Court of Appeal
Supreme Court

New South Wales

Case Name:	BB Australia Pty Ltd v Danset Pty Ltd
Medium Neutral Citation:	[2018] NSWCA 101
Hearing Date(s):	1 May 2018
Decision Date:	16 May 2018
Before:	Meagher JA at [1]; Barrett AJA at [2]; Simpson AJA at [71]
Decision:	1 Appeal dismissed. 2 Cross appeal dismissed. 3 That BB Australia Pty Ltd pay the costs of all other parties to the proceedings in this Court.

Catchwords:	CONTRACT – particular parties – franchisee and franchisor - where franchise agreement breached by denying franchisor the opportunity to exercise option to purchase business assets – where assets sold to a third party without franchisor knowledge – whether franchisor suffered loss – where resultant loss equal to the difference between the price paid by the third party and the price to be paid under exercise of option – no such difference proved. EQUITY – equitable remedies – account of profits – equitable compensation - where deceit and fraud by the franchisee – where third party induced breach - whether assets held on trust for the franchisor – whether otherwise the franchisor had an equitable interest in the business assets – no trust established – no fiduciary duty shown – no basis for award of account of profits or equitable compensation. PROCEDURE – where certain claims reserved by trial judge for future consideration – whether Court of Appeal should determine those claims.
Legislation Cited:	A New Tax System (Goods and Services Tax) Act 1999 (Cth) Supreme Court Act 1970 (NSW) Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited:

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39
Attorney General v Blake [2001] 1 AC 268; [2000] UKHL 45
BB Australia Pty Ltd v Bytan Pty Ltd [2012] VSC 171
BB Australia Pty Ltd v Constanti [2017] VSC 114
Black v S Freedman & Co (1910) 12 CLR 105; [1910] HCA 58
Browning v Brachers [2005] EWCA Civ 753; [2005] PNLR 44
Bunny Industries Ltd v FSW Enterprises Pty Ltd [1982] Qd R 712
Chan v Cresdon Pty Ltd (1989) 168 CLR 242; [1989] HCA 63
Chang v Registrar of Titles (1976) 137 CLR 177; [1976] HCA 1
Commissioner of Taxes (Q) v Camphin (1937) 57 CLR 127; [1937] HCA 30
Duncuft v Albrecht (1841) 12 Sim 189; 59 ER 1104
Englewood Properties Ltd v Patel [2005] 1 WLR 1961; [2005] EWHC 188 (Ch)
Fink v Fink (1946) 74 CLR 127; [1943] HCA 54
Fistar v Riverwood Legion and Community Club Ltd (2016) 91 NSWLR 732; [2016] NSWCA 81
General Tire & Rubber Co Ltd v Firestone Tyre & Rubber Co Ltd (No 2) [1975] 1 WLR 819
Goldsbrough Mort & Co Ltd v Quinn (1910) 10 CLR 674; [1910] HCA 20
House v The King (1936) 55 CLR 499; [1936] HCA 40
Howe v Teefy (1927) 27 SR (NSW) 301
Kern Corporation Ltd v Walter Reid Trading Pty Ltd (1987) 163 CLR 164; [1987] HCA 20
KLDE Pty Ltd v Commissioner of Stamp Duties (Qld) (1984) 155 CLR 288; 1984] HCA 63
Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57; [1974] HCA 49
Legione v Hateley (1983) 152 CLR 406; [1983] HCA 11
Libertarian Investments Ltd v Hall [2013] HKCFA 93; (2013) 16 HKCFAR 681
Lysaght v Edwards (1876) 2 Ch D 449
Mercier Rouse Street Pty Ltd v Burness [2015] VSCA 8
Morris-Garner v One Step (Support) Ltd [2018] UKSC

Texts Cited:	Ashley Black, “Modern indicia of fiduciary relationships in a commercial setting and the interaction of equity and contract”, 15 November 2017, www.supremecourt.justice.nsw.gov.au/Documents/Publications/.../2017_Black_J.pdf
Category:	Principal judgment
Parties:	BB Australia Pty Ltd (Appellant) Danset Pty Ltd (First Respondent) Jorge Miraldo (Second Respondent) Maria Miraldo (Third Respondent) Tresblue Pty Ltd (Fourth Respondent) John Price (Fifth Respondent)
Representation:	Counsel: K Rees SC / PD Herzfeld (Appellant) IR Pike SC / JS Burnett (First, Second, Third Respondents) M Cashion SC / JA Darvall (Fourth, Fifth Respondents) Solicitors: Macpherson Kelley (Appellant) Slater and Gordon (First, Second, Third Respondents) Paul Mattick & Associates (Fourth, Fifth Respondents)
File Number(s):	2017/323900
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity – Commercial List
Citation:	[2017] NSWSC 1307
Date of Decision:	28 September 2017
Before:	McDougall J
File Number(s):	2016/94570

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the decision]

A video rental franchisee sold its business without the consent of the franchisor. The franchisor terminated the franchise agreement and sued the franchisee on four bases: (a) for damages for breach of contract, relying on the franchisee's repudiation of an option contained in the franchise agreement for the franchisor to purchase the business for fair market value on expiration or earlier termination of the franchise agreement; (b) for misleading or deceptive conduct contrary to statute; (c) for breach of a trust upon which the assets sold by the franchisee were allegedly held; and (d) under provisions of the agreement requiring the franchisee to indemnify or reimburse the franchisor for certain costs and expenses. The purchaser from the franchisee was sued by the franchisor for inducing breach of contract and accessorial liability for the franchisee's conduct.

By the end of the hearing at first instance, the franchisee had conceded the breach of contract and statutory misconduct claims. The primary judge held (a) that nothing was recoverable on the conceded causes of action as no loss had been proved; (b) that the assets were not held on trust; and (c) that the indemnity and reimbursement claims should be reserved for future consideration.

Held (Barrett AJA, Meagher JA and Simpson AJA agreeing), dismissing the appeal:

1. The franchisor had failed to establish that the fair market value that would have been payable under its option to purchase was less than the price that the franchisee received upon sale of the business. The finding that the franchisor had proved no loss was correct.

2. The option to purchase did not cause the franchisee to be a trustee of the business for the franchisor. No analogy could be drawn with the position of the holder of an option to purchase land and, even if it could, might have grounded a finding of equitable interest but not trust. Nor was there any analogy with cases of theft.

Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315; [2003] HCA 57, *Chang v Registrar of Titles* (1976) 137 CLR 177; [1976] HCA 1, *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164; [1987] HCA 20, *Stern v McArthur* (1988) 165 CLR 489; [1988] HCA 51 applied. *Black v S Freedman & Co* (1910) 12 CLR 105; [1910] HCA 58 referred to.

3. The decision that the claim for indemnity and reimbursement should be reserved for future consideration was an interlocutory and discretionary decision on a matter of practice and procedure and did not attract exercise of the narrow power of appellate intervention applicable to such cases.

