IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

No. LM-2022-000174

[2023] EWHC 2883 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 17 July 2023

Before:

MR DAVID ELVIN KC
(Sitting as a Deputy High Court Judge)

B E T W E E N :

WINKWORTH FRANCHISING LTD

Claimant

- and -

NICHOLAS GOBLE

Defendant

MR COHEN KC and MR ROBSON (instructed by Sherrards Solicitors) appeared on behalf of the Claimant.

MR S ATKINS KC (instructed by Fladgate LLP) appeared on behalf of the Defendant.

J U D G M E N T

(Transcript prepared without the aid of documentation)

MR DAVID ELVIN KC:

1 The claimant, Winkworth Franchising Ltd ("WFL"), applies for summary judgment against the Defendant, Mr Nicholas Goble, on two of the grounds pleaded in the amended particulars of claim and responded to in the amended defence. WFL applies for a declaration that a number of franchise agreements entered into with the Defendant have ended or been terminated without extension.

2 The principles applicable to CPR Part 24 are well-known and are set out in the judgment of Lewison J, as he then was, in ***Easyair Ltd (t/a Openair) v. Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at [15], approved by the Court of Appeal in ***AC Ward & Son Ltd v. Catlin (Five) Ltd & Ors*** [2010] Lloyds Rep IR 301 (Comm) at [24].

3 I note in particular Lewison J's principles (i) and (ii) namely that:

> "(i) The court must consider whether the claimant has a 'realistic' [prospect of success] as opposed to a 'fanciful' prospect of success.
> "(ii) A 'realistic' claim is one that 'carries some degree of conviction'. This means a claim that is more than merely arguable."

That also under (vii) there may be cases where there is:

> "... a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it."

4 The proceedings brought by WFL relate to its opposition to the contractual extension to and purported termination of a series of franchise agreements relating to its well-known estate agency brand between it and the Defendant, relating to five franchise agreements ("FAs"). Those FAs are all dated 25 October 2002 and ran for 20 years until 25 October 2022 subject to provisions following extension and comprised:

(1) A sales franchise agreement and a letting franchise agreement for what is described as the "territory" in Battersea.

(2) A letting franchise agreement for the territory of Kennington; and

(3) A sales franchise agreement and letting franchise agreement for the territory of Pimlico.

5 For the purposes of this application, I have been referred to and provided with the sale franchise agreement for the Battersea territory ("the FA"), which it is common ground is in materially similar terms to the other franchise agreements subject to an important amendment, which I mention below.

6 I proceed on the basis that what I determine in reference to the FA will apply to all of the franchise agreements within the scope of these proceedings.

7 The Defendant has a right to extend the franchise agreements for two additional periods of ten years each, provided that the total term does not exceed 40 years (see cl.18 of the FA). The Defendant exercised his right to extend the franchise agreements by the service of notices under cl.18.1 on 24 November 2020.

8 WFL was entitled to refuse that renewal in a number of specified circumstances and in the event sought to do so by the service of two counter notices pursuant to cl.18.2 and 18.3 of the FA. The effect of a valid refusal under cl.18.3 of the notice of extension under cl.18.1 is that there would be no extension to the agreement and the FA would expire at the end of the initial 20-year term on 25 October 2022.

9 It is common ground that the franchise agreements were all amended so that the criterion for refusal under cl.18.3(a), if the Defendant was "in breach of any one or more of his obligations hereunder" (which is how it appears it in the copy provided to the court) should read "in material breach of any one or more of his obligations hereunder".

10 In addition to a refusal under cl.18.3 there is also a contractual right for WFL to terminate the FA at any time pursuant to cl.19.2(b), as well as any right which might arise in common law to terminate the repudiatory breach.

11 The dispute before me is whether there had been a valid objection made by WFL to an extension to the Defendant's franchise agreement, which in turn raises issues whether the Defendant has complied with various requests for information made by WFL to the Defendant, it is said, pursuant to the terms of the franchise agreements which have not been provided as required.

12 WFL's case is that it was necessary and appropriate to request certain information to award it the Defendant's business (carried on through three management companies) when considering how to respond to his notices to extend. The Defendant on the other hand says that WFL is deliberately looking to find fault, to terminate his franchises in order either to take them over or to impose new terms more favourable to WFL and has behaved in an unfair fashion given his successful operation of the various franchises for the last 20 years.

