Neutral Citation Number: [2023] EWHC 1077 (Comm)

Case No: CC-2021-BHM-000024

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (KB)

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 9 May 2023

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

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Between :

(1) London Business House Limited	**Claimants**
(2) Faisal Rehman	
- and -	
(1) Pitman Training Limited	**Defendants**
(2) Pitman Training Group Limited	

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- -

The 2nd Claimant appeared in person representing both Claimants
Ali Tabari (instructed by **Hamilton Pratt**) for the **Defendants**

Hearing dates: 28-31 March 2023

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Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

This judgment is handed down remotely at 10.30pm on 9 May 2023 by email to the parties and by publishing a copy on the website of the National Archives.

HHJ WORSTER :

Introduction

1. The 1st Claimant ("LBH") is a company owned and controlled by the 2nd Claimant ("Mr Rehman"), who is the Director of the 1st Claimant. Their claim arises out of a written Franchising Agreement dated 11 March 2015 ("the agreement") made between the Claimants and the 1st Defendant. The Claimants seek a Declaration that the agreement has been rescinded, and damages.

2. The Claimants also pursue their claims against the 2nd Defendant. The reason for that is that the 1st Defendant is a dormant company. It has no assets and according to its filed accounts, has not traded since 2018. It is wholly owned by the 2nd Defendant. The Claimants understanding was that the 2nd Defendant also owned the intellectual property rights attaching to the "Pitman" brand and licenced their use to the 1st Defendant for the purposes of franchising. The concern was that the real party to the agreement was the 2nd Defendant. That belief was bolstered by the fact that the Claimants paid the deposit and other monies due under the agreement into the 2nd Defendant's bank account. There was also a practical concern for the Claimants. If they succeeded against the 1st Defendant alone, they would be left with a judgment against a company with no assets.

3. The Defendants position is that the agreement was made between the Claimants and the 1st Defendant, and that the 2nd Defendant was not a party to the agreement. Money received by the 2nd Defendant was received as the agent of the 1st Defendant. The express terms of the agreement are clear. The agreement begins by stating that it is made between (1) Pitman Training Limited as the Franchisor, London Business House Limited as the Franchisee, and Faisal Rehman as "the Individual". The agreement is professionally drafted, initialled by the parties on each page, and signed.

4. On the face of it, it does seem odd that the Pitman franchise is traded by a dormant company, whilst its parent company acts only as its agent. However, that is the clear effect of the agreement, and is the way that the Defendants have arranged their business. The reason for that structure was dealt with by Claire Lister in her witness statement at paragraph 4, and I raised it with her again at the end of her evidence. Ms Lister is the former owner and Managing Director of the 2nd Defendant. Her evidence was that the 2nd Defendant had two dormant wholly owned subsidiaries, the 1st Claimant which entered into all the UK franchise agreements, and a second company which held all the trademarks and international agreements. These arrangements were devised to facilitate restructuring (in her oral evidence she referred to management buy outs) without having to novate all of the agreements. She had some personal experience of that. The explanation made sense, and it removes any suspicion that this was some sort of deliberate tactic to avoid liability under the terms of the agreement.

5. Moreover, it is apparent that all UK "Pitman" franchise agreements are with the 1st Defendant. Consequently, the Claimants and the Court can be confident that if the Claimants obtained a judgment against the 1st Defendant, there would be an economic imperative for the 2nd Defendant to ensure that it was satisfied. If it did not, and the 1st Defendant was wound up as a result, it would have the potential to bring all the UK Pitman franchise agreements to an end, with serious and direct consequences for the overall business of the 2nd Defendant. On the evidence I concluded that the issue was

academic, and I approach the matter on the basis that the agreement was made with the 1st Defendant, whom I shall refer to as "Pitman".

6. The Claimants were initially represented by lawyers. The Particulars of Claim and the Reply were drafted by Counsel, and Mr Rehman had assistance from his solicitors with disclosure and the preparation of his witness statement. Consequently his case has been properly formulated, and his witness statement is well-structured and detailed. At trial, Mr Rehman represented himself and his company without the benefit of legal assistance. In doing so he demonstrated a detailed knowledge of the factual background, and whilst he would not claim any great knowledge of the law, I should record that he cross examined Ms Lister with some skill. He had obviously spent a considerable time preparing his case. Given that he was not represented, I raised a number of issues with Mr Tabari in the course of his closing submissions to test the arguments which arose on the Claimants case. The fact that Mr Rehman did not raise some of those matters directly does not prevent me from considering them.

7. I heard oral evidence from Mr Rehman for the Claimants, and from Claire Lister, Kerry Bentley (a director and shareholder of Derby), Stewart Howard (a former Franchise Development Manager with the Claimants) and Yowie Roberts (then a Senior Franchise Development Manager). The parties also called expert accounting evidence in relation to the Claimants' losses; Professor Barnes for the Claimants and Mr Woodward for the Defendants. They had met and produced a joint statement, and were both called to give oral evidence and to be cross examined. There was a soft copy trial bundle. References to numbers in square brackets are to the pages of that bundle unless otherwise indicated.

8. The Defendants had also intended to call Nichola Haythorne to give evidence. She made a full witness statement, a copy of which was exchanged as directed, and provision was made for her to give evidence in the trial timetable. However, on 15 March 2023 she emailed the Defendants 'solicitor to say that her mother had been taken into hospital two weeks before and had suffered a cardiac arrest. Whilst she had been resuscitated, she was left with severe brain damage. She had been taken off life support and Ms Haythorne was with her waiting for her to die, Her email refers to the stress of giving evidence in such circumstances, and to the fact that she is concerned for the health of her unborn child. There were some further email exchanges in which the Defendants' solicitor sought to speak with Ms Haythorne, and explore whether the trial should be adjourned. On 19 March 2023 Ms Haythorne replied to say that her mother had died, and that she was "categorically not able and willing" to attend the trial because of her emotional turmoil and the additional stress it would cause. She asked not to be contacted again.

9. The Defendants made an application on 20 March 2023 to rely upon Ms Haythorne's witness statement at trial and for the court to give it "full weight" as if a hearsay notice had been served at exchange. Mr Tabari's submission is that given the compelling reasons for Ms Haythorne not attending court to be cross examined, the statement ought to be given more than minimal weight. Ms Haythorne was an important witness, particularly in relation to the claim in misrepresentation. Mr Rehman would undoubtedly have had a number of questions to ask her. He submitted that I should not take her statement into account. He relied upon the opening words of her email of 15 March 2023 which said:

> *Sorry but I am going to have to withdraw from being a witness.*

Mr Rehman interpreted that as Ms Haythorne withdrawing her witness statement. That is not how I read Ms Haythorne's intention. She is not saying that the statement cannot be relied upon. Indeed, the penultimate paragraph of her email of 19 March 2023 begins with this:

> *You have my witness statement and are able to present that to the court …*

10. I indicated at the start of the trial that I would rule on the application when I gave judgment. Having the benefit now of hearing all the evidence, I grant the application. The effect of doing so is limited. It means that the Defendants may rely upon the witness statement as hearsay, and avoids the potential consequences of a failure to serve a hearsay notice at the time provided for the exchange of witness statement in accordance with CPR Part 33. Section 2(4) of the Civil Evidence Act 1995 provides that the failure to serve such a notice does not go to the admissibility of the evidence, but may go to weight.

11. Mr Rehman made the point that I have no independent evidence to establish the truth of what Ms Haythorne says in her emails. That is true, but the content and tenor of the emails she sent to the Defendants' solicitor satisfy me that I can rely upon the veracity of what she says. It would be an extraordinary story to invent. There is a "good reason" for the purposes of the relief from sanctions test, and in all the circumstances of the case it is just to make the order sought. The weight I actually give to the statement is dealt with in the discussion of the evidence.

