FINAL EXAMINATION

CONTRACTS

HOUSE OF RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after you receive the exam via email around 10 am on Monday, May 11, 2015. You must submit your answers by 1 pm on Thursday, May 14, 2015. **If you turn in your answers after 1 pm on May 14, then you will receive an F for your Contracts grade. NO EXCUSES.**

2. **TURNING IN YOUR ANSWERS:** Turn in your answer by sending the file to registrar@law.du.edu. It's a good idea to send your answer with either a send receipt or a delivery receipt. As well, send yourself a copy of the message that you send to the registrar. This will verify the fact and time of sending your answer. DO NOT SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL. In the subject line of your email, put the following text: "Russell-Contracts-[exam number]" where [exam number] is your exam number. Name the file that contains your answer using the same convention: Russell-Contracts-[exam number]. If you have technical problems turning in your answer, please contact the registrar. **Do NOT contact Professor Russell with difficulties related to exam submission.**

3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answers to anyone at all before 1 pm on Thursday, May 14. Be cautious, for example, about posting anything on

Facebook that anyone might think is a request for assistance. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 1 pm on May 14, 2015.

4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. **Do not put your name anywhere on the exam.** You should name the file Russell-Contracts-[Exam Number]

5. **LENGTH:** This examination consists of one question. You may use no more than 2,500 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination. **Include the word count at the end of your answer.**

6. **SPACING:** Please double-space your answers. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. Avoid wasting time with lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another. **Starting the exam with a long list of general points is a waste of time.**

8. **JURISDICTION:** The laws of the 51st state of the union apply to all the issues in this examination. This state has adopted the Uniform Commercial Code. The 51st state is NOT Colorado.

9. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answer. You will earn a better grade by being thorough and concise. And, of course, well-organized answers will be the best answers that earn the highest grades.

10. **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise. You have to accept the exam's presentation as true. For example, if there is lava in the exam, the exam indicates that lava is 1,500 degrees Fahrenheit, but you happen to know that lava is much hotter, then you should put aside your superior knowledge and accept the lava as being the temperature that the exam says it is. Typically, House of Russell exams try to simplify some issues by mashing down the science just a bit.

11. **KEEP A COPY:** You should feel free, of course, to keep a copy of the exam. Please keep your answer also.

12. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Dean of Students immediately after this examination ends.

13. **GOOD LUCK:** Good luck and have a great summer.

Das Franchise (франшиза)

Your client is Jim Bizowner. The news story below, which has just run in the newspaper, concerns one of several issues for which he needs your help. Mr. Bizowner has talked with your boss, Amy Partner, in the small, business boutique law firm in which you work.

Two Newstate cafés defect from Daz Bog, emerge as Genessee Coffee

By Alicia Wallace, The Newstate Post

Two Newstate coffee shops have defected from Daz Bog Coffee.

After closing Tuesday night as franchise locations for the Russian-themed company, the coffee shops at 110 16th St. and 1200 Clayton St. reopened Wednesday morning as Genessee Coffee stores.

Under the cover of night, workers removed the red-and-black Daz Bog signs, tiled and painted over the Newstate-based firm's signature Russian-language writing on the walls, and replaced the menu boards to reflect an all-local lineup of food and coffee.

Now filling the pastry cases are baked goods from Newstate's City Bakery, and the coffee beans are from local roasters Corvus and Novo.

"Financially, it was impossible for us to go any longer, so we decided to debrand and rebrand and face the consequences," said Jim Bizowner, a Daz Bog franchisee who owned the two locations with his late son, Brian, since January 2013. "We told the franchisor that we were going to do it. We called their bluff."

"I started these locations two years ago with my son," Bizowner said. "We put our heart and soul into these stores. It doesn't matter how hard you work; under the Daz Bog system, you just can't succeed."

How long the coffee shops will remain Genessee Coffee locations remains to be seen.

Daz Bog president and chief operating officer Leonid Fyodorov said Wednesday the company plans to take "immediate possession" of the store locations.

"We were surprised to see our former franchisee Jim Bizowner step outside of the legal process and violate the franchise agreement with us by rebranding our two Daz Bog stores in violation of Daz Bog's rights," Fyodorov said in a prepared statement. Said Fyodorov: "Daz Bog takes these matters very seriously and we intend to use all available legal resources and processes to appropriately resolve these disputes. Due to the unfortunate breach of his obligations as a franchisee, Daz Bog has terminated Bizowner's Franchise Agreements and given notice to the landlords of our intent to take immediate possession of the store locations."

Bizowner claims the franchisor engages in unfair business practices, including overcharging its franchisees for goods. "Daz Bog charges franchisees prices that

are considerably higher than industry standards for products that must be purchased from Daz Bog," said Bizowner.

Bruce Van Zandt, a morning regular at the 110 16th St. coffee shop for nearly 10 years, has seen the location change from a Diedrich Coffee to a Daz Bog and now to a Genessee. The location and the friendly staff, including longtime barista Megan Lamothe, are what keep him coming back, he said. "This is a great transition for me," he said, noting the small-batch coffees. "I love it."

[End of article.]

Bizowner has described to your boss the details of his entering into the contract with Fyodorov to form two Daz Bog franchises. Bizowner, who previously had managed a boat dealership, was experienced in business although he was not someone ordinarily thought of as "savvy."

Bizowner approached Daz Bog after reading about franchise possibilities on the Daz Bog web site. Bizowner felt that he met Daz Bog's expectations: he was a team player and a people person who was attentive to detail and enthusiastic. He also met the financial qualifications because he had more than $200,000 in cash and otherwise met the financial qualifications.

In June of 2012, Fyodorov, the CEO and owner of Daz Bog, received email from Bizowner saying that Bizowner was interested in becoming a Daz Bog franchisee. Fyodorov believed strongly that next to personal and financial qualifications, enthusiasm is a key success factor. For that reason, Fyodorov looks

for people who exhibit a high level of enthusiasm and who are motivated to succeed. Building a successful business takes dedication and hard work, and Fyodorov believes the key to success is the energy and enthusiasm of the business's leadership.

Bizowner has told your boss that when he first met in person with Mr Fyodorov, Fyodorov told Bizowner that "I have got unique opportunities in Newstate for two new Daz Bog stores." Bizowner claims that Fyodorov showed him a document that included combined weekly gross sales figures for the two stores, ascending each week, starting from $5,000 and progressing by increments of $1,000 to $14,000 weekly combined profit for the two coffee stores. Underneath these figures were expected expenses and net figures for profits generated relative to sales achieved. Fyodorov described the document as a "pro forma expenditure statement." Although Fyodorov showed the document to Bizowner, Fyodorov did not give Bizowner a copy. Bizowner is adamant that Fyodorov used this document to show the sales figures that Bizowner could expect once he opened the stores and that the figures in the document showed the profit that Bizowner could expect from operating two coffee franchises.

Bizowner says he has a clear memory of Fyodorov saying to him "you can expect sales of $11,000/$12,000 per week, but it will take a good 3 months and then you will be right after that. The first month will be a hit and then it will die down a bit." Fyodorov then showed him the document and pointed to the columns headed "Weekly Sales." Bizowner recalls Fyodorov saying, "this is what you'll be doing in the first week, the second week etc." Mr Bizowner says he was excited by

these figures, and that these figures were the reason he decided to become a franchisee.

During the late summer of 2012, Bizowner continued to have discussions with Fyodorov. Bizowner learned that he would have to pay a $25,000, nonrefundable franchise fee for each of the two Daz Bog franchise stores that he wanted to start. Initially, Fyodorov told Bizowner that he should expect to make an initial investment of $187,000 for each coffee store. In the fall of 2012, though, he learned that $187,000 at the low end of initial investment in a franchise and that the franchisor recommended $269,000 as a median amount that franchisees should invest with $376,000 being the high end for initial investment in a franchise.

In November of 2012, Fyodorov telephoned Bizowner and requested $25,000 or one-half of the total deposit needed for two franchises. Fyodorov was anxious to get Bizowner's agreement, Bizowner recalls Fyodorov saying "I have shown you the weekly forecast figures for what the two coffee stores should be doing—you are losing money every week that you are not in the coffee business! I have shown you how much you can make." Bizowner believes that Fyodorov will deny having said this.

In December of 2012, Bizowner decided to pull the trigger and commit to two Daz Bog Franchises. He knew that he would not get the holiday revenue for 2012, but in light of the figures that Fyodorov had shown him, he felt very confident that he would soon be making substantial amounts of money. He paid Fyodorov a total of $50,000 for the franchise fees—$25,000 for each store. In effect, payment of this fee got him into the Daz Bog business. Once he opened his

businesses, which he expected to do in April of 2013, Bizowner would pay 6 percent of his gross revenue each month to Daz Bog as a royalty.

Bizowner opened both of his coffee shops on April 4, 2013. He had invested $400,000 in the shops—some funds he borrowed and some came from his cash reserves. As with any coffee shop, he sold coffee drinks, other beverages, food, cups, coffee paraphernalia, and beans. As predicted, there was a good deal of customer interest when he first opened after which business fell off somewhat and then climbed back. However, by late July of 2013, Bizowner could see that the projections that Fyodorov had shown him were far above his actual gross revenues for the two stores.

Bizowner had good staff in both coffee shops, and he worked nearly round the clock. Even so, after Christmas of 2013, he had not come anywhere near the $14,000 per week that Fyodorov had projected. His biggest week was only $7,000 total for the two stores, and after paying all his employees and expenses, he found that he was barely making money.

In January of 2014, he confronted Fyodorov about the fact that the figures that Fyodorov had suggested were apparently unobtainable. Fyodorov denied that he had ever given Bizowner projected sales figures. Fyodorov emphasized that it was company policy never to give prospective franchisees any projected sales figures. He said that there was no doubt that this was company policy. Fyodor implied that maybe he had made a mistake in thinking that Bizowner had what it took to be a Daz Bog franchisee. Bizowner was downhearted.

When he signed the franchise deal, Bizowner did not understand a different cost that he would face as a franchisee. In addition to requiring the franchise fee and a 6 percent royalty on his gross revenue, Bizowner also had to buy most of his supplies—beans, cups, sugar packets, utensils, filters, for instance—from Daz Bog. The markup on these supplies was very high— 68 percent mark-up on cold cups and a 41 percent mark-up on coffee filters, for example. These prices were far higher than what franchisees would pay if they bought directly from suppliers.

After talking with other Daz Bog franchisees in early 2015, Bizowner learned that a number of franchisees had failed; that nearly every franchisee thought that Daz Bog's requiring franchisees to purchase supplies at huge markups was both ridiculous and highly unusual in the business; and that everyone to whom he mentioned the financial projections that Fyodor showed him thought that the projected profits were unrealistically high and that Fyodor had lied to Bizowner when he suggested that Bizowner might have sales revenue as high as $14,000 per week. No other franchisee had heard of or had obtained sales figures that high.

After talking with these other owners, Bizowner resolved to do something. And last week, he made the bold move of stepping away from the franchise and has rebranded his stores as Genessee Coffee.

Bizowner provided sections of the contract that he thought might be relevant to Ms. Partner, as follows:

Paragraph 13. Liquidated Damages.

Upon the Franchisee's breach of this agreement or the Franchisor's termination of this agreement for good cause, the Franchisee shall pay to the Franchisor within 30 days of the date of the termination, as liquidated damages for the premature termination of this

agreement and not as a penalty, an amount equal to 3 ½ times the continuing royalty fees payable to the Franchisor in respect to the last 12 months' of the Franchised Business's active operations or for the entire period the Franchised Business has been open for business, whichever is the shorter period.

Paragraph 14. Gross Sales.

"Gross Sales" means:

(a) all revenue derived from the sale, at regular selling prices before any discounts or allowances, of any food, merchandise, and services, from the Store;

(b) all income of every kind and nature related to the Store, Franchise, or Marks, even if derived from sales or activities not permitted by this Agreement;

(c) the fair value of any non-monetary consideration received by Franchisee for any food, merchandise, and services, from the Shop, which are bartered, traded or otherwise exchanged by Franchisee for valuable goods or services; and

(d) all proceeds of any business interruption insurance policies related to the Store or Franchise.

Specifically excluded from "Gross Sales" are:

(i) the incidental sale of gift cards (or any similar redemption device), if authorized by Daz Bog; provided however that goods and services purchased with gift cards (or any similar redemption device) shall be included in Gross Sales, to the same extent as if paid for with cash;

(ii) sales taxes, excise taxes, or other taxes added to the selling price of any item or service, if actually collected from customers and transmitted to a governmental taxing authority; provided however any tax rebate, allowance, of discount shall be part of Gross Sales to the extent received, taken, or realized by Franchisee;

(iii) any extraordinary sale of equipment or fixtures used in the Store.

Paragraph 15. Franchisor Disclosure.

Franchisor does not provide projections on earnings. The franchisor does not give earnings information about a Daz Bog franchise. Earnings may vary between franchises. The franchisor cannot estimate earnings for a particular franchise. Like any business, risk is involved and no representation or guarantee (whether oral, written or implied) can be or has been given in relation to the store's success, profit, or potential turnover.

Paragraph 16. Legal Advice and Risk.

Franchisor recommends that Franchisee obtains legal advice in respect of this document and the Related Documents and Franchisee acknowledges such recommendation and that Franchisee has had the opportunity to obtain such advice. Franchisee acknowledges that Franchisee has conducted an independent investigation of the business and the Franchised Business and recognizes that:

(a) the Franchised Business involves business risks that make the success of the Franchised Business largely dependent on Franchisee's business abilities; and
(b) although Franchisor has used its best endeavors to ensure that the Franchise site is satisfactory for the operation of the Franchise Business, Franchisee shall make no claim against Franchisor as a consequence of the location of the Franchise Site proving to be unsatisfactory for the conduct of the Franchise Business.

Paragraph 17. Entire Agreement and Acknowledgement.
This document together with any Related Document contains the entire agreement and understanding of the parties with respect to the Franchised Business and the Business. There are no representations, undertakings, agreements, terms or conditions not contained or referred to herein or in the Related Documents. This document supersedes and extinguishes any prior written agreement between the parties or any of them relating to the location of the Franchise Site. Franchisee confirms and acknowledges that prior to having executed this document Franchisee has read the provisions of this document carefully.

Breaking up the franchise relationship has opened a variety of other questions. Bizowner asked Ms. Partner about three in particular.

First, Bizowner wants to get rid of the cleaning service that he has used since he opened both of his Daz Bog franchises. When he opened the business, Fyodorov recommended to him that he hire Daz Cleaners, a cleaning service that specialized in cleaning restaurants, coffee shops, and bars. To say that Fyodorov recommended the service is something of a misstatement; Bizowner feels that Fyodorov demanded that he hire them. Implicit in the suggestion that he hire Daz Cleaners was the threat that if he did not do so, he would not be allowed to operate the franchise.

In any event, Daz Cleaners are expensive, and Bizowner wants to fire them. They charge $1,500 per month to clean both stores; Bizowner could save a lot of money by having his own employees clean the stores.

Bizowner has no written contract with Daz Cleaners. Just before he opened the stores, Bizowner hired Daz Cleaners with a handshake and oral agreement to pay them $1,500 per month. In a face-to-face conversation, he promised the owner of Daz Cleaners that they would be his cleaners for as long as he operated the stores, which was to be ten years under the original contract. They then shook hands on the deal. They have been cleaning his stores every night since he opened. Now that the franchise contract is over, he wants to save money.