House v The King (1936) 55 CLR 499; [1936] HCA 40, *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; [1981] HCA 39 applied.

JUDGMENT

1. **MEAGHER JA**: I agree with the reasons of and orders proposed by Barrett AJA.

2. **BARRETT AJA:** The appellant ("BBA") operated the Blockbuster video franchise in Australia. Its business was based on franchise agreements enabling independent business owners to conduct Blockbuster branded retail stores from which entertainment DVDs and video games were let on hire (and, to some extent, sold) to customers.

3. In October 2002, the first respondent ("Danset") entered into a franchise agreement with BBA. In exercise of rights thus acquired, Danset conducted a Blockbuster rental business at premises in O'Brien Street, Bondi. The term of the franchise agreement was 10 years, expiring on 30 October 2012. At all material times, Danset held a lease of the shop premises from a third party. The franchise agreement gave BBA certain rights to purchase the business assets of the franchise upon termination or expiration of the franchise agreement or earlier decision of Danset to sell the business. It was a term of the agreement that Danset not transfer the franchise without BBA's consent.

4. In early October 2012, Danset, without the knowledge or consent of BBA, sold the assets of its Blockbuster business to Tresblue Pty Ltd ("Tresblue") which conducted a similar video rental business under the competing Civic brand at nearby premises in Curlewis Street, Bondi. Danset also assigned to Tresblue the lease of the O'Brien Street premises which had about six months to run. Tresblue then also began operating under the Civic brand at the O'Brien Street premises. BBA, for its part, terminated the franchise agreement with Danset.

The proceedings at first instance

5. In consequence of Danset's sale to Tresblue, BBA commenced proceedings against several parties. The first defendant was Danset. The second and third defendants were Mr Jorge Miraldo and Mrs Maria Miraldo, the directors and shareholders of Danset who had guaranteed its performance under the franchise agreement. The fourth defendant was Tresblue. The fifth defendant was Mr John Price, the controller of Tresblue. In the narrative that follows, references to "the Danset parties" are references to Danset, Mr Miraldo and Mrs Miraldo; and references to "the Tresblue parties" are references to Tresblue and Mr Price.

6. BBA's claims at trial were, in brief, that Danset, by selling to Tresblue, breached provisions of the franchise agreement; that the conduct of Danset in and about the sale was misleading or deceptive; that Danset had held the assets of the Blockbuster Bondi business on trust for BBA and that the sale was made in breach of trust; that Mr Miraldo and Mrs Miraldo were knowingly concerned in Danset's breach of trust; that Tresblue and Mr Price induced the breach of contract by Danset and were knowingly concerned in its breach of trust; and that Danset was, under the franchise agreement, liable to indemnify or reimburse BBA for certain expenses incurred by it.

7. The trust-based claims were no doubt made with a view to obtaining relief in the form of an account of profits (or equitable compensation) potentially more favourable to BBA than such damages as might be warranted by reference to the other causes of action. BBA did not frame its case on the insecure footing that an account of profits may be ordered as a remedy for breach of contract

(cf *Attorney General v Blake* [2001] 1 AC 268; [2000] UKHL 45[1]). Rather, it adopted the orthodox position that an account of profits is an equitable remedy that may be awarded to deprive a fiduciary of gains obtained in breach of duty and that, in some circumstances, equitable compensation may represent a more appropriate means of achieving that end.

8. The proceedings were heard by McDougall J sitting in the Commercial List of the Equity Division. On 28 September 2017 and for reasons he then published, his Honour dismissed the bulk of BBA's claims against the Danset parties and all claims against the Tresblue parties. His Honour reserved for further consideration the balance of the claims against the Danset parties.

9. By the end of the hearing at first instance, the breach of contract claims and the claims based on allegations of misleading or deceptive conduct had been conceded by the Danset parties. They acknowledged that BBA's allegations of breach of contract had been proved. Likewise, they acknowledged that the case of misleading or deceptive conduct, and the Miraldos' accessory liability for that conduct, had been proved. The Tresblue parties did not concede these allegations against Danset. Nor did it contest them. Ultimately, however, the primary judge concluded that BBA had not suffered any loss by reason of the admitted wrongs – essentially because, although it was more likely than not that BBA would have exercised an option under the franchise agreement to purchase the assets on termination or expiration of the franchise, there was no evidence that it could then have sold them at a profit or otherwise turned them to profitable account.

10. His Honour also found against BBA on its claim that the assets sold by Danset had been subject to a trust in favour of BBA and that an account of profits or equitable compensation would, on that basis, be appropriately awarded in consequence of the unauthorised sale. In relation to the alleged contractual obligation of Danset to indemnify or reimburse BBA for certain expenses incurred, his Honour expressed no final view.

---

[1] The approach taken in that case may not be wholly settled in the United Kingdom: see Morris-Garner v One Step (Support) Ltd [2018] UKSC 20; [2018] 2 WLR 1353.

11. In relation to the allegation against Tresblue and Mr Price that they had committed the tort of inducing breach of contract, the primary judge said that, in view of BBA's failure to prove that it had suffered loss as a result of Danset's breach of contract, there was no need to decide the matter. His Honour nevertheless recorded a number of findings adverse to Tresblue and Mr Price that would have been pertinent had it been necessary to come to a conclusion on the character of their conduct. Tresblue and Mr Price accept that, in view of those adverse findings, they would have been liable in tort had loss been established.

The franchise agreement

12. Before turning to the issues to which this Court must give its attention, it is appropriate to refer to provisions of the franchise agreement under which BBA had (or was to have) a right to purchase the assets of the O'Brien Street business. The first group of relevant provisions (within clause 15) created such a right if Danset decided to sell. Under those provisions, BBA had what was, in essence, a right of first refusal entitling it to match any "bona fide, arm's length, executed written offer" received from a bona fide purchaser. In the course of the trial, counsel for BBA accepted that no right to purchase had arisen under the clause 15 provisions because an offer of the kind there mentioned had never come into existence.

13. The provisions central to the primary judge's decision (and to the appeal) are within clause 18. Clause 18.13 was in these terms:

> "18.13 Upon termination of this Agreement by FRANCHISOR in accordance with its terms and conditions, upon termination of this Agreement by FRANCHISEE without cause, or upon expiration of this Agreement (without the grant of a Successor Franchise as now specifically described in Section 16), FRANCHISOR shall have the option, exercisable by giving written notice thereof within sixty (60) days from the date of such expiration or termination, to purchase from FRANCHISEE all the assets used in the STORE. Assets shall include, without limitation, leasehold improvements, equipment, furniture, fixtures, signs, inventory and the lease or sub-lease for the Site. FRANCHISOR shall have the unrestricted right to assign this option to purchase."