12. The other pre trial application was made by Mr Rehman on 23 March 2023. This was an application for permission to bring a contempt application against Kerry Bentley. The basis of the application appears to be Mr Rehman's case that certain aspects of her witness statement are untrue and that she has lied. In the addendum to the application he alleges that:

> *This statement has not even a shadow of truth in it.*

I explained to Mr Rehman at the start of the trial that such applications are rare, and usually inappropriate, and that the time to consider whether such an application should be made would be when the witness had given their evidence, and not before. In the light of the evidence Ms Bentley gave and my conclusions as to her honesty, I dismiss the application. The addendum to the application also sought the "forensic retrieval" of emails and the adjournment of the trial pending their production. Having raised the matter, Mr Rehman did not pursue that part of his application. He no doubt appreciated that the time for making applications for further disclosure had long passed, and that the court was unlikely to adjourn a trial.

The claim in summary

13. In 2014, Mr Rehman was looking for business opportunities, and having done some research was attracted to the Pitman brand. Pitmans provide training courses and (on completion) certificates of training. The brand is well established. Mr Rehman contacted Pitmans. Initially there was discussion of his taking the franchise in Romford, but in due course he settled on Nottingham. I deal with the detail of the exchanges between Mr Rehman and the staff of Pitmans below. Those discussions led to Mr Rehman signing the agreement in March 2015.

14. Mr Rehman's business was not a success. His case is that this was because Pitman was supplying another course provider in the area covered by his franchise. Pitman's case is

that this had no effect on Mr Rehman's business at all, and that his lack of success was the consequence of his failings as a franchisee. Whichever it was, there is no issue but that the franchise came to an end, and LBH stopped trading on 14 June 2017. The Claimants' case is that the agreement was terminated by their election to rescind the agreement by Mr Rehman's letter of 12 May 2017. The Defendants' case is that the agreement was terminated by their letter of 15 June 2027.

15. The claim is put in two ways. Firstly in contract, and secondly as a claim in misrepresentation. At the core of both formulations of the claim is what the Particulars of Claim refer to as the "Exclusive Right". This is said to be:

> *… an exclusive right for [LBH] to operate the System (as defined in the agreement) and provide the services (as defined in the agreement) for the purpose of operating its business in the Territory (as defined in the agreement) for at least a five year period, or in summary to exclusively operate the "Pitmans" brand and associated trade marks in the Territory*

16. Mr Rehman's submission was to the effect that the idea of exclusivity lies at the heart of a franchise arrangement. I return below to the detail of the argument, but in essence the contractual claim is that Pitman breached the terms of the agreement by "permitting, facilitating or encouraging" Derby Business College Limited ("Derby") to use Pitman's products in the Nottingham territory under the terms of a licence. The Claimants case is that this caused LBH a loss, both because it lost business to Derby and because of the further impact that had upon the growth of it's business. The claim for damages is for (i) the recovery of set up costs and other losses consequent upon the early termination of the agreement; (ii) loss of profit from closure of LBC's business to the end of the 5 year term of the agreement; and (iii) loss of profit from a second 5 year franchise. The claim in misrepresentation is to similar effect, but relies upon representations made to Mr Rehman by Nichola Haythorne orally and in emails before the agreement was signed. Those are said to be to the effect that the Claimants would enjoy an exclusive territory from which to trade the Pitman brand. Mr Rehman's primary case is that these representations were made fraudulently; see paragraph 1 of his skeleton argument

17. The Defendants dispute that there was an "Exclusive Right" in the terms alleged. They point to the express terms of the agreement and say that defines the parties rights. They deny that their involvement with Derby breached the agreement. Further they say that Mr Rehman was told about Derby, and that because Derby only provided government funded courses it did not compete with LBC's business or contribute to the failure LBC's business. The losses claimed are in dispute, in particular that there was any prospect of LBC securing a second five year franchise. The alleged misrepresentations are denied. If established, it is denied that they were made fraudulently, whether that be deliberate fraud or reckless fraud. The particular relevance of the allegation of fraud is that liability for a claim for negligent or innocent misrepresentation would fall within the scope of the exclusion clauses in the agreement. The Claimants in turn say that those clauses were not reasonable within the meaning of section 11 of the Unfair Contract Terms Act 1977.

The facts

18. The first aspect of the evidence to consider relates to the business relationship between Pitman and Derby. For a number of years, Derby was the Pitman franchisee for the Derby area. That arrangement came to an end in 2012. However, it is apparent that

some business relationship continued between Pitman and Derby, and it is the effect of that upon Mr Rehman's business which is key to the resolution of this matter. Mr Rehman alleges that Pitman's dealings with Derby during the course of the agreement were a breach of his rights to exclusivity, and caused loss. Pitman's case is summarised at paragraph 4 of the Defence:

> *For the purposes of these proceedings, DBC offered only government-funded training courses for generic basic level employment skills ['the Funded Courses'] through the First Defendant by reason of a 3-year licence agreement commencing 28th November 2012. It became entitled to do so by reason of having undergone successful application processes with governmental organisations funding such courses; the First Claimant never undertook that process, and was not entitled to offer the Funded Courses. The Funded Courses and their target market were very different to the core business of the First Defendant, which was to up-skill primarily career developers, career changes and parents re-entering the job market after a career break, or to change careers.*

19. As that pleading suggests, Derby undertook government funded training, although the evidence revealed that there was also some minor commercial provision. The tendering process for a government contract was lengthy and competitive, but Derby were successful in getting funding. In particular Derby had funding for basic level skill training and specific jobs such as fork lift driving truck driving and bricklaying; see Claire Lister's witness statement at paragraph 17. To be eligible to go on a government funded course, the student had to meet specific eligibility criteria. Ms Lister recalls certain examples: single parents, the long term unemployed, and those with drug or addiction problems.

20. On 28 November 2012 Pitman and Derby entered into a 3 year Licenced User Agreement ("the Licence") which covered the arears of Derby, Nottingham (postcode arears NG 1-7) and Mansfield (NG 18-25). There is a copy in the trial bundle at [1118]. The Licence commenced in September 2012 [1129] and so would have run to August/September 2015. Mr Rehman's evidence was that his business started trading in the July of 2015, so there is little if any overlap between the end of Derby's 2012 Licence and the beginning of his business.

21. As to the terms of the Licence, by clause 2 Pitman granted Derby what was described as "the non-exclusive right during the continuance of this Agreement to provide the Courses". The "Courses" are defined as the provision of training courses using the Products and the Course Materials as detailed in the Schedule. The Schedule identifies those materials at [1130]. Clause 4 provided for the obligations of Pitman. They included obligations to:

    4.1 Permit the Licensee to operate and promote the Courses in accordance with the terms of this Agreement.

    4.3 Supply or procure the supply of Products and Course Materials to the Licensee at the prices set out in The Schedule.

    4.4 Supply suitably worded Certificates to the Licensee's students who reach the appropriate level when using the Services.

22. Derby's obligations are set out at clause 5 and elsewhere in the Licence. In particular I note the following:

5. l Purchase or acquire the Course Materials and the Products only from the Licensor or from such other supplier as the Licensor shall nominate from time to time provided that nothing in this Agreement shall prevent the Licensee from providing courses other than the Courses or from purchasing or acquiring from third parties any materials and products it wishes to use in relation to courses of study other than the Courses.

5.3 Provide the Courses strictly in accordance with the terms of this Agreement and in particular:-

5.3.1 Use only the Trade Name, the Trade Marks or such other name or marks or logos in accordance with the Terms of Use and only in connection with the Courses and not in relation to any other aspect of the Licensee's Business.

5.3 .2 Not use the Trade Name or Trade Marks or anything confusingly similar as part of a corporate name.

5.7 Not present any of the Course Materials to its students or others in any format or packaging other than that which they are supplied by the Licensor.

8.1 The Licensee may advertise the Courses but will not publish any advertising or promotional material in respect of the Courses which features the Trade Name or displays the Trade Mark unless it has the prior written consent oft he Licensor to the advertising medium …

9.3 The Licensee shall not use the term "Pitman Training Centre" in any way whatsoever, including but not limited in relation to the Licensee's Business and to the Courses.