Second, Bizowner is concerned about a delivery that is scheduled to arrive on Friday, May 15. For the past year, Bizowner has had a contract with a paper printing company that delivers napkins printed with the Daz Bog logo. These napkins are one of the few supplies that Bizowner has not been obliged to buy from the franchisor. The shipment arrives on the third Friday of every month and costs $450. Because the napkins are imprinted with the Daz Bog logo, Bizowner has no use for them.

Bizowner purchased the napkins using a form that Bizowner received during franchisee training. The franchise trainer explained that the form contained fine print that said "Acceptance is expressly made conditional on assent to the additional or different terms." Elsewhere in the fine print, the acknowledgement that Bizowner used contained a provision that "the contract includes implied warranties of merchantability and fitness for a particular purpose" and also a

provision that "the buyer will not be liable for any injuries to the seller, its staff, or agents including injuries due solely to the negligence of the buyer."

When Bizowner had first ordered printed napkins from the napkin printer, Bizowner had telephoned the company, which was called Printers, Inc. He described what he wanted, and Printers' salesperson took the order and said that he would send the invoice. The seller's invoice included a disclaimer that said "no alteration of the terms of this order, whether with different or additional terms, will constitute an acceptance." Bizowner then sent back his own form with the language mentioned above. Bizowner has been interested to see that paper forms that contradict each other have nonetheless resulted in delivery of napkins every month for 11 months. This month, however, because he no longer has any need for napkins printed with "Daz Bog," he plans on rejecting the shipment after he tells Printers that the printed terms of their forms do not form a contract.

Third, Bizowner has a warranty claim. Last month, he agreed to purchase a new espresso machine that the seller, Espresso Machines, LLC, claimed would speed up the production of coffee using higher-capacity machines. The commercial-grade machine cost $3,500. The design of the machines allows a barista to make six different coffee drinks simultaneously. Previously, the stores' machines allowed only four different coffee drinks to be made at once. The Espresso Machines salesperson explained that during peak morning sales times, the new six-way machine would speed up service to the line of customers and therefore yield higher profits for the store. Bizowner agreed to purchase one of the machines for one of his stores, and he signed a contract with Espresso Machines that, he noticed last week while reviewing some paperwork, contained this

sentence on the rear of the form: **"THERE ARE NO IMPLIED OR EXPRESS WARRANTIES."**

Here is the problem with the new coffee-making machine, which was installed last week during the night of the transition from Daz Bog to Genessee. If a barista steams milk while also making coffee, then the production of coffee stops. There seems to be some sort of mechanism in the espresso machine that diverts water from the production of coffee when the barista steams milk. Or maybe there is a defect in the design of the espresso machine's motherboard. Because so many of his morning customers drink cappuccino—which requires steamed milk—the new machine slows the production of coffee in his store and makes the lines longer. The longer lines are costing him business and customers leave and go to competitors' shops for coffee.

Your job is to write a memo to your boss Amy Partner in which you advise her how to advise Bizowner with regard to Daz Bog, Daz Cleaners, Printers, Inc., and Espresso Machines, LLC. Note that Newstate does NOT have a special set of statutes dealing with franchises. Note, too, that your concern is Contract law.

END OF EXAM

Memorandum

To: Contracts Students

From: Professor Thomas D. Russell

Date: September 7, 2015

Re: **Spring 2015 Contracts Exam—Das Franchise (франшиза)**

The spring 2015 exam was a good exam that was somewhat less challenging than other final exams in recent years. The exam was based upon a combination of a local news story involving two Denver Dazbog coffee franchises and the facts of an Australian case involving a muffin franchise (Van Camp v Muffin Break Pty Ltd, FMCA 386 (2008) 2008 WL 1875984. (attached)

Consistent with faculty policy, the mean was 3.10 and the median was 3.00. The exam grades were as follows:

Grade earned	Number
A	2
A-	3
B+	10
B	9
B-	6
C+	1
C	0
C-	1
D+ & below	0

Attached are three answers. The first two are the highest-scoring answers, which have both excellent content and fine organization. The third answer, though not one of the highest scoring in the

class, is beautifully organized and a fine example of how, going forward, I hope students will organize their exam answers.

Each of the four parts of the exam offered different challenges.

The first part of the exam concerned the franchise agreement itself. The standard analysis using the complete organization that I presented from the start of the course was paramount. Oddly, some students neglected in this and other parts of their answers to mention promissory estoppel after discussing consideration.

A franchise agreement, in the absence of a specialized franchise statute, is subject to the common law. The call of the question specified that there was no applicable franchise law in the jurisdiction. In class, when we discussed the Elway case and the exam based upon that case, I made clear that Article 2 of the UCC did not apply to franchises. Nonetheless, many students said that the UCC applied to the Daz Bog franchises. Many others analyzed both the common law and Article 2, which was a Waste of Time (WOT). Those students who included Article 2 in their analysis of the franchise agreement earned lower grades.

The next substantial issue in the first part was the application of the parol evidence rule. Many students regurgitated the basic distinctions between Willistonian and Corbinesque jurisdictions without making clear why the differences mattered. Of critical importance, whatever the jurisdiction, was the fraud exception to the parol evidence rule. If the franchisor committed fraud during the negotiations, then evidence of the negotiations is admissible.

The implied covenant of good faith and fair dealing was also at issue in this section. Once bound together in a franchise agreement, a franchisor may not deal in bad faith with its franchisees.

The liquidated damages clause of the franchise agreement was also an important issue. The clause in the exam is a standard clause used in franchise agreements. The liquidated damages clause would not operate as a penalty against the franchisee and, as many students showed, would likely be less than expectation damages.

The fraud issue connected with the parol evidence rule analysis led to two important possibilities for the franchisee. One is that fraud in the inducement may vitiate the entire contract because there is a failure of consideration. If there was fraud in the formation, then the franchisee may be entitled to restitution damages. Many students observed that the franchisee might use fraud as a defense, but few students thought the fraud issue through and explained that the franchisee, though seemingly the breacher, might be entitled to damages.

Strong answers to the first part of the exam thus led to analysis of damages for both parties to this transaction—not just the franchisor.

The second part of the exam demanded a common law analysis of the breach of the service contract to clean the stores. Here again, students who also included Article 2 analysis demonstrated that they did not understand the applicability of Article 2.

The second part of the exam included a statute of frauds issue. The franchisee agreed to use Daz Cleaners as long as he operated the stores. Although the original franchise agreement was to be

ten years, the franchisee might operate the stores for less than one year, which means that the agreement was not within the statute of frauds. The remainder of the breach analysis—including promissory estoppel—was generally straightforward. Answers needed to include an analysis of the duress issue, which was not likely to be successful for the franchisor.

The third section concerned the napkins. This section included a battle of forms (2-207) issue that led to the conclusion that there was no paper deal, but that the parties, by performing, formed a 2-207(3) paper deal. Arguably, the franchisee committed bad faith in negotiating the contract. Strong answers included three points: 1) the printer might readily resell the printed napkins to another Daz Bog franchisee; 2) the amount in dispute was tiny; and 3) the franchisee should seek to continue his good relationship with the printer by having the printer provide napkins with the new logo.

The fourth section concerns espresso machines and therefore Article 2 of the UCC applies. Including an analysis of both Article 2 and the common law, as above with the franchise agreement, was a WOT and yielded a lower grade.

This section, in addition to the standard analysis, called for an analysis of the creation and limitation of express and implied warranties. However, the key to this section was not the analysis of warranties but rather the realization that the franchisee was still in a position to reject the machines or, if need be, revoke acceptance of the machines. Although the question suggested that BizOwner had a warranty claim, the strongest answers noted that rejecting the new machines was the best remedy.

Daz Bog (DB) Franchisee Agreement:

- Applicable law: Common Law (Restatement)
  - Service: A franchise grants the ability to run a business using the franchisor's branding and corporate structure (HR, Supply Chain, etc.). Any goods are incidental to this service.
- Enforceability:
  - Offer:
    - The main bulk of the agreement is to sell two franchises for $50,000 and 6% of all gross revenues generated therefrom. This represents an offer to enter into a bargain from DB, to Bizowner. (§24)
  - Acceptance:
    - Biz owner signed the written contract, paid the $50,000, and continued to pay the 6% royalty for approximately 2.5 years (December 2012-May 2015). This constitutes acceptance by manifestation of assent and by performance. (§50)
  - Consideration
    - A promise (providing and continuing to provide branding and business services) for a promise (upfront money, a promise for

continued royalties, and a promise to run the business in conformity to the Franchise Agreement). (§71)

- Promissory Estoppel:
  - If traditional formation fails, the mutual signing of the contract would generally induce action/performance of its terms. Further, performance of the deal evinces a binding agreement. (§90)

- Content of the Deal:
  - Parol Evidence Rule:
    - Analysis:
      - Is there a written contract?
        - Yes (§209)
      - Is the written contract integrated?
        - Yes. Paragraph 17 of the contract is a merger clause, which makes the written contract the final expression of the terms and supersedes all prior written agreements. (§209(1))
      - Is the written contract completely integrated?
        - Probably. Paragraph 17 states that the written contract and "any Related Document" constitutes

the entire agreement. This appears to be a complete and exclusive statement of the terms. (§210)

- Ambiguity:
    - However, "any Related Document" is vague/ambiguous. A Willistonian judge will likely interpret the term to include only documents/sections within the written contract. However, a Corbinesque judge/jurisdiction might allow interpretive evidence from outside the written contract. The subjective, Corbinesque approach is favored by the majority and §201.
    - Thus, a Corbinesque judge could interpret the term to include the pro forma, a seemingly "related document." However, it is unlikely that a judge would do so because the pro forma is inconsistent with paragraph 15 of the written contract.
- Result:
    - Therefore, the Parol Evidence Rule (§213) discharges all inconsistent prior agreements and other agreements within the scope of the written contract. This would exclude/make inadmissible all evidence about the

predicted profitability of the stores because it contradicts the written contract (paragraph 15).

- Express warranty of profitability and/or Condition Subsequent:
  - Creation:
    - Evidence about Fyodorov's statements about profitability will be inadmissible in establishing the creation of such a warranty/condition.
  - Disclaimer:
    - Further, the written contract effectively disclaims warranties as to the profitability of the store and/or the franchisor's liability for the franchisee's financial failure. (Paragraph 15, 16)

- Breach:
  - By rebranding overnight and ending the 10 year agreement after 2.5 years, Bizowner has likely breached the contract. Any right to revoke acceptance of the contract has expired.
- Damages: (for DB)
  - Liquidated damages (§356)
    - 3.5 x (6% x Gross Revenues from May 2014 to May 2015)

- This exact amount is likely less than the Expectation Interest (depends on DB's saved expenses) and therefore, is a reasonable calculation of damages from the time of contracting. Thus, paragraph 13's liquidated damages clause is not a penalty and therefore, enforceable.

- Expectation: §347
  - If the Liquidated Damages clause is deemed a penalty, the Expectation Interest would seek to put DB in as good a position as if the contract was fully performed.
  - [6% x Expected Gross Revenues for remainder of the contract's length (approximately 7.5 years)] + Incidentals (includes profit from supplies sales)(No discernable consequential damages) - Expenses Saved by DB (overhead)
- Reliance: §349
  - The Reliance Interest attempts to return the parties to their positions prior to contracting. Here, it consists of DB's damages from expenditures made in preparation/performance, but not already compensated for by Bizowner.
- Restitution: §371

- Requires Bizowner to return any unjust enrichment from DB. The record doesn't indicate any such amount.

- Specific Performance: §359(1)
  - Specific Performance will not be available to DB because Liquidated Damages/Expectation Interest will be adequate, the amount of damages ascertainable, substitute performance is possible, and damages are likely collectable. (§360(a)-(c))

- Defenses:
  - Statute of Limitations:
    - If DB sues Bizowner, the suit must be filed within a specified period of time. Such time is likely in the Newstate statutes.
  - Fraud: §162
    - Analysis:
      - Did DB intend to induce assent/action?
        - Yes. Fyodorov, as an agent of DB, said he had "unique opportunities" and repeatedly told/reminded Bizowner about the profit he could earn. (§162(1))
      - Did DB affirmatively misrepresent facts?

        - Yes. The pro forma projections were "unrealistically high" and the other DB franchisees said Bizowner could never have achieved profits of $14,000/week. (§162(1)(a)-(b))
    - Were the misrepresentations material?
        - Yes. The misrepresentations would induce a reasonable person, as evinced by Bizowner's (an experienced businessman) assent, and therefore are material. (§162(2))
    - Were the misrepresentations assertions of opinion?
        - Fyodorov's use of specific details and financial documents/records suggests certainty/fact, not opinion. (§168(1)) Further, Bizowner's belief in Fyodorov's (DB's President/COO) financial statements was not unreasonable. (§169)
- Problem:
    - Bizowner currently has no proof of Fyodorov's fraudulent statements, Fyodorov denies making them, and other franchisees have not experienced such fraud/inducement.
- Solution:

- Bizowner may be able to find evidence/record of the pro forma document during Discovery.

- Result:
  - Thus, Fyodorov fraudulently induced Bizowner to assent to the written contract. Therefore, if Bizowner can prove such fraud, the contract would be voidable and Bizowner could avoid liability for contract breach and recover fraud/tort damages. (§164(1))

- Misrepresentation:
  - Bizowner was unaware of the requirement to buy supplies from DB and it is unclear if this was a term in the written contract. DB was best situated to have cleared up this confusion/mistake. (§161(b)-(c)) Thus, DB's non-disclosure of this fact might invalidate this term and limit DB's damages. (ASSUMING: contract contains a severability clause so the whole contract is not voided)

- Unconcionability:
  - Similarly, the requirement to buy supplies from DB may be deemed unconscionable because of the unfair pricing,

unusualness of the term, and Bizowner's inability to negotiate. (§208) This would only limit DB's damages.

- Good Faith:
  - If the prices were not specified at the time of agreement, using high prices (68% and 41% above value) may be deemed bad faith dealing in the performance of the contract. (§205) This would only limit DB's damages.
- Mitigation:
  - Bizowner may show that DB could mitigate the damages by entering another franchise agreement. However, if this argument succeeds, it may not decrease damages significantly since Bizowner would still be liable for the expensive process of mitigating/substituting via another franchise agreement.
- Impracticability:
  - Bizowner could argue that breach should be excused because it was financially impossible for him to succeed/continue. (§266(2)) However, to allow such a defense, the court must reallocate the risk of financial failure from Bizowner, as established in paragraph 16, to DB. Such reallocation is unlikely.

- Conclusion:
  - Bizowner breached the contract by rebranding and will be liable for the liquidated damages in paragraph 13 of the contract. Although he may have a valid defense of fraud, he currently lacks the necessary evidence. Thus, if he can afford it, Bizowner should go into Discovery and attempt to find such evidence. If the pro forma is not found during discovery, Bizowner should renegotiate/settle prior to trial.

