Henderson & Ors v Purairclean Pty Ltd & Anor [2013] NTSC 29

PARTIES:	HENDERSON, Kenneth Herbert AND HENDERSON, Gaelene AND HENDER KG PTY LTD (ACN 136 537 507) v PURAIRCLEAN PTY LTD (ACN 141 491 170) AND JAYMAK AUSTRALIA PTY LTD (ACN 110 994 744)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	41 of 2012 (21217736)
DELIVERED:	21 June 2013
HEARING DATES:	13 May 2013 – 17 May 2013
JUDGMENT OF:	RILEY CJ

CATCHWORDS:

COMPETITION AND CONSUMER LAW — Misleading and deceptive conduct — Franchise agreement — Representations as to potential turnover made to prospective franchisee — Representations not misleading or deceptive — No reliance — No loss or damage — *Trade Practices Act 1974* (Cth) s 51A, s 52, s 87.

COMPETITION AND CONSUMER LAW — Industry Codes — Franchising Code of Conduct — Disclosure — Franchise agreement must be disclosed 'in form in which it is to be executed' — Franchise manuals incorporated into agreement by reference — Disclosure before variation of franchise agreement — No loss or damage — *Trade Practices Act 1974* (Cth) s 51AD, s 87 — *Franchising Code of Conduct* cl 10.

CONTRACTS — Validity — Uncertainty and incompleteness — Incorporation by reference — Contracts executed without exchange of manuals that were incorporated by reference — No invalidity.

CONTRACTS — Restraint of trade — Franchise agreement — Validity of restraint — Validity to be assessed at time of entering contract — Reasonableness — Duration.

Trade Practices Act 1974 (Cth) s 51A, s 51AD, s 52, s 87.
Trade Practices (Industry Codes — Franchising) Regulations 1998 (Cth).
Franchising Code of Conduct cl 10.

Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (1973) 133 CLR 288
Australian Securities and Investments Commission v Fortescue Metals Group Ltd (2011) 190 FCR 364
Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304
Duralla Pty Ltd v Plant (1984) 2 FCR 342
Lindner v Murdock's Garage (1950) 83 CLR 628
Marks v GIO Australia Holdings Limited (1998) 196 CLR 494
Master Education Services Pty Ltd v Ketchell (2008) 236 CLR 101
Nordenfeldt v Maxim Nordenfeldt Guns and Ammunition Company Ltd [1894] AC 535
Peters (WA) Ltd v Petersville Ltd (2001) 205 CLR 126

Rafferty v Madgwicks (2012) 203 FCR 1
Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193

REPRESENTATION:

Counsel:

Plaintiff:	W Roper
Defendant:	M R Burnett

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Haarsma Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Henderson & Ors v Purairclean Pty Ltd & Anor [2013] NTSC 29
No 41 of 2012 (21217736)

BETWEEN:

KENNETH HERBERT HENDERSON
First Plaintiff

AND

GAELENE HENDERSON
Second Plaintiff

AND

HENDER KG PTY LTD
(ACN 136 537 507)
Third Plaintiff

AND:

PURAIRCLEAN PTY LTD
(ACN 141 491 170)
First Defendant

AND

JAYMAK AUSTRALIA PTY LTD
(ACN 110 994 744)
Second Defendant

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 21 June 2013)

[1] In February 2009, the first plaintiff, Mr Henderson, was working as a process technician at a mine in Western Australia. As a result of a serious

illness suffered by his wife, the second plaintiff, he was looking for other employment. He saw an advertisement on the Seek website for a 'Jaymak Complete Coolroom Care Franchise' for the Northern Territory. He responded to the advertisement and entered into discussions with Bill Christou, who was then the National Business Manager of the second defendant, Jaymak Australia Pty Ltd. Mr Henderson and Mrs Henderson agreed to purchase the franchise and they incorporated the third plaintiff ('Hender').

[2] On 30 April 2009, Mr and Mrs Henderson and Hender acknowledged in writing that they had received a disclosure document, the franchise agreement, the *Franchising Code of Conduct*[1] and a business name registration form from Jaymak Australia. They acknowledged that they had a reasonable opportunity to understand the disclosure document and the Code and indicated they had received advice about the agreement and the business from an independent accountant. They had been advised to seek advice from an independent legal adviser and an independent business adviser but decided not to do so. They said they had made their own enquiries as to the likely profit and turnover of the franchise and its viability. They further acknowledged that they had not relied upon any representations from the franchisor other than those contained in the documents. On 4 May 2009 Jaymak, Hender and Mr and Mrs Henderson entered into the Jaymak Franchise Agreement.

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[1] Schedule to the *Trade Practices (Industry Codes — Franchising) Regulations 1998* (Cth).

[3] Mr Henderson resigned from his employment and travelled to Sydney for Jaymak training. On 28 May 2009, whilst in Sydney, he was provided with the Jaymak Franchise Operations Manual (the 'May manual'). This manual was in substantially the same form as previous manuals except that it listed the authorised products and services that could be provided by Jaymak franchisees, one of which was 'air con vent cleaning and treatment'.

[4] On 1 June 2009, Mark Andrew Mackenzie, the managing director of Jaymak, flew to Darwin to provide sales training to Mr and Mrs Henderson. At that time he provided Mr and Mrs Henderson with the relevant user names and passwords to enable them to gain access to the manuals on the Jaymak intra-net site.

[5] Mr Mackenzie visited Darwin again on 15 June 2009. During this visit Mr Henderson informed Mr Mackenzie of a system he had developed for cleaning split system air-conditioners. The procedure involved the use of a cleaning tray fabricated out of aluminium and a pump unit, both of which were subsequently registered in the name of Mr Henderson with the Registrar of Designs under the *Designs Act 2003* (Cth). Mr Henderson developed what he described as the 'Cleaning Process', which he documented.

[6] Throughout the proceedings Mr Mackenzie, on behalf of Jaymak and Purairclean Pty Ltd (the first defendant), has made it clear that neither defendant claims any interest in the cleaning tray, pump and cleaning

process to which Mr Henderson refers. They do not dispute that Mr Henderson designed or developed the cleaning tray, pump and cleaning process. They do not use those items in the present businesses.

[7] In the course of proceedings and with the consent of both parties I made the following declaration in relation to those matters:

> The first and second defendants have no present and have never had any right, title or other interest in any intellectual property or other proprietary rights which may subsist in any of the Cleaning Tray, the Pump and the Cleaning Process as those terms are defined in the plaintiffs Second Further Amended Writ and Statement of Claim, filed 3 April 2013.

[8] The plaintiffs commenced operating the Jaymak franchise in June 2009. The evidence of Mr and Mrs Henderson was that by August 2009 they were concerned that the business was not producing sufficient funds to meet their goals. Mr Mackenzie gave unchallenged evidence that no such concern was expressed to him. The financial records reveal that, in fact, Hender received revenue as follows:

(a) $167,413 for the financial year ending 30 June 2010;

(b) $239,775 for the financial year ending 30 June 2011;

(c) $228,393 for the financial year ending 30 June 2012.

