Neutral Citation Number [2018] EWHC 3153 (Ch)

Claim No. C30BS537

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT BRISTOL
CHANCERY DIVISION

Bristol Civil Justice Centre
1, Redcliff Street,
Bristol BS1 6NP

Before: Mr Recorder Richard Meade QC sitting as a Deputy Judge of the High Court

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Between:

PROPERTY LINKS INTERNATIONAL LIMITED
Claimant

and

COFFEE REPUBLIC RETAIL LIMITED
Defendant

and

MARK CHRISTIE
Third Party

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Robert Sheridan (instructed by **Enigma Solicitors**) for the Claimant and the Third Party
Tina Ranales-Cotos (instructed by **Hill Dickinson LLP**) for the Defendant

Hearing dates: 9, 10, 11 and 12 October 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Introduction

1. At a meeting on 19 December 2006 a written agreement ("the MFA") was made by the Claimant, a Bulgarian company, and Coffee Republic Franchise Limited ("CRFL") which was owned by Coffee Republic PLC ("CRPLC").

2. The MFA was a franchise agreement for the territory of Bulgaria and it related to coffee and coffee shops. It allowed the Claimant to use CRPLC's COFFEE REPUBLIC trade marks.

3. The Defendant is the successor in title to CRFL and CRPLC.

4. The MFA was signed by Mr Bartlett, then the CEO of CRPLC, and Mr Christie, a director of the Claimant. Mr Christie signed twice. Each of his signatures was witnessed by Mr Kelland, the other director of the Claimant.

5. It is alleged by the Claimant and Mr Christie that, at or before the December 2006 meeting and in any event prior to making the MFA, the parties made an oral collateral contract ("the OCC") that supervened, modified or cancelled certain terms of the MFA.

6. Mr Bartlett, Mr Christie and Mr Kelland were long-standing friends, all from Plymouth, and had done business together on many previous occasions and, I find, in a very informal way. CRPLC was a public listed company and required much greater formality which, I find, they all appreciated in theory but did not respect in practice.

7. On the face of the MFA, Mr Christie signed first on behalf of the Claimant and second on his own behalf as guarantor. During his oral evidence he appeared to dispute whether his second signature was as guarantor, or whether he so understood it at the time. As will appear below, I reject much of his evidence, and I reject this. He signed as guarantor and he knew it.

8. The Claimant set about opening outlets in Bulgaria, and invested considerable funds (from the two directors) in doing so. It ran the outlets itself and not through sub-franchisees, and for some but not all it paid lump-sum franchise opening fees required by the MFA. It also paid a running royalty of 3.5% required by the MFA for a period. Its Bulgarian operations were run by Mr Kiril Milanov.

9. The Claimant's operations in Bulgaria struggled for at least two main reasons. First, the parties had hoped that Bulgaria's economy would boom after accession to the EU in 2007 but it fell short of what they had anticipated. Second, the global economic crisis of 2008 had a severe impact.

10. The Claimant's franchise fee and royalty payments were intermittent and CRPLC began to complain. Among other things it sent letters before action to the Claimant, and to Mr Christie as guarantor, in February 2009.

11. CRPLC also began to struggle.

12. It is alleged by the Claimant that in May 2009 (a) CRPLC granted the Claimant a six or twelve month fee holiday, the primary case being that it was a twelve month holiday given by a letter from Mr Bartlett with Board approval by letter of 29 May 2009, and (b) by a written amendment signed by Messrs Bartlett, Christie and Kelland, precise date unknown, ("the May Written Amendment"), the MFA was amended in various ways but in particular to relieve Mr Christie of almost all personal obligations under the MFA, including any guarantee of the Claimant's obligations.

13. The Defendant challenges the authenticity of each of the May 2009 documents. It says they are fake, and were concocted by Messrs Bartlett, Christie and Kelland for the purposes of these proceedings.

14. On 7 July 2009 CRPLC appointed KPMG as administrators.

15. On 29 July 2009 the Defendant purchased the business of CRPLC and CRFL. The Defendant did not purchase the outstanding debts of franchisees such as the Claimant.

16. On 17 September 2009 a deed of assignment was executed by the Defendant in respect of the MFA.

17. On 29 September 2009 Mr Christie and Mr Kelland met Mr Affara of the Defendant, who was the new CEO of the Coffee Republic business. Also present was Mr Reynolds, who had been the financial controller of CRPLC, and was the "last man standing" from the PLC at the Defendant. There is a dispute about what was said at the meeting, but certainly it was said that the Claimant was in breach of the MFA in at least some respects.

18. On 7 January 2010 the Defendant served notice of breach of the MFA on the Claimant, copied to Mr Christie as guarantor.

19. On 24 March 2010 the Defendant served notice of termination of the MFA on the Claimant and Mr Christie as guarantor.

20. There matters lay until 5 June 2015 when a letter of claim was sent to the Defendant on behalf of the Claimant.

21. Following correspondence the claim was issued on 7 July 2015. The Defendant entered a Defence and counterclaimed for breach of the MFA, joining Mr Christie on the basis of the allegation that he was a guarantor of the Claimant's obligations under the MFA.

Procedural matters

22. There have been various, serious procedural misadventures arising from the Claimant's conduct of the proceedings. I will describe the significant ones.

23. The Particulars of Claim were completely unparticularised as to quantum, but after directions made by consent a Schedule of Loss was served on 10 February 2017 seeking a total of £759,387 based on lost profits. No details were given but they were supplied in a report of a Mr Seamark which was incorporated by reference.

24. On 14 September 2018 the Claimant made an application to remove Mr Seamark as its expert and to substitute a report from a Mr Frenkel on a quite different basis (loss of capital value rather than loss of profits) seeking only £355,731. The application was supported by a witness statement from Mr Christie which revealed that the Claimant had been in deep disagreement with Mr Seamark since February 2017 and that (paragraph 17) "Despite our best efforts, the claimant has been left in a situation where it cannot demonstrate its case to the court in relation to quantum".

25. The application was refused on paper by HHJ Russen QC on 26 September 2018.

26. While still instructed, Mr Seamark had attended a meeting of experts with the Defendant's accountant expert, Mr Pickles of BDO. A joint statement had resulted.

