Neutral Citation Number: [2021] EWHC 1218 (Ch)

Case No: BL-2020-001411

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch)

Microsoft Teams
Date: 11/05/2021

Before : INSOLVENCY AND COMPANIES COURT JUDGE JONES SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

DWYER (UK FRANCHISING) LIMITED

Claimant

-and-

(1) FREDBAR LIMITED

(2) MR. SHAUN ROWLAND BARTLETT

Defendants

- -
- -

MR PAUL STRELITZ (instructed by **OWEN WHITE Limited**) for the **Claimant**
MR DAVID E. GRANT (instructed by **direct access**) for the **Defendants**

Hearing dates: **18, 19, 22, 26 & 30 MARCH 2021**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 11/5/21.....

INSOLVENCY AND COMPANIES COURT JUDGE JONES

INSOLVENCY AND COMPANIES COURT JUDGE JONES SITTING AS A JUDGE OF THE HIGH COURT:

A) Introduction

1. Dwyer (UK Franchising) Limited ("the Claimant") is the franchisor of the "Drain Doctor" plumbing and drain repair services franchise. On 4 October 2018 it entered into a franchise agreement ("the Agreement") with Fredbar Limited as franchisee and Mr Shaun Bartlett ("Mr Bartlett") as guarantor. Its claim is that Fredbar Limited committed a repudiatory breach when it purported to terminate the Agreement by letter dated 16 July 2020 and no longer accepted it was bound by its terms. The Claimant terminated the Agreement by letter dated 19 August 2020. Damages are sought for breach of the Agreement. It also requests injunctive relief for delivery up of franchise property and to restrain breach of the Agreement's restraint of trade covenants. This trial concerns liability and injunctive relief only.

2. If the injunctive relief is granted it will prevent the operation of a new business of Fredbar Limited called "Daily Drains". It has traded within and around the post codes of the Agreement's franchise area in Cardiff after termination of the Agreement and, on the Claimant's case, before termination. An application for interim injunctive relief was heard by Mr Justice Nugee, as he then was, on 17 September 2020. He decided the appropriate course was to expedite the trial.

3. The Claimant is a substantial company with more than thirty franchisees covering over sixty territories. It describes itself as the UK's largest full-service emergency plumbing and drainage company operating in commercial and domestic sectors. It is owned by "Neighborly UK", which is part of "Neighborly Worldwide", previously known as the Dwyer Group, a holding company formed in Waco, Texas. The ultimate parent is described by the Claimant as the world's largest home service franchise business. For the year ended 31 December 2018, the Claimant had a turnover of some £2.174 million. It suffered a loss of £(893,225) compared with a profit of £28,519 the previous year resulting from a turnover of £2.398 million. However, the balance sheet investment value of its fixed assets, its subsidiaries, established healthy net assets of some £13.221 million enabling it to carry net current liabilities of nearly £4 million.

4. In contrast, Fredbar Limited was formed on 24 September 2018 by Mr Bartlett with the intention of it becoming one of the Claimant's franchisees. He had no previous experience of plumbing and drainage work or of being a company director. He relied upon training by the Claimant and a course was completed by 15 December 2018. The franchise business was run from Mr Bartlett's home using a van hired for the purpose. Its first year's, small companies' exempt accounts with a start date of 1 October 2019 record net liabilities of £(3,113) after deducting liabilities from fixed assets of £26,277 and current assets of £14,617.

5. Fredbar Limited and Mr Bartlett deny the claim and rely upon Fredbar Limited's termination of the Agreement. They assert that negligent misrepresentations made before the Agreement was concluded entitle its rescission or termination. They challenge various clauses seeking to exclude any reliance or liability for representations as unreasonable. They complain about the circumstances in which the Agreement and a Deed of Variation were entered into and at trial alleged undue influence. They also contend that the Claimant failed to fulfil various obligations

under the Agreement entitling repudiation. These included a failure to comply with a "force majeure" clause during the Covid pandemic. Alternatively, if the Agreement was rescinded or terminated by the Claimant, they assert that the restraint of trade covenants will either not apply upon their true construction or are unreasonable and unenforceable. It is their case that the new business can and should continue.

6. Whilst it is plain there has been inequality of arms during these proceedings, at trial Fredbar Limited and Mr Bartlett have had the considerable benefit of being able to instruct Mr Grant as their barrister through direct access. That has avoided the significant disadvantage they would otherwise have been under because the Claimant had the benefit of Mr Strelitz acting as their counsel. Both counsel are to be complimented upon the professionalism and skills they have applied to this trial.

7. Nevertheless that inequality was relevant to the circumstances in which the Agreement was concluded, to the operation of Fredbar Limited's business and to the issues which arose concerning enforcement of the restraint of trade covenants. It continued to be relevant to the conduct of the litigation before Mr Grant's involvement. It is an inequality perhaps typified by the size and convoluted nature of the Agreement, the difficulties experienced by Mr Bartlett as a result of the Covid pandemic and the fact that for him the outcome of this claim will potentially determine whether he and his family will be able to keep their modest family accommodation. Nevertheless, this case still involves a commercial transaction and the outcome must be determined applying legal principles to the contractual relationship of franchisor and franchisee. The starting point, therefore, is the Agreement.

B) The Agreement

8. Under the terms of the one hundred plus page Agreement, Fredbar Limited purchased an exclusive licence to obtain the right to trade under the name "Drain Doctor" within nine specified Cardiff postcode areas, districts and sectors. It is for a term of ten years with provision for a renewal agreement. English law applies. Although exclusive, the Claimant (subject to provisions concerning the right for Fredbar Limited to respond) could authorise other franchisees to service customers who made such a request or when the service could not be provided by Fredbar Limited. As a result of response, Fredbar Limited could be authorised to provide services to customers outside the territory if not solicitated or (in briefest summary) if one of their customers requested services outside. However, Fredbar Limited could not actively solicit customers outside the area. The same provisions applied to all other franchisees (see further at clause 3.2). The Agreement is a standard form document drafted by lawyers. That was inevitably necessary but unfortunately it has been drafted in an unnecessarily complicated and lengthy style.

9. The recitals record that the trade name is *"associated with quality residential and commercial plumbing and drainage services"* which have been derived from the time money effort and expense incurred by "Mr Rooter Corporation" of Texas, U.S.A., when developing the Claimant's business methods over a number of years. The recitals also contain an acknowledgment that Fredbar Limited and Mr Bartlett had

taken or had the opportunity to take *"full legal and financial advice"* concerning the Agreement before its execution.

10. By clause 5 the Claimant contracted as its *"initial obligations"* to provide initial training, access to its business "Manual" after training and advice upon any products and equipment required to start the business. At its discretion, it would assist Fredbar Limited to establish and operate its Drain Doctor Business.

11. By clause 6 the Claimant contracted as its *"continuing obligations"* to provide periodical refresher training courses, to ensure the Manual was kept up to date and to provide advice in connection with its "System" when reasonably required by Fredbar Limited. In addition the Claimant "may" provide "Additional Support" for a reasonable fee provided its staff were available. An example of that support being *"field visits beyond those normally required for training purposes"*.

12. By clauses 11.1 and 11.2 the Claimant would use the weekly marketing and promotion fund (the "MAP Fund") fee to be paid by Fredbar Limited (as detailed within Schedule 11 to the Agreement) and all other franchisees, to promote the Drain Doctor Business through national advertising and/or promotional activities (amongst other methods). This obligation was conditional upon payment of the fee and the method of promotion was discretionary. It was not guaranteed that Fredbar Limited would benefit equally with other franchisees from the use of the MAP Fund. In addition, the Claimant would advise upon any further advertising Fredbar Limited may carry out in accordance with its obligations under the Agreement.

13. Fredbar Limited was required to pay an initial franchise fee of £35,000 plus VAT for which it entered into a loan agreement (see Schedule 14 of the Agreement") with the Claimant for £17,500. It would be required to pay a weekly management service fee (plus VAT) ("the MSF") based upon a percentage of invoiced gross sales (net of VAT). The fee would range from 15% up to £7,500 of invoiced sales and down to 11% for sales invoiced of £23,001 and above. It was subject to a minimum payment based upon the territory's population and the period of the term. The MAP Fund fee (plus VAT) was a weekly contribution of 2% of the weekly gross sales (net of VAT).

14. Fredbar Limited was obliged by clause 7 and Schedule 2 (amongst other requirements) not to damage the Claimant's goodwill in its trademarks or its reputation. It was subject under clause 8 to a variety of obligations concerning products, services and equipment as detailed within Schedule 3 to the Agreement. There was a general obligation within clause 9 to maintain high standards, protect the franchise and comply with the requirements of Schedule 4. That Schedule contained a variety of obligations concerning vehicles, premises and the standard of operations within a wide variety of listed topics. These included a sweep up clause within paragraph 4.12 of Schedule 4 to comply with all reasonable requirements notified by the Claimant for the efficient conduct of its Drain Doctor Business.

15. Schedule 3, sub-clause 3.18 made provision for Fredbar Limited to participate in providing products and services to "Key Account Customers", known as "National Account Customers". This depended upon notification of such opportunity by the Claimant and upon Fredbar Limited's notified election to participate. If that occurred, Fredbar Limited would submit a job sheet and the Claimant would invoice the Key

Account Customer. Fredbar Limited would (in summary) be paid the sums received by the Claimant.

16. Clause 11.3 of the Agreement required local advertising and promotions from Fredbar Limited with a minimum spend of £15,000 or 5% of its gross sales, whichever is the greater.

17. Within clause 13 and Schedule 10 there were a variety of clauses addressing confidentiality, data protection and competition undertaking prohibitions. A "deed of undertaking and non-competition for owners" was required to be executed by each owner of Fredbar Limited as an individual undertaking.

18. There were wide obligations upon Fredbar Limited within clause 14 of the Agreement requiring (in briefest summary) the keeping of accounts and records including the requirement to regularly enter and update the Claimant's software so that it would have full information concerning the products sold, services provided and its overall financial performance.

19. Clause 17 and Schedule 8 included a variety of termination provisions. The Schedule identified the termination events which would entitle the Claimant to terminate the Agreement forthwith by notice in writing. It contained some twenty five, detailed clauses. These need not be set out here but can be summarised in the most general terms as including breaches of obligations justifying termination.

20. As to breaches, clause 17.2 provided for the Claimant to be able to terminate upon written notice in the event of an irredeemable, substantial breach. Redeemable breaches would lead to immediate termination if not remedied within 21 days of notice to do so. Termination would not affect pre-existing rights and obligations, including those resulting from any antecedent breach. Clause 17.7 contained a liquidated damages provision requiring payment by Fredbar Limited of £20,000 if the Agreement was to be terminated by the Claimant. Additional, higher damages could still be claimed.

21. Clause 18 covered post termination obligations designed (in effect) to achieve a "clean break". There would be post termination restrictions binding Fredbar Limited and Mr Bartlett. These included restraint of trade provisions which will need to be considered in detail when deciding this claim unless Fredbar Limited had been entitled to terminate or rescind the Agreement. Those restraints would last for 1 year and at this stage it is sufficient to describe them as preventing any competition within the franchise area or within a 5 mile radius. Breach would lead to an obligation to account for profits. There was a "blue pencil" reasonableness provision.

22. Clauses 20 - 22 of the Agreement contained some 13 sub-clauses dealing with the overall concept that Fredbar Limited had entered into the Agreement knowing that advice should be taken first, that the risk was upon it and that it had done so without relying upon representations, warranties, inducements or promises from the Claimant, whether express or implied. These are clauses which will potentially need careful consideration within the context of submissions and will be addressed in detail below to the extent that is necessary.

23. The obligations of Mr Bartlett were principally contained within Schedule 5 to the Agreement. There was an obligation to enter into a standard form performance guarantee if requested. There were requirements (in summary) to ensure that he was involved full time and as a director in the Fredbar Limited's business and that he would not compete with the Drain Doctor Business or solicit employees or business.

24. There was an entire agreement provision within clause 24 and a force majeure provision in clause 30. Clause 29 contained an indemnity from Fredbar Limited and Mr Bartlett to the Claimant for all loss resulting from specified conduct. Clause 30 was a "force majeure" clause, which will need to be addressed in detail below when deciding the claim.

C) The Side Letter

25. A "side letter" also executed on 4 October 2018 by Fredbar Limited and Mr Bartlett concerned a contribution from the Claimant to Fredbar Limited towards the purchase of vans for its business. In summary and without referring to a number of provisions, it would receive £5000 plus VAT if it purchased a new van from the Claimant's preferred supplier. An additional £5000 plus VAT would be given for a second, new van if purchased after 8 months of trading provided Fredbar Limited achieved a minimum of £8,000 gross sales in any month within the first eighteen months of trading.

D) The Deed of Variation

26. A Deed of Variation dated 30 January 2019 added new postcode areas to the geographical area of the franchise. Mr Grant explained in his opening that it did not alter the area but merely recognised that buildings within it had recently been allocated their own postcodes. Strangely in that circumstances and in any event it also contained a clause, purportedly in consideration for the variation, releasing the Claimant and (in summary) all who might possibly be connected with it from any existing claims that might exist. In closing submissions Mr Strelitz informed the Court that this clause would not be relied upon by the Claimant. That is the appropriate course. It was apparent from the evidence during cross-examination that no thought had been given to the release clause by either party and the Claimant accepted it had no reason for such a clause to be included. The most plausible explanation is that it is an anomaly, potentially introduced by solicitors drafting the deed without consideration for the real intentions of the parties to the deed.

E) The Statements of Case

E1) The Particulars of Claim

27. The primary ground for termination of the Agreement relied upon by the Claimant in its Particulars of Claim is the acceptance of a repudiatory breach resulting from

correspondence from Fredbar Limited establishing that it would no longer operate the franchise. In the alternative clause 17.1 is relied upon because of breaches of paragraphs 9 and 17 of Schedule 8 to the Agreement. Namely, the cessation of the Fredbar Limited's franchise business and Fredbar Limited and Mr Bartlett directly or indirectly competing against the Claimant during the term of the Agreement. It is pleaded that this step of termination only occurred after correspondence which establishes that attempts by the Claimant to encourage Fredbar Limited to continue in business as a franchisee had failed. The claim of competition is based upon the assertion that the Claimant discovered on 6 August 2020 that Fredbar Limited was trading as "Daily Drains" having not operated the franchise since around 23 April 2020.

28. Additional grounds of breach are relied upon in paragraphs 20-21 of the Particulars of Claim. They include: a failure to use best endeavours to maximise sales in accordance with clause 3.4; the failure to pay the Management Service Fee totalling £2996.84 in breach of clause 10.1.2; the misuse of confidential information in breach of clause 13.1; a transfer without the Claimant's prior consent of some of Mr Bartlett's interest in Fredbar Limited on or around 31 December 2018 when his partner, Ms Sadie Milne, was registered as a person with significant control of Fredbar Limited in breach of clause 16.4; the failure since on or around 23 April 2020 to record sums generated by the business in breach of clauses 14.1 and 14.2; the failure to comply with obligations in paragraphs 2(a), 2(c), 2(d), 2(f) and/or 2(g) of Schedule 5 in breach of clause 9.

29. The Particulars of Claim also assert breach of the Agreement's continuing, post termination obligations by: failing to return the Manual in breach of clause 18.1.2; using and failing to transfer telephone numbers in breach of clause 18.1.4; not disassociating Fredbar Limited with the franchised business on Facebook in breach of clause 18.1.6; making use of the Trade Marks and purporting to be associated with the Brand online and through advertising and social media in breach of clauses 18.1.7.2 and 18.1.7.3; not paying all sums due in breach of clause 18.1.8; engaging in a competing operation within the radius to which the restraint of trade covenants apply in breach of clauses 18.2.1.1, 18.2.1.2, 18.3.1.1 and/or 18.3.1.2; and/or soliciting customers of the franchised business in breach of clauses 18.2.1.3 and/or 18.3.1.3.

30. The claim against Mr Bartlett relies upon his guarantee of the performance by Fredbar Limited of its obligations. The injunctive relief against both seeks to prevent them operating a business in competition in accordance with the post termination, restraint of trade covenants until midnight on 18 August 2021. Orders are also sought to ensure compliance with the post termination requirements identified as breached in the paragraph above.

E2) The Defence and Counterclaim

31. The Defence and Counterclaim appears to be a document drafted by Mr Bartlett and, as such, needs some interpretation to be construed in a legal context. However, it is reasonably plain what is intended and the Claimant through Mr Strelitz has explained

that they have approached this statement of case with a degree of latitude and have chosen not to rely upon technical pleading points.

32. The grounds of termination identified in Fredbar Limited's letter dated 16 July 2020 were: (i) a failure to comply with the force majeure clause 30 of the Agreement due to the Covid pandemic; (ii) misrepresentation on the basis that the franchise had been mis-sold and advertised; (iii) passive aggressive behaviour from the Claimant, who regularly suggested that more funds should be borrowed; (iv) that the Agreement had been entered into under pressure having been sent on 3 October 2018 and the Claimant by its sales representative, Mr Barton, having attended Mr Bartlett's home to procure its execution on 4 October 2018; (v) Mr Barton having pressurised the sale on 4 October and having not provided the appropriate opportunity for Mr Bartlett to look over the 101 page Agreement; (vi) that the Claimant having charged for National Accounts in addition to a 17% turnover fee when they were advertised as free; (vii) the use of Mr Bartlett's details in advertising in breach of his human rights; and (viii) to achieve a clean break for reasons stated.

33. It follows that the defence (albeit not expressly) relies upon prior termination of the Agreement and the fact that any binding restraint of trade covenants will not be enforceable in consequence. There was also a counterclaim for damages resulting from the Claimant's breach(es) of the Agreement.

34. In the alternative, the Defence challenges other matters relied upon by the Claimant to justify its termination, the grounds for which are refuted. In particular that: (i) no evidence of comprehensive training has been provided, no certificates had been received and no refresher courses held; (ii) statements that the training was extensive were exaggerated; (iii) no advice was received in respect of the Claimant's "System"; (iv) the Deed of Variation slipped in the clause of release when it had only been understood to amend the geographical area and, as a result, had been signed without being properly read; (v) Ms Sadie Milne was not a shareholder; (vi) no intellectual property was infringed, not least because it was unidentifiable; (vii) no confidential information has been misused; (viii) there was no breach of the obligation to maximise sales; (ix) the debt of £2,456.84 would be paid if both parties went their separate ways; (x) the "Drain Doctor" brand is not well known and provides little benefit; and (xi) clauses 18.2.1.3 and/or 18.3.1.3 are unclear as to their meaning.

35. Further breaches of the Agreement, not relied upon when terminating it but relied upon now, are identified. Namely, spending the MAP Fund on the National Accounts "ADMIN charge" and using a flat fee for the National Account's charge. Information regarding the MAP Fund had not been provided.

36. It is asserted in any event that the restraint of trade clauses are unreasonable. They and the non-reliance clauses are unenforceable and sections 8 and 11 of the Unfair Contract Terms Act 1977 are relied upon.

37. Paragraphs 17-19 of the Defence appear to assert that there has been no breach of the restraint of trade covenants to the extent that they apply. They and paragraphs 20-21 are not always easy to construe, although I have sought to identify the defences they raise in the paragraphs above. It is accepted that the Manual and telephone numbers have not been returned. However, the Manual is criticised and the numbers are used by family and friends. They were not used by customers. It is accepted that "Daily

Drains" has traded but all reference to the franchise has been removed from Facebook. Fredbar Limited and Mr Bartlett have not made use of the Claimant's brand or trade marks after termination.

38. Mr Bartlett relies upon all of the matters above and also asserts that clause 29.1 and Schedule 5 contains unfair and unreasonable terms having regard to the circumstances which were or ought to have been known when the Agreement was entered into.

E3) The Reply and Defence to Counterclaim

39. The Reply and Defence to Counterclaim complains of a lack of particularity in the Defence and Counterclaim. Subject to that, it disputes any suggestion that Fredbar Limited and/or Mr Bartlett were rushed into entering the Agreement. Force majeure is denied. The misrepresentations are refuted but in the context of an inability to adequately address them because of a lack of particularisation. The allegations of breach of the Agreement by the Claimant are denied. However, this is also subject to the statement that the precise bases for that case have not been identified. Any suggestions that there has not been competition or other breach of covenant as alleged in the Particulars of Claim is contested. It is unnecessary here to set out the details of this statement of case in further detail.

E4) Further Information

40. I agree that the Defence and Counterclaim does not adequately particularise the misrepresentations relied upon and can be described as opaque when it comes to identifying that part of the case. However, "Further Information" was provided pursuant to a CPR Part 18 request and the 27 October 2020 Order of Master Kaye within a document dated 2 November 2020. Mr Grant helpfully distilled the misrepresentations alleged within his skeleton argument and orally made clear that the case was founded in negligence. It was appropriate and necessary for this to be confirmed within a document of Fredbar Limited's and Mr Bartlett's. A formal statement of case was served before evidence was called by the Claimant. It reads:

> *"Proposed amendment for misrepresentation*
>
> *10A. At various times, C made the following representations upon which D1 and D2 relied in entering into the FA:*
>
> a. *"In the first year of trading DD1-2 could expect to earn £200,000 in turnover" ;*
>
> b. *"Protect your investment by re-selling";*
>
> c. *"Turn £35,000 initial investment into £1,500,000 net profit over your 10 year";*
>
> d. *"More of our business owners are running £1,000,000 plus turnover businesses";*
>
> e. *"It might be now or never don't miss out on an area close to you, as we only have a limited amount of franchise territories left to allocate";*

f. *"As a drain doctor franchisee you can expect to be in demand from day one. You will have access to a number of lucrative national accounts, with all service requests in your area sent to your territory;*

g. *"We hold a number of major corporate accounts, work which is to be completed by franchisees through the national accounts team – at no extra cost to the franchise partners";*

h. *Franchisees will "benefit from local marketing activity";*

i. *C also provided D1 and D2 with excel spreadsheets of D1's likely turnover which were grossly exaggerated*

(collectively "the representations")

10B Each of the representations was false for the reasons set out in D1 and D2's Response to Claimant's Request for Further Information, dated 13th of November 2020, at paragraph 1b in response to request 1.1.b.