Daz Cleaners (DC):

- Applicable law: Common Law (Restatement)
    - Service: Cleaning the stores
- Enforceability:
    - Offer:
        - Oral offer to clean 2 stores for $1,500/month. (§24)
    - Acceptance:
        - Bizowner shook the DC owner's hand and has performed. (§50)
    - Consideration:
        - A promise ($1,500/month for as long as operating) for a promise (cleaning services). (§71)
    - Promissory Estoppel:
        - If traditional formation fails, the oral promises, shaking hands, and 2.5 years of performance would generally induce further/continued performance. (§90)
- Breach:
    - Bizowner wants to end the contract immediately. This would likely constitute breach. Bizowner's use of the term "stores" is ambiguous and could mean "Daz Bog stores" or could mean "any stores." However, the contract will be interpreted against Bizowner, the party

who supplied the ambiguous words, and will thus, likely be construed as including the Genesee stores. (§206)

- Damages:
  - Liquidated Damages:
    - There is no Liquidated Damages clause/agreement.
  - Expectation: §347
    - DC's profits over the remaining course of the contract (an undefined, but reasonable length) + Incidental Damages - Costs saved by non-performance
  - Reliance: §349
    - DC's damages from expenditures made in preparation/performance of the contract not already compensated.
  - Restitution: §371
    - The record does not indicate any unjust compensation to Bizowner that would form the Restitution Interest.
  - Specific Performance: §359(1)
    - Specific Performance will not be available to DC. (§360(a)-(c))
- Defenses:
  - Statute of Limitations: See above.

- Statute of Frauds: §131
  - Is this agreement within the statute?
    - No. This agreement does not cover any of the traditional circumstances within the statute. Further, the agreement could be performed in less than 1 year. Thus, it is not within the statute and therefore, cannot be voided by the statute.
- Duress and/or Undue Influence:
  - Bizowner may be able to show duress and/or undue influence from Fyodorov's implicit threat/requirement. (§176(1)(d), §177(1)) However, since the duress came from a 3rd party and DC has given consideration and relied on the agreement, the contract is not voidable under duress. (§175) Likewise, even though DC is expensive and has a similar name to DB, these facts alone, are insufficient to show bad faith or awareness of the undue influence. Therefore the contract is, also, likely not voidable under Undue Influence. (§177(3))
- Mitigation:

- Bizowner can argue that DC can mitigate the damages by entering new/replacement contracts. However, this will only limit, not destroy, Bizowner's liability for damages.

- Conclusion:
  - Immediately ending this contract will likely be considered breach by Bizowner. Bizowner should tell DC that the contract was only for the DB branded stores, not the Genesee stores. If DC is not persuaded, Bizowner should pursue negotiations to end the contract.

Printers, Inc.:

- Applicable law: UCC (2-102, 2-105)
    - Goods: Printed napkins
- Enforceability:
    - Offer:
        - Printers, Inc. offered printed napkins for $450/month. (2-204(1))
    - Acceptance:
        - Bizowner reached agreement with the salesperson and has performed. (2-204(1))
    - Consideration:
        - Promise ($450/month) for Promise (napkins)
    - Promissory Estoppel:
        - If traditional formation fails, mutual performance for 11 months would induce further/continued performance. (§90 via UCC 1-103)
- Content of the Deal:
    - Battle of the Forms: 2-207
        - Bizowner sent acceptance of the of the seller's terms via his own form, constituting a definite and seasonable expression of acceptance. (2-207(1)) The form made acceptance conditional

on the different/new terms. (2-207(2)) Yet, even without exact agreement, both parties performed as if there was a contract for 11 months. (2-207(3)) Thus, a valid and binding contract does exist and includes the agreed upon terms, plus UCC gap-fillers for conflicting/unspecified terms. (2-207(3))

- Conclusion:
  - Bizowner should not reject the agreed upon shipment because he will breach the contract and be liable for damages (2-601, 2-602, 2-608) which could be as much as Printers Inc.'s total profit for the remainder of the contract's length plus incidental expenses (Expectation Interest). Rather, Bizowner should attempt to modify the deal in order to receive napkins printed with the Genesee logo. At only $450/month, Printers, Inc. may be willing to incur the cost of reprinting this month's supply in-order to preserve/bolster the business relationship.

Espresso Machines, LLC (EM):

- Applicable law: UCC (2-102, 2-105)
    - Goods: Six-way Espresso Machine
- Enforceability:
    - Offer:
        - EM offered a six-way espresso machine for $3,500. (2-204(1))
    - Acceptance:
        - Bizowner signed a contract and paid for the machine. (2-204(1))
    - Consideration:
        - Promise (six-way espresso machine) for a Promise ($3,500).
    - Promissory Estoppel:
        - If traditional formation fails, the mutual signing of the contract would generally induce action/performance of its terms. (§90 via UCC 1-103)
    - Warranties:
        - Creation:
            - Express Warranties:
                - EM's claim that the machine will speed up business and lead to higher profits is merely puffing because

it is not specific, nor a description of the machine. (2-313(2))

- Yet, EM may have created an express warranty if its representatives said the machine can make "six different coffee drinks simultaneously." (2-313(1)(a)) However, the record is not clear who said this.

- Implied Warranties:
  - An implied Warranty of Merchantability is always implied in UCC contracts. (2-314(1))
  - Also, an implied Warranty of Fitness for Particular Purpose is implied in this contract because EM was aware that the machine was purchased to increase coffee production and Bizowner likely relied on the seller's assertion that the machine would do so. (2-315)

- Limitation/Disclaimer:
  - Express Warranties:
    - The contract used to purchase the machine included a clause purporting to disclaim all implied and

express warranties. If an express warranty as to the ability to make six coffee drinks simultaneously, has been created, this general clause does not disclaim it due to a lack of specificity. (2-316(1))

- Implied Warranties:
  - Similarly, this clause fails to disclaim the Implied Warranty of Merchantability because it doesn't specifically mention the term "merchantability". (2-316(2)
  - Yet, the clause likely succeeds at disclaiming the Implied Warranty of Fitness for a Particular Purpose because it is in writing and in bolded, capitol letters. (2-316(2), 1-201(b)(10)) However, if this clause is not with other boilerplate, but is hidden on the back, it is not conspicuous and thus, would fail to disclaim any of the warranties.

- Breach:
  - Inspect and reject:
    - Bizowner has a right to inspect the goods upon delivery (2-513) and, within a reasonable time, (2-602(1)) to notify EM and

reject the goods if they fail, in any respect, to conform to the contract. (2-601) If a design flaw or motherboard issue caused the defect, Bizowner may reject the goods since they were received "last week." Rejection would give EM a right to deliver conforming goods and prevent breach. (2-508)

- Revoke Acceptance:
    - However, if a court determines that a reasonable time for inspection/rejection has passed, Bizowner may still revoke his acceptance of the goods because the machine's value is substantially impaired to him, since it actually causes slower drink production. (2-608)
- Warranties:
    - If an Express Warranty for the ability to make six coffee drinks simultaneously has been created, then it is also, likely breached. "[C]offee drink" implies that the machine has the ability to make espresso and steam milk simultaneously and thus, the machine fails to conform. (2-313(1)(b))
    - Similarly, the machine does not pass without objection under the description and is not fit for its ordinary purpose. (2-314)

Therefore, the Implied Warranty of Merchantability is also breached.

- Conclusion:
  - Bizowner should immediately attempt to reject the machine and allow EM to cure. If EM refuses or is unable, Bizowner should sue for breach of warranties. (ASSUMING: no remedy limitation (2-719)) However, such damages will not include the consequential damages from lost customers, as Bizowner never expressed such a concern/potential loss to EM. (2-714(3), 2-715(2))

Word Count: 2,500

To: Ms. Partner

From: 539

RE: Bizowner

DAZ BOG(DB)–FRANCHISE AGREEMENT

Applicable Law

- Common law applies, running a franchise coffee shop is a service. UCC applies only to goods(i.e. sale of coffee).

Enforceability

- *Offer/Acceptance:*
  - Preliminary discussions aren't an offer, but an indication of willingness to negotiate. Bizowner reached out to Fyodorov, so he is the master of the offer. Standard to determine an offer is objective, a third party on skype would think Bizowner made an offer to Fyodorov. Fyodorov was able to say "I accept" to Bizowner's offer to be a franchisee.
- *Consideration:*
  - Promise for promise, helps tell gifts from contracts. Bizowner promised to make investment in a DB franchise and Fyodorov promised to provide franchise support.
- *Promissory Estoppel:*
  - Even if no contract, Fyodorov promised Bizowner could have a franchise if he paid the franchise fee on which reasonably induced Bizowner's reliance(Restatement§90).

Content

- *Parol Evidence Rule(PER):*
  - There's nothing to indicate the contract wasn't intended to be a final expression of Bizowner—Fyodorov's agreement. A judge determines if the contract is integrated and whether it's partial or complete. Under Willistonian jurisdiction the merger clause indicates complete integration, PER would apply, and Bizowner can't introduce evidence of the pro forma expenditure statement. Under Corbinesque jurisdiction the merger clause is evidence of integration, but not determinative and a judge would consider evidence as to integration. PER bars evidence that directly contradicts with a contract term. The statement directly contradicts ¶15. However, PER wouldn't prohibit Bizowner's use of the statement to prove fraud.
- *Covenants Not to Compete:*
  - Contract likely had a clause prohibiting Bizowner from operating a coffee shop in a certain radius, upon termination of contract. If such a clause exists, Bizowner

may be liable for breach because he is still running the shops. If a court thought the clause violated public policy it would blue pencil.

Breach

- *Franchise Agreement:*
  - Bizowner failed in his obligation to continue the business under DB franchise. Such a material breach relieves Fyodorov from his duties and would make Bizowner liable for damages. Fyodorov could have sued earlier as Bizowner anticipatorily breached in telling Fyodorov he was de-branding. However, Bizowner should claim Fyodorov committed fraud, and that continuation of the contract has become impracticable because of DB's unconscionable business practices. If successful, it would relieve Bizowner from liability.
- *Conditions:*
  - Failure of a condition to occur isn't breach. Likely the contract had a concurrent condition, unless Bizowner paid franchise fee Fyodorov didn't have to grant DB franchise and vice versa. However, conditions were met.

Damages

- *Liquidated:*
  - Clause isn't enforceable if it's a penalty/looks like a pound of flesh. Clause says 3.5 times continuing royalty fees for past 12 months. We don't know Bizowner's exact profits, estimating in the past year he made $7,000/week combined profit, then 3.5(6%•($7,000•52)=$76,440. If the court thinks it's a penalty it won't enforce ¶15 against Bizowner. A court may also think 3.5x royalty fees of a year, for a 10 year contract is reasonable after only 2 years of performance, but likely wouldn't find it reasonable if Bizowner's performance was closer to 10 years.
- *Expectation*:
  - Fydorov may try to recover expectation damages from Bizowner, but they're likely too speculative since we don't know what Bizowner's profits would be.
  - If Bizowner is successful in misrepresentation claim, he'd request damages to put him in the position he would've been if business performed as Fydorov indicated. 3 months after start, 9years 7months at $14,000/week=$1,610,000 expected profits—$728,000 actual profits(speculative at $7,000/week for 2 years)—costs saved(don't know). Bizowner isn't likely to recover expectation damages because they're too speculative, because of the new business rule, and likely can't recover expectation damages under void contract.
- *Reliance*:
  - If can't get expectation damages, Fydorov will request whatever amount it spent to train Bizowner and any investment it put in the store to be put back to square zero.
  - If successful in defense, Bizowner would ask for $50,000 in franchise fees+$400,000 in investment—$728,000 actual profits(speculative)=$254,000.

- *Restitution*:
  - Bizowner wasn't unjustly enriched by DB/Fydorov.
  - To avoid unjust enrichment, Bizowner could maybe get back his franchise fee.
- *Specific Performance*:
  - Where money suffices, court won't enforce specific performance. Also, courts generally don't require specific performance for services since requiring someone to work seems like involuntary servitude(Restatement§367).

Defenses

- *Misrepresentation*:
  - Fyodorov misstated a material fact in showing the pro forma statement. The statement isn't an opinion/puffing, it's used to persuade investors. Fydorov committed fraud as he likely knew other franchises hadn't made profits like the statement showed, or at least knew Bizowner likely wouldn't make those profits since the contract declined providing earning projections(Restatement162). Bizowner only decided to invest in the franchise after seeing the statement, it was reasonable to rely on such numbers as that's their purpose, and he lost money by investing in a business that didn't make money. Bizowner should try to rescind the contract and claim damages, but might not succeed in this claim. A court might find it wasn't reasonable to rely on the statement after seeing ¶15.
- *Good Faith*:
  - Fydorov didn't exercise good faith by representing to Bizowner, via the statement, Bizowner would make $14,000/week when the contract included ¶15. However, it's likely irrelevant because ¶15 specifically overrides Fydorov's actions. Fydorov may try to assert Bizowner didn't act in good faith by de-branding, but Bizowner notified Fydorov of his concerns, thus giving Fydorov a chance to re-negotiate.
- *Impracticability:*
  - With a 68% mark-up on cold cups, etc. it was impracticable for Bizowner to continue performance. It was likely impracticable at the beginning of the contract(Restatement266). Since this was an unusual business practice, it was unforeseeable to Bizowner the effect this would have on the business. However, if the requirement to purchase the marked up goods was in the contract Bizowner would have reason to know of costs and is unlikely to succeed on impractiability.
- *Unconscionability:*
  - Bizowner may claim mark-up on supplies is unconscionable because no honest man would have agreed to 68% mark-up, etc. Court could refuse to enforce contract or may enforce remainder of contract, but permit buying supplies at wholesale.

Conclusion

- Bizowner may have a fraud, impracticability, or unconscionability defense, but they're shaky defenses. It was likely more efficient for Bizowner to breach. Also, he should check he isn't violating a non-compete clause.

DAZ CLEANERS(DC)–CLEANING CONTRACT

Applicable Law

- Common law applies to services.

Enforceability

- *Offer/Acceptance:*
  - Bizowner is the master of offer. A third party on skype would think Bizowner made an offer. DC said "I accept" by immediately shaking hands.
- *Consideration:*
  - Promise for promise. Bizowner promised to pay DC $1,500/month and DC promised to clean both stores.
- *Promissory Estoppel:*
  - Even if no contract, Bizowner promised DC could clean the stores which may have induced DC to allocate resources/hire more personnel/turn away other customers in reliance(Restatement§90).

Content

- *Parol Evidence Rule(PER):*
  - Applies to oral contracts. Evidence that Fydorov demanded Bizowner hire DC normally would be precluded as it doesn't speak to integration/clarify terms of contract, but it may be used as evidence to show duress.
  - The statement as to the duration of contract with DC may also fall under PER, but even if it did, a Corbinesque jurisdiction likely wouldn't prohibit it as it clarifies terms of contract.

Breach

- *Condition Subsequent*:
  - Bizowner's promise DC would clean as long as he operated the stores was possibly a condition subsequent. Bizowner should argue "stores" means DB coffee stores, the occurrence of him not continuing to operate DB stores would relieve him of his duty to DC and doesn't constitute breach(Restatement§§224,230).
- Bizowner may not be liable for breach if he can prove duress.
- Bizowner's statement regarding the duration of the contract is ambiguous. If neither party knew of the other's understanding of the statement, then neither party is bound(Restatement§20).

Damages

- *Liquidated*:
  - No clause.

- *Expectation*:
  - DC's damages if Bizowner is found liable=$180,000(contract price)–costs saved(don't know). Likely too speculative because contract only lasted as long as Bizowner operated the stores.
- *Reliance*:
  - Nothing indicating DC incurred expenses relying on 10year contract.
- *Restitution*:
  - No unjust enrichment
- *Specific Performance*:
  - Court likely wouldn't require Bizowner to keep contract, but just pay monetary damages because money would suffice.
- *Mitigation*:
  - DC's damages would be reduce if failed to find new customer.

