded.[11]

[22] In those circumstances, the challenged paragraphs ought to be struck out with no leave to replead.

Application for determination of preliminary question

[23] The defendants' application is in these terms:

> "2 Pursuant to rule 483 of the *Uniform Civil Procedure Rules 1999* (Qld), that the following question be heard and

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9 Partnerships for instance; see *Chan v Zacharia* (1984) 154 CLR 178.

10 *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* (2015) 237 FCR 534 at [149]-[150].

11 *Uniform Civil Procedure Rules* 1999, r 171.

determined separately from, and before, all other issues in the proceeding (Preliminary Question):

> Whether the Plaintiffs are barred, by reason of sub-sections 236(2) and 237(3) of the *Australian Consumer Law*, or otherwise, from obtaining any of the relief sought in this proceeding.

3 That the Defendants' application for the order in paragraph 2 above be determined immediately prior to, or concurrently with, the determination of the Preliminary Question itself."

[24] Rule 483 of the *Uniform Civil Procedure Rules* 1999 (UCPR) allows for a separate question to be identified and heard and determined apart from the rest of the proceeding.

[25] What is sought by the defendants is a summary determination of that point which, if determined in their favour, would effectively conclude the proceedings, given that the contractual and equitable claims have been struck out.

[26] The defendants' approach is an odd one. Rule 293 gives jurisdiction to the court to give summary judgment for a defendant. A defendant with a point that is fatal to a plaintiff's claim or part of it, will be successful in an application under r 293 if that point is made out and:

(a) the plaintiff has no real prospects of succeeding in the claim; and

(b) there is no need for a trial of that claim.[12]

[27] In practical terms, there is no difference in the court's approach to, on the one hand, a summary judgment application and, on the other hand, the summary determination of a separate question.[13] In either situation, judgment could not be given except in the clearest of cases. This has been expressed over the years in many ways. In *Rich v CGU Insurance Ltd*,[14] Gleeson CJ, McHugh and Gummow JJ, following *Agar v Hyde*,[15] said this:

> "[18] However, the general principle is that issues raised in proceedings are to be determined in a summary way only in the clearest of cases. In *Agar v Hyde*, Gaudron, McHugh, Gummow and Hayne JJ said:
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> > 'Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.'"[16]

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12 r 293(2).
13 *Joey Construction Pty Ltd v IT Environmental (Australia) Pty Ltd* [2018] FCA 534.
14 (2005) 79 ALJR 856.
15 (2000) 201 CLR 552 at [57].
16 At [18].

[28] The plaintiffs claim damages under s 236 and compensation under s 237 of the ACL. Sections 236 and 237 provide:

> "236 Actions for damages
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> (1) If:
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> (a) a person (the claimant) suffers loss or damage because of the conduct of another person; and
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> (b) the conduct contravened a provision of Chapter 2 or 3;
>
> the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.
>
> (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued."
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> 237 Compensation orders etc. on application by an injured person or the regulator
>
> (1) A court may:
>
> (a) on application of a person (the injured person) who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:
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> (i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or
>
> (ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term; or
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> (b) on the application of the regulator made on behalf of one or more such injured persons;
>
> make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.
>
> (2) The order must be an order that the court considers will:
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> (a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or
>
> (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.
>
> (3) An application under subsection (1) may be made at any time within 6 years after the day on which:

> (a) if subsection (1)(a)(i) applies--the cause of action that relates to the conduct referred to in that subsection accrued; or
>
> (b) if subsection (1)(a)(ii) applies - the declaration referred to in that subsection is made."

[29] Therefore, for both a claim for damages under s 236(1), or a claim for compensation under s 237(1), the proceeding must be commenced "within six years after the day on which the cause of action … accrued".[17]

[30] Critically, time begins to run on the statutory causes of action once the party has suffered loss.[18] Here, the proceedings were commenced on 30 June 2020. Therefore, if the loss occurred before 30 June 2014, then the causes of action arose before 30 June 2014, and the claim is statute-barred.