10C. C had no reasonable belief in the representations, which were made negligently, but nevertheless encouraged and induced D1 and D2 to believe in the representations.

10C But for the above representations, D1 and D2 would not have entered into the FA."

41. Mr Grant's skeleton argument also identified a claim of undue influence. Although no pleading point was being taken, it was plainly necessary for there to be an amendment to the Defence to identify precisely what facts and matters were being relied upon by Fredbar Limited and/or Mr Bartlett to support this case. The above-mentioned document also includes the following:

"Proposed amendment re undue influence:

10D. C applied undue pressure amounting to actual undue influence by not allowing D2 to exercise his own free judgment when signing the FA:

PARTICULARS

a. By reason of the inequality of bargaining power, D1 and D2 were susceptible to being unduly influenced by C;

b. Through its agents, C gave D1 and D2 insufficient time to sign to consider the FA which was a lengthy and complex legal document. Sarah Wood, an employee of the Claimant, emailed the FA to D2 at 14:44 hrs on 3rd of October 2018 and Mr Barton, another employee, attended D2's home at approximately 11am on 4th of October 2018 to procure D2's signature;

c. Despite D2's lack of experience in plumbing, franchising or running a business, Mr Barton failed to direct D2 to the terms of Clause 20 and failed to advise D1 and D2 to take independent legal and financial advice;

d. When D2 indicated that he wanted time to consider the terms of the FA, Mr Barton presented the FA on a take it or leave it basis which (Mr Barton said) could be retracted at any moment;

e. Mr Barton persuaded D2 to sign the FA in front of a third party tradesman who was coincidentally undertaking work in D2's house;

f. Mr Barton persuaded D2 to cross through and alter some of his answers to the FA;

g. After he had left D2's house, Mr Barton returned shortly afterwards and required D2 to provide further signatures to the FA.

10E. In consequence of the matters set out above, D2 was unable to and did not exercise his independent judgment at the time that he signed the FA with the result that the FA does not reflect his true intention and is the product of C's actual undue influence and is liable to, and is to be, set aside by D1 and D2."

42. This document having been provided so very late in the day, the trial proceeded by agreement on the basis that the Claimant would address the issue of amendment in closing submissions. This was a pragmatic approach attributable to the trial timetable needing to be kept but it also reflected, as Mr Strelitz explained, the fact that whilst the right to object was reserved, the Claimant would adopt a relaxed approach to pleading matters. No difficulties arose from this course being taken.

43. Only one amendment was in issue during closing submissions, namely the reference to *"excel spreadsheets".* This is a reference to the various financial projections provided by the Claimant during the contractual negotiations. The objection was that the case before trial only alleged misrepresentation in respect of the projections sent by the Claimant on 30 August 2018. Mr Strelitz submitted that it would be unfair and unjust to extend the issue to subsequent spreadsheet projection when the Claimant had not had the opportunity to address them in disclosure and evidence. I will address this submission within my decision below.

44. For completeness before turning to the witnesses, I should also mention that the Claimant has a document entitled "Claimants Further Information In Response To Defendant's Request dated 17 October 2020". Its contents will be borne in mind when addressing the evidence but need not be summarised here.

F) The Witnesses – An Overview

F1) Introduction

45. The trial took place through the remote medium of Microsoft Teams, which worked extremely well. If anything, the absence of the formalities of the court room environment and immediate proximity of counsel appeared to create a more relaxed environment for the witnesses. Nevertheless, I have borne in mind the pressures that inevitably exist for any witness and the difficulties for memory caused both by the lapse of time and the fact that memory is reconstructed each time it is to be applied. I have also appreciated that if I do not accept a particular piece of evidence, that will not necessarily mean it is a lie or that other parts of that witness's evidence will also be unreliable. Bearing those matters in mind I will set out my assessment of the witnesses.

F2) The Claimant's Witnesses

46. Mrs Brunton was employed by the Claimant to assist intending franchisees decide whether to enter into a franchise and, if so, to help them set up their new business. She is a BFA Qualified Franchise Professional. She worked for the Claimant from June 2017 until November 2018. She had been involved in Mr Bartlett's introduction to the Claimant, was a contact for him whilst negotiations proceeded and to a limited degree assisted in the preparation of his business plan and financial projections. Her connection to Mr Bartlett's application is illustrated by the fact that she would have travelled to see him for the purpose of finalising and signing the Agreement but for vehicle problems. It is in that context that issues of fact have arisen concerning what financial information she told/represented to Mr Bartlett.

47. Mrs Brunton was a straight forward witness who was willing to assist the court. I am satisfied she did her best to provide her evidence to the best of her recollection. I must obviously take into consideration the effects of the lapse of time upon her memory when considering the issues between her recollection and Mr Bartlett's. However, I should make clear that I do not consider them other than in the context of Mrs Brunton being an honest and willing witness.

48. Some mileage has been sought to be made by the Claimant of the fact and manner in which Mr Bartlett approached Mrs Brunton once he heard she would be a witness for the Claimant at trial. There is, of course, no property in a witness and I am not going to address that matter and the criticisms of Mr Bartlett further. I have not found this part of the evidence of assistance, bearing in mind it post-dated the relevant issues, occurred within the context of the stresses of on-going litigation and Mr Bartlett was acting as a litigant in person.

49. Mr Pierre Jeannes's employment title with the Claimant is that of *"managing director"* but he is not one of its officers. He has responsibility for its day to day management subject to the board of directors. Mr Jeannes had a background role in the Claimant contracting with Mr Bartlett and was involved in subsequent dealings. His evidence in chief was primarily concerned with the nature of the Claimant's business and with the allegations made against its system of operations within this claim. They ranged, for example, from its advertising to the financial information relevant to the business plan and projections. He also took the opportunity to raise matters which the Claimant wished to rely upon to challenge and criticise Mr Bartlett's character and abilities as a franchisee. I will refer to that evidence in due course.

50. During cross-examination Mr Jeannes gave his evidence fairly and calmly. He was always willing to answer questions and when appropriate did not shy away from answers which might not necessarily assist the Claimant in the litigation. A good example being his acceptance without issue of a variety of general propositions derived from the "British Franchise Association's Guide to Best Practice in Ethical Franchising". It is perhaps surprising that he had not previously read that document but nothing turns on that fact for the purposes of this trial. Another example was the fact that he did not attempt to shy away from his recollection of Mr Bartlett as a good candidate for a franchise, someone who he liked and who he thought would do really well.

51. This all suggests a reliable witness but he is embroiled in the dispute and as managing director will inevitably have perceived matters from the perspective of the Claimant. The above-mentioned challenges and criticisms within his evidence in chief illustrated that and are to some extent in contrast to the more generous approach taken during cross-examination. I will approach his evidence with caution accordingly but make clear that I consider him to be an honest and willing witness.

52. The evidence of Mr Packevicius's concerned the projections which he prepared for Fredbar Limited and Mr Bartlett as a franchisee consultant for the Claimant. He has a MBA but no professional qualification. He was responsible for the first set of projections which remained the foundation stone for the later variations. He gave his evidence carefully and made clear when he could not remember specific matters. I found him to be a reliable witness subject to the issues of memory that affect all witnesses.

53. Mr Boyden is the franchise sales marketing manager. He gave evidence concerning the Claimant's advertising insofar as records of it had been recovered. His evidence was straight forward and I also found him to be a reliable witness subject to the issues of memory that affect all witnesses.

54. Mr Barton was the franchise development manager. He came across as a straight forward, willing and reliable witness during cross-examination. He was involved in the redrafting of the projections after Mr Bartlett on 6 September 2018 had decided not to proceed. Surprisingly his witness statement does not deal with those changes, his resulting discussions with Mr Bartlett or seek to justify them. There are important matters of issue within his evidence concerning what occurred on the day the Agreement was executed by Mr Bartlett. I will need to view his evidence on those matters with particular care taking into consideration the evidence as a whole. I will need to bear in mind the potential for his memory to have been affected (sub-consciously at least) by the fact that he would want to present his role in the best possible light. For example, he would not want it to appear that he had not fulfilled his responsibilities to the Claimant.

55. One of the issues is whether the copy of the Agreement produced within the Claimant's documents and included within the trial bundle is a true copy of the Agreement executed by Mr Bartlett. This relates in part to the question whether he executed two Agreements at his home on 4 October 2018 and in particular to the question whether the contents of Schedule 13 to the Agreement were subsequently altered. It is Mr Bartlett's case that the Claimant's document cannot be the one he signed and must have been altered by it. That is because, in contrast to his, it shows ticks for "no" against the "yes/no" answers to questions 7 and 8 within that Schedule but not the ticks for "yes" converted into crosses, the alteration having been initialled by him ("the Ticks/Crosses Issue"). It was put to Mr Barton that he had been responsible for this falsity.

56. The above-mentioned impression of reliability will be borne in mind when considering such matters but with obvious caution taking into consideration the seriousness of the allegation.

F3) The Respondents' Witnesses

57. The first witness for the First and Second Defendant was Mr Longley. The flavour of his evidence can be gained from the following paragraphs 15 and 16 of his witness statement:

> *"The real average reason why so many new franchisees last less than 3 years is the misleading advertising and inflated business projections which means they are unprepared and ill equipped and quickly realise that there is no possibility of making the franchise agreement work. The Claimant promises a guaranteed stream of work and does not explain that it is only possible to grow with considerable additional financial investment. Many of the franchisees risked all their savings and many have had to take out loans on top of this. This means that they are paying money upfront and on an ongoing basis to the Claimant for the licence, and have repayment obligations to the bank or other lender without sufficient revenue to meet these and other outgoings. On leaving they will be hit with a leaving fee plus estimated royalties till the end of their contract.*
> *I have seen totally false cash flow projections sent out to people and I have refused to give a reference to potential franchisees based on the fact the franchisor had been lying to potential franchisees."*

58. I have copied this passage because it draws attention to five points. The first, that it is fully disputed by the Claimant. The second, that this evidence does not specifically relate to Fredbar Limited's franchise. Third, he has never held a Direct Drain Doctor franchise. Fourth, insofar as his evidence is intended to provide an opinion upon the financial rationale of the Claimant's business model and approach, it would be evidence required from an expert adduced pursuant to the permission of the court and in accordance with the requirements of Civil Procedure Rules. It is not. Fifth, Fredbar Limited and Mr Bartlett do not challenge the business model and approach as such. Their challenge is specific to its application to them in respect of the Cardiff franchise. For those reasons I will not rely upon his evidence. In the circumstances I need not address the submission that his evidence is tainted by the fact that he is in litigation with the Claimant.

59. The second witness, Mr James Light, has been a Drain Doctor franchisee. However, he too has no personal knowledge of Fredbar Limited's franchise. It cannot be viewed and is not presented as similar fact evidence and it too does not assist a case which is specific to the Cardiff franchise.

60. Mr Bartlett is not someone who benefited from our system of cross-examination. He had not prepared by reading the papers immediately beforehand and plainly found the documentation far too extensive. He relied upon memory without assistance from the documentation but, as with many people, did not have a good recall of events which had occurred a year ago and more. Both deficiencies made the questioning hard for him. In addition, he found it difficult to reply to questions which challenged his process of thought and understanding at a material time. For example, when challenged over the proposition that financial projections by their very nature could not have been guaranteed, he could state, as he did, that he had to rely upon the projections because this was all the information he had. He could not, however, articulate the concept that he was entitled to rely upon the figures as estimates even though they could not be guaranteed. He also found it difficult when addressing the Ticks/Crosses Issue to explain what he would be accepting or rejecting when ticking or crossing questions 7 and 8 within Schedule 13 to the Agreement.

61. This is not to suggest that he is unintelligent. Certainly not, the main problem was that he plainly found the world of courts, lawyers and cross-examination alien. Allowance should be made for the fact that the lawyers' environment of paperwork, analysis and logic was foreign to him. It should and will not be concluded that his evidence should be rejected because he "performed" poorly as judged from a lawyer's perspective.

62. I should add that on occasions it was put to him that he had sought to present particular facts, matters or assertions for the reason that he had calculated it would benefit his case. He responded on at least one occasion along the lines of suggesting that his mind would not have enabled him to work that out within this legal environment. I agree with that response based upon my assessment of the difficulties he had when giving evidence.

63. In any event his generally poor performance as a witness does not necessarily mean he should not be believed. Indeed, potentially it might aid a case which relies upon him having been misled and/or pressured into entering the Agreement, a lengthy and complex legal document.

64. Mr Strelitz submitted that Mr Bartlett's evidence should not be accepted unless supported by irrefutable contemporaneous documentary evidence. He relied to some extent upon Mr Bartlett's approach to cross-examination, including argument, but in particular upon four examples of conduct which Mr Strelitz submitted demonstrated a propensity to tailor his evidence to suit his case. They were (in summary): (i) a proposal to the Claimant by email on 1 February 2019 that it should lodge a good online review; (ii) entries on Facebook of screenshots suggesting (arguably) that work carried out whilst a franchisee was carried out by "Daily Drains"; (iii) misstatements that the franchise and/or Daily Drains had not traded before termination; and (iv) providing a drainage report to a customer before the franchise terminated but carrying out the work and receiving payment as Daily Drains after termination without disclosure to the Claimant.

65. I agree that those matters and the matters specifically concerning how he gave his evidence mean that the right approach is to treat Mr Bartlett as a witness whose evidence needs to be considered with caution because it is potentially unreliable. I will also bear in mind the pressures that this claim place upon him. However, I do not accept the submission that his evidence must be corroborated to be accepted. That would offend the "bad character" principle: the previous commission of an offence and the propensity to commit offences does not mean that the offence under consideration was committed.

G) Submissions

66. To assist the court and to save time, Mr Strelitz and Mr Grant have provided carefully analysed oral submissions with the assistance of "speaking notes". I am grateful for their detailed work.

H) Evidence and Findings of Fact

67. The wide ranging nature of the issues before me means it is necessary to consider the evidence in detail. However, I should make clear that I will not address each and every fact and matter arising from the evidence but only those which I consider important for the purposes of my judgment. The fact that matters may not be referred to does not mean they have not been considered and borne in mind.

H1) The Initial Approach and Advertising

68. Although advertisements by the Claimant will only be relevant to the extent that they were relied upon and induced Fredbar Limited and Mr Bartlett to enter into the Agreement, the following advertisements to be found within the court bundle illustrate the business model the Claimant was presenting through its promotional material:

> An advertisement on 11 February 2017 promoted the Claimant's franchises on the bases that: the Claimant provided *"proven levels of support"*; *"Drain Doctor has a great reputation and is often the first call for anyone needing expert plumbing and drainage services, a reputable brand recognised nationwide and a name synonymous with quality in our service sector"*; and *"Many of our franchisees are now reaping the benefits of running a successful business, achieving turnovers of up to 1.3 million"*. Another advertisement, 10 February 2017, referred to a franchise offering the advantage of a *"secure investment with high profit and growth potential"* which *"can be re-sold, thus protecting your investment"*. In addition it mentioned that there are *"National and nationally negotiated accounts . Drain Doctor works the 'big name' companies throughout the U.K"*. An advertisement of 18 March 2018 included the statement that the fact it has *"top franchisees achieving heights of £2million+ in turnover"* would be a reason why *"maybe it's time for you to investigate our multi-van management franchise"*. That advertisement also referred to the existence of *"a number of major corporate accounts, companies with request work to be done by our franchisees through our in-house National Accounts Team at no extra cost to our franchise partners … comprehensive training, ongoing support, bespoke technology and marketing expertise, all driving your business growth. Our systems maximise productivity and efficiency"*. The *"Drain Doctor … [is] looking for the right individuals to adopt a proven 30-year business model … Without previous business experience, you can achieve our target turnover of over £1 million, building your franchise empire"*.

69. On Sunday 19 August 2018 Mr Bartlett received an email from Mrs Brunton thanking him for his interest in the Drain Doctor Plumbing and Drainage Franchise. Apparently, it is an automated response but one which reads as though it is a personal letter. Mr Bartlett's enquiry had resulted from his general investigations into available franchises and specifically from having read Drain Doctor's advertising material, viewed its web-site and carried out some on-line research with sites such as "Franchise Direct" and "Franchise Local".

70. In his evidence in chief Mr Bartlett identified a number of specific advertisements which he said *"caught his eye"* and caused him to contact the Claimant. They were set out in his witness statement as follows:

> *"Protect your investment by re-selling"; "Turn £35,000 initial investment into £1,500,000 net profit over your 10 years"; "More of our business owners are running £1,000,000 plus turnover businesses"; "It might be now or never don't miss out on an area close to you, as we only have a limited amount of franchise territories left to allocate"; "As a drain doctor*

> *franchisee you can expect to be in demand from day one. You will have access to a number of lucrative national accounts, with all service requests in your area sent to your territory"; "Our current highest figures stand beyond the £2 million pound mark"; "We hold a number of major corporate accounts, work which is to be completed by franchisees through the national accounts team – at no extra cost to the franchise partners"; "Benefit from local marketing activity"; "Drain Doctor's nationally recognised name"; "Support services from an experienced team"; "A secure business with high growth and profit potential"; "The use of tried and tested business systems"; "Franchise owners work in close proximity to home and enjoy a better work life balance"; "Expanding corporate partnerships and commercial contracts – We've doubled our national accounts team to handle the extra work we're generating for you"; "We will help you to place Drain Doctor advertisements in your local yellow pages"; and "give you access to our internet advertising".*

71. Mr Bartlett's evidence was that he saw the Claimant as a franchisor who would offer a ready-made business model for him to operate and own within a new geographical territory. There would be work freely provided by the Claimant through National Accounts and the Claimant would advertise locally within the area of the franchise. He would join a band of franchisees, the majority of whom were turning over £1 million.

72. Whilst I accept that evidence as a general recall of his position before contacting the Claimant based upon the advertising to which he referred, it is important to remember that whilst advertisements should be truthful and comply with advertising standards, they formed only the background leading to the information discussed with Mr Bartlett before the Agreement was executed. The task for this court is not to critique advertisements but to identify the information which Fredbar Limited and Mr Bartlett relied upon when entering into the Agreement. That does not mean the advertisements are necessarily unimportant. They set a scene, they are potentially relevant to mind set (including reliance) and they may assist when determining credibility.

73. Mr Jeannes's evidence in chief within his third witness statement included financial information produced for the purposes of this litigation to support the accuracy of the advertising representations. It was derived from existing data previously collected by the Claimant from its franchisees. In addition he referred to a *"number of valuable resales during the period October 2015 to October 2018"*. He also mentioned two new franchisees having been recruited in April 2017 and July 2018 for new territories. He explained that neither had any success but attributed that to reasons which, if correct, were specific to them.

74. Mr Grant, during his cross-examination of Mr Jeannes, sought to establish that the figures for turnover were negligently misleading, that the National Accounts work was indeed an important feature but one which was missing for Fredbar Limited in Cardiff and that the true figures established the representation of an investment protected by the ability to resale to be negligent.

75. Mr Jeannes's evidence included a table setting out the Claimant's records of the annual turnover achieved by the five most successful franchisees from 2016-2020 with their projections for 2021 to 2025. Only the "Northwest" franchise consistently achieved a £2million+ turnover. That was between 2017 and 2020. Another, the "Anglia" franchise, achieved it once, in 2018. Those two franchises were the only ones which achieved turnovers of over £1.3 million. "Anglia" exceeded that figure each year between 2017 and 2020 having achieved £1.192 million in 2016

76. Of the other three, top five franchisees only Newcastle achieved turnover above £1 million between 2016 and 2020. That was in 2019 when its turnover was £1.012 million. It had achieved £851k in 2018 but the figures for those three during 2016-2018 otherwise failed to reach a turnover of more than £700,000. The average annual turnover for those three franchises was in the region of £515,000 (rounded up). Bearing in mind that Mr Jeannes accepted that in 2018 there were about 35-36 franchises, that paints a rather different picture to the scene established by the advertisements which caught Mr Bartlett's eye.

77. Indeed, bearing in mind the obvious inter-connection between the Claimant's income and its franchisees' turnover, it is also notable that Mr Jeannes candidly explained that the Claimant's business had not been doing well prior to his appointment in February 2016. However, its overall business performance is not really in issue (certainly not directly) and as "managing director" Mr Jeannes has plainly taken steps to improve matters. He referred to the Claimant having issued at least twenty five new franchise agreements and there having been re-sales: two in 2015 for £75,000 and £35,495, two in 2017 for £79,000 and £75,000, one in 2018 for £85,000, one in 2019 for £44,000; and one in 2020 for £50,000. The figures showed there had been 46 franchise units operating in 2017 and 32 in 2020.

H2) Mr Bartlett and His Enquiries

78. Mr Bartlett is in his mid-thirties and lives in Cardiff with his partner and young son. Although he left school in 2000 to join the army, he will have benefited from the valuable experience that must have been gained from his role as an area systems operator in the Royal Signals. He subsequently obtained a degree in sports science in 2010 and subsequently worked as a sales representative/account manager for major companies. Therefore, notwithstanding his difficulties as a witness and whilst he was not a business man or educated in business matters, one can easily conclude that with training and guidance he should have been able to start his own plumbing/drains business using a limited company. However, it would have been clear to any franchisor that he would need training and guidance in both elements: the services to be provided and the ability to run and comply with the responsibilities of running a limited company. It is also plain that he would want to know that such training and guidance would be available when investigating the prospect of purchasing a franchise.