13 WFL has also sought to terminate the franchise agreements for a repudiatory breach and pursuant to cl.19.2 of the FA. Those issues are not suitable for summary judgment to the extent that if I refuse summary judgment on the primary basis advanced by WFL, there appears now to be a significant, albeit unpleaded, dispute about whether WFL elected to waive the right to terminate which would require further evidence of fact and on the *Easyair* principles would not be appropriate for summary judgment on the evidence currently before the court.

14 I made this clear during the course of the hearing so counsel focussed on the issues relating to WFL's opposition to extension under cl.18.

15 I adopt WFL's brief chronology with some additions of my own.

16 Firstly, on 24 November 2020 the Defendant issued a renewal notice. On 18 August 2021 WFL emailed the Defendant in terms which it says requested him to provide the

most recent receipts for the rent of his properties in accordance with cl.18.3(b) of the FA. On 17 March 2022 WFL issued a counter notice ("CN1").

17 On 5 May 2022 the Defendant's solicitors, Fladgate, wrote to WFL questioning the basis on which CN1 was served and seeking clarification of the reasons. On 26 May 2022 Sherrards for WFL replied to Fladgate setting out at para.17 the matters outstanding, and at para.19 requiring that they now be provided.

18 On 6 June 2022 Fladgates requested more time to investigate and to deal with the points in the 26 May letter, and disputed certain matters. On 7 June 2022 Sherrards emailed that they did not accept the contentions in the Fladgate letter and would issue proceedings. On 16 June 2022, to take account of matters which postdated CN1 and as a precaution, WFL issued a further counter notice ("CN2") to cover the possibility that CN1 might not be effective.

The Issues on this Application

19 If either of the CNs were effective the franchise agreements would have terminated on 25 October 2022. On 21 October 2022 WFL sent to the Defendant a letter of summary termination pursuant to cl.19 of the FA and/or accepting his claimed repudiation of them.

20 The factual context is far more complex that this short chronology suggests and, as the Defendant's own witness statement and that of Miss Tara Tan for WFL make clear, there are many allegations and counter allegations of lack of cooperation and obstructive behaviour, poor relations and bad faith, and many other breaches of agreement are alleged. The Defendant points out his successful business operation during the life of the franchise agreements and describes his recent relationship with senior management of WFL as "challenging" – by which he means he has been poorly and unfairly treated.

21 These issues are relevant to a number of issues in the proceedings but are not matters for this application, which is confined to two narrow grounds on which WFL submits the application can be decided on limited documentation and undisputed evidence under matters of law.

22 WFL contends that the Defendant is no longer a franchisee because the franchise agreements have each terminated. However while these proceedings are on foot, and on a without prejudice basis, WFL has agreed a temporary arrangement in which the Defendant continues to trade using the Winkworth brand.

23 In order to avoid more factually contentious issues WFL has applied for summary judgment on two grounds and as Mr Cohen KC on behalf of WFL submits:

(1) WFL was entitled to require the Defendant's accounts under cl.14.12. Accounts were demanded before but provided after CN1. For failure to provide the accounts WFL was entitled to give CN1; the effective breach of cl.14.12 entitled WFL to serve a counter notice under cl.18.3(a) opposing renewal.

(2) The Defendant failed to produce proof of payment of rent of the premises from which he conducted his estate agency was up to date, contrary to cl.5.6(b) and 14.10 of the FA.

24 WFL submits that if it establishes either of those grounds it was entitled to serve a counter notice and to oppose renewal of the FA pursuant to cl.18 and 19.

25 Both grounds are disputed by Mr Atkins KC on behalf of the Defendant.

Relevant Provisions of the FA

26 Using the representative FA before me the following provisions are relevant. Firstly the FA defines "the franchisor" as WFL and "the franchisee" as the Defendant. It is for a term of 20 years from 25 October 2002 and thus expired on 25 October 2022, subject to the provisions for renewal:

> "5.6. In the event that the interest of the Franchisee in the Premises is leasehold the Franchisee shall:
>
> (a) Observe and perform all the covenants and conditions imposed on the Franchisee under the terms of the applicable lease or underlease ('The Lease') under which the Franchisee holds the Premises at all times and in the manner therein provided;
>
> (b) At the request of the Franchisor, from time to time, produce the last receipts for payment of rent, service charges, insurance premiums or any other sums payable under the Lease and particulars of the insurance of insurances maintained in respect of the Premises or a copy of the relevant policy or policies.
>
> …
>
> "14.6. The Franchisor will within the period of two calendar months following the end of each Accounting Year of part of an Accounting Year of the Term ('The Accounting Date') provide the Franchisee with a certificate in writing by its auditors certifying the Gross Receipts of the Business during the twelve months or shorter period ending on the Accounting Date and showing the commission and other payments due to the Franchisor. For the purpose of providing the certificate the Franchisor's auditors shall be given access to all relevant books and accounts of both the Franchisor and the Franchisee and shall have the right to request such other evidence as may be reasonably required to verify the amount due. Such certificate shall specify the extent to which the commission actually deducted by the Franchisor varies from the amount due. The Franchisor shall repay to the Franchisee any over-payment, or, as the case may be, the Franchisee shall pay to the Franchisor any under-payment, including any balance of Minimum Annual Commission payable but as yet unpaid at the Accounting Date pursuant to Clause 13, within seven days of the issue of the said certificate.

…

"14.10. The Franchisee will provide within two calendar months of the Accounting Date a certificate from its own accountants/auditors verifying that any clients' accounts held by the Franchisee are and have been properly maintained and that the balances at the Accounting Date accurately represent the amount of clients' money so held.

"14.11. The Franchisee will supply within three months of the Accounting Date an audited set of accounts of the Franchisee to the Franchisor.

"14.12. Upon a request received from the Franchisor the Franchisee shall supply and deliver up to the Franchisor all such information and documents relating to its accounts and the operation of its business as are required under the terms of this Agreement. This provision is fundamental to the terms and goes to the root of this Agreement for the reasons of protecting and preserving the Franchisor's reputation and the reputation and interest of the Franchisor in the System and the Trade Name and its intellectual property rights therein and breach hereof shall constitute grounds for termination under Clause 19.2(b).

…

"18.1. Subject to Clause 19 the Term shall be capable of extension by the Franchisee. The Franchisee shall have the right to extend the Term for two further periods of ten years by notice to the Franchisor provided that the Term does not exceed forty years. Such notice may be given not more than twenty-four months nor less than six months before the twentieth or thirtieth anniversaries of the Commencement Date as the case may be. Upon the giving of such notice the Term shall be extended to thirty years of forty years after the Commencement Date as the case may be on the terms and conditions set out herein save that on the thirtieth anniversary or the Commencement Date this clause shall be excluded and that on the twentieth and thirtieth anniversaries of the Commencement Date the Minimum Annual Commission payable pursuant to Clause 13.1 shall be increased by an amount proportionate to any increase in the Index of Retail Prices published by the Office for National Statistics (or if such index shall cease to be published by reference to any other equivalent index published by any government department or agency which shall be selected by the Franchisor);

"18.2. The Franchisor shall have the right to refuse to accept such notices by servicing a counter-notice in writing on the Franchisee no later than three months before the twentieth or thirtieth anniversaries of the Commencement Date as the case may be but only for the reasons set out in Clause 18.3.

"18.3. The Franchisor shall have the right to refuse to extend the Term if:

(a) The Franchisee is at such time in material breach of any one or more of his obligations hereunder or has been in persistent breach of the terms hereof in like terms to those contained in Clause 17.6(b) as if the same were set out in this sub-clause seriatim; and/or

(b) The Franchisee has during the Term failed to provide a professional and efficient service following written notice by the Franchisor to rectify the same; and/or

(c) UK or European competition law shall have changed during the Term in a material respect so as to make such extension objectionable for any reason provided that the Franchisor and the Franchisee shall use all reasonable endeavours to agree amendments to the terms of this Agreement or a replacement Franchise Agreement in similar terms amended only to remove or amend any terms objectionable under UK or European Competition Law.

…

"19.2. This Agreement shall expire at the end of the Term, but the Franchisor shall also be entitled to terminate this Agreement at any time and without payment of compensation to the Franchisee:

…

(b) If the Franchisee ... shall:

(i) fail to perform any of the material and/or fundamental obligations on its behalf herein contained and/or

(ii) shall commit any substantial or persistent breach or breaches of the terms of this Agreement and/or

…

(n) If the Franchisee, the personal representatives of a deceased Franchisee or the attorney receiver or manager of an incapacitated Franchisee shall fail to produce or deliver up to the Franchisor or fail to permit the Franchisor to inspect its books of account or other records and information on request as required under the provisions of Clause 14 hereto."

Material Breach

27 As an important preliminary issue, it is necessary to consider the effect of the

requirement for a "material breach" to be demonstrated for the purposes of cl. 18(3) and the effect of cl. 14.12 and the obligation to provide information and documents upon request.