Defenses

- *Statute of Frauds(SOF):*
  - Contract doesn't fall within SOF because agreement was to last as long as Bizowner operated the stores, and he could stop operating the stores in one year.
- *Duress*:
  - Fyodorov made an implicit threat that if Bizwoner didn't hire DC he wouldn't get a franchise, overcoming Bizowner's free will to not hire DC.
- *Misunderstanding*:
  - Bizowner's statement on duration of the contract is ambiguous. It could mean as long as he runs a coffee shop or as long as he runs a DB store. Bizowner should try to show general misunderstanding or that DC should've known he only meant while he runs a DB store since it's common for DB to implicitly require all DB stores to use DC.

Conclusion

- Bizowner should assert duress and misunderstanding defenses or demonstrate duration was a condition subsequent and he may be able to successfully end contract.

PRINTERS, INC.(PI)—NAPKINS

Applicable Law

- *Bonebrake*:
  - UCC applies to goods, napkins are goods as they fit in a shopping cart. Could be service for printing, but likely thrust of business is selling the good of customizable napkins.

Enforceability

- *Offer/Acceptance*:
  - Bizowner is master of offer as purchase order by phone is an offer. PI accepted by sending invoice, also by performance in form of delivery.

- *Consideration*:
    - Bizowner promised to pay for napkins and PI promised to deliver napkins.

Content

- *Battle of Forms*:
    - No mirror image rule under UCC. Bizowner should argue he isn't a merchant as he doesn't deal in good of the kind(i.e. paper products v. coffee(UCC2-104)).
    - If he isn't a merchant his form was a proposal to amend, since PI didn't expressly assent to terms there would be no contract(2-207).
    - Even if Bizowner is a merchant, PI didn't expressly assent so there would be no contract(2-207(2)).
    - However, Bizowner didn't insist on assent and both parties acted as if an enforceable agreement existed, so there is a contract consisting of terms on which both parties agreed(2-207). The code fills in gaps where necessary.
- *Warranties*:
    - Likely Bizowner's form and PI's form contradicted on warranties, UCC provides implied warranty of merchantability(2-314).
- The clause from Bizowner's form disclaiming negligence is likely excluded as contradictory too(2-207).

Breach

- May be more efficient for Bizowner to be liable for breach than continue the contract.
- Bizowner's form may have included cancellation-for-convenience clause, but it is likely excluded due to battle of forms.
- *Perfect Tender*:
    - Bizowner could wait for delivery, hope for a defect so that napkins fail to conform in every respect, then reject and avoid performance(2-601). However, PI would have an opportunity to cure and if those conformed Bizowner couldn't reject.

Damages

- *Liquidated*:
    - No clause
- *Expectation*:
    - We don't know duration of contract/pricing, but if Bizowner breached, PI could recover to put it where it would've been had contract been performed: contract price—market price of napkins+incidentals(2-710)—expenses saved(2-708). PI could also maybe get damages for loss volume seller(2-208(2)).
- *Reliance*:
    - If expectation is too speculative, Bizowner could be liable to put PI back to square zero: cost of producing—profit of resell+cost of return shipping(if applicable)
- *Restitution*:
    - No unjust enrichment here

- *Specific Performance*:
  - PI may argue customized napkins are unique goods, but they're likely not unique as they could be sold to other DB stores(2-716).
- *Mitigation*:
  - PI has no duty to mitigate, but damages would be reduced if it doesn't.

Defenses

- *Duress*: Likely wouldn't succeed since Bizowner wasn't required under franchise agreement/implicitly threatened like he was in DC contract.

Conclusion

- Bizowner likely has a contract. He could hope to reject under UCC§2-601, but unlikely. Will likely be liable for damages under breach, but is more efficient than continued performance.

Espresso Machines, LLC(EM)—Espresso Machine

Applicable Law

- UCC applies to goods, espresso machine is a good that fits in a shopping cart.

Enforceability

- *Offer/Acceptance*:
  - EM salesperson was master of offer. Bizowner accepted by signing contract.
- *Consideration*:
  - Bizowner promised to pay $3,500 and EM promised to provide espresso machine.

Content

- *Parol Evidence Rule(PER)*:
  - Contract was likely intended as final expression of agreement, thus integrated. No merger clause. Willistonian jurisdiction would look at four-corners and exclude salesperson's comments about functionality and increased service speed. Corbinesque jurisdiction may not exclude evidence, but since it contradicts with written terms it's likely to be excluded.
- *Warranties Creation*:
  - Salesperson's explanation that machine would speed up service/can make six drinks simultaneously created express(2-313(2)). Not puffing, it is more specific than clearly expressing an opinion. Implied warranty of merchantability is implied because EM is a merchant with respect to espresso machines(2-314). EM salesperson knew Bizowner wanted to speed up production of drinks, likely implied warranty of fitness for a particular purpose was created(2-315).
- *Warranty Disclaimers*:
  - Clause disclaims express warranty, also, because of PER, Bizowner likely can't show express(2-316(1)). Bizowner had no opportunity to inspect and EM didn't demand he inspect(2-316(3)(b)). Clause doesn't disclaim merchantability,

because it doesn't specifically mention "merchantability"(2-316(2)). May disclaim fitness for particular purpose by language, but Bizowner should argue that since it's on the back of the form it wasn't conspicuous enough(2-316(2)).

Breach

- *Warranty Breach*:
  - If steaming milk is expected to be part of the drink making process, then the machine fails to function for its ordinary purpose and EM breached its warranty of merchantability and particular purpose(2-316).
- *Perfect Tender Rule*:
  - Bizowner may reject the machine for failing to conform in every respect(2-601). He likely hasn't accepted as he's only had it for a week, which could be a reasonable time to inspect(2-606). If a court finds he's accepted, Bizowner could still revoke acceptance as its malfunction substantially impairs the value(2-608). EM has opportunity to cure.

Damages

- *Liquidated*:
  - No clause
- *Expectation*:
  - Bizowner could get another six drink machine and EM would have to pay the difference. Bizowner would ask for damages equaling=cover—$3,500(contract price)+incidentals+consequential—expenses saved(2-712).
  - We don't know what the cost of cover would be.
  - Incidentals would likely be for installation/uninstallation, return of rejected machine, cost of initial delivery(2-715).
  - Consequential damages would likely be for slowed business as it was foreseeable and there's no indication they were disclaimed(§§2-715,2-719).
- *Reliance*:
  - Bizowner could collect cost of return shipping and installation, and return of $3,500 to put him back to square zero.
- *Restitution*:
  - To avoid unjust enrichment, Bizowner should return machine and EM return $3,500.
- *Specific Performance*:
  - Money suffices, court won't enforce.
- *Mitigation*:
  - Damages would be limited by failure to mitigate(i.e. re-installing old machine).

Defenses

- *Statute of Limitations*:
  - EM could assert if Bizowner doesn't bring suit in 4 years(2-725).

Conclusion

- Bizowner likely has breach of warranty claim and breach of contract claim under UCC§2-601 if brought in 4 years.

Word Count: 2500

MEMORANDUM

TO: Amy Partner
FROM: 1148
DATE: May 14, 2015
RE: Advising for Client Bizowner

Claim 1: Daz Bog ("DB")

1. Applicable Law

- Franchise agreement includes services (serving coffee/foods), goods (coffee/food/supplies), and franchise rights (arguably, intangible good). It hasn't been concretely decided what law governs; therefore, analysis of both is required.
- **UCC:** Franchise licensing doesn't naturally fit into UCC's definition of "goods". Arguably, UCC's language provides room to interpret application when franchise agreements include sale of goods. "Contract for sale" includes a contract to sell goods at a future time, and doesn't limit applicability to contracts/terms that exclusively involve sale of goods. (2-106) Also, UCC applies to transactions in goods which can be interpreted as transactions involving goods. (2-102) DB's franchise agreement provides for future sale of goods and goods are at least incidentally involved; therefore, this is a transaction involving goods arguably within scope of UCC.
- **Common Law:** Arguably, Common Law applies to franchise agreements because it is nonmovable, not a good, and not a sale (no passing of title, franchise retains control).
- With the growth of global franchise agreements, it is likely UCC is better equipped to handle such transactions by providing uniformity.
- **Bonebrake Test:** Predominate thrust of contract is goods (tangible, intangible) over service (serving drink/food), UCC applies.

2. Enforceability

2.1 Offer and Acceptance

- Bizowner invited DB to deal. DB invited acceptance by offering franchise. Bizowner accepted by signing contract and paying non-refundable fee.

2.2 Consideration

- Promise (franchise licensing, supplies) for promise (deposit, royalties, payment).

2.3 Promissory Estoppel

- If Court deems above inadequate to form contract, promissory estoppel is analyzed. DB will argue both parties induced action by performance and injustice could only be avoided by enforcement of promise. Damages limited as justice requires. (Restatement § 90, UCC 1-103)

3. Content of Deal

- Bilateral: Contract for sell of franchise licensing and supplies.

Merger Clause

- Contact included Merger Clause, integrated and complete agreement.
- Bizowner will rebut clause as part of contract because Fyodorov has reason to believe, from prior conversations, that the projected figures were the reason Bizowner decided to become a franchisee and he wouldn't have accepted otherwise.

Parol Evidence Rule

- Bizowner will try applying PER and argue contract wasn't complete. PER will be an attempt to give authority to "pro forma expenditure statement" (although he doesn't have a copy) about expected sales made by Fyodorov prior to signing contract.
- **Willistonian**: Court will take more formal approach, emphasize Merger Clause, and conclude contract is fully integrated; therefore, statement likely not included.

- **Corbinesque:** Court will be more flexible, willing to look beyond four corners, and wanting to give meaning to partially integrated contracts; therefore, better chance statement included.
- **Bizowner:** Statement is credible enough to demonstrate writing isn't a complete integration of agreement, so must be admitted.
- **DB:** Contract integrated and complete and additional document would contradict writings of contract which states DB doesn't give projections; therefore, parol evidence shouldn't be let in.

Warranties

- **Express:** If statement is admitted, Bizowner will argue it's an express warranty. Fyodorov's affirmation of fact/promise about projected sales warranted expectations and were part of bargaining process. (2-313)

4. Breach?

- **Bizowner:** If statement admitted, express warranty for projected sales is material breach.
- **DB:** Material breach of contract by closing and rebranding.

5. Damages

- Party can only elect expectation, reliance, or restitution, but argument can be made for more to maximize reward.

5.1 Liquidated damages

- **DB:** Contract includes liquidation clause where, upon breach or termination, Bizowner must pay DB liquidated damages within 30 days constituting 3.5 times continuing royalty fees (6%) for last 12 months. If determined to be unreasonable, acts as a penalty and is void. (2-718)

5.2 Expectation

- Puts non-breaching party in as good of a position as they would be if breacher had performed.

- **Bizowner:** If DB breached, interest based on expected projected sales. Loss of value as franchisee plus consequential damages (reasonable anticipated lost profits) and incidentals (cost of transportation, keeping goods, etc) minus payments received from DB and costs saved by breach (royalties, etc).
- **DB:** If Bizowner breached, interest based on Bizowner operating franchises, royalties, and supplies. Loss of value as franchisor (selling supplies, royalties) plus consequential damages (reasonable anticipate lost profits) and incidentals (cost of transportation, keeping goods, etc) minus payments received from Bizowner and costs saved by breach.

5.3 Reliance

- Put non-breacher back to square zero.
- **Bizowner:** interest based on projected sales. Expenditures made in preparation of performance/performing ($50,000 deposit, $400,000 investment) minus any loss DB can prove with reasonable certainty that Bizowner would've suffered even if contract fully performed.
- **DB:** interest based on franchise contract for 10 years. Expenditures made in preparation of performance/performing minus any loss Bizowner can prove with reasonable certainty that DB would've suffered even if contract fully performed.

5.4 Restitution

- Breacher returns money received, contract treated as ended.
- **Bizowner:** DB returns contract price ($50,000) minus value of anything not returned.

6. Defenses

6.1 Mitigation

- Depending on who is determined to have breached, both parties will argue other should mitigate losses so damages decreased.

6.2 Misunderstanding

- **Bizowner:** misunderstanding regarding projected sales not being part of contract and not understanding different costs as a franchisee (royalties plus purchasing supplies from DB).
- **DB:** no misunderstanding, projected sales are never given.

6.3 Misrepresentation

- **Bizowner:** Fyodorov made a fraudulent misrepresentation/false assertion of facts in regards to projected sale on behalf of DB, so contract is voidable.

Claim 2: Daz Cleaners ("DC")

1. Applicable Law

- Service (cleaning), Common Law applies.

2. Enforceability

2.1 Offer and Acceptance

- Common Law stresses knowing exact moment contract is formed. Bizowner's orally made offer and handshake was acceptance, no information to assume acceptance wasn't a mirror image of offer. (Restatement 24, 30)

2.2 Consideration

- Bilateral: Promise of performance (cleaning) for promise (payment of $1,500/month), manifestation of mutual assent to the exchange and consideration. (Restatement 17, 71)

2.3 Promissory Estoppel

- If Court deems above inadequate to form contract, promissory estoppel is analyzed. DC will argue both parties induced action by performance and injustice could only be avoided by enforcement of promise. (Restatement § 90) Damages limited as justice requires.

3. Content of Deal

- Contract for service of cleaning.

Warranties

- **Implied:** Common Law doesn't have.

4. Breach?

- If Court determines there's no contract, no breach.
- If there's contract, Bizowner will materially breach by firing DC before 10 year projected term.
- If Bizowner breaches, DC can cancel deal or pursue damages.

5. Damages

5.1 Expectation

- **DC:** sue to be put back in position as if performed. (Restatement 344) Lost Value ($1,550/month) minus costs saved by breach. (Incidental and consequential only UCC)

6. Defenses

6.1 Statute of Frauds ("SOF")

- Depends on 51st State's statute, affirmative defense.
- **Bizowner:** Contract within SOF because it's for a service to be performed for 10 years, but is unenforceable because oral/lacked written requirements.

6.2 Undue Influence

- **Bizowner:** If considered fiduciary relationship, undue influence because Fyodorov demanded he hire DC. Fyodorov was in a position of disparate power implicitly threatening that if Bizowner didn't hire DC he wouldn't be able to operate franchises. (Restatement 177)

6.3 Mitigation

- **Bizowner:** DC can mitigate loses by finding another client to render service for.

6.4 Misunderstanding

- **Bizowner:** Both parties were aware of ambiguity at time of contracting and parties didn't intend same meaning; therefore, no contract.

6.5 No Deal

- **Bizowner**: oral statement didn't constitute contract; therefore, no deal, no breach, no damages.

Claim 3: Printers, Inc.

1. Applicable Law

- Contract for goods (napkins), UCC applies.

2. Enforceability

2.1 Offer and Acceptance

- Offer and acceptance aren't clear. Likely construed as Bizowner invited Printers to deal. Printers' invoice invited acceptance by offering to sell napkins with disclaimer. Bizowner accepted by acknowledging and returning his form with additional terms. (2-206)
- **Bizowner**: no acceptance because of differing forms.
- **Printers:** UCC treats as a deal because there was performance (11 months). Contract was likely formed without additional terms and UCC fills in gaps. (2-207)

2.2 Consideration

- Bilateral: Promise (napkins) for promise (payment of $450/month).

2.3 Promissory Estoppel

- If Court deems above inadequate to form contract, promissory estoppel is analyzed. Printers will argue both parties induced action by performance and injustice could only be avoided by enforcement of promise. (Restatement § 90, UCC 1-103) Damages limited as justice requires.