[9] In any event, Mr and Mrs Henderson advertised under the Jaymak name and obtained work cleaning split system air-conditioners, in addition to servicing cool rooms. This was done with the knowledge and approval of Mr

Mackenzie and was carried out as part of the Jaymak NT franchise. The first air-conditioning work was performed in September 2009.

[10] On 30 August 2009, Jaymak Australia produced a further manual (the 'August manual') which replaced the earlier reference to 'air-con vent cleaning and treatment' with 'Aircon Cleaning and Treatment' as an authorised service for which a franchise fee was payable. The August manual was uploaded to the intranet site at that time.

[11] Mr Henderson said in evidence that in October 2009 Hender commenced paying to Jaymak franchise management fees on work performed in relation to cleaning air-conditioners. However, it seems he was mistaken in this regard as email exchanges at the time record that there was a 'waiver on paying fees on any Air-Conditioner work until 30/12/2009' in recognition of the Hendersons' contribution to writing service procedures and processes in relation to such work. This reflected a policy of Jaymak to encourage innovation and development by franchisees by offering a 'three month waiver on fees for new add-on services if the franchisees were prepared to write service processes and procedures'.

[12] Some franchisees were not happy to perform the residential air-conditioning work as part of their Jaymak franchise. In January 2010, Mr Mackenzie discussed with the Hendersons and other franchisees the prospect of separating the domestic air-conditioning cleaning business from Jaymak under a new franchise. The idea was to separate the residential air-

conditioning cleaning business from the remaining commercial Jaymak businesses.

[13] Purairclean Pty Ltd was incorporated on 14 January 2010 for the purpose of establishing the new franchise business. The existing franchisees, including Mr and Mrs Henderson, were invited to join the new franchise. Some franchisees elected not to do so.

[14] On 1 July 2010, Purairclean issued the Purairclean Operations Manual version 1.0.

[15] Mr Henderson gave evidence that the air-conditioner cleaning side of the Hender business 'grew at a considerable rate through 2010 and by September 2010, approximately two thirds of [Hender's] revenue was coming from air-conditioning cleaning and sanitising.'

[16] On 20 October 2010, Hender and Mr and Mrs Henderson entered into a franchise agreement with Purairclean. They did so after receiving the relevant disclosure document which, inter alia, identified the nature of the business as being the cleaning of air-conditioners in the residential market. The Hendersons were enthusiastic about entering the agreement and they thanked Mr Mackenzie in writing for the opportunity. The purchase price was a nominal amount of one dollar, in relation to which Mr Mackenzie said to the Hendersons, 'I don't want you to pay any more than one dollar for the air-conditioner franchise because you developed it'. Mr Henderson said in

his evidence that Hender was not provided with any manuals, although he contributed substantially to the contents of the manual.

[17] Around May 2011, the Hendersons were looking to sell the Jaymak NT franchise in order to focus on the Purairclean franchise. In an email dated 8 May 2011 Mrs Henderson said 'I can't believe we're saying we want to sell Jaymak … but our future is Purairclean'. No expressions of concern or complaint regarding the operations or turnover of the Jaymak NT franchise appear in the written material.

[18] On 12 July 2011, the Hendersons and Purairclean signed a document described as a Memorandum of Understanding in relation to the development of the Purairclean franchise business in which agreement was reached that Hender would receive $5000 for every new franchisee recruited and trained in the system, as well as a '30% profit share allocation'.

[19] Later, on the advice of a 'business coach', Mr and Mrs Henderson took legal advice. On 13 January 2012, their lawyers wrote to Purairclean asserting that the intellectual property and know-how used in connection with the franchise business was developed by Mr and Mrs Henderson and not Purairclean. Until then the relationship between the parties had been very positive.

[20] On or about 29 February 2012, the third plaintiff, Hender KG Pty Ltd, ceased to trade as Purairclean NT. Before that date it had been trading under that name and pursuant to the Purairclean franchise agreement. A new

company, K & G Henderson Pty Ltd, was formed by the Hendersons. Mr and Mrs Henderson were the sole directors and shareholders of the new company.

[21] K & G Henderson Pty Ltd effectively took over the business that had previously been conducted by Hender under the names Purairclean NT and Jaymak NT. The new business serviced the customers who had previously been serviced by Hender. For a period, K & G Henderson Pty Ltd traded under the name PurAir Airconditioning, a name registered on 6 January 2012. It commenced trading under that name on 1 March 2012. Advertising taken out at the time advised in relation to PurAir Airconditioning that:

> This business has been operational under Gaelene and Ken for over three years, previously known as Jaymak NT and Purairclean NT which have now ceased operations.

[22] After complaint from the defendants as to the use of the name PurAir Airconditioning, the company traded under the name Ecoair Airconditioning. Ecoair Airconditioning was registered on 1 May 2012 and trading under that name commenced about that time. The phone numbers for the new business and the address from which the new business operated remained the same as for the Hender business throughout the whole period.

[23] These acts constituted a clear repudiation of the terms of the Purairclean franchise agreement.

[24] Thereafter Purairclean Pty Ltd issued breach notices under the franchise agreement to Hender and, later, a notice of termination under the Memorandum of Understanding. On 1 February 2012, Jaymak Australia commenced serving Darwin clients directly. On 1 June 2012 Purairclean Pty Ltd served notice on Hender repudiating the Purairclean Franchise Agreement. By letters dated 17 July 2012 Purairclean demanded that the Hendersons pay money claimed to be due under the Franchise Agreement. The plaintiffs admit having received the letters of demand and having failed to pay the amounts demanded.

The witnesses

[25] Both Mr and Mrs Henderson gave oral evidence in the proceedings. Mrs Henderson made it plain that she was not heavily involved in the financial side of matters and she left those to her husband. It would seem that, in relation to matters related to the businesses, she generally deferred to her husband. I found her to be a witness who was doing her best to assist although she did suffer problems with her memory, probably as a result of the serious illness she has suffered.

[26] On the other hand, I am unable to find that Mr Henderson was a forthright witness. He was slow to provide information that he considered might be harmful to his case. I was unable to accept some of his evidence. For example:

(a) He gave evidence that he did not think the name Purairclean NT and the business name registered on behalf of the Hendersons, PurAir Airconditioning, were alike. He rejected the suggestion that the choice of the business name was designed to take advantage of the goodwill created from the franchise business. He said he had not considered the similarity of the names and the new business name was chosen without regard to the prospect that customers of the franchise business would think the new business was a continuation of the existing franchise business. He maintained this position notwithstanding the advertising to which I have referred, the prominent reference to Purairclean on his work vehicle and in the advertising, the continuation of the same phone numbers and, of course, the remarkable similarity between the business names Purairclean NT and PurAir Airconditioning. I do not accept his evidence in this regard.