28 Although there is an issue in these proceedings with respect to whether cl.14.2 is a freestanding obligation relating to any request by WFL for information or documents, Mr Cohen KC has accepted that for the purposes of this application it should be read narrowly, as the Defendant submits, and be taken to refer only to an obligation to provide information and documents where there is another express obligation to do so in the FA.

29 Mr Atkins KC for the Defendant emphasises the need to demonstrate materiality with regard to any breach relied upon, but also that it cannot have been the intention of the parties in entering into the FA that any breach of its provisions requiring the provision of information, in this case – however minor – would permit WFL to oppose renewal of the agreement or to entitle WFL to terminate the FA. If the failure did not engage the reasons for the provision of the information, as explained by Tara Tan's 2nd witness statement on behalf of WFL e.g. at paras.32(d), 33 and 34, they should not be considered sufficiently material or fundamental to entitle WFL to oppose renewal or to terminate.

30 The difficulty with Mr Atkins' submissions on this issue is that the parties have expressly provided for the significance of cl.14.12 ("is fundamental to the terms and goes to the root of this Agreement") and how the obligation is to be regarded, with reference to the performance of the FA. His approach would superimpose another test of materiality in order to determine whether the breaches were fundamental, notwithstanding the agreement that they were.

31 Mr Cohen also submits that this approach, in effect, seeks to withdraw from the admission made in para.22A of the defence which admits para.25A of the amended particulars of claim.

32 Paragraph 25A of the amended particulars of claim states:

> "25A. The effect of cl.14.12 was to require Mr Goble to provide to WFL on its demand any information or documents that he was required to have or produce under the franchise agreement (including any information or document that he was required to have or produce pursuant to the Manual). A breach of cl.14.12 was in any circumstances a material breach within the meaning of cl.18.3(a) and was a ground for summary termination under cl.19.2(b) and (n)."

33 Paragraph 22A of the amended defence sets out a qualified admission of para.25A of the amended particulars of claim:

> "Paragraph 25A is admitted except that it is denied if and insofar as it is alleged that any provision in the manual works substantially to widen the scope of Mr Goble's obligations to provide documents and information under the franchise agreements (See further paras.25 and 26 below)."

34 The qualification in para.22A of the amended defence relates to the question of whether the terms of WFL's Manual widen the scope of the Defendant's obligations to provide documents and information under the FA. The obligations relating to the manual (defined by cl.1.1(h) of the FA) and the disputes in these proceedings relating to them are not relevant to the current application.

35 Since the issue of the Manual is not before me and not relied upon by WFL in making this application, it appears to me on the face of the Defendant's own admission of para.25A of the amended particulars of claim is that a breach of cl.14.12 is a material breach within the meaning of cl.18.3(a) and a ground for summary termination under cl.19.2(b) and (n). Mr Atkins confirmed that he did not seek permission to withdraw or amend or the admission made in para.22A of the amended defence.

36 In any event, given the specific provisions of cl.14.12 it appears to me that the parties in entering into the FA agreed that the breaches falling within cl.14.12 should be regarded as fundamental to the FA for the reasons there stated. There is no legal basis here for disregarding the parties' own agreed characterisation. (See ***Lombard North Central Plc v. Butterworth*** [1987] QB 527 at [535] to [536} per Mustill LJ)

37 Mr Atkins did not advance any basis for distinguishing or not applying the principles in ***Lombard North*** to cl.14.12, other than to submit that it should be judged by the reasons appearing in the second part of 14.12, and as set out in his skeleton argument at para.19, i.e. that the information requested goes to "protecting and preserving the franchisor's reputation and the reputation and interests of the franchisor in the system and trade name of its intellectual property rights therein". If the alleged failure cannot sensibly be regarded as engaging any of the reasons, he says, it should not be considered a fundamental breach for the purposes of cl.14.12. He added that as a matter of common sense a breach capable of being fundamental in this sense would at least need to be material so that cl.14.12 and 18.3(a) are aligned in having a minimum threshold of materiality.

38 In ***Bairstow Eves (Securities) Ltd v. Ripley*** (1993) 65 P & CR 220, which concerned a leasehold option, the Court of Appeal held that the landlord was entitled to hold the tenant to his bargain and to insist on the performance of the covenant to redecorate in the last year of the term, which was not done, in order to be entitled to exercise an option to renew. As Scott LJ held at p.27:

> "The court is not entitled to rewrite that covenant ... or to presume to inform Mr Ripley that the breach of the covenant was only trivial and should be ignored for the purposes of the condition precedent."