3. Content of Deal

- Contract for sell/purchase of napkins.

Battle of the Forms

- Any definite and seasonable expression of acceptance operates as acceptance even though not a mirror image of offer unless acceptance is expressly made conditional on assent to additional or different terms. (2-207(1)) Printers will argue performance by parties for 11 months operated as acceptance regardless of additional terms.
- Additional terms are construed as proposals for addition to contract unless: offer expressly limits acceptance, materially alters it, and notification of objection given within reasonable time. Here, terms on both forms are big and will likely be thrown out. (2-207(2))
- Printers will argue parties acting like there was a contract is sufficient to establish contract although paper says there's no actual contract. (2-207(3))
- Printers can also argue terms were just modifications and agreement modifying contract needs no consideration to be binding. (2-209)

4. Breach?

- **Printers:** If contract is determined to be formed or Bizowner is estopped, there was substantial performance so rejection of delivery is a material breach.
- UCC/Court can fill in gap as to length of contract, but it is likely if Bizowner rejects upcoming offer (especially without giving notice) then it will constitute a breach.
- Bizowner cannot revoke acceptance because Printers will argue napkins conform and reasonable time passed. (2-608)
- If Bizowner rejects shipment, Printers can cancel deal or pursue damages.

5. Damages

- If Bizowner rejects, Printers is entitled to seller remedies. (2-703 to 2-710)

5.1 Expectation

- **Printers**: will sue for Lost Value for rejected shipment ($450/month) plus consequential damages (reasonable anticipated lost profits) plus incidentals (cost of keeping napkins) minus payments received from Bizowner minus any costs saved by breach.

5.2 Reliance

- **Printers**: will sue for costs spent relying on contract, to take it back to square zero.

6. Defenses

6.1 Statute of Frauds

- **Bizowner**: contract is unenforceable because it is for sale of goods exceeding $500, but doesn't include sufficient writing because he didn't sign Printers' form.
- **Printers**: UCC requirements are satisfied and parties engaged in performance.

6.2 Mitigation

- **Bizowner:** If breached, Printers should mitigate and damages are decreased. Printers can resell napkins to another DB franchise and can only recover damages for difference between resale price and contract price with incidentals minus expenses saved by breach. (2-706)

6.3 No Deal

- **Bizowner**: forms conflicted and there was no acceptance; therefore, no deal which means no breach and thus no damages owed.

Claim 4: Espresso Machines, LLC ("EM")

1. Applicable Law

- **Bonebrake Test:** Predominate thrust of contract is goods (espresso machine) with minor service (installation), UCC applies.

2. Enforceability

2.1 Offer and Acceptance

- EM's salesperson invited acceptance by offering to sell/install machine. Bizowner accepted by signing contract. (2-206)

2.2 Consideration

- Bilateral: Promise (espresso machine) for promise (payment of $3,500).

2.3 Promissory Estoppel

- If Court deems above inadequate to form a contract, promissory estoppel is analyzed. Bizowner reasonably relied on EM's promise to supply machine capable of improving efficiency; therefore, an enforceable promise was established. (Restatement § 90, UCC 1-103) Damages limited as justice requires.

3. Content of Deal

- Contract for sale/purchase of espresso machine, any ambiguity works against drafter EM.

Warranty

- **Express:** EM's affirmation of fact/promise and description of machine warranted a machine capable of conforming to description because it was part of bargaining process. (2-313)
- **Implied Warranty of Merchantability ("IWM"):** EM is a merchant with respect to goods of the kind, thereby creating IWM. The machine must pass without objection in trade under contract description and be fit for ordinary purposes in which it is used. (2-314)

- **Implied Warranty Fitness for Particular Purpose ("IWFPP"):** EM had reason to believe a particular purpose (efficiency) for which the machine was to be used. EM's salesperson explained the new six-way machine would speed up services and yield higher profits. Bizowner relied on EM's judgment, therefore creating IWFPP. (2-315)
- **Exclusion:** EM attempted to disclaim any warranties; however, a clause generally disclaiming all warranties doesn't reduce a seller's obligation with respect to product description. The construction of EM's product description claims and disclaimer are inconsistent and unreasonable. To exclude IWH, "merchantability" must be used and it must be conspicuous, "merchantability" wasn't used and disclaimer was on back of form. To exclude IWFPP, it must be in writing and conspicuous, EM did include writing in bold letters but it was on back of form and likely to be missed. (2-316)
- **Limitation of Remedies:** EM arguably didn't successful disclaim any warranties; therefore, EM didn't effectively limit remedies for breach of any warranties. (2-719)

4. Breach?

- Material Breach: Bizowner didn't receive substantial benefit, defective product affected outcome of contract.
- EM breached express warranty, description of contracted machine differed greatly from its actual capability.
- EM breached IWM, machine not capable of simultaneously producing coffee and steaming milk wouldn't pass without objection in trade for use under contract description and ordinary purpose by coffee shops.
- EM breached IWFPP, relied on EM's expertise to supply machine improving production and profit.
- **Perfect Tender Rule:** EM was obligated to deliver exactly what was promised or buyer is entitled to give it back. (2-601)

- **Reject:** Bizowner can reject acceptance of machine within reasonable time because its non-conformity substantially impairs its value and defect was previously undiscoverable. (2-608)
- Bizowner can keep defective machine and seek damages.

5. Damages

- EM attempted to disclaim warranties, but it is not part of deal (see above). Bizowner is entitled to buyer's remedies. (2-711 to 15)

5.1 Expectation

- Lost Value of defective machine ($3,500) plus consequential damages (reasonable anticipated profits from each lost day of increased production and loss of customers) plus incidentals (cost of keeping machine).
- **New Business Rule:** EM will likely contest lost profit calculation because Bizowner had been operating for a relatively short time and at a near loss.

5.2 Restitution

- EM returns contract price ($3,500) minus value of machine if not returned.

5.3 Warranties

- **Bizowner:** recover loss resulting in normal course of events from breach. Difference between value of machine delivered and value it would have had if machine had been according to contract.

6. Defenses

6.1 Statute of Fraud

- **EM:** contract is outside of SOF because it requires more substantial writing to indicate understanding.

- **Bizowner:** counter, contract is over $500 and within SOF and forms of writings are covered. (2-201)

6.2 Mitigation

- **EM:** Bizowner didn't mitigate loss by seeking a substitute machine capable of initial description, so damages should decrease.
- If Bizowner does substitute, he can recover difference in value of a like machine and value of EM's machine. (2-712)
- Bizowner can seek difference in value of machine accepted and the value it would've had if as warranted. (2-714)

6.3 Misunderstanding/Mistake

- **EM:** misunderstanding in Bizowner requesting a machine capable of making six drinks, coffee and cappuccino, simultaneously.
- **Bizowner:** counter, making both simultaneously is customary and implied and ambiguity interpreted against drafter.

6.4 Misrepresentation

- **Bizowner:** EM's salesperson made a fraudulent misrepresentation/false assertion of facts in regards to machine's capability, contract is voidable.

WORD COUNT: 2,496

Van Camp v Muffin Break Pty Ltd, [2008] FMCA 386 (2008)
2008 WL 1875984

R & L Van Camp Applicant
and

Muffin Break Pty Ltd Respondent

Docket Number(s):MLG162 of 2007

Federal Magistrates Court of Australia

10 - 14 September 2007; 8 November 2007 and 9 November 2007, 28 March 2008.
Melbourne

O'Dwyer FM

Introduction

1 This is a claim for compensation by the corporate purchaser of a franchise outlet from the respondent. The respondent is the franchisor of a business specialising in the provision of coffee and muffins throughout Australia in medium to large retail shopping centres. The applicant purchased an outlet at the Forest Hill Chase Shopping Centre (the FHC site) and carried on business there for the period 10 April 2006 to 20 November 2006. This site was a greenfield site; that is to say, it was the first such outlet at that particular shopping centre. This is significant, as the respondent was unable to provide any history of prior trading before the applicant purchased the franchise.

2 The applicant alleges that, in short compass, it was provided with projected sales that did not eventuate and was induced into the purchase of the franchise by representations about the suitability of the site for such an enterprise, both representations allegedly made in breach of s 52 of the *Trade Practices Act 1974* (the Act). There was no issue between the parties as to whether the respondent in its dealings with the applicant was engaging in trade or commerce, or that s 52 had application.

3 The particulars of such representations are set out in more detail below. Suffice to say, the expectations of the applicant were not realised, it suffered loss and now looks to the respondent for compensation pursuant to s 87 of the Act.

4 The conduct complained of by the applicant is primarily that of Mr Brusch acting as an employee of the respondent, and Mr Infanti acting as a director of the respondent. Under s 84 (2) of the Act, such conduct is deemed to be that of the respondent. No issue was taken on this point by the respondent

5 Pivotal to the determination of this case is the question of the credit of the principal personalities involved and the accuracy of their understanding of events.

6 Hereafter a statement of fact is to be taken as a finding of fact unless the context suggests otherwise.

Background

7 The applicant was incorporated and used as the structure by which a husband and wife team, Mr and Mrs Van Camp proposed to conduct the purchase and running of the franchise. The principal participant in the lead up to the purchase was Mr Van Camp, with Mrs Van Camp playing very little role in the lead-up to the purchase and, indeed, in its running once purchased (save for some clerical work). The principal participant was Mr Rhys Van Camp.

8 Mr Van Camp has a long history of involvement in the motor car industry. He was employed as a manager in that industry between 2000 and 2004 in Albury. From 2004 to 2005 he was employed as a manager in Melbourne before leaving the industry to operate the FHC site. His employment in Albury, however, is significant in the context of this case. It was whilst he was employed there that he befriended the owner of the Wodonga franchise of the respondent. By invitation of that owner he had direct exposure to how the franchise operated. He observed what he understood to be a

very successful franchise.

9 It is not unfair to say that he was impressed by the apparent financial success of the Wodonga franchise and by how the franchisor operated. He endeavoured to purchase that franchise, but for various reasons that did not come to pass. Again, it is not unfair to say, from that experience he considered a Muffin Break franchise as providing financial opportunity and security. It is also not unfair to say that from then on he set his heart on obtaining such a franchise outlet.

10 There is further background considered significant by Mr Van Camp. He believed he had a special relationship with the respondent through his father's business network. That relationship, in my view, was fairly tenuous, but nonetheless he believed it very important because it afforded him, he believed, favourable consideration by the respondent. Based on that network, I understood Mr Van Camp to believe that the respondent would do the right thing by him and he could rely uncritically on what was said to him.

11 That connection to the respondent which Mr Van Camp found so reassuring was based upon his father's business partner whose cousin was a friend of a director of the respondent - as I said, fairly tenuous. At the request of Mr Van Camp, through his father's business partner, contact was initiated with that director to advise of Mr Van Camp's interest in a Muffin Break franchise. His father's business partner then provided him with a point of contact at the respondent; namely, Mr Sergio Infanti. Mr Van Camp made contact with Mr Infanti straightaway. The evidence concerning this contact is discussed in more detail below. Mr Infanti then referred Mr Van Camp to the respondent's representative in Melbourne, Mr Tony Brusch.

12 Mr Van Camp met with Mr Brusch at the FHC site on 30 November 2005. This is a significant meeting and what took place at that meeting, and what was said, is pivotal to the outcome of this case. There is a stark conflict in the evidence as to what happened on this occasion.

The alleged representations

13 Mr Van Camp alleges the respondent engaged in conduct contrary to s 52 of the Act. That conduct is said to be constituted by the following:

(i) that Mr Infanti acknowledged the connection through his father's network and informed Mr Van Camp that there was a "unique opportunity happening at Forest Hill Chase";

(ii) that the respondent had done its research and determined that the FHC site was a suitable site for the establishment of a franchise outlet (per Mr Brusch); and

(iii) that Mr Van Camp was shown, in print form, by Mr Brusch the projected sales he could expect over the initial months of trading.

14 Mr Van Camp alleges that:

(i) contrary to the representation made that the site was a unique opportunity - the inference being an opportunity to create a successful franchise - it was not. The site chosen, having regard to the nature of the shopping centre and its demographic customer base, was an unsuitable site for the establishment of a Muffin Break franchise; and

(ii) the projected sales were not realised, despite his best efforts.

The respondent's primary position

15 Simply put, the respondent contends that none of the representations the applicant relies on were made. In support of that contention, I was urged to give appropriate weight to:

(i) the credibility of Mr Brusch, about whom I was asked to make a favourable finding relative to Mr Van Camp based on their respective performances in the witness box;

(ii) the necessary inferences to be drawn by the acknowledgements appearing in the documentation signed by Mr Van Camp that no representations were made;

(iii) the failure of Mr Van Camp to inform significant advisers of the projected sales representation, with again the inference being it was not made;

(iv) the failure of Mr Van Camp to do what was expected of a prudent purchaser to safeguard his own interests and obtain proper legal, accounting and business advice from fully informed advisers. (It was also put, although not strongly, but more as a buttress to the inferential argument, that even if such representations were made, that does not relieve the applicant from making proper inquiry and from reading the documentation thoroughly, and further from having insisted that such representations be included in the documentation.); and

(v) the reasonable and necessary inferences to be drawn as set out, leads to the conclusion that the documentation embodies the whole of the agreement between the parties.

The documented acknowledgements relied on by the respondent

16 In the documentation executed by Mr Van Camp there were numerous acknowledgements that the documents were the full embodiment of the agreement and that no representations were made by the respondent to the applicant. Specifically, the following acknowledgements appear:

(a) Paragraph 19.1, Franchisor Disclosure - "Franchisor does not provide projections on earnings and the prescribed statement is given in paragraph 19.4 of this disclosure document".

(b) Paragraph 19.4, Franchisor Disclosure - "The franchisor does not give earnings information about a Muffin Break franchise. Earnings may vary between franchises. The franchisor cannot estimate earnings for a particular franchise."

(c) Agreement to proceed signed 27 January 2006 - "Like any business, risk is involved and no representation or guarantee (whether oral, written or implied can be, or has been given in relation to the store's success, profit or potential turnover. (if any such representation or guarantee has been made by the Franchisor and/or the lessor's representatives you must specify it below)." No representations were specified on this form.

(d) Questionnaire signed 27 January 2006. There appears at the bottom of the first page the following - "Please Note, Muffin Break does not represent or warrant in any way that a particular level of income is attainable".

(e) Statement as to advice by franchisee signed 27 January 2006 which acknowledges Mr Van Camp has had the opportunity to read and understands the acceptance of the franchisee's disclosure statement.

(f) Statements of Legal and Accounting advice, both signed 27 January 2006, which acknowledge legal and accounting advice had been obtained by Mr Van Camp.

(g) Foodco Prospective Franchisee document signed on 27 January 2006 which is a tick a box questionnaire that acknowledges that no turn over figures were provided, that no person has made a statement in relation to actual or projected profits, or the likelihood of success, and no person has made any statement or promise about the amount of money or revenue to be earned. It also asked the question, do you understand that the franchise agreement contains the entire agreement and that any statement or promise not included in the Foodco Franchise agreement in writing will not be binding upon Foodco, to which Van Camp purported answered, yes.

(h) Agreement to enter into franchise agreement and licence agreement dated 23 March 2006 and the franchise agreement dated 20 June 2006, both having common clauses 16 and 21.3.