27. The trial came on before me on 9 October 2018 (8 October was a reading day).

28. On the first day of trial Mr Sheridan for the Claimant and Mr Christie informed me that that Mr Begg and Mr Milanov, intended fact witnesses for the Claimant and Mr Christie, would not be attending to give oral evidence; on the second day he informed me that Mr Seamark would not give oral evidence but that it was intended to rely on his report anyway. None of this had been communicated to the Defendant in advance.

29. I heard oral evidence from Messrs Kelland, Bartlett and Christie (in that order) for the Claimant and Mr Christie, and from Messrs Affara and Reynolds for the Defendant.

30. Following observations from me that his non-attendance might be regarded as significant, Mr Sheridan suggested that Mr Milanov might give evidence by telephone, but later this was corrected because (it was said) Mr Milanov is a full-time carer for his aged mother and could spare no time at all from his duties. In any event, I said that telephone evidence with no prior arrangements in terms of supervision or provision of papers in Bulgaria would not work.

31. It was also said by Mr Sheridan, on instructions, that Mr Milanov had not been asked to attend because of a miscommunication between Mr Kelland and the Claimant's and Mr Christie's solicitors whereby Mr Kelland had understood that a foreign witness did not have to attend Court. I find the idea that this misunderstanding could arise and last until the first day of trial (when Counsel had agreed a trial timetable which assumed oral cross-examination) to lack any credibility but I am unable to determine where the blame lies as between the Claimant and its solicitors.

32. As to the accounting evidence and quantum generally, Mr Sheridan told me on the second day of the hearing that he proposed to proceed by cross-examining Mr Pickles on the basis of the rejected report of Mr Frenkel, rather than on the lines of Mr Seamark's report. Mr Sheridan's submission was that he could ask any question that he wished, in the hope that Mr Pickles would accept Mr Frenkel's approach, but with the obvious risk that Mr Pickles would not accept it.

33. The evident difficulty with this was that Mr Seamark's report was not just evidence but was the basis of the Claimant's case by virtue of its incorporation in the pleadings. To allow a completely different report to be advanced, even only by way of cross-examination, would be the same as allowing a wholesale amendment of the pleadings. So I ruled against the approach orally during the trial. With considerable hesitation I allowed cross-examination of Mr Pickles on the basis of the approach in Mr Seamark's report, since there was at least some potential factual basis in the

Claimant's written and oral evidence for a claim that loss had been suffered (though in the event I reject it – see below). This seemed to me to be the "least-worst" option given the situation created by the Claimant at the last minute. Clearly, with timely, accurate information from the Claimant the case would never have been managed this way.

Legal principles

34. As to witness recollection and the relative value of evidence based on it compared with contemporaneous documents, Ms Ranales-Cotos referred me to the decision of Leggatt J in *Blue v. Ashley* [2017] EWHC 1928 (Comm). I accept the importance of this.

35. As to whether any OCC, fee holiday, or waiver of Mr Christie's status as guarantor would be binding on the Defendant as successor to CRPLC, Mr Sheridan relied on the general principle that an assignee of a chose in action cannot generally be in a better position than the assignor; he relied on *Mangles v Dixon* (1852) 3 HL Cas 70 to the effect that that may not apply where the assignee makes inquiry of the debtor and is misled by him; and he relied on *Athenaeum Life Assurance Society v Pooley* [1858] 3 De G and J 294 to the effect that the debtor may by inequitable conduct disentitle himself from relying an equity created by the conduct of the assignor. *Mangles* and *Athenaeum* were both considered and affirmed in *Bibby Factors Northwest Limited v HFD Limited* [2015] EWCA Civ 1908.

36. By the end of closing, these principles were not really in dispute. Putting them in the context of this case, it is not alleged that the Defendant or KPMG made any inquiry of the Claimant or Mr Christie in connection with the purchase of the relevant assets or business of CRPLC, so the *Mangles* exception cannot apply. In relation to the alleged fee holiday, Mr Sheridan accepted that if a 12 month fee holiday was in fact granted but the Claimant misled the Defendant in to believing it was only 6 months, and the Defendant acted on that (by using it as a ground for termination), that would be a

relevant factor which could potentially disentitle the Claimant from relying on the 12 month period.

37. As to damages for wrongful termination of the MFA by the Defendant (were I to have found that), Ms Ranales-Cotos relied on *MMP GmbH v. Antal International Network GmbH* [2011] EWHC 1120 (Comm) for the proposition that where a franchisee's business has ceased trading following a breach by the franchisor then the measure of damages must be the loss of capital value of the business and not loss of future profits (the importance of this being that Mr Seamark never attempted to assess loss of capital value). I do not read the decision as making any absolute rule (and *Chitty* (32^{nd} Ed., 26-172), also relied on by Ms Ranales-Cotos does not treat it that way), and I also accept the force in Mr Sheridan's answer, that the Claimant's business did not entirely cease anyway. However, since I have held that the Defendant was not in repudiatory breach, since I have limited my treatment of quantum to deciding some keys facts, and since those facts mean that the value of the claim would be zero in any case (or nominal), my view on *Antal* hardly matters.

The issues

38. The parties agreed a list of issues which was amended slightly by agreement just before trial and on the first day of the hearing. As so often happens, and without any fault of the parties, matters moved on during the trial and I think it is convenient to restate the issues.

39. First, was there any relevant OCC made at or before the 19 December 2006 meeting and if so, what were its terms?

40. Second, was the Claimant in breach of the MFA when the Defendant purported to terminate in March 2010? Four grounds of breach were relied on, namely (a) failure to pay royalties, (b) failure to provide information by reason of the internet functionality of the Claimant's tills being switched off in breach of clause 11.1, (c) failure to provide copy franchise agreements in breach of clause 4.5 and (d) failure to provide audited accounts in breach of clause 11.2.

41. Third, and going along with issue 2(a), was there any fee holiday granted to the Claimant by CRPLC in May 2009? If so, was it for 6 months or 12 months? Only a 12 month fee holiday would mean that the Claimant was not in breach of the payment requirements of the MFA at the date of purported termination.