14. Clause 18.15 specified what the purchase price would be (and what it would not include):

> "18.15 The purchase price for the assets of the STORE shall be the fair market value, determined as of the date of termination or expiration of this

> Agreement in a manner consistent with reasonable depreciation of leasehold improvements owned by FRANCHISEE and the equipment, furniture, fixtures, signs and inventory of the STORE, provided that the purchase price shall not contain any factor or increment for any trademark, service mark or other commercial symbol used in connection with the operation of the STORE, goodwill or "going concern" value for the STORE or the data generated from the Licensed Program or Alternate Program and further provided that FRANCHISOR may exclude from the assets purchased hereunder any equipment, furniture, fixtures, signs and inventory that are not approved as meeting quality standards for BLOCKBUSTER Video Stores. The length of the remaining term of the lease or sublease for the Site of the STORE shall also be considered in determining the fair market value hereunder."

15. Clause 18.16 provided for expert determination if the parties could not agree on price.

16. In relation to the option to purchase provided for in clause 18.13, the primary judge accepted that, had BBA had an opportunity to exercise that option, it was more likely than not that it would have done so. The sale to Tresblue in breach of contract therefore fell to be considered on the footing that, if BBA had not been denied an opportunity to exercise the clause 18.13 option and thereby to purchase the assets of the O'Brien Street business for the price provided for in clause 18.15 (that is, fair market value), it would have enjoyed such benefit, if any, as would have come from purchasing at that price and being able to resell the purchased assets or deploy them for its own benefit. BBA's damages claim, as articulated in final submissions, was therefore for the difference between the true value of the assets and the price that would have been payable on the exercise of the clause 18.13 option to purchase.

17. The primary judge held that BBA, upon whom the burden of proof lay, had not established that the difference just mentioned was a positive sum, that is, that the price that would have been payable on exercise of the option was less than the true value of the assets.

Issues on appeal

18. By its notice of appeal, BBA challenges the primary judge's decision on the following bases:

    (1) Having found that BBA would have exercised its option to purchase the business assets were it not for the dishonest and fraudulent design of the Danset parties, the primary judge should have found that BBA suffered resultant loss equal to the difference between the price that Tresblue paid for those assets, said to reflect their true value, and the

price that BBA would have paid in consequence of the exercise of the option.

(2) The primary judge should have found that the Tresblue parties had induced Danset's admittedly dishonest and fraudulent breach of contract.

(3) The primary judge should have held that, by reason of Danset's deceit and admitted fraud, Danset held the business assets on trust for BBA (or that BBA otherwise had an equitable interest in the assets) with the result that an account of profits should have been awarded in favour of BBA and against not only Danset but also Mr Miraldo, Mrs Miraldo, Tresblue and Mr Price.

(4) The primary judge should have decided the issues about contractual responsibility for certain legal and related costs incurred by BBA and ordered that the Danset parties reimburse BBA for those costs.

19. The Danset parties, by notice of cross appeal, agree that the issue of contractual responsibility for costs should have been determined but say that the correct decision would have been that there was nothing to which that responsibility extended.

20. The issues requiring the attention of this Court are accordingly:

(1) Whether the primary judge was correct in his conclusion that no loss accrued to BBA in consequence of Danset's sale to Tresblue and the misleading or deceptive conduct of Danset in connection with the sale.

(2) Whether the primary judge was correct in his conclusion that Danset was not a trustee of the property described in clause 18.13 of the franchise agreement.

(3) Whether the primary judge should have decided the issue concerning indemnity or reimbursement by Danset for certain expenses incurred by BBA and whether this Court should now proceed to do so.

The loss issue – decision of the primary judge

21. By selling the business to Tresblue, Danset put it beyond its power to sell to BBA if and when called upon to do so by exercise of the clause 18.13 option. Danset repudiated BBA's contractual right to elect to buy upon expiration or earlier termination of the franchise agreement. BBA was therefore entitled to sue immediately for breach of contract and to recover damages, putting it in the position it would have been in had the contract been performed.

22. There is no complaint about the primary judge's approach to the assessment of damages. It is his Honour's conclusion that is challenged by BBA. As I have

said, the primary judge was satisfied that it was more likely than not that BBA would have exercised the clause 18.13 option had it been given the opportunity to do so; but that there was no evidence that, having bought the assets of the business, BBA could have resold them at a profit or otherwise employed them in a way that would have made a profit or avoided a loss. In particular, his Honour held that BBA would not have employed the assets by operating a new store on the site, either itself or through a franchisee. That finding was based on evidence of a steady and inexorable decline in the number of Blockbuster stores in Australia and New South Wales in the period November 2007 to December 2016 (Australia-wide, the number fell from 339 to 47; in New South Wales the reduction was from 106 to 10).

23. The primary judge therefore concluded that BBA had not proved that there was a difference between the true value of the assets the subject of the clause 18.13 option to purchase and the price that would have been payable pursuant to clause 18.15 on exercise of that option, that is, the "fair market value" of the assets. His Honour obviously (and correctly) considered that "fair market value" was to be determined by ascertaining what a hypothetical willing but not anxious seller could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to pay in a notional market for the property concerned.

The loss issue – discussion and assessment

24. The conclusion that his Honour should have reached, BBA says, is that the true value of the assets exceeded the "fair market value" fixed by clause 18.15 as the price to be paid in consequence of the exercise of the option. BBA further submits that, although there may be difficulties of quantification, the court must "do its best"[2] and relies on the following passage in the judgment of Street CJ in *Howe v Teefy* (1927) 27 SR (NSW) 301 at 306:

> "There may be cases where it would be impossible to say that any assessable loss had resulted from a breach of contract, but, short of that, if a plaintiff has been deprived of something which has a monetary value, a jury is not relieved from the duty of assessing the loss merely because the calculation is a difficult one or because the circumstances do not admit of the damages being assessed with certainty."

---

[2] Fink v Fink (1946) 74 CLR 127; [1943] HCA 54 at CLR 143.

25. In addition, BBA says that, since "the defendants are wrongdoers, damages should be liberally assessed"[3] and the court should "assess the value of the missing property on a basis that is generous to the claimant".[4]

26. The parties agree that the best evidence of the true value of the property sold by Danset to Tresblue is the price of $280,000 at which that sale was made. BBA contends, however, that the price that would have been payable in consequence of exercise of the clause 18.13 option is a smaller sum. Two reasons are advanced: first, that there is a discrepancy between the subject matter of the actual transaction and that of the postulated transaction; and, second, that, on the evidence, the book value of the assets in Danset's books of account is the best indicator of their "fair market value".

Goodwill

27. Under clause 18.13, the subject matter of the option is "all the assets used in the STORE" (clause 18.15, dealing with price, uses a slightly different form of words: "the assets of the STORE"). The items included are, in substance, trading stock (or inventory) equipment, furniture, fixtures, signs and the leasehold.[5] Under clause 18.15, the price payable by BBA for that collection of property would have been the "fair market value" thereof calculated, however:

    (a) in a manner consistent with reasonable depreciation of equipment, furniture, fixtures, signs, inventory and leasehold improvements owned by Danset;

    (b) after excluding any element for any trade mark, service mark or commercial symbol;

    (c) after excluding any element for "goodwill or 'going concern' value"; and

    (d) after taking into account the extent of the unexpired term of the lease.