[31] It has been often said that caution should be exercised before summary judgment is given on the basis that a limitation defence must inevitably succeed.[19]

[32] There is no legal prohibition upon the summary determination of a limitation defence. Problems are though often found when seeking to determine limitation issues summarily. The dangers were identified in this way in *Wardley Australia Ltd v Western Australia*:[20]

> "We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question."[21]

[33] That statement of principle admits of the following:

1. There will be cases where, on the hearing of an application to summarily determine a limitations point, there will be sufficient knowledge of the damage sustained and the circumstances in which it was sustained to enable a summary determination of the issue; and
2. Judgment can be given in a "clear case".[22]

[34] I respectfully agree with what was said by Thawley J in *Han Jing Pty Ltd v Nestle Australia Ltd*,[23] following *Jobbins v Capel Court Corporation Ltd*,[24] that if it is

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17 Section 236(2) and 237(3).
18 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.
19 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, *Magman International Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 1, *Queensland v Takeovers Panel* (2015) 320 ALR 726 at [75].
20 (1992) 175 CLR 514.
21 At 533 per Mason CJ, Dawson, Gaudron and McHugh JJ.
22 See *Reilly v Australia and New Zealand Banking Group Limited (No 2)* [2020] FCA 1502.
23 [2021] FCA 143.
24 (1989) 25 FCR 226.

clear that the case cannot succeed due to a limitation defence, then judgment should be given.[25] There is never any reason to put parties to the expense and inconvenience of litigating a clearly hopeless cause, whether the case is bad due to a limitation issue or some other problem.

[35] In this case, loss is causally linked to OM entering into the franchise agreement and Mr Narsey signing the guarantee. The loss is not necessarily incurred upon the entering into of those contracts, but it may be.[26] Whether a claim is statute-barred is often not easy to ascertain and may require factual findings to be made. This is due in part to two closely related principles.

[36] Firstly, loss may be contingent upon the happening of some event after the entering into of the contract said to be induced by misleading conduct (contingency loss). *Wardley Australia Ltd v Western Australia*[27] and *Commonwealth of Australia v Cornwell*[28] are examples of such cases. Secondly, although time runs when the damage is suffered, regardless of when knowledge of the loss comes to the claimant,[29] there will be cases where the loss making nature of the business does not immediately emerge. In those cases, time will run when the loss is ascertained.[30]

[37] *Bodycorp Repairers Pty Ltd v Holding Redlich*[31] is a unanimous joint judgment of the Victorian Court of Appeal who held, after reviewing various decisions of the High Court, that in determining when loss and damage are suffered, the proper approach is to:

> "(a) analyse the facts of the particular case: *Wardley*;
>
> (b) identify the economic interest of the claimant which allegedly has been infringed: *Hawkins v Clayton, Wardley*; and
>
> (c) have regard to the pleaded loss and damage claimed: *Wardley*."[32]

[38] The first requirement, although perhaps an obvious one, provides the reason why it is often inappropriate to determine limitation issues summarily before factual disputes have been explored. However, here we have not only the pleadings but the evidence sought to be adduced by the plaintiffs in support of their claim.

[39] In the statement of claim, the plaintiffs claim the following loss:

(a) $310,000 - this is the cost of establishing the franchise, ie the fit-out of the shop. That money was paid o before 30 June 2014;

(b) $68,753 - this is the 2012 trading losses;

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25 See also *Reilly v Australia and New Zealand Banking Group Limited (No 2)* [2020] FCA 1502 at [21].

26 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640.

27 (1992) 175 CLR 514.

28 (2007) 229 CLR 519.

29 *Bodycorp Repairers Pty Ltd Holding Redlich* [2018] VSCA 17 [181] following *Hawkins v Clayton* (1998) 164 CLR 539.

30 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 followed in *Karedis Enterprises Pty Ltd v Antoniou* (1995) 59 FCR 35 at 42A-B and 45. See also *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* [2015] 1 Qd R 476.

31 [2018] VSCA 17.