42. Fourth, if there was no OCC to prevent Mr Christie being a guarantor under the MFA, was he released from any such guarantee by the May Written Amendment?

43. Issues 3 and 4 depend heavily on whether the two documents of May 2009 are genuine or fake.

44. Fifth, if there was a fee holiday or an amendment in relation to Mr Christie's obligations, are they binding on the Defendant as successor to CRPLC?

45. Sixth, is the Claimant liable under the counterclaim for passing off, trade mark infringement and/or breach of the MFA's post-termination restrictions by carrying on using the COFFEE REPUBLIC marks after purported termination? It is accepted that this depends purely on whether there was valid termination.

46. Seventh, is the Claimant liable under the counterclaim for unpaid royalties? This depends on issue 3.

47. Eighth, what is the correct quantum for any of the claims and counterclaims which succeeds?

48. As the trial progressed, the OCC (which had been at the forefront of the pleadings and written evidence) faded from the Claimant's case and this pattern continued in the Claimant's closing submissions where Mr Sheridan realistically accepted that the oral

evidence about the December 2006 meeting had not gone well for the Claimant. Emphasis shifted to the May 2009 documents.

The witnesses

49. Each of Mr Bartlett, Mr Christie and Mr Kelland was an extremely poor witness. Their deficiencies were very similar so I will make some comments which apply to all, and identify some points specific to them.

50. First, they are firm friends and have been for a long time. They are still in a business relationship of some sort concerning Mr Bartlett's AMERICANO coffee franchising business (details are murky and it seemed to me that Mr Kelland in particular was very misleading about this in suggesting there was no ongoing business relationship, as was revealed when Mr Bartlett gave evidence). This caused them to lose objectivity.

51. Second, they have a shared sense of grievance and disappointment arising from the related failures of CRPLC and the Claimant.

52. Third, they have discussed these grievances repeatedly over the years and that has caused them to lose sight of what actually happened, their recollection of real events being replaced with what they wish had occurred.

53. Fourth, in their business dealings before the MFA they operated in a very informal and mutually forgiving environment (for example, Mr Christie once bought a property from Mr Bartlett under a misapprehension and the latter agreed simply to reverse the deal) in which they little cared what contract they had, if any, but just settled up later on the basis of what they thought was fair. That in itself was unobjectionable but it was hopelessly ill-suited on all sides to making a formal agreement involving a listed company. This contributed to their feeling that in some way there ought to be an OCC overriding the MFA.

54. Fifth, none of them had any real regard to the seriousness of, or care required in, making a witness statement or giving oral evidence or (in the case of Mr Christie and Mr Kelland) submitting a statement of case with a statement of truth.

55. Sixth, each of them gave long, rambling answers on matters of limited or no relevance and which did not answer the question put. For Mr Bartlett this was mainly because of an inability to focus and because he was so keen to explain what had gone wrong with CRPLC despite his (as he saw it) entrepreneurial flair. For Mr Christie and Mr Kelland I formed the clear view that it was a more calculating way of avoiding having to give answers adverse to their case.

56. Seventh, their witness statements contained assertions relevant to supporting the Claimant's case which were plainly wrong and in which they can have had no belief had they thought about it. An example common to all three was the suggestion that the MFA was "not fit for purpose" and was downloaded by CRPLC staff (a Mr Carroll) from the internet, perhaps even plagiarised from Starbucks. This was obvious nonsense since the MFA bears on its front the name of a firm known by Mr Bartlett to be franchising specialists and since it was customised to the Claimant (see e.g. The Schedule at page 28 and clause 30.4). It was intended to support the Claimant's case in a material way because it supported the notion that the MFA needed supplementation or correction by oral agreement to make it work.

57. It was troubling that all three of them said this; I attribute this partly to their collective sense of grievance and frequent discussions. But in relation to Mr Bartlett, he accepted that his witness statement had been prepared by a lawyer at the Claimant's solicitors based on what Mr Christie and Mr Kelland thought, and that he had merely scanned it before signing. Mr Bartlett tried to excuse this particular instance by saying he was being "flippant", but this too was obvious nonsense.

58. As to Mr Christie and Mr Kelland, I would also mention that their accounts of what the OCC consisted of in their written statements did not match what was said in the pleadings. They were materially different.

59. In addition, what they said in their written statements was at odds with the statement of Mr Milanov (whom all agreed to have been efficient in his conduct of the business in Bulgaria) for example in relation to whether lump sums for franchise fees were payable, and whether they instructed him to make them (which they eventually accepted).

60. Further shortcomings in their evidence are identified below, but they were so numerous that I have not even attempted to identify them all.

61. Mr Affara was a very good witness with a clear recollection judged against what is reasonable given the passage of time. He accepted certain minor shortcomings in his written evidence (e.g. that he had not mentioned in it reference at the 29 September 2009 meeting to the Claimant's tills being "turned off", though he was firm that he did, and Mr Reynolds agreed). He was in the thick of the relevant events and is still the CEO of the Defendant, but his objectivity remained very good.

62. Mr Reynolds was an excellent and clear witness. He likewise accepted minor deficiencies in his witness statements. He is important because he is now independent of the parties, having left the Defendant in 2013. He was in his job during all the material events, before and after the sale to the Defendant.

63. Overall and for all the above reasons I conclude that (a) I prefer the evidence of Mr Affara and Mr Reynolds over that of Messrs Bartlett, Christie and Kelland in relation to those matters where they conflict and (b) I cannot rely on Messrs Bartlett, Christie and Kelland at all in relation to matters said to favour the Claimant's case unless they are supported by contemporaneous documents or are inherently credible and likely.

64. In saying this, I do not think that Messrs Bartlett, Christie and Kelland were given to pre-planned or co-ordinated lies. Rather, they had allowed themselves to be deluded about what happened, and were then prepared to say whatever occurred to them on the spur of the moment when they found themselves in difficulty maintaining their story.