79. In that context the following advertisement around 4 November 2017 provided a general description of the advantages said to be offered by a Claimant's franchise which would be relevant to Mr Bartlett when deciding whether to contract. It sets the scene for the discussions which led to the Agreement:

> *"Start your business with the guidance and support of the team from the global multi-billion pound Dwyer Group of service brands. We know how to make your business successful and profitable - we've been helping franchisees to change their lives for over 30 years.*
>
> *You'll receive comprehensive training. ongoing support. bespoke technology and marketing expertise that will all drive your business growth. Our systems maximise productivity and efficiency. and regular meetings with other like-minded business owners in the Drain Doctor Network ensure constant innovation and shared experiences to strengthen your franchise.*

> *Thanks to our scale. we also hold major corporate accounts-jobs which are passed to you in your exclusive trading area, at no extra cost."*

80. It is evident that those services would meet Mr Bartlett's requirements. An email from Mrs Brunton sent on 20 August 2018 evidences that she had spoken to Mr Bartlett that day and that the Claimant's approach would be consistent with the above-mentioned advertisement. She highlighted that the Claimant provided help to enable a franchisee grow the business including: Marketing; Recruiting; World Class Customer Service; An Educational Sales Approach; The Only Menu Pricing on the Market Today; Finance Management; and Daily Support in the Field From Franchise Consultants. She emphasised that he should consider the following when evaluating the franchise: systems; training; support; and culture. However, the emphasis was upon it being his decision. The procedure would involve: mutual evaluation through telephone conversations with her; Mr Bartlett making enquiries of existing franchisees; and also attending an operations day at the Claimant's corporate offices to see how the systems work and how they can make the business more profitable with him having more time away from the business.

81. Mr Bartlett recollected Mrs Brunton during that conversation speaking in enthusiastic terms about the franchise and the opportunities in Cardiff including available national account work, the use of local marketing and the fact that work would be available from day one. It is impossible for either of them to be sure about precisely what was said during that telephone conversation. It was only an introduction but I am sure she would have been enthusiastic and encouraging.

82. Insofar as she referred to franchisees turning over £1 million per annum, as Mr Bartlett recollected, that would be true. If she said "lots" were achieving that level of turnover, that would not be the case. Mrs Brunton said she did not. I accept that because Mr Bartlett's memory is not sufficiently good enough for me to find on the balance of probability that this pronoun was used. However, even if Mrs Brunton did say "lots" during the telephone conversation, it was just the beginning of the discussions. The real issue is what was subsequently discussed and represented and what was relied upon when the Agreement was completed. This finding and conclusion equally applies to Mr Bartlett's recollection and Mrs Brunton's denial that she referred to a £200,000 turnover in year one.

83. Mr Bartlett spoke to other franchisees and whilst he was rather dismissive of the value of those conversations in the witness box, the reality is that he had that opportunity and they did not prevent him from pursuing this franchise purchase.

84. From an early stage in that process Mr Bartlett appreciated that if he decided to contract with the Claimant, his future company would be able to start its new business using the name "Drain Doctor Plumbing". The business should benefit from the good will generated by the franchise, its name and logo. He would drive a shiny red van advertising that the new business was part of the franchise. It would include on its sides the name, the logo, the telephone number and web-site address. By becoming a franchisee the business would also have the further advantages of support to be provided by the Claimant in accordance with the terms of the franchise agreement to be concluded with him. Mr Bartlett would know that no other "Drain Doctor Plumbing" business could compete within the geographical area of the Cardiff franchise he was intending to purchase.

85. He pursued his interest and completed a self-assessment report providing personal details to the Claimant. These included his employment history, current salary and reasons for leaving. He also named a referee and gave disclosure of his assets and liabilities. This was important information. It was to be relied upon by the Claimant when deciding whether Mr Bartlett was a suitable person to become a franchisee using a limited company as his vehicle. It was information that both would have had in mind when negotiating the Agreement. It is part of the circumstances which will be potentially relevant to the Agreement's construction and application.

86. The information established that the franchise would become Mr Bartlett's sole source of income having left his present employment. He then earnt in the region of £38,000 a year (including a bonus but pre-tax) and he had a mortgage (£134,000) to pay in respect of the family home. His partner had a relatively small income and his available assets (£20,000 subject to a £5,000 loan) would inevitably be tied up in the business. It would be obvious to anyone at the time the Agreement was concluded that the reality was that the family home would be at risk if the business failed. That would be so if he had to guarantee any of his company's liabilities but also in any event unless he would be able to find a new income with which to pay the mortgage. It would be a major decision for him to make. He would give up reasonable security provided by his current employment for the prospect of achieving the benefits promoted by the Claimant for those who became its franchisees.

87. However, Mr Bartlett was enthusiastic, ambitious and was aiming to start the franchise in October 2018. He saw it as a route to making significant money through his own business. Nevertheless he is certainly not a foolhardy character. I accept that he will have been cautious because of the financial risks involved.

88. Whilst Mr Bartlett had been making enquiries of franchisees, the Claimant was considering his suitability for their purposes. Mrs Brunton emailed Mr Jeannes on 22 August 2018 with the information provided by Mr Bartlett. She was authorised to continue discussions with him on the basis that he appeared to be a good applicant. On 23 August 2018 she sent him a template business plan. Although the sections relevant to the particular franchisee were left blank, sections concerning the Claimant were completed. They included a guide to who the Claimant is, the nature of the franchise and to the anticipated terms.

89. In outline, Mr Bartlett would be joining a 10 year franchise with some 35 franchisees trading in 53 territories for a franchise purchase fee of £35,000 plus VAT. There would be a commitment to pay during the term monthly royalty fees of 15% of turnover and an advertising and marketing levy of 2% of turnover. There was no reference to National Account work except for a brief mention of *"Regional key account support"* and *"cross marketing opportunities"*. Start-up costs would be in the region of £50,000 and the standard territory would cover about 400,000 people. Pre-opening and post-opening support was identified. Training and support meant no previous experience was required. A tried and tested business model was applied and qualified technicians would undertake the jobs unless an owner-operator franchise was agreed. Its Appendix 3 identified findings of independent research to be completed by the franchisee including reference to demand in the local area and to competitors.

90. As to the latter, however, the Claimant was fully aware that Mr Bartlett intended to carry out the work himself, at least until the business was sound enough to enable technicians to assist. The template included reference to projections and in a conclusion anticipated a *"very strong business case"* because (amongst other matters) the franchise had an excellent track record and the projections showed profitable trading.

H3) The August Projections

91. Much is made by the Claimant of the fact that the projections received by Mr Bartlett contained clear statements in a red box that the figures were illustrative, not guaranteed and that no liability would flow from any inaccuracy. I do not undermine the need for such a box but the reality is that projections could only be estimates by definition. As such they could not be guaranteed (absent any further representation) and they could not be, as such, inaccurate. That is why no liability could flow as stated within the box. However, they had to be based upon genuine information and be produced honestly and with reasonable skill and care as estimated projections. As Mr Bartlett pointed out, he had to rely upon them because he had no other information concerning the Claimant's franchise. That did not mean the projections would be fulfilled and I am satisfied Mr Bartlett appreciated that fact.

92. The projections were first prepared by Mr Packevicius, for which purpose he had a video call with Mr Bartlett on 30 August 2018. The projections changed from time to time during the negotiations but consisted of the same documentation and essential methodology: a list of start-up costs, profit and loss accounts for months 0-12, 13-24 and 25-36 and cash flows for or relevant to the same periods. Turnover was calculated using averages obtained from data collected by the Claimant from results regularly submitted by their franchisees. There was no research specific to the Cardiff area intended to be franchised and there was no suggestion that any such research had been carried out. Nor was there any filtering of the results to take into consideration the length of time a franchise (and/or a preceding franchise) had been in existence and/or the different results that might be expected from a new start up with or without an experienced operator. The projections simply depended upon the concept that averages of figures achieved in other areas of England of a similar population size could be the basis of forecasts for the new Cardiff franchise. The Claimant's evidence was that the figures used were in any event conservative based upon the data derived from existing franchisees.

93. There is much to be said for the suggestion that this is an unsophisticated approach. However, there is no suggestion that Mr Bartlett was misled over that methodology, for example by it being represented that the projections were based upon specific territorial research. To the contrary, his evidence at paragraphs 11-12 of his 6th witness statement reads:

> *"It was explained to me that, as the area population was 400,000 (specified in all projection models SRB5 p33, 51, 58, 65, 72 & 79 for the franchise fee of £35,000) the projected turnover and information mentioned remained the same and was based upon previous franchisees.*
> *We agreed that all other outgoings would be based on what new franchisees in the past were paying on average for marketing, miscellaneous, staff wages, service vehicle fuel and telephone communication etc.*".

94. Mr Bartlett was prepared to proceed on the basis of projections derived from averaged franchisee data. That was his decision. He and the Claimant were in a purchaser:vendor relationship, albeit one which would result in franchisee:franchisor relationship. Whilst the latter would create a special relationship requiring the parties to work together to fulfil their respective obligations, that did not mean that he was being advised by the Claimant when it was selling its franchise to him. Mr Bartlett's evidence that as someone with no experience he *"took direction"* from Mrs Brunton and Mr Packevicius does not change that relationship. There was nothing to prevent Mr Bartlett from carrying out his own research or seek the advice of others concerning the Cardiff market before and after the projections were provided. For example, he could have investigated the likelihood of the market sustaining the average figures used for the number of jobs and for the earnings per job. For the avoidance of doubt, it is plain from his evidence before me that his reference to *"previous franchisees"* was intended to refer to existing franchisees not those who had previously only operated in the Cardiff area.

95. The forecasts assumed the Claimant's business model would be used and that in month 8 the franchisee would be able to engage a new employee. They would be provided with a second van and the projections proceeded on the basis of the estimated, anticipated increase in turnover. A second person would be employed and van purchased in month 21 and a third person and van in month 32. The ability to meet these assumptions was based upon the average figures relied upon for the projections down to months 8, 21 and 32 respectively.

96. Plainly as a model it would succeed if the projections were fulfilled. The Claimant's evidence, in particular from Mr Jeannes, that their projections from month 8 cannot be criticised if that model is not applied is correct. However, it does little more than sustain the theory that expansion will increase turnover and profit provided the market enables and permits expansion. Application of this model is dependent upon the franchisee achieving the projections and, as a result, being able to afford the additional employment and van purchase commitments. That will be dependent upon the level of demand at or about month 8 and, therefore, upon the specific Cardiff market. The Claimant's criticisms of Fredbar Limited for failing to adopt that part of the model must be read in this context even though that is not stated by its witnesses.

97. Looking at the projections in further detail:

    a) The number of projected jobs per week for the first year's trading were predicted to rise from 5 in month one to 6, 8, 9 and 10 in the following four months. The next increase was to 14 in month eight and in November and December it would be 15. The increase to 14 coincided with the new employee and van. The leads projected to be required for each week to achieve that level of turnover started with 5 in month one and increased to 10 in month two. Increasing each month, they reached 16.67 for months five to seven. Months eight to ten projected an increase to 23.33 and it would be 25 for the last two months of the financial year.

    b) The projected turnover for month one was £4,763, in month two £5,716 and £7,621 in month three. It would increase by about £1,000 a month until reaching

£9,743 in month six and £9,959 in month seven. The effect of the new employee and van would increase the turnover to £13,943 in month eight. In month ten it would increase to £14,246 and reach £15,263 for the last two months. The projected turnover totalled £128,969.05 based upon average payments for each completed job of £220.00 in months one to three, £225 in months four to six, £230 in months seven to nine and £235 in months ten to twelve. The fact that the projections were subsequently revised means it is unnecessary to detail the 30 August 2018 projections for the next two years.

c) The franchisee's required starting capital was £80,000. The projections, if achieved, would mean that the Cardiff franchisee would not have to borrow further funds or receive any additional share capital but would be able to trade and expand its business with new vans using the income derived from its trading and/or its original borrowing. The expenses were calculated by reference to franchise average data. They were specific to a start-up to the extent that the item of expenditure would only be incurred at that stage.

d) The method used for calculating the projected *"net operating profit"* within the profit and loss account was expressly identified (for these and all subsequent projections). It used the "EB[I]TDA" formula (i.e. excluding interest) but without including certain expenses described as *"loan and lease payments etc"* ("the Excluded Expenses"). Their exclusion would in part be because some payments were for the purchase of long-term or noncurrent assets to be reported in the balance sheet (i.e. the initial franchise fee and the down payment for the van) but all needed to be included in the projections as cash flow.

e) The Excluded Expenses could be further identified within the cash flow as the payments below the annual subtotal of £124,466 for *"cash paid out"* (the sub-total consisting of the items coloured yellow (costs of sale) and blue (fixed overheads)). The Excluded Expenses during the first 12 months consisted of *"Franchise Fee & Stationery Marketing"* (£43,000), VAT (£3,703), *"Leased Van and Equipment Payment"* (£11,962) and *"Vehicle Down Payment and Expenses"* (£11,592). They totalled (£27,257).

f) The Claimant's calculation of *"net operating profit"* (the EB[I]TDA) would result in returns of £9,508 for year 1, £19,758 at the end of year 2 and £83,274 by year 3. If the Excluded Expenses had been included (i.e. assuming they would all lead to a profit and loss account cost), it would have produced a projected loss of (-£17,749). This loss would have been covered in cashflow terms by Mr Bartlett's initial funding for Fredbar Limited of £80,000, which presumably would be a loan rather than share capital.

g) That loss would be increased if the franchisee paid the projected *"Owners' [monthly] withdrawal"*. This would be an additional £1500 a month for the first 12 months resulting in cash in hand at the beginning of month thirteen of £10,561. Those payments were identified in evidence by Mr Packevicius as the sums Mr Bartlett required for his normal living expenses. Mr Bartlett agreed with that figure. It does not correlate with his previous earnings but he described it as the sum on which they could just about get by.

h) However, the cash flow also attributed £2,500 per month from month one as *"staff wages"* within the expenses applied to calculate the EB[I]TDA. It was known for the purpose of the projections that Mr Bartlett was intending to start the business as the sole employee operating the van. That wage would be his and would continue through to projected trading month 8. At that stage it would double to allow for a second van operative. The conclusion to be drawn is that the £2,500 per month (ignoring employer tax and NIC contributions, which the projections do) was available within the cash flow for Mr Bartlett's salary.

i) The £1500, which after all is described as *"owners' withdrawal"*, must represent either repayment of existing loans made by Mr Bartlett to the Company for its working capital or be a director's loan intended to be repaid by dividends at the year end, assuming the necessary profits would enable them to be declared and approved. When asked whether that was so, Mr Packevicius admitted he did not know or indeed understand this issue and could not assist. It is nevertheless the appropriate explanation. For year one there could be no dividend because of the loss and, therefore, the payments, if withdrawn, would have reduced Mr Bartlett's initial loan. It is an explanation which would provide leeway within the cash flow but would not affect the EB[I]TDA.

98. The projections (as with all subsequent versions) did not include income which might be received from National Account work. An email sent to Mr Bartlett on 30 August 2018 explained that those projected figures would be sent some four days later after the Claimant's "National Accounts team" had carried out their assessment. This work has been described by the Claimant's witnesses as being *"the cherry on top"*.

H4) September – 3 October 2018

99. It is apparent from two emails of 5 September 2018 that Mr Bartlett considered the projections carefully. He made enquiries concerning the inclusion of rent/rates, the meaning of "msf/naf and where employee wages are to be found. At the time of his decision, according to the emails, the plan had been for him to invest (whether as capital or lending) £20,000 together with a further £90,000 which he would have had to borrow. It is not entirely clear how that fits with the projections first sent to him on 30 August 2018 which identified £80,000 as the investment required and included payment of £43,000 in month one for the *"franchise fee and marketing material"*. However, nothing specifically turns on this because changes were made and the discussions continued. What is apparent is that ongoing discussions would result in new projections when appropriate.

100. On or about 6 September 2018 Mr Bartlett decided not to proceed. A brief internal email from Mrs Brunton attributed that decision to *"cost implications"*. The Claimant decided to review its projections to try to sell its franchise to him. This is not something addressed in the Claimant's evidence in any detail but nor is it covered by Mr Bartlett. He does not provide evidence of any discussions he had concerning the review or its results. No representations, explanations or justifications concerning the revision are identified and relied upon.

101. Two sets of projections were provided during September. The first at page 818 of the bundle and the second at page 830. It is sufficient to refer to the latter which appear to have been sent around 10 September 2018. They are in the same format and apply the same essential methodology as the 30 August 2018 projections (see in particular paragraphs 95-96 and 97c-e and h-i above). The revisions (which need only refer to the first year because of later changes) include:

    a) An increase in turnover from £128,969.05 in the 31 August projections to £147,912.80. The number of completed jobs remained the same (except for month one starting at 3 not 5) but the average payments for each completed job increased: £260 in months one to eight (not the previous average for those eight months of £224.38); £270 in months nine to ten (not £230 and £235) and £280 in months ten to twelve (not £235).

    b) The franchisee's starting working capital was £60,000 (not £80,000). It would be reduced to £17,759 at the end of the first year.

    c) The total expenses for the "EB[I]DA" less Excluded Expenses calculation were £124,766. The *"net operating profit"* without the Excluded Expenses would be £23,147.

    d) The Excluded Expenses now included £1,000 a month for *"bank loan principal payments"*. The "Franchise Fee & Stationery Marketing" payments were reduced by £28,500 on the basis that an initial payment of £24,500 would be paid (attributable to the bank loan paying the franchise fee balance) and two payments of £5,000 each would be received as payments towards the vans from the Claimant. VAT increased to £7,276 but the two other elements of Excluded Expenditure remained the same. The *"Owner's withdrawal"* of £1500 started in month one. The total of Excluded Expenditure plus *"Owner's withdrawal"* would be £200,095. Further borrowing would not be required.

    e) Cash flow was potentially tight with working capital having to be relied upon in seven months of the first year and cash on hand reduced to £17,759 at the beginning of the second financial year. The most cash retained from a month's trading would be £7,138 in month 5. Months 11 and 12 were only £3,064 and £3,719, whilst month 6 was £948 and month 9 was £343.

102. It appears that Mr Barton was responsible for the new projections and structure, although he would have been assisted by members of the Claimant's team. An email from Mr Barton to Mrs Brunton sent 10 September 2018 concluded that Mr Bartlett is *"pretty gassed about all of this now, only hurdles left are funding and his wife … she seems to be the one who could put the brakes on now"*.

103. Plainly, there are potential questions concerning the changes above. In particular how average figures based upon existing franchisee data could be changed including why the average payment per job increased so significantly. This was a key ingredient with a range of £220 increasing to £235 over the first year changing to a range of £260 increasing to £280. However, the evidence of Mr Bartlett does not address this. He does not refer to the conversations which resulted in him changing his mind. He does not identify any representations or inducements made specifically concerning those alterations which are now said to have been negligent.

104. Mr Bartlett sought a loan from National Westminster Bank plc and it appears from email correspondence that a business plan and financial model were sent to their franchise development manager during September. The completed "Business plan for the establishment of a Drain Doctor franchise in Cardiff" dated September 2018, which followed the above-mentioned template, contained details of Mr Bartlett's background and assets identifying his personal funds as £20,000 and his intention to invest £18,000. There was also reference to his £133,000 mortgage, to his partner and three year old son. His business plan was described as one which *"works via a combination of immediate emergency work and preventative/clearance contract work"*. The following points emerge following the order of the plan but without repeating information above concerning the projections:

a) The report identified six of the Claimant's National Account customers who had branches in the Cardiff area. The potential annual turnover to be received from National Account work was £20,510. Mr Bartlett's evidence in chief was that Mrs Brunton told him they had *"some fantastic national account work ready in Cardiff"*. In cross-examination his recollection was that he had been told there would be "lots" of National Account work. Those recollections refer to vague and certainly imprecise concepts. Nevertheless, it is plain that National Account work was anticipated as projected in the report but without guarantee.

b) This accords with the Claimant's *"cherry on the top"* description of National Account work. It would be the extra which would make a positive impact upon the business and its financial returns. Whilst evidence from Mr Bartlett suggested he thought, at least at some stage, that this work was included in the projected turnover figures, to his potential advantage for the purpose of the claim, that was not the case (see paragraph 98 above).

c) The van rebate subsequently provided for in the Side Letter was described as *"a gesture of confidence in the model and in [Mr Bartlett's] ability …"*.

d) The job average figures used in the plan/projections were based on jobs completed across the Claimant's network and were slightly below national average in year one but in line with that average in year two. It is stated that:*"… the robust level of jobs for the start-up months (3-5 per week) are the result of a tried and tested pre-launch marketing campaign (the cost of which is included in the franchise fee). This initial high momentum is then carried forward with a consistent marketing budget (£1450 year 1, £2000 year 2, £3500 year 3)"*.

e) The reference to advertising to be provided by the Claimant was consistent with Mr Bartlett's recollection during his evidence in chief that Mrs Brunton told him local advertising *"would mean exposure in the area from day one with newspaper articles and frequent advertising"*.

f) Growth forecasts, described as "his" but clearly relating to the Claimant's projections, were described as *"very achievable"* and the forecasts as not being *"wildly optimistic and cater for months where growth will not be linear"*.

g) In summary it was described as: *"a sensible proposal from an entrepreneur who is prepared to release his savings and investments into the business start-up in order to grow his asset base and build a thriving business"*.

h) Appendix 3 which would contain the details of any independent research carried out by the franchisee with reference to (amongst other matters) target customers, local demand and competition was blank.

105. Although Mr Bartlett's business plan, it is plain from the drafting that those points were also being made primarily upon information which the Claimant had provided to Mr Bartlett and that the summary was their opinion. Mr Bartlett wanted to proceed. In chief he said: *"With no reason to believe the financial model given to me was grossly inaccurate nor that the advertising was exaggerated or wrong I asked to be sent across the franchise agreement."* I note he was not referring to guaranteed projections and it was his consistent evidence that he appreciated they were projections.