32 At *Bodycorp Repairers Pty Ltd v Holding Redlich* [2018] VSCA 17 at [181].

(c) $32,061 - this is the 2013 trading losses;

(d) $57,759 - this is the 2014 trading losses;

(e) $12,884 - this is the 2015 trading losses;

(f) $5,977 - this is the 2016 trading losses;

(g) $10,981 - this is the 2017 trading losses;

(h) Loss of wages for Mr Narsey and Mr Manot and damages for loss of opportunity. This is claimed over the entire period of the operations of the franchise;

(i) $250,000 - loss of goodwill which is pleaded as the loss making nature of the business which could have been realised "at the end of the franchise term". It is unnecessary to explore how that loss is compensable.[33]

[40] The representations which are pleaded in the statement of claim are:

(a) The Emporium franchise business would make a profit in excess of $100,000.00 per year

(b) A suitable benchmark of the cost of goods that would be sold for the Franchise would be $32% of net sales

(c) Nestle would promote the Movenpick brand and the Emporium Movenpick outlet so as to ensure that the franchise business would be profitable

(d) As a Franchisee, the Plaintiff would be a 'part of the Nestle family' and that Nestle 'would look after them' and ensure that the franchise business would be profitable

(e) Nestle was in the process of expanding the Movenpick brand into Australia and Nestle intended to make the Movenpick brand a recognisable household name in Australia

(f) All Movenpick outlets were profitable

(g) Nestle would supply products to the Franchise at a 30% discount on the usual price of the first two years and a 25% discount for the following 3 years

(h) Nestle would grant the Plaintiff an option to purchase the Carindale Movenpick outlet

(i) The Plaintiff would only need to contribute $300,000 (plus GST) to 'get the franchise up and running'

(j) Only Nestle Movenpick franchisees would be permitted to sell the Movenpick ice cream on a 'by the scoop' basis

(k) That Emporium would break-even at $10,000 per week but that they were confident that the business would make at least $15,000 weekly.[34]

[41] The breaches are pleaded as:

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33 Paragraph 10 to the statement of claim.

34 Extracted from paragraph 3 of the statement of claim.

(a) The Franchise was not profitable;

(b) The Franchise did not make a profit in the excess of $100,000 per year

(c) The costs of goods was not in the order of 32% of net sales

(d) Nestle did not promote the Movenpick brand and the Movenpick Emporium outlet

(e) Nestle did not look after the Plaintiff

(f) Nestle did not provide assistance such as marketing to the Plaintiff

(g) Nestle did not expand the Movenpick brand in Australia

(h) Nestle did not make the Movenpick brand a recognisable household name in Australia

(i) Not all Movenpick outlets were profitable

(j) 20 to 30 new Movenpick outlets were not opened in Australia at any time

(k) The Barracks Movenpick Store was not achieving a turnover of $10,000 per week

(l) The Carindale Movenpick was not offered for purchase in 6 months time but after 12 month

(m) The Plaintiff had to contribute more than $300,000 plus GST

(n) Nestle did not pay the extra requirements to open the Emporium Franchise.[35]

[42] Reliance upon the representations is pleaded in these terms:

> "4. (Representations) Reliance in deciding to enter the Franchise Agreement and so operate the Franchise, the Plaintiff relied upon the Representations."

[43] Mr Manot's affidavit attests to the various representations. However, his affidavit also shows that some of the representations clearly will not support the claim.

[44] As previously observed, one of the representations is that Nestle would grant the plaintiff an option to purchase the Carindale Movenpick outlet. Mr Manot in his affidavit, said this:

> "22. I am told by Mr Narsey, that after declining to take the franchise, on 11th April 2012, during telephone conversation between Mr Maiale and Mr Narsey, Mr Maiale made the following representations or admissions:
>
> a. Admitted that the Plaintiffs had been mislead in relation to selling Carindale to it, in order to induce it to purchase the Movenpick Emporium Franchise. Mr Maiale did not have the authority to sell the store, as it was planned to be a corporate store from day 1.