The alleged OCC and the December 2006 Meeting

65. The December meeting took place at CRPLC's offices. Mr Christie and Mr Kelland attended for the Claimant. A variety of people from CRPLC were in and out of the meeting; exactly who does not matter, though they included Mr Carroll and Mr Breach (the Chairman) save to say (a) that the only attendees who gave evidence at trial were Messrs Christie, Kelland and Bartlett, and (b) that Mr Muirhead, whom Mr Christie and Mr Kelland both said was there in their written evidence, certainly was not because he had not yet joined CRPLC. This was another careless error in their evidence.

66. The meeting started badly with Mr Christie and Mr Kelland walking out after a few minutes over what was on any view a trivial slight, but as they left they met Mr Bartlett coming in, who calmed them down and saved the meeting. Discussions resumed.

67. All the witnesses said, and I accept, that Mr Bartlett was desperate to make a deal because he badly wanted to announce the formation of an international franchising agreement, which would be CRPLC's first, to the stock market. No doubt this and his general approach led him to talk up the agreement that was on offer, and perhaps also his past dealings with Mr Christie and Mr Kelland led him to emphasise that they would have a listening ear at CRPLC in the future. But none of that means that the terms of the contract made were anything other than the written terms of the MFA.

68. I find that a version of the MFA prepared by Chambers & Co of Norwich was available in the meeting on a CRPLC computer and was customised for the

Claimant's situation at least by the preparation of The Schedule, by the addition of clause 30.4 and by the change to sterling as the currency in clause 10.3 (the point that had earlier led to the walk-out by the Claimant). It was not plagiarised from the internet, it was not unfit for purpose and it was not seen or described as such in the meeting.

69. I find that Mr Christie and Mr Kelland signed it, understanding it to be intended to create legal relations and to bind the Claimant and Mr Christie, the latter as guarantor.

70. The alleged OCC was pleaded to have the following terms (paragraph 8 of the Particulars of Claim):

(a) The initial franchise fee would not be payable (although, as a gesture of goodwill, the claimant did pay the said fee for one of the outlets). Royalties would be only be payable as and when the claimant had a franchisee in place running a particular outlet and not when the claimant opened an outlet.

(b) The claimant would be permitted to operate the original stores without the need to search for franchisees;

(c) The directors would not have to give personal guarantees;

(d) Payments would be in Euros;

(e) Apart from coffee beans, the claimant would be free to source the produce that it desired.

71. The Claimant has not proven any of these.

72. I positively reject the first half of (a); no such thing was discussed and the Claimant's later conduct refutes it, since it paid two amounts of 12,500 (erratically one was £12,501 sterling and one was €12,500 – see e.g. the Statement of Account with the February 2009 letter before action), there is no sign of it being a goodwill payment

and such would be out of keeping with the Claimant's overall pattern of non- or late-payment.

73. I also reject the second half of (a); the weight of the oral evidence, including Mr Kelland and Mr Bartlett, was that it was agreed that royalties would be payable on all sales.

74. Nothing really turns on (b). It is possible that there was some discussion that running outlets itself might in fact be the Claimant's approach initially (as indeed it was in due course when no franchisees could be found), but I reject any suggestion that the Claimant did not even have to try to find franchisees (that would make no sense at all in a *master* franchise agreement) and therefore I reject (b).

75. I reject (c) as inherently implausible and refuted by Mr Bartlett's oral evidence (though his written statement supported this he readily said orally that it was intended that Mr Christie should give a guarantee and when confronted with his statement he laconically said that he "was snookered either way").

76. I reject (d) although nothing turns on it. The MFA specifically says sterling and there is no dispute that there was active discussion of the appropriate currency.

77. (e) is the only clause, although of no importance, where the Claimant has a reasonable argument, since, for example, it was plainly not practical for some very perishable goods to be shipped from the UK, and cigarettes were also sold customarily in Bulgaria but not supplied by CRPLC. It is however immaterial save possibly as factual support for the need for clause 30.4 which is referred to in the May Written Amendment, and which may have been inserted because the parties thought that these specific and relatively minor matters would have to be revisited. I find that it was at most an agreement to agree, however.

78. It is to be noted that Mr Kelland gave a rather different and somewhat inconsistent list of oral terms in his statement at paragraph 66 (e.g. that "the initial franchise fee would be flexible", which is meaninglessly vague), while Mr Christie had a still different and differently inconsistent set at paragraph 44 of his statement (e.g. with "flexible" royalties and only one franchise fee payable).

79. Overall, it is my finding that Mr Kelland and Mr Christie caused a statement of case to be submitted on the alleged OCC, and then provided witness statements, with a complete lack of care and indeed recklessness as to what the true position had been. What they said was a mixture of wishful thinking, what they had discussed with Mr Bartlett prior to the meeting, what they would have liked the agreement to be, vague warm words from Mr Bartlett at the meeting, how they behaved later, and what they thought would be necessary to defeat the inevitable claim by the Defendant that the Claimant had been in breach of the MFA.

80. I find that what really happened was that they signed the MFA with all seriousness intending to be bound by it, albeit in a mood of optimism and hope for a good future relationship with CRPLC mediated through Mr Bartlett. Similarly and specifically Mr Christie knew and intended that he was giving a personal guarantee, although in the way of the world he gave little or no thought to the likelihood of it ever being called upon.

The Claimant's operation of the business

81. I can pass relatively quickly over the period from December 2006 to early 2009. Five outlets were opened by the Claimant. Some did better than others but overall performance was poorer than had been hoped. Footfall was low. Contrary to the parties' hopes Bulgaria did not boom like Poland had on its accession to the EU. The world economic recession bit.

82. The Claimant paid some bills to CRPLC. It made some royalty payments and two payments in amounts of 12,500, referred to above, but it was behind on lump sum

franchise fees and royalties. In an email exchange in December 2008 between Mr Muirhead and Mr Breach of CRPLC the former recorded that Mr Christie had said he was going to start "dribbling some money" to CRPLC and the former replied that "[Mr Christie] is a master at teeming and lading his receipts and debts". I find that that was the perception at CRPLC and the truth, based on the contemporaneous documents and the written and oral evidence of Mr Reynolds.

