HWL EBSWORTH
LAWYERS

Our Ref: RCG:166397

31 October 2008

Secretary
Parliamentary Joint Committee on Corporations
and Financial Services
Department of the Senate
PO Box 6100 Parliament House
Canberra ACT 2600

Dear Sir

Supplementary Submission to the Inquiry on the Franchising Code of Conduct

I refer to my appearance before the Committee in Sydney on Friday, 9 October 2008. In my Opening Statement and in answer to a question from the Committee, I indicated that while dealers 'freely' entered into motor vehicle dealer agreements, the agreements were substantially one sided with little ability for dealers or dealer councils to negotiate agreements which reasonably reflect the business risk of the motor vehicle dealers. In particular, it is my experience in assisting a significant number of dealer councils in consultation with motor vehicle distributors on the content of new dealer agreements is that there is unequal bargaining power and dealer councils are often faced with the following circumstances:-

- The members, and in particular the chairman of a dealer council often feel significantly restrained in their approach to consultations on the basis that objections to particular clauses may damage the relationship with the distributor and they may suffer adverse consequences at a later date;

- In view of the matter referred to above, members of a working committee of a dealer council established to consult with a distributor often do not attend working party meetings with the distributor and leave it to the chairman and one or more other members of the committee to conduct the consultations. In these circumstances there is even increased concern about possible adverse consequences for the business relationship with the distributor on the members of the working party who consult with the distributor;

- I have experienced in some consultations conduct by a distributor carrying out warranty audits on the members of a dealer council working party;

- The nature of the discussions between a dealer council working party and a distributor is in the main merely 'consultation' and often does not demonstrate a preparedness by the distributor to genuinely engage in real negotiation of a new dealer agreement, and

- On a number of occasions where a dealer council has suggested that the discussions take place under collective negotiation under the *Trade Practices Act* this approach, or process, is rejected by the distributor.

Assignment of Dealerships

I **attach** a recent decision of the Supreme Court of Queensland in *Peter Eric Lockhart and Map Enterprises Pty Ltd –v- GM Holden Ltd* concerning the refusal by the Respondent to consent to the assignment of a motor vehicle dealership. Section 20(2) of the *Franchising Code* provides that a franchisor must not unreasonably withhold consent to the transfer and it describes the circumstances in which it is reasonable to withhold consent including that the proposed transferee has not met the selection criteria of the motor vehicle distributor or the agreement to the transfer will have a significant adverse effect on the dealership system. In the Lockhart case the motor vehicle dealership was offered $5,000,000 for the sale of the dealership but the consent to the assignment was rejected by the distributor. In these circumstances, and given that the distributor was not going to renew the dealership the dealer ultimately gained agreement from the distributor to assign its dealership to another purchaser for a lesser amount of $3.4million. The Court formed the view that the distributor, in refusing to consent to the assignment, had acted reasonably and in accordance with the requirements of the *Franchising Code.* The Lockhart case considered specific motor vehicle legislation applying in the United States where it is unlawful for any manufacturer:-

> '*... to prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business*'.

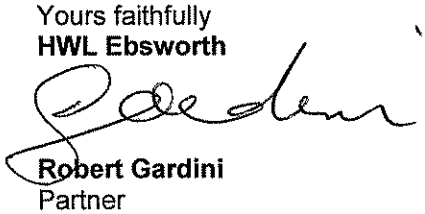
It is my recommendation that the Committee should either amend the Code to insert such a provision or alternatively introduce a separate car code containing such a requirement.

Please note the above views are my personal views and do not necessarily reflect the views of HWL Ebsworth.

MTAA Submission

In appearing with the MTAA representatives at the public hearing in Canberra on Friday, 17 October 2008, I indicated that I had not participated in a motor vehicle dealer mediation over a ten year period where a settlement had taken place. After giving that evidence to the Committee, I now recall that there was one mediation where a settlement did take place between a dealer and a motor vehicle distributor. I also point out that whilst there was a settlement of the dispute at that time, the affected dealer has subsequently had its dealer agreement terminated.

Yours faithfully
HWL Ebsworth



Robert Gardini
Partner

Writer: Robert Gardini | (02) 9334 8612 |
E-mail: robert.gardini@hwlebsworth.com.au
Postal: GPO Box 5408 Sydney, New South Wales 2001
Address: Level 14, Australia Square, 264-278 George Street, Sydney, New South Wales 2000
Facsimile: 1300 369 656 (Australia) | +61 3 8615 4301 (International)
DX: DX 129 Sydney

Encl.

SUPREME COURT OF QUEENSLAND

CITATION:	*Lockhart v Holden* [2008] QSC 257
PARTIES:	**PETER ERIC LOCKHART** (first plaintiff) **MAP ENTERPRISES PTY LTD (ACN 093 360 126)** (second plaintiff) v **GM HOLDEN LTD (ACN 006 893 232)** (defendant)
FILE NO:	BS3311/05
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	24 October 2008
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	26 May 2008 – 6 June 2008
JUDGE:	Douglas J
ORDER:	**Judgment for the defendant with costs, including reserved costs, on the standard basis.**
CATCHWORDS:	TRADE AND COMMERCE – TRADE PRACTICES ACT 1974 (CTH) AND RELATED LEGISLATION – INDUSTRY CODES OF CONDUCT – FRANCHISES – TRANSFER – where the defendant refused to agree to the transfer of a franchise held by the plaintiffs to a third party – where the third party had agreed to buy the business – whether the refusal was unreasonable *Trade Practices Act* 1974 (Cth), ss 51AD, 51AE, 52, 82 *Trade Practices (Industry Codes – Franchising) Regulations* 1998 (Cth), s 3 *Franchising Code of Conduct* (Cth), ss 20(2), 20(3) *Australian Hotels Assn (NSW) v TAB Ltd* [2006] NSWSC 293, cited *Bridgestone Australia Ltd v G.A.H. Engineering Pty Ltd* [1997] 2 Qd R 145, cited *Caltex Oil (Aust) Pty Ltd v Allan* (Supreme Court of New South Wales, No. 2534 of 1987; Young J, unreported, 10

June 1987, BC8701326), cited
Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228, cited
Freudhofer v. Poledano [1972] VR 287, cited
Garry Rogers Motors (Aust.) Pty Ltd v Subaru (Aust) Pty Ltd (1999) 21 ATPR 41-703, cited
Gas 'n Go Petroleum Pty Ltd v Caltex Oil (Australia) Pty Ltd (Federal Court; Beaumont J., 26 April 1991, unreported, BC9103131), cited
Gold Coast Waterways Authority v Salmead Pty Ltd [1997] 1 Qd R 346, cited
Gore v Montague Mining Pty Ltd [2000] FCA 1214, distinguished
Heenan v Di Sisto[2008] NSWCA 25, considered
Hendriks v McGeoch [2008] NSWCA 53, cited
Henville v Walker (2001) 206 CLR 459, cited
Highmist Pty Ltd v Tricare Australia Ltd [2005] QSC 115, cited
In re Van Ness Auto Plaza Inc. 120 BR 545 (1990), considered
Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd [2001] QCA 212, cited
LE Stewart Investments Pty Ltd v Mercedes-Benz (NSW) Pty Ltd (Supreme Court of NSW, Court of Appeal, No 40190 of 1990; 14 February 1992, unreported, BC9202078), cited
Masterclass Enterprises Pty Ltd v Bedshed Franchisors (WA) Pty Ltd [2008] WASC 67, considered and applied
Meridian Retail v Australian Unity Retail Network [2006] VSC 223, cited
Re Kendells (NSW) Pty Ltd (In Liq) [2005] QSC 064, cited
Re Zurich Australian Insurance Ltd [1999] 2 Qd R 203, cited
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, cited
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 76 ALJR 436, cited
Sellars v. Adelaide Petroleum N.L. (1994) 179 CLR 332, cited
The Big Four Pty Ltd v DaimlerChrysler Australia/Pacific Pty Ltd [2002] FCA 783, cited
Thomas v. D'Arcy [2005] 1 Qd R 666, cited
Travel Compensation Fund v Tambree (2005) 224 CLR 627, applied
Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15, cited

COUNSEL: S. Couper QC with J. Chapple for the first and second plaintiffs
D.J.S. Jackson QC with K.A. Barlow for the defendant

SOLICITORS: Holding Redlich for the first and second plaintiffs
Mallesons Stephen Jaques for the defendant

[1] **Douglas J**: On 22 July 2003 the defendant, GM Holden Ltd (GMH), refused to agree to the transfer of a GMH dealership franchise held by Peter Lockhart Motors Pty Ltd (PLM) to Zupps South East Pty Ltd (Zupps). Zupps had agreed to buy the business operated by PLM on 8 July 2003. The reasonableness of GMH's refusal is the principal issue in this case.

[2] By s 20(2) of the *Franchising Code of Conduct*, a schedule to the *Trade Practices (Industry Codes – Franchising) Regulations* 1998 made under the *Trade Practices Act* 1974 (Cth), a franchisor must not unreasonably withhold consent to such a transfer. A contravention of the Code infringes that Act; see s 51AD. Such a contravention enlivens a right to damages under s 82 in favour of a person who suffers loss or damage by conduct of another person done in contravention of Pt IVB of the Act, which contains s 51AD.