39 So too here. WFL was entitled to rely on the terms of cl.14.11 subject to the question of estoppel, which I deal with below, and 14.12, and an additional requirement to assess materiality should not be imported into the obligation given the agreement in 14.12 as to the characterisation of a breach of 14.12 and the admission in para.25A of the amended defence. It is not for the court to rewrite the bargain WFL and the Defendant entered into in the franchise agreement.

40 It therefore appears to me as follows:

(1) Clause 14.12 should be approached for the purposes of this application as applying to where there are other specific obligations to provide information in the FA, such as under cl.5.6(b), 14.6, 14.10 and 14.11; and

(2) Breach of cl.14.12, if I so find, should be treated whether by admission or as a matter of construction of the FA as a material breach for the purpose of cl.18.3 and one entitling WFL to terminate under cl.19.

Grounds for the Application

1. Provision of accounts

41 WFL submits it is entitled to see the Defendant's accounts pursuant to cl.14.11 of the FA, which states that:

> "The franchisee will supply within three months of the Accounting Date an audited set of accounts of the franchisee to the franchisor."

42 Clause 14.6 provided:

> "The Franchisor will within the period of two calendar months following the end of each Accounting Year or part of an Accounting Year of the Term ('The Accounting Date') provide the Franchisee with a certificate in writing by its auditors certifying the Gross Receipts of the business during the twelve months or shorter period ending on the Accounting Date and showing the commission and other payments due to Franchisor…"

43 The "Accounting Date" was defined by cl.1.1 of the FA by reference to the "meaning given to it in cl.14.6".

44 The term "Accounting Year" was also defined by cl.1.1 of the FA; in this case as

> "a calendar year starting on 1 January and ending on 31 December, or such other annual period as shall be adopted for accounting purposes as mentioned in cl.14.13."

45 Taking the two definitions together, the Accounting Date is therefore "two calendar months following" 31 December in each year. The Defendant was therefore required to provide accounts for an Accounting Year within three months of the Accounting Date i.e. three months from the end of the preceding Accounting Year. It follows, Mr Cohen submits, that for the 2020 calendar year, the Defendant was required to produce accounts by 31 May 2021. I disregard for these purposes the possible argument that the date might have been earlier since this was not pressed by Mr Cohen.

46 In respect of the 2020 accounting year, on 10 June 2021 WFL requested from the Defendant

> "annual financial statements as filed with HMRC for year ended 2020 ... please could we have by 14 June 2021."

47 On the same day the Defendant replied that,

> "our 2020 accounts have not been filed. We have until September 2021 to file."

48 This may have been correct, but it does not appear to have been a response to the obligation under cl.14.11 of the FA.

49 WFL responded on 11 June by requesting instead that draft accounts be provided but the Defendant stated that "none have been done".

50 On 13 July WFL again requested draft accounts for 2020 and reminded the Defendant of his obligations under cl.14.12. Further requests were made for draft accounts on 16 and 27 July 2021 but there was no response from the Defendant.

51 As a result on 17 March 2020 WFL serviced CN1. CN1 stated:

> "**Franchise renewal request**
>
> "We refer to your requests/notices, by (1) letter dated 24 November 2020; and (2) by emails dated 24 and 27 November 2020 respectively, to extend/renew each of the Franchise Agreements.
>
> "Having considered the position very carefully, we write by way of service, and in accordance with clause 18.3(a) of each of the Franchise Agreements, to inform you that WFL is hereby exercising its right to refuse to accept your notices requesting the extension of the Franchise Agreements. For the avoidance of doubt, this letter constitutes a counter-notice in writing, pursuant to clauses 18.2 and 18.3 of the Franchise Agreements. Whilst it is not necessary for us to provide any detail of the reasons, we confirm that there are a number of issues that have led to our decision. They are reasons pursuant to clause 18.3 of the Franchise Agreements and include (without limitation, and in no particular order):
>
> 1. Your failure to enter into new Option Agreements in respect of (1) the new lease in relation to the premises in Pimlico (Belgrave Road); and (2) the new premises from which you operate in Clapham (in respect of the Battersea Franchise Agreements);
>
> 2. The apparent under-declaration to Winkworth of the levels of your income for the years 2018 and 2019.
>
> 3. Your failure to cooperate with and/or progress compliance checks/audit processes.
>
> "As such, the Franchise Agreements will formally come to an end

> with effect from 25 October 2022 and this notice constitutes appropriate notice of termination (to the extent that any such notice is technically required under the terms of the Franchise Agreements)."