28. BBA emphasises that, having regard to (c) above, one element of the collection of property in fact existing is to be ignored in assessing the "fair market value"

---

[3] General Tire & Rubber Co Ltd v Firestone Tyre & Rubber Co Ltd (No.2) [1975] 1 WLR 819 at 824 (HL).

[4] Browning v Brachers [2005] EWCA Civ 753; [2005] PNLR 44 at [204] – [205].

[5] Subject to exclusion, in accordance with clause 18.15, of anything deemed by BBA not to meet quality standards.

of that collection, namely "goodwill or 'going concern' value". BBA further says that element was included in the sale to Tresblue and that there is accordingly a difference between the respective subject matters indicating that the clause 18.15 price would have been less than the price paid by Tresblue. It is therefore necessary to decide whether the sale to Tresblue did include goodwill.

29. The contract for sale between Danset and Tresblue describes the subject matter of the transaction as "the business". Clause 20 states that, on completion, "the vendor must give the purchaser … possession of the business" and "cause the legal title to the business to pass to the purchaser". Clause 1.1 defines "the business" in terms which expressly include goodwill:

> "The business means the business identified on page 1 of the contract and includes the chattels, fittings, fixtures, and furniture, goodwill, intellectual and industrial property, licences, permits, plant, quotas and software of the business, together with any other items referred to in this contract as forming part of the business."

30. Page 1 of the contract (the content of which thus plays a part in the definition of the subject matter of the sale) includes, against an item "Type of business": "Inventory, fixtures & fittings of a video store". There is also a reference to the O'Brien Street address. Against an item "Assets and price apportionment" appears:

> "Goodwill: NIL
>
> Equipment and Inventory: $280,000.00."

31. In special condition 16(c), dealing with goods and services tax, the vendor and purchaser agreed that

> "this sale is the supply of a going concern and that of [sic] consequence the vendor is not making a taxable supply in selling the business".

32. In the context in which it appears, this reference to "supply of a going concern" must be understood in the way indicated by the goods and services tax legislation. Under subdivision 38-J in subsection 38-325(2) of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), a "supply of a going concern" is a supply under which the supplier supplies to the recipient "all of the things that are necessary for the continued operation of an enterprise". The goodwill of a business is one of the things necessary for its continued

operation. Acknowledgement by Danset and Tresblue in their contract that the sale was the supply of a going concern therefore necessarily implied what was expressly stated in the definition of "business", that is, that the goodwill of the business – at least to the extent that it could be put into the possession of Tresblue by Danset without the assistance of BBA – formed part of the subject matter of the sale.

33. The conclusion must therefore be that whatever goodwill Danset was capable of assigning without the assistance of BBA was included in the sale by Danset to Tresblue. That conclusion is consistent with the fact that, after completion of the sale, Tresblue carried on business for a time in the O'Brien Street premises.

34. BBA argues that no like item would have been included in the assets acquired by it pursuant to exercise of the clause 18.13 option. That clause refers to "all the assets used in the STORE". Goodwill would not normally be viewed as an asset "used in" business premises.[6] Clause 18.15, by contrast, refers to "the assets of the STORE". Those words might extend to goodwill. But because the option is exercisable only upon expiration or earlier termination of the franchise agreement, no goodwill element relevant to the Blockbuster connection would exist. It is at least arguable that some element of goodwill associated with the business location (possibly minor) would have passed to BBA upon exercise of the option.

35. In each case, however, the agreed price excluded any amount for whatever goodwill component was included in the transaction. Clause 18.15 of the franchise agreement stated that the purchase price was not to include "any factor or increment for … goodwill or going concern value", while the "price apportionment" section on page 1 of the sale contract between Danset and Tresblue stated that the price of $280,000 was attributed wholly to equipment and inventory, and nothing was payable for goodwill. It follows that, even if the goodwill expressed to be included in the Danset-Tresblue sale would not have been included in any sale resulting from exercise of the clause 18.13 option,

---

[6] In BB Australia Pty Ltd v Bytan Pty Ltd [2012] VSC 171 at [7], Pagone J regarded "all the assets used in the STORE" in an apparently identical clause as synonymous with "those assets by which the Franchisee operated the business".

that discrepancy in subject matter does not cause some figure lower than $280,000 to be seen as the price at which the assets the subject of the option were sold by Danset to Tresblue. Under both the transaction that in fact occurred and the transaction that would have occurred, no part of the price was attributable to goodwill. The alleged discrepancy on which BBA seeks to rely in arguing that the actual price $280,000 does not accurately reflect the true value of assets that do not include goodwill is therefore illusory.

36. BBA submitted, in effect, that the provision of the contract between Danset and Tresblue apportioning zero consideration to goodwill should be given no weight because those parties were prepared to structure the contract in whatever way gave them the best protection from BBA. But precisely how the inclusion of goodwill in the sale but the attributing of zero consideration to it would have assisted some such design was not explained.

Book value

37. BBA next submitted that the best evidence of the "fair market value" of the property the subject of the clause 18.13 option was the book value of that property recorded in the books of account of Danset. The evidence established that the book value was $38,000. BBA advanced three reasons for concluding that this book value was in truth the "fair market value": first, that it was generally consistent with prices at which BBA had purchased the assets of other franchised stores at around the relevant time;[7] second, that it was consistent with the fact that the major component was 17,000 ex-rental movie DVDs which, at the time, were routinely purchased by BBA for between $2.00 and $2.50 each (indicating a sum of $34,000 to $42,500); and, third, that Mr Miraldo had expressed a belief that a purchase pursuant to exercise of the clause 18.13 option would yield less than the fair value of the stock used in a going concern business.

38. The Danset parties submitted that prices paid by BBA to acquire other stores are of no assistance in determining the price that BBA would have had to pay in consequence of the exercise of the option. This is because all those

---

[7] Turramurra $46,408; Norwood SA $40,770; Blackwood SA $38,920. BBA also pointed to the sale of the assets of the Ridgehaven SA store in December 2015 for $38,920. A sale of the assets of the Concord store for $143,000 in December 2015 was said to have involved a much larger asset pool.

acquisitions had features distinguishing them in material ways from the Danset case. First, as evidence extracted from BBA's managing director and principal witness eventually confirmed, all the other cases involved stores that had been closed, whereas the O'Brien Street store remained operational, albeit under a different name. Second, the assumed sum of $2.00 to $2.50 for each DVD is not wholly consistent with the evidence about the other stores: in some cases and for some items, higher prices applied.[8] Third, some of the other sales were not comparable because of the treatment of fixtures and fittings.[9] The Danset parties also submitted that Mr Miraldo's subjective belief about what exercise of the clause 18.13 option would have produced for Danset is irrelevant.