106. On 24 September 2018 he incorporated Fredbar Limited. The same day he was emailed a copy of a standard form franchise agreement. In evidence Mr Bartlett stated that he did not look at it and was not overly interested in its terms because it was not the one he would be required to sign. Taken at face value, that is surprising and cannot be correct because although a standard form, it is in the form he would have sign or renegotiate to become a franchisee. The fact that he said he merely required it to send it to the National Westminster Bank does not alter that conclusion. Indeed, the fact that he was sending it to identify the terms he might be signing would justify their study.

107. I think what he really meant (but did not say) was that since he would have to sign what the Claimant required if he was to become a franchisee, the real issue for him at this stage was whether he wanted to be a franchisee not what the detailed contractual terms would be. Bearing in mind the length and complexity of the document, that would not be surprising based upon my assessment of him as witness. Legal matters are not his forte. However, I make no finding on that. The point is that he now had access to this standard form, he could have studied its contents and he could have taken advice if he so chose.

108. Mr Bartlett attended an "orientation day" or "induction day" on 26 or 27 September 2018. Mr Jeannes in his evidence in chief stated that having met Mr Bartlett before and at that event he *"knew … he required more support and hand holding than any other franchisee in getting set up, including help with quite simple tasks … he struck [him] as someone who was overactive and tended to be easily agitated … he was needy, prone to agitation and had had difficulty in building relationships, including [subsequently] with customers"*. One might have expected Mr Bartlett to be rejected as a potential franchisee based upon that assessment and plainly Mr Jeannes thought so too because he found it necessary to justify his acceptance of Mr Bartlett on the basis that *"everybody deserves a chance"*.

109. Matters proceeded quickly after that. On 1st October 2018 Mrs Brunton started arranging a day when the Agreement could be signed at Mr Bartlett's house in Cardiff. She was unable to attend and Mr Barton arrived during the morning of 4 October 2018. He said he brought two hard copies with him, Mr Bartlett is sure there was only one. The agreement in the form to be signed had been emailed to Mr Bartlett

the day before together with the Side Letter. Mr Bartlett's recollection was that he sat on the bedroom floor to read it on his laptop but on scrolling down realised it was a *"heavy document"*. He also described it as overwhelming and said during cross-examination that he had contacted Mr Barton asking for more time. His recollection was that Mr Barton said he would go through it the next day and that it need not be signed. There is no documentary evidence of this but whether that conversation occurred or not, what really matters is what happened the next day in the context of a standard agreement having previously been sent but this agreement only being received the day before.

H5) Mr Bartlett's Actual or Deemed Knowledge Based on the Projections

110. At this stage, Mr Bartlett will or ought to have addressed the issue whether the projections were realistic forecasts knowing that they were based on franchisee average figures which had been revised. For that purpose he would or ought to have considered turnover, the figures producing the EB[I]TDA, the Excluded Expenses and the amount of working capital required. When addressing turnover he knew or ought to have known that he had to assume that the franchise would achieve the projected job numbers and fees per job which were in line with those the projections had used based on franchisee averages. He knew or ought to have known that the same basis for assumption would apply to cost of sales, net operating expenses and any other income and expenses.

111. He knew or ought to have known that the cash flow was tight and required the working capital to be significantly diminished. He also knew or ought to have known that the projections for months 1-7 were important to achieve in order to be able to engage an employee and new van without further borrowing. To that extent the information the Claimant provided for the business plan will have given comfort concerning the anticipated consequences of the tried and tested pre-launch marketing campaign and consistent marketing budget (see paragraph 104(d) above). So too will have the reference to the projections being very achievable (see paragraph 104(f) above).

112. He also knew or ought to have known that there was potential leeway within the projections:

a) First, if he did not take the £2,500 salary or the £1500 "Owner's Withdrawal" (whether as repaid lending or borrowing pending dividends).

b) Second, if matters were unsuccessful at the beginning he could delay the engagement of a new employee and van. Whilst that eventuality was not covered by alternative projections, the cash flow for the first seven months suggested that step may not be essential in the short term, albeit that would obviously depend upon how poor the performance was and would mean the projections for the later months would require revision.

c) Third, as a result of the Business Plan he knew that National Account work was forecast at £20,510.

113. However, he also knew or ought to have known that the forecast did not include or take into consideration evidence specifically concerning the Cardiff market or differentiate starting franchises or inexperienced franchisees or those without plumbing or drainage services experience (see paragraph 93 above). He decided (or ought to have done) that his business plan did not require completion of Appendix 3, noting it was for the franchisee to complete. In addition, there was no reference to the experiences of the previous franchisee who had ceased business some three years before. Whatever the experience of that business, it was not a factor taken into consideration for the purposes of deciding whether to enter the Agreement.

114. It is to be noted that his evidence has not tied his understanding and application of the projections when deciding whether to proceed with the Agreement to any of the advertisements. It is also to be noted that there is no suggestion that Mr Bartlett was aware of Mr Jeannes's assessment of him (see paragraph 108 above) when considering the projections or at any time before entering the Agreement.

H6) Revised Projections

115. There is an issue as to which projections were available to Mr Bartlett when he signed the Agreement. The choice is between those at page 830 of the bundle, which appear to have been in existence by 10 September 2018 as evidenced by an email of Mr Barton to Mrs Brunton, and those sent by Mr Barton by email at 16:39 on 4 October 2018, which appear at page 1173 of the bundle, followed by a version sent one minute later. No real difference has been identified between those at page 1173 and the slightly later ones at page 1184.

116. The essential difference between the projections at page 1184 and the September version at page 830 is that the cash flow for the later version contained two pre-trading months. Start-up costs were attributed to those two months without income. As a result Fredbar Limited's £60,000 working capital (no longer £80,000 as in the 30 August projections) stood at £23,654 at the beginning of the first month of trading. Fredbar Limited having spent £36,346 during the two pre-trading months.

117. The issue arises because Mr Bartlett's recollection is that the emails with the revised projections were received a few hours after he had executed the Agreement on 4 October 2018 at his home in the presence of Mr Barton and a witness. Mr Barton presumably having arrived at his home in Wolverhampton by the time he sent those emails. Mr Barton's recollection, which came to mind for the purpose of amending his witness statement before affirming his evidence in chief, was that he sent the emails whilst sitting at Mr Bartlett's dining room table.

118. Mr Bartlett accepted during cross-examination that the emails might have been sent whilst at the table but in my judgment, it does not matter. First because the projections reflected changes resulting from discussions during the meeting. The distinction was cash flow based only. The projections of jobs per week, leads and turnover were the same. The cash flow changes will be identified below but there were no significant changes to the figures used.

119. Second, because whilst Mr Bartlett had executed the Agreement it would not become contractually binding until executed by the Claimant, which would require payment of the franchise fee. He had time to withdraw before that occurred and this was not only obvious but was also stated in an email sent to him by Mr Barton on 4 October 2018. He chose not to withdraw following receipt of the page 1184 projections. It follows, that the projections at page 1184 will have been relied upon by him because he did not seek to raise issue with them or with the Agreement before it became binding.

120. The following points arise concerning the page 1184 projections (also in the same format and applying the same essential methodology as the 30 August 2018 projections - see in particular paragraphs 94-95 and 96d, i and j above):

a) Starting capital remained at £60,000.

b) The number of projected jobs per week for the first year's trading remained the same as the August projections except that it was three in month one. The number of leads also did not change.

c) Mr Bartlett's evidence (which applied to all the projections) as a salesman of 8 years' experience was that he thought the conversion rate was particularly high and the reality would be more like 30 – 40%. He put the high conversion down to guaranteed leads and national accounts work. Mr Jeannes stated that the Claimant's data established a high conversion rate well in excess of the conservative 60% projection. This was attributable to the fact that most of the work was in response to an emergency.

d) The projected turnover remained at £147,912.80 although the cash flow anticipated £157,854). It was based upon job numbers and average payments for jobs which were very similar to the September projections. There was no change to the leads' conversion.

e) There were minor changes for the purposes of the *"net operating profit"* but the projected EB[I]TDA on ordinary activities at the end of the first 12 months remained similar, £23,447. The insertion of two pre-trading months before the financial year largely only affected the Excluded Expenses.

f) The cash flow projected that Fredbar Limited's original working capital of £60,000 would be reduced to £23,654 during the first two, pre-trading months. In approximate terms, the cash flow showed cash in hand of between £24,000 and £22,000 at the end of the first three months of trading. For months four to twelve it would fluctuate between around £11,000 and just under £20,000. The cash in hand was calculated after the additional deduction of £1500 per month from month four of trading attributed to "Owners' withdrawal". It is to be assumed that the total of £13,500 would be treated as repayment in part of Mr Bartlett's original £60,000 loan to Fredbar Limited.

g) The EB[I]TDA for the second financial year was estimated to be £54,903 with a third van in month 23 and projected sales of £290,976. Mr Bartlett's salary would remain the same. The additional costs excluded from EB[I]TDA totalled £82,031. Owner's withdrawals would remain at £1500 each month. Working

capital would be in the £4.76k-19k range until month 24 when it would be £24,829.

h) The EB[I]TDA for the third financial year was estimated to be £111,426 with a fourth van in month 32 and projected sales of £467,640. The additional costs excluded from EB[I]TDA totalled £95,116. Owner's withdrawals increase to £5,000 each month to produce a director's loan for that year of £60,000 subject to repayment from dividends capable of and being declared and approved. Working capital would range between around £32,000 and £71,862, the last sum being for month 36.

121. Therefore the fundamental variation was the insertion of two pre-trading months. Overall that made little material difference to the underlying results of the projections. As a result and in the absence of any evidence to the contrary, I am satisfied that Mr Bartlett's actual or deemed knowledge based on the September projections (at paragraphs 110-114 above) continued to apply without any material change to the projections revised on 4 October.

122. The need for those revisions must have been identified during discussions between Mr Bartlett and Mr Barton at their meeting on 4 October. That leads to the conclusion that Mr Bartlett must have considered the projections carefully before and during the meeting. Indeed, the importance to him and the Claimant of projections is also evident from his original decision not to proceed on or about 6 September 2018, the above-mentioned emails of 5 September 2018 in which he made detailed enquiries, them being sent to National Westminster Bank plc and the number of changes that occurred including on the day the Agreement was executed by him. All this presents a picture of Mr Bartlett acting responsibly and carefully pursuing his aim of becoming a franchisee based upon the material and projections being presented to him by the Claimant.

123. However, it also means that the references within advertising to franchises turning over more than a £1m a year or similar had little relevance to his decision to execute the Agreement. The fact that this was advertised had offered some encouragement but the issue for him in terms of turnover projections was whether the projections he received would be achievable. Namely whether it was realistic to estimate that the new business in Cardiff would grow towards £150,000 in the first year, £300,000 in the second and £500,000 in the third. I am satisfied that this was his concern viewed from the perspective of Fredbar Limited potentially purchasing a new franchise for the designated area.

H7) Execution of the Agreement

124. What happened at the meeting is the subject of considerable controversy. Mr Bartlett stated in chief that the sale was *"rushed and undue pressure applied by the salesman Owen Barton"*. He described the Agreement as *"too much to take in"* and referred in chief to Mr Barton pressuring him by mentioning that others were interested in the Cardiff territory and he could lose the opportunity if his signature was delayed. He said he was told it was a *"take it or leave it"* decision. He thought the financial projections and the marketing were accurate and anticipated a *"great work life*

balance". He was not advised to seek independent legal advice and the clause within the Agreement relevant to that requirement, clause 20, was not mentioned. He said he did not get legal advice because he just wanted to be a franchisee but would have done had he been told he should.

125. Mr Bartlett's recollection during cross-examination of what occurred at the 4 October meeting was vague. He could not recall going through the Agreement in any detail or the projections. He explained that Mr Barton was *"in charge"* and that he let him lead and get on with it. The detail and time required to consider such a long document properly meant a lot of things were glossed over. Whilst he accepted Mr Barton did not say that questions could not be asked, he was directing the day. His one clear recollection, as he described it, was crossing out the two ticks in the Questionnaire. He did not remember the Side Letter being discussed. He signed believing that he was bound by the Agreement. He did not remember the subsequent emails stating otherwise. He was not left with a hardcopy and that is not in dispute.

126. Mr Barton relied upon the fact that the standard form of agreement had been sent on 24 September. He recollected from the orientation day that it was Mr Bartlett who had indicated his willingness to sign within the week. His recollection of the meeting was that he spent some 5 hours from about 11.00am going through and discussing the Agreement in detail with Mr Bartlett. Projections were discussed including the amendments subsequently emailed. He said there was no pressure and Mr Bartlett did not indicate that he needed or wanted more time. They had gone through the Agreement together and it was not said that it was a "take it or leave it" offer or that it might be retracted at any moment. Mr Barton also stressed that Mr Bartlett had more than adequate time to assess his position even after the Agreement was signed. He said that he told Mr Bartlett that *"nothing … would be triggered until the franchise fee was paid and was countersigned by the Claimant"*. This was set out in any event in one of his 4 October 2018 emails to Mr Bartlett and I am satisfied Mr Bartlett was aware of this fact.

127. Mr Grant during his cross-examination of Mr Barton drew attention to a number of differences between the versions of the Agreement produced by the Claimant and by Mr Bartlett in disclosure. He described them as obviously different. For example, the shape and position of ticks on the questionnaire, different signatures and handwriting when comparing pages 1162, 1163 and 1164 of the bundle with pages 1148, 1149 and 1155 including a different witness name for Mr Wallace and the different printing of Mr Jupp's name. Mr Barton disagreed and observed that at best the differences represented the fact that two documents were being completed individually.

128. I find on the balance of probability that:

a) There is no doubt that the new projections were formulated as a result of discussions at the meeting. This will have taken a considerable time. There can also be no doubt that Mr Barton will have spent some time going through the Agreement with Mr Bartlett. However, the Agreement is very long and unnecessarily complicated. It is a lawyers' document generated more with the law in mind than in a form which non-lawyers can readily understand. It is improbable that Mr Barton will have taken Mr Bartlett through the Agreement to explain its content in the manner a lawyer advising Mr Bartlett would do. Indeed, that was not his job. It is probable instead that an outline review will

have occurred when addressing its clauses. That is not necessarily being critical of Mr Barton because he was acting for the Claimant and it was not his job to advise Mr Bartlett.

b) Nevertheless I am satisfied and confident that however carefully Mr Bartlett was taken through the Agreement, he would have been able to say little if asked to describe what he had agreed when Mr Barton left the house. It is simply too complicated. As far as he was concerned he had agreed to become a franchisee and he would be starting the new business through Fredbar Limited in accordance with the business plan and projections and with the support of the Claimant. Although he was challenged during his cross-examination for stating that by signing he had become a franchisee, and plainly that was incorrect because the Claimant still had to sign and he had not paid the fee, that was his mind-set. In practical terms he had become a franchisee subject to something going wrong and he or the Claimant deciding to pull out.

c) That criticism of complexity having been made of the Agreement, nevertheless the reality is that this was a business arrangement, the terms could have been read and understood by Mr Bartlett subject to any specific arguments or issues of construction and he could have refused to sign without seeking legal advice. The Agreement made clear on its face, in the recital as well as within clause 20, that he should seek that advice and he chose not to. I do not accept that Mr Barton overrode that right in any way.

d) Mr Bartlett's evidence was that he told Mr Barton that he wanted a solicitor. If so, it would establish that he was aware of the ability to obtain and of the potential importance of independent advice. To that extent it would undermine his complaint that he was not advised to take such advice whether by express reference to clause 20 of the Agreement or otherwise. However, I doubt that his recollection is accurate. I certainly do not find on the balance of probability that Mr Barton continued to seek the execution of the Agreement knowing that Mr Bartlett wanted independent advice before doing so. I am also satisfied that if such an event had occurred, Mr Bartlett would not have signed. In reaching that decision I have applied my assessment of Mr Bartlett as a witness and the vagueness of his memory concerning that day.

129. Those findings of fact do not specifically address the issues raised concerning undue influence. Whether there was undue influence is a matter for the decision below. The following are additional, potentially relevant findings of fact:

a) Mr Bartlett was wearing two hats. One as director of Fredbar Limited, the other his own. It is plain and would have been clear to Mr Bartlett at the time that Mr Barton only acted for the Claimant. His role was to obtain Mr Bartlett's signature and achieve a sale of the Claimant's product. To that extent he would be influencing Mr Bartlett to enter into the Agreement because that is what he was selling. He was doing so in the location of Mr Bartlett's home.

b) There was a more subtle aspect to the relationship, namely the fact that the Claimant and Mr Bartlett both needed to decide if the other was suitable for them on the basis that they would be working together as franchisor and franchisee should the Agreement be executed. In that context they had worked together to

ensure there was a business plan including projections which would be feasible. In addition, during that process of negotiations Mr Bartlett had inevitably had to rely upon the knowledge and experience of the Claimant.

c) There was no lawyer present and no other form of independent advice. The agreement was in the form described above. Whilst probably not presented as a "take it or leave it" document in those terms, there was no suggestion that the standard form could or would be altered.

d) Mr Bartlett had only received the Agreement the day before, which would not have given him time to properly study it or obtain advice but it was in the same form as the standard form agreement which he could have studied and taken advice upon since 24 September 2018.

e) There is no factual evidence of any threats or facts establishing on the balance of probability other similar forms of actual improper pressure or coercion. Mr Bartlett's choice to become a franchisee was his decision and he did not want to change that decision until the matters of termination relied upon arose.

130. Mr Bartlett's execution of the deed was witnessed by a tradesman. Mr Barton left the house either with two hard copies of the Agreement executed by Mr Bartlett or with one hard copy. The Side Letter was also signed. Mr Barton had to return to the house shortly after leaving for home because not everything had been signed, although it is unclear what that was.

131. Mr Barton is sure he took two signed copies, whereas Mr Bartlett is adamant he only signed one. Mr Bartlett in evidence and through Mr Grant during his cross-examination of Mr Barton relied upon a number of differences which were said to establish that only one was signed by Mr Bartlett. The position is complicated by the fact that it was only at the beginning of the trial that the suggestion was made by the Claimant that there were two documents and it was only then that the allegation of a forged document was made by Mr Bartlett. This has meant there is no forensic investigation outside of the court room and no expert evidence. The position is further complicated by the fact that the bundle only includes part of the copy now in Mr Bartlett's possession. The contrast is between the Claimant's version at page 1149 and Mr Bartlett's at page 1162. This leads on to the Ticks/Crosses Issue.

H8) The Ticks/Crosses Issue

132. That issue has raised considerable controversy and resulted in accusations of the falsification of documents. In that context the parties have identified this as an important issue. I understand that but that misses two important points. First the prolix nature of the Agreement. Second, the fact that the answer to both questions should be "yes" not "no". The strength of disagreement means I should address that in further detail.

133. It is worth first considering the context of the answers to sub-clauses 7 and 8 of Clause 13 of Schedule 13:

a) Clause 21.5 of the Agreement provides that:

> *"The Franchisee and the Individual both acknowledge that they have been provided with a copy of the Franchisee's Disclosure Questionnaire at Schedule 13 of this Agreement and as a result have been put on notice that if there are any representations or warranties which they consider have been made to either of them which would have induced either or both of them to enter into this Agreement they were obliged to submit particulars thereof to the Franchisor in writing prior to the signing of this Agreement and, if they have not done so, that will be unequivocal evidence that neither of them have relied on any such representations or warranties and the Franchisor will rely on the acknowledgments contained in this Clause when agreeing to enter into this Agreement with the Franchisee and the Individual."*

b) Sub-clauses 7 and 8 of Clause 13 of Schedule 13 which describe each questions as "Important" and asks for them to be reviewed carefully read:

> *7. Has anyone made any statement or promise to you concerning the turnover, profits, operating costs or earnings potential of a Drain Doctor franchise other than as set out in the Sample Financial Data?*
> *Yes __ No*
>
> *8. Have any of our officers, directors or employees and/or any broker, agent or other third party claiming or appearing to speak on our behalf made any statement or promise beyond those contained in the franchise agreement and the Sample Financial Data concerning the turnover, profits, operating costs and/or earning potential that you might expect to achieve from operating a Drain Doctor franchise?*
> *Yes __ No*

c) *"Sample Financial Data"* is defined in sub-clause 4 of Clause 13 of Schedule 13 as follows:

> *We have provided you with sample monthly management accounts and cash flow illustrations for your franchise* ***("Sample Financial Data").*** *These are based on previous experience of our existing franchisees and may also include requirements specific to you which you have provided to us. You understand and acknowledge that we do not guarantee or give any warranty regarding the accuracy of the Sample Financial Data, the results predicted by it or the turnover, cash flow and profitability of your franchise. You understand and acknowledge that the success, turnover and profitability of your franchise depends upon a number of factors including your skills and abilities, the number of hours you work, your ability to follow and apply the System and methods of doing business, your pricing, sales volumes, local marketing efforts, the cost of labour and supplies, general overheads, competition from other businesses providing the same services, interest rates, inflation, the economy and other economic and business factors. You hereby confirm and agree that you have not relied upon the content of the Sample Financial Data in making your decision to enter into the franchise agreement.*

134. This is prolix. In addition, the last sentence of sub-clause 4, that the intending franchisee has not relied upon the Sample Financial Data when deciding whether to enter into the franchise agreement, is clearly unacceptable. It was inevitably incorrect to the knowledge of the Claimant.

135. In any event, applying the definition to sub-clause 7 of Clause 13 of Schedule 13 (but ignoring the possibility of a promise), the answer in this case and presumably in all cases must be "Yes". The reasons for that being: First, because the question refers to "a Drain Doctor franchise" not to the franchise which would exist should the Agreement be signed. Second, the Claimant advertised the turnover of its franchisees.

Third, Mr Bartlett at the invitation of the Claimant has talked to other franchisees and discussed their business with them.