Background

[3] PLM had operated the franchise since 1989. It had previously been operated by Mr David Lockhart, the father of the plaintiff, Mr Peter Lockhart. Mr David Lockhart gave the business to PLM, which was a company operated by his son and daughter in law in 1989. Mr Peter Lockhart owned 99.9 per cent of the 100,000 issued shares in PLM. Mrs Moira Lockhart owned the balance, which included 99 preference shares. PLM operated the business from 1989 until 31 October 2003 when Mr and Mrs Lockhart sold their shares to 4214 Holdings Pty Ltd. Because the shares in PLM were sold in 2003 it is not a plaintiff. The plaintiffs are Mr Peter Lockhart and Map Enterprises Pty Ltd, a company controlled by him and Mrs Lockhart, which, from 2000 onwards, owned some of the land on which the franchise operated. Mr Lockhart owned the balance of the land.

[4] Mr Lockhart's claim is that he would have obtained more from the sale of the franchise to Zupps had consent to that transaction not been withheld, either because Zupps would have paid more for the business than he later achieved or because he lost the opportunity of selling the shares in PLM to Zupps at a higher price. Map Enterprises and he also claim, as owners of the land on which the franchise was conducted, to have lost the opportunity to lease the land to Zupps at a greater rental than PLM agreed to pay after its shares had been bought by 4214 Holdings.

[5] GMH's reasons for refusal were set out in its letter of 22 July 2003[1] in these terms:

> "This letter confirms that we would not give consent to transfer of the RSSA if a request was delivered to us. It is our considered opinion that this proposed transfer will have a significant adverse effect on the franchise in the following way
>
> 1. It increases the risk exposure to Holden by concentrating a large portion of its business and market distribution in the hands of one Retailer.
> 2. It may impact adversely on the ability of other Retailers in the region in respect to access to markets and the supply of products.
> 3. The future business model of Zupps has additional risks within the ownership and management structure that are considered to have the potential to increase Holden's risk within its distribution network."

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1 Ex 34.1

[6] Its attitude was influenced by a "chain dealer policy" it had adopted to which I shall refer in more detail later.

PLM's performance as a dealer

[7] PLM had not been performing as a dealer to GMH's satisfaction for many years. On 19 December 2001, Mr Bingham of GMH forwarded a letter to PLM by which it offered PLM a Retail Sales and Service Agreement (RSSA) to have a term of one year with effect from 1 January 2002. In the letter and in separate discussions, GMH informed Mr Lockhart that the RSSA was subject to a performance review in September 2002 and that, if PLM met GMH's performance standards by then, a further RSSA would be offered to PLM for a term from 1 January 2003 to 31 December 2006.

[8] In 2002, GMH and PLM entered into an RSSA, with effect from 1 January 2002 to 31 December 2002. On 16 September 2002, Mr Bingham wrote to Mr Lockhart, informing him that PLM had been evaluated as non-effective for the past 5 year term of the agreement, including during 2002, and that the RSSA, which would expire on 31 December 2002, would not be renewed. On 16 October 2002, Mr Lockhart and Mr Mulcahy from GMH met to discuss the "work out" of PLM's dealership. Among other things, in discussing (in broad terms) possible purchasers of the dealership, Mr Lockhart asked Mr Mulcahy about the Zupps Motor Group. Mr Mulcahy told Mr Lockhart that Zupps were probably too big and he could not be confident that a transfer to Zupps would be approved.

[9] GMH did not take steps to terminate PLM's continued operation as a dealer on 31 December 2002. The terms on which PLM's dealership was allowed to continue were set out in a letter dated 30 January 2003 from Mr Mulcahy to Mr Lockhart. By that letter, GMH agreed to extend the term of the RSSA to 31 March 2003, for the purpose of enabling PLM to submit to GMH, and for GMH to consider, an application for GMH's consent to the transfer, to another person, of a controlling interest in PLM or its business. The RSSA was extended further during 2003:

(a) by letter dated 7 March 2003 from Mr Mulcahy to Mr Lockhart, to 31 May 2003;[2]

(b) by letter dated 29 May 2003 from Mr Mulcahy to Mr Lockhart, to 1 July 2003;[3]

(c) by letter dated 26 June 2003 from Mr Mulcahy to Mr Lockhart, to 31 July 2003;[4]

(d) thereafter, by further correspondence and conversations, to 15 August 2003;

[10] Informally, it was then allowed to continue until it came to an end when Mr Lockhart and his wife completed the sale of all their shares and GMH entered into a new RSSA with PLM on 30 October 2003. During 2003, GMH continued to assess PLM's performance as non-effective.

GMH's dealership policies

[11] GMH had developed policies about ownership of its dealerships which were reflected in two documents in evidence and in the oral evidence of Mr McKenzie,

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2 Ex 39.06.
3 Ex 39.07.
4 Ex 43.07.

Mr Bingham and Mr Mulcahy. The first document was dated 1 March 1986 but is likely to have been an expression of views developed earlier, perhaps going back to the 1970s. Relevant parts of the document included[5]:

> "The person upon whom General Motors relies to operate a dealership (Dealer Operator) should have a complete ownership but must have at least substantial ownership interest in the dealership and be closely identified with the community the dealership serves. Further, the complex nature of automotive dealership operations requires that a Dealer Operator have full managerial authority for only one automotive dealership.
>
> While it is generally preferable for each dealership to be owned independently of other dealerships, in certain circumstances the most effective utilisation of available dealership investment capital can be archived by allowing qualified investor to have partial ownership interest in more than one dealership.
>
> POLICY
>
> The relationship between General Motors-Holden's and each of its franchisees is in the nature of a personal service contract wherein General Motors-Holden's relies upon the personal qualifications of the individuals named in the franchise agreement who have and exercise full managerial authority in the ownership and/or operation of the franchise. Because of the nature of the business, it is desirable that the franchisees be operated by the individual(s) who own it or who have a controlling financial interest in the operation.
>
> Furthermore, in furtherance of the mutual interests of the. franchisor and the franchisee, it is desirable that the individual(s) who operates a franchisee become a resident of the. community which he or she serves.
>
> Accordingly, the approval of an individual(s) as a participant in franchisees of General Motors products in more than one location could, under certain conditons [sic], place the franchising unit(s) concerned at a disadvantage.
>
> Therefore, the following is the policy of General Motors Holden relative to an individual(s) owning a financial interest in more than one General Motors franchisee:
>
> A. Fundamentally, each business entity franchised by General Motors-Holden's should be owned and operated by an individual(s) who has no interest in another business entity franchised by General Motors-Holden's and it should be the exception for such individual(s) to have interests in more than one General Motors-Holden's franchisee.

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5 Ex 27.

B. Where an exception is made, the individual operator(s) relied upon in the agreement should be in a position to give a majority of his or her time and attention to each dealership.
C. When an individual or group owning any financial interest in an existing General Motors franchisee acquires a financial interest in one or more other General Motors franchisee, it is considered that a chain of franchisees has been formed.
D. The locations of the dealerships in which each proposed chain dealer and/or the dealer's immediate family will hold an ownership interest should be such that customers will not be deprived of the benefits of competition between dealerships, other dealers will not be exposed to unfair competition and General Motors will not be deprived of the representation to which it is entitled.
E. Each GMH dealership in which the proposed chain dealer already holds an ownership interest must be at or above Zone Average in performing its respective sales and service responsibilities and must be satisfactorily meeting all other obligations under its Dealer Sales and Service Agreements with General Motors-Holden's. Also, the chain dealer must be making satisfactory progress in meeting its buy-out obligations under any buy-out agreement(s) in effect with Dealer Operators at such dealerships.
F. In a multiple dealer area, the combined GMH Motor Vehicle planning potentials of a chain investor shall not exceed 15% of the total GMH Motor Vehicle S.E.G. for the area. For purposes of this section, a chain dealer and his immediate family are treated, as one."

[12] A "Motor Vehicle S.E.G." which should not exceed 15 per cent for the purposes of para. F of that policy was described by Mr Bingham as a "Sales Evaluation Guide related to the number of vehicles GMH reasonably expected a dealer to sell in a chronological period, usually 12 months."[6] That policy was supplemented, on Mr Bingham's evidence,[7] or, perhaps, replaced, on Mr McKenzie's evidence,[8] in 2000 by a document whose operative passages in 2003 dealing with "chain ownership" most probably included the following[9]:

> "The success of the franchise system can be attributed to the principle that:
>
> > "The Dealer who owns the business will drive the best outcome - for his/herself and Holden." Historically Holden has required that Dealer Operators should have a controlling financial interest in the business.
>
> This principle and policy has been modified over time where significant equity impost has prevented an individual retailer from

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6 T6/70 ll.10-14.
7 T6/60-61, T.6/64-65.
8 T5/78-80.
9 Ex 28. It was a document kept on a computer that changed slightly over the period from when it was first created. Its precise wording at any particular date earlier than 7 June 2006 has not been preserved.

totally funding the purchase of a business. This situation has been addressed by:

1. Allowing the Dealer Operator to fund a minimum 25% share capital
2. Holden providing capital funds through the Dealer Assistance Division plan.

During the late 90s it was evident that the network required some adjustment, to meet changes in the market, and the increased capital demands for large-scale businesses.

A plan was adopted that modified ownership criterion to the extent that:

- The rigid rules governing share ownership would be considered on a case by case basis.
- Where there was future uncertainty as to the viability of smaller dealers Holden would permit adjacent Provincial dealers to purchase these businesses, thus allowing a fair exit to those owners and continuity of representation for Holden.

Current Policy.
Metropolitan Markets
Holden will permit the chain ownership of businesses to the extent that in our opinion such ownership should not create any concentrated ownership of locations in a particular market or region that might create risk to Holden in respect to its business and the interests of other Dealers in the region in the long term. Wherever possible and preferably the Dealer Operator should have the right to purchase equity in the business he manages. This intent should be reviewed on an annual basis as part of the 5-Year Business Plan process."