(b) Mr Henderson gave evidence that, based upon information provided by Jaymak Australia,[2] he and his wife calculated that they could earn an income 'comparable with [his] income from the mine in the first year of operation'. He said that his calculation of his net position was decisive in his decision to enter into the franchise agreement and it was based on this calculation that he entered into the agreement. His calculations were set out as $150,000 (his claimed first year goal turnover) less $55,000 (setup costs) less $15,000 (franchise fees) leaving a balance of

[2] Discussed below at [31]–[32].

$80,000 which Mr Henderson said ‘allowed some room for comfort’. Under cross-examination, it became clear that his income at the mine was the higher figure of $85,000 per annum. The disparity between his income from the mine and that which he could expect to receive in the first year of the franchise became even greater when Mr Henderson acknowledged that he had not included any figure for the obvious costs involved in producing the turnover referred to in his calculations. The fact that costs of a significant order would be incurred was obvious and I do not accept that he was unaware of, or overlooked the existence of, such costs. I do not accept his evidence that he calculated the likely return from the franchise in the manner described nor his claim that the calculated figure was commensurate with his income from the mine. Further, I do not accept that any such calculation was a factor in his decision to enter the franchise agreement.

(c) When cross-examined as to his claim that there was insufficient cool room cleaning work available, Mr Henderson was asked whether there was such work which was overdue in October 2011. He acknowledged that this was so but denied that it had anything to do with him concentrating on air-conditioning work to the detriment of the cool room work. He was then taken to an email written by Mrs Henderson on 12 October 2011 seeking assistance from other franchise holders around Australia and which included the following:

> We are sending out this SOS to see if anyone would like to pop on up to Darwin for about 2 to 3 weeks to carry out some cool room re-service work which is becoming very overdue. We are completely booked for the entire month of October and into November and that is 7 days a week with air-conditioners. ... We unfortunately do not have time to do this business justice.

Only then did Mr Henderson acknowledge, 'that is possibly the case'.

(d) Mr Henderson claimed that Hender commenced paying to Jaymak Australia franchise management fees on work performed in relation to cleaning air-conditioners in October 2009. This was not so, as evidenced by email exchanges made at the time.[3]

[27] The witnesses who gave oral evidence on behalf of the defendants were Mark Andrew Mackenzie, who is the managing director of both Jaymak Australia Pty Ltd and Purairclean Pty Ltd, and Lawrence William Mungovan, the national operations manager of the franchise network conducted by Jaymak Australia. Mr Mungovan was not challenged as to his evidence. Mr Mackenzie was subjected to cross-examination and I found him to be a witness who did his best to recall events and conversations relevant to these proceedings. He was willing to acknowledge facts against his interest. He readily acknowledged mistakes in his calculations. I found him to be a frank and generally reliable witness.

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[3] See [11] above.

The Jaymak representations

[28] The plaintiffs claimed that, in the period of February to March 2009, Jaymak made representations to Mr and Mrs Henderson to the effect that:

a. the average turnover of a Jaymak franchise as at February/March 2009 was $150,000 per annum; and

b. the aforesaid average turnover was a conservative estimate of the actual average turnover of a Jaymak Franchise as at February/March 2009; and

c. Hender and Mr and Mrs Henderson should exceed that turnover should they acquire a Jaymak franchise in the Northern Territory of Australia.

[29] The plaintiffs claimed that the representations were misleading and deceptive or likely to mislead and deceive for the purposes of s 52 of the *Trade Practices Act 1974* (Cth) in that:

a. the average turnover of a Jaymak franchise as at February/March 2009 was not in fact $150,000 per annum but rather was considerably less than that amount;

b. the aforesaid average turnover was, in the circumstances, not a conservative estimate of the actual average turnover of a Jaymak franchise as at February/March 2009, but rather was an overstatement of the same; and

c. Hender and Mr and Mrs Henderson did not in fact exceed that turnover following Hender's acquisition of the franchise.

[30] It was claimed that, but for the representations, Mr and Mrs Henderson, through Hender: would not have proceeded with the acquisition of the Jaymak franchise; would not have assumed obligations as guarantors; would not have incurred the costs and fees related to the franchise; would not have entered into the Purairclean franchise; would not have undertaken

obligations as guarantors in relation to the Purairclean franchise; and would not have incurred the fees and charges in relation to that franchise. It was further claimed that Mr Henderson would not have resigned from his previous employment. The Hendersons and Hender claimed to have suffered loss and damage or that they were likely to suffer loss and damage as a result of the reliance upon the representations.

[31] The plaintiffs say that the representations were communicated partly in writing and partly orally. In relation to the communication in writing, the plaintiffs rely upon an advertisement which appeared on the Seek website in or about February 2009. Although a copy of the advertisement was not able to be located there was agreement as to the presence of the following words upon which the plaintiffs rely:

> With as little as 100 customers, you could have a business generating you over $150,000 in sales per year just in repeat business. This will be your goal for the first 18 to 24 months.

[32] In relation to the oral communication, Mr Henderson gave evidence that Mr Christou, the then Business Development Manager of Jaymak Australia, said to them, in the context of the Seek advertisement, words to the 'general effect' that:

> The $150,000 is based on the experiences and turnovers of our other franchisees. If anything that figure is conservative. You will have no competition in the NT and there is no reason why, if you work hard, you shouldn't exceed that amount.

Mrs Henderson also said the conversation took place in the context of the Seek advertisement and the words were to the following effect:

> We provide you with customers and you can find your own. You won't have any competition in Darwin. The whole market can be yours. Our modelling is based on the turnovers our other franchisees have received just from repeat business. You will have no problem getting customers up here and should easily make more than $150,000 a year in turnover if you put the effort in.

(a) The representations

[33] The plaintiffs submitted that the identified representations were false and misleading. It was submitted that the representations were as to future matters within the meaning of s 51A of the *Trade Practices Act* with the consequence that they are deemed to be misleading for the purposes of s 52 of the Act upon the plaintiffs demonstrating that the represented state of facts did not come to pass, unless Jaymak Australia establishes that it had reasonable grounds for making the representations. It was further submitted that if Jaymak Australia did have reasonable grounds for making those representations they were, as a matter of fact, ultimately misleading and deceptive.

[34] Contrary to the submission of the plaintiffs, the representations made in the Seek advertisement do not make any reference to the average turnover of a Jaymak franchise as at February/March 2009 being $150,000 per annum. What the advertisement does is advise a potential franchisor that: (a) with as little as 100 customers; (b) the franchisee could have a business generating

over $150,000 in sales per annum; (c) in repeat business. It then says that this would ‘be your goal’ for the first 18 to 24 months. The advertisement made no reference to an ‘average turnover’ but, rather, was a statement of fact that, as at that date, the repeat business of 100 customers would generate $150,000 in sales per annum.