136. Whilst sub-clause 8 of Clause 13 of Schedule 13 is directed at the future franchise, the Claimant's advertisements also lead to the answer "Yes" for this question even assuming there is no other reason to provide that answer.

137. If the Ticks and Crosses issue starts from the premise that the Agreement(s) executed by Mr Bartlett was/were in the same form as the hard copy produced by the Claimant in the trial bundle and, therefore, ticked "no" (page 1145 of the bundle), the answers would be incorrect to the knowledge of both parties. However, if in the form of Mr Bartlett's copy before their alteration (page 1159 of the bundle) the answers to sub-clauses 7 and 8 would have been correct having been ticked "yes". However, the conversion of the ticks into initialled crosses and the new ticks for the answers "no" also produced the incorrect answer.

138. An overview of the Ticks/Crosses Issue is that it hides the fundamental points that not only are these questions confusing, not only do you have to read them with a definition and with the main clause in the body of the Agreement, the whole argument over whether "No" was ticked is based upon the false premise that it could have been truthfully ticked "No".

139. I find as a fact that none of the matters above will have been appreciated by either Mr Barton or Mr Bartlett. There is certainly no evidence that either did. My assessment of Mr Bartlett leads me to consider it is probable that he "ran" through the ticking process of Schedule 13 by ticking everything without much thought. He will only have ticked "no" to questions 7 and 8 because he was told to by Mr Barton. Mr Barton would probably not have appreciated the subtleties and would have reached that conclusion from the incorrect premise that the answer had to be "no". None of this assists the case.

140. As a result, I do not have to decide and obviously could not decide without a forensic examination of the originals (almost certainly requiring expert advice) whether signatures are forged or copied from other documents etcetera. There is an undetermined issue as to why the two versions are different. However, it is unnecessary to resolve it. I anticipate there will be an explanation which does not involve misconduct. None of the Claimant's witnesses had cause to take such a route and it would not accord with my assessment of them as witnesses. I am sure that Mr Bartlett would not have decided that this change needed to be made to support his case. After all, he would have ensured the answer was "yes", if he had. In any event it would also not accord with my assessment of him at paragraph 62 above.

H9) Preparing to Commence Business

141. The Franchise Agreement became effective around 22 October 2018 after the franchise fee had been paid, although Mr Bartlett had started preparation before then to lay the groundwork. These included taking steps to contact National Account companies within the Cardiff territory and searching for equipment such as a "jetter" and a drainage camera. He had also discussed a Sales Plan with Ms Bond, one of the

Claimant's franchise consultants and further revised projections (page 1362 of the bundle). They appear to have resulted from those discussions and are slightly more optimistic with a consequential benefit for Fredbar Limited's working capital:

a) The original working capital of £60,000 would reduce to about half during the first two, pre-trading months by payment (principally) of the franchise fee, advertising and initial set up costs. In approximate terms, the cash flow shows that a sum of between £24,000 and £32,000 would continue to be available at the end of each of the first twelve trading months. That is in contrast with a reduction to between £24,000 and £22,000 during the first three months of trading and fluctuations for months four to twelve of between @£11,000 and just under £20,000. The job average, leads needed and turnover did not alter.

b) The EB[I]TDA on ordinary activities at the end of the first financial year less Excluded Expenses was estimated to be £29,147 (not £23,477) based on the same turnover of £147,913 (although the cash flow still anticipates £157,913). Cost of sales was the same (£83,916) but operating expenses reduced (£34,850 not £40,550) producing a total of £118,766 not £124,466. That would leave the Excluded Payments of bank loan payments (£10,200), franchise fee and stationery marketing (£10,000), VAT (£7,276), Lease Van and Equipment Payment (£9,455) (not £11,962), Vehicle down payment and expenses (£5,796), totalling £42,727 (not £45,234) to be paid. The *"Owner's withdrawal"* would still total £13,500 for the year on the basis that the £1500 loans would start in month four but Mr Bartlett would in any event have received £2,500 a month as salary (subject to employer deductions).

c) The EB[I]TDA for the second financial year was estimated to be £54,903 with a third van in month 23 and projected sales of £290,976. Mr Bartlett's salary would remain the same. The additional costs excluded from EB[I]TDA totalled £77,930 (not £82,031). Owner's withdrawal would remain at £1500 each month. Working capital would be in the £25-32,000 range (not £4.76k–19k) until month 24 when it would be £42,983 (not £24,829).

d) The EB[I]TDA for the third financial year was estimated to be £129,426 (not £111,426) with a fourth van in month 32 and projected sales of £467,640. The additional costs excluded from EB[I]TDA totalled £89,667 (not £95,116). *"Owner's withdrawal"* would increase to £5,000 each month to repay Mr Bartlett's original lending or to produce a director's loan for that year of £60,000 subject to repayment from dividends capable of and being declared and approved. Working capital would range between about £50-100,000 and in month 36 would stand at £113,464 (not about £32,000 and £71,862).

142. Internal emails from Ms Bond within the bundle identify a variety of initial work required for the Claimant and Mr Bartlett ranging from obtaining the van and necessary insurance policies to creating a local website, adding the Cardiff franchise to the national website opening social media accounts and starting to look at a PR Campaign. Options for a business telephone line and number which could be used on all marketing material were considered. By email sent on 8 November Mr Bartlett informed Ms Bond that he would use a landline number 02922414253, which he did not currently use. There would be further variations to the projections (see pages

1229, 1362 and also 1387/8 of the bundle) which are not relied upon by the parties and need not be set out.

143. In accordance with the Claimant's "Sure Start" programme, Mr Bartlett attended a week's franchisee training course from 19 to 23 November 2018. He spent a few days with the Birmingham franchisee. He had a two day plumbing course on 4 and 5 December 2018 and technician training from 10 to 14 December. Mr Bartlett's email to Mr Jeannes of 30 December 2018 nevertheless identified his concerns in particular about his inability to carry out the plumbing/drainage work and the need for him, which he says he always intended, to employ someone to undertake it as soon as he can afford to do so. The following contemporaneous observations are entirely credible and moved towards Mr Jeannes's critical assessment of him as a potential franchisee (see paragraph 108 above):

> *"The one area I feel unprepared in is the most important and that's doing the job itself, I've been getting to grips with the jetter as well as the camera and other bits (rods, plumbing tools etc) and although I can learn pretty quickly I'd still say that I'm not really overly confident.*
>
> *I appreciate the training but having spoken to the engineers and other franchisees who have plumbing courses and NVQ's under their belts they have illustrated that going into this industry with no background will be a tall order and being out with them I tend to agree.*
>
> *The induction week was good and gave me an insight into neighborly, shadowing the franchisees engineers was helpful for the 5 days in which I did it although I was watching the guys do the jobs as opposed to someone watching me do them. From watching the engineers I could see that some of the jobs were tricky for them and I couldn't imagine me doing them on my own confidently (tap change, push pipe coming out when using electromagnetic equipment etc), they mentioned that some jobs are more straight forward which I also did see like drainage clearance and camera video recording."*

144. Mr Bartlett in evidence was critical of the standard of the course, the promotional activity and pretty much everything done by the Claimant. However, this viewpoint appears to have been influenced by subsequent events and he did not complain at the time even if he can explain his emails of thanks as polite messages. In any event there is no direct evidence to establish what was flawed or what could have been improved. There is no expert evidence, for example, to criticise the marketing. Evidence of the marketing carried out is included in the evidence of the Claimant and it is not possible to make any adverse findings of fact either from its content or from the evidence relied upon by Fredbar Limited and Mr Bartlett.

145. On 31 December 2018 Companies House received a PSCO1 form registering a notification that Mr Bartlett's partner, Ms Milne, held directly or indirectly more than 25% but not more than 50% of the Fredbar Limited's shares. She was not registered as a shareholder. Mr Bartlett states she was not and I am satisfied that her interest was indirect.

H10) Trading 2019

146. Fredbar Limited began trading on 7 January 2019 with three jobs booked as a result of preparatory work. The following summary of how the business progressed is taken

primarily from the contemporaneous evidence with reference to the witness evidence when necessary and appropriate.

147. On 21 January 2019 Mr Bartlett received the Deed of Variation and on 29 January was asking how it should be signed. The reason for the Deed (to be dealt with for completeness although the issue is conceded for this trial as mentioned above) was explained to him in Ms Bond's email of 21 January as follows:

> *We have been moving our original maps for our territories to a new system which has highlighted some additional postcodes for your area. The postcodes below are in addition to what you already have. Additional postal codes: Cardiff: CF91 5; CF95 1; CF99 1; CF11 1. Attached is a Deed of Variation detailing this addition which will go with your Franchise Agreement.*

148. Although the Deed dated 30 January 2019 contained a release and discharge from liability clause, there is nothing to suggest that the Claimant intended that to be part of the agreement except for its inclusion. As to that, Mr Jeannes during cross-examination candidly stated that the Claimant had nothing in mind which might be the subject of release and it is clear that this is a clause for some reason added by the lawyers which the parties had no genuine intention of agreeing because neither the Claimant or Mr Bartlett had it in mind at all.

149. On 24 January 2019 Mr Bartlett received his first National Account work from J D Wetherspoons. There were problems, however, at the end of the month with a private customer. By the end of the month Mr Bartlett was investigating the cost of an employee but was concerned it would be in the region of £3,500 a month bearing in mind pay, insurance, the need for a second van and other associated costs.

150. During February Mr Bartlett addressed improved marketing and consulting with the Claimant's "local marketing" team, as well as with Mr Craig his franchisee adviser, employed by the Claimant. Problems occurred at the beginning of the month when a jetter head and extension hose stuck in a pipe and he met a frosty approach from the house owner. *"Not an easy one"* as Mr Craig commented in correspondence. Mr Bartlett received his foundation training certificate from the Claimant.

151. In April 2019 Mr Bartlett investigated potential improvements for marketing with the Claimant (acting by Mr Owen Deere and Mr Craig). However, it is apparent from an email sent 3 April to eSales Hub Ltd, a leads provider, that he did not want to overreach himself. It is in that context that he wanted them to provide 20 rather than 40 leads a month. Whilst the Claimant has emphasised that it accepts it was for Mr Bartlett to decide how to run Fredbar Limited's business, it contended that this placed an unnecessary restraint on turnover and that it is evidence of an intention to restrict the amount of available work.

152. In one sense that is true but it ignores the fact that the email explained that decision within the additional context of having other avenues of work to market, such as *"national accounts/local businesses/check a trade and volume coming in from free advertising websites*". The limit or restriction arose because there was other work not because he is work shy.

153. Mr Bartlett's desire to improve the business through marketing continued during May. At the beginning of the month he enquired about National Account work. On 6 May

he emailed the Claimant (including Mr Craig and Ms Bond) to set out his rough calculations for an employee. He asked to go through costs totalling in the region of £8,000 each month but concluded that at that rate he would not receive the income required to afford it. An email sent to the Claimant on 13 May evidences that Mr Bartlett was working hard to increase Fredbar Limited's turnover and profit, in particular to obtain regular work with large organisations which would make it a lot easier to hire an employee. He sought further advice from a franchisee in Gloucester.

154. During his evidence in chief Mr Bartlett described January to May 2019 as *"extremely tough"* and emphasised how testing he found some of the jobs due to his *"derisory training"*. He also referred to health and safety issues. I have little doubt that he will have found the work challenging and it will not have surprised Mr Jeannes. The reality is that (inevitably in the time provided) he had only received limited training and had to learn on the job. However, there is no contemporary evidence of this losing Fredbar Limited work or of it making the franchise business unsustainable. There was some criticism from customers of Fredbar Limited but this was in the minority, as will appear from the results considered below. Mr Bartlett said in evidence that he completed about 8 jobs a week on average, principally within the territory, which is not out of line with the projections (ignoring the introduction of an employee and second van). It is also the case that whilst the concept of starting a franchise with no experience certainly must have appeared daunting, if not imprudent, it was his decision.

155. Mr Bartlett in his evidence also referred to problems of competition when the Claimant's proposed prices were at premium rates and could be contrasted with those who offered low fixed fees. The Claimant's evidence was that their business model relied upon quality, although question how that could be squared with a franchisee having one employee owner with limited training and no previous experience. Mr Bartlett stated that the Claimant's projected job average would have priced him out of the market and to be competitive he charged £170 on average. However, there is no evidence analysing the competition, supply or demand within the Cardiff area. He also complained about the lack of National Account work with JD Wetherspoons offering the only commercial, repeat work.

156. During June Fredbar Limited, with the Claimant's assistance, was completing a tender for service and maintenance of Cardiff Council's drains to be submitted by Dwyer UK Franchising, trading as "Drain Doctor". A site visit was booked to enable pricing. By 18 June a *"massive[ly]"* improved web-site was in place. By the end of the month Mr Bartlett expressed in an email to Mr Deere and Mr Craig his keenness to obtain as many jobs as possible so he could afford an employee.

157. On 4 July the possibility of Council work in Caernarfon was raised by the Claimant but correctly appreciating that distance meant this was unrealistic. Mr Craig found a possible contract needing 100% commitment and no cherry picking of jobs with Mid and West Wales Fire and Rescue Service Drainage Services. Mr Bartlett in response identified the travel drawbacks and the Claimant also identified potential contractual liabilities. The correspondence indicates continuing enthusiasm for work on the part of Mr Bartlett but also an absence of opportunities being provided by the Claimant within a reasonable travel area.

158. According to the documents in the bundle, it was around the beginning of July that the Claimant advertised the prospect of turning a £35,000 investment into £1.5 million plus earnings over ten years because of a constant level of demand. Mr Barton was the designated contact for those interested in obtaining one of the last 15 franchise territories remaining. Plainly this advertisement does not meet Mr Barton's experience but this case is concerned with the Cardiff franchise and the Agreement.

159. By 12 July Mr Bartlett concluded that Fredbar Limited could not meet the projections. Instead of a turnover in the first year of £147,912.80 (using the September and 4 October projections), he thought he would be more likely to achieve between £75-90,000 (as set out in an email sent to Mr Abraham, who worked with Mr Craig, and copied to Mr Craig, Mr Jeannes and others).

160. Although the outstanding balance of the franchise fee was interest free, its monthly repayments was a drain on Fredbar Limited's finances. Refinancing enabled Fredbar Limited to repay the remaining £17,500 on 17 July 2019. The Claimant at trial criticised this for failing to follow the projections and, as a result, to interfere with cash flow unnecessarily. The Claimant did not appear to appreciate that Fredbar Limited had achieved this by obtaining a third party loan. It assisted cashflow because it provided considerably reduced monthly payments even though it would have to be carried for longer. In fact an email from Mr Craig concerning his management meeting with Mr Bartlett in October establishes that he was aware of that. There was no cause for criticism especially when this occurred because the projections could not be followed.

161. On 19 July 2019 Mr Deere was asked in an email from an operations director, Mr Sleath, to ensure that Mr Bartlett did not *"get caught in the 'One man Band' mind set"* but expanded his operation. It is far from clear how that criticism was justified or risk identified when the correspondence above is taken into consideration together with the disappointing trading results. At the end of the month Mr Bartlett asked the Claimant for a breakdown *"in costs that MSF has been spent …. [and to] provide a full breakdown in costs of what the MAP fund has been spent on"* during the past 18 months.

162. August 2019 was the month designated in the projections for a second van and a new employee. Mr Jeannes in evidence emphasised the importance of this step and drew attention to the effect it was anticipated to have in the projections. Monthly turnover *"jumps to over £15,000 per month"*. It is fair to observe that Mr Jeannes also explained in evidence that it was Mr Bartlett's decision when to take that step. His point was that Mr Bartlett could not complain about the projections when he did not follow the Claimant's plan.

163. Mr Jeannes was obviously correct to observe the importance of this step to the projections. However, that point strays towards assuming that the projections had an accuracy or even guarantee which the Claimant professed they did not have both in terms of when a van could be afforded and what the results would be. The counter to Mr Jeannes point is that the work was not there to afford the van and employee. In this regard it is to be remembered that the cash flow projected was tight, it depended upon averaged figures and not upon any research specific to Cardiff.

164. Mr Bartlett in evidence emphasised that this was the position despite all the marketing work he had undertaken. It appears from the correspondence that a solution presented to him was to borrow to grow and he was criticised (subject to acknowledgment that he was entitled to adopt this approach) for being adverse to borrowing. However, criticism did not address the problem of demand. It was also the case that the projections had not required additional borrowing whether for this purpose or otherwise. Mr Bartlett's evidence during cross-examination was that he could not achieve the projections because of the competition in Cardiff which was based upon far lower charges that the Claimant's national averages. He referred to some charging £50 for a call out.

165. At the beginning of August Mr Bartlett proposed a change in geographical territory to enable him to cover work within a 30 mile radius. Mr Craig identified that this would require at least two vans and increased expenditure. He requested a business plan. Although there is no evidence of this being pursued, it too weighs against the contention that Mr Bartlett was work shy or was otherwise not trying to expand.

166. Around this time Mr Bartlett investigated "pay per click" marketing. A new website and the need to obtain more reviews was discussed. Help was sought from a digital marketing firm. Mr Craig expressed concern to Mr Deere that Mr Bartlett needed a more structured marketing strategy. Mr Bartlett outlined the details of his marketing in an email sent 6 August to Mr Craig, copying in Mr Sleath, Mr Jeannes and others. A search engine optimisation agreement was entered into with "Pinnacle" around mid-August for £250 per month. By the end of the month Mr Bartlett asked eSales Hub Ltd to stop his leads for September *"as work has really picked up with national accounts and [he was] stretching [himself] to get all the work completed"*.

167. That request led to what can be summarised as procedural difficulties with the result that there could not really be suspension. It would either be paused with a reduced but nevertheless billed lead flow or stopped and the calls number transferred. This would continue to be an email issue through the autumn. It was a topic of criticism during the cross-examination of Mr Bartlett but that did not address the more fundamental issue of whether the Cardiff market would support the job rates required by the projections and whether the additional expenditure should be incurred in the context of financial results which did not come near to meeting the projections. Those results are also relevant to the fact that Fredbar Limited did not spend the minimum marketing amount of the greater of £15,000 and 5% of gross sales as required by clause 11.3 of the Agreement. Nevertheless that is readily understandable in the light of the financial results. It is plain from the evidence that Mr Bartlett was doing his best and there was no direct evidence of lost business attributable to his advertising decisions.

168. An email sent on 24 September 2019 from Mr Craig set out a summary of his monthly management meeting with Mr Bartlett. Overall, it followed the course of the matters already addressed but emphasised the need to focus on the aim of employing someone and having a well-planned marketing strategy. It was anticipated that the aim should be achievable early in 2020. By 25 September Mr Craig advised that Mr Bartlett needed to attend a "WJA" course and a confined spaces course for health and safety reasons.

169. During his answers to cross-examination, Mr Bartlett was critical of Mr Craig's skill set as an adviser. He contrasted his lack of experience of marketing with his own eight years' employment as a salesman, which meant it was Mr Bartlett who was proactive and had the ideas. Mr Craig would emphasise the need to follow the Claimant's 14 step plan but Mr Bartlett viewed this plan as a basic approach to marketing which he would inevitably fulfil. He did not accept that the minutes of the monthly meetings, as and when they were in fact held, were necessarily accurate records of the discussions.

170. In October Mr Bartlett was concluding that Pinnacle did not produce the results to justify the expenditure. His preference was to stick with eSales. In an email to Mr Craig on 16 October 2019 he described himself as always being busy either carrying out jobs as they came in or marketing. Those facts have not been analysed in the context of the turnover being achieved including the level of fees charged. Mr Craig's email summary of their monthly discussion: recorded that gross profit was a high percentage of turnover because of low overheads; approved the Pinnacle approach but generally wanted a spread sheet recording marketing; and acknowledged the pressure of debt upon Mr Bartlett. In addition, in response to the email he acknowledged Mr Bartlett's reference to the need for more structure for his days.

171. In November Mr Bartlett decided to stop eSales to see how the website would perform without it bearing in mind that the Cardiff page was not ranking on Google. He would rely upon a local company instead and was being advised that this would give the Drain Doctor page a chance to rank on Google. The absence of the web page ranking on Google continued to be a theme for Mr Bartlett and the Claimant.

172. By email sent on 5 December Mr Bartlett expressed to Mr Jeannes his desire for a second van but identified the problem that he was *"not stretched with jobs and not turning any away"*. A second van would mean that the £8,000 a month he was currently making would be spent on costs: *"Of that 8k 37% goes to yourselves and the VAT man, around 15% - goes on materials, fuel, insurance, marketing etc. 7% on van leasing and 25% on paying off the loans! Leaving me with around 18% … Unless a big contract lands on [his] lap and guarantees 70k a year and then [he'd] jump to have the extra van"*. This evidence too undermines the Claimant's picture of Mr Bartlett being shy to expand. In evidence Mr Bartlett said that the advice he received from Mr Jeannes during a visit was to pay more money on marketing and borrow more from the bank to get a second van. He noted this in his email of 22 January 2020. That advice does not address the question whether that would be a prudent commercial step in the context of the financial results.

173. The Claimant's records for Fredbar Limited's first year of trading (page 284 of the bundle) reveal the completion of an average of 8.25 jobs each week out of an average of 8.83 leads received each week (a 99% average) at an average fee of £191.21 a job. The total turnover was £81,816 (including National Account work). The total fixed costs were £21,103 and the total variable expenses £25,630. This produced a EB[I]DA net profit without the Excluded Expenses of £35,084. This was in contrast with the projections anticipating a turnover of £147,913 plus National Account work based on an average fee per job of £265 over the 12 months produced from an average of 11 completed jobs each week derived from an average of 16.39 leads each week.

174. The Claimant's records for the same period reveal the national franchise average fee per job to have been £278. This was based on an average of 890.92 jobs completed

each week out of an average of 1064.58 leads received each week (a 84% average). The number of franchisees is not stated and, therefore, that data cannot be taken further. However, what is plain is that the average fee per job was in line with the September and 4 October 2018 projections for Fredbar Limited, whereas the average fee achieved by it was critically, significantly lower.