23. The Licence provided for annual fees of £3,000 and £1,500 for the Nottingham and Mansfield arears. There was no annual fee for Derby because of the pre-existing franchise. The Schedule sets out prices for the workbooks and CDs, and Derby agreed to purchase the numbers agreed.

24. Ms Bentley's evidence was that the course materials that Pitman delivered to Derby were not branded with the Pitman name or logo. The phrase she used to describe what was supplied to Derby was "white label". The terms of the Licence do not expressly provide for that, but the terms of clause 5.7 appear to be drafted with that in mind.

25. The record of Pitman's sales to Derby in the relevant period are set out in Stewart Howard's email of 7 January 2022 at [295]. 896 courses were sold to Derby in the period from January to July 2015. None were sold in 2016, but it appears that there were some further dealings between Derby and Pitman in 2017. Ms Bentley confirmed in her evidence that some further European funding was obtained in 2017. Mr Howard's email indicates that 81 courses were supplied by Pitman to Derby in the period from March to November 2017.

26. Appendix 9 to Mr Woodward's expert report provides some further detail, derived from the Defendants' disclosure. That material was then considered by both experts in their joint statement. Paragraph 1 includes this [378]:

> *These transactions represent [Derby's] purchases of courses from Pitman, and span 5.7 months (12 May 2017 - 3 November 2017). Lost sales over this period are estimated at £15,415 in total.*

Ms Bentley confirmed that there were no more dealings between Pitman and Derby after that 5.7 month period between May and November 2017. Again it is apparent that the overlap with LBC's trading in 2017 is limited.

27. The second area of the evidence to consider relates to the period before the parties entered into the agreement. The first document Mr Rehman made particular reference to was Nichola Haythorne's email of 25 July 2014. This attached a franchise information pack. The Claimants rely upon it as amounting to a representation of fact that Pitman franchisees were not allowed to trade in other franchisees territories. As Mr Tabari pointed out to Mr Rehman in the course of cross examination, there is nothing to that effect in the body of the email. The attachment refers to territory, but not to exclusivity. But even assuming that here is something to that effect in the attachment, the material provided represents the position of a franchisee as subsequently set out in the agreement. Whether or not it amounts to a representation of fact, or as Pitmans say, is an introductory email which is obviously to be superseded by something more formal, may not matter very much.

28. Matters proceeded, and 10 October 2014 Mr Rehman and Ms Haythorne met at Pitman's offices in Wetherby. At paragraph 10 of his witness statement, Mr Rehman says that Mr Haythorne went into great detail to assure him that every franchise area is exclusive. She explained the methods Pitmans used to ensure the exclusivity of each area by using territory maps, assigning postcodes to territories, and defining catchment areas according to population. At paragraph 12 of the statement he says that "various words" were used to make it clear to him that all Pitman franchisees had the right to develop an exclusive franchise within a designated area. He refers to the training centre being the only Pitman Training Centre in the area and to the definition of territories. His evidence is also that he was told that a franchisee is not permitted to conduct business outside his or her designated area and *… nor can anyone else conduct business within his/her franchise territory.*

29. There was reference to the franchise agreement, and Nichola Haythorne confirms in her witness statement that she would have had a hard copy with her. Mr Rehman's evidence is that he was told that this was a standard agreement, and the same across the board.

30. The one major dispute of fact as between Mr Rehman and Ms Haythorne is that whilst Mr Rehman says that Derby and its licence agreement was not mentioned at all, Ms Haythorne says it was. Her evidence is that she would have told Mr Rehman that Derby had a Licence for Nottingham and Derby. She would not have gone into a lot of detail about it, but if there was a recent franchisee, her practice was to disclose that. She says that she would have told Mr Rehman that Derby targeted government funded work whereas a franchisee would target privately funded customers. Ms Haythorne says in her witness statement that she knew she had to tell Mr Rehman about Derby. She does not remember a reaction from Mr Rehman when she told him about Derby, but had there been one she would have recalled it. She says that at that point Mr Rehman was more interested in Romford than Nottingham, raising the possibility that at that stage the matter did not concern him, so that he may not have paid attention to what she told him. She also makes reference to Mr Rehman talking over her and moving on to different topics rather than answering a question.

31. Ms Haythorne was not available for cross examination. That significantly affects the weight I can give what she says in her witness statement. She produced no note of the

conversation, and as Mr Rehman pointed out, there is nothing in writing to him, then or subsequently, which confirms that he was told about Derby's business. The follow up email she sent the same day [1155] makes no reference to Derby. It attaches a copy of the Franchise agreement, and suggests that Mr Rehman takes some legal advice about it. The email makes no reference to exclusivity.

32. The memory of witnesses to a conversation many years before, particularly when the matter has taken on a significance it may not have originally had, is not always a reliable source of accurate evidence. To paraphrase paragraph 1.3 to the Appendix to PD 57 AC, the courts recognise that human memory is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but is a fluid and malleable state of perception concerning an individual's past experiences, and therefore is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration. Consequently the Courts have always looked for contemporaneous documents, and assistance from the surrounding circumstances and the likelihoods.

33. There are two points which add weight to Ms Haythorne's evidence on this issue. Firstly, in the course of his oral evidence, Mr Rehman said that during this first meeting he and Ms Haythorne discussed selling Pitman courses to customers who would pay for those courses on a cash basis, by credit, by bank loans and on a publicly funded basis. Having given that evidence, there was this exchange:

Mr Tabari: *You hadn't discussed government funding at the first meeting had you?*

Mr Rehman: *The first meeting (pause) [it] was discussed that I would be selling Pitman courses sold on cash or funded basis.*

If public funding was mentioned, it is more likely that Ms Haythorne would have referred to Derby, because she knew that Derby did publicly funded work and were operating in the area. However, Mr Rehman's recollection may not be correct. He sometimes gave the evidence he thought was consistent with his case, rather than the evidence he could really remember.

34. Secondly, in her email to Yowie Roberts on 10 December 2014 [1215] Ms Haythorne says this (the passage relevant to this point is in bold, but I include the whole email because of its relevance to other issues):

> *Please find attached copies of the emails with documents sent to Faisal so far. Attached are the following;*
>
> *1. Original email with franchising brochure*
>
> *2. Follow up info from meeting - soft copies of the hard copy documents I gave to him in the meeting (e.g. FA, territory map, premises guidance)*
>
> *3. Heads of agreement - this was drafted when he was looking at Romford, it needs amending for the Nottingham territory but in the main it will the same, I just haven't done yet as there isn't a mega urgency currently as I don't think he will sign until he has had confirmation of bank funding and can pay the deposit*
>
> *4. Some background info on a postcode request - he requested that the DE postcodes be included in his Nottingham territory, I basically said no*

5. *Sent him the opening guide so he could get an idea of what was required in relation to centre set up (I also said you would discuss centre set up requirements with him in more detail in due course) and also he had requested some turnover examples so I gave him some turnover examples of a mix of city PTC's*

6. *His application form*

7. *A start up strategy document which he sent to me to outline his plan of action - this was done when he was looking at Romford so dates will have been put back now (and was a little ambitious to start with anyway) but at least it shows commitment*

I've also discussed staffing with him - made it clear that he isn't a sales person and as sales and marketing is a key role for the business to be a success he will need to recruit someone for this role from day 1. He understood this and is just planning on being an operational manager but having a BDM type person to take control of the sales/marketing side of the business. He did try push for us to do the recruitment of this person but we said the recruitment of the person is up to him, however, we can speak to him about the type of person he's looking for based on what works well for other centres. Just to give you the heads up as I would imagine he will discuss this with you.