52 On 31 March 2022, although it might have been thought to be unnecessary given the previous requests, WFL made a further request for the accounts and gave the Defendant more time than the FA required to provide them:

> "Further to the accounts department's request on 10 June 2021 (repeated on 13 July 2021 and 16 July 2021) for a draft and/or final copy of your Annual Financial Statements for 2020 (as filed with HMRC) the accounts department have confirmed such a copy has never been provided by you to them. We understand an abbreviated version was submitted to Companies House on 27 September 2021 but you failed to submit a copy of the full HMRC version to us.
>
> We now ask you to provide a copy by 5pm on 25 April 2022."

WFL also reminded the Defendant of the provisions of cl.14.12.

53 The Defendant finally provided the outstanding accounts on 26 April 2022, over a year after the period stipulated by cl.14.11, more than a month after the service of CN1, and a day later than the email of 31 March requested.

54 WFL contend that it was entitled to require the production of accounts under cl.14.12, regardless of any deadlines for filing of accounts with HMRC. Many requests were made for the accounts before CN1 served and no response was received which adequately addressed the contractual obligation to supply them. WFL therefore submits that the breach of cl.14.12 of the FA entitled WFL to serve a counter notice under cl.18.3(a) and to oppose the renewal of the FA so that it terminated without extension on 25 October 2022.

55 The Defendant opposes submissions for a number of reasons.

56 The issue pleaded at para.21A of the amended defence, that the obligation under cl.14.12 is said not to be freestanding but only relates to other obligations under the FA, is conceded by WFL for the purpose of this application, as already noted.

57 Further Mr Atkins submitted (for example at para.21 of his skeleton argument) that given the draconian consequences of non-compliance a request for cl.14.12 purposes should be "crystal clear", and if the requests were ambiguous, as he submitted they were, then they should not be regarded as valid requests for the purposes of cl.14.12. These are matters which fall to be determined on the documents, since this is a matter which was dealt with in correspondence and it is not suggested I do not have all the relevant documentation before me.

58 It is clearly necessary that any request on the 14.12 should be sufficiently clear in order for it to be understood, though I consider Mr Atkins' suggestion that is should be crystal clear as going too far. I reject Mr Atkins' submissions that the request, or rather the series of requests were insufficient to trigger cl.14.12 for the following

reasons:

(1) There was an absolute obligation on the Defendant to produce the accounts within three months regardless of any request under cl.14.11.

(2) The numerous requests made were sufficiently clear even if there may have been some confusion over the reference to HMRC accounts initially. By July it was clear that WFL was content to receive draft accounts and Miss Penn's email of 13 July 2021 specifically quoted 14.12 and requested draft accounts for 2020. This was repeated, including the email of 27 July 2021,

> "our request is for draft accounts for 2020 – please provide these directly …. by next Monday would seem reasonable to me as we have been asking for this as we have been asking for this since 10th June 2021."

(3) When the Defendant contested the request for the provision of accounts for a number of years, WFL replied on 14 June 2021,

> "This is a legitimate request and in line with your franchise agreement (see cl.14) where it states you are to supply to us ever year a copy of your accounts. For the years stated you did not supply them to us."

(4) From the correspondence, and the reference to the obligation to provide accounts annually, I do not consider that the Defendant could reasonably have failed to understand that the request related to the obligation of cl.14.11. I note that the Defendant's response as a reminder of 14 June, and to which the email quoted above was a response, was not that he did not understand the request or the obligation to provide the accounts, but that he questioned the motivation for the request, complained about it being made during a difficult time for business during the pandemic, and said that he disliked

> "games being played not only with me but numerous other franchises. It is not healthy."

59 I therefore reject the contention that the request was insufficiently clear for the purposes of cl.14.12.

60 Secondly, a defence of estoppel by convention is advanced (see para.21C of the amended defence). In particular it is pleaded:

> "(1) WFL is estopped by convention from relying upon a breach of clause 14.11 for the purposes of either of its counter-notices or its purported notice of termination.
>
> (a) The parties proceeded upon a common assumption, expressly shared between them, that it was unnecessary for Mr Goble to provide audited

accounts and that monthly income statements and yearly unaudited accounts would suffice instead.