H11) Trading to 31 March 2020

175. In an email sent to Mr Craig on 22 January 2020 Mr Bartlett set out existing problems including: the advantages and disadvantages of eSales (he asked for 40 leads in January); the problems experienced by the marketing company trying to get a Google ranking; the lack of a frequent response to canvassing days; and the limited amount of National Account work, *"about 5-10% a month or sometimes nothing"*. He noted that word of mouth was slowly getting more work. He observed that an increase in marketing spend was fine in principle but it was unclear how to use it to achieve results.

176. The email identified two ways of growing the business, first organically by becoming established over 2-3 years and second by landing a large contract. On 24 January his email to Mr Craig observed: *"I don't hardly get anything from national accounts"* having received notification that the National Account administration charge would increase from £2.50 to £12.50 per job. That notification, an email from Mr Jeannes of 24 January 2020, explained:

> *"Currently the cost of administering the National Account team sits within the MAP fund and therefore the fund is not being used in the appropriate way and leaves no funds to undertake much needed national promotional activity. By implementing the correct fee, we will be able to release the burden on the MAP fund and allow the National Accounts function to support itself. The MAP fund can then be used for its intended purpose, which will benefit the whole Network."*

177. Mr Craig spent two days with Mr Bartlett at the end of the month. His summary of what occurred by email sent 31 January 2020 is short. It referred to a review of Fredbar Limited's pricing and to the agreed conclusion that the pricing was *"good"*. It was observed within the summary that future improvement depended upon engaging an employee who would use a second van, which in turn depended upon improvements enabling the resulting expenditure to be afforded. It was also recorded that Mr Bartlett was looking for Fredbar Limited to have £30,000 in its bank account in order to be in a position to undertake that expenditure commitment. The figures suggested this would occur in July/August 2020. Mr Craig wrote that he thought it should happen quicker but no detail of the basis for this is provided in the summary.

178. Mr Craig wanted a marketing plan, which he described in the email as listing potential customers and recording in spreadsheet form the steps taken and results achieved on a weekly basis. Mr Craig's explanation for a low job average was that Mr Bartlett had to do everything until a second van and employee were obtained. If that referred to price, it was unexplained.

179. On 8 February Mr Bartlett sent a "*basic business plan"* with targets for the next 6-12 months. It recorded that he was only drawing £719 a month from Fredbar Limited.

The turnover was around £7,200 per month (about one third below the projections but they were based upon an employee and second van engaged since month 8) with running costs for the van of £5,317. The aim would be to build up working capital from the £17,200 then in the account to a level of about £30,000 and then to purchase a van and equipment and engage the employee. He would need another £3,500 a month to break even if an experienced engineer could be found but the cost could be reduced by employing, for example, an apprentice. The time estimate for this was 8 February 2020. There would need to be additional marketing expenditure and a day every other week spent by him trying to attract more commercial customers. About a week later an amended time line was produced but it need not be detailed. Overall the evidence established a willingness to expand but a prudent approach towards when that expansion could and should occur.

180. February saw a complaint from CRM Students Ltd but the overall evidence is that by the beginning of February he was still continuing to do his best to work towards expansion of the business. On the evidence, the complaint has to be treated as a problem which can occur in business.

181. On 16 February Mr Bartlett emailed Mr Craig proposing to sell the franchise if he could not get a second van by March/April 2021. This followed a discussion with Mr Jeannes, who apparently observed that there would not be much to sell. Mr Bartlett repeated his wish to grow the business but not through increasing his borrowing. The sums were just not adding up despite the fact that his January 2020 figures showed jobs completed and turn over *"were all up"*, as Mr Craig observed in an email sent 19 February. Mr Craig also opined that the problem was the low job average which he attributed to Mr Bartlett being on his own and the fact that Mr Bartlett was under pressure to complete all his tasks.

182. On 17 February Mr Bartlett emailed Mr Craig to let him know the conclusion from his research was that the value of a business is apparently *"between 1.5 to 5 times the amount of net profit"* and Fredbar Limited had a net profit of around £40,000 for 2019. That obviously depends upon the definition of net profit used and in any event is plainly an inexperienced conclusion.

183. On 27 February 2020 Mr Bartlett by email again set out the sums which demonstrated why a second van was not a realistic commercial proposition at that stage. He observed that the position would have been worse if he had not paid off the franchise fee using cheaper borrowing. It is unnecessary to repeat the specific figures used but he also added before asking two specific questions:

> *"Before starting this franchise I was verbally told that the turnover for the previous franchisees on this area was £287,000 per year, only recently I've found out that this is because they had a centralised contract with Welsh Water, not long after losing this contract they ceased trading. Also before joining the forecast I received as to the amount of revenue I could expect to make in the first year was £147,000 and this was told to me to be a conservative amount. With no prior industry experience I took this information as gospel."*

184. Mr Craig's response a few hours later in answer to the specific questions can be summarised as: (i) he needed to invest capital to grow; (ii) the ideal percentage for National Account sales is 20-25% of turnover; (iii) marketing and investment in a second van *"go hand and hand"*, a *"leap of faith when you would hope to see the number of jobs going up as your marketing activity increases … the second van often*

coincides with an increase in Job Average and therefore more turnover. The business owner can concentrate on more marketing and getting quotes out on time …". Bluntly, a leap of faith approach is easy to advise when the advisor will not be taking the risk and Mr Craig's approach is in stark contrast with the prudent approach adopted by Mr Bartlett particularly within the context of the financial results and difficulties.

185. On 6 March 2020 Mr Bartlett asked Mr Craig if he had spoken to Mr Jeannes about his intention to sell the franchise and stated that he would be looking to sell in the next few weeks. That day a meeting at the Claimant's "Home Office" in Banbury was requested by Mr Craig. It was apparently required by *"certain rules and regulations"*, as explained in an email sent on 9 March in which Mr Craig also observed that he *"appreciate[d] you don't want to terminate but would rather sell"*.

H12) Covid

186. Covid intervened. On 24 March 2020 Mr Bartlett received notification from the Chief Medical Officer/Medical Director NHS Wales that his young son was vulnerable and that the best way of avoiding the virus was to stay at home for the next 12 weeks. In a lengthy round robin email of 25 March to franchisees Mr Jeannes addressed the problems and the potential for applying minimum MSF and fees in the future depending upon what happened. On 26 March he gave notification of the Claimant from 1 April furloughing seven employees including people who dealt with Mr Bartlett.

187. On 27 March Mr Bartlett emailed Mr Craig referring to the pandemic having resulted in a lack of calls and business over the past 10 days and raising the possibility of suspension under clause 30 of the Agreement. At the same time he emphasised that he would do all he could to continue trading and to keep Mr Craig fully informed. Mr Craig's response was relatively neutral but referred to emergency drainage and plumbing being a key industry.

188. On 30 March Mr Bartlett emailed Mr Craig (copying in Mr Jeannes) attaching a copy of the notification from the Chief Medical Officer/Medical Director NHS Wales.

189. On 31 March Mr Craig wrote requiring reinstatement of Mr Bartlett's recently cancelled direct debit and requested a cash flow and debtors' list. He explained it would be for Mr Bartlett to decide whether to go into isolation because of his son. Mr Bartlett's response the same day explained that his decision to cancel the direct debit had been based essentially on the need to ensure he retained enough money for his family's expenses. He was owed very little, £2585.71. He had had only two jobs the previous week producing £215 plus VAT. If that continued, he would be at risk of insolvency and unable to trade. He requested (setting out detailed reasons) a suspension under clause 30 of the Agreement. Those reasons included self-isolation for the protection of his son.

190. Mr Jeannes chose to respond to Mr Bartlett's emails to Mr Craig with a "without prejudice" letter requiring *"immediate attention"*, dated and sent by email on 31 March 2020. He asked for further information. He made clear that failure to pay the

MSF would be a breach of the Agreement. He stated that clause 30 of the Agreement did not apply. Services could still be provided as this was a key worker service even though they may have to be provided differently. Fewer jobs did not mean "force majeure". Even if it did apply, the terms obliged Fredbar Limited to use reasonable endeavours to keep trading and he suggested there was the potential for extra work if sewerage managers now had to outsource. There was no suggestion of negotiation or offer of settlement.

191. Mr Bartlett in an email response that day asked Mr Jeannes 13 questions. In essence concerning: why force majeure would not apply; payment of MSF; and what help would to be given to franchisees. He also addressed his personal position to explain that he needed to self-isolate and to preserve funds for his family but at the same time could not claim the benefits of furlough and, therefore, had to find some form of income. He was investigating universal credit and corona virus business interruption loans.

192. The Claimant's records for Fredbar Limited's first 15 months of trading ending 31 March 2020 (page 283 of the bundle) show a job average fee of £197.03 out of a turnover of £104,822.17 from 532 invoiced jobs out of 547. Fredbar Limited had quoted for 555 jobs during that period. The National Accounts' work produced 40 jobs from 54 quotes and a total turnover of £7,538.50. This increased the turnover to £112,360.67, an average of £7,490.71 a month.

H13) Termination

193. Mr Jeannes having received a chasing email asking for a response within 7 days, wrote again on a "without prejudice" basis on 2 April. In essence he rejected Mr Bartlett's approach to clause 30 and to payment of MSF. He suggested that as a director of a limited company, Mr Bartlett could take furlough. However, he also made the following offer:

> *"Responses to the remainder of your questions depend on what actions you will be taking. Given you are a single operator and your son has specific needs, if you self-isolate and do no work at all, we will wait for you to return to work and then discuss a repayment plan with you for the outstanding MSF and MAP Fees.*
>
> *If however you are intending to continue to operate, MSF and MAP Fees must be paid in accordance with the Agreement. If you self-isolate and are undertaking no work whatsoever then, for the period of self-isolation we will, on a without prejudice basis, waive the weekly minimum MSF payment. However, if you continue to carry out work, the minimum MSF payment will remain payable. If you are suspending operations to self-isolate, it is appropriate and necessary for us to take the steps outlined in my earlier letter i.e. temporary removal of the webpage, stopping national accounts and diverting the business phone number. These steps will not be necessary if you continue to trade."*

194. By letter dated and sent by email on 8 April 2020 Mr Jeannes wrote that fees must be paid if Mr Bartlett continued to trade. He demanded payment of all sums due and reinstatement of the direct debit within 7 days (extending time because Mr Bartlett may not have received his 2 April letter). He warned that the Agreement would be terminated for breach if payments were not made with damages resulting under the terms of the Agreement of at least £20,000. Sums which would be recoverable

personally from Mr Bartlett as a guarantor. It was a most unattractive approach within the Covid context, whatever the Claimant's contractual rights and even though the offer of self-isolation and no fees had previously been made.

195. By email sent on 9 April Mr Bartlett asked for an open response. He again raised the application of clause 30 of the Agreement, explained the MSF suspension, objected to it being asserted that he was in breach of the Agreement in a without prejudice letter and before asking what support/aid would be provided to him made the following general complaints concerning the franchise:

> *"I paid £35,000 to become a franchisee as I thought I was buying into a support network but quite frankly it's been the opposite. I borrowed £62,000 from the bank to start this franchise which was a big risk. From the first day of joining I have been told to get on an employee and borrow more money and for me to spend more money on marketing in order to run two vans and pay the outgoings while making profit. The onus of success seems to fall very much on my shoulders which leaves me asking the question 'what does the franchisor actually do?'. Even now during this worldwide pandemic all it seems to be is that the franchisor wants it's pound of flesh and that's it and if someone doesn't cooperate instead of trying to remedy the situation we'll bully you into submission."*

196. By open response dated 9 April 2020 it was disputed that clause 30 applied and, as a result, denied the Claimant was in breach of the Agreement. The details of that response will be addressed below when deciding that issue. The Claimant's position with regard to termination for breach by Fredbar Limited remained the same and clauses 10, 17.2, 17.7 and 18.18 of the Agreement were relied upon. It was stated without prejudice to the Claimant's rights under the Agreement, that if payment of the sums due was not made within 7 days the Cardiff Drain Doctor webpage would be removed and National Account customers in the franchise area would be redeployed.

197. The criticism of an "unattractive approach" continues to apply. It represented a failure to treat a franchisee compassionately in the context of exceptional circumstances which required all companies to adopt a reasonable approach rather than apply strict legal rights. It was contrary to the whole tenor of approach expected at the time, as evidenced by the fact that businesses such as the Claimant's were able to and did obtain the assistance of the Government through the furlough and other schemes. Fredbar Limited and Mr Bartlett were under severe financial strain and needed assistance. Although not expressly prayed in aid in this case, it is reasonable to conclude that the resulting commercial pressure and its affect upon the family's finances will have adversely affected his mind-set. However, it has to be appreciated by Mr Bartlett that moral criticism (albeit based upon considerable judicial experience of insolvency scenarios before and during the pandemic) is not the judge of legal rights and obligations.

198. Mr Bartlett's responses of 11 and 12 April disagreed with the Claimant's approach to Covid but backed down over payment of the MSF whilst requesting reasonableness and compromise. His email sent 13 April notified Mr Jeannes that he had asked for reinstatement of the direct debit. This led to £2,201.18 being paid to the Claimant during the week of 21 April 2020. Mr Jeannes responded briefly on 14 April. The Claimant would look into non-payment by a National Account customer.

199. On 23 April Mr Bartlett gave notice that he was considering furloughing and self-isolating because of his son's vulnerability and because of the lack of jobs. On 24

April 2020 Mr Bartlett informed Mr Jeannes of his self-isolation. Fredbar Limited therefore accepted the 2 April 2020 offer. Mr Jeannes immediately directed his team to divert Fredbar Limited's telephone number to head-quarters and to remove access to its email address and website. He recorded that he had also caused Fredbar's removal from the Claimant's webchise account. He emailed Mr Bartlett stating that the Claimant accepted as a concession solely due to the son's health condition that Fredbar Limited needed to cease trading for 12 weeks until 17 July. MSF would still be collected *"against all invoiced work in full"*. That did not accord with the 2 April offer which had been accepted.

200. By email later that day (24 April) Mr Bartlett wrote to Mr Jeannes:

> *"As per my last email it is due to my son being considered high risk which is a direct result of this war type environment we find ourselves in with the invisible enemy COVID 19. Due to COVID 19 it has directly impacted on my circumstances and is hindering as well as preventing me from continuing with duties otherwise I am on a daily basis putting my son at risk. Also the lack of business due to COVID 19 which is 'hindering' my ability to trade which is probably for the best given the circumstances. However with a fear for income I have stupidly carried on trading and not wanting to find myself and my family destitute after some sort of normality is resumed. Especially with repercussions as stated in a letter from yourself of having to pay more than £20,000 for breach of agreement."*

201. He also addressed points made in the 9 April email and set out his understanding from its content that he would not have to pay MSF (including the minimum weekly payment) whilst self-isolating because all obligations under the MSF would be suspended. He still disagreed with the Claimant's decision that clause 20 did not apply. He asked for debtor information on webchise from which he was now excluded to be released to enable debt recovery.

202. On 29 April 2020 by emailed letter Mr Jeannes noted and accepted that Mr Bartlett had again cancelled his direct debit. The payment of MSF and MAP Fund payments directly by Fredbar Limited would be suspended but amounts due would be deducted from National Account customer payments before being paid to it. The unpaid balance would be notified for payment on resumption of trading. Information on webchise concerning debtors would be released shortly to enable debt recovery and it was suggested (but not required) that a percentage of payments received during self-isolation should be paid to the Claimant to avoid that unpaid balance. Mr Bartlett's response of 3 May in the face of another alteration of terms of suspension because of the National Account deductions was that he did not anticipate a deficit because of the significant reduction of business since lockdown. He continued to self-isolate on those terms and accepted this suspension rather than insist on his previous acceptance of the 2 April 2020 offer or terminating the Agreement.

203. On 30 May 2020 Mr Bartlett visited Cool Solution Refrigeration Ltd. Included in the bundle is the resulting drainage report from Fredbar Ltd t/a "Drain Doctor" dated 17 July 2019 on the front cover but 16 July internally. It detailed the work required as ascertained during the visit and Mr Bartlett accepted in evidence that "Daily Drains" was subsequently awarded the contract. Although Mr Bartlett's recollection was that he went briefly to the customer to provide a quote for a CCTV survey, popping in on the way back from food shopping on 30 June 2020, it is plain that the visit was far more purposive and planned than that. The report includes the following description:

> *"Brief: For the purpose of the survey Drain Doctor had access to all inspection chambers and manholes within the property, areas of interest were pipes that ran through the building and condition of all pipes in the underground car park. Five stack pipes had the camera put through them from bottom to top floor and vice versa, two of which were storm pipes and the remaining three taking waste. 4 surface drains were inspected in the car park but due to the bends in the pipe a full run of the pipe recording could not be made due to the angle of the pipe and the camera not fitting through. All five stack pipes run into the underground car park as do the surface drains on the outside car park, from there the water is taken into the main sewage system. Just outside the building to the front before the entrance to the car park is where all the waste water goes."*

204. On 3 June Mr Craig recorded in an email that Mr Bartlett had telephoned to inform him that he was *"considering leaving the network and no longer wished to continue the franchise"*. The email ended by hoping that Mr Bartlett would stay and start trading once isolation is concluded.

205. Fredbar Limited appears to have been setting up a web-site because there is within the bundle a copy of its content which is dated 8 June 2020. This is for drainage service and emergency plumbing at fixed prices covering Swansea/Cardiff/Bristol/Gloucester/Newport/South Wales. The email is Info@dailydrains.co.uk and the telephone number 02922414253 (i.e. the same number used for the franchise as referred to at paragraph 142 above). Undated photographs show Mr Bartlett with a red van newly painted advertising Daily Drains Drainage & Plumbing, 02922414253, www.dailydrains.co.uk. It is distinct from the previous red van advertising of Drain Doctor. A variety of advertising/social media platforms provide the same information.

206. On 14 July Mr Jeannes wrote to Mr Bartlett recording his understanding that Fredbar Limited would not resume trading at the agreed date. By email sent on 16 July Mr Bartlett terminated the Agreement. If there was no entitlement to terminate, the email established that Fredbar Limited was no longer intending to be bound by its terms. It was written by him without legal assistance. He stated in evidence that the first job carried out for "Daily Drains" was that day. Mr Jeannes in a detailed response on 29 July (in summary) refuted all the allegations and offered Mr Bartlett the opportunity to reconsider his position. He described this as *"an olive branch"* but warned that termination and a claim for damages would follow if it was rejected.

207. Invoices dated 23, 27 and 31 July and 4, 10, 11, 13 and 15 August 2020 show Fredbar Limited was trading as "Daily Drains" but with shaun.bartlett@draindoctor.co.uk as the email address. The telephone number was 02922414253 designated for the franchise (see paragraph 142 above). On 4 August 2020 the Claimant through its National Accounts sent details of a domestic web enquiry concerning a blocked toilet to Mr Bartlett. There are some subsequent August invoices within the bundle in similar form.

208. Mr Bartlett responded to Mr Jeannes by email sent 6 August. He was very critical of its contents, stood by his termination but made an offer to forgo any financial redress. A solicitor's letter dated 10 August maintained the Claimant's position but also included a final offer to accept reversal of the termination if Mr Bartlett would choose that route. There was further correspondence and the Claimant terminated the Agreement by its solicitor's letter dated 19 August 2020. At that time Fredbar Limited owed MSF fees totalling £2,976.84. Mr Bartlett sought the assistance of the

conciliation service of the British Franchise Association but their involvement had to cease as at 26 August because the Claimant was starting legal proceedings.

209. Included in the bundle is a copy of a "Facebook" entry for *"Dailydrainsshaun"* dated 3 September 2020. It had photographs of work providing information *"on who we are and what we do"* which is dated 10 August 2020, although they do not show work being carried out but just pictures of, for example, pipes and installations. Scrolling down, there was an entry dated 7 June but it *"is not drain related"* and in essence described doing nothing like everyone else. However, there is a photograph of a pipe dated 22 April with the comment *"another collapsed pipe repaired on a customers driveway"*. The commentary for photographs of drains dated 10 April suggested a job being carried out that day. Similar photographs suggested work carried out on 15 and 17 November 2019, 27 February and 2 and 29 March 2020. A posting on 23 March referred to Daily Drains wanting to extend its free service to NHS staff.

210. Those entries could be evidence of work carried out by Daily Drains but on the balance of probability they are photographs of work carried out as a Drain Doctor franchisee without that attribution being made. That is established by the photograph and commentary in respect of work on 15 and 17 November 2019 and by the evidence before me overall. That conclusion is consistent with: (i) Mr Bartlett's self-isolation, (ii) the evidence that Daily Drains was being set up towards the end of May 2020 and beginning of June, which appears to be in preparation for work to begin after termination of the Agreement, and (iii) the absence of invoices until after he had purported to terminate the Agreement.

H14) The Claimant's Criticisms of Fredbar Limited's Trading

211. As an underlying defence to the claims of misrepresentation, Mr Jeanes asserted in evidence that *"Mr Bartlett did not fulfil his side of the bargain in relation to investment in local marketing and … in a second van. He did not achieve anywhere near the job average in the franchise or as projected. That should be contrasted with a recent franchisee operating in Bradford who followed the Claimant's 14 step programme 'very carefully"*. He also drew attention to a £284 job average in 2019 for the franchisee covering North Wales. Mr Jeannes stated that Fredbar Limited would have had a turnover of £118,706 in 2019 had he charged the Claimant's average rates.

212. However, those assertions assume there was a supply of work to sustain an increase in charge from an average per job of £191.21 to between £260 and £280 according to the month projected. Mr Jeannes did not provide any evidence that this was possible in the Cardiff area other than to rely upon the average data of other franchisees in different areas and without reference to their specific circumstances including (amongst many other potentially relevant factors) competition. The assertions which are mathematically correct were made without evidential justification for their application.