39. Despite attempts by BBA to counter the arguments thus advanced by the Danset parties, those arguments must be accepted. There are simply too many differences to make the transactions involving other stores comparable in any way that is meaningful for present purposes – particularly when another transaction precisely comparable is available in the form of the sale by Danset to Tresblue.

40. BBA's contention that the book value of $38,000 in Danset's books of account represents the best evidence of the "fair market value" of the assets fails also at the level of principle. The amount at which an enterprise carries assets in its books generally reflects historical cost less depreciation, unless some "mark to market" or "fair value" basis of accounting applies. Mr Miraldo's evidence was that the accounts were kept according to the conventional historical cost method and that one particular policy was to depreciate video stock by 100 per cent each year. An accounting expert called by BBA accepted that, to the extent that a video library written off to zero had a market value, that value would need to be added back to determine the market value of the assets. A DVD purchased for $20 on 1 July 2011, recorded in the books at cost and written off on 30 June 2012 did not suffer a reduction in "fair market value" from $20 to zero between 29 June 2012 and 1 July 2012. As is shown by other parts

---

8 The evidence showed that, in other sale transactions, prices for some items (particularly video games) were $7.00, $8.00, $8.35, $13.50 and $30.00 per item.

9 The Turramurra transaction excluded fixtures and fittings, game consoles, plant and equipment and consumable stock. The Norwood and Blackwood transactions excluded fixtures and fittings. In the case of Rose Bay, the price included $19,250 for fixtures and fittings.

of the evidence already noticed, the fact that ex-rental movie DVDs were routinely purchase for between $2.00 and $2.50 each (and some items changed hands at greater prices) is at odds with zero value

Conclusion on loss

41. BBA submitted that assessment of loss was made difficult by Danset's conduct in, as it were, going behind BBA's back and negotiating a dishonest and clandestine transaction with Tresblue which then blended the Danset assets into its own without any opportunity for BBA to inspect or value those assets. Danset's response is that BBA's managing director and principal witness did not refer to any such difficulty in his evidence. But even if some approach of generosity in assessing damages was appropriate in the circumstances, it was still for BBA to prove its loss. The primary judge paid attention to the relevant evidence and concluded that BBA had failed to prove that the "fair market value" contemplated by clause 18.15 differed from the consideration of $280,000 under the arm's length transaction between Danset and Tresblue and, accordingly, that loss of any amount was occasioned by Danset's breaches. BBA has not demonstrated that his Honour was in error.

The trust issue – decision of the primary judge

42. BBA's trust claims were pleaded as follows in the amended originating process:

> "54. From the date of the decision to sell referred to in paragraph 25 above, Danset held the assets of the Store from time to time (including the Assets) on trust for Blockbuster on terms in accordance with the Right of First Refusal (**the Right of First Refusal Trust**).
>
> 55. Further or alternatively to paragraph 54 above, from the date of the Franchise Agreement was executed as set out in paragraph 5 above, Danset held the assets of the Store from time to time (including the Assets) on trust for Blockbuster on terms in accordance with the Option to Purchase (**the Option to Purchase Trust**).
>
> 56. By reason of the matters alleged in paragraphs 25-31 above, Danset breached;
>
> (a) the Right of First Refusal Trust;
>
> (b) further or alternatively, the Option to Purchase Trust.
>
> 57. As a result:
>
> (a) Blockbuster suffered loss and damage; and
>
> PARTICULARS
>
> Blockbuster refers to and repeats the particulars to paragraph 45 above.

(b) Danset made a profit.

PARTICULARS

The profit was constituted by:

(a) the difference between the price paid for the Assets by Tresblue and the price which would have been paid by BB Australia upon exercise of the Option to Purchase:

(b) *plus* interest on the Loan Agreement."

43. The "matters alleged in paragraphs 25-31 above" were, in summary the unauthorised sale of the business by Danset to Tresblue. The alleged loss and damage was that particularised in the pleading concerning breach of contract.

44. As I have said, the trust claim based on clause 15 of the franchise agreement was ultimately abandoned. As to the "Option to Purchase Trust" claim founded on clause 18.13, the primary judge referred to BBA's reliance on "the analogous case of contracts for the disposition of an interest in land". His Honour then set out clause 8.1 of the agreement:

> "It is understood and agreed by the parties hereto that this Agreement creates an arm's length commercial relationship and does not create and shall not be interpreted or construed as creating a fiduciary or agency, nor any similar relationship between them, that FRANCHISOR and FRANCHISEE are and shall be independent contractors, and that nothing in this Agreement is intended to make either party an agent, joint venturer, partner, or employee of the other nor any similar relationship for any purpose."

45. After noting that, at the level of principle, contractual and fiduciary duties may co-exist, his Honour referred to the fact that the parties had chosen to regulate their commercial relationship by "an extremely detailed written contract" which expressly disavowed the existence of any "fiduciary" or "similar" relationship between them.

46. Turning to submissions about the position of the purchaser under an uncompleted contract for the sale of land, his Honour expressed an opinion that BBA was not in any sense a "purchaser" of any form of property and had no more than contractual rights. Those rights, he said, might well be protected by injunction restraining breach of contract. The overall conclusion was:

> "All that can be put to one side, because there is neither scope nor need to superimpose fiduciary obligations onto the contractual relationship for which the parties bargained. First, the contract itself says so. Second, this is not a case where, in principle, damages for breach are not an adequate remedy. My conclusion that BBA has not proved that it suffered any loss, through the deprivation of either contractual right, does not indicate otherwise."

The trust issue – discussion and assessment

47. In this Court, BBA maintained its claim based on the "Option to Purchase Trust" pleaded in the terms set out at [42] above. As well as relying on the pleaded basis for a finding that Danset was a trustee of the clause 18.13 business assets, BBA resorted to an "analogy" with cases in which stolen property has been regarded as impressed with a trust.

48. As I have said, BBA's trust-based case aimed to establish that it had the equitable right of the beneficiary of a fiduciary duty and therefore an expectation of the gain-based remedies that may be appropriate where such a duty is breached. In seeking to cast Danset in the role of its fiduciary, BBA did not suggest that any "fact based" fiduciary duty arose.[10] Its case was that Danset held the business assets as a trustee and, in that way, stood in the highest form of fiduciary relationship towards BBA.

49. Because of clause 18.13, BBA's position was that, upon expiration or earlier termination of the agreement, it would have an option, exercisable within a stated period after such expiration or termination, to purchase from Danset all the assets used in the O'Brien Street store. The clause makes it clear that the property that it would then be open to BBA to elect to purchase by exercise of the option is the assets used in the store as existing at the time of expiration or termination. Until that time had arrived, it would not be possible for BBA to point to any particular item owned by Danset and to say that ownership of that item would pass to it upon completion of a sale and purchase resulting from its decision to exercise the option. The item might be sold, discarded, stolen or destroyed at any time before such completion. It is not (and could not be) suggested that such an event is something about which BBA would have legitimate complaint. During the continuance of the franchise, the assets in the store were the property of Danset to be dealt with as decided by it.