[35] As there was no reference in the Seek advertisement to ‘average turnover’ it could not be said, as the plaintiffs contend, that this was a conservative estimate of the actual average turnover of a Jaymak franchise.

[36] Finally, there is nothing in the Seek advertisement to suggest that a franchisee ‘should exceed that turnover should they acquire a Jaymak franchise in the Northern Territory’. At its highest, the Seek advertisement identified that a turnover of $150,000 per annum was a ‘goal’ which ‘could’ be achieved with as little as 100 customers and in 18 to 24 months.

[37] Turning to the oral communication with Mr Christou, it was accepted by the Hendersons that the conversation took place in the context of the Seek advertisement. Neither version of the conversation refers to an average turnover but rather refers to the experience of other franchisees in other locations. What was said was that, by reference to the experience of other franchisees, the figure of $150,000 per annum referred to in the Seek advertisement could be achieved from the repeat business of 100 customers.

[38] In so far as the plaintiffs allege that Mr Christou represented that the franchisee ‘should’ produce a turnover that exceeds $150,000 per annum,

the conversation must be considered in the context of the Seek advertisement which expressed the figure as a 'goal'. The Hendersons adopted that figure as a goal. It was a statement of aspiration rather than of fact or expectation. For the reasons set out below the figure was, in fact, achieved. Further, as I have concluded below, the Hendersons did not place relevant reliance upon the pleaded representations.

[39] In my opinion the representations as pleaded by the plaintiffs have not been made out.

(b) The representations were correct

[40] It is unnecessary to consider whether the representation that the average annual turnover of a Jaymak franchise was $150,000 was, in any event, factually correct as at that time. I will deal with that briefly. Any suggested representation was made in the context of the Seek advertisement which qualified the claimed turnover by reference to it being a goal that could be achieved with 100 customers. The evidence of Mr Mackenzie was that he had prepared figures for the 2012 conference of Jaymak franchisees and he provided those figures to the Court. The figures were prepared for the benefit of other existing franchisees in 2012 and were not prepared for the purposes of these proceedings. The calculations of Mr Mackenzie were that, as at 2008/2009, 'the average spend was $1554 per annum for each regular customer'. With 100 customers the goal of $150,000 in turnover would be reached. The calculations were challenged in cross-examination and some error was conceded by Mr Mackenzie. In my opinion the difference was not

significant. In addition the figures reflected the understanding of Mr Mackenzie at the time. Mr Mackenzie went on to say that his calculations were supported by his own experience with customers and as the result of dealing with other franchisees. I accept his evidence in this regard.

[41] Whether the representations were as to existing facts or as to a future matter there were reasonable grounds for the making of those representations.

(c) The turnover figures of Jaymak NT

[42] There is no dispute that the Hendersons did 'work hard' and 'put the effort in'. They claimed that the represented state of affairs did not come to pass. Whilst acknowledging that Hender achieved the turnover figures set out at [8] above, the plaintiffs observed that only:

(a) $101,383.59 for the 2009/2010 financial year;

(b) $82,078.26 for the 2010/2011 financial year; and

(c) $33,905.38 for the 2011/2012 financial year,

was referable to the cool room cleaning franchise that Hender originally acquired and in respect of which the representations were made. It was submitted that the difference between the figures resulted from the air-conditioning cleaning services performed by Jaymak NT when it became apparent to the Hendersons that the turnover of the cool room business would not reach what they claimed to be the represented level.

[43] In my opinion this submission proceeds on a false premise. It treats the business operated by Hender under the name Jaymak NT as if there were two quite separate businesses. There were not. The services provided under the Jaymak franchise included, from at least May 2009, 'air-con vent cleaning and treatment' or, as it was subsequently described, 'aircon cleaning and treatment'. In addition, the Hendersons sought and obtained the approval of Mr Mackenzie, on behalf of Jaymak Australia, to carry out the air-conditioning cleaning services within the franchise agreement as permitted under that agreement. Both the air-conditioning cleaning services and the cool room cleaning services were part of the one integrated business.

[44] All revenue was earned by Hender through Mr Henderson working for Jaymak NT. The air-conditioning work was attracted by and performed under the name of Jaymak NT and all the administrative support, including the business system, was provided by Jaymak Australia. The different aspects of the business were integrated and performed under the terms of the Jaymak Franchise Agreement. The Hendersons did not seek to pursue the air-conditioning work in a separate company and to have done so would have breached of the Jaymak Franchise Agreement.

[45] It is apparent that both Mr and Mrs Henderson preferred the air-conditioning side of the business and put increasing amounts of their time and effort into establishing that aspect of the business to the detriment of the cool room cleaning side of the business. This was acknowledged in the email of Mrs Henderson dated 8 May 2011 when she said:

> Ken and I want to know how we go about selling Jaymak and think that we should do it soon, I can't believe we're saying we want to sell Jaymak … but our future is Purairclean and it's what we want to really build and concentrate on, I think we could have 30 franchises in 10 years easily.

[46] In an earlier email, dated 2 November 2009, Mr and Mrs Henderson said of Jaymak Australia:

> A working partnership has allowed us to develop all areas of the business and together with great encouragement and unlimited support from the Franchisor we are achieving steady growth well beyond our original targets.

[47] The fact that the businesses were integrated and that the air conditioning work was being preferred is reflected in the email written by Mrs Henderson on 12 October 2011 seeking assistance from other franchise holders around Australia in which she noted that the 'cool room re-service work … is becoming very overdue' and that 'we unfortunately do not have time to do this business justice'.[4] It is further reflected in the evidence that Hender had been unsuccessfully seeking a further permanent employee for a period of some two years to assist Mr Henderson to carry out the work. This does not suggest a lack of work.

[48] Whether or not there was a representation to Mr and Mrs Henderson that the turnover of the franchise should exceed $150,000 per annum, the fact is that the turnover of Jaymak NT in the relevant years did exceed $150,000.

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[4] See at [26](c) above.

(d) Reliance

[49] Further, and in any event, I do not accept that the plaintiffs relied upon the representations as pleaded. At the time of making the decision to leave his employment, Mr Henderson had full awareness of the diagnosis of the illness suffered by Mrs Henderson. He was anxious to leave his fly-in fly-out employment and return to employment in or around Darwin. He did not rely upon any representation as to the income he could earn being equivalent to his existing income as a reason for leaving his employment. This is demonstrated by the fact that his own calculations revealed that his income would be less than what he earned in the mines. To the extent that he relied upon any expectation of future earnings, the reliance was placed upon his own calculation and not upon any representation of average turnover made to him.