[13] There was also evidence dealing with the origins and the administration of the chain dealership policy. GMH's preference was that there be a "dealer principal" for each dealership who had a substantial equity in that dealership. If several dealerships were operated by one company, particularly a public company, it preferred that the dealer principal have a substantial shareholding in the company. Its preference was that the day to day operator have at least 25 per cent equity in the dealership. Where it permitted common ownership of multiple dealerships it would not permit one company or entity to own a greater than appropriate share for a particular market. One rule of thumb adopted for this "footprint" policy was that one commonly owned group should not "exceed 25% share of total Holden sales in any one commonly defined market area".[10]

[14] Mr Mackenzie's evidence was that the policy was arrived at by assessing the existing large group dealerships then in existence, all of which held somewhere between 20 per cent and 25 per cent of their respective markets with the intent that they not grow larger in those markets by acquiring other dealerships. That rule of thumb was not referred to in the affidavit of Mr Bingham or Mr Mulcahy but Mr Mackenzie said it had been in place for at least 10 years before November 2005,

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10 Ex. 26 para 22

when he retired, and, to the best of his knowledge, operated in the years before he became national sales director of GMH in 1995.[11] He was unable to say when the change to this policy from the 15 per cent "S.E.G." policy referred to in the 1986 document occurred.[12]

[15] The policy existed at least partly because of the failure of the Auswild Dealership Group some years earlier. That group had been led by the patriarchal figure of Sir James Auswild and, after his death, the dealerships owned by it, approaching 40 in number in New South Wales and Victoria, collapsed, affecting GMH's market share very significantly.[13]

[16] The rule of thumb at approximately 25 per cent was understood to be part of GMH's policy by Mr Mulcahy, the Queensland manager. He believed that Mr Bingham and the "dealer network" told him that.[14] Mr Bingham's evidence about the administration of the policy was more complex. He believed that existing large dealerships like the Zupps Group had been "grandfathered" at their planning potential volumes of around 20-25 per cent of their market area but that, otherwise, the 15 per cent "S.E.G." of the 1986 policy continued to apply.[15]

Position of Zupps

[17] The Zupps Group owned three dealerships in an area described by GMH as the "Greater Brisbane Market Area" ("GBMA") which extended from north of Caboolture to South of Tweed Heads taking in the Brisbane metropolitan area and the Gold Coast but not Ipswich. In that area Zupps had dealerships at Aspley, Mt Gravatt and Brown's Plains, the latter also being referred to as Hillcrest. In 2002 Zupps' proportion of the total sales of new GMH vehicles from those dealerships was 25.48 per cent for all the dealers in that area. PLM's total sales of new GMH vehicles from its Southport dealership constituted 5.73 per cent for the dealers in the GBMA. Mr Bingham's evidence of the reasons why GMH treated the Gold Coast and Brisbane as part of the one market area included the fact that there was a substantial transient population of people residing on the Gold Coast prepared to travel to Brisbane in order to purchase a motor vehicle and vice versa. He also said that GMH arranged advertising in south east Queensland in which dealers in all areas of the GBMA would participate. He also pointed to the Federal Chamber of Automotive Industries' treatment of Brisbane and the Gold Coast as both being within the "Queensland Metro" market.[16] Mr Mackenzie focussed also on the reach of media and advertising in a particular area.[17]

[18] Another feature of the franchise system operated by GMH was the allocation of areas of prime responsibility ("APRs") to each dealer. They were defined by postcodes surrounding the dealership's location. In order to determine the APRs and the locations of dealerships, GMH analysed sales, population trends and other data as part of a long term strategy that was continually reviewed and had a time line of at least 5 to 10 years. Before allocating new APRs or reallocating APRs, Holden

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11 T5/72 ll. 1-30 and T5/79-80
12 T5/79 ll. 35-45
13 T5/81 ll. 7-38
14 T7/69 ll. 30-35.
15 T6/67 ll. 44-52; T6/68 l. 38-69 l. 20.
16 Ex 35 paras 13-20. See also ex 26 paras 40-49 in the evidence of Mr McKenzie.
17 Ex 26 paras 42-44.

consulted with the affected dealers to ascertain their views. Of course these allocations did not prevent the dealers from selling to buyers outside those areas and the extent to which Zupps sold outside its APRs assumed some importance in the evidence.

[19] The combination of the PLM dealership with the existing Zupps dealerships would give Zupps 31.21 per cent of the total sales of new GMH vehicles in the GBMA, clearly in excess of GMH policy if it were appropriate to include the Gold Coast and Brisbane within the one market for the purposes of that policy. There is little clear evidence that GMH told its dealers of the percentage applied by it to its footprint policy but it did tell dealers that it endorsed "multiple ownership through a chain dealer policy with appropriate market share limits" in a circular of 3 April 1998.[18] Mr Lockhart had also already been told by Mr Mulcahy that Zupps were probably too big to purchase his dealership. Mr Lockhart was also aware of GMH's concerns about the Auswild experience and large groups aggregating too much market concentration in any particular area.[19]

Events leading up to refusal

[20] Nonetheless, on 8 July 2003 PLM and Zupps executed heads of agreement providing that PLM would sell Zupps its GMH dealership for $5 million for the goodwill and the value of the other assets to be agreed. The heads of agreement provided that a complete agreement was to be negotiated up to the date for completion, specified as 1 October 2003. On completion PLM would cause the plaintiffs to grant to Zupps leases of PLM's premises for a term of five years with two five year options at a total combined starting rent of $50,000 per month. That was to be increased to $75,000 per month on completion of building works on the site with rental increases thereafter at the lower of CPI plus 1 per cent or 5 per cent per annum, with a review to market at the beginning of each option period. The completion of the proposed sale was subject to GMH granting Zupps an assignment of PLM's RSSA or a new RSSA on terms satisfactory to Zupps. The heads of agreement did not provide that Zupps would pay outgoings in addition to the rent payable under the leases. The evidence was that the rent payable under the leases was significantly higher than market rent, said to be $572,156 plus outgoings rather than the $900,000 proposed in the heads of agreement. The valuation of the rental inclusive of outgoings was $693,050.

[21] On 9 July 2003 Mr Lockhart informed Mr Mulcahy of his agreement with Zupps, gave him a copy of the heads of agreement and asked that GMH commence its procedures to approve Zupps as the new Southport dealer. To that time nobody at GMH knew that Mr Lockhart had been negotiating with Zupps.

[22] The application to approve Zupps as the new Southport dealer was refused by a letter of 22 July 2003 from Mr Bingham to Mr Lockhart. Mr Bingham had also telephoned Mr Lockhart on that day to inform him that GMH was not prepared to accept Zupps.

[23] GMH's conduct in refusing the application was criticised on the basis that it did not treat the application according to GMH's normal standards. The reason it gave for that was that it had already extended the term of PLM's RSSA several times to

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18 Ex 45 and T7/58 l. 55-T59 l. 12.

19 T2/41 l. 38-42 l. 10.

allow PLM to submit an application for GMH's consent to the transfer and was anxious to resolve this issue. What it did do was summarised for GMH as follows:[20]

> "(a) on 9 or 10 July Gary Gooding telephoned Ross Mackenzie to inform the latter of the proposed purchase;
> (b) on 10 July 2003 Mr Mulcahy met with John Zupp and Mr Gooding for several hours and discussed the proposal;
> (c) on 16 July 2003, Mr Mulcahy wrote to Zupps seeking further information relevant to PLM's and Zupps' request that Zupps be appointed dealer for Southport;
> (d) on 18 July 2003, Mr Mulcahy met Mr Zupp and Mr Gooding and informed them of Holden's intention not to approve the transfer;
> (e) on 21 July 2003, Mr Gooding wrote to Mr Mulcahy in response to Mr Mulcahy's 16 July letter, enclosing a Zupps "business plan" to support its proposed acquisition of the Southport dealership;
> (f) it also appears that at some point in this period Mr Zupp spoke to Peter Hanenberger, Holden's Chief Executive, with whom Mr Zupp had a personal friendship."

[24] The letter of refusal from Mr Bingham to Mr Lockhart to which I have already referred[21] identified GMH's reasons by reference to what it perceived as the risks of market concentration, the effect of the proposal on other dealers and problems it perceived with succession planning at Zupps. Those reasons established the framework within which this litigation has been conducted.

Discussions after refusal

[25] There were further meetings between the parties after GMH refused its consent to the transfer of the franchise which led to the sending of two further letters, in particular, amplifying GMH's reasons for the refusal. One, a letter of 11 August 2003, from Mr Bingham to Mr Gooding, a senior executive at Zupps, contained the following passages discussing the fact that GMH had previously permitted a transfer between other dealers of a dealership at Windsor and also the possibility raised by Zupps that it sell its dealership at Aspley to allow it to purchase the Southport operation of PLM:[22]

> "We were discussing the Windsor location and our decision to allow John Leach to transfer the RSSA to Eagers.
>
> This was our rationale so far as Windsor was concerned.
>
> 1. Eagers was the first and only buyer Leach nominated to us. The purchase required the transfer of leasehold of the premises, amongst other conditions
> 2. In the event that Leach had nominated another Brisbane Holden Retailer or anybody else from outside we would have most likely have rejected that request. Why? Leach Motors is in close proximity to the Newstead location. There was significant intra-

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20 Paragraph 30 of the defendant's written submissions.
21 Paragraph [5] above.
22 Ex 34.12

brand competition between both Retailers. Why would Holden wish to replicate the very environment its network plan was trying to remedy to the benefit of all Retailers in the Brisbane market? An issue of risk management for Holden and its Brisbane Retailers.