50. It was submitted on behalf of BBA that, even before expiration or termination of the agreement, it had an equitable interest in each and every element of the

---

[10] For a recent discussion by Justice Black of circumstances that may give rise to a fact based or ad hoc fiduciary duty, reference may be made to: Ashley Black, "Modern indicia of fiduciary relationships in a commercial setting and the interaction of equity and contract", 15 November 2017, www.supremecourt.justice.nsw.gov.au/Documents/Publications/.../2017_Black_J.pdf

assets in the store as they existed from time to time. The thesis is that, because of clause 18.13, equity would regard those assets, as for the time being constituted and existing, as subject to a trust in favour of BBA binding both Danset and the assets themselves. The central proposition is that the legal owner of property that is subject to a contract for sale or an option to purchase is a "trustee" of that property for the purchaser or optionee.[11]

51. Submissions on that central proposition concentrated on the position occupied by the purchaser under an uncompleted contract for the sale of land and that of the holder of an option to purchase land. Authoritative observations in *Chang v Registrar of Titles* (1976) 137 CLR 177; [1976] HCA 1[12], *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164; [1987] HCA 20[13], *Stern v*

---

[11] There was subsidiary reliance on the proposition that an equitable interest may subsist in a fluctuating "pool" of personal property.

[12] Per Jacobs J at CLR 189-190: "Moreover, it is doubtful whether a vendor under a contract of sale can properly be described as a trustee within the meaning of the Trustee Act unless settlement has taken place and all that remains to be done is to transfer or convey an outstanding legal estate. It is true that a vendor at the stage of contract where the contract is enforceable by specific performance has at times been described as a trustee: see, e.g. Shaw v Foster; Lysaght v Edwards; and if by that no more is meant than that the purchaser is regarded by equity as the beneficial owner of the estate of which the vendor is the legal owner then there is no difficulty in describing the vendor as a trustee. However, if by such a description it is sought to transpose into the law of vendor and purchaser the law governing the rights and duties of trustees, statutory or otherwise, considerable difficulties arise. The present case is an example of the confusion which can arise from giving this description to a party to a contract for the sale of land assumed to be capable of specific performance simply because he has the obligation under the contract to transfer property to the other party on completion of the contract and because equity regards the other as beneficial owner. Where there are rights outstanding on both sides, the description of the vendor as a trustee tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the respective parties."

[13] Per Deane J at CLR 191-192: "For limited purposes, the distinction between legal title and beneficial ownership may provide a useful reference point in describing the position of the ordinary unpaid vendor of land under an uncompleted contract of sale. However, and with due respect to some past statements of high authority to the contrary, it is wrong to characterize the position of such a vendor as that of a trustee. True it is that, pending payment of the purchase price, the purchaser has an equitable interest in the land which reflects the extent to which equitable remedies are available to protect his contractual rights and that the vendor is under obligations in equity which attach to the land. None the less, the vendor himself retains a continuing beneficial estate in the land which transcends any 'lien' for unpaid purchase money to which he may be entitled in equity after completion. Pending completion, he is beneficially entitled to possession and use. Pending completion, he is beneficially entitled to the rents and profits. If the purchaser enters upon the land without the vendor's permission and without authority under the contract, the vendor can maintain, for his own benefit, an action for trespass against the purchaser. … Regardless of whether his rights be viewed in the perspective of foresight (i.e. before completion) or hindsight (i.e. after completion), the ordinary unpaid vendor of land is not a trustee of the land for the purchaser. Nor is it accurate to refer to such a vendor as a 'trustee sub modo' unless the disarming mystique of the added Latin is treated as a warrant for essential misdescription."

McArthur (1988) 165 CLR 489; [1988] HCA 51[14] and, more recently, *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; [2003] HCA 57[15] make it impossible to say in Australia today that the vendor under an uncompleted contract for the sale of land is a "trustee" for the purchaser.[16] What can, however, be said is that the purchaser under such a contract has an equitable interest in the land commensurate with the availability of equitable relief to protect the purchaser's position in relation to the land. The most far-reaching relief that a purchaser may obtain is a decree of specific performance but in many circumstances an injunction may be sufficient (and, of itself, appropriate) to safeguard the purchaser's position.[17] In the same way, a person having an option to purchase land has an equitable interest in the land from the time of the grant of the option.[18] The holder of an extant but unexercised option has no conceivable claim to specific performance. The equitable interest, in that case, is commensurate with (and therefore limited by) the availability of injunction securing to the option holder the opportunity to obtain, through future exercise, the position of a purchaser.

---

[14] Per Gaudron J at CLR 537: "The interest in land forfeited by a purchaser under a contract of sale is merely an equitable interest commensurate with the ability to protect the interest under the contract by obtaining specific performance."

[15] In Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315; [2003] HCA 57 at [53], Gleeson CJ, McHugh, Gummow, Hayne and Heydon referred with approval to the statements of Jacobs J in Chang v Registrar of Titles (above) and Deane J in Kern Corporation Ltd v Walter Reid Trading Pty Ltd (above) and Gaudron J in Stern v McArthur (above), all of which attributed to a purchaser an equitable interest commensurate with the availability of equitable relief. See also Legione v Hateley (1983) 152 CLR 406; [1983] HCA 11 at CLR 446; KLDE Pty Ltd v Commissioner of Stamp Duties (Qld) (1984) 155 CLR 288; 1984] HCA 63 at CLR 300, Stern v McArthur (above) at CLR 522–523; Chan v Cresdon Pty Ltd (1989) 168 CLR 242; 1989] HCA 63 at CLR 252–3.

[16] The view that the vendor becomes a trustee of the land for the purchaser upon the making of the contract is probably most often associated with Lysaght v Edwards (1876) 2 Ch D 449. An example of the application of that thinking in Australia is found in the decision of the Full Court of the Supreme Court of Queensland in Bunny Industries Ltd v FSW Enterprises Pty Ltd [1982] Qd R 712. As Santamaria JA pointed out (with the concurrence of Warren CJ and Neave JA) in Mercier Rouse Street Pty Ltd v Burness [2015] VSCA 8, the analogies drawn in Lysaght v Edwards with trusts and mortgages were rejected (or regarded as inapt and unhelpful) in the High Court cases just mentioned, with the result that cases such as in Bunny Industries Ltd v FSW Enterprises Pty Ltd (above) are no longer good law.

[17] Stern v McArthur (1988) 165 CLR 489; [1988] HCA 51 at CLR 537; Chan v Cresdon Pty Ltd (1989) 168 CLR 242; [1989] HCA 63; Willmott Growers Group Inc v Willmott Forests Ltd (2013) 251 CLR 592; [2013] HCA 51.