83. In February 2009 CRPLC sent a letter before action; it appears that Mr Bartlett intervened to prevent its being pursued. A letter before action was also sent to Mr Christie as guarantor; he did not raise any objection based on an oral agreement or anything else that he was not in fact a guarantor.

84. At the same time, CRPLC's own position was becoming extremely perilous. Board minutes and other documents make this clear, and although his evidence was very poor in many respects, I accept Mr Bartlett's general description of frantically trying to get money in, keep creditors happy, raise fresh capital, and support some struggling franchisees.

85. In May 2009, Mr Bartlett visited Bulgaria; he had also visited in 2008. There was confusion and inconsistency in the Claimant's witnesses' evidence about which of these visits was said to have been the occasion for the making of the May Written Amendment. On this one point I do accept that the witnesses were merely confused by there having been two visits; their explanations were reasonable and plausible and in particular they were able to date the relevant visit by reference to the global recession having bitten (which was only by May 2009) and by whether or not Mr Kelland was present.

Authenticity of the May 2009 documents

86. As to the 29 May 2009 letter, I remind myself that the burden is on the Claimant to prove that there was a fee holiday. I also remind myself of the importance of contemporaneous documents. However, I must be careful not to assume that I have

all the relevant documents, or to assume that the documents at the time were consistent, or well-thought out, or orderly. And all agree that in addition to email and letter communication, the relevant players spoke by telephone constantly.

87. In particular, if there was any fee holiday then it was certainly mediated by Mr Bartlett, who on his own evidence was overwhelmed with activity trying to save CRPLC. He was travelling very frequently from London to Plymouth. He was also clearly very bad at detail and formalities.

88. Mr Christie and Mr Kelland both said in their witness statements that there was a 12 month fee holiday and that it was granted by the letter of 29 May 2009 (page 664). They both also claimed that Mr Bartlett said the holiday was approved by the Board. But their statements are confused and confusing because they say that the board authorised a 6 month holiday on 28 May 2009 and that the letter of 29 May 2009 nonetheless actually gave them 12 months.

89. In their somewhat later communications (September 2009 and January 2010), however, they twice claimed that they had a 6 month fee holiday and invited the Claimant to check the board minutes (emails of 14 September 2009, 15 January 2010).

90. However, the board minutes for 28 May 2009 say nothing about a fee holiday at all, although they do say that the Claimant was struggling in its Bulgarian operation. Mr Reynolds writing internally in June 2009 expressed an understanding that the Claimant was going to start to pay off its debts, and the June board minutes also reflect an expectation of payment, which would be squarely inconsistent with a resolution in May to grant a fee holiday.

91. I am not at all convinced that fee holidays, especially for relatively minor debtors such as the Claimant, would have been discussed at board meetings or required a board resolution, but I did not hear from any witness who could speak with authority to it.

In a fast-moving crisis such as that facing CRPLC I would have expected the executives to need to be able to make such decisions (to grant or seek a fee holiday) much more quickly, and there is no sign of any such activity with any trading partner in the board minutes. This does not resolve why the 29 May 2009 letter and other communications say there was a board resolution, or why Mr Bartlett said so. He had no explanation for the absence of any reference in the minutes to a fee holiday.

92. As to the preparation and execution of the 29 May 2009 letter itself, chaos again reigns in the Claimant's evidence. Mr Bartlett variously claimed that it had been done in London at CRPLC, or that he had had his staff do it in Plymouth. Just before trial (27 September 2009) he signed a letter at Mr Kelland's instigation confidently claiming that it had been done in London, but this made little sense because it is clear that the address block at the top right would clash with the CRPLC letterhead, which would have been used in London (a point carefully flagged in Mr Affara's written evidence). In addition, it said that the 29 May 2009 letter had been written not by Mr Bartlett but by the Finance Director or in house lawyer. I find that Mr Bartlett was again utterly careless. The truth is that he has no idea.

93. As to the physical provenance of the 29 May 2009 letter, Mr Kelland claimed in his oral evidence, when I asked, that the physical piece of paper copied in the trial bundles had been found in some filing cabinet at the Claimant's office. But it is unsigned and it seems odd that an electronic copy would be printed and kept while the hard copy (if there was one, which does seem likely) was discarded. In any case, I made clear twice during the trial that I was concerned that the Claimant was not making sufficient effort to prove the authenticity of the 29 May 2009 letter and nothing material was done (unlike in relation to the May Written Amendment).

94. In my view, if there had been the grant of a twelve month fee holiday in May 2009 or around then, then the Claimant would have relied on it at the time. Instead, it relied on a six month fee holiday which it said was supported by board minutes.

95. Mr Sheridan put the Claimant's case like this: either the 29 May 2009 letter is genuine or it is (as the Defendant contends) a forgery. If the former then there was a twelve month fee holiday and if the latter there was no fee holiday at all. He argued that the statements about a six month fee holiday later that year cannot affect this analysis (although he concedes, correctly in my view, that they are relevant to the *Mangles* point – see below).

96. The Defendant's case, on the other hand, is that the 29 May 2009 letter is a forgery concocted by Messrs Bartlett, Christie and Kelland during the course of this litigation to create a situation in which the Claimant was not in breach of the payment terms of the MFA at the date of the Defendant's purported termination.

97. I do not accept either of these extreme positions. It is intellectually frustrating that the forensic scrutiny of four days in court, witness statements, disclosure and cross-examination have not made it possible to say with any clarity what happened in relation to any fee holiday, but that is undoubtedly the situation.

98. I do not accept that the 29 May 2009 letter is a forgery. There is nothing intrinsic to it to prove that (the address block issue merely shows it was not written at CRPLC in London), and although I have said that Messrs Bartlett, Christie and Kelland were reckless about the truth and accuracy of their evidence I do not think it would be characteristic of them individually or jointly to come up with such a directly dishonest and subtle plan as to forge a document just good enough to serve their purpose in the litigation. Had they done so then I am sure Mr Bartlett would thereafter have come up with a story about where it was written and stuck to it, and the letter he signed at Mr Kelland's behest just before trial would not have been undertaken or at least would have been consistent with the story to which he was already committed.