[50] The undisputed fact that Mr and Mrs Henderson did not make any complaint regarding turnover to the defendants until after the breakdown in the relationship supports the conclusion that whatever disappointment they felt in that regard (if any) was not the result of any misrepresentation made to them by the defendants. I find Mr Henderson to be a person who would be quick to protest if he thought he had been misled. To the contrary, the Hendersons were fulsome in their support of Jaymak Australia, including stating in an email dated 2 November 2009 that they were ‘achieving steady growth well beyond [their] original targets’.

[51] Accepting only for the purposes of this discussion that the claimed representations were made, I do not accept the evidence of Mr and Mrs Henderson that, but for those representations, they would not have acquired the Jaymak NT franchise or executed the Jaymak Franchise Agreement. Such a claim is quite contrary to the expressions of satisfaction of both Mr and Mrs Henderson throughout the period in which they operated the franchise. Although those expressions were made after the execution of the agreement, they reflect the positive attitude of the Hendersons from before the time of signing through to the time when difficulties arose in the relationship regarding intellectual property rather than turnover.

[52] It is to be noted that, at the time of entering the Jaymak Franchise Agreement, the Hendersons also signed a document entitled 'Acknowledgement by the Franchisee and the Guarantors' in which they acknowledged that they had the opportunity to read and understand all of the transaction documents. In the acknowledgement they were given the opportunity to identify representations upon which they relied or intended to rely in relation to entering the franchise agreement. They identified no such representations. In response to the question, 'Has the Franchisor, its employees, directors, agents or associates made any representations or statements to you other than those contained in the Transaction Documents?' the Hendersons responded 'no'. It is a question of fact whether such a contractual disclaimer of reliance is evidence of non-reliance and of want of a causal link between the suggested representations and the loss or damage

flowing from entry into the contract.[5] In this case, the acknowledgement reflects the fact of non-reliance.

(e) Loss or likelihood of loss

[53] The plaintiffs seek relief pursuant to s 87 of the *Trade Practices Act* based upon their claim that they are likely to suffer loss or damage. That section confers remedial powers on the Court[6] and is enlivened if the plaintiffs establish that they have suffered or are likely to suffer loss or damage as a result of the impugned conduct. The approach to the section was discussed in *Marks v GIO Australia Holdings Limited* where it was said:[7]

> If loss or damage is shown to have been suffered or to be likely to be suffered, orders of the kind prescribed by s 87 may be made. Proof of loss or damage (actual or potential) is therefore the gateway to the s 87 remedies. But the identification of loss or damage is important in the operation of s 87 not only for this reason but also because the power to make orders under s 87 is limited to making orders 'if the Court considers that the order or orders concerned will compensate .. in whole or in part for the loss or damage or will prevent or reduce the loss or damage ... That is, the Court can make orders under s 87 only in so far as those orders will compensate (or will prevent or reduce) the loss or damage that is identified.

[54] The plaintiffs must establish a causal link between the impugned conduct and the loss that is claimed.[8] That has not occurred in this case for the reasons expressed above, namely: Mr Henderson made his own calculations which he described as 'the decisive factor' in deciding to enter into the

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5 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 312 [31] per French CJ.

6 *Duralla Pty Ltd v Plant* (1984) 2 FCR 342 at 345–6 per Smithers J.

7 (1998) 196 CLR 494 at 513 [43] per McHugh, Hayne and Callinan JJ.

8 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 319–20 [27] per French CJ, quoting *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 604–5 [37] per Gleeson CJ, Hayne and Heydon JJ.

agreement; the Hendersons acknowledged that they had not relied upon any representations; and the plaintiffs made no complaint of any link between such representations and any loss suffered until after the falling out over other issues.

[55] Further, the plaintiffs have not established that any loss was in fact suffered. As is revealed by the financial records referred to at [8] above the turnover of Hender in each year of operation was in excess of $150,000.

[56] The remaining loss claimed by the plaintiffs is that Jaymak Australia may be entitled to rely upon the restraint of trade provisions contained in the Jaymak Franchise Agreement. There is no causal link between the alleged impugned conduct and the imposition of the restraints of trade contained in the Jaymak Franchise agreement or the Purairclean Franchise agreement.

[57] In conclusion on this issue, I hold that the representations were not made by or on behalf of Jaymak Australia in the form claimed by the plaintiffs, and the representations that were made were not misleading or deceptive or likely to mislead or deceive for the purposes of the *Trade Practices Act*. Further, I find that the Hendersons did not enter into either franchise agreement or undertake obligations as guarantors under those franchise agreements because of any such representation but, rather, relied upon their own assessment of the prospects for the franchise in Darwin. I find that Mr Henderson did not leave his previous employment for reasons associated with any such representation. Finally, I find that neither the Hendersons nor

Hender suffered loss or damage or were likely to suffer loss or damage as a result of reliance upon any such representation.

The *Franchising Code of Conduct*

[58] The plaintiffs submitted that Jaymak Australia and Purairclean Pty Ltd contravened the provisions of the *Franchising Code of Conduct*[9] in that they failed to comply with their disclosure obligations before the execution of each of the Jaymak Franchising Agreement and the Purairclean Franchising Agreement and, further, before the extension of the Jaymak Franchising Agreement as a result of the issue of the May and August manuals.

[59] There was no dispute that the Code has application to each of the Franchising Agreements. The Code is an industry code for the purposes of s 51AD of the *Trade Practices Act*, which provides that 'a corporation must not, in trade or commerce, contravene an applicable industry code'. The complaint of the plaintiffs was, in relation to each of the franchise agreements, that the disclosure requirements were not met. Reference was made to the obligations imposed upon the franchisor under the Code to provide a copy of the franchise agreement 'in the form in which it is to be executed' to a prospective franchisee at least 14 days before entering into the agreement.[10]

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[9] The Code is the schedule to the *Trade Practices (Industry Codes – Franchising) Regulations 2008* (Cth).

[10] *Franchising Code of Conduct* cl 10.

(a) The Jaymak Franchise Agreement

[60] The plaintiffs argued that whilst Jaymak Australia provided them with the Jaymak Franchise Agreement it did not provide the manual which, it contended, was a necessary and incidental part of the agreement. It was submitted, and it is accepted, that the scheme created by the Code is intended to be protective of prospective franchisees[11] and that protection is to be achieved 'by ensuring that a prospective franchisee is in a position to make an informed decision about the operation of the franchise'.[12]

[61] The defendants submitted that the plaintiffs were provided with a copy of the franchise agreement in the form in which it was to be executed and the plaintiffs executed that document in that form. The manual was provided soon after. The defendants say there has been compliance with the requirements of the Code. In my opinion that is so. It was not necessary to provide the manuals to the prospective franchisee. The manuals were referred to and incorporated into the agreement by reference. The manuals, along with any other similarly incorporated material, were available to be inspected upon request. This does not detract from the fact that the franchise agreement was provided in the form in which it was to be executed.

[62] If it be the fact that the franchise agreement was not provided 'in the form in which it is to be executed', it matters not. This is because the plaintiffs seek a remedy pursuant to s 87 of the *Trade Practices Act* but, in so doing, they

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[11] *Rafferty v Madgwicks* (2012) 203 FCR 1 at 41 [149].