Also FYI - when we had our initial meeting and we discussed Nottingham I did inform him of Kerry having a licencing agreement for Derby and Nottingham so he is aware of this. It was of course a while back now and as he had started focussing on Romford he may have put it at the back of his mind but he has been told so if you do mention it, it shouldn't be new news!

35. This is Ms Haythorne's recollection two months after the event, and many years before the issue became a difficult one. There is no reason for her to make this up or to mislead her colleague. Mr Rehman was not sure that the email was genuine. Given the terms of the email and the variety of (what would then have been) relevant attachments, I reject any suggestion that this email had been concocted. Mr Rehman's point is that there was nothing put in writing to him about Derby. Given its importance, it is a good point. But I have concluded that he probably was told about Derby at this meeting but either it did not register with him at the time because he was more interested in Romford, or he has since forgotten.

36. To return to the history. On 10 October 2014 Ms Haythorne sent Mr Rehman an email attaching a soft copy of the Pitman's Franchise Agreement. This is relied upon as an element of the claim for misrepresentation; see paragraph 10.3 of the Particulars of Claim. The key passage is at page 42 of the draft agreement. I return to the significance of this later in the judgement.

37. On 30 October 2014, Ms Haythorne sent Mr Rehman Heads of Terms for Romford [1169]. Paragraph 15 says this:

Our Franchise Agreement has been prepared by our solicitors Ashton KCJ who are affiliates of the British Franchise Association. As you know, we are also full members of the British Franchise Association and as such we are bound to comply with the European Code of Ethics on franchising. The Franchise Agreement in particular complies with all of these requirements.

This reflects a passage on the BFA website. Mr Rehman relies on the promise of transparency in his submissions as to construction and more generally in relation to the Defendants' obligations towards LBC as a franchisee. His pleaded case is that the Code is incorporated into the agreement as an implied term.

38. On 13 November 2014, Mr Rehman met Claire Lister. There are two points of note in her evidence of that meeting. Firstly she says that she raised the issue of sales, Mr Rehman's lack of experience in the area and the need to recruit support. Her evidence is that Mr Rehman agreed with what she was saying. Secondly she was concerned that he was proposing to provide government funded training and that he expected it to be very successful. Ms Lister's evidence is that she said that would not be possible. She sets out her reasoning for taking the view she did at paragraphs 10-11 of her witness statement, but in essence it was that the trend was for the government to use fewer and larger agencies, and that you had to have been in business for 2 years. Ms Lister says that she told Mr Rehman that at that stage there were no franchisees with government funding, but that Derby was a prime contractor and used sub-contractors. The context was that it might be that Derby would use LBC as a sub-contractor. The detail and logic of how the topic of Derby arose for discussion is compelling.

39. Mr Rehman denies that he was ever told about Derby, but Ms Lister was an impressive witness, making appropriate concessions and answering questions in a straightforward way. She no doubt has a loyalty to the Defendants, but she is no longer involved in the organisation and so would have nothing to gain in giving evidence she did not believe to be true. Her evidence on this issue fits in with my findings about the meeting in October 2014 and the probabilities, and I accept it.

40. By January 2015 Mr Rehman had decided to pursue Nottingham rather than Romford, and on 13 January 2015 Ms Haythorne sent Mr Rehman Heads of Terms. This document is also relied upon as a misrepresentation; see paragraph 10.4 of the Particulars of Claim. The relevant passage is at paragraph 3:

> *Our current Franchise Agreement precludes adjacent franchisees from soliciting outside of their territory (and by implication therefore into your territory) and your Agreement will be the same.*

The Claimants' case is that this is a representation designed to be read to mean that no other franchisee or licensee would be permitted to solicit business in the territory.

41. Mr Rehman was again advised to seek legal advice, but he decided not to. On 23 February 2015 he said that he assumed that the agreement was standard and would gladly sign it. The agreement is dated 11 March 2015. I deal with the relevant terms of the agreement later in this judgment. On 17 April 2015 LBC took a lease of premises in Nottingham. There was a little delay in setting up the centre, but that work was completed on 7 July 2015 and LBC recorded its first sales that month; see Professor Barnes at [342].

42. There is no pleaded allegation that Pitman failed to provide LBC with the advice or materials which were needed to operate its business pursuant to the agreement. Mr Rehman's evidence includes references to what he regards as failings in the assistance he was given by the Franchise Development Managers, Mr Roberts and Mr Howard. For their part they give evidence of what they perceived as failings and weaknesses on Mr Rehman's part, in particular in failing to follow the advice they did give. It is

unnecessary to determine those sorts of issues. The Claimants case on breach turns on the involvement of Derby.

43. There was also some evidence from the Defendants that LBC's first delivery of workbooks in July 2015 had gone to Derby by mistake and that they were collected by or for LBC from Derby or taken to LBC. This was relied upon as showing that Mr Rehman knew about Derby. Mr Rehman denied that, and the evidence was a little confused, perhaps unsurprisingly given the passage of time. There was obviously some incident along these lines, but whether that entailed Mr Rehman having any direct contact with Derby (or appreciating that he had) I am uncertain. Mr Rehman's evidence was that he first found out about Derby in late 2016. On a date in November 2016 he says that a lady walked into his centre to enquire about a level 3 Pitman course. She said that she had recently completed the level 2 course in Nottingham with Derby. She showed Mr Rehman her Pitman's course book and said that she had been issued with a course completion certificate by Pitman through Derby. Mr Rehman asked to see the certificates, but the lady refused and left.

44. Clause 4 of the Licence agreement with Derby provides for Pitman to issue "suitably worded certificates", but the certificates issued by Derby did carry the Pitman logo in addition to Derby's details, and there is no reason to doubt what Mr Rehman says about this incident. I have found that he was probably told that Derby were involved in publicly funded training in Nottingham, but I can accept that either this did not register with him, or that he did not appreciate that it meant that Pitman certificates would be made available to Derby. Mr Tabari suggested to Mr Rehman that he was looking for excuses to explain the failure of his business, and that it was convenient for him to blame it on Derby. There may be something in that, but I am minded to accept that it was only in November 2016 that Mr Rehman appreciated that Derby may be involved in an operation that was competing with his franchise by making use of the Pitman name.

45. On 29 November 2016, Mr Rehman was contacted by a Pauline Rawes who said that she was a Nottingham student and had registered for an Office Manager Diploma and wanted to make payment by telephone. Mr Rehman did not have a customer by that name. Ms Rawes told him that she had made an on-line or telephone enquiry with Pitman and had been told she could register. Ms Rawes lived outside the territory but had inquired about Nottingham. The complaint here is not about Derby, but the failure by Pitman to refer business inquiries it receives centrally to Mr Rehman.

46. Mr Rehman complained about these two matters to Mr Howard on 1 December 2016. He made some inquiries of his own, and found that the Derby website included the Pitman Training logo and that Derby were offering Pitman courses. There is a print of the Derby web page in the trial bundle at [1030]-[1031].

47. Mr Rehman had also received an email from a Peter Brownlee which he passed on to Mr Howard on 14 December 2016. Mr Brownlee's email said this:

> *Hi Faisal*
>
> *Firstly thank you for the information you sent me on your courses I enquired about. now I have a couple of questions.*
>
> *1) I was under the impression from browsing the Pitman Training website that only Pitman Centres could offer Pitman Training Certificates?*

2) How a non Pitman Centre/Provider can offer the same courses and certification CHEAPER than a Pitman Centre?

this leaves me totally vexed as one of my work colleagues did a qualification through Pitman a few years ago, and she has said that as ONLY Pitman Centres can offer these they are highly sort after by employers.

please see below email from other provider with attachments as you can see they clearly state Pitman Certificates will be achieved.

kind Regards

Peter Brownlee

48. The email exchange attached was between Mr Brownlee and a Jamie-Leanne Traynor, who describes herself as "Business Leader" with Derby and gives their address in Nottingham. The emails are dated 1 December 2016. The first is at 14.18 and was sent to Mr Brownlee.