99. The fact that the 29 May 2009 letter is not a forgery does not mean that it necessarily reflects a real and effective contemporaneous communication to the Claimant of a 12 month fee holiday, however. If there had been such a thing, why would the Claimant

very soon thereafter claim to have received only a six month fee holiday and, in the teeth of the MFA being terminated, accept that on that basis money was owed?

100. It is clear that the 29 May 2009 letter was not the only communication at the time about a fee holiday; Mr Christie at paragraph 66 of his first statement refers to an oral communication about a 6 month holiday actually having been granted, reviewable at its conclusion, *and* the 12 months of the 29 May 2009 letter. Mr Kelland's written evidence is similar and similarly confusing.

101. It would not surprise me at all if Mr Bartlett told Messrs Christie and Kelland a number of different and mutually contradictory things about the fee holiday, and it is perfectly possible that they thought the holiday was 6 months and paid little attention to the letter, or just thought it was a mistake that it said 12 months. This at least would explain their later assertion to the Defendant that there was a six month fee holiday. And in this event they might well have come across the letter in preparing for these proceedings and used it to justify non-payment right up until March 2010, rather than (as the Defendant alleges) forging it when they realised they need an excuse for non-payment for the whole of that period. It should be noted that the letter before claim asserted a six month holiday and it seems unlikely to me that the Claimant would commit itself to that version of events and only thereafter forge a letter asserting a longer period.

102. So I conclude that the Claimant has completely failed to prove a 12 month fee holiday. Since a 6 month fee holiday would mean that the Claimant was in breach of the payment provisions of the MFA in January 2010 and had not cured it by March 2010 it is not very important to the real dispute before me whether there was a 6 month fee holiday at all. It does however affect the quantum of the counterclaim. Although the Claimant's evidence is better on this point since it said there was such a holiday at the time, I find that it has still failed to prove its case on this. There are just too many uncertainties and inconsistencies, and all the Claimant's witnesses are thoroughly unreliable.

103. It may seem odd that Mr Bartlett was granting fee holidays to CRPLC's debtors at all; one could more readily understand that he would *seek* a fee holiday from the company's creditors while working hard to get in as much money that was owing as possible. However, what he said was that the collapse into insolvency of any franchisee's business could be fatally damaging to CRPLC's image, and I accept this. More questionable may be the fact that on the Claimant's case he was granting a fee holiday to his personal friends with whom he was in business (in Mr Christie's case, absolving him from a personal guarantee), but since it is not alleged that he lacked capacity to grant the fee holiday, I need say no more about it.

Would the Defendant have been misled?

104. Even had the 29 May 2009 letter provided a clear and effective communication of a 12 month fee holiday by CRPLC to the Claimant, it is clear that what the Claimant later said to the Defendant was that there was a 6 month holiday. On the Claimant's case this was misleading, and materially so: it would give the Defendant the false impression that at the date of the notice of breach and the date of notice of termination the Claimant was in fact in breach of its obligations to make payment of royalties. So it could lead to the Claimant terminating the MFA when it had no right to do so.

105. That being so, I find that it would clearly be inequitable for the Claimant to rely on the grant of a 12 month fee holiday by the 29 May 2009 letter (although of course my finding is that there was no such grant).

The May Written Amendment

106. This document is very different in its style and contents from the 29 May 2009 letter. The latter is just plain, rather crude text and unsigned, whereas the former shows a lot more attention to detail, has a heading, is signed three times and has an official stamp. Faking it would have been an utterly different and much more complex proposition from concocting the 29 May 2009 letter. I find that Messrs Bartlett, Christie and Kelland lacked the wit, organisation and focus to do anything so relatively complex.

The forward planning that it would imply is not their style, which I have found instead to be to lurch from one mis-statement to another.

107. I also find that many aspects of the May Written Amendment are inherently plausible. There clearly was a degree of understanding, at least by May 2009 and even when the MFA was made, that the Bulgarian market was different from the UK, for example in relation to the sale of cigarettes and alcohol, and I accept that it was not practical to get highly perishable goods like cream cakes from the UK to Bulgaria. Clause 30.4 of the MFA, referenced in the heading to the May Written Amendment anticipated future changes of this kind.

108. On the other hand, paragraph 3 of the May Written Amendment, releasing Mr Christie from all obligations in the nature of guarantee, stands out as very different, not a reaction to Bulgarian conditions, and not having any obvious connection to the purpose of clause 30.4. Making the MFA conform to real conditions is one thing; a gratuitous release of a potentially important obligation is something else. Given the issues in the case and the approach of Mess Bartlett, Christie and Kelland a strong degree of suspicion is warranted.

109. Had matters rested there, I think my decision on the authenticity of the May Written Amendment would have been difficult, but in the middle of the trial, following a strong indication I gave that I felt that the challenge to authenticity was not being taken seriously enough by the Claimant, my attention was drawn for the first time to a document of 18 June 2010 from Mr McKenzie of Bond Pearce to Ms Coleman of KPMG; Bond Pearce was the firm of solicitors that had sent a letter of claim to Mr Christie as guarantor in March 2010. It says:

Coleman, Samantha

From: William McKenzie [William.McKenzie@bondpearce.com]
Sent: 18 June 2010 15:34
To: Coleman, Samantha
Subject: Coffee Republic - Property Links [1A.FID353441]
Attachments: eCopy scanned document.pdf

Dear Sam

We have received the alleged Guarantee amendment from PLI.

This does provide an additional page attached to the back of the agreement you sent me and is signed by the directors of PLI and Steve Bartlett for Coffee Republic (see attached, scroll to final page). Point 3 in the amendments limits Christie's need to guarantee the Master Franchisee's obligations to a single obligation at section 8.15. This retains Christie's obligation not to acquire any financial interest in the capital of a competing undertaking, but removes his guarantee for the remainder of the Master Franchisee's obligations.

110. It therefore reports that a "Guarantee amendment" had been received from PLI, the Claimant. The tone is that Mr Christie had challenged whether he was in fact still a guarantor.