[12] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 112 [25].

have not identified any loss or damage or potential loss or damage from any breach of the Code. The manual was supplied soon after the document was signed and the parties continued thereafter to operate pursuant to the terms of the manual and subsequent manuals without complaint or difficulty. There was no suggestion from either Mr or Mrs Henderson that there was anything in the manual which caused concern and there was no suggestion that they would not have signed the franchise agreement if they had seen the manual before the time of signature. They do not complain that they were not in a position to make an informed decision about the operation of the franchise. Nothing flowed from any failure to provide the manual to the proposed franchisees before they signed the franchise agreement.

[63] In relation to the Jaymak Franchise Agreement, the plaintiffs claimed that the defendants also breached the Code by varying the terms of the agreement by extending the definition of 'Authorised Products and Services' in the May and August 2009 versions of the manual. In particular, it was said they did so by including split system air-conditioning cleaning within those services. It was alleged that the breach occurred because the defendants did not provide the requisite disclosure and did not obtain from the franchisee confirmation that the franchisee had received, read and had a reasonable opportunity to understand the disclosure document and the Code.[13] It was submitted that to the extent that the franchise agreement was varied by the

[13] *Franchising Code of Conduct* cl 11.

May or August manuals, those variations should be declared void and/or unenforceable.

[64] A disclosure document must be given to prospective franchisees or 'a franchisee, if the franchisor or the franchisee proposes to renew, extend, or extend the scope of the franchise agreement'.[14] Neither the May nor August manuals renewed or extended the agreement. It is arguable that the May manual extended the scope of the franchise agreement by adding the business of cleaning of domestic air conditioners. However, the franchise agreement at all times contemplated that services and products could be added through amendment to the manuals. There was no suggestion that the addition of this business was in any way inconsistent with, or not allowed under, the franchise agreement.

[65] If the May manual did extend the scope of the franchise agreement by adding the business of cleaning of domestic air conditioners to the authorised services, nothing flows from any failure on the part of Jaymak Australia to make appropriate disclosure pursuant to the provisions of the Code. It was the plaintiffs who sought approval to carry out such work under the terms of the agreement and approval was granted. It was Mr Henderson who wrote some of the material which appeared in the later manual. The November 2008 manual permitted associated work to be added provided authorisation was first obtained and that is what occurred.

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[14] *Franchising Code of Conduct* cl 6B.

[66] There was no loss or damage or potential loss or damage that flowed from the franchisee not being provided with a new disclosure document. After the plaintiffs became aware of the May manual they continued to operate as they had before with the approval of the defendants. They gave no evidence of any provision of the May manual which in any way would have led to them altering their position had they been aware of it. They wished to do the work, they sought permission to do the work and went on to do the work whether or not it appeared in the 'authorised services' within the May manual.

[67] Following the introduction of the May manual, and at the time the August manual was issued, the cleaning of air-conditioners was included within the range of authorised products and services. Although the description of this service provided in the August manual is slightly different, it covers the same work and was understood by the parties to do so. There was no requirement for any disclosure at this time.

(b) The Purairclean Franchise Agreement

[68] Similar submissions were made in relation to the Purairclean Franchise Agreement. It was submitted that when the franchise agreement was entered into the relevant manual was not provided. The plaintiffs' claim in this regard is even weaker. The new franchise was set up with the approval and, indeed, express support of Mr and Mrs Henderson. The business of cleaning air-conditioners was one that had been pursued by Mr Henderson and it was Mr Henderson who wrote significant parts of what became the manual when

it was produced. The business carried on under the Purairclean Franchise Agreement by the Hendersons was the same as part of the business carried on by them under the Jaymak Franchise Agreement. There can be no suggestion that the Hendersons were not fully aware of the nature of the business and all that was subsequently contained in the manual. They cannot, and do not, complain that they were not in a position to make an informed decision about the operation of the franchise. Nothing flowed from any failure to provide the manual to the proposed franchisees prior to the time of signing the agreement.

[69] Again, there was no loss or damage or potential loss or damage that flowed from any failure in this regard.

Contract construction — uncertainty and incompleteness

[70] The plaintiffs contend that the Jaymak Franchise Agreement and the Purairclean Franchise Agreement were each executed in the absence of any manuals and, as the manuals contained relevant information, there was ‘no formal meeting of the minds’. It was submitted that essential matters were left for determination by one of the parties because the content of expressions such as ‘system’, ‘confidential information’ and ‘authorised products and services’ were not agreed on execution.

[71] Generally speaking, courts will endeavour to uphold contracts notwithstanding uncertainty of expression. Further, terms may be

incorporated into a contract by reference. In *Cheshire & Fifoot*[15] it is noted that:

> It is no objection that incorporated terms are in a form that is subject to unilateral alteration from time to time, although the power to vary them may, like other contractual powers, be subject to an implied obligation to act in good faith.

[72] In the present case, material was incorporated into each franchise agreement by way of reference. Each agreement was a signed document and each referred to the manual or manuals and identified them for the purposes of the agreement. Each agreement expressly incorporated the identified relevant manual into the agreement. The expressions to which the plaintiff specifically referred were addressed in the incorporated manuals. There was no evidence that the parties to either agreement had a different understanding as to the nature or terms of the agreement. There was no evidence that the terms of either relevant manual were such as to 'foist upon the parties a bargain which they have not made'.[16] There was no suggestion that either party acted in bad faith.

[73] It is apparent that the parties intended to enter into a binding agreement. The parties proceeded with their business arrangements under the respective franchise agreements for some time without difficulty or concern. They did so by reference to the agreement. No area of disagreement, confusion or

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[15] N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot: Law of Contract* (LexisNexis Butterworths, 10th Australian ed, 2012) at 445 [10.27], referring to *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 (citations omitted).

[16] *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at 408 [123] per Keane CJ. See generally at 407–8 [121]–[123].

uncertainty as to what was meant by either agreement was identified. The Court has not been called upon to construe the terms of either franchise agreement because of any claimed unclear meaning. The conduct of the business arrangements continued until there was a falling out over a collateral matter.

[74] In my opinion neither franchise agreement was uncertain or incomplete in a way that would make the agreement void or unenforceable.

[75] It was submitted on behalf of the plaintiffs that 'Jaymak's attempts to unilaterally vary the Jaymak Franchise Agreement in May and August 2009, so as to extend the same to air-conditioning, were ineffective'. This submission ignores the fact that the arrangement proceeded by way of consent and at the request of the plaintiffs. It was not a case where the Hendersons claimed to have no other alternative than to accept the amendments because of the binding agreement. Rather, they wished to proceed with cleaning of domestic air conditioners within the existing franchise agreement. So much is evident from the evidence of Mrs Henderson.