Hi

Many thanks for your enquiry into our courses. Dependant on your current circumstances you could be eligible for funded provision or if not this would be done on a private basis. If you could let me know if you are currently employed or unemployed etc I will be able to inform you further.

49. Mr Brownlee replied.

hi

thanks for your reply, I am currently employed and wanting to further my career and add something new to my CV to broaden my scope.

50. Ms Traynor then sent this email.

Hi Peter,

Thanks for the quick response. I have attached some of the course outline for the packages you have mentioned. These vary between £300 - £400 each however where multiple courses are purchased discounts can be applied.

If this is something you would like to discuss in more depth we normally suggest coming in to speak with one of the advisors where you can have a look at the course materials and discuss in more detail how the training works.

Should you have any questions please do not hesitate to ask.

51. Mr Tabari suggested to Mr Rehman that he had put Mr Brownlee up to this enquiry. The email does indeed sound like a rehearsal of Mr Rehman's complaints about this issue. Mr Rehman denied it, but whether Mr Brownlee's was a genuine inquiry or not, the evidence shows that Derby were prepared to offer these courses on a private basis when a direct inquiry was made. Mr Rehman asked Kerry Bentley about it. Ms Bentley's evidence was to the effect that this should not have happened and she apologised for it. Her evidence was that her company's business was 98% government funding and that only a small percentage was what she described as "commercial".

52. Mr Rehman raised these matters in an email exchange with Mr Howard on 14 December 2016.

> *Hi Stewart,*
>
> *I have already brought in to your attention that DBC is selling Pitman courses. They are advertising openly on their website and contacting students and selling Pitman courses without any restriction. Apparently this is being done during the entire time period since we are opened as PTC in Nottingham. This is causing serious problems and unbearable financial loss.*
>
> *Please provide answers to the following questions, immediately and precisely :*
>
> *• Is PTG aware of their courses being sold by our direct competitor in our exclusive franchise area ?*
>
> *• If PTG is aware of this than what exactly is the justification of such activity?*
>
> *• If PTG is unaware of their courses being sold by our competitor than how DBC has access to the Pitman's training material and why PTG is not aware that another company is using their brand name and advertising on their website and misleading the students?*
>
> *• This is a serious legal matter and please categorically answer that what type of legal support will be provided to us by the PTG to take DBC to the court of law?*
>
> *I have attached a few links of current web pages of DBC displaying Pitman logo and offering Pitman training courses. I have also forwarded a couple of e-mails by clients indicating this issue.*
>
> *DBC is selling Pitman courses in our exclusive franchise area on cheaper prices, credit financing and through funded training, this seriously damages our sales potential. I am impatiently waiting for your clear and to the point reply before starting any legal proceedings. I repeat that this is a very serious and legal issue and should immediately be dealt accordingly because it is my investment which is at stake.*
>
> *I appreciate your co-operation.*

53. Mr Howard replied by email of 14 December 2016.

> *Hi Faisal,*
>
> *This is something we are aware of and we will discuss it in the new year as Claire is now off on annual leave.*

54. By this stage Mr Rehman was getting behind with the monthly payments due to Pitman, and Pitman issued default notices on 1 September 2016 and again on 31 January 2017. Mr Rehman emphasised the fact that he was making payments, and overall the default was minimal. But it is apparent that Pitman had concerns. Mr Howard may have wanted to wait to discuss the issue Mr Rehman was raising about Derby because of those matters, but his one line reply to what was (on any view) a detailed email raising a matter of real concern was inadequate. Mr Rehman goes further and says that it was an admission that Pitman were conniving in Derby's activities. Mr Howard denied that, and I do not read the email in that way. It was an inadequate reply, but not more than that.

55. It proved difficult to find a date when Ms Lister was available for a meeting, but on 2 March 2017 Mr Rehman had a meeting with her, Mr Howard and Mr Roberts. A note was made which the Defendants rely upon. A copy is in the trial bundle at [1493]. It is not a verbatim note, nor does Mr Rehman agree it. It records Mr Rehman asking Claire Lister if she knew that Derby had been selling Pitman courses over the previous two years. In summary she said that she was not aware that they had been selling at all since funding ceased (in 2015) but that she knew they had obtained funding in the area just before Christmas. She said that if they were making private sales she would take the matter further. Mr Rehman describes the meeting as a failure and he left it without resolving how the matter was to proceed further. His position was that Derby's activities had robbed him of a source of revenue, and that Pitman had acted in a way which undermined his business.

56. Mr Rehman's wife, purporting to be interested in courses, telephoned Derby on 6 March 2017 to book a Pitman course in Nottingham and to pay by cash. Derby told her that they could provide a course on cash terms and booked an appointment for her with a course adviser, which she did not attend.

57. Mr Rehman consulted solicitors, who wrote to Pitman on 9 March 2017 indicating that they were investigating a claim. On 5 May 2017 Pitman issued a further default notice, and on 12 May 2017 Mr Rehman's solicitors wrote saying that their client's business was no longer financially viable due to the continuing activities of Derby and that LBC were left with no alternative but to cease trading on 15 June 2017. Pitman's solicitors responded saying that the claim was not understood, and on 15 June 2017 sent their own letter terminating the agreement pursuant to clauses 21.2.6 and 21.2.9. These proceedings were issued on 3 December 2020.

The agreement

58. The terms of the agreement have a central role in this case. Having identified the parties to the agreement, there is the following preamble:

> *WHEREAS:*
>
> *(A) The Franchisor as a result of extensive research and practical commercial experience has developed and operates a successful business in the provision of training courses and associated publications ("the Business").*
>
> *(B) The Franchisor has established substantial goodwill and demand for the Business under the name "Pitman Training Centre" ("the Trade Name").*
>
> *(C) The Business operates under the Trade Name and various trade marks which are owned by Pitman Training Group Limited ("PTG"). PTG has licensed the franchisor to use and sub licence the use of the Trade Name and associated trade marks.*
>
> *(D) The Franchisor has acquired practical business knowledge and experience and skill in establishing and developing the Business ("the System"). The System includes methods of tuition including the use of software packages used or in connection with the operation of the Business and a recognised design, decor and colour scheme for the business premises, equipment and furniture layout, standards of quality, uniformity of products, related services, awards of a recognised Pitman Training certificate and*

accounting and management control procedures. The System is secret, substantial and confidential and is the exclusive property of the Franchisor.

(E) The Franchisee desires to obtain the right to operate the System under the Trade Name in accordance with the conditions set out below.

59. This preamble identifies the System and the Trade Marks as property of value. The agreement then goes on to identify what it is that is being granted to LBC as franchisee.

2. APPOINTMENT AND GRANT

2.1 The Franchisor grants to the Franchisee the right during the continuance of this Agreement to:-

2.1.1 operate the System;

2.1.2 provide the Services;

2.1.3 use the Products and sell the Course Materials;

2.1.4 use the Trade Name and the Trade Marks;

for the purposes of the Franchisee's Business in the Territory.

2.2 The Franchisee shall provide the Services only at the Premises unless the Franchisor has given written consent to their provision at another location within the Territory.

2.3 The Franchisor expressly reserves to itself the right to operate the Business in all areas where such operation would not infringe any rights of the Franchisee under this Agreement

That "right" is not expressed as an exclusive right. However, the Claimants case is that on a true construction of the agreement as a whole, the right is an exclusive one. The Claimants rely in particular upon the terms of the Schedule at internal page 42 of the agreement, clause 11, and the effect of clauses 17.3.2 and 17.2; see paragraph 12 of the Particulars of Claim.

60. First amongst the Franchisor's continuing obligations as provided for by clause 8, is to permit the Franchisee to operate and promote the Franchisee's Business under the Trade Name in accordance with the terms of the agreement. There is nothing express about ensuring exclusivity or preventing others from operating. Here I note the terms of clause 2.3.