213. A similar conclusion applies to his evidence that the failure to acquire a second van and employee was a critical factor in Fredbar Limited's inability to meet the projections taking into account the monthly predicted increases once a second van and employee were introduced. In one sense that assertion was based upon accurate

factual evidence. The projections were not followed, the employee and van were not engaged and the rates for the jobs were far lower than the average figures produced by other franchisees. However, the defence of failure assumes that there was a market for Fredbar Limited's services in Cardiff which would have otherwise provided the average figures at the level of work envisaged by the projections both to enable the employee to be engaged and van hired and to achieve the increased turnover predicted. There was no statistical or other market specific evidence for the Cardiff territory to sustain that assumption.

214. In particular, there was no evidence to suggest that the internal market conditions of the franchise area do not need to be addressed because of the statistical breadth of the data collected from other franchisees in England/Wales. Nor any evidence to suggest that it would be irrelevant to the application of average data whether this was a new franchise and/or whether the operator had experience.

215. The only additional evidence was Mr Jeannes's comparison with another new franchisee and a franchisee whose area included North Wales but that was made without any information or facts which justified the comparison of the three different geographical areas, markets and (presumably) experience. That evidence was as inappropriate as the evidence from Mr Light because there are far too many potential variables and different scenarios that have not even been considered or addressed. Nor is it evidence which can be forensically assessed without expert opinion.

216. As a further or alternative factor, Mr Jeannes attributed the low job average to the fact that Mr Bartlett found managing customer relations difficult. He referred to three complaints and arguments with customers. He also blamed a low spend of £3,378.63 on local advertising which would have affected leads compared with the budgeted £14,375. However, there was no evidence to identify these matters as the cause of Fredbar Limited's difficulties. Complaints inevitably occur and the evidence established general satisfaction. There was evidence for the first year's trading that out of 214 website calls Fredbar Limited had an effective rate of 95.8%. Out of 43 reviews he had 1 detractor, 5 neutrals and 37 promoters. It is impossible to conclude from the evidence on its own that this had a material impact upon the overall performance of the franchise.

217. In addition, although its difficulties appear to result in part from an absence of leads and jobs compared with the projections, the evidence of what occurred does not suggest that advertising would have made a significant difference. In any event, a key factor was the amount capable of being charged. There was no evidence to attribute that to the complaints or to the reduced advertising budget. It is also a failure which has to be appreciated within the context of the financial difficulties being experienced.

218. A factor causing financial difficulty was the fact that National Account work was low at £7,000 in the first year compared with the £20,000 referred to in the business plan. Mr Jeannes dismissed the relevance of the absence of National Accounts work compared with the Business Plan's predictions. His approach in evidence was that it would take time for Fredbar Limited to build up relations and that Mr Bartlett *"was bad at doing that. He lost a national account with 'CRM [Students Limited]"* (noting that occurred in 2020). However, what he should have been considering in the context of the Claimant's defence was the effect of the absence of this "cherry on the top" work from Fredbar Limited's income. Whilst it was not within the projections, the

additional income and, therefore, safety net which it might have existed and enabled a second employee and van to be engaged was absent. This should not have been ignored for the purpose of the defence because it was an additional factor sustaining Fredbar Limited's approach. The other being the reduced turnover compared with the projections.

219. In judgment there is no evidence to support a finding of fact on the balance of probability that Fredbar Limited was at fault by reason of a failure to pursue its obligations and its business opportunities in particular taking into consideration that test in the context of the Claimant appreciating that Fredbar Limited's one employee had had limited training and no previous experience. It was asserted that Mr Bartlett did not sufficiently follow the Claimant's 14 step sales plan but there was no evidence to sustain that conclusion or to deal with Mr Bartlett's, equally unprovable assertions that the plan only set out common sense.

220. The facts establish on the balance of probability that Fredbar Limited could not get close to the figures for jobs achieved or to the cost of work average relied upon in the projections. The facts do not establish that this is to be attributed to Fredbar Limited's actions or omissions. For the avoidance of doubt, however, I should make plain that this failure to establish the defence on the balance of probability does not prove that misrepresentations were made concerning future financial performance before the Agreement was concluded. That is a matter to be decided below.

I) Decisions

I1) Misrepresentation – Advertising/Financial Statements

221. Some of the statements relied upon by Fredbar Limited and Mr Bartlett as misrepresentations (see paragraph 40 above) were not false, applying the test of what a reasonable person in the position of the representee would have understood from the words in the context in which they were used (see ***Ali v Abbeyfield*** [2018] EWHC 669 Ch) at [69]). I refer to: (i) The statement *"protect your investment by re-selling"*, which cannot be a misrepresentation when the terms of the Agreement permit a franchise to be resold. Plainly the statement is not to be construed as a guarantee of value. (ii) Fredbar Limited was in demand from day one (it had three jobs), it had access to National Account work, the franchisees operated within an exclusive territory and available territory was limited. (iii) There was local marketing activity.

222. Turning to the advertisements of or concerning turnover and net profit, I have found as a fact that the evidence provided by Mr Jeannes regarding the financial performance of the Claimant's top five franchisees failed to live up to the representations made within the advertisements to which Mr Bartlett referred (see paragraphs 75-77 above). Those advertisements *"caught his eye"* and caused him to contact the Claimant. However, the fundamental problem for Fredbar Limited and Mr Bartlett is that they need to prove on the balance of probability in respect of each misrepresentation asserted by them that it induced them to enter into the Agreement and was intended by the Claimant to be relied upon by them.

223. That is a problem because I have found as a matter of fact that the representations of financial performance (even assuming all were made before the Agreement was entered into) were or would have been superseded by the August-October 2018 projections for the first three years of trading. The same problem would have applied to the statements alleged to have made by Mrs Brunton concerning the potential financial performance of a franchise even had I found them to have been made (see paragraphs 81-82 above). The evidence of Fredbar Limited and Mr Bartlett did not tie any of the misrepresentations to their understanding or application of the projections.

224. It is an obvious problem but I should mention the case law explaining it. When opening the Claimant's case Mr Strelitz referred me to the decision of ***Zagora Management Ltd and Othrs v Zurich Insurance plc and Othrs (No1)*** [2019] EWHC 140 (TCC), 182 Conl.R 180 including the reference to the well-known passage from the judgment of Lady Justice Arden, as she then was, in ***Dadourian Group International Inc v Simms*** [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep 601 at [99]. Mr Grant referred to the tests helpfully summarised by Mr Justice Christopher Clarke, as he then was, in ***Raiffeisen Zentralbank v RBS*** [2010] EWHC 1392 (Comm); [2011] Lloyds Rep 123 at [81]-[86]. I have those cases in mind but it is sufficient for my judgment to set out the following passage from Lady Justice Arden's judgment:

> *'... (1) it is a question of fact whether a representee has been induced to enter into a transaction by a material misrepresentation intended by the representor to be relied upon by the representee; (2) if the misrepresentation is of such a nature that it would be likely to play a part in the decision of a reasonable person to enter into a transaction it will be presumed that it did so unless the representor satisfies the court to the contrary (see Morritt LJ in Barton v County NatWest Limited [1999] Lloyd's Rep Banking 408 at page 421, para 58); (3) the misrepresentation does not have to be the sole inducement for the representee to be able to rely on it: it is enough if the misrepresentation plays a real and substantial part, albeit not a decisive part, in inducing the representee to act; (4) the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee's decision to enter into the transaction; the representor does not have to go so far as to show that the misrepresentation played no part at all; and (5) the issue is to be decided by the court on a balance of probabilities on the whole of the evidence before it.'*

225. The fact that the projections superseded the financial representations within the advertisements and/or made orally is illustrated by the fact that the first set of projections of 31 August 2018 caused Mr Bartlett to decide not to proceed with the purchase of a franchise. The facts also establish that he changed his mind because of the revised projections received in September. It was the projections that were relied upon and induced Fredbar Limited and Mr Bartlett to enter into the Agreement. The advertisements did not play a real or substantial part in the decision and the same conclusion is to be reached for the same reasons for any statements by Mrs Brunton (if made) concerning expected financial performance different to or not specifically referring to the projections.

226. That leaves two of the representations within the proposed amendment for misrepresentation. The first is that there would be no extra cost for National Accounts' work. However, whether there should be an extra cost or not must depend upon the terms of the Agreement. Its terms superseded the advertisement. There is no claim in misrepresentation based upon an earlier advertisement because an extra cost of a 3% levy was contractually agreed (see paragraph 3.18(f)(i) of Schedule 4 to the Agreement). There is no specific challenge to the inclusion of that provision, such as exclusion by rectification.

227. The second concerned the projections, described in the proposed Amended Defence as being representations that grossly exaggerated turnover.

I2) Misrepresentation – The Projections

I2i) Permission to Amend?

228. The first issue is whether the "amendment" requires permission and, if so, whether it should be granted (see paragraphs 40 and 42-43 above). Applying ***CPR Rule 17.3*** the ultimate consideration, as Mr Grant submitted, is one of overriding justice in accordance with ***CPR 1.1(2)*** (see ***The White Book at §17.3.5 and 17.3.8*** concerning late amendments). Whilst there is also a real prospect of success test to be applied to an opposed application for amendment, pragmatically in this claim it would be supplanted by a decision on the merits because the application is being considered after both sides have closed their cases.

229. Assuming permission to amend is required, there is the fundamental difficulty that the sentence "*C also provided D1 and D2 with excel spreadsheets of D1's likely turnover which were grossly exaggerated"* is opaque. It does not detail why the turnover is alleged to be grossly exaggerated, whether by reference to Fredbar Limited's results, specific projections or otherwise. It does not address the fact that the projections were based upon averages calculated from data provided by the Claimant's franchisees. It has not been suggested that those calculations were in error. In the absence of pleaded particulars obvious questions arise (including): Does it relate, for example, to the use of average data for the Cardiff area without taking into consideration specific market evidence and/or to its use in the context of the particular circumstances of Mr Bartlett as the owner of the potential franchisee? If so, on what bases? From this statement of case alone, the Claimant would not know. The Claimant is entitled to particularisation and clarification.

230. To be fair to Mr Grant, all he was seeking to do when drafting the amendments was to distil what had previously been asserted by Fredbar Limited and Mr Bartlett (as set out in his skeleton argument, see paragraph 40 above). His closing submissions described the proposed amendment as *"simply a belts and braces exercise to regularise the matter"*. It is his primary submission, therefore, that permission is not required.

231. Assuming, however, that permission is required, in my judgment the amendment would be too opaque for it to be granted. Therefore, this claim must be decided on the grounds specified within the Defence and Counterclaim of Fredbar Limited and Mr Bartlett, as supplemented by the Reply to the Request for Further Information. The next issue is whether they provide further clarification.

I2ii) The Statement of Case

232. The Defence itself is not instructive and fails to identify the specific misrepresentations relied upon except for its general reference to the grounds within

the 16 July 2020 termination letter. It concentrates upon the advertisements and does not address the projections. In his skeleton argument Mr Grant drew attention to paragraph 1d from the Reply to the Claimant's Request for Further Information of the Defence which reads (my underlining):

> "The defendants believe that all of the misrepresentations were made negligently. The projections were not accurate and did not show a true representation to the finances over the first three years of trading, nor was Sarah Woods assertion of achieving a £200,000 turn-over in year 1 realistic for a brand-new business with an individual from outside the industry with no previous experience. Advertising that an initial £35,000 can turn into £1,500,000 net profit is negligent without adding that further borrowing is necessary. Advertising that national accounts are free of charge when there is a charge is negligent and the information is inaccurate. Advertising that there are 55 franchisees when in fact there are 32 is negligent as it's inaccurate and so on for the remaining of the advertising."

233. This was a sweep up answer to the Request numbered 1.1, which referred to paragraph 10 of the Defence and asked for full particulars of the alleged *"blatant mistruths"*. That paragraph referred to Mr Bartlett's email of termination sent 16 July 2020 and asserted (my underlining):

> *"D2 explained that the franchise had been miss-sold to D1 and D2 and provided some evidence of blatant mistruths that C advertises to potential franchisees but yet doesn't provide. Under the Misrepresentation Act 1967 D2 has the right to terminate the agreement after entering into the FA when a misrepresentation having been made to D2;"*

234. Specifically in response to the Requests numbered 1.1a, b, c and d, Fredbar Limited and Mr Bartlett asserted at sub-paragraph (ii) of their Reply that *"Sarah Wood sent over a projection excel spreadsheet of the likely turnover the defendants could expect, the figures are grossly exaggerated"* (my underlining). The spreadsheet referred to is subsequently identified in the Further Information as the one she emailed on 30 August 2018.

235. At sub-paragraph (c) of the Reply to the Request numbered 1.1, it was also stated with reference to turnover figures supplied in the 6 September 2018 projections that (my underlining):

> *"i. [albeit with reference to an alleged oral statement by Mrs Brunton that the projection of £200,000 given to the defendant by the claimant's employee was grossly exaggerated] … they only achieved a little over £100,000 in the first year.*
>
> *ii. The projections given to the defendants are grossly exaggerated over a three-year trading period (£158,000 year 1; £343,000 year 2 and £558,000 year 3). The projections did not include any further borrowing of funds, Pierre Jeannes of the claimant states that growth of the franchise would be achieved through further borrowing to reach targets, this is not shown within the excel spreadsheet so it's misinformation. Also, the claimant has not validified the projections by cross referencing them with brand new franchisees taking over unoccupied territories over the first three years of trading."*

236. Finally at sub-paragraph 2(b) of the Reply to the Request 1.2, which sought full particulars of how it was alleged that the franchise was *"mis-sold"*, it was stated (my underlining):

> *"The defendants were sent a projection excel spreadsheet and verbally told to expect £200,000 in turnover within the first year. By the defendants looking at the excel spreadsheet and told that the amounts therein were conservative the defendants believed that the figures would be highly attainable, whereas when in fact they aren't as the defendant's found out while trading.*

> *Had the projections been more realistic to a new franchise taking over an unoccupied territory then the defendants would not have become a franchisee, they were led to believe what they were told and shown by the claimant."*

237. As a result of the Further Information, in my judgment the statement of case of Fredbar Limited and Mr Bartlett is to be construed as alleging that the projections provided on 30 August 2018 and 6 September 2018 contained negligent misrepresentations resulting in the turnover projected being unattainable and grossly exaggerated in particular because: (i) they did not provide for the additional borrowing which would be required to achieve that turnover through investment in a new employee and van; and/or (ii) did not take into consideration the fact that a new franchisee was taking over unoccupied territory.

238. Although the statement of case only addressed the 30 August and 6 September 2018 projections, those received on 4 October 2018 have to be taken into consideration as the projections finally relied upon by Fredbar Limited and Mr Bartlett if and to the extent that they made a material difference. As I have found as fact and as will become apparent from my reasoning and decision below, they did not.

I2iii) The Representation

239. It is obviously necessary to first identify from the facts what representations were made when the projections were provided. The starting point is that averaged franchisee figures were provided to Mr Bartlett within projections which it would be reasonable to rely upon as an estimate or forecast when deciding whether to purchase the Cardiff franchise.

240. Important conclusions flow from that. First, it means that the figures used were not negligent misrepresentations. There is no case that they were not correctly calculated averages whether in August or September/October 2018. It is true that the changes to average figures introduced by the September/October projections raise potential questions as to their accuracy to the extent that they differed from the averages produced within the 30 August figures. However, as explained, the evidence from Mr Bartlett does not specifically address those changes whether by alleging that the new figures cannot have been the averages to be used because of their inconsistency with the averages first presented or otherwise.

241. Second, as a result of the figures being treated as accurate averages, the case of negligent misrepresentation based upon unattainable figures must challenge the Claimant's methodology (use of averaged franchisee data) on the ground that it was careless to represent or that there were no reasonable grounds for representing that it would be reasonable to rely upon that data as an estimate or forecast when deciding whether to purchase the Cardiff franchise.

242. However, that ground must be subject to the qualification that the representation was made with Mr Bartlett knowing that the projections did not take into consideration any market evidence relevant to the Cardiff area or the fact that this was a new franchisee taking over unoccupied territory and/or any special consideration of the circumstances of Mr Bartlett. Instead he knew they were solely based upon average data. I have found he knew that to be the case (see in particular paragraph 93 above).

243. Therefore, the challenge to methodology must allege carelessness or no reasonable grounds for representing that it would be reasonable to rely upon that data as an estimate or forecast when deciding whether to purchase the Cardiff franchise despite Fredbar Limited and Mr Bartlett knowing that no other enquiries and/or adjustments had been made.

244. That still leaves outstanding the questions: why and upon what evidence do Fredbar Limited and Mr Bartlett rely to allege it was negligent to represent the projections were achievable forecasts at the time the representations made and the Agreement concluded? The question why is answered by the particulars identified at paragraph 237 above. The only evidence relied upon, however, is the fact that Fredbar Limited did not come close to achieving the results forecast by the projections.

245. That evidence raises the potential for a case of negligent misrepresentation. Such a case might have linked back, for example, to the information the Claimant provided for the business plan including the reference to the projections being represented as *"very achievable"* (see paragraph 104(h) above). However, not only was this not pleaded as a particular within the Defence or Further Information but the 12 and 15 month results provide hindsight and cannot by themselves establish negligence. It has not been suggested that the results themselves are sufficient evidence to imply negligence. This was not pleaded as a particular and without pleading could not be considered by the Claimant for the purposes of disclosure and/or be met by it with evidence in response. In any event, plainly they were not. There are too many potential, variables. The causes of the results would need to be linked to the alleged misrepresentation when made and to facts existing at the time the Agreement was concluded. Even if a link could be established, it would also need to address the fact that there was nothing represented to suggest that further enquiries or adjustments (with or without expert advice) could or should not be made by made by Fredbar Limited and Mr Bartlett.

246. The simple answer to this part of the claim, therefore, is that Fredbar Limited and Mr Bartlett have not produced evidence to establish why it was negligent to represent the projections were achievable forecasts at the time the representations were made and the Agreement concluded. They have not done so generally or in the context of the findings of knowledge made in respect of Mr Bartlett including his decision not to obtain information which Appendix 3 to the Agreement proposed the intending franchisee would provide (see paragraphs 110-113 [specifically 113] and 121 above).

247. Applying that decision specifically to the claim that the projections were misrepresentations because they did not require further borrowing whereas Fredbar Limited's results meant that borrowing was required: The figures projected did not show borrowing because it would not be needed if they were attained. The fact that Fredbar Limited did less well does not prove it was a negligent misrepresentation to present the projections as a forecast.

248. Applying the decision specifically to the claim based upon the fact that this was a new franchisee taking over unoccupied territory: That is not proved to be the cause of the results achieved and nor is it proved that it was a negligent misrepresentation to present the projections as a forecast before or at the time the Agreement was concluded.

249. The Defence and Further Information do not identify a case of negligent misrepresentation based on the projections' estimates for the number of jobs and the average fee per job. That is the answer to any reliance upon the evidence from Mr Bartlett that competition resulted in him having a lower average price per job. Applying Mr Strelitz's submissions, the Claimant is entitled to object to such a case being decided because the absence of such particularisation meant it did not have the opportunity to address those matters in disclosure, preparation of evidence or at trial.

250. However, even assuming (wrongly) that objection could be ignored, the fact that Fredbar Limited did less well does not prove that the methodology resulted in negligent misrepresentation. For example, the fact that others charge less does not mean that others cannot charge more. There may be reasons of quality, brand or simply of supply and demand enabling more to be charged. These matters were not but would have had to be addressed. There is reference in the evidence to competition and to £50 fixed charges but this comes nowhere near to alleging or establishing negligent misrepresentation.

251. What was needed was evidence (and the opportunity for the Claimant to rebut it) that this problem existed and could or should have been ascertained by the Claimant before the Agreement was concluded with the result that presentation of the projections as attainable was negligent. Even then, that would leave the problem that Fredbar Limited and Mr Bartlett were aware that only average data was used and could themselves have readily appreciated that additional data specific to the Cardiff market could and should have been sought and/or adjustments made. A problem which is exacerbated by the findings of knowledge made in respect of Mr Bartlett.

252. Reference has also been made outside of the Defence and the Further Information to the Business Plan's projection of National Account work. The same objection to an absence of particularisation despite the Order of the Master applies. In any event, the fact that less was received than predicted does not in itself make the prediction negligent. The causes for its absence has not been a subject of the trial. No evidence addressing the reasons why the projections were negligent at the time was presented.

253. In conclusion, whatever the further data that might have been taken into consideration at the date of presentation of the proposals and/or the date the Agreement was completed, it has not been proved that the Claimant was careless when presenting or that it did not have reasonable grounds for presenting the projections as a forecast. It has also not been proved that it was negligent to make a representation of attainability based upon average franchisee figures when the franchisee purchaser was perfectly entitled to investigate the Cardiff market and take into consideration any other relevant factors when deciding whether to rely upon the projections.

254. There is no suggestion that the Claimant misled Fredbar Limited and Mr Bartlett concerning methodology when the projections were provided. The Claimant was not acting for or otherwise advising Fredbar Limited and Mr Bartlett. This was a commercial transaction. There was nothing to stop them investigating local market conditions or refusing to enter into the Agreement without projections addressing those conditions. They were willing to enter into the Agreement in reliance upon projections which were based upon the results of the Claimant's franchisees. Those projections were based upon accurate data. No negligence has been established based upon the methodology used.

I3) Undue Influence

255. ***In Royal Bank of Scotland Plc v Etridge (No 2) (HL(E))*** [2001] UKHL 44, [2002] 2 AC 773 Lord Nicholls explained that equity provided protection for those who entered into transactions as a result of *"unacceptable forms of persuasion"*. The court will investigate whether their intention to enter into the transaction resulted from the exercise of improper or undue influence. If so, *"the consent thus procured ought not fairly to be treated as the expression of [that] person's free will"*.