We turn now [to] your request for an explanation regarding your proposal to sell the Aspley location to enable a purchase at Southport.

Question/s
Why would Holden invite risk by allowing another participant to enter the network in Brisbane where some semblance of franchise value has been achieved over recent years?

Zupps is a high quality Retailer. Why would Holden risk the potential of a lesser calibre Retailer assuming ownership of the location?

What if Zupps delivered us a proposal to sell to a multi-national group or another not suited to our long-term interests? Could we have rejected that application if presented to us where the Franchise Code stipulated otherwise? What risks would such an appointment have potentially delivered to Holden and its Brisbane Retailers, including Zupps?

Why are Zupps prepared to sell this established and valuable business? Do they know something about the market area that engenders some hidden risk or agenda? Whatever sale value they place on the business we (as an applicant) must take a conservative risk position. The sale of the business may have taken an extended period, if consummated at all. What dislocation to the business would have occurred during this period? What risk to the franchise?

Zupps is a high quality Retailer. Nevertheless there are others, even if not of equal calibre both within the Holden franchise and elsewhere. What overall benefit would Holden really derive from a "trade off" between locations? Would any "trade off" have insured against the potential risk Holden might have incurred at Aspley?

What precedent would this establish elsewhere and hence what risk to the franchise if Holden Retailers sought to barter locations? How could Holden control that possibility having been seen to condone the practice in this instance?

Sound risk management dictates that one avoids risk wherever possible; one does not try to manage it, after the event. We apply these principles objectively on every occasion we appoint a Retailer. There is always a risk whenever we appoint a Retailer. There is a risk to Holden and its good reputation and a risk to other Retailers. The greater share of our business a Retailer controls the greater the risk

attributable to that ownership. Hence, we are obligated avoid risk wherever possible, market-by-market as each and every individual proposal to change ownership is presented to us for consideration."

[26] Later, by a letter of 7 August 2003 from Mr Mulcahy to Mr Lockhart the following discussion of the reasons contained in the letter of 22 July was set out:[23]

"Our letter of July 22nd delivered three reasons why we considered this proposal was contrary to the best interests of the franchise and likely to have a significant effect on the Holden franchise system.

Items one (1) and (3) detailed in our letter deal with commercial risk and franchisors' entitlements under Section 20 of the Franchise Code of Conduct. Namely,

We are obligated to minimise risk where the management of the franchise is concerned. The franchise system has historically enabled franchisors to apportion risk over a wide and diverse group of individual businessmen and businesses.

Where any individual business fails, or suffers disruptions, the risk to the franchisor is contained to that particular business and location. The overall impact on the organisation is therefore limited and can be readily redressed. It follows therefore that where any one Retailer or Retailer Group holds a significant share of the franchise market - the greater the risk exposure to the franchisor. We have corporate governance obligations that in this instance or similar instances require that we avoid any further risk.

Item two (2) of our letter deals with Section 51AA of the Trade Practices Act that relates to unconscionable conduct in business transactions. Section 51AA does not prescribe what might constitute unconscionable behaviour on the part of a franchisor.

Rather, it refers to such behaviour within the meaning of the unwritten law. Simply stated, the regulation provides for an interpretation after the event by the regulator as to what in their view may or may not constitute unconscionable conduct by a franchisor. Given the dynamics of the automotive industry no responsible franchisor would knowingly expose itself at inception to the potential risk of any future legal action or prosecution in managing its affairs under this section of the legislation."

[27] These letters reflect at least two of the reasons why GMH said it refused its consent to the transfer; namely that Zupps' footprint would increase unacceptably were it to acquire the Southport dealership, with possible adverse effects on other dealers in the area. At the time it seems likely that GMH believed that the combination of the Southport dealership with the existing Zupps' dealerships would give it at least 28 per cent of the market in the GBMA although later analysis suggests that percentage would, in fact, have been about 31.2 per cent.

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23 Ex 39.9.

[28] It was also clear that GMH was concerned about the control of the Zupps business after the death or retirement of Mr John Zupp and that it was not satisfied that an appropriate succession plan was in place either through Mr Zupps' daughter or through other management, none of whom had any shareholding or other equity in Zupps or its dealership. Mr Bingham was also concerned that Zupps had not provided to GMH any proper business plan for the Southport dealership.

Sale to 4214 Holdings

[29] After GMH refused to give its consent to a transfer of the Southport dealership to Zupps, Mr Lockhart negotiated with a Mr Newton, the dealer principal of a large Holden dealership in Adelaide, and agreed in principle to sell the PLM business and business assets to a company controlled by Mr Newton. That was on the basis that Mr Newton's company would pay $3.6 million for goodwill and an agreed value for the tangible assets of the business and would lease the premises for a starting rental of $700,000 per annum. That agreement was made by an exchange of correspondence on 18 and 19 August 2008.

[30] Later the arrangement altered. Mr and Mrs Lockhart agreed to sell all their shares in PLM to Mr Newton's company for goodwill of $3.4 million plus the net tangible assets at a value to be agreed. That change in the arrangement reflected accounting advice that Mr Lockhart would be substantially better off, after tax, if he could sell his shares in PLM rather than cause PLM to sell its business. An agreement was made between Mr and Mrs Lockhart, Map Enterprises and Mr Newton's company, 4214 Holdings Pty Ltd, on 30 October 2003 which settled, apart from some adjustments, on 31 October 2003.

[31] On 31 October 2003, Mr Lockhart and Map Enterprises leased their respective areas of the site on which PLM operated to PLM for five years with one option of five years with a starting rental for the two leases combined of $50,000 per month rising to $700,000 per annum on completion of renovation works being undertaken on the premises. Those leases also provided that the lessee was to pay all outgoings incurred by the lessors and that rent would increase annually at the lower of CPI plus 1 per cent and 5 per cent. The rent for the first year of any renewed term would be the higher of the rent in the last year of the initial term of the lease and market rent.

Issues

[32] The request for the transfer of the franchise was characterised by the defendant as a request that GMH agree to appoint Zupps as a new franchisee on the basis that the existing franchise agreement was to expire and be replaced with one for the new franchisee and that it was that request that was refused. Such a characterisation of what occurred makes sense as there was no doubt that PLM's existing RSSA was due to expire and what was important from GMH's point of view was the identity of the management of whatever entity was to enter into a new RSSA with it.

[33] It was accepted that the onus lay on the plaintiffs to establish that the refusal by GMH to consent to the transfer was unreasonable although Mr Couper QC argued that an evidentiary onus lay on the defendant because it was in possession of the information relevant to the reasonableness of its decision.

Breach of s 20

[34] Section 20(2) of the Code provides that a franchisor must not unreasonably withhold consent to the transfer while s 20(3) relevantly describes circumstances in which it is reasonable for a franchisor to withhold consent as including:

> "(c) the proposed transferee has not met the selection criteria of the franchisor; or
>
> (d) agreement to the transfer will have a significantly adverse effect on the franchise system ..."

[35] I shall discuss the interpretation of those provisions after examining the parties' submissions about the factual issues relevant to the reasonableness of GMH's decision.

Reasons for refusal – market concentration

[36] The plaintiffs' argument about the issue of market concentration focussed on an assertion that the decision was based on an arbitrary policy not derived from any rational identification of factors which would justify its adoption. In that context they contended that Zupps was an appropriate purchaser, solvent, unlikely to cease being a Holden dealer, likely to continue to be satisfactory in its performance as such a dealer financially and otherwise. They also argued that any risk, for example, that Zupps might be acquired by a public company was present, irrespective of whether it purchased the Southport dealership. They also submitted that there was no evidence that any transfer to Zupps would in fact increase any risks particularised by GMH in its defence. To characterise the argument in another way, the argument was that GMH was "starting at shadows", an approach that was insufficient to provide a reasonable ground for refusal of the transfer.

[37] To the contrary, GMH's argument was that its policy of dividing up its franchises into a network, itself divided up into APRs, was designed to encourage the model of an individual franchise business operated by a dealer principal who had the authority to make the necessary business decisions to run the franchise. Its preferred policy was that the dealer principal have equity in the business of not less than 25 per cent with the right to acquire the balance of any franchise business over a five year period. Its formal policy since at least the mid-1980s was that there should be a limit to the market penetration of any one dealer group in any one market area. It was directed particularly towards the larger metropolitan dealer groups such as Suttons in Sydney and Zupps in Brisbane with the aim that the risk to Holden of an adverse event affecting a large dealer group be contained. It also was intended to protect smaller dealerships from the competition created by dealer groups who enjoyed competitive advantages from their size.

[38] That the large dealer groups were contained to between 20 per cent and 25 per cent of their markets was explained historically because of their existing market shares and by GMH's experience with the Auswild group when it failed. That experience led GMH to form the view that further market concentration within relevant market areas caused by larger dealer groups purchasing further dealerships should not occur. It argued that that was a reasonable approach not shown, on the evidence, to be unreasonable. It was submitted that the 25 per cent limit was not arbitrary because it was based on the historical size of the larger chain dealer franchisee groups in the national network in their relevant market areas. That was the level

which GMH would accept as reflecting the status quo but beyond which such dealerships should not grow.

[39] Some of this information came from Mr Bingham whose evidence was criticised by the plaintiffs. Although he sometimes had difficulty in focussing on the question he had been asked and also tended to provide more information than was necessary, Mr Bingham's evidence seemed to me to be generally reliable and careful and based as far as possible on his recollection of the events and the documentary record. He also had very significant experience with the operation and administration of the policy over a long period and was steeped in the practice of "risk management". I saw no reason to conclude that this evidence about the origin and operation of the GMH policy was unreliable.