[18] In Goldsbrough Mort & Co Ltd v Quinn (1910) 10 CLR 674; [1910] HCA 20, Isaacs J said (at CLR 692) that an option to purchase "gives the optionee an interest in the land" which is "not the same as that of a purchaser". Reference may also be made to Commissioner of Taxes (Q) v Camphin (1937) 57 CLR 127; [1937] HCA 30 and Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57; [1974] HCA 49 among many other cases.

52. It does not follow from the existence of such an equitable interest in land that the person holding that interest has any expectation of being awarded an account of profits (or equitable compensation) against the person upon whom the equitable interest is binding. Take, for example, the case of an equitable charge affecting land and securing indebtedness of a given sum. The chargee has an equitable interest in the land but if the chargor, in disregard of the chargee's rights, sells and derives a profit, there is no basis on which the chargee can lay claim to that profit. The chargee's interest is limited by the right to recover the secured moneys and to resort to the land (or, perhaps, some substitute property or proceeds) to obtain satisfaction of that right.

53. The key that will unlock the door to an account of profits (or equitable compensation) for BBA is not an equitable interest. It is a fiduciary duty.[19] A claim constituting or reflected by an equitable interest in property may, in certain circumstances, be maintained against replacement property or a fund representing the original property. But a claim to an account of profits must be founded on an obligation not to derive personal advantage.[20] The duty of a fiduciary as such includes a proscriptive obligation not to obtain any unauthorised benefit from the relationship – the so-called "no profit rule". A trustee is subject to the full rigor of that rule as an incident of the fiduciary responsibility to act in all things solely in the interests of the beneficiaries and to subordinate self-interest. But a vendor of land (or the grantor of an option to

---

[19] The role of equitable compensation as an alternative to an account of profits in cases of breach of fiduciary duty was explained by Robiero PJ in Libertarian Investments Ltd v Hall [2013] HKCFA 93; (2013) 16 HKCFAR 681 at [87]: "Equitable compensation rests on the premise that the basic duty of a trustee or fiduciary who has misappropriated assets or otherwise caused loss or damage to the trust estate in breach of his duty is to restore the lost property to the trust (together with an account of profits if applicable). Where restoration in specie is not possible, the Court may order equitable compensation in place of restoration."

[20] While an account of profits is commonly associated with breach of fiduciary duty, the remedy may also be awarded in other circumstances of unconscientious obtaining of profitable advantage, including breach of an equitable obligation of confidence and infringement of an intellectual property right. The rationale for the remedy in the fiduciary context was explained by Mason CJ, Brennan, Deane, Dawson and Gaudron JJ in Warman International Ltd v Dwyer (1995) 182 CLR 544; [1995] HCA 18 at CLR 557-558 in this way: "A fiduciary must account for a profit or benefit if it was obtained either (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position. The stringent rule that the fiduciary cannot profit from his trust is said to have two purposes: (1) that the fiduciary must account for what has been acquired at the expense of the trust, and (2) to ensure that fiduciaries generally conduct themselves 'at a level higher than that trodden by the crowd'. The objectives which the rule seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage."

purchase) is not required to give undivided loyalty and to act solely in the interests of the purchaser (or option holder).[21] Apart from anything else, the vendor or grantor is entitled, pending completion of the sale, to retain ownership and possession of the land, to enjoy all the ordinary incidents of ownership and possession and to turn those advantages to account without the slightest expectation that resultant profit or benefit should belong to the other party.[22]

54. Because the most that BBA could conceivably derive from clause 18.13 is an equitable interest in the subject matter of the option commensurate with a right to enjoin dealing by Danset incompatible with full and continuing availability of the option right, Danset could not be held to be a trustee even if that subject matter were land. The fact that the subject matter is almost exclusively chattels and that none is unique or rare removes any remote vestige of cogency that BBA's argument might otherwise have. DVDs, video games and shop and office furniture are freely available for purchase in a readily available market, with the result that, even in proceedings by a purchase against a vendor, equity would not decree specific performance or order an injunction in aid of the purchaser's right.[23]

55. I turn now to the analogy that BBA seeks to draw with a case of theft. It is settled law in Australia that "[w]here money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character". These are the

---

[21] It was said in Englewood Properties Ltd v Patel [2005] 1 WLR 1961; [2005] EWHC 188 (Ch).that the vendor's duty, pending completion, is a "duty to preserve the property in its state as at the time of the contract". It was thus seen as a specific and narrow duty carrying no overtones of avoidance of conflict or personal profit.

[22] Even in earlier times when the relationship of vendor and purchaser was seen as closely assimilated to that of trustee and beneficiary, the vendor was "not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it": Shaw v Foster (1872) LR 5 HL 321 (Lord Cairns).

[23] See, for example, Duncuft v Albrecht (1841) 12 Sim 189 at 199; 59 ER 1104 at 1108 as to securities freely available on a stock market. Submissions on behalf of BBA sought to deal with this aspect by characterising the clause 18.13 assets as a composite whole constituting some form of unique wherewithal to conduct a business and also by drawing an analogy between BBA's position and that of the holder of a floating charge who, as stated by Lord Walker of Gestingthorpe in Re Spectrum Plus Ltd [2005] 2 AC 680; [2005] UKHL 41 has "a proprietary interest … in a fund of circulating capital" (original emphasis). It may be doubted that this analogy is apt – but even if it is, it does not supply the element of fiduciary obligation on which BBA's entitlement to an account of profits (or equitable compensation) depends.

words of O'Connor J in *Black v S Freedman & Co* (1910) 12 CLR 105; [1910] HCA 58 at CLR 110. It was held in that case that the stolen money could be traced into the hands of a recipient who took as a volunteer. The provenance and legitimacy of these propositions were recently explained by Leeming JA in *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732; [2016] NSWCA 81. His Honour then said (at [40]):

> "It follows therefore that the victim of theft may have a variety of claimswhen a third party receives trust property. In practice, there may be claimsbased on the victim's legal title to the property, and, because any dealing withtrust property by the thief to a third party will be in breach of the trust, theremay be equitable claims consequent upon that breach."

56. With a view to deriving support from these principles, BBA seeks, in concept at least, to classify Danset as a thief of the assets sold by it to Tresblue and to cast Tresblue in the role of a purchaser receiving stolen property with knowledge of the theft. That approach does not strengthen by analogy (or otherwise) the argument that, at the time of the sale to Tresblue, the assets the subject of the clause 18.13 option were held by Danset as a trustee for BBA. The assets were not owned by BBA at any time. They were therefore incapable of being stolen from BBA; and BBA was not, as referred to by Leeming JA, "the victim of theft". BBA was certainly wronged by Danset. But the wrong was a breach of contract, not the misappropriation of property.