Clause 16 provides:

16 Legal Advice and Risk

16.1 Franchisor recommends that Franchisee obtains legal advice in respect of this document and the Related Documents and Franchisee acknowledges such recommendation and that Franchisee has had the opportunity to obtain such advice.

16.2 Franchisee acknowledges that Franchisee has conducted an independent investigation of the business and the Franchised Business and recognises that:

(a) the Franchised Business involves business risks that make the success of the Franchised Business largely dependent on Franchisees and business abilities; and

(b) although Franchisor has used its best endeavours to ensure that the Franchise site is satisfactory for the operation of the Franchise Business, Franchisee shall make no claim against Franchisor as a consequence of the location of the Franchise Site proving to be unsatisfactory for the conduct of the Franchise Business.

Clause 21.3 provides:

21.3 Entire Agreement and Acknowledgement

21.3.1 This document together with any Related Document contains the entire agreement and understanding of the parties with respect to the Franchised Business and the Business.

21.3.2 There are no representations, undertakings, agreements, terms or conditions not contained or referred to herein or in the Related Documents.

21.3.3 This document supersedes and extinguishes any prior written agreement between the parties or any of them relating to the location of the Franchise Site.

21.3.4 Franchisee confirms and acknowledges that prior to having executed this document Franchisee has

read the provisions of this document carefully.

(i) Email from Nadia Micalessi dated 8 February 2006 to Mr Bain, the applicant's banker, which stated when attaching a pro forma expense statement - "Please note, this model is to show estimated expenses. It is not a sales or earnings projection."

17 As stated, the respondent submits that the various acknowledgements set out above lend weight to the conclusion that no representation was made by Mr Brusch, as alleged, about projected sales and suitability of the site, or by Mr Infanti about the suitability of the site.

18 The respondent further submits that to give efficacy to the agreement, and for all the commercial necessity for such as canvassed by the Court of Appeal in *Real Estate City Pty Ltd v Moustafa* (2005) VSCA 181 at [36], the applicant cannot lightly avoid the import and ramifications of his acknowledgements, including those clauses that can be said to have extinguished any prior representations.

The conflicting evidence and the assessment of credit

The credit of principal witnesses

19 Counsel for the respondent, after making reference to the trite warnings about the tendency of witnesses to reconstruct, however innocently, past events to suit their need and to support their case (see *Watson v Foxman* (1995) 49 NSWLR 315 per McLelland CJ at 318 t0 319) invited me to apply those critical assessments to Mr Van Camp and find his evidence less creditable than that of the principal witness for the respondent, Mr Brusch. Those warnings are indeed very pertinent in general; but, in particular, in this case. However, they apply to both the principal witnesses and when applied, for the reasons set out below, I prefer the evidence of Mr Van Camp than that of Mr Brusch who I found to be a most unworthy witness.

Mr Van Camp

20 Mr Van Camp presented as someone not particularly articulate, but nevertheless, as a generally honest witness. He had a genuinely poor memory, in my view, as to detail, but a good memory for key events - particularly those precipitous events in his dealings with the respondent's representatives leading up to him agreeing to purchase the franchise at the FHC site.

21 The respondent attempted, unsuccessfully, to discredit Mr Van Camp because of apparent discrepancies between his evidence and notes made in his diary. I am satisfied the diary was plainly an *aide memoir* and when one looks at the diary it does precisely what Mr Van Camp said it did; that is, records the things that were said to him and things he had to do.

22 Mr Van Camp impressed as an individual hell bent on purchasing a franchise outlet from the respondent. He impressed as naive to some commercial realities; blinded to some degree as he was by his experience and understanding of the expected profits he saw apparent in the Wodonga franchise, and later reinforced from his experience at the franchise in the Know Shopping Centre. I am sure he uncritically accepted, particularly having regard to the projected sales and the assurance about the uniqueness of the site, the notion that to own such a franchise would be a source of financial security for himself and his family, and for his own reasons - again, naively in my view- believed through his father's tenuous network with the respondent, he would not be badly done by and could rely on the respondent to "do the right thing by him". In my view, he had that mindset when dealing with the respondent. To that degree it can be said that he was not a prudent purchaser and may very well fit the description of "foolish". However, for the reasons set out below, he was encouraged in that mindset. His uncritical belief in the viability of such a franchise, if not engendered, was significantly reinforced by the representations made to him about projected sales and the suitability of the site.

Mr Brusch

23 Mr Brusch presented as a nervous and anxious witness who impressed as most concerned to protect his standing with his employer. He was also very evasive and his evidence in many regards, as highlighted below, was contradictory and most unpersuasive.

24 He admitted when he dealt with Mr Van Camp he was inexperienced in negotiating and dealing at first instance with a prospective franchisee. It was his first experience of it. From the evidence, he manifestly got it wrong in a number of undisputed areas. The timing of signing of some documentation and the demand for the payment of a deposit and

franchise fee are but two examples of how he muddled his way through what would normally be a "turn key" process for the respondent which deals with very many such applications for the purchase of franchises around Australia. It is not unfair to say, in my view, he simply did not know what he was doing by way of process - an obvious conclusion on the evidence, but one which did not prevent Mr Brusch, at least initially, maintaining that he followed the proper process; that although it was his first time, he had others around him to advise. This was but one example of the contradictory nature of his evidence.

25 Another example was his evidence about the faxing of the file to Sydney head office before any issue arose with Mr Van Camp about projected sales not being reached. When documents were produced, it became evident that very significant documents were sent to the Sydney head office on 6 June 2006; that is, at a time after the issue arose about projected sales when Mr Van Camp's solicitors raised it in correspondence. No satisfactory explanation was given as to why they were not sent earlier and why they were sent when they were. These diary notes were disparaging of Mr Van Camp.

26 One purportedly written only two days after opening the site speaks of Mr Van Camp's "work ethic, stamina levels, ability to train staff and lack of desire to bake/clean and carry out operational duties... Rhys changes his mind slightly showing that he had exaggerated and embezzled the truth a little..." There is, I note, from Mr Brusch's perspective, a very self serving aspect about those diary notes. They attempt, at a purportedly early stage of observation, to lay the foundation for criticism of Mr Van Camp and his management of the site. They, in my view, having regard to their content and the time they purportedly relate to (ie the start of operations), are a contrivance that defy logic, both as to their content and the timing of them being sent to head office. These diary notes are designed to protect Mr Brusch in any contest between himself and Mr Van Camp as to events, and generally discredit Mr Van Camp in the eyes of Mr Brusch's employer.

27 One diary note was dated 16 June 2006, whereas it was sent to head office on 6 June 2006. When this was highlighted, Mr Brusch changed his evidence and said it should have been dated 16 May. This is further evidence, in my mind, supportive of the conclusion that these diary notes were not contemporaneous, and were manufactured in June and contrived to set the foundation to discredit Mr Van Camp in the eyes of Mr Brusch's employer and thereby protect Mr Brusch's position there. One must ask why he would need to do this, and I believe the answer is very obvious - because he knew then, even if he did not at the time of making the representation, that he had breached the respondent's practice by making a representation about projected sales; realising he had exposed the respondent and himself to adverse outcomes.

28 These diary notes have the stench of contrivance about them. Their existence, how they, of all documents, came to be sent to Sydney only after the issues arose, whereas parts of the file had been sent earlier, draws me to the conclusion that they are indeed contrived documents. The end result is that Mr Brusch's credit is further tarnished.

29 I am further satisfied these diary notes are a contrivance designed to set the ground for an argument that the failure of the franchise can be laid at the feet of the applicant for poor performance. Incidentally, any argument that the failure of the franchise can be laid at the feet of Mr Van Camp for poor management does not withstand factual analysis as after he vacated the site the respondent ran it for some time before finding a replacement franchisee who also ran it at a much less successful level than Mr Van Camp. The evidence was it is only recently beginning to show profit; but this was after significant changes were made to the Forrest Hill Shopping Centre by of tenant mix and layout.

Unique opportunity

30 Mr Van Camp gave evidence that when he made contact with the respondent's director, Mr Infanti, he was told by him that, "I have got a unique opportunity at Forest Hill Chase, a non-established Muffin Break." Mr Infanti denies using the expression "unique opportunity", although does admit to using the word "opportunity" in the discussion, but in a different context. I discuss the evidence of Mr Infanti below. On balance, however, I can say that I accept Mr Van Camp's version of the conversation. His recollection of it, I am satisfied, is very vivid; it being such a significant first point of contact he had with someone from the respondent in authority, and someone he understood his father's network had procured. I am further satisfied the suggestion of a "unique opportunity" was meant to convey to Mr Van Camp that to be offered the FHC site was special, to his considerable advantage and confirmation in his mind that his father's business network had already paid dividends. It was an expression, subjectively, that reinforced Mr Van Camp's belief he was on the road to the purchase of a successful business. Of course, the respondent cannot be said to attract liability

because of this unwise, subjective assessment of his relationship with the respondent. However, on a more objective basis, the expression "unique opportunity", in my view, does connote an opportunity for advancement, a reassurance that good things would flow from the chance to take up this franchise independent of any notion by Mr Van Camp that he was being "looked after by the people at the top.".

30 November 2005 meeting

31 The meeting held at the FHC site on 30 November 2005 is a determinate meeting. The parties present, namely Mr Van Camp and Mr Brusch, agree that a document was produced that set out weekly sales figures, ascending each week, starting from $5,000 and progressing to $14,000, by increments of $1,000. Under them were the expenses and outgoings to expect, showing profits generated relative to sales achieved. The document was described as a "pro forma expenditure statement". Although shown to Mr Van Camp, he was not provided with a copy then, but later provided with one via his finance provider who in turn was given one by the respondent's Ms Micalessi. Mr Brusch agrees that the notation appearing on the pro forma expense statement, forwarded by Ms Micalessi, warning that the figures were not to be taken as sales or earnings projections did not appear on the document he showed Mr Van Camp. Mr Brusch further agrees that it was the first time he had ever used such a document.

32 On the document he had entered the known lease expense for the site. He did not see fit at that stage to note, as was later done, the warning that the figures were not meant to be taken as projected sales figures for the site. For someone who later, in the witness box, professed an understanding throughout his dealings with Mr Van Camp that projected sales figures were never to be given to a prospective franchisee, he could offer no explanation why the written warning was not given on this occasion, but later included by him in the statement sent by Ms Micalessi. Also, the fact he entered the lease expense on or prior to that date is inconsistent with his later evidence that he was generally unaware of the respondent's lease commitments to the Forest Hill Chase Centre that were then extant.

33 It is to be noted that the calculation of outgoings is done on a percentage of sales (save for the lease expense). Why a document setting out the percentage formula for calculating those expenses was not provided instead of the figures based on sales, was never explained by the respondent. The mere fact, in my view, that the document sets out sales figures, leaves it open to be interpreted by a prospective franchisee as indicative of likely sales that are achievable - otherwise, why use these particular sales figures. The respondent says it is meant to be illustrative of expenses to assist a prospective franchise in deciding. In my view, it is a seriously, inherently dangerous document, pregnant as it is with promise of large profits on making large sales. It is a document that, if it is to be used as the respondent suggested, must come with very clear, unequivocal warnings as to its purpose; namely, that it is not to be used as a projection of sales by intended franchisees. Even with such warnings, it is inherently, in my view, designed to create expectations that may never be fulfilled. I do not agree, as Counsel for the respondent submitted, that the "document itself simply sets out a set of figures and is innocuous as far as it goes."

34 The respondent relies with confidence on the evidence of Mr Brusch as to what was said at the meeting about this document and the purpose for which it was put. It is a confidence misplaced.

35 Mr Van Camp is adamant that Mr Brusch used this document to show the sales figures he could expect each week from start up time and that from them he could gain an understanding of the profit he could expect from this franchise.

36 Mr Van Camp says he has a clear memory of Mr Brusch saying to him, "you can expect sales of $11,000/$12,000 per week, but it will take a good 3 months and then you will be right after that. The first month will be a hit and then it will die down a bit." He was then shown the document and was pointed to the columns headed "Weekly Sales". Mr Van Camp recalls Mr Brusch saying, "this is what you'll be doing in the first week, the second week etc". Mr Van Camp says he was reassured by these figures.

37 On Mr Van Camp's evidence there was a discussion about likely sales at the meeting on 30 November 2005. Mr Brusch says there was no such discussion. A highly improbable circumstance, in my view, where the parties are meeting on site and shown likely expenses based on sales figures. I find Mr Brusch's evidence in this regard palpably, inherently implausible. A key factor for any prospective franchisee is to determine profitability of a franchise and in this instance that is determinate on the level of sales that could be expected. To look at expenses, without any consideration of sales, as Mr Brusch would have the Court believe was the approach asked of Mr Van Camp, defies logic. Whatever may be the shortcomings in Mr Van Camp's business acumen, that would not be one. The level of naiveté needed to be found in

Mr Van Camp for such a proposition to be credible was not evident in Mr Van Camp when he gave his evidence. As stated, his evidence was very credible as to what the pro forma expense statement was used for by Mr Brusch. I have no hesitation in finding that the representation was made by him, and further that the representation about the sales projections induced in Mr Van Camp the belief that he was about to take on a successful business enterprise. With that induced belief brought about, if not solely, to a very significant degree by Mr Brusch's representation, Mr Van Camp was prepared to enter into the franchise and associated licence agreements.

38 Mr Brusch was adamant that he never said they were projected sales figures and confirmed that it was company policy never to give prospective franchisees any projected sales figures. He spoke in this context about company policy as if he was then aware of it and would have applied it without any doubt. For reasons set out below, I formed the view that Mr Brusch either may not have been aware of company policy, as he seemed unaware of other processes, until after this issue became enlivened or, because of my general assessment of Mr Brusch as being dishonest, he was prepared to ignore company policy to ensure he persuaded Mr Van Camp to take up the franchise at a site that was proving problematic from the perspective of finding a franchisee in a timely manner.

39 The respondent argued that the idea that these figures were to be taken as projected sales for this site was a matter of relevantly recent invention by Mr Van Camp. Against that contention, however, I note that the respondent's Ms Michelle Kennedy, Retail Operations Manager/Consultant in an email to Mr Brusch on 15 May 2006 highlighted her concern that Mr Van Camp had raised with her his expectation about sales based on projected sales figures given to him. Also, in correspondence from Mr Van Camp's solicitor to the respondent dated 31 May 2005 the following appears - "despite his best endeavours to reach projected target sales figures." These two references close to starting the franchise operation are consistent with Mr Van Camp's stated position on this and manifestly inconsistent with the respondent's suggestion the issue of projected sales figures is a more recent invention; namely, at the time of issuing proceedings.

40 Mr Van Camp also gave evidence that at the meeting Mr Brusch said that, when speaking of the site, "there is a good demographic of people here. Muffin Break has done its homework to enure the site is a unique site." This is denied by Mr Brusch. For reasons set out above and below, I do not find Mr Brusch a truthful witness and I accept Mr Van Camp's evidence about this statement. Again, this was a representation that reinforced in the applicant the perception that this franchise, on this site, would be successful.

41 Mr Van Camp also alleges that Mr Brusch referred to the FHC site as a "ripper of an opportunity". Again Mr Brusch denies using this expression and went further to say the use of the word "ripper" is foreign to him. He is English and through the respondent's counsel I was urged to find someone with Mr Brusch's English background would not use such an expression. This is patently preposterous. Again Mr Brusch's credit is determinate of this issue. I find Mr Van Camp's recollection of this part of the conversation accurate. Again it is another example of the pitch used to induce Mr Van Camp to proceed with the purchase of the franchise.