(b) WFL expected Mr Goble to rely upon that common assumption and he did so throughout their course of dealing for more than twenty years of the Franchise Agreements.

(c) Mr Goble will suffer a detriment if WFL were now able to resile from their common assumption and rely upon a breach of clause 14.11 for the purposes of its counter-notices or its purported notice of termination, such that it would be unjust and unconscionable to allow WFL to do so."

61 Mr Cohen submits that WFL concedes the estoppel for the purposes of this application. But submits that it does not affect the outcome since, whether audited or unaudited, no accounts were in fact provided until 26 April 2022, some 13 months after the date required by cl.14.11 and long after the extended time for compliance granted by WLF to the Defendant in correspondence.

62 Mr Atkins' response to this was not easy to follow since he appeared to submit that the common understanding which arose did not have any specific time for compliance attached to the requirements to provide unaudited accounts. However the pleading of the estoppel does not suggest that any other element of cl.14.11 was affected by the common understanding other than the requirement for audited accounts.

63 The principles applicable to estoppel by convention were set out by Briggs J, as he then was, in ***HM Revenue and Custom Commissioners v. Benchdollar Ltd & Ors*** [2010] 1 All ER 174, as modified by him in ***Stena Line Ltd v. Merchant Navy Ratings Pension Fund Trustees Ltd*** [2010] Pens LR 411 and approved by the Supreme Court in ***Tinkler v. Revenue & Customs*** [2022] AC 886 by Lord Burrows at paras. 42 to 53, and Lord Briggs himself at para.92.

64 In ***Benchdollar*** Briggs J held at para.52:

> "In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings … are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert

the true legal (or factual) position."

65 Lord Burrows in ***Tinkler*** added at para.51:

> "It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as 'C') must know that the person against whom the estoppel is raised (who I shall refer to as 'D') shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption."

66 The statement of principle in ***Benchdollar*** was modified by Briggs J in ***Stena Line*** at 137, where he accepted that his first principle should include the proposition that

> "the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred."

67 Here the expression of the common assumption between the parties related, as the amended defence pleaded, solely to the substitution in place of orders to (inaudible) the provision of "monthly income statements and the early unaudited accounts". On that basis it is pleaded at para.21C(c) that the Defendant will suffer a detriment if WFL resiles on the common assumption. There is nothing pleaded, as I have mentioned, which extends beyond that proposition and no application for permission to further amend was made. Indeed, the reference in para.21C(a) to "yearly unaudited accounts" is consistent with cl.14.11 and the obligation to provide accounts within three months of the end of each Accounting Date.

68 It follows that I accept Mr Cohen's submissions that since no accounts at all were provided despite the many requests, and WFL's agreement to accept draft accounts, that the estoppel does not affect the outcome of the issue of breach since, many months before CN1 was served, WFL had stated that it would accept draft accounts, not audited accounts (which is what appears to have been meant by HMRC accounts).

69 The Defendant also contends that the performance of cl.14.11, and therefore the validity of a request under cl.14.12, is contingent upon WFL's performance under cl.14.6 (see for example paras.21C(1)(d) of the amended defence). I disagree.

70 It appears to me that there are a series of obligations under cl.14 and that under 14.6 requires the certification of gross receipts of the business by WFL having inspected books and accounts. The obligations under 14.10 and 14.11 are separate obligations, not stated to be contingent on any other obligations relating to the Defendant's own accounts and requiring his own accounts or auditors to produce data and accounts.

71 No doubt one issue may be to ascertain to what extent the Defendant's own accounting is consistent with WFL's own findings of its investigations under cl.14.6. However, that does not require one to be contingent upon the other. Each of the

obligations appears to me to be freestanding and are not even in sequence in the FA since there were intervening provisions relating to payment and receipt of money and details of bank accounts. Clause 14.9 is specifically related to certification under cl.14.6, which demonstrates that the FA states where the provisions are intended to be linked in some manner.

72 I therefore conclude, on the basis of the evidence before the court on this specific issue, and in light of the concessions made by WFL, that WFL's claim is made out in respect of the breaches at cl.14.11 and 14.12 in the Defendant's failure to provide accounts, even within the extended timescales given by WF. There was a material breach within cl.18.3(a) which entitled WFL to serve CN1. It follows that I find that WFL was entitled to refuse to extend the FA and that it terminated on 25 October 2022. The same conclusion must hold good for the other franchise agreements for which this is a specimen.