[40] In dealing with the pleading that GMH erred because it was unreasonable to have regard to Zupps' overall footprint where Zupps had offered to relinquish the Aspley dealership, GMH submitted that there was no satisfactory evidence adduced by the plaintiffs that Zupps had offered to relinquish the Aspley dealership. There is a file note of 11 July 2003 where Mr Mulcahy suggested that possibility to Mr Zupp which Mr Mulcahy confirmed in his oral evidence produced a horrified reaction from Mr Zupp.[24] After the decision was made by GMH to refuse the transfer there is reference in a letter from Mr Gooding to Mr Bingham of 11 August 2003[25] of the possibility of Zupps relinquishing the Aspley dealership. That had not been mentioned in previous correspondence. GMH also submitted that even if such an offer had been made it would not have made its decision not to approve the transfer unreasonable because of the indeterminacy of any proposal by Zupps to sell the Aspley franchise.

[41] Out of an abundance of caution GMH also addressed some evidentiary issues not pleaded precisely by the plaintiff to the effect that GMH's policy was not adequately documented, was arbitrary, had an exception where a chain dealer from one market area was prepared to enter another market area and that GMH had mistaken the market area or may have applied it inconsistently. They also dealt with the possible argument that there had been no detailed analysis of the application of the policy in Zupps' case and that Zupps Aspley's individual market power was not significant. In respect of those issues GMH's submission was that the policy was properly documented from as early as 1986 and restated in 2000 with a "rule of thumb" known within its organisation to the relevant decision makers such as Mr Mackenzie, Mr Bingham and Mr Mulcahy. I have already referred to the argument that the limit was not arbitrary because of its origin and the size of the existing large chain dealerships.

[42] GMH argued that the exception to the footprint policy, permitting dealers from other market areas to purchase a dealership in a particular market area where they were then not present, was irrelevant on the basis that Zupps' acquisition of Southport would have been in the GBMA and also on the basis that such an exception did not apparently apply to interstate ownership of a dealership in a relevant market area where smaller single dealer franchises would not be placed at a competitive disadvantage.

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24 T7/61 ll.1-9.

25 Ex 34.11.

[43] Their argument in respect of the GBMA as an appropriate market area drew on the evidence to which I have referred already. GMH also submitted that any suggested distinction between Brisbane and the Gold Coast was not supported by evidence recognising any dividing line or relevant purpose for which any suggested distinction should be made. Any argument that the Sunshine Coast should have been included in the area, GMH submitted, would not materially alter the overall market share that the Zupps dealer group held and no evidence was led to suggest that its inclusion should make a difference as to whether it was unreasonable or not to approve the transfer.

[44] Any suggestions that inconsistent applications of GMH's policy were demonstrated by Zupps' development of the Hillcrest dealership, its acquisition of the Beaudesert dealership and the acquisition by AP Eagers Ltd of the Windsor dealership and discussions about the potential acquisition by Zupps of the Woolloongabba dealership were distinguished. It was argued, convincingly on the evidence, that Hillcrest was not a dealership acquired by Zupps from another dealer but an "open point" within the Mt Gravatt dealership's APR filled in 1998 by allowing Zupps to open a branch within its then APR. There was no suggestion that it caused Zupps' market share to increase significantly in or after 1998 to or beyond the 25 per cent threshold. Again, Zupps' acquisition of the Beaudesert dealership did not increase its 25 per cent threshold of the market significantly.

[45] The acquisition by AP Eagers of the Windsor dealership in 2000 was explained because that dealership was too close to AP Eagers' existing dealership at Newstead. Windsor had previously been owned by Leach Motors and, when it was transferred to AP Eagers, was closed shortly afterwards with its APR incorporated into the existing AP Eagers business area of operation. Again GMH submitted that there was no suggestion in the evidence that it significantly increased AP Eagers' market share or that that share increased to or beyond the 25 per cent threshold.

[46] As to the potential acquisition of Woolloongabba the submission was made that no application was made by Zupps to acquire the Woolloongabba dealership, although there was a hypothetical discussion about that possibility. The only record of the conversation in the evidence was a draft letter written some years later by Mr Bingham, who was not a party to the conversation. Nor was there any consideration by GMH then of the implications of such an acquisition on the chain dealer policy or the footprint policy.

[47] A further unpleaded challenge dealt with by the written submissions by GMH concerned a suggestion that the decision not to consent to the transfer was made because Zupps would not give up its Mitsubishi dealerships. There was very little evidence of any such suggestion and nobody was called from Zupps to suggest that the matter had ever been raised. It does not seem to me to be an issue with which I need to be concerned.

[48] The evidence of the "pump out" rates achieved by Zupps was also the subject of some significant analysis in the trial. GMH's case was that Zupps sold a greater than usual proportion of vehicles outside its own APRs into other dealer areas in the GBMA and elsewhere. The balancing of those pump out rates with the numbers of vehicles sold by other dealers into Zupps APRs was not sufficient, on my view of the evidence, however, to dissuade me from the conclusion that Zupps already had a significant degree of market power in the GBMA, sufficient to make GMH's views

about the desirability of limiting its share of that market both genuine and reasonable.

Reasons for refusal – effect on other dealers

[49] GMH's concern about the effect on other dealers of an increase in Zupps' market share in the GBMA seems to be related to its footprint policy in the sense that it was concerned that Zupps' greater size would give it advantages in the market place allowing it to compete aggressively against other local dealers particularly on the Gold Coast at Robina and over the border at Tweed Heads. GMH's concern was characterised also as arising from a wish to discourage one Holden dealer from cannibalising another's business instead of maximising GMH's market share and profits against other motor vehicle manufacturers.

[50] Although the plaintiffs argued that this was a hypothetical risk with no foundation in reality because GMH supplied all of its vehicle and spare parts to all dealers at the same price, it seems clear that larger dealerships would have economies of scale related to management costs and advertising that would put them in a position of advantage compared to smaller dealers. It is my view that such a risk was not just hypothetical or speculative but is tied logically to the structure of the dealerships organised by GMH.

[51] The plaintiffs also focussed on the hypothetical nature of any risk that Zupps might use its vehicle allocations to divert vehicles from its other dealerships to the Southport business to compete more effectively against the other dealers on the Gold Coast and argued that there was no evidence that Zupps engaged in that practice. That risk itself may have been more theoretical but there seemed to me to have been good reasons, stemming from Zupps' greater size, why GMH might be concerned about the effect on local dealers at the Gold Coast of the further strengthening of Zupps' dealership in the GBMA if it purchased the Southport dealership.

Reasons for refusal – Zupps' succession plans

[52] There was significant evidence that GMH had been concerned for some time that the managers of Zupps' dealerships had no equity in the businesses and little of the incentive to stay provided by ownership. Nor did Ms Terri Zupp, Mr John Zupp's daughter, enjoy the confidence, for example, of Mr Mackenzie, Mr Bingham and Mr Mulcahy as a replacement owner or controller of the Zupps business. The succession plans showing her as the likely principal of the business in the future had not allayed their concerns previously. Those concerns were based particularly on the fact that Mr John Zupp had shown little inclination to distance himself from the "hands on" management style that he had always used so successfully in conducting his business. That raised a real concern for them if Mr Zupp exited the business unexpectedly. It was also highlighted for them because of GMH's previous experience with the failure of the Auswild Group after it lost its patriarch.

[53] The plaintiffs' arguments against this view of GMH referred to Zupps' establishment of the Browns Plains dealership in spite of the concern about the succession planning in the Zupps organisation and drew attention to the apparent competency of the people running each of the Zupps dealerships and GMH's ability to decline to grant Zupps a new franchise agreement from December 2006 if it was not satisfied with the proposed business plan of any relevant dealership. The

assertion by GMH that it was concerned about succession planning was also criticised because Mr Mulcahy could not recall seeing the Zupps' business plan for the Southport dealership including the proposed management structure and because he could not recall a conversation with Mr Bingham about the succession plan in July 2003. It was also pointed out that Mr Bingham and Mr Mackenzie did not see the succession plan, but there seems to be no doubt that succession planning had been something otherwise at the forefront of GMH's concern about Zupps likely continuing success as a dealership group. That expressed reason for GMH's decision was unlikely to be false and there was no evidence led by the plaintiffs from Zupps to counteract any view that GMH's concern about succession planning was unrealistic.

Reasons for refusal – were they genuine?

[54] As I said earlier the plaintiffs sought to argue that none of the risks pleaded by the defendant rose above the level of speculation and were not truly based on any characteristic of the Zupps group of companies. That was said to follow from the fact that in August 2000 GMH may have contemplated a transfer of the Woolloongabba franchise to the Zupps group and expressions of support for Mr Zupp by Mr Hanenberger, then the managing director of GMH in, for example, June 2001. Some support was also sought to be gleaned from a statement by Mr Mackenzie to Mr Gooding said to be to the effect that Zupps' entry into heads of agreement to purchase the Southport dealership sounded like a good idea or sounded "OK".[26]

[55] Mr Mackenzie's interpretation of what he said was rather different and it seems to me to be drawing rather a long bow to conclude that GMH's expressed concerns for its decision did not reflect its true concerns. It may be that there were differences in view within GMH between Mr Hanenberger, for example, and some of his subordinates. But there was no evidence on which I could rely to form any view that the reasons GMH gave for its decisions did not truly reflect its decision making process. This affects, in particular, the theory that GMH refused the transfer because Zupps had not offered to dispose of its Mitsubishi franchise. No evidence from any representative of Zupps was produced by the plaintiff to deal with that theory as I have already pointed out.