42 Ms Michelle Kennedy was the Retail Operations Consultant assigned to monitor and assist Mr Van Camp in the establishment of the franchise. In over 13 years of adjudication, I have never experienced a witness quite like Ms Kennedy. She was unnecessarily and bizarrely aggressive, and obviously unhappy about being required to give evidence in this case. She was evasive, purported to have a poor memory of important events; such as the conversation between Mr Van Camp and herself that caused her to generate her email to Mr Brusch of 15 May 2006. In that instance she had no recollection of the underlying conversation with Mr Van Camp, or whether she spoke to Mr Brusch about it at all.

43 She was generally uncooperative with both the applicant's and respondent's counsel. She was a most unimpressive witness.

44 She did nonetheless refute the allegation made by Mr Van Camp about her statement that the franchise would achieve good sales in the relatively near future. As between the two, however, Mr Van Camp's evidence was far more convincing and I accept his version of events as being true and accurate. I accept Ms Kennedy reassured Mr Van Camp with the words, "don't worry Rhys, it will beat $12,000 soon."

45 Whilst this representation was made after the purchase of the franchise, it is nonetheless, in my view, confirmatory of the earlier representations made by Mr Brusch about projected sales and is entirely consistent with Mr Van Camp's understanding of events.

46 The evidence given by Mr Brusch in the witness box about the conversation between himself and Mr Van Camp that centred on the production and explanation of the pro forma expense statement was, in my view, inherently improbable. In effect, when presented with the statement and when told about Mr Van Camp's obligation to do his "due diligence", he, according to Mr Brusch, sat mute - no interaction about what level of sales he might expect from the site, no questions asked as to how he might pursue his due diligence enquiries. I note that Mr Brusch conceded that at the meeting they discussed expenses, price, the takings at the Wodonga store, but not at the site Mr Van Camp proposed to purchase. In my view, again, if you are discussing price of the franchise, expenses and takings at another store, it is highly improbable that they did not discuss the takings at the very site Mr Van Camp was interested in. In my view, Mr Van Camp's version of events on 30 November 2005 is to be preferred, not only because of the objective improbabilities of Mr Brusch's version, but also because of my assessment of Mr Brusch, both by his demeanour in the witness box and the evasive, inconsistent and downright misleading nature of his evidence, that he was a person not to be believed.

47 If someone has alleged they entered into an agreement by an inducement, by a statement made and they become aware that the statement is not true, you would expect that person to complain as soon as they become aware of its falsity. That is exactly what happened with Mr Van Camp. When a few months had passed and he was not taking what was represented to him, he complained, first to Ms Kennedy and then through his solicitors. This is consistent behaviour on Mr Van Camp's part which is supportive of a finding, on balance, that the representation as to takings was made. The email from Mr Kennedy to Mr Brusch of 15 May 2006 is corroborative of his understanding of events.

Further representations leading up to 27 January 2006

48 Mr Van Camp's evidence is that on a number of occasions during December 2005 and January 2006, Mr Brusch rang him chasing up a requested $10,000 deposit. Mr Brusch was anxious to get him signed up and stated, "I have shown you the weekly forecast figures for what the store should be doing - you are losing money. I have shown you how much you can make." Again, Mr Brusch denies saying this. Again, I accept Mr Van Camp's evidence in this regard. This evidence reinforces the evidence of the representation made about projected sales and helped induced or reinforce a sense of confidence in Mr Van Camp about the successful nature of a franchise outlet at Forest Hill Chase.

49 This line is also consistent with what I find was said to Mr Van Camp when he was attending franchisee training in Sydney in early February 2006. He had cause to complain about being pressured by the respondent to pay $64,000. When it became apparent that Mr Van Camp was unhappy, Mr Infanti said to him, "don't let Forest Hill get away from you as it is an unique opportunity." Mr Infanti agrees he spoke to Mr Van Camp when he became aware he was unhappy, but denies the pertinent content of the discussion, although he admits to other aspects of it as recalled by Mr Van Camp. Mr Van Camp displayed a good memory of other aspects of the conversation which were confirmed by Mr Infanti and I am satisfied his memory is sound on all aspects of the conversation. I accept Mr Van Camp's evidence on what was said. Again, it is consistent generally with the events and circumstances acknowledged to have taken place by all the parties, and in the particular, consistent with Mr Van Camp's understanding of the discussion that took place which was designed to placate him and allayed his concern.

The signing of documents on 27 January 2006

50 Mr Van Camp also gave evidence of how it came about that he signed requisite documentation - which documentation is now relied on by the respondent - in which he acknowledged matters pertaining to representations made to him, or not as the case may be. He states that the meeting that took place at the offices of Mr Brusch on 27 January 2006 was rushed and did not afford him an opportunity to study the documentation put before him for signature. He says he went to the meeting with the understanding that he would hand back the documents he had been given earlier and pay the requisite deposit of $10,000. He did not understand that he would be required to sign any documents. He further did not expect a demand at the meeting for a payment of an extra $64,000. I accept his evidence in these regards.

51 He recites that Mr Brusch was anxious about a bushfire burning near his home (the fire was at Kinglake, Mr Brusch lived at Christmas Hills - in bushfire terms, not a great distance apart) and wanted to get the signing of documentation over and done with quickly so he could go home. He states that a questionnaire was filled out by Mr Brusch on his behalf, and that Mr Brusch suggested the answers for him, just to get through it quickly.

52 Mr Brusch refuted the rushed circumstances of this meeting, although he conceded a bushfire was burning at Kinglake, and that a bushfire alert had been issued for the area where he lived; but he said he expressed no anxiety about

rushing home, believing the fire was some distance from his home. He supported his contention that he did not rush back home after the meeting by presenting evidence of the time and place of telephone calls he made from his mobile.

53 I accept that Mr Brusch did not rush home as he suggested he would to Mr Van Camp, but I do not accept, as he suggests, that the meeting was not rushed. He agreed that the meeting lasted 45 minutes - in my view, having regard to the amount of new documentation presented and the need to ensure sufficient time for it to be read and understood, as was the acknowledged desired practice of the respondent, such an admitted short time in any event fell far short of an appropriate time. From the evidence of Ms Paravicini the procedure employed by the respondent is designed to allow a prospective franchisee time to study documentation provided in a sequential way and to obtain advice when appropriate, over a period of time which affords the best opportunity of properly reading, and properly understanding all the documents. In the context of this case, the usual practise in this regard, for some of the documentation, was not afford to Mr Van Camp when he was pressed to sign documentation on 27 January 2007

54 I don't accept, however, that it was as much as 45 minutes. Mr Van Camp believed it to be much shorter.

55 Mr Van Camp's recollection, in my view, is consistent with the day's event (ie a bushfire near Mr Brusch's home). Mr Van Camp's knowledge of the fire and Mr Brusch's home location was passed to him by Mr Brusch. The account given by Mr Van Camp has all the hallmarks of an accurate account and is consistent. For reasons set out both above and below, I do not find Mr Brusch a truthful witness and where there is inconsistency between the two over the events on 27 January 2006, I have no hesitation in accepting Mr Van Camp's evidence as truthful and accurate.

56 It has to be said, however, that some of the documentation (agreement to enter into a franchise agreement and disclosure statement) signed on 27 January 2006 had been sent to Mr Van Camp in December 2005 and he had an opportunity, which he appears not to have availed himself of, to read this material at his leisure. Mr Van Camp says, however, that he did not expect to have to sign all the documentation, which included more than that which had been sent to him, in front of Mr Brusch that day. He came to pay a $10,000 deposit. It came as a surprise to him and he felt hurried by Mr Brusch to sign those documents and others presented for the first time. He was prepared to sign, however, because of the trust he had in Mr Brusch, his then belief in the standing and credulity of the respondent, and the suitability of the site as represented to him. Mr Brusch was then considered by Mr Van Camp like "my best friend". I am satisfied that Mr Van Camp had no real understanding of what he was signing on this day and did so at the direction and insistence of Mr Brusch who was anxious to get it all done so he could, on the face of it, attend to significant and urgent matters at home. Because of the rushed circumstances, the involvement of Mr Brusch in taking over the process and answering questions on behalf of Mr Van Camp, ticking boxes and suggesting the wording for other answers, the acknowledgements in those documents, in my view, are of limited probative value.

57 I note that Mr Brusch agreed he ticked off the Foodco Prospective Franchise questionnaire. He said it was his normal practice to do it himself. Should it be his normal practice, then it is a highly undesirable practice in terms of protecting his employer.

58 I also note that when questioned about the circumstances of the Foodco Prospective Franchisee document being completed, Mr Brusch's answers were qualified and conjectural in nature, and had the character of reconstruction - as, indeed, all of his evidence about the events of 27 January 2006 did.

59 Mr Van Camp as at 27 January 2006, I am satisfied, was committed and, indeed, had received an invoice for $74,000. Subsequent signing of similar acknowledgements on 23 March 2006 (to cater for the change to a corporate purchaser) or 20 June 2006 do not alter the situation unless proven that the representations as to takings and the suitability of the site were no longer operating in the mind of the applicant as an inducement. I am satisfied that those representations were still operative as inducements to the applicant to enter into the franchise and licence agreements.

Accounting and legal advice

60 I am satisfied Mr Van Camp sought both legal and accounting advice as evidenced by acknowledgements to that effect from his lawyer and accountant submitted, as required, to the respondent.

61 I am satisfied further that the legal advice was simply to the effect that there was little that could be done to alter any of the documentation - that it was the usual sort of agreement franchisors had with franchisees. Similarly, I accept that the advice from the accountant was to the effect that as there were no trading figures to consider, because it was a new

site, there was little by way of advice that could be offered. He sought the accountant's advice because it was demanded of him by the respondent, but having regard to the representations made, Mr Van Camp believed such advice unnecessary.

62 The respondent suggests that should there have been representations made as alleged about projected sales, then the legal advice should have canvassed this. Further, the accountant should have been made aware of the projected figures. Neither of the two expert advisers to Mr Van Camp was called and I was asked to draw an adverse inference that should they have been called, they would not have supported Mr Van Camp by informing the court that they were ever made aware of the representation about projected sales figures. The respondent says I can infer they were unaware of the representation about projected sales because there was none.

63 In that regard, I am satisfied that Mr Van Camp did not tell his experts about the representation about projected sales or the "uniqueness" of the site. His evidence was to that effect. However, I am not persuaded that leads to the conclusion I have been asked to reach. I am satisfied that Mr Van Camp, perhaps unwisely, believed it unnecessary to inform them of the representations, so confident was he in the merit of them and the unchallengeable prospect in his mind that he was going to do very well with such a franchise. The getting of advice from the lawyer and the accountant was a procedural process asked of by the respondent that he was made to endure to get approval for the franchise - admittedly, a naïve, and unwise approach. It was an approach, however, not unreasonably induced in Mr Van Camp because of those pivotal representations made by Mr Brusch on 30 November 2005; namely, the projected sales and the fact the respondent had done its research and believed the site at Forest Hill Chase was a suitable site.

64 Further, when Mr Van Camp was asked whether he had done an independent inquiry as to the suitability of the site and the risks involved, he responded by saying he did not have to as Mr Brusch had given him the estimates of what it would earn. I am satisfied that this was Mr Van Camp's approach to these issues, an approach induced and later reinforced by representations made by Mr Brusch about projected sales and to this degree it can be clearly said he relied on them and was induced into proceeding with the purchase.

The failure to call witnesses

65 In support of the respondent's general, primary contention that no representation were made as alleged, the respondent highlighted the failure of the applicant to call a number of witnesses, who, had they been called, the respondent asked me to infer, they would not have supported Mr Van Camp's allegations about the representation about projected takings. Those witnesses were Mr Van Camp's father, the accountant and lawyer employed by Mr Van Camp, and Mr Brian, the ban representative. I was asked to form the view that had they been called they would not have been able to give corroborative evidence of Mr Van Camp telling them about the projected sales. It followed, in the view of the respondent, that had Mr Van Camp not told them of the projected sales, then I could conclude that no representation was made by Mr Brusch as alleged. It is to be noted that Mr Van Camp admits readily not telling his accountant, his lawyer and Mr Brain about the representation. What he says, in effect, in regard to his non telling of the representation is that he believed it unnecessary, so persuade was he about the representation that their knowledge of it was unnecessary. He offers no explanation for not calling his father other than he did not think he needed to. Whilst there is the potential to draw the inference, to do so in the face of my otherwise confident assessment of Mr Van Camp as a truthful and accurate witness would be contrary to all other aspects of the evidence. I find it is highly probable the representation was made as alleged.

A minor issue

66 There was an issue between Mr Van Camp and Mr Brusch over how the price of the coffee was set. Whilst it does not touch on significant issues in the case, it does go to the question of credit. Mr Van Camp said Mr Brusch set the price, whereas Mr Brusch said it was left to Mr Van Camp. Later Mr Brusch was critical of the high level set for the price of coffee. I have no hesitation, after hearing from the parties, in finding that the high price was set by Mr Van Camp at the insistence of Mr Brusch who wished to maintain parity with the pricing at another outlet. Again, in my view, this is another example where Mr Brusch's lack of credit and duplicity was exposed.

Need for a franchisee

67 I am satisfied as the new operations/development manager, as a first indicator to his employer of his worthiness for his new role, Mr Brusch was anxious to ensure a franchisee was found as soon as practicable for the FHC site and that as Mr Van Camp came to him via a contact from a director of the respondent, he was to ensure Mr Van Camp became the franchisee of the FHC site.

68 The space allocated for the FHC site had been unoccupied for some time and the respondent was paying rent on it. The respondent had been looking for a franchisee for the site since 27 May 2005 and had become responsible for the payment of rent from 8 October 2005. I am satisfied that there was pressure on the respondent, in particular on Mr Brusch, to obtain a franchisee for this site as soon as practicable in order to stop the otherwise unproductive haemorrhaging of rent. Mr Brusch denies this, but I do not accept his denial. The commercial reality dictated that a rent paying franchisee be found as soon as practicable. To the extent that Mr Brusch and Mr Infanti denied this commercial reality, their credit was compromised; although it must be acknowledged, Mr Infanti reluctantly agreed that this situation was "less than optimal".

69 Mr Brusch's evidence that he was not aware of the respondent's obligation to pay rent on the site is not credible. He had visited the site on his own and with another prospective franchisee in September 2005. Mr Infant's evidence was to the effect he would have expected Mr Brusch to be aware of this reality and that it was evident from the site file in Mr Brusch's keeping, which had the lease details, that rent was due and being paid on the site. For Mr Brusch to feign ignorance of this, as he did, belies his credibility, particularly where he put in the details of the rent expense in the pro forma expenses statement produced on 30 November 2005.

Unreasonableness of the representation about projected sales

70 The unreasonableness about the representation of projected sales figures is manifest when the actual sales are examined. I am more that satisfied Mr Van Camp applied himself to the task of establishing a successful franchise at Forest Hill Chase, employing as he did not only his physical, emotional and financial resources, but also the advice and guidance offered by the respondent. The end result was failure. The sales produced by the applicant were far short of those projected by Mr Brusch.

71 Although, as stated above, Mr Brusch attempted to set the scene with contrived diary notes designed to assist in a conclusion that the failure might reasonably be attributed to Mr Van Camp's inability to apply himself as required (and that his veracity was questionable), the evidence would suggest otherwise. The explanation for it would appear more consistent with Mr Bernardi's assessment of the site, an expert called by the applicant on the question of the suitability of the site.