The breach of the Jaymak Franchise Agreement

[76] The defendants claim that the plaintiffs have breached this franchise agreement. Accepting that the agreement is valid and enforceable, there seems to be no dispute that they did so.

[77] Hender failed to provide profit and loss statements, balance sheets and sales reports for the month of January 2012. A breach notice in accordance with the agreement was served and the breach was not remedied. Further, in March 2012 Hender failed to provide services to clients in breach of the relevant clauses of the franchise agreement. In April 2012 it ceased making any payment of management fees, and in May 2012, it ceased operating under the agreement. The agreement was then terminated.

[78] Jaymak Australia seeks management fees payable before the termination of the agreement and also management fees it would have received between June 2012 and May 2014, being the expiry date of the franchise agreement.

[79] The management fees claimed by Jaymak Australia are the minimum payments due pursuant to the terms of the franchise agreement and $551.25 for each of the months of March 2012 to May 2012 and then $578.81 for each of the months of June 2012 to May 2013 being the loss to date. There is also a claim for the future in the sum of $607.75 per month for the period from June 2013 to May 2014, the present value of which is $7169.50. The total claim is in the sum of $15,768.47 plus GST.

[80] The plaintiffs point out that the claim makes no allowance for money received by Jaymak from operating the Jaymak franchise in the intervening period. I agree with the plaintiffs that the amount received must be set off against the defendants' claim for losses to date. I invite the parties to make the necessary calculations in this regard.

[81] Further, the claim for the future loss does not make any allowance for the income the second defendant will derive from operating the franchise during that period. The evidence shows that the continued operation will make money consistently at least with what has occurred to date. In my opinion the anticipated receipts should be set off against the amount claimed. I am not satisfied that any loss will be suffered and I make no allowance in this regard.

The breach of the Purairclean Franchise Agreement

[82] The defendants also claim that the plaintiffs have breached this franchise agreement. Accepting that the agreement is valid and enforceable, there seems to be no dispute that they did so.

[83] Again the breach is constituted by a failure to pay management fees, this time from December 2011 onwards. A breach notice was served but Hender did not remedy the breach. Further, in clear breach of the agreement Hender ceased trading under the Purairclean Franchise Agreement on 29 February 2012 and the same business was thereafter operated by K & G Henderson Pty Ltd. The franchise agreement was terminated at that time.

[84] As a consequence, Purairclean lost the benefit of management fees payable from 29 February 2012 to the end of the franchise period under the Purairclean Franchise Agreement being 30 September 2015. In addition, the defendants claim those management fees that were payable but unpaid prior to the repudiation on 29 February 2012.

[85] The defendants presented the claim for damages in two ways. The first was to allow for management fees for the period December 2011 to February 2012 inclusive based upon the turnover in the December 2011 Profit and Loss Statement of Hender and then for the period from March 2012 onwards based on the turnover reflected in the K & G Henderson Pty Ltd financial statements from 1 July 2012 to 16 April 2013, being the last figures available prior to trial. This approach gave a figure of $120,082.63 plus GST. It was the submission of the defendants that the use of the K & G Henderson Pty Ltd figures is appropriate as the performance of the company demonstrated that the franchise would have increased its turnover. In my opinion this is the appropriate approach.

[86] The second approach was to allow for the management fees for December 2011 based on the turnover in the Hender Profit and Loss Statement for December 2011 and then for the period from January 2012 onwards on the turnover reflected in the Profit and Loss Statement of Hender for the period 1 July 2011 to 29 February 2012. This led to a claim in the amount of $75,591.06 plus GST.

[87] The plaintiffs submitted that the second approach should be adopted because the figures achieved by K & G Henderson Pty Ltd ignore the fact that the business conducted by the company ‘was very different’ from that being conducted by Hender. It was submitted that this was because the K & G Henderson Pty Ltd business was not confined to: a restricted area of operation; the provision of limited products and services; the use of

approved consumables; the residential market; or Purairclean's approach to the advertising of its services. Whilst those restrictions contained in the franchise agreement did not apply to K & G Henderson Pty Ltd, there was no suggestion in any of the evidence that, save for some possibly different advertising, the business was in fact different from the business previously conducted under the franchise agreement. Further, I do not accept the submission made on behalf of the plaintiffs that the default management fee of $250 plus GST per month has application in the circumstances.

[88] In relation to GST, I accept the submissions of the plaintiffs that damages awarded for payments due following termination of the franchise agreement do not constitute a supply and consequently no GST attaches.[17] The franchise agreement was terminated on 29 February 2012.

[89] The plaintiffs say that Purairclean Pty Ltd has failed to mitigate its loss by failing adequately to pursue the sale of the Purairclean franchise or by seeking to operate the franchise itself as it did with the Jaymak franchise. There is some force in this argument. There was some limited advertising of the availability of the franchise but it could not be said to have been pursued with vigour. Further, the franchise may yet be sold or, possibly, the business opportunity undertaken by Purairclean Pty Ltd itself. Although the plaintiffs have continued to work in the field there is nothing to suggest that the opportunities have been exhausted or that another business offering the same

[17] Australian Tax Office, Goods and Services Tax Ruling GSTR 2001/4, 'Goods and Services Tax: GST Consequences of Court Orders and Out-of-Court Settlements'.

services could not comfortably survive. In my opinion, doing the best I can with the limited information available, the award of damages should be reduced for both the past and the future by one third to reflect these matters.

Claim on guarantee

[90] Pursuant to the provisions of each agreement, Mr and Mrs Henderson individually guaranteed the performance of the obligations imposed on the franchisees. They agreed that they would indemnify the franchisor in each case for all losses that might be sustained as a result of a breach of the particular franchise agreement and would pay to Jaymak Australia or Purairclean Pty Ltd such moneys as Hender was obliged to pay under the relevant franchise agreement and had not paid. Letters of demand were served by the defendants on 17 July 2012.

[91] It was submitted on behalf of Mr and Mrs Henderson that the franchise agreements had been unilaterally varied by the issue of the manuals and, upon variation, they were relieved of their obligations under the guarantees and indemnities. However, as was pointed out by the defendants, each of the franchise agreements provided that, in consideration of the franchisee being granted a franchise, the Hendersons guaranteed performance of the agreement as ‘varied or extended in any way’. As principals of the franchisee the Hendersons were fully aware of the variations.

[92] In my opinion the Hendersons are liable to guarantee the performance of the obligations of the franchisee under each of the franchise agreements and to provide indemnity in relation to breaches under the agreement.

Restraint of trade

[93] Each of the franchise agreements included a non-competition or restraint of trade provision in identical terms. The relevant clause, clause 24.1, provided that Hender and Mr and Mrs Henderson must not engage in a 'competitive business' in a defined area for the 'restraint period'. The restraint period was expressed as a graduated period of three months through to three years or 'any other period during which a person seeking to enforce clause 24 is entitled at law to the benefit of protection afforded by the Franchisee's covenant contained in clause 24 after the expiry or termination of this Agreement.' Clause 24.2 provided for the reading down of clause 24 and severance where necessary.