61. By clause 5.1.6 the Defendants make available to the Claimants the "Franchise Package", a term which is defined by reference to the Schedule to the agreement. Internal page 42 is the part of the Schedule which identifies the items which make up the Franchise Package. They are as follows (emphasis added):

Authority to operate a franchised Pitman Training Centre Business from the Premises

Dedicated and exclusive use of the Pitman Training brand and logo within the agreed Territory

A dedicated Territory for the Franchisee to develop and grow

A dedicated Franchise Development Manager to help establish the Franchisee's Business, assist with growth and business development and marketing guidance

A comprehensive pre-opening training package including product awareness, developing the Franchisee's Business and dedicated sales training

A dedicated Franchise Manager to project manage the Premises opening

A continuing business support programme

Connectivity and specific training on the bespoke Pitman Training Management Information System

Provision of a Pitman Training Decor Pack

Provision of an initial Business Stationery pack (excluding business cards)

Connectivity to the Pitman Training 0800 freephone network for marketing lead generation

Establishment of a location specific web pages that the Franchisee can maintain and update as required

Where possible, the establishment of a test centre for external suppliers

Presentation to each successful student of the Pitman Training Diploma, Certification and Awards as appropriate

The sections I have highlighted in bold are those relied upon by the Claimants.

62. Clause 11 refers to Major Account Holders, which are defined as any business nominated as such by Pitman from time to time.

11 MAJOR ACCOUNTS

11.1 In the event of a Major Account Customer having an office situate in the Territory, the Franchisee shall notify a director of the Franchisor in writing of any proposed visit to or enquiry from the said office and shall work to the directions of the Franchisor to secure any business therefrom.

11.2 In the event that the Franchisor secures any contract or other arrangement for the provision of any of the Services from such Major Account Customer or ensures that the Business is accorded an approved supplier status then the Franchisor shall notify the Franchisee of the details and the Franchisee shall have one week from the date of such notification to notify the Franchisor that it will provide the Services to the local office of the Major Account Customer on the terms agreed nationally by the Franchisor.

11.3 If the Franchisor does not receive notification from the Franchisee as set out at clause 11.2 above, or the Franchisee in any way declines to provide the Services, the Franchisor shall be free to directly or indirectly provide the Services to the office of the Major Account Customer in the Territory as it sees fit.

Whilst Mr Rehman never formulated the point, it is that clauses 11.2 and 11.3 would be unnecessary if the Claimants did not have an exclusive right to provide the services within its territory.

63. Clause 17 refers to the Franchisee's Business Plan. This is a 3 year rolling plan, which the Franchisee agrees to comply with; see clause 9.4.1.

> *BUSINESS PLAN*
>
> *17.1 The Franchisee shall update the Business Plan by each consecutive anniversary of the Commencement Date for a further one year period and supply a copy of the same to the Franchisor not less than one month before the start of the ear to which it is to apply. Each such Business Plan must be approved by the Franchisor.*
>
> *17.2 If the Franchisee shall fail to comply with the objectives set down in the Business Plan then the Franchisee shall within seven days of a notice to that effect from the Franchisor, meet the Franchisor's representative to discuss ways of improving the Franchisee's performance and the Franchisee shall comply strictly with any requirements of the Franchisor in that respect following the meeting.*
>
> *17.3 If the Franchisee shall, in the sole opinion of the Franchisor, fail to comply with the requirements of the Franchisor arising under the provisions of clause 17.2 the Franchisor may:-*
>
> *17.3.1 change the boundaries of the Territory; or*
>
> *17.3.2 allow other franchisees of the Franchisor to solicit, and provide the Services to, customers within the Territory; or*
>
> *17.3.3 terminate this Agreement forthwith.*

The argument advanced at paragraph 12.3 of the Particulars of Claim is that this is a reservation of rights by the Defendants that would not have been necessary of appropriate to include in the absence of the right to operate the Pitmans brand and associated trade marks in the territory.

64. Also of relevance to the Claimants' argument is the nature of the restriction on the franchisee to solicit for business out of the territory. Mr Rehman's point is that his is a standard agreement and that other franchisees would be subject to the same restriction. The overall intention of having clauses to that effect in these agreements is to give each franchisee an exclusive right within its own territory.

> *9.1.5 Not without the Franchisor's written consent solicit or tout (including mail-shot or other similar marketing methods) for custom any person or firm outside the Territory. For the purpose of this clause mailshotting and emailing, or directly targeting the Franchisee's website activities, to individuals based outside the Territory shall be deemed a breach of this condition.*

65. The second sentence of clause 9.1.5 reflects the distinction between active solicitation and the "passive" acceptance of business which comes to the franchisee because of the customer's approach. It is also to be noted that the agreement does not limit the franchisee to dealing with customers who are paying for these courses themselves. Consequently the franchisee is free to pursue government funding. There was a document attached to Nichola Haythorne's email of 25 July 2014 which identified "five core private customer segments", a copy of which is in the trial bundle at [474]-[475]. The Claimants would say that private clients were the group to target, and that it would

have been nigh on impossible for Mr Rehman to obtain any government funding, certainly in the early years of his business. But in terms of the agreement, it was open to him to do so. If there is a term giving LBC the exclusive right to trade the Pitman brand in the territory, that may in principle be breached by selling to customers who benefit from government funding. The Defendants case would be that any such breach has not caused LBC any loss, because it was business they would not have obtained.

The principles of construction

66. The principles of the construction of written agreements have been considered by the Supreme Court in a number of cases in recent years; see *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; and *Wood v Capita Insurance Services Limited* [2017] UKSC 24. Mr Tabari refers to the essential matters at paragraph 32 of his skeleton argument. They have been summarised in a number of cases. One convenient summary is to be found in the judgment of Andrew Burrows QC (as he then was) in *Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm) at [32]; a summary described as "entirely correct" by Rose LJ (as she then was) in her judgment on the appeal; see [2019] EWCA Civ 1641 at [29].

> *The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain.*

67. In this instance the words of the agreement are carefully chosen. Mr Rehman may say that there was an inequality of bargaining power and that he was not advised by solicitors (as the Defendants knew). But those are matters which go to whether or not the terms excluding liability for misrepresentation are reasonable for the purposes of the Unfair Contract Terms Act 1977, rather than to the construction of the agreement.

68. The most attractive aspect of the Claimants' case is the point Mr Rehman put forward – that the idea of exclusivity lies at the heart of a franchise agreement. Without it, the idea doesn't work. If the franchisee had to face competition from the franchisor itself, or from some other party who was supplied by the franchisor, what would be the benefit of having a franchise? That may be seen as business common sense or the purpose of the term. But that notion is also reflected by the terms of the Schedule at internal page 42, that the Franchise package includes a *dedicated and exclusive use of the Pitman Training brand and logo within the agreed Territory* and a *dedicated Territory for the Franchisee to develop and grow*. Notwithstanding the lack of an express provision in clause 2 or otherwise in the body of the agreement to the effect that the rights granted are exclusive, taken as a whole I conclude that there must be an element of exclusivity offered by this agreement. The terms of clauses 11 and 17 are consistent with that approach, even if (taken on their own) they may not be sufficient to establish it.

69. The real question in my mind is the extent of that exclusivity. The right granted by clause 2 is defined by reference to the System and the Trade Marks. This is not about trading as such, but the use of (what the claim summarises as) the Pitman brand. That is what is valuable, and that is what the franchisee is buying. That limitation on the extent or scope of the exclusivity is consistent not only with the language of clause 2 and internal page 42, but also with the underlying purpose of the franchise. In other words the exclusivity granted is limited to the trading of that brand. The corollary is that the franchisor may engage in supplying materials which do not involve the trading of that brand without breaching the agreement.