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35 Extracted from paragraph 6 of the statement of claim.

b. Made an offer of discounting ice cream for 2 years at 30% and a further discount of 25% for 3 years after that as a compensation for the misleading incident."

[45] The pleaded representation about Carindale is a representation that allegedly occurred on 22 February 2012. The conversation to the effect that the plaintiff would not obtain a franchise for a Carindale shop, occurred on 11 April 2012 and the franchise agreement was signed later on 18 May.[36]

[46] The representation about the Carindale franchise cannot then be an operative inducement to entering into the franchise agreement.

[47] The representation concerning the cost of the fit-out being not less than $300,000 is also mentioned in Mr Manot's affidavit.[37] This overrun was raised in an email from Mr Manot to Mr Maiale on 4 April 2012 and an agreement was reached that Nestle would pay any fit-out excess over $300,000. That arrangement was reached before the signing of the franchise agreement.

[48] The plaintiffs' case is that as a result of representations, they[38] entered into the franchise agreement (and presumably the guarantee[39]) and thereby exposed themselves to liability.[40] They would not have done that they say had they not been convinced that the business would be profitable.

[49] After a year of trading, the business was not profitable and the plaintiff had suffered trading losses and expended $300,000 on the fit-out. By 30 June 2014 (which is the critical date for the limitation period) there had been two years of trading losses totalling over $100,000. Mr Manot had been complaining about the losses.

1. On 22 October 2012 he sent an email to Mr Korrey complaining about the quoted break even figure for the store.[41]

2. There was a meeting on 21 December 2012 between Mr Manot, Mr Narsey and Mr Korrey where concerns over profitability were raised and this was responded to by Mr Korrey in an email of 21 December 2012.[42]

3. On 3 April 2013, Mr Manot met with Mr Maiale. From Mr Maiale's email of 12 April 2013 (which is about the meeting) it is obvious that lack of profitability was complained about.[43]

4. In early June 2014, clearly before 10 June,[44] Mr Manot conducted a meeting of the plaintiffs and other franchisees at Portside. In Mr Manot's own words, this was to "discuss the challenges faced by franchisees and ways to overcome them".[45] It seems that at the meeting there was discussion about possible litigation.[46]

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36 See also exhibits OBG38, OBG39 and OBG40 to Mr Manot's affidavit.
37 Paragraph 20.
38 At least Om Business Group Pty Ltd.
39 Mr Narsey.
40 Although Mr Manot's case is not apparent.
41 Mr Manot's affidavit exhibit OBG 34.
42 Exhibit OBG 45.
43 Exhibit OBG 46.
44 Exhibit OBG 50.
45 Affidavit paragraph 37. Mr Korrey's response at exhibit OBG 50.

[50] Not only was the unprofitable nature of the business known to the plaintiffs, they were complaining loudly about it.

[51] This is therefore, one of the "clearest of cases"[47] where it is obvious that by 30 June 2014 loss had been suffered, and the loss had manifested itself. By 30 June 2014 time had begun to run under the ACL.

[52] It follows then that the limitation defence must succeed and it is appropriate to determine that issue summarily as a separate issue.

[53] The application seeks a determination that ss 236(2) and 237(3) are an answer to the plaintiffs' claim for "any of the relief sought in [the] proceeding". The limitation is only an answer to the claims under the ACL. The orders are framed accordingly.

[54] It is ordered that:

1. Paragraphs 8, 9 (as to the words "breach of the Franchise Agreement"), 10(d), 10(e) and 10(f) of the statement of claim are struck out.

2. The following question shall be heard and determined separately from, and before, any other issues in the proceeding:

> Whether the plaintiffs are barred, by reason of sub-sections 236(2) and 237(3) of the *Australian Consumer Law*, or otherwise, from obtaining any of the relief sought in this proceeding under the *Australian Consumer Law*.

3. The plaintiffs are barred, by reason of sub-sections 236(2) and 237(3) of the *Australian Consumer Law* from obtaining any of the relief sought in this proceeding under the *Australian Consumer Law*.

4. The parties will be heard on the question of costs.

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46 Exhibit OBG 50.

47 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533.