[94] The plaintiffs sought declarations in relation to each of the restraint of trade clauses that the clauses were not effective so as to restrain Mr and Mrs Henderson from carrying on business in the Northern Territory as providers of air-conditioning cleaning services to both residential and commercial clientele. The submission was based upon all of the earlier submissions including that the respective franchise agreements were void and/or unenforceable and, also, that because of the so-called 'problems with the construction of the subject agreements themselves', the agreements were of no force and effect.

[95] There is a presumption that a restraint of trade clause is invalid. This is for public policy reasons.[18] The presumption may be rebutted where the person for whose benefit the restraint was imposed is able to establish that the restriction is no wider than is reasonably necessary to protect a legitimate interest.[19] The restraint must be reasonable as between the parties in that it affords no more than adequate protection to the beneficiary.[20] The onus is on the restraining party in this regard.[21] The restraint must also be in the public interest.

[96] It has been recognised that the interest of a franchisor in protecting the franchise business and preserving confidential information provided within that business and which can be used to compete with the franchisor is capable of being afforded protection.[22]

[97] Generally speaking the validity of the restraint must be decided as at the date of the agreement in which it is imposed.[23] The foreseeable or probable developments after entering into the agreement which would throw light on the circumstances existing at that date may be taken into account.[24]

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[18] *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 139–40 [27]–[28] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

[19] *Nordenfeldt v Maxim Nordenfeldt Guns and Ammunition Company Ltd* [1894] AC 535 at 565 per Lord Macnaghten.

[20] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 307 per Walsh J.

[21] *Lindner v Murdock's Garage* (1950) 83 CLR 628 at 633 per Latham CJ.

[22] N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot: Law of Contract* (LexisNexis Butterworths, 10th Australian ed, 2012) at 985 [18.37].

[23] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 318 per Gibbs J.

[24] Ibid.

[98] In my opinion there was, at the time the franchise agreement was entered into, a basis for imposing a restraint of trade. There was an established business in the field of the cleaning of residential air-conditioners which had been operating under the name of Jaymak NT. When Purairclean NT commenced operation it took the benefit of the existing customers and the existing procedures.

[99] There is no suggestion that there has been a breach of the Jaymak Australia restraint of trade clause. The concern is the restraint of trade clause contained in the Purairclean Franchise Agreement. The evidence revealed that the plaintiffs commenced a new business on the day following the abandonment of the franchise. Initially the Hendersons operated through the business K & G Henderson Pty Ltd trading as PurAir Air-conditioning and later as Ecoair Air-conditioning. Trading proceeded on the basis that customers of the former business would not recognise any change in business. The telephone numbers remained the same and the new business was promoted as being a continuation of the business that had been conducted for the previous three years under the franchise agreements. The new business was conducted in the general area of Darwin which is where the franchised business had been conducted. The new business has now been underway for just over one year.

[100] At present there is no business being carried on by Purairclean Pty Ltd in the Northern Territory or, indeed, elsewhere in Australia. To restrain the

plaintiffs from providing the service would be to deprive the public of that service.

[101] It was the submission of the defendants that a restraint for a period of two years dated from 29 February 2012, being the date of the termination of the franchise, would be appropriate. In my opinion the lesser period of restraint for one year from 29 February 2012 is more appropriate. That, in my view, would have been sufficient to protect the interests of the franchisor in all the circumstances.

Conclusions

[102] In summary I have reached the following conclusions.

[103] The claim that the defendants engaged in misleading and deceptive conduct regarding turnover prior to entry into the Jaymak Franchise Agreement has not been made out and is dismissed. This is so because:

(a) the pleaded representations were not made;

(b) any representations were not in fact misleading and/or deceptive;

(c) there were reasonable grounds for making the representations in fact made;

(d) the plaintiffs did not rely upon the representations as pleaded or any other representations in entering into the agreement; and further

(e) no loss or damage was suffered or likely to be suffered by the plaintiffs for the purposes of s 87 of the *Trade Practices Act* in relation to the alleged representations.

[104] Jaymak Australia did not breach the provisions of the *Franchising Code of Conduct* by not providing the plaintiffs with a copy of the Jaymak Franchise Agreement in the form in which it was to be executed. The Franchise Agreement was provided in the form that it was executed. The Jaymak Franchising Agreement incorporated, by reference, the manuals as amended from time to time. Further, Jaymak Australia did not breach the Code when it issued the May 2009 manual or the August 2009 manual.

[105] The submissions that the Jaymak Franchise Agreement and the Purairclean Franchise Agreement were not binding because: they were only agreements to be bound if the parties agreed the scope of the System and Authorised Products and Services; or were not complete; or were uncertain; have not been made out and those claims are dismissed.

[106] Purairclean Pty Ltd did not breach the provisions of the *Franchising Code of Conduct* by not providing a copy of the franchise agreement in the form in which it was to be executed.

[107] Hender breached the Jaymak Franchise Agreement by: failing to provide monthly profit and loss statements, balance sheets and sales reports from February 2012 onwards; failing to comply with the terms of the franchise agreement; failing or refusing to service clients; and failing to pay

management fees due on 15 April 2012 and onwards. It repudiated and abandoned the franchise agreement by ceasing to trade under the name Jaymak NT on or about 31 May 2012. As a result, Jaymak Australia has suffered loss and damage. Mr and Mrs Henderson are liable for the loss and damage under the terms of the guarantee and indemnity contained in the Jaymak Franchise Agreement.

[108] Hender breached the Purairclean Franchise Agreement by failing to pay fees due under that agreement from January 2012 onwards and by failing to provide monthly profit and loss statements, balance sheets and sales reports from January 2012 onwards. Hender repudiated and abandoned the franchise agreement by ceasing to trade under the name Purairclean NT on or about 29 February 2012. Purairclean has suffered loss and damage as a result of the breach. Mr and Mrs Henderson are liable for the loss and damage under the terms of the guarantee and indemnity contained in the Purairclean Franchise Agreement.

[109] The restraint of trade clauses in both the Jaymak Franchise Agreement and the Purairclean Franchise Agreement are valid and enforceable for the identified area and for the period of 12 months from the date of termination of the franchise. The plaintiffs have breached the Purairclean restraint clause by operating the business of K & G Henderson Pty Ltd and conducting the residential air-conditioning cleaning business. Mr and Mrs Henderson are liable for the loss under the terms of the guarantee and indemnity contained in the Purairclean Franchise Agreement.

[110] Purairclean has failed to discharge its duty to mitigate its loss as described in the reasons above.

[111] I invite the parties to make submissions as to the precise calculation of the awards of damage in accordance with the reasons now published and also to make submissions in relation to the issues of costs and interest.