70. It is also to be noted that the Claimants do not contend for absolute exclusivity. The point is clarified in the Part 18 response provided at a time when the Claimants were represented by solicitors and Counsel:

> *Request:*
>
> *Please confirm whether or not it is asserted that the alleged Exclusive Right the Claimants say was granted, was subject to such right not prohibiting [Derby] or any other franchisee or licensee from servicing customers located in the Territory received by way of a "passive sale"? A "passive sale" being as described by paragraph 51 of the Commission Notice – Guidelines on Vertical Restraints.*
>
> *Response:*
>
> *... the request is misleading as to the proper construction or paragraph 13 of the PoC. At no point within paragraph 13 (or within the PoC at all) do the Claimants assert that the Exclusive Right prohibited [Derby] or any other franchisee or licensee from servicing customers located in the Territory received by way of a "passive sale".*
>
> *Nonetheless, and without prejudice to the foregoing, in order to assist the Defendants, the Claimants respond as follows:*
>
> *(a) A reference to exclusivity in a franchise agreement is commonplace.*
>
> *(b) A reference to absolute exclusivity is not commonplace, for sound Competition Law related reasons.*
>
> *(c) Nowhere in the PoC have the Claimants contended that absolute exclusivity applies.*

71. The consequence in practice is that the grant of a licence which gives rise to the provision of workbooks and other materials, but does not involve the trading of the Pitman brand, is not a breach of the agreement. At first blush it may look surprising that a franchisor can grant a licence which involves the provision of the same materials it provides to its franchisee, but at cheaper rates. But if that does not involve the brand, it is not prevented by the agreement.

72. The workbooks and other materials were provided to Derby without branding, so there is no breach there. The difficulty for the Defendants is that Derby appear to have used the Pitman logo on its website and issued Pitman certificates. Both those activities invoke the brand. Does that put the Defendants in breach? Neither was the direct act of the Defendants. When the use of the logo was discovered, the Defendants required that it be removed from Derby's website. The terms of the Licence could have been clearer,

but I conclude that the use of the logo on Derby's website was not something the Defendants were party to, and it does not put them in breach of the agreement.

73. However, the Licence to Derby contemplates the provision of "suitably worded certificates". A "Pitman" certificate appears to have been used, and I conclude that there is a breach here.

74. Derby's offer of courses to those it was approached by, whether genuine customers or not, would not amount to active solicitation. Mr Rehman would object to it, but on his pleaded case it is not a breach of the agreement.

The claims in Misrepresentation

75. Whilst there was a lot of evidence about what was said in the pre-contract period, it adds nothing to the claim in contract. Mr Rehman's evidence of conversations many years ago is not to be relied upon. Claire Lister's description of him talking over her, and not listening to what he was being told but moving on to the next thing, was reflected in the way Mr Rehman gave his evidence. He did not often provide an answer to the question, at least not a straightforward one. To him giving evidence was an exercise in winning the argument. It is often difficult for witnesses to distinguish between giving evidence of the facts, and the arguments as to the rights and wrongs of what happened. That can be particularly acute when a litigant is not legally represented and is having to think about how to argue the case as well as give evidence. I make full allowance for that. Mr Rehman demonstrated that he is an intelligent man. But I have no doubt that he has persuaded himself of the rightness of his cause, and that his memory of past events is coloured by that.

76. The documents relied upon reflect the terms of the agreement – indeed they include the terms of the draft agreement. That offered some exclusivity as I have found. The position was not misrepresented, and it was certainly not misrepresented fraudulently, whether on an intentional or reckless basis.

77. If it be said that there was some negligent or innocent misrepresentation, then any liability is excluded by the operation of clauses 26.2 and 29.4 of the agreement. Given my central findings, it is unnecessary to deal with the matter in any great detail. The clauses provide as follows:

> *26.2 The Franchisee and the Individual acknowledge that in giving advice to and assisting the Franchisee in establishing the Franchisee's Business the Franchisor bases its advice and recommendations on experience actually obtained in practice and is not making or giving any representations guarantees or warranties with regard to such matters or generally in connection with the sales volume profitability or any other aspect of the Business. The Franchisee and the Individual acknowledge that they have been advised by the Franchisor to seek appropriate independent advice and that the decision to enter into this Agreement has been taken solely on the basis of the personal judgement and experience of the Franchisee and Individual having taken such independent advice.*
>
> *29.4 This Agreement contains the entire agreement between the parties. No pre-contractual statements shall add to or vary this Agreement or be of any force or effect. The Franchisee and the Individual acknowledge that they have been told that if there are any pre-contractual statements which they consider have been made to them which have induced them to enter into this Agreement they are*

obliged to submit a written statement thereof to the Franchisor so that an agreed form thereof may be annexed to and form part of this Agreement. In the absence of such written annexure the Franchisee shall be deemed not to have relied upon any pre-contractual statements made or given or purportedly made or given by the Franchisor. The Franchisee and the Individual irrevocably and unconditionally waive any right they may have to claim damages for any misrepresentation made in any pre-contractual statements not contained in this agreement.

78. These are relatively standard no reliance/entire agreement clauses. If the Defendants had been required to satisfy the court that these clauses were fair and reasonable terms to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made, then I would have been so satisfied. The agreement was the Defendant's standard agreement, but Ms Lister confirmed that it was not immutable. Mr Rehman had many months to consider the terms before he signed the agreement, and whilst he had tried to negotiate himself a better deal at the outset of his dealings with Pitman, he never raised any objection to the terms of the agreement. It is also of note that he was advised to take legal advice twice, but decided not to.

79. Mr Rehman relies upon the fact that Defendants were members of the British Franchise Association and complied with its Code. He submits that this gives rise to an expectation that the agreement will be transparent and fair. The matter is not relied upon in the Claimants' pleaded case in support of the UCTA submission, but it seems to me to be Mr Rehman's best point. My view of these exclusion clauses are that they are what a businessman would expect to find in an agreement such as this. They seek to ensure that the basis of the relationship is contained within a document. There are sound commercial reasons for that, and the terms are fair and reasonable within the meaning of section 11 of the Act.

80. The claim in misrepresentation fails, and consequently there can be no claim for rescission. In any event, given the difficulties in restoring the parties to the position before the contract and the affirmation of the agreement by the Claimant trading on from December 2016 to May 2017, I would have refused to grant rescission. The Claimants traded for nearly two years, and appear to have obtained at least some benefit from the agreement.

81. For the sake of completeness, I would also reject the argument that the terms of the BFA's Code are incorporated into the agreement. This is neither obvious nor necessary for the purposes of business efficacy. The law here is well settled; see most recently Lady Rose in *Barton v Morris* at [2023] UKSC 3 at [20]-[23].

Causation

82. The real basis of the claim for damages is the claim for breach of contract. That is limited to the breach I have found proved, and the loss caused by that breach. Did that breach of the agreement (that is the use of Pitman certificates by Derby) cause LBC a loss? The burden of proof here lies on the Claimants, but the court will be astute not to set the bar too high where the evidence is by its nature hard for a Claimant to obtain, or within the knowledge of the Defendant but not produced.

83. The Defendants overarching point is that the customers who were attracted to Derby's government funded courses would not have been potential customers of LBC. The

franchise allowed LBC to undertake government funded work, and LBC could have applied to become such a provider. But it never had government funding, nor did it ever apply. Mr Rehman may have wanted to provide courses to government funded customers, but on the basis of the evidence I have from Ms Lister and Ms Bentley, the reality is that he had no prospect of getting that funding, particularly in the years before he had a proven track record. I accept the evidence called by the Defendants on this point. It is inherently plausible and there is nothing to contradict it. It follows that the breach I have found caused no loss to LBC.

84. If the use of the Pitman logo on Derby's website was a breach of the agreement (I have found that it was not, but deal with the point lest I am found to be wrong), then a claim based on that allegation would also fail at the causation stage. There is no evidence to demonstrate that any business was actually diverted from LBC to Derby. Moreover the chronology tells against the Claimants. Derby stopped using Pitman materials in about August 2015, so the scope for competition or diversion at the start of LBC's trading is minimal. Derby did not use Pitman courses at all in 2016, and so the failure of the business to thrive during that period cannot be a consequence of anything Derby did.