111. Then, the second paragraph refers to an *additional* page, at the *back of the agreement* (clearly the MFA): see the reference to ("see attached, scroll to final page"). It talks of "Point 3" limiting any guarantee, and to clause 8.15. I find without any doubt that this describes the May Written Amendment, and plainly identifies it as an amendment to the MFA.

112. I find that this proves that the May Written Amendment existed in June 2010. I accept Mr Sheridan's submission that there would be no logic to a suggestion that it was faked between May 2009 and June 2010, and I reject Ms Ranales-Cotos' submission that its existence in 2010 did not mean that it was genuine then. I note that neither Bond Pearce nor KPMG raised any query about its status or authenticity.

113. The June 2010 email came from the Claimant's disclosure; it was however never mentioned to me on behalf of the Claimant (or referenced in any witness statement or statement of case) until the middle of the trial despite it being obvious for a long time that the authenticity of the May Written Amendment was under attack. I find this extraordinary; a lot of time and costs would have been saved had it been identified much earlier. It might be said that the Defendant overlooked it as well, but I accept Ms Ranales-Cotos' submission that there was a lot of disclosure in the case and that it is much harder to comprehend and appreciate the importance of the other side's disclosure than one's own. Also, the Claimant's pleaded case as amplified in Further Information had been that the amendment to the MFA had been oral, not in writing.

114. So my conclusion is that the May Written Amendment is genuine and was made in May 2009.

115. The Defendant's secondary argument on the May Written Amendment was that even if it were genuine and removed Mr Christie's obligation as a guarantor, it did not release him from a separate obligation by way of indemnity under clause 21.3 of the MFA. I reject this: although the phrasing of the May Written Amendment is unusual in that it states that obligations under a recital (rather than an operative provision) are removed, its overall objective (to leave Mr Christie only with the obligation in clause 8.15) is clear, and clause 21.3, if left in place, would be contrary to that, and would have the same effect as the main guarantee in respect of all financial obligations of the Claimant.

29 September 2009 Meeting

116. My findings are as follows.

117. The meeting was ill-tempered, mostly on the part of Mr Christie and Mr Kelland. Mr Kelland walked out soon after the meeting started and Mr Christie spent most of the rest of the time trying to salvage matters. His main focus was on trying to persuade

Mr Affara to agree to repackage the Claimant's business to include only the profitable outlets. Mr Affara said he was not interested in that.

118. I hold that Mr Affara said that the Claimant was in breach of the MFA and that the Defendant would terminate the MFA unless the breaches were remedied. I hold that he did not say that the Defendant was going to terminate the MFA come what may, which anyway would have made little commercial sense since there was some royalty-bearing business being conducted.

119. I hold that Mr Affara and Mr Reynolds complained that the Defendant was not receiving information about the Claimant's receipts and that the facility on the Claimant's tills for automatic transmission of the information to CRPLC (and now the Defendant) had been switched off. It is true that their written statements did not say this (although the issue with the tills was mentioned by Mr Affara more generally), but it makes sense, is consistent with contemporaneous documents that information was lacking, and I accept their clear oral evidence.

120. Further, on the basis of the written and oral evidence of Mr Affara and Mr Reynolds I find that the Claimant's tills were in fact switched off in relation to reporting over the internet of takings for a significant period prior to the September 29 2009 meeting and that this was never remedied.

121. I also prefer the evidence of Mr Reynolds that the tills were working in this respect for UK sites and other overseas franchises and this further undermines the position of the Claimant. I reject the evidence of Mr Bartlett to the contrary in his account that there were IT problems in London hindering the receipt of takings information from tills in stores. Mr Reynolds, who was by far the more reliable witness and much closer to this issue from day to day at the time, is to be preferred.

122. I reject the evidence of Mr Christie and Mr Kelland that the issue of the tills was not raised at the meeting.

Decision to terminate already taken by 29 September 2009?

123. The Claimant asserts that from the meeting of 29 September 2009 on (if not before) the Defendant was determined on terminating the MFA and did not care whether or not it had any good reason or whether or by what steps the Claimant tried to remedy any breaches.

124. This is not of direct relevance since it was, correctly in my view, common ground between Counsel that the adequacy of grounds for termination is an objective matter. It was relied on by the Claimant as prejudice, really. In any event, I reject it since it is contradicted by contemporaneous documents on both sides referring to *threats* of termination and to termination if there was no cure of the breaches. I also accept Mr Affara's evidence that that was not the Claimant's intention.

Franchise agreement provision

125. Clause 4.5 of the MFA requires the provision of sub-franchise agreements by the Claimant within 10 days of their being made. Since none were ever made (as CRPLC and, I find, the Defendant were aware) this obligation never arose. It was a trivial issue anyway.

126. Ms Ranales-Cotos tried in closing to argue that it was obvious that the breach complained of was really under clause 4.2, the Claimant having always run the outlets itself and never had obtained any franchisees. I reject this as an interpretation of the Notice of Breach and anyway to allow the Defendant to contend that such a breach merited termination would have required further and different factual investigation since CRPLC and perhaps the Defendant always knew that the Claimant was operating all the outlets itself.

Audited accounts

127. On the balance of probabilities (although the documentation is incomplete) I find that Mr Milanov provided the Claimant's 2009 accounts to CRPLC on time. The 2010 accounts are not alleged yet to have been due when the Notice of Breach was served.

128. So this allegation of breach fails. Again it was trivial, really.

Breach

129. My overall conclusion is therefore that as at 7 January 2010 the Claimant was in breach of clause 11.1 by virtue of the till reporting functionality being turned off, and in breach of the obligation to pay fees. It has failed to prove any fee holiday, but if there was one it was for only six months. Even if it had been granted a 12 month fee holiday in May 2009 then it lost its entitlement to rely on it as a matter of equity because it misled the Defendant into thinking that it had only six months (an impression which it never corrected).

130. Neither breach was remedied by 24 March 2010 so the Defendant was entitled to terminate and did so effectively and lawfully.