73 While WFL may wish to pursue the balance of the claim for further relief based on early termination pursuant to cl.19, or for repudiation of the FA, which may or may not be subject to an application for permission to amend to plead a defence of the right to termination had been waived, that is not a matter for me on this application for the reasons I have already given.

Rent and Payment Information

74 I propose to deal with this basis shortly since I have already found that WFL was entitled to refuse to extend the FA. WFL contend that the Defendant was in breach of cl.5.6(b) read with cl.14.12, which required on request that the Defendant should:

> "... from time to time produce the last receipts for payment of rent, service charges and insurance premiums, or any other sums payable under the lease and particularly that the insurance or insurances are maintained in respect of the premises, or a copy of the relevant policy or policies."

75 The breach alleged is that the Defendant did not respond to a request for confirmation of rent payment, and as a result of the dispute which occurred by the date of service of CN1 concerning whether this information had been requested, further correspondence ensued and CN2 was served on 16 June 2022. There are issues with regard to the making and adequacy of the request and when it was done.

76 However there is an important preliminary point with respect to this ground for opposing renewal under cl.18.3, which is whether the failure to produce proof of payment of rent was in breach of cl.5.6(b) and thus of cl.14.12. The Defendant contends that the requirement to produce the "last receipts for payment of rent" required the production of such receipts as in fact existed and that the obligation was not one to procure a document or provide some other proof of payment.

77 It is common ground that no receipts in fact existed at the time of the request, but Mr Cohen submitted that cl.5.6(b) required not merely the production of last receipts of rent but, where no such receipts exist, to procure them or provide proof of payment. This was eventually provided but WFL says this was too late to comply with cl.14.2.

78 I do not agree. In my judgment the natural reading of cl.5.6(b) is that the reference to "last receipts" is clearly to documents that have been received since an obligation simply to provide proof of payment could have been easily expressed if this had been intended. Indeed there are several examples of obligations under the FA to obtain or supply information rather than to produce existing documentation. See for example cl.14.2 which required the production of details to allow WFL to generate invoices; 14.9 to supply details of bank accounts; and 14.10 and 14.11.

79 Other protections exist to ensure that the franchisee complies with his obligations to pay under leasehold obligations. Clause 5.6(a) requires the Defendant to observe and perform all leasehold obligations, and 5.6(d) to take all necessary steps to avoid determination of the lease, or to procure its renewal as the case may be. Clause 5.6(c) requires the WFL should be informed of the service of any notice to terminate the lease, or the notice that is served by the landlord in respect of the premises.

80 There are, therefore, a group of obligations in cl.5.6 to protect the franchisee's interests in the lease of the premises occupied for the purposes of the business, of which cl.5.6(b) forms part, and does not support a construction different to the plain meaning of the words. It is merely one means of requiring documentation to prove compliance by the Defendant with certain leasehold covenants required in any event by cl.5.6(a).

81 In view of my construction of cl.5.6(b) that there were no "last receipts" in existence to be produced under cl.5.6(b), then WFL was not entitled on the basis accepted by Mr Cohen for the purposes of this obligation to make a general request for that information to be procured under cl.14.12.

82 I therefore reject the ground of opposition to extension pursuant to cl.5.6(b).

Conclusion

83 Although I have rejected the cl.5.6(b) ground for refusing the extension under cl.18.3 I have found that the ground under cl.14.11 and 14.12 to be established. WFL has a realistic prospect of success at trial on its opposition to an extension of the FA, though not for all the reasons it has advanced.

84 The relevant documentation is before me and the issues, as I have discussed, are matters of construction of the FA and the application of the facts as they appear from that documentation to the FA. This is a case which falls within para.15(vii) of Lewison J's judgment in ***Easyair***.

85 I do not consider that there is relevant additional evidence on these issues that is not before me, or is likely to become available, which would require fuller investigation into the facts at trial, nor do there exist other good reasons for them to be considered at trial. The fact that the relationship between the Defendant and WFL has obviously broken down, and that there are other significant and highly contentious issues between them, as I have noted, does not prevent the court from reaching clear conclusions on the expiry of the FA and WFL's opposition to the right to extend.

86 Since I have reached clear conclusions on both the issues arising on this application, and as was said in ***Easyair***, it is better that they be determined sooner rather than later.

Therefore I will grant a declaration to WFL in terms of amended particulars of claim, para.60D, to the extent that I find that CN1 dated 17 March 2022 validly and effectively served to terminate the franchise agreements on 25 October 2022.

87 I will hear submissions from counsel on the form of order and costs.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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