[56] The rationality of GMH's reasons was also questioned by reference to Mr Bingham's reasons in his letter of 11 August 2003[27] where he explained his dismissal of the Zupps proposal to sell its Aspley dealership. As I said earlier GMH argued plausibly that the proposal was not raised until after GMH's decision was made and was itself a speculative suggestion introduced after a decision had been made at the end of a lengthy process where many previous indulgences had been given to PLM.

[57] In other words it does not seem to me that the plaintiffs have established any case that the grounds put forward by GMH for refusing its consent to the transfer of the dealership were not genuine or were made in bad faith. The issue is whether the plaintiffs have shown that its consent was withheld unreasonably. As I have said earlier the onus of proof of that issue lies on the plaintiffs.

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26 T6/76 ll. 15-25.

27 Ex 36.13.

Was there a contravention of s 51 AD?

[58] There is little authority on the proper interpretation of s 51AD of the Act and cl 20(3) of the Code. The only decision, *Masterclass Enterprises Pty Ltd v Bedshed Franchisors (WA) Pty Ltd,*[28] clearly supports the view that the circumstances in which it is reasonable for a franchisor to withhold consent are not limited to those described in cl 20(3). *Masterclass Enterprises* was also a case where consent to a transfer of a franchise was withheld on the basis that the business would not be under the direct supervision of someone with a substantial interest in it. That was a condition of the franchise agreement and the proposed transferee's directors did not intend to give the business their full attention. Newnes J. decided that the refusal was reasonable, having regard to the nature of the franchising relationship.

[59] Although these decisions are essentially questions of fact in each case, there is much to be said for his Honour's conclusion that it cannot be regarded as unreasonable for a franchisor to require that a "franchise business be supervised by someone with a substantial interest in the franchise."[29] His Honour went on to say about this requirement of the franchisor:[30]

> "It is entitled to act, as from the evidence it does, on the basis that that provides greater motivation for the continuing success of the business over the lengthy term of the franchise agreement, and that it is also likely to ensure a continuity and consistent quality of supervision that is less likely to be achieved if the business is dependent upon employed managers."

[60] GMH argued, therefore, that *Masterclass* was authority for the principle that, if a franchisor, in refusing consent, was acting in the legitimate interests of the continuing success of the business in the long term, it cannot generally be considered to be unreasonable. In that context its submission was that its footprint policy was designed to ensure it retained control over the dealership system and would help to ensure the viability and profitability of its smaller dealerships and the dealership system in the long term.

[61] The criticism of that approach for the plaintiffs was that it was impermissible for a franchisor to make a decision based on the effects an assignment *may* have on its interests as a franchisor because of the limitations in the language of s. 20(3)(d), which refers to circumstances in which it is reasonable for a franchisor to withhold consent as including where agreement to the proposed transfer *will* have a significantly adverse effect on the franchise *system*. The emphasis on the words I have italicised, the plaintiffs argued, was to focus the argument on the effects on the system rather than on the franchisor or individual franchisees, where the focus of this remedial legislation was on redressing the imbalance in market power between franchisors and franchisees. The inclusive nature of the section's language leads me to conclude, however, that its focus is not that narrow.

[62] The approach in *Masterclass Enterprises* seems more persuasive to me and it is buttressed by other decisions in similar contexts where the importance of a franchisor's confidence in a proposed franchisee's ability to operate within a continuing commercial relationship has been emphasised, as has the existence of

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28 [2008] WASC 67 at [107]-[108].

29 [2008] WASC 67 at [114]. See also his Honour's discussion at [93]-[98].

30 [2008] WASC 67 at [114].

other, possibly conflicting, commercial interests in a franchisee.[31] The nature of a franchising relationship as one "akin in some respects to a partnership requiring cooperation and good faith to work effectively" [32] was also emphasised by GMH, as was the possibility that it was the type of commercial contract where mutual obligations of good faith might be implied.[33]

[63] Some of the authorities are careful to point out that cases on the withholding of a landlord's consent to an assignment of a lease are unreliable guides to the resolution of this type of dispute between a franchisor and a franchisee because of the continuing close commercial arrangements between the parties to a franchise agreement.[34] Carlson J of the United States Bankruptcy Court discussed the issues helpfully in *In re Van Ness Auto Plaza Inc.*:[35]

> "If a lessor's decision to withhold consent is not to be subject to *de novo* review, the case is even stronger for according some deference to an automobile manufacturer's decision to withhold consent to the transfer of a franchise. First, it is more difficult to determine whether an automobile dealer will be a suitable franchisee than it is to determine whether a lessee will perform under a lease. A lessee's major contractual duty is to pay rent timely. A franchisee's duties are much more complex. Second, a franchise agreement involves the manufacturer and dealer in a much closer business relationship than commonly exists between a lessor and lessee. Thus, the courts must be somewhat cautious in requiring the manufacturer to enter into such a relationship involuntarily.
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> At the same time, the language of Vehicle Code section 11713.3(e) indicates that the standard of review must be more exacting than whether the manufacturer acted in good faith after considering

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31 See, e.g. *Caltex Oil (Aust) Pty Ltd v Allan* (Supreme Court of New South Wales, No. 2534 of 1987; Young J, unreported, 10 June 1987, BC8701326) at pp. 4-5; *Gas 'n Go Petroleum Pty Ltd v Caltex Oil (Australia) Pty Ltd* (Federal Court; Beaumont J., 26 April 1991, unreported, BC9103131); *LE Stewart Investments Pty Ltd v Mercedes-Benz (NSW) Pty Ltd* (Supreme Court of NSW, Court of Appeal, No 40190 of 1990; 14 February 1992, unreported, BC9202078).

32 *Bridgestone Australia Ltd v G.A.H. Engineering Pty Ltd* [1997] 2 Qd R 145, 150.

33 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 263-264 and *Garry Rogers Motors (Aust.) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) 21 ATPR 41-703 703 at 43,014 [34]; but cf. *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 [40], [86]-[87] and [155]. See also *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, [189]-[191] and *Australian Hotels Assn (NSW) v TAB Ltd* [2006] NSWSC 293 [69]-[80] which indicate a renewed reluctance in New South Wales to recognise that commercial contracts are a class of contracts that, as a legal incident, have an implied obligation of good faith. The Queensland and Victorian courts are also circumspect; See *Gold Coast Waterways Authority v Salmead Pty Ltd* [1997] 1 Qd R 346, *Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* [2001] QCA 212 and *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203, 213-219 [34]-[82]. There is no great desire to leap into the fray either; *Re Kendells (NSW) Pty Ltd (In Liq)* [2005] QSC 064 [58]-[60] where Muir J surveys the cases helpfully and *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115 at [43]. In Victoria see *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [3]-[4], [25] and, particularly, *Meridian Retail v Australian Unity Retail Network* [2006] VSC 223 at [210]-[211] where Dodds-Streeton J said: "Relevant authorities indicate, however, that the implication of an obligation of good faith may be particularly appropriate in the context of a franchise relationship, doubtless because it frequently embodies a significant disparity of bargaining power."

34 *Masterclass Enterprises Pty Ltd v Bedshed Franchisors (WA) Pty Ltd* at [113]; *Gas 'n Go Petroleum Pty Ltd v Caltex Oil (Australia) Pty Ltd* and *In re Van Ness Auto Plaza Inc.* 120 BR 545 (1990).

35 120 BR 545, 548-549 (1990)

> appropriate criteria. This is so for two reasons. First, if the legislature had intended the standard to be good faith, it undoubtedly would have so specified. Several federal and state statutes governing franchise agreements require that a franchiser act in good faith in all dealings with its franchisees. *See e.g.,* 15 U.S.C. § 1221 (Automobile Dealer Franchise Act); *R.L.M. Dist. Co. v. W.A. Taylor, Inc.,* 723 F. Supp. 421, 428 (D. Ariz. 1988) (re: Ariz. Rev. Stat. § 44-1565(3)). If the California legislature intended to create a good faith standard, it would simply have provided that withholding consent to assignment must be made in good faith. Instead, it provided that the decision must be reasonable. Second, the first sentence of the section 11713.3(e) recognizes that a dealer may not be able to recover the reasonable value of its investment in the dealership business unless it is able to assign the franchise. It provides that it is unlawful for any manufacturer "to prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business." The second sentence of the section states that the manufacturer's consent to assignment may not unreasonably be withheld. The statute attaches substantial importance to enabling the dealer to recover its investment. This concern is simply too weighty to be overcome by a manufacturer's refusal to consent to assignment supported only by the manufacturer's subjective good faith.
>
> Because the manufacturer may not act arbitrarily, and because the manufacturer is in possession of all information regarding its reasons for refusing to consent to assignment, the burden of presenting plausible reasons for the refusal to consent must be on the manufacturer. The ultimate burden of persuasion, however, is on the dealer to establish that the manufacturer's refusal to consent is unreasonable. *Cf.* Restatement (Second) of Property § 15.2 comment g at 105 (1977) (leases); *Reuling v. Sergeant,* 93 Cal. App. 2d 241, 242, 208 P.2d 1046 (1949) (leases)."