72 The only conclusion that can be reached, based upon the experience to date of the site, is that the representation made as to projected sales by Mr Brusch was unreasonable.

The suitability of the site

73 Mr Infanti's evidence touched on two issues. The first was whether he said the FHC site was an "unique opportunity", and the second as to whether the FHC site was a suitable site for a Muffin Break franchise.

74 Whilst Mr Infanti presented reasonably well, his evidence in my view was equivocal and not persuasive on the question of what was said when Mr Van Camp first made contact with him. Where there is conflicted between him and Mr Van Camp on this issue, on balance, I prefer Mr Van Camp's evidence.

75 In relation to Mr Infanti's evidence on how the FHC was chosen as a suitable site, a significant player in that process was not called. Mr Nick Vlahos, the then Development Manager, and Mr Brusch's predecessor, was said by Mr Infanti to have assessed the FHC site for suitability and he discussed it with him by way of providing assistance and review of his selection. No evidence was provided by Mr Vlahos as to how he went about assessing the site as suitable. There was no record of any process or policy applied by the respondent used to determine suitability in general, and certainly none in the particular about the FHC site. Mr Infanti stated, when assessing the suitability of this site that he applied his "general knowledge" and that there was no specific analysis of the site by him. I was not persuaded by Mr Infanti that he applied the analysis described by Mr Buckingham, the respondent's expert who made comparisons between the FHC site and the nearby shopping centre, The Glenn.

76 Mr Infanti appeared to adopt the process employed after the event by the respondent's expert, Mr Buckingham. I am not, on balance, convinced it was an exercise followed by Mr Infanti when assessing the suitability of the site in the first instance. In any event, should I have been persuade Mr Infanti did as he said, that is, made a comparison of nearby shopping centres comparing their moving annual turn over, I am far from persuade it was an analysis that showed much

depth and formed a foundation that would justify and support the representation made by Mr Brusch that "Muffin Break has done its homework to ensure the site is a unique site" or "this is a ripper of a site", which representations, as stated above, I find were made by Mr Brusch.

77 Mr Infanti's selection process for this site is not supported by file notes or contemporaneous documents. Essentially it did not go beyond looking at the performance of Muffin Break franchises in centres which had a comparable moving annual turnover; although for reasons shown by Mr Bernardi, the applicant's expert, to be inappropriate, he included stores in Darwin and Cairns as comparators.

78 Mr Infanti conceded that there was no demographic analysis carried out, either quantitative or qualitative. Having said that, however, it has to be conceded that it is very difficult and beyond the capability of any retailer to carry out or obtain quantitative statistical demographic analysis of a specific centre because of the almost universal practice of shopping centre owners to refuse such intrusive undertakings, and because of their concern, in any event, to maintain, for commercial reasons, the confidentiality of such research.

79 Be that as it may, significantly, when Mr Infanti did look at Muffin Break franchises in the area, if he indeed did, he failed to look at, or take into consideration, one that was only 3 kms away which had failed; that is, the one in Whitehorse Plaza. He sought to discount this site as not relevant to an evaluation, but there were similarities with the FHC site that warranted evaluation in a more considered way than was done.

80 Although a quantitative assessment of the demographic that shopped at the Forest Hill Chase Shopping Centre was not possible, it certainly was open to a qualitative assessment as to its suitability by examining the nature of the major tenants (at the time they were stores catering for the lower socio-economic demographic, as opposed to The Glenn that cater for the higher end of the market), the competition from other coffee providers, and the location of the site within the centre. Mr Bernardi did all of that and concluded it was not a suitable site. Admittedly, it was an assessment greatly assisted by hindsight, but it nonetheless is confirmed by the poor performance of the site despite Mr Van Camp's best endeavours, and also those who followed. Again this qualitative assessment is given credulity by the fact the site has recently began making profit because of a significant change of the tenant mix when two major retailers, Myer and Target have established themselves there. It is very evident that the respondent did not undertake the assessment believed by Mr Bernardi to have been appropriate and which, had it been done, Mr Bernardi believed would have concluded the site was not suitable for a Muffin Break franchise, or at the very least, was one where one could not speak with confidence as to its suitability. Mr Bernardi evidence was persuasive and I accept it. From it, the only conclusion that can be reached is that the respondent did not undertake a reasonable and necessary evaluation that would have justified the representations about the site as being an "unique opportunity", or that the respondent "had done its homework" and it was "a unique site". Both comments about the site in my view are misleading, and from the mouth of Mr Brusch, deceptive. There was no evidence presented that Mr Brusch was aware of any "homework" having been done, there was no evidence in writing of an evaluative process having been undertaken and of which Mr Brusch had been made aware. Of course, Mr Brusch simply denies the statement was made, but I don't accept his denial.

81 Conversely, Mr Buckingham's evidence on behalf of the respondent I found unpersuasive and lacked the qualitative analysis of the site itself that I believe was necessary before a representation could be made about its suitability.

Reasonableness about the representation of the suitability of the site

82 In the circumstances, in respect of the FHC site, I find that Mr Infanti could not have, nor did he have, a reasonable belief that the FHC site was suitable for the operation of the franchise. Further, Mr Brusch could not have, nor did have a reasonable belief as to the suitability of the site. There is no factual basis for the representations about the suitability of the site.

The legal framework and the submissions

83 The respondent contends that to say representations were made about projected sales and that the respondent engaged in misleading and deceptive conduct would be to ignore all written documents. The whole scheme of the documents, if read correctly, would put a prospective franchisee on notice.

84 The respondent asserts that Mr Van Camp did not act reasonably in his dealings with the respondent, particularly

when regard is had to what was required of him; namely, the seeking of expert advice as to the risks of business, accounting and legal advice and the careful reading of the documentation that highlighted the acknowledgements as to representations. The respondent highlights the observations of his Honour Gibbs CJ in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199

> "Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit o persons who fail to take reasonable care of their own interests. What is reasonable will of course depend on all the circumstances."

85 The respondent also relies on the observations of his Honour Gummow J in *Elders Trustee and Executor Company Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193 at 247 when he said "section 52 is not designed for the benefit of a person who fails to take reasonable care of his own interests."

86 The conclusion asked to be drawn by the respondent is that first, no representations were made as evidenced by the acknowledgements and for other incidental reasons covered above, but, in any event, the respondent should not be bound by them in circumstances where Mr Van Camp has not acted reasonably having regard to the clear direction given in the documentation that he seek and availed himself of, by fully informing his experts of the representations, the advice available to him.

87 The respondent drew a parallel with the facts of this case and that in *Poulet Frais Pty & Anor v The Silver Fox Company* (2005) 220 ALR 211. In that case, figures were provided by the franchisor of trading figures by other franchise outlets, but care was taken in the documentation to stipulate that the prospective franchisee in that case could not, in effect, rely on this as being indicative of what would be generated at the subject site.

88 The distinction, however, between the *Poulet Frais case* and this case is simply that I find Mr Brusch did, indeed, make the representation that the applicant could expect the sales projected in the pro forma expense statement and that representation constitutes misleading and deceptive conduct contrary to s 52 of the Act.

89 Again, the respondent relies on *Poulet Frais* as supportive of the proposition that the representation and warranty that the site was suitable because the respondent, through Mr Infanti's analysis of the site, in the circumstances, was a reasonable assessment of the suitability of the suit. Again, for the reasons set out, I am not persuaded he did not engage in an appropriate analysis as to suitability.

90 The applicant relies primarily on s 52 of the Act as the legal basis for its claim for compensation. Although S 52 imposes strict liability (see *Butcher v Lachlan Elders Realty Pty Ltd* (2004) 218 CLR 592) and whilst it is a provision designed to protect the consumer, it is not designed to protect the extraordinary gullible and foolish. This is because the conduct relevantly would not be misleading and deceptive if it is only misleading and deceptive to the extraordinary gullible or foolish person.

91 That said, a party who makes a misleading or deceptive misrepresentation cannot obliterate its effect or escape the consequences of making those statements by subsequently incorporating in documents which are executed in reliance upon that misleading and deceptive representation an acknowledgement or a disclaimer.

92 The cases of *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No1)* 79 ALR 83 (*Henjo Investments*) and *Demagogue Pty Ltd v Ramensky* (1992) 110 ALR 608 both stand for the legal principle that in determining whether conduct has been engaged in contrary to s 52 of the Act, the Court must consider the conduct as a whole and determine whether in all of the circumstances the conduct is regarded as misleading or deceptive; that it is not necessary and it is, indeed, artificial to require the identification of a specific representation.

93 The applicant argues that it was induced by, and relied upon, more than one representation (i.e. sales projections, suitability of the site, that respondent would do the right thing because of a "special" relationship). An applicant is permitted to rely upon or to have been induced by more than one representation. (See *Henjo Investments; Gould v*

Vaggelas (1985) 62 ALR 527 and *Sykes v Reserve Bank of Australia* (1998) 158 ALR 710)

94 The respondent relies heavily on the subsequent signing by Mr Van Camp of an acknowledgment that no representations were made. However, *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367 at 371 stands for the principle that such an acknowledgment does not constitute a bar to any successful claim that misleading or deceptive representations were made, but is merely a matter which must be considered in determining whether the relevant conduct as a whole can be regarded as misleading and deceptive. His Honour Sheppard J. in that case at 371 observed:

> "The remedy conferred by s 52 of the Trade Practices Act will not be lost, whatever the parties may provide in their agreement. If the vendor of goods has engaged in misleading or deceptive conduct, the law makes that person accountable for loss and damage suffered as a result of the unlawful conduct. That conduct will usually have been committed, as in this case, prior to the signing of any contract. If, as a result of the conduct, a person is induced to enter into a contract and suffers loss, an action to recover it lies. The terms of the contract are irrelevant."

95 His Honour Wilcox J. in *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375 at 378 stated:

> "Whatever may be the effect of cl 19 [the exemption clause in that case] in relation to an action brought in contract, in which reliance is placed upon an alleged warranty or condition not included in the contract of sale, that clause should not be allowed to defeat a claim based upon s 52. To permit such a clause to defeat such a claim would be to accept the possibility that a vendor might exacerbate his deception, as by actively misleading a purchaser as to the existence or nature of such an exclusion, and thereby ensure that he would escape liability."

96 In *Oraka Pty Ltd v Leda Holdings Ltd* (1997) ATPR 41-558 at 43-717 his Honour Burchett J. stated:

> "It cannot be thought that the very agreement that was obtained by a misrepresentation can be made good by incorporating in it a further misrepresentation falsely asserting that it was not procured by the means which were in fact employed. The agreement that so speaks to sustain itself was obtained by misrepresentation and no verbal magic of an added clause can change that."

97 This principle is not limited to agreements that were induced through deliberate misrepresentations. It also extends to any agreement which purports to excuse a party from liability for a contravention of s 52. (See *IOOF Australia Trustees (NSW) Ltd v Tandipech* (1998) ATPR 41-652)

98 The primary position of the respondent is that there were no representations as alleged. It relies on the evidence of its witnesses and on the acknowledgement clauses in documentation signed by Mr Van Camp as proof of that fact. For the reasons set out above, I am satisfied on the balance of probabilities that the representations were made. That being so, however, is not the end of the matter. The respondent then made submissions of the legal effect of the acknowledgment clauses.

99 The High Court in *Butchers Case* drew the distinction between oral representations and written representations. Both *Poulet Frais* and *Butcher's case* related to written representations. Contrary to the respondent's submission, *Poulet Frais* was not a case which bears a striking similarity of the facts of this case, except to the extent it concerned a franchise and involved an alleged representation about takings. The representation in *Poulet Frais* was written. There the trial judge found when all the documents were interpreted, there was an implied representation that if the franchisee did certain things he could expect sales as represented. What the appeal court said in *Poulet Frais* was, when you look at the documents as a whole, which included disclaimers, you cannot read out of that documentation, taken as a whole, the representation that the trial judge found.

100 In my view, neither *Butcher's case* or *Poulet Frais* deal with the facts of this case; namely with an allegation of an oral representation which induced Mr Van Camp to sign the documents which he did. It cannot be acceptable that the very agreement that was obtained by a misrepresentation can be made good by incorporating in it a further misrepresentation falsely asserting that it was not procured by the means which were in fact employed. See *Waltip Pty*

Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) ATPR 40-975 where his Honour Pincus J held that clauses in a deed of acknowledgement, providing that no precontractual statements had been made relied upon before the parties entered a lease, were of no effect if the facts were to the contrary.

101 The applicant also relies on s 51A of the Act which provides that where a representation is made as to any future matter and where there are no reasonable grounds for making that representation, the representation shall be taken as misleading. The findings set out above, which, in summary, conclude that Mr Brusch represented the likely sales Mr Van Camp could expect to receive on a week by week basis, reaching a target of $11,000 - $12,000 per week after 3 months, was, indeed, a representation made without any reasonable ground.

Conclusion

102 The respondent itself was, and remains, very aware of the potential for misrepresentation or deception by a practice of projecting sales to a prospective franchisee; hence the evidence of Mr Brusch, and Ms Kennedy about the respondent's established practise of not giving sales projections In response to that concern, the respondent includes acknowledgements about such representations. This is all predicated on the understanding that any such projections have serious consequences for they have the potential to expose the respondent to adverse claims.

103 In my view, the nature of the representations, taken as a whole, were capable of distorting the judgment of Mr Van Camp and distracting him, and indeed, any reasonable man in the circumstances, from the significance of the acknowledgements executed by him on behalf of the applicant.

104 In any event, the signing of questionnaire and Foodco Prospective Franchise document with its acknowledgements in the circumstance they were on 27 January 2006 does not lead to the inference as suggested by the respondent that no representations were made along the lines alleged. These documents signed, as I am satisfied, in rushed circumstances are of limited probative value and do not buttress the general contention of the respondent that the representations alleged were never made.

105 For the reasons set out above, I am of the view the respondent, through its employee, Mr Brusch engaged in misleading and deceptive conduct in breach of ss 51A and 52 of the Act when it made representations about the projected sales figures. That was a representation made in the lead up to the signing of the franchise and licence agreements. I am further satisfied that, to a significant degree, Mr Van Camp relied on the sales projection figures to assuage any concerns he may otherwise have had, or might otherwise be reasonably engendered, and was induced into a belief that the FHC site was truly "a unique site" at which he could be assured, by inference, of success.

106 One can reasonably expect a prospective franchisee to rely on representations made about likely takings when determining whether or not to enter into an agreement to purchase a franchise. There has been no evidence led by the respondents that they had reasonable grounds for the making of that representation in those terms because, first, they deny it was made and secondly, the subsequent financial performance of the FHC site would suggest, of itself, that the representation as to likely takings was not reasonably made.

107 In addition, for the reasons set out above, I am satisfied that the site was unreasonably represented as suitable. The unreasonableness of that representation stems from the lack application of a proper process of evaluation.

108 In the circumstances set out, the applicant was entitled to rescind the franchise and licence agreements *ab initio* and is therefore entitled to be put back into the position it enjoyed prior to the agreements.

Quantum

109 The evidence of loss was provided by Mr Sincock of Deloitte. The quantum of the applicant's claim I find, after certain concessions were made by the applicant, to be:

(a)	capital investment	$276,263.30
(b)	interest outstanding on loan facility (as at 31 Aug 2007)	$ 20,629.49
(c)	interest on loan facility from 1 Sept 07 to 26 March 2008	$ to be calculated