131. The other two allegations of breach fail but it does not matter given the two that have succeeded.

Counterclaim

132. It is not in dispute that on my finding that the MFA was lawfully terminated by the Defendant, the Claimant is liable for its continued use of the COFFEE REPUBLIC marks. The liability arises from trade mark infringement, passing off and breach of the post-termination restrictions in the MFA, and I find it does not matter which: the remedy is a notional reasonable royalty in each case. I deal with the amount below.

133. Given my finding of breach of the royalty payment provisions, the Claimant is liable to the Defendant for outstanding royalties. The experts agreed that the amount was either £4,395 or £4,196 and that the difference was immaterial. Since Mr Pickles' report went in, he was cross-examined (though not on this) and is clearly the more reliable, I will take his figure.

Quantum

134. Since I have found no liability on the claim quantum does not arise, but I think it is sensible and proportionate to make relevant key findings in case my decision on liability should be overturned on appeal (although since my decision rests on findings of primary fact this is unlikely and my mentioning the possibility does not mean that I consider it at all probable).

135. My first finding is that the Claimant has failed to prove any loss at all since, as it accepted, without the report of Mr Seamark it had no ability to do so. In principle and in the right case it may of course be possible to prove and quantify loss without any expert evidence at all. In others, the expert's role may merely be to provide calculations based on primary facts and the Court can do the task itself if the expert falters. The present case was not like either of those: the experts had a real and substantial task of taking certain primary facts and projecting them forwards to assess the financial effect. The Defendant had evidence on this and the Claimant had none.

136. My second finding is that Mr Pickles was a good and thorough witness and I accept his evidence. He was criticised for getting costs and profit the wrong way around in his report. This may sound like a serious mistake but he explained and I accept that although he expressed himself wrongly, his analysis used the correct numbers. Mr Pickles estimated loss at zero on the basis that the COFFEE REPUBLIC brand in fact had no value to the Claimant (zero loss would not have precluded the award of nominal damages).

137. My next three findings are factual and also relate to the attacks made on Mr Pickles on matters of substance.

138. So my third finding is that it is probable that coffee was more expensive for the Claimant to get under the MFA than to source locally in Bulgaria. The evidence is slight but it appears that the franchisor would always build profit into coffee supplies to the franchisee (a proposition which Mr Bartlett supported), and of course shipping would be avoided by buying in Bulgaria. Further, the true position, if not that, could easily have been proved by the Claimant from its records, but the accounting experts agreed that the Claimant had failed to provide any adequate documentation.

139. My fourth finding is that the cost of coffee may well explain the very different cost margins of the Claimant now (45%) compared with 2008-2010 (64%), and, relatedly, I hold that it was reasonable for Mr Pickles to use those numbers. Mr Sheridan said that there was no evidence that the difference could be accounted for by the cost of coffee, but this wrongly inverts the burden of proof in an important and material way, since the experts agreed (see above) that the Claimant failed to provide the information needed.

140. My fifth finding is that COFFEE REPUBLIC is not a brand that had any presence or significant power to bring in custom in Bulgaria. Yet the Claimant had to pay royalties of 3.5% to use it. Mr Sheridan submitted that this made no sense: why would the parties agree that? As part of this finding, my reasoning is that the Claimant just simply made a bad bargain because it wrongly assessed the strength of the brand in Bulgaria (Mr Sheridan's submission that Mr Affara was saying his company's name was worthless was wrong: Mr Affara thinks it is valuable in some places, including the UK, but not in Bulgaria). It should be remembered that COFFEE REPUBLIC had no trade in Bulgaria at all prior to the MFA and there was no reliable evidence that Bulgarians came across it in any significant numbers when visiting the UK.

141. My sixth finding, which follows from the fifth, is that the COFFEE REPUBLIC brand did not drive any greater volume of sales when used by the Claimant in Bulgaria. Mr Pickles was criticised for assuming that sales would not differ with and without the brand despite saying that the point of franchises was volume. But he clearly meant effective franchises driven by powerful brands, not the COFFEE REPUBLIC situation as I have found it to be.

142. My seventh finding is that any assessment based on the possibility of the Claimant opening more franchises/outlets (a) must fail on the facts since the Claimant was never in a position to do so, and (b) would have to take into account opening fees of about £120,000 per outlet.

143. Mr Sheridan's post-trial written submissions sought to advance a further basis of claim leading to a total quantum of £152,138. I strongly suspect that its basis is materially different from any that the Claimant had foreshadowed and so consistently with my approach to the Frenkel report I might well have refused to allow it to be run, but in any case it is contrary to all my findings above and I reject it.

144. Overall, my clear view is that the Claimant's business in Bulgaria struggled badly for macroeconomic reasons not within the control of the parties (the global recession, the performance of the Bulgarian economy on its accession to the EU), but so far as the MFA was concerned, it was a burden on the Claimant and not a benefit because it required appreciable royalties and higher costs of goods without providing any more custom. The Claimant was better off without it and so had the Defendant been in repudiatory breach there would have been at most an entitlement to nominal damages.

145. My finding that the brand was ineffective in Bulgaria must be reflected in any quantification of the counterclaim for trade mark infringement, passing off and breach of post term restrictions. I find that the proper award would be a notional reasonable royalty assessed at the date of breach, i.e. a notional renegotiation and not just a reimposition of the 3.5% rate. This is an extremely rough exercise but doing the best

I can I assess it at £2,000.00, in part because at least a licence for the period in question would save the Claimant from having to rebrand in haste.

Conclusion

146. The Claimant was in breach of the MFA at the date of termination. The Defendant was entitled to terminate. The claim therefore fails.

147. Had the claim succeeded, it would have been valueless and only nominal damages would have been payable.

148. Mr Christie was not a guarantor under the MFA because his obligation was removed by the May Written Amendment. The claim against him on that basis therefore fails.

149. The counterclaim succeeds and the Claimant must pay £6,395.00 (£4,395.00 royalties under the MFA plus £2,000.00 damages) plus interest.

150. I will deal with the appropriate form of order, and costs, by way of written submissions. I direct the parties first to try to agree, and failing that to provide written submissions by 20 November 2018, not to exceed 4 pages of normal type, with any supporting evidence. If these directions are not practical then the parties are invited to suggest appropriate variations.