[64] His Honour concluded that the appropriate test under Californian law was that withholding consent to an assignment was reasonable if the decision was supported by substantial evidence showing that the proposed assignee was materially deficient with respect to one or more appropriate, performance-related criteria. That approach may suggest a focus on the individual qualities of the proposed assignee but I would not exclude considerations relevant to how the proposed assignee fits into the franchisor's overall network, such as the first and second reasons advanced by GMH in this case. Such considerations were, in any event, treated as possibly relevant by his Honour in *In re Van Ness Auto Plaza Inc.*[36]

[65] When I apply such an approach to the reasons given by GMH for refusing to agree to Zupps taking over the Southport franchise it seems to me to be the proper conclusion that their decision was reasonable. It was based on their policy that their dealerships should be conducted by owner-operators and reflected their concern to avoid the concentration of too much market power in one retailer in the GBMA. The policy and the market area it had defined were both rational approaches to the

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[36] 120 BR 545, 551 (1990) under the heading "*Other dealerships and Flashlube.*"

issues of risk management that GMH perceived existed in the overall management of their dealer network. The potential consequences for the profitability of their other retailers because of the concentration of market power with Zupps and the other possibly harmful consequences arising from the doubts they held about Zupps' succession planning were also relevant, rational features of the decision made. All of these reasons seemed plausible to me, not arbitrary, and were based on a long history of risk management where the policies that had been developed stemmed from experience, notably in the Auswild debacle.

[66] They were also reasons that reflected GMH's selection criteria for dealers, that they be owner-operators and not possessed of too great a concentration of market power in the area. There is an argument that the failure of a proposed transferee to meet the selection criteria of the transferor is not affected by any consideration that the selection criteria themselves be reasonable.[37] That argument is based on the absence of the word "reasonable" in s 20(3)(c) as compared to s 20(3)(b) and s 20(3)(g). The contrary view is that all the subsections are affected by the overarching obligation not to withhold consent unreasonably in s 20(2). It is unnecessary for me to resolve that issue as it is my view that these selection criteria were in themselves reasonable.

[67] The evidence also seems to me to fall within the language of s 20(3)(d) of the Code as a circumstance where it is reasonable to withhold consent because agreement to the transfer will have a significantly adverse effect on the franchise system. One relevant adverse effect at least, meeting the prescriptive use of the word "will" urged for the plaintiffs, would be the breach of GMH's policy in allowing Zupps to exceed a 25 per cent share of total Holden sales in its market area, a precedent that would create significant problems for the fair administration of the system in other market areas with similar concentrations of market share.[38] The fact that the larger franchisees might not have been told the precise percentage of the market share to which they were limited does not seem to be terribly relevant in this context. What was important was that they had been told that they as larger players were not to be allowed to acquire more market share in their areas.

[68] Accordingly the plaintiffs' main case fails. They have not persuaded me that GMH's decision to refuse to agree to the proposed transfer of PLM's franchise to Zupps was unreasonable.

Alleged contravention of s 52

[69] The plaintiffs allege in their amended statement of claim that GMH's refusal by its letter of 22 July 2003 to consent to the appointment of Zupps to the Southport dealership constituted a representation that GMH would not consent if a request for a transfer of PLM's franchise was made, when in fact GMH did not in fact then have that intention. That argument was not pursued and GMH submitted that the evidence established clearly that when it wrote the letter it did have the intention to refuse to consent to the transfer of the business so that it had reasonable grounds for saying that it would refuse to give such consent. There was no evidence that GMH did not hold that intention at the time and the evidence also establishes that it had reasonable grounds for not appointing Zupps as the dealer at Southport from the

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37 *Masterclass Enterprises Pty Ltd v Bedshed Franchisors (WA) Pty Ltd* at [110-112].

38 T5/59-60 in the evidence of Mr Addison.

findings I have already made. GMH also submitted that no loss had been established arising from this alleged breach. That also seemed to me to be accurate.

Causation and s 82

[70] The defendant also submitted that the plaintiffs did not suffer any loss by reason of any contravention of s 51AD for three reasons: first, that neither of the plaintiffs suffered loss in respect of any alleged loss of opportunity for Mr Lockhart to enter into another transaction with Zupps for the sale of shares in PLM; secondly, neither of the plaintiffs can recover on a claim for loss of rental for a contravention of s 51AD because neither of them suffered loss by the alleged contravention and Mr Lockhart cannot recover loss as a shareholder of PLM for a loss of dividend or distribution of its assets because that is not a loss by the alleged contravention; and, thirdly, the plaintiffs did not suffer any loss of a valuable opportunity by reason of any withholding of consent to the transfer of the franchise by the defendant, because the franchise agreement was about to expire.

[71] The argument commenced with the tests for causation that have been developed in the High Court for assessing damages under s 82(1) of the *Trade Practices Act* where the damage is caused by another person's contravention of the relevant provisions of that Act.[39] Gleeson CJ said in *Travel Compensation Fund v Tambree,*[40] in deciding whether loss or damage is contravening conduct, and assessing the amount of the loss that is to be so characterised, "it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found." In the same decision Gummow and Hayne JJ said: [41]

> "it is doubtful whether there is any "common sense" notion of causation which can provide a useful, still less universal, legal norm. There are, therefore, cases in which the answer to a question of causation will require examination of the purpose of a particular cause of action, or the nature and scope of the defendant's obligation in the particular circumstances."

[72] Here the argument was that the Code's provisions were directed at the relationship between franchisors and franchisees and the conduct of franchisors towards franchisees and not to people in the position of Mr Lockhart and Map Enterprises, a shareholder and landlord. Because of my main conclusion it is not necessary for me to decide this issue but, prima facie, I would have thought it possible for a controlling shareholder and a landlord of a franchisee whose rights had been contravened to suffer loss by the relevant contravention just as was recognised by Sundberg J in *The Big Four Pty Ltd v DaimlerChrysler Australia/Pacific Pty Ltd*[42] in respect of a proposed franchisee. A proposed franchisee may be more directly a "participant in an industry"[43] than a landlord or a shareholder but where the land is particularly adapted to use for the franchisee and the relevant shareholder was the majority shareholder and managing director of the franchisee it seems to me to be properly arguable that they are persons who can suffer loss under s 82 of the *Trade*

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39 See *Henville v Walker* (2001) 206 CLR 459; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627.

40 (2005) 224 CLR 627, 639 at [30].

41 (2005) 224 CLR 627, 642-643 at [45].

42 [2002] FCA 783

43 See s 51ACA of the *Trade Practices Act.*

Practices Act by a contravention of the obligations owed to the franchisee. It would be necessary, however, for the shareholder to show some loss incurred by him personally separate from that incurred by the company.[44]

[73] Another reason for including Mr Lockhart in the category of people who may claim to have suffered loss by a contravention is because the Code provides that a transfer of a franchise includes a transfer of an interest in a franchise.[45]

[74] Here GMH also submitted that the only loss to Mr Lockhart or Map Enterprises possibly caused by its withholding consent to a transfer of the franchise, being PLM's interest under the RSSA, to Zupps was the value of the balance of the term of the RSSA, which was due to expire on the transfer. The goodwill payment for the business under the heads of agreement was not attached to or to be paid for the transfer of the RSSA, but was to be paid for the expectation that Holden would enter into a new RSSA with Zupps. Accordingly, GMH argued that the loss of the difference between any expected goodwill payment or any expected lease was not due to the failure to obtain a transfer of the balance of the franchise. It was due to the failure of GMH to agree to issue a new franchise agreement to Zupps. No loss was caused, therefore, by a contravention in relation to the existing franchise.

Damages

[75] Perhaps for such reasons the plaintiffs approached the question of damages more globally by arguing that their loss had two components. The first claimed was Mr Lockhart's loss of the opportunity to receive a higher payment from the sale of the goodwill of the business of Peter Lockhart Motors.[46] The second was the loss to each of Mr Lockhart and MAP Enterprises Pty Ltd which consisted of the loss of the opportunity to receive the additional rent which would have been payable by Zupps pursuant to leases entered into in accordance with the heads of agreement.

[76] A major evidentiary problem facing the plaintiffs on this aspect of their case was their failure to call any witness from Zupps to prove that it would have agreed to purchase the shares in PLM instead of what they had offered to do, namely to buy the business and its assets from PLM. Nor was there any evidence that Zupps would, in that case, have agreed to pay more for the goodwill than the actual purchaser or that it would have paid rental to Mr Lockhart and Map Enterprises in the same amounts as indicated in their heads of agreement. There was no explanation offered why no witness from Zupps was called so that in the circumstances I am left simply to speculate that they might have paid something more than was eventually paid.

[77] There were other problems associated with proof of damage. Any loss on the goodwill payment offered by Zupps was not suffered by Mr Lockhart but by PLM and Mr Lockhart very likely received more in his pocket, after tax, from selling the shares for $3.4M, than he would have received had PLM sold its business to Zupps and distributed the proceeds to him. This was the view adopted by the accountant called for the defendant, Mr McGuinness, whose evidence seemed more reliable on these issues. It was based on more reliable, proven assumptions.

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44 See, e.g., *Thomas v. D'Arcy* [2005] 1 Qd R 666.

45 See the definition of "franchise" in s. 3 of the Code.

46 See, e.g., *Sellars v. Adelaide Petroleum N.L.* (1994) 179 CLR 332.

[78] The accountants also differed between themselves about the net after tax situation of Mr Lockhart should Zupps have agreed to buy the shares. But the plaintiffs' principal difficulty is their failure to prove that Zupps would have agreed to purchase the shares at a price better than that offered by 4214 Holdings Pty Ltd. In that context GMH's submissions were persuasive. They included:

> "208 On the face of it, there was no commercial reason for Zupps SE to agree to such a course. That course would involve it in extra expense, in undertaking due diligence of the company and possibly in extra transaction costs; extra risk in taking on the liabilities of the company, including any then unknown to Mr Lockhart; and no offsetting benefit to it.
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> 209 Even if it were open to infer that a hypothetical reasonable purchaser might agree to the proposed new arrangement, that is not to the point. The question is whether a particular proposed purchaser, Zupps SE, would agree to change the arrangement that it had made. Mr Lockhart has not attempted to discharge that onus."