85. The only evidence of overlap is towards the end of LBC's trading life. Mr Howard's evidence is that in the period from March to November 2017, 81 courses were sold to Derby for use in Derby and Nottingham; [295]. By this time LBC's business was plainly in difficulties. There is the evidence of Mr Brownlee's approach in November 2016 and Mrs Rehman's telephone call in March 2017, but nothing else. Mr Tabari makes the point that even in the emails from Ms Traynor in December 2016, there is no mention of the courses being "Pitman" courses. Kerry Bentley's evidence when questioned on this point by Mr Rehman was that she knew nothing of her staff offering privately-funded courses, that it was not something they were supposed to do, and that she did not approve of the practice. At worst there would have been a "handful" of such offers.

86. Standing back and considering the evidence overall, I cannot be satisfied (on the balance of probabilities) that Derby's activities had any measurable effect on LBC's turnover or profit.

Termination

87. Whilst slightly out of order in terms of contractual analysis, I deal with termination at this stage because of its relevance to the scope of the recoverable loss in the claim in contract. The provision of Pitman certificates was not specifically one of the complaints Mt Rehman had, although it is part and parcel of his more general complaint that Derby were competing with him under the terms of the Licence. Of itself, the provision of such certificates in circumstances where the certificates would only ever be issued to customers who were government funded and consequently not potential customers of LBC, is not a repudiatory breach on the part of Pitman. It does not go to the root of the relationship between the parties to the agreement. Nor does it demonstrate an intention not to be bound by that agreement. Consequently it did not entitle LBC to terminate the agreement by its solicitors letter of 12 May 2017. I am bound to say that the intended effect of that letter is not at all clear. It says that the business is no longer viable and that trading will cease, but it does not use the words or contractual termination. But even if the letter was intended as an acceptance of Pitman's repudiatory breach, I find that it was not effective to terminate the agreement. I also note that the agreement provided that LBC was to give 2 months notice of termination.

88. The agreement was terminated by the Claimants letter of 15 June 2017, responding to the Claimants' letter of 12 May 2017 and the intended closure of the franchise. That was a repudiatory breach, and the agreement made further express provision for Pitman to terminate in these circumstances. The consequence is that whilst LBC may pursue a claim for loss caused by the breach of the agreement, any claim is limited to that. There is no viable claim for the wider losses caused by the closure of the business or for any future losses.

Loss

89. The parties each relied upon expert evidence. Both experts gave evidence. Professor Barnes' approach reflected his academic experience. Mr Woodward's was more attuned to the commercial world. Mr Woodward was also the more experienced expert witness, having given evidence a dozen or so times. His report engaged in a detailed analysis of the accounting documents available and produced the figures which the experts used in their joint statement. Professor Barnes withdrew his initial report without explaining why or what had changed, and produced a second. He disarmingly acknowledged that he had no idea what "Part 35" was. The experts agreed a substantial amount of the underlying material and plainly acted in a constructive way to narrow the issues. The Court is grateful to them both for taking that approach. But where they differ, I prefer the approach of Mr Woodward.

90. There are three main heads of claim: (i) Wasted set-up and closure costs; (ii) Loss of profit in the first franchise term; and (iii) loss of profit in the second franchise term. Dealing firstly with wasted costs. As I make clear above, none of these losses are recoverable in the circumstances of the breach as I have found it. They arise only if LBC are entitled to terminate or rescind the agreement. I have found against the Claimants on both matters, but having heard the evidence on loss it is right that I make the relevant findings of fact.

91. The sums claimed in the schedule of loss are mostly round figure sums. I deal with them in turn:

    (1) The £42,000 franchise fee. There was a duty on the Claimants to mitigate. The Defendants say that Claimants could have tried to sell the franchise on, but made no effort to do so. The duty is to take reasonable steps, and there is no explanation for Mr Rehman's failure to do anything to find a buyer. The question is, what could he have sold the franchise for? Ms Lister suggests that £40,000 - £50,000 was realistic. I regard that as optimistic given the poor trading results this franchise had over the previous 2 years. That said, Pitman was a good brand, and doing the best I can, I would expect Mr Rehman to recover at least half of what he had paid out. I would have allowed him £21,000.

    (2) Office furniture of £8,000. There is no documentary evidence to support the claim. Mr Rehman says that the documents were lost in the move. There would have been some furniture, not least because the agreement required the Centre to be properly fitted out. This would have had some residual value too. I would allow Mr Rehman half the sum he claims - £4,000.

    (3) IT equipment at £15,000. Once again there is a minimal amount of documentation. Mr Rehman can give oral evidence, but that has not always proved accurate. Once again I do not doubt that there was IT equipment bought.

Again I will allow Mr Rehman half of the sum he claims on the basis that it must have been at least that sum: £7,500.

(4) Carpets and blinds at £4,000. There is an invoice for blinds at £1705. I allow that sum.

(5) Professional fees of £9,000. The fees for work relating to the lease were £6,113.62 net, and £850 for drawing up a business plan. The claim for the cost of obtaining business finance is too remote.

(6) Travel expenses of £2,000. There is no documentary evidence to support this, and in any event I doubt that it is a recoverable loss.

(7) Early termination of the lease at £8,000. I would allow this sum.

(8) Earl termination of broadband and electricity. No documents were provided, and I disallow these claims.

(9) Dilapidations. No documentary evidence was provided, and in any event I am not satisfied that such a claim is causally related even to the claim in contract as pleaded.

The total I would have allowed under this head would have been £42,505.

92. Secondly loss of profit in the first franchise term. There are no trading accounts, but the experts have identified the maximum sums attributable to Derby's trading in the 5.7 months from May to November 2017. Lost sales over the period are estimated at £15,415; see paragraph 1 of "Matters Agreed" in the joint statement at [378]. Variable direct costs are agreed at £25%, so that the monthly profit is £2,028, or some £11,562 over the 5.7 months; see the summary at [383]. That sum assumes that every customer Derby had went to LBC instead.

93. These "lost sales" are limited to this 5.7 month period. There is no evidence to support the argument that they can be applied over any other part of the first franchise term. Mr Woodward's analysis of that aspect of the matter is the correct one. Nor can I see a basis for claiming the lost sales without deducting the costs that would have been incurred in servicing that work. The recoverable loss is the loss of profit, not the loss of sales. Professor Barnes appeared to concede that point in cross examination. If LBC had made a further profit of £11,562 in the relevant period, it would still not have broken even.

94. Thirdly loss of profit in a second franchise period. The difficulty for the Claimants, even if they had been entitled to terminate the agreement, is that it is far more likely than not that LBC would have failed to meet the requirements of the agreement for the grant of a new 5 years agreement. Clause 4 of the agreement provided for a second term subject to the certain conditions.

> *The Franchisor shall grant a new agreement provided that prior to the Expiry Date:-*
>
> *4.2.1 The Franchisee shall have substantially observed and performed the provisions of this Agreement.*
>
> *4.2.2 There shall be no outstanding material breach by the Franchisee as defined in clause 21.2.9 and no circumstances exist which would entitle the Franchisor to terminate this Agreement.*

95. All of the Pitman witnesses who had dealt with Mr Rehman had reservations about his suitability as a franchisee. LBC was in regular arrears in making the monthly payments due under the terms of the agreement, and so Pitman would have been entitled to refuse a second agreement had LBC applied for one. I have no doubt that if it had been open to Pitman to refuse a second term, it would have done so. Consequently, even if the Claimants had made out their case to the full, a claim for these losses would have failed.

Conclusion

96. The claim is dismissed. The claim in misrepresentation fails at the liability stage. The claim in contract succeeds on liability to a limited extent, but fails on causation and loss. The judgement will be handed down remotely. I will list a short hearing to deal with consequential orders on 15 May 2023. The time for appeal will run from the conclusion of that further hearing.