57. The primary judge correctly rejected the case based on the so-called "Option to Purchase Trust". As his Honour observed, the wrong suffered by BBA was breach of "an extremely detailed written contract" made by sophisticated commercial parties who expressly recorded the absence of any "fiduciary" or "similar" relationship between them. The remedies available to BBA in consequence of the unauthorised and clandestine sale of the property the subject of the clause 18.13 option are accordingly remedies for breach of contract.

The indemnity and reimbursement issue

58. It is not necessary to set out the provisions of the franchise agreement imposing on the Danset parties obligations to indemnify and reimburse BBA for expenses. It is sufficient to note that those provisions extend to certain losses and expenses incurred in connection with any proceedings arising out of any

breach of the agreement or in obtaining legal services in connection with the Danset parties' failure to comply with the agreement.[24] BBA claimed substantial sums under these provisions. Over objection by counsel for the Danset parties, the primary judge admitted into evidence a number of fee invoices for the purpose of proving that BBA had paid some amounts alleged to be covered by the provisions in question.

59. Both BBA and the Danset parties submit that the primary judge should have determined BBA's indemnity and reimbursement claims. Both further submit that, in the absence of a determination by the primary judge, this Court should decide both the question of liability and, if relevant, all questions of quantification. When regard is had to the course of procedure below, these submissions can be seen to be quite ill-conceived.

60. At the time of publishing his reasons on 28 September 2017, the primary judge disposed of parts of the proceedings by:

> (a) an order that, except as to the claims in prayers E, F and K of the originating process, the amended originating process be dismissed as between BBA and the Danset parties;
>
> (b) an order that, as regards those parties, all questions of costs be reserved; and
>
> (c) an order that, as between BBA and the Tresblue parties, the amended originating process be dismissed with costs.

61. A further order was made as follows:

> "Reserve for further consideration prayers for relief E, F and K in the originating process filed on 11 March 2016."

62. Prayers E, F and K were those relevant to the claims for indemnity and reimbursement for costs and expenses. His Honour's reasons for, as it were, separating out and deferring the indemnity and reimbursement questions lay in what he described as "an unhappy and unsatisfactory procedural history" of

---

[24] Apparently identical franchise agreement provisions were considered in BB Australia Pty Ltd v Constanti [2017] VSC 114 by Mukhtar AsJ who, at [46], said of one provision on which BBA seeks to rely in this case (clause 8.6) that "it is not an enforcement costs clause but an indemnity for losses caused to the franchisor for suits brought by third parties for wrongful conduct by the franchisee".

that part of BBA's case. It is not necessary to go into detail. It is sufficient to say that his Honour's stated reasons appear cogent and that no explicit criticism of them is advanced.

63. On 13 October 2017, the primary judge made a number of additional orders. One was an order under rule 20.14 of the *Uniform Civil Procedure Rules 2005* (NSW) that there be referred to a named legal costs consultant for inquiry and report a number of questions concerning quantification of costs and expenses incurred by BBA. The objective, clearly enough, was to bring into existence a report on matters of quantification with a view to debate whether the report should be adopted by the court (in whole or in part and whether or not with variations); and that that debate should take place when the claims in prayers E, F and K came back before the primary judge for further consideration. The obvious intention was that those undetermined claims should be revisited at that time and that the relevant parties (BBA and the Danset parties) should make further submissions on them before the primary judge.

64. In both BBA's notice of appeal and the notice of cross appeal filed by the Danset parties, it is said that the primary judge "erred in failing to decide the questions of construction" relevant to prayers E, F and K. BBA says that his Honour also "erred in failing to conclude" that the Danset parties are liable to BBA in relation to those matters, while the Danset parties say that the judge "erred in failing to conclude" that they are not so liable. It is submitted on both sides that the course on which the primary judge has embarked is an undesirable or inefficient course; that questions of construction of the indemnity and reimbursement provisions should be determined before any attempt at quantification is made; that this Court is in as good a position as the primary judge to decide the issues of construction and should do so; and that the question of quantification should then be addressed in the light of the conclusions reached as to the question of construction. The Danset parties, by their cross appeal, also seek to challenge the decision of the primary judge that the tax invoices tendered by BBA should be admitted into evidence for the limited purpose stated.

65. BBA and the Danset parties are thus united in an attempt to have this Court intervene not only to terminate the course of procedure fixed by the primary judge for the adjudication of the outstanding claims in prayers E, F and K but also to take to itself the function of making that adjudication.

66. Both the appeal and the cross appeal are expressed to be brought under s 101(1) of the *Supreme Court Act 1970* (NSW). That section creates rights of appeal in respect of "any judgment or order" of the Supreme Court in a Division. Central to this aspect is the primary judge's order that prayers E, F and K be reserved for further consideration. BBA, although urging the approach and outcome I have mentioned, does not, in terms, challenge that order, in that it does not seek in its notice of appeal an order setting it aside. The Danset parties, by contrast, do make such a claim, together with a claim for an order dismissing prayers E, F and K. Although no party explicitly seeks to have the order of 13 October 2017 set aside, such a claim is clearly implied by the expectation that this Court should itself deal with both liability and quantification.

67. The orders in question are interlocutory and discretionary orders concerning a matter of practice and procedure. This Court could properly set them aside only on a ground of the kind associated with *House v The King* (1936) 55 CLR 499; [1936] HCA 40 and upon a finding that the particular appellate restraint enjoined by *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; [1981] HCA 39 was not warranted. No basis for intervention consistent with those limitations has been identified. The parties may think that it would be more efficient for the questions of construction to be decided before they have to address matters of quantification. They may prefer to obtain from this Court now a determination on both liability and quantification rather than arguing those matters at a later time before the primary judge in accordance with the regime his Honour has put in place. They may think that they can, in that way, avoid the possibility that one side or the other may initiate a new appeal. But those considerations do not indicate in any way whatsoever that the primary judge has, in relation to the orders in question, allowed extraneous or irrelevant matters to guide or affect him, mistaken the facts or failed to take

into account some material consideration; or that the orders are, on the facts, unreasonable or plainly unjust.

68. No basis has been shown for the imposition of an outcome under which this Court addresses and determines the issues that the primary judge has reserved for consideration in the future under a regime he has already put in place.

The position of the Tresblue parties

69. On the hearing of the appeal, the Tresblue parties were content to adopt the submissions of the Danset parties as to why the decision of the primary judge on aspects affecting them should not be disturbed. The conclusions on the loss and trust issues favourable to the Danset parties work also to the advantage of the Tresblue parties.

Conclusion

70. In my opinion, BBA has not made out any of the grounds of appeal upon which it relies. Nor have the Danset parties shown any basis on which their cross-appeal should succeed. Orders should therefore be made as follows:

    (1) Appeal dismissed.

    (2) Cross appeal dismissed.

    (3) That BB Australia Pty Ltd pay the costs of all other parties to the proceedings in this Court.

71. **SIMPSON AJA:** I agree with Barrett AJA.

****

Amendments

17 May 2018 - Coversheet - date of decision corrected to 2017