[79] They extended those submissions orally by reference to a number of decisions. In *Gore v Montague Mining Pty Ltd*,[47] the Full Court of the Federal Court took the view that the failure of the respondent to that appeal to establish that the relevant parties to an agreement would have accepted possible advice from a solicitor to recommend the insertion of an assignment clause or would have agreed to the addition of such a clause to a contract was fatal to the success of the action. That decision has been distinguished recently, however, in *Heenan v Di Sisto*[48] where Giles JA for the New South Wales Court of Appeal said:

> "[30] In the present case, what the respondents lost by the appellant's negligence was the opportunity, or less formally the chance, of achieving the commercial outcome of receiving $2,100,000 on the sale of No 33 and No 126 to Skyworld. Providing they established causation, they were entitled as damages to the value of that lost chance. Damages from a negligent solicitor on the basis of loss of a chance has been recognised in a number of cases, and it is unnecessary to cite them.
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> [31] In many of the cases the negligence has lain in failure to bring proceedings within time, and whether it caused the loss of a chance of some value has not been in issue. In the present case, the respondents lost the chance which would have arisen through advice to make the contracts interdependent, and in order to establish causation had to prove that if properly advised they would have instructed the appellant to do so. The principle was stated in *Sellars v Adelaide Petroleum NL* at 353 —
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> > '... when the issue of causation turns on what the plaintiff would have done, there is no particular reason for departing from proof on the balance of

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47 [2000] FCA 1214 at [41], [64]-[65], [70].

48 [2008] NSWCA 25 at [30]-[34]. See also *Hendriks v McGeoch* [2008] NSWCA 53 at [88].

probabilities notwithstanding that the question is hypothetical.'

[32] Whether the respondents would have instructed the appellant that the contracts should be made interdependent is just as much a past hypothetical event as whether Skyworld would have agreed. As Professor Fleming observed in "Probabilistic Causation in Tort Law: a Postscript" (1991) 70 Can Bar Rev 136 at 140, all causal inquiries involve might-have-beens, but the balance of probabilities has been applied to what the plaintiff would have done if properly advised by the defendant solicitor in, for example, *Sykes v Midland Bank Executor & Trustee Co Ltd* (1971) 1 QB 113; *Allied Maples Group Ltd v Simmons & Simmons* (1995) 1 WLR 1602; *Hanflex Pty Ltd v NS Hope & Associates* (1990) 2 Qd R 218; and *Hall v Foong* (1995) 65 SASR 281. See also *Daniels v Anderson* (1995) 37 NSWLR 438, an auditor's negligence case in which, after a detailed consideration of *Sellars v Adelaide Petroleum NL* and other cases, this Court said at 530 that 'the issue of causation should be approached upon the basis of proof upon the balance of probabilities with the qualification that an assessment of whether the chance which is said to have been lost had a value is to be made upon the possibilities or probabilities of the case' and for the issue of causation asked whether the directors would have acted to avert the loss if properly informed by the auditor.

[33] I adopt this approach to whether the respondents would have instructed the appellant that the contracts should be made interdependent. As will appear, it would not matter if what the respondents would have done was according to the degree of probability. Whether Skyworld would have agreed and whether it would have completed the contracts, however, are part of the valuation of the lost chance, to be ascertained by reference to the degree of probabilities or possibilities.

[34] I should, however, refer to *Gove (sic) v Montague Mining Pty Ltd* [2000] FCA 1214 on which the respondents relied. The plaintiff claimed against its solicitors for negligent advice in relation to a commercial agreement. It was held that the plaintiff had failed to prove that any negligence caused it loss because it did not call evidence of what it would have done if the correct advice had been given. Some of their Honours' discussion at [31]–[70] appears to have regarded proof on the balance of probabilities as applicable not only to what the plaintiff would have done if the correct advice had been given, but also to whether the opposite party would have agreed to an additional clause in the agreement and whether the absence of the clause "was a material cause of putting [the plaintiff] in the situation where it had to

> accept a less valuable bargain". However, it appears that the focus of the discussion was on what the plaintiff would have done, and so far as the discussion went further it was influenced by an earlier decision of the Full Federal Court in *WCW Pty Ltd v Bolster* (6 January 1993 unreported) which in turn relied on *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149. *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* must now be read in the light of *Sellars v Adelaide Petroleum NL* and *Daniels v Anderson*, and of the principles now established. In my view whether Skyworld would have agreed was to be approached according to the degree of probability rather than on the balance of probabilities."

[80] As Mr Jackson QC conceded for GMH there will be cases where it is only possible to speculate about these possibilities because of the death of potential witnesses. It seems to me, too, that, even if all relevant witnesses are alive and give evidence, there is still going to be an element of speculation about what decision they might have made some years in the past about circumstances then confronting them. In my view, therefore, I am able to assess the chance that Zupps would have agreed to purchase the shares in PLM, but I am certainly inhibited in reaching the view that the chance was significant by the failure to call a witness from that organisation.

[81] Nor was I given the benefit of any evidence from Mr Lockhart about the amount of any discount he would have given to Zupps to entice it to buy his shares rather than PLM's business. An incentive was given to Mr Newton to change the nature of the transaction by a reduction of the goodwill component from $3,600,000 to $3,400,000. Mr Couper QC invited me to conclude that a similar discount, or perhaps more, would have been offered to Zupps. Presumably, also, there would have been some level below which Mr Lockhart would have preferred to hold Zupps to the agreement he had already made.

[82] There is no reason simply to assume that Zupps would have offered a similar amount to purchase the shares as they had proposed for the purchase of the business. Considering that the interests associated with Mr Newton were able to be persuaded to change the transaction from a purchase of the business and its assets to a share purchase there is likely to be some chance, however, that Zupps could have been persuaded similarly. Because of the failure to call anyone from Zupps to prove that it would have agreed to purchase the shares, however, I believe I am justified in concluding that the loss of a chance should be valued conservatively. If there had been such a transaction then the difference between the goodwill amount of $5,000,000 offered by Zupps, assuming it would have offered the same amount when notionally purchasing the shares in PLM, from that paid by 4214 Holdings Pty Ltd, would have been approximately $1,600,000. The parties agreed that the pre-tax figure was appropriate, although the defendant's calculations were based on after tax figures grossed up to represent the pre-tax amount. On the basis that the maximum loss claimable would have been $1,600,000 I would value the loss of the chance of achieving that benefit at no more than $400,000.

[83] It is more rational to recognise the chance that Zupps would have agreed to pay rent to the plaintiffs at the rates set out in their agreement with PLM even if they had eventually bought the shares in that company. Clearly Zupps was interested in

acquiring the business in circumstances where they would be operating from the existing premises. There were problems associated with the calculation of the likely loss that the plaintiffs would have suffered, however, because the agreement with Zupps did not identify whether it would be paying outgoings and nobody was called from Zupps to prove that they would have agreed to make such payments where the rent they had agreed already seemed well above the market price. Nor was there satisfactory evidence about the level of actual outgoings or of the likely market rents from October 2008 onwards after the initial agreement with Zupps would have ceased. The plaintiffs, having considered whether to call evidence of market rents, expressly decided not to do so. Nor was there any evidence of the likelihood of Zupps' continuing ability to pay rent or of the likelihood that it would have continued to be the lessee.

[84] It was submitted for GMH that Mr McGuiness's calculations demonstrate that, taking into account the actual rents received to date by the plaintiffs, which slightly exceeded the rents to which they have been entitled under the leases, and taking into account the inflation rates implied by the rental increases over that period, the net present value, at 31 October 2003, of the true losses is $378,882.129. I accept those calculations and think it appropriate to adopt the conventional approach of assessing the damages as at the date of the alleged breach rather than the approach more common in assessing damages for loss of earning capacity, where a plaintiff has been injured, of calculating the total of lost earnings by the date of the trial.[49] The latter approach was urged on me by the plaintiffs as a more reliable method of calculating the loss of an income stream such as the rental in this case. The conventional approach focuses on assessing the loss prospectively and is better calculated to allow parties to discover the value of their loss at as early a date as possible.

[85] The actual leases by the plaintiffs to 4214 Holdings Pty Ltd divide the total rent for the whole premises between the plaintiffs in the ratio (first to second plaintiff) of 58.67:41.33. Therefore, it was argued, the total nominal loss over the period of $550,055 results in a loss to the first plaintiff of $323,891 and to the second plaintiff of $226,164. Those figures, discounted to net present value as at 31 October 2003, would be $218,501 and $160,381 respectively on which interest would be assessable from then until judgment. Mr McGuiness's approach to assessing the net present value of those figures was more persuasive than that of Mr Lytras who was instructed to assume that the rental stream of income was risk free, an unrealistic assumption.

[86] The defendant also persuaded me that no future losses had been proved in respect of any differences in rental that might have been achieved had Zupps been given the franchise so my view is that no loss is shown into the future. Therefore, if I had been of the view that the plaintiffs had any entitlement to damages, I would have assessed them as $400,000 to the first plaintiff in respect of the loss of the chance to sell the shares in PLM to Zupps and as $218,501 and $160,381 to the first and second plaintiffs respectively in respect of the potential loss of rental. I would have assessed interest on those sums since 31 October 2003 at 10 per cent per annum.

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49 See, e,g,, *Freudhofer v. Poledano* [1972] VR 287, 290-291.

Orders

[87] Because of my decision that there has been no breach of the Code or contravention of s 51AD, however, there should be judgment for the defendant with costs, including reserved costs, on the standard basis.