256. The circumstances in which that influence may arise are never closed. It may result from the actions of the influencer, for example improper pressure or coercion caused by unlawful threats. Alternatively it may result from the influence that a person has over another because of a special relationship. Mr Bartlett relies upon the former, actual undue influence, for which he must prove that his free will when executing the Agreement was impaired because the Claimant behaved improperly and that such conduct caused or was part of the process which produced his execution of the Agreement on behalf of Fredbar Limited and himself.

257. Mr Grant in his closing submissions relied upon the background circumstance of inequality of bargaining power, insufficient time having been given to consider the lengthy and complex Agreement, a failure to advise that independent legal advice be taken or to provide the opportunity for such advice and upon the actions of Mr Barton on 4 October 2018. His submissions relied upon Mr Bartlett having never run his own business, having had no previous experience of becoming a franchisee or of the specific business of plumbing and drainage and having initially decided not to become one of the Claimant's franchisees. Mr Grant observed in support of his submissions that despite those facts and despite Mr Bartlett only having seen the Agreement the day before in electronic form, it was presented to him on a take it or leave it basis, had to be signed before a tradesman witness coincidentally working in the house and not only required alterations to the questionnaire's answers but needed Mr Barton's return to procure further signatures.

258. There is much to be said for the proposition that this type of transaction should be subject to regulations. In particular that franchise agreements should be in a clear and concise form, that independent advice should be required, there should be time to "cool off" after execution and break clauses should be included. However, there are no specific laws governing the sale and purchase of a franchise. Equity must be applied in the context of a commercial transaction for which Mr Bartlett (subject to him establishing impairment of free will) was able to decide whether he was willing to enter into the Agreement despite its lengthy and cumbersome form. In addition, he could decide whether he needed independent advice either in terms of economics and/or law.

259. The evidence has led me to find as fact that Mr Bartlett decided to proceed with the Agreement having considered the revised projections of 6 September 2018. He decided to execute the Agreement having considered them with Mr Barton to the extent that they were revised in the form emailed on 4 October 2018. There is no suggestion that those revisions did not reflect their discussions. In addition, Mr Bartlett had had the standard form draft available to consider from about 24

September 2018. He may have required it to send to the Bank but that did not mean he could not study it and it was his choice not to do so, if that was the case. Mr Bartlett could also have sought expert advice before executing the Agreement but chose not to do so. The Agreement expressly referred to such a course in the recital as well as within clause 20.

260. Mr Bartlett's recollection of the meeting on 4 October 2018 was vague and I cannot find it established on the balance of probability that his free will when executing the Agreement was impaired. He has not proved on the balance of probability that the Claimant through Mr Barton behaved improperly. Based upon the findings at paragraphs 128-129 above, my finding at paragraph 129e is conclusive. There was no undue influence. Mr Bartlett's free will when executing the Agreement was not impaired

I4) Force Majeure

261. Clause 30.1 of the Agreement is entitled "Force Majeure" and reads:

> *"This Agreement will be suspended during any period that either of the parties is prevented or hindered from complying with their respective obligations under any part of this Agreement by any cause which the Franchisor designates as force majeure including strikes, disruption to the supply chain, political unrest, financial distress, terrorism, fuel shortages, war, civil disorder, and natural disasters."* ***[p1082]***

262. "Force majeure" as a legal term means unforeseeable circumstance(s) that prevent someone from fulfilling a contract. In this case the parties have agreed that there would be a suspension during any period the Claimant designated as a "force majeure" event. For the purposes of exercising that power, the clause sets out examples of the type of event which would be categorised as a "force majeure".

263. Applying the principles identified in ***Braganza v BP Shipping Ltd*** [2015] UKSC 17; [2015] 1 WLR 1661, there was an implied term for clause 30 of the Agreement that the power of designation must be exercised honestly, in good faith and genuinely. It must not be exercised arbitrarily, capriciously, perversely or irrationally. The Claimant in exercising that power must have taken account of the matters which are relevant and ought to be taken into account and not have taken into consideration those matters which are irrelevant. Providing that is done, the decision is one for the Claimant's discretion but the court will set it aside if it is one which no reasonable decision-maker could have reached.

264. Other sub-clauses of clause 30 provided:

> ***30.2*** *During such period of suspension the Franchisee will use its reasonable endeavours to continue trading and will keep the Franchisor fully notified of trading conditions and any factors outside of the Franchisee's reasonable control which the Franchisee reasonably believes will affect or impair its ability to continue trading.*
>
> ***30.3*** *If such period of suspension exceeds one hundred and eighty (180) days, then the Franchisor will, upon giving written notice to the Franchisee, be able to require that:*
>
> *30.3.2 all money due to the Franchisor will be paid immediately;*

30.3.2 the Franchisee immediately ceases trading, until further notice from the Franchisor; and

30.3.3 this Agreement is terminated without liability on the Franchisor's behalf to the Franchisee and/or the Individual.

265. Sub-paragraph 30.2 might at first glance be read as permitting continued trading during the period of suspension. That would be inconsistent with the fundamental requirement for a "force majeure" event, namely that the contract cannot be fulfilled. It is in fact a requirement for the franchisee to use reasonable endeavours to end the suspension by continued trading. That should occur when reasonable endeavours meant the franchisee would no longer be prevented or hindered from complying with the Agreement. Sub-paragraph 30.3 provided the circumstances in which the suspension will lead to the end of the franchise.

266. As to the Claimant's application of its power: When the correspondence referred to within paragraphs 186-191 above is analysed, the first request by Mr Bartlett for suspension made by email sent 27 March 2020 related solely to the effect the Covid pandemic was having upon turnover. It is this circumstance which was addressed by the Claimant through Mr Jeannes when deciding not to designate the pandemic a *"force majeure"*. I refer to his letter dated 31 March 2020 (which should not have been marked "without prejudice" to the extent that it included a decision under the Agreement that clause 30 did not apply and did not involve a negotiation), 2 and 9 April. However, that was not the only basis upon which suspension was sought.

267. By 30 March 2020 the request and potential reason for suspension became a very personal one. The Claimant was not only aware but had received a copy of the notification from the Chief Medical Officer/Medical Director NHS Wales that Mr Bartlett's son was vulnerable and that the best way of avoiding the virus was to stay at home for the next 12 weeks. This meant Covid not only affected turnover because of its effect on demand but it also gave rise to the need for Mr Bartlett to isolate for the safety of his son. It directly affected Fredbar Limited's ability to supply. This was made clear to the Claimant in Mr Bartlett's email sent 30 March 2020 (see paragraph 188 above).

268. Despite that, the reasons for the decision(s) after 29 March 2020 that clause 30 did not apply, still only addressed the effect of Covid upon turnover by reference to demand. The decision(s) did not take into consideration the need for isolation for family safety despite Mr Jeannes's 31 March 2020 letter referring to this in the first paragraph. For example, the response to Mr Bartlett's further email sent 9 April (setting out reasons for clause 30 not applying still referred only to the general effect of Covid and not to Mr Bartlett's family position).

269. That meant the discretion was not exercised in accordance with the implied term because a critical factor had been ignored for the purposes of the decision. The approach then adopted by the Claimant, namely that Fredbar Limited was in breach of the terms of the Agreement entitling its termination unless remedied, was maintained without the Claimant having complied with the implied term when exercising its discretion under clause 30. This was a breach of the Agreement.

270. Whilst clause 17 of the Agreement set out express provisions concerning its termination by the Claimant, there was no provision concerning termination by

Fredbar Limited or Mr Bartlett. The common law applied and it is necessary to consider whether the Agreement could be terminated by the letter dated 16 July 2020 as a result of this breach.

271. Mr Grant submitted that the failure to exercise the discretion was a repudiatory breach and justified Fredbar Limited's subsequent termination of the Agreement on 16 June 2020. Mr Strelitz submitted that clause 30 of the Agreement only permitted the exercise of a discretion and a failure to do so, if established, would not go to the root of the commercial purpose of the Agreement and amount to a repudiatory breach. As a response Mr Grant submitted that if the failure to pay the MSF was a repudiatory breach, as the Claimant alleged in the contemporaneous correspondence, by the same token, the failure to relieve Fredbar Limited of its obligation to pay when clause 30 ought to have been engaged was a repudiatory breach.

272. In my judgment, looking at the position at the time the Agreement was made, this was a fundamental term. Its application would only arise in exceptional circumstances but that did not mean its exercise was not essential when those circumstances occurred. Plainly it was and a decision by the Claimant which ignored an important consideration, in this case the potential effect upon Mr Bartlett and his family, would commercially and objectively be considered a breach of an important term which went to the root of the commercial purpose of the Agreement. Alternatively it would be an intermediate term entitling termination depending on the seriousness of the breach.

273. However, notwithstanding the decision refusing to apply clause 30, the Claimant in the letter from Mr Jeannes dated 2 April 2020 offered the choice between ceasing to trade completely when MSF and MAP fees would be suspended and trading when MSF and MAP fees must be paid including the minimum MSF payment. True this was not a decision under clause 30 but it meant that Mr Bartlett could self-isolate as though a force majeure decision had been made.

274. On 24 April 2020 Mr Bartlett indicated that he was self-isolating. He accepted the 2 April 2020 offer. Although that met with changes of terms from the Claimant (see paragraphs 199-202 above), the final position for self-isolation set out in Mr Jeannes's email of 29 April 2020 was acknowledged by Mr Bartlett in his response of 3 May and by his self-isolation on those terms. Mr Bartlett continued to self-isolate in accordance with that acknowledgment. As a result the Agreement was affirmed. There was no ground for termination on 16 July 2020 when the suspension was still in force.

I5) The MAP Fund

275. It is also claimed by Fredbar Limited and Mr Bartlett that the Agreement could be terminated because the Claimant had used the MAP Fund to pay the costs of the National Accounts' team which was a repudiatory breach of clause 11 of the Agreement.

276. They rely upon the admission within the email sent by Mr Jeannes on 24 January 2020 (see paragraph 176 above) in which he stated that *"the cost of administering the*

National Account team sits within the MAP fund and therefore the fund is not being used in the appropriate way and leaves no funds to undertake much needed national promotional activity".

277. Clause 11 plainly provided that the MAP fee paid weekly must be used *"only"* to establish a marketing advertising and promotion fund and to use that fund *"upon such national advertising and/or promotional activities as the Franchisor thinks fit, including establishing and maintaining a relationship, -with Key Accounts Customers …"*. This was expanded upon within Schedule 11 which, although widely drafted, contained detailed provisions concerning the use of the Fund:

> To pay for costs and expenses related to various promotional programs and advertising campaigns designed to assist franchisees in selling and performing services in accordance with the System. Payments incurred for those purposes could include payment for materials provided to franchisees for those purposes and payments relating to creative concepts, graphics, materials, communication media, and endorsements used and their geographic, market, and media placement and allocation. The programs and activities could be for the purpose of maximising the recognition of the Claimant's Marks and for any other activity that it believed would enhance the System's image and promote general public awareness of the System and the Marks (including account acquisition programs and programs to obtain, maintain, and retain Key Accounts. It could be used to develop marketing and advertising materials, programs and campaigns, and to execute advertising, marketing, and research activities. It may be used when the Claimant collaborated with the advertising funds of certain franchise systems affiliated with the Claimant to save costs and expenses and to improve the effectiveness of the Claimant's advertising programs and activities. For example, the Claimant could solicit Key Accounts for the benefit of other franchised businesses it operated. It could fund collection agents and the cost of legal proceedings to recover franchisee contributions. Expenses incurred in activities related to maintaining, administering, directing, and conducting the MAP Fund and its programs (including programs related to Key Accounts); conducting market research and public relations activities; creating and/or preparing advertising, promotion, and marketing materials; and collecting and accounting for MAP Fund contributions. Any and all costs of preparing and producing video, audio and printed advertising materials, administering national and regional advertising programs, including direct mail, point of sale and other media advertising, employing advertising agencies and supporting public relations, market research, advertising and marketing activities and other promotions or activities intended to advance the business prospects of franchisees.
>
> In addition it was expressly provided that the und may be used "to pay the salaries and benefits of personnel who manage and administer the MAP Fund, the MAP Fund's other administrative costs, travel expenses of personnel while they are on MAP Fund business, meeting costs, overhead relating to MAP Fund business …".

278. I have set that out in detail because it is plain from the contents that the MAP Fund should not have been used to subsidise the cost of administering for the National Account team. I do not accept Mr Strelitz's submissions to the contrary. Although Schedule 11 provided at paragraph 10 that the Fund was not a trust, it also provided (in oxymoronic terms) that it was not the Claimant's asset. Use of the Fund as though it was the Claimant's asset and its use in breach of the very specific and detailed provisions limiting the purpose of its use would entitle termination. On these facts it is unnecessary to decide if the contractual provisions are conditions or intermediate terms which may justify discharge. That is because the Claimant did not try to remedy its breach. It continued to refuse to accept that clause 30 applied and this gave rise to the right to terminate. The parties are to be regarded as having agreed that consequence at the time the Agreement was concluded for the following reasons: First because it would be a breach of a contractual provision designed to ensure the correct

use of funds which do not belong to the Claimant for the specific benefit of the franchisees and their businesses. Second because it would be a breach of a fiduciary obligation. Third because the breach would undermine trust and confidence, which was a necessary criteria for the franchisor:franchisee relationship.

279. Mr Jeannes in his evidence in chief explained that the revenue generated from the 3% charge levied upon its franchisees upon each invoice for National Account work received was insufficient to meet the costs of the national accounts team. That is not a justification for the misuse of the MAP Fund. If a franchise agreement obliges the Claimant to incur the cost of the national accounts team, whether because there was no obligation upon a franchisee to pay for it or because the obligation did not provide sufficient revenue, (subject to contrary terms) it must use its own money whether that is generated from the franchise agreements or not.

280. Mr Jeannes also referred to an agreement with a nominated body of franchisees, the Franchise Advisory Council, to increase the 3% levy franchise fees from a base calculation of £2.50 a job to £12.50 a job. This, he said, was announced to franchisees at a meeting in October 2019 which Mr Bartlett did not attend. I do not understand how this is intended to provide a defence to the misuse of the MAP Fund. There is no suggestion that the cost of administration of the National Accounts team paid from the MAP Fund was used to pay any of the expenses permitted by clause 11 or schedule 11 of the Agreement. Mr Jeannes's email sent on 24 January 2020 admits misuse. A repudiatory breach is established.

281. Mr Grant submitted that use of the MAP Fund to fund the National Accounts team was exacerbated by the £12.50 levy. I do not consider it exacerbated the breach but it did create a potential claim. No provision has been identified which entitled the Claimant to increase the charge above the 3% administration fee provided for in paragraph 3.18(f)(i) of Schedule 4 to the Agreement. The Agreement contained an entire agreement clause and no provision has been shown to me that enables variation as a result of agreement with the Franchise Advisory Council. If payment was raised from Fredbar Limited, it would be entitled to claim the sums wrongly retained by the Claimant. Correctly, this was not relied upon as a breach entitling termination of the Agreement.

282. Returning to the breach of clause 11 of the Agreement, Mr Strelitz submitted in the alternative that Fredbar Limited and Mr Bartlett waived or acquiesced in the breach when he stated by email sent on 7 March 2020 that he was *"not looking to terminate"* the Agreement but was intending to sell the franchise. Mr Strelitz referred me to the decision of the Court of Appeal in ***Force India Formula One Team Ltd v Etihad Airways PJSC*** *[2010] EWCA Civ 1051* and in particular to the need to act quickly to avoid acquiescence.

283. That is not quite the approach taken in the lead judgment. The court was concerned to point out that *"a situation of repudiation may well be more or less complex and call for more or less urgency"* (see paragraph [113]). As a result the principles of election had to be applied in context. This was explained by Rix L.J. in ***Stocznia Gdanska SA v Latvian Shipping Co (No.2)*** [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [87] when he stated:

> *"In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing 'writ in water' until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract—such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract."*

284. Those principles require knowledge of the relevant facts and communication of the election in unequivocal terms whether by statement or by action/omission. If too much time is allowed to pass before acceptance of a repudiatory breach, the offended party may be taken to have affirmed. Whether that is so is a matter of fact based upon the evidence as a whole.

285. In this case it is plain that Mr Bartlett having been informed of the breach on or about 24 January 2020 did not seek to terminate the Agreement. The email he sent on 7 March might be treated as one which kept his options open but even if that is correct, Fredbar Limited and Mr Bartlett met the Covid crisis with the request for suspension. It is plain he had not terminated the Agreement and had elected to continue to be bound by it. His claim for breach of the Agreement must be limited to damages.

I6) The 16 July and 19 August Termination Emails

286. The decisions above mean that Fredbar Limited and Mr Bartlett had no right to rescind or terminate the Agreement when Mr Bartlett purported to do so within his email sent 16 July 2020. It follows that the Claimant was entitled to accept their decision to no longer be bound by the Agreement as a renunciation whether they traded in competition or not. The time given for Mr Bartlett to reconsider Fredbar Limited's position was not an affirmation of the Agreement. Further, Fredbar Limited maintained its renunciation and the Claimant was entitled to terminate by its 19 August letter.

287. It follows that from 19 August 2020 Fredbar Limited could no longer hold itself out as being a "Drain Doctor" franchise. Fredbar Limited and Mr Bartlett were required to return to the Claimant all franchise items such as the Manual in accordance with the provisions of the Agreement. My understanding is that Mr Bartlett now asserts that the Manual has been returned. That can be resolved between the parties on the basis that it should have been. There is no dispute that Fredbar Limited owed MSF fees totalling £2,976.84.

288. There is an issue over the delivery up of the telephone number, 02922 414253 upon termination. On the one hand the Claimant asserted that it has been used for Fredbar Limited's business as a franchisee and should be delivered up to protect goodwill. On the other hand Mr Bartlett asserted that it was not in fact used for business and is a long standing number for use by family and friends. The evidence referred to in

paragraph 142 above, however, established that the number was not being used at the time when Mr Bartlett decided it would be used for the franchise, as agreed with the Claimant, November 2018. There was also evidence that it was used in marketing literature for the franchise and subsequently used for the new "Drain Doctor" business.

289. Clause 18.1.4 of the Agreement required Fredbar Limited on termination to cease using the telephone numbers used in its franchisee business including its and Mr Bartlett's mobile telephone numbers. It also required the numbers to be transferred to the Claimant irrespective of whether they were used before entering into the Agreement. Based on this evidence above, it has to be concluded that this applies to the telephone number, 02922 414253 if that can be achieved.

I7) Daily Drains

290. The evidence concerning Cool Solution Refrigeration Ltd (see paragraph 203 above) establishes that Fredbar Limited trading as "Daily Drains" obtained a contract as a result of a report resulting from an inspection carried out on 30 May 2020. There is also evidence of work having been carried out by "Daily Drains" for different customers before the Claimant's termination of the Agreement as evidenced by invoices raised before 19 August 2020 (see paragraphs 207 and 209-210 above).

291. The Agreement contained an express clause prohibiting Fredbar Limited and/or Mr Bartlett from owning or being concerned with another plumbing and drainage business whilst the Agreement was in force (albeit that one has to reach paragraph 4.3 of Schedule 4, which is incorporated by clause 9, before finding it). There is also the problem for them that the report and invoices all included "Drain Doctor" references. It is sufficient to conclude that a breach of clause 9 occurred. Plainly that was a repudiatory breach and also entitled termination of the Agreement by the Claimant by the letter dated 19 August 2020.

I7) Restraint of Trade Covenants

I7i) The Covenants

292. This leads to the question of the enforceability of the restraint of trade covenants. The Claimant relies upon clauses 18.2.1.1 and 18.2.1.2 of the Agreement against Fredbar Limited and clauses 18.3.1.1 and 18.3.1.2 with similar wording and effect against Mr Bartlett:

> ***"Post termination restrictions on the Franchisee***
>
> *18.2.1 Following termination or expiration of this Agreement, the Franchisee will not for a period of one (1) year thereafter directly or indirectly:*
>
> *18.2.1.1 be engaged concerned or interested in a business similar to or competitive with the Drain Doctor Business within the Exclusive Marketing Territory (save for a financial interest which does not allow the Franchisee to influence the economic conduct of such a business);*

18.2.1.2 be engaged concerned or interested in a business similar to or competitive with the Drain Doctor Business which operates within a radius of five (5) miles from the Exclusive Marketing Territory;"

293. Restraint of trade covenants are on their face contrary to public policy. Therefore the burden is upon the party seeking enforcement to satisfy the court that the provisions were designed to protect their legitimate interests and extend no further than is reasonably necessary to achieve that purpose (see ***Carewatch Care Services Ltd v Focus Caring Services Ltd*** [2014] EWHC 2313 (Ch) at [126]). It has not been argued, correctly, that general commercial acceptance can be relied upon in this case. However, I accept the submission of Mr Strelitz that the approach to be taken is more akin to the treatment of clauses in contracts for sale than for clauses in employment contracts. I will approach the test of reasonableness accordingly.

I7ii) The Claimant's Evidence

294. I have considered the evidence of Mr Jeannes at paragraph 47 of his third witness statement dealing with the need for their application. There is no evidence, however, dealing with the intentions of the parties concerning the restraint of trade covenants either during negotiations or upon completion of the Agreement. There is no factual evidence to link the Claimant's inability to recruit a new franchisee to the continued trading of Fredbar Limited in its new business. There are no facts stated to establish the general proposition that continued operation of a former franchisee within the Claimant's territory makes recruitment difficult or prejudices the success of the future franchisee. The whole paragraph is short of evidence to support the statements made and appears more to be lawyer than witness led in its drafting.

I7iii) Submissions

295. Mr Strelitz in his skeleton argument submitted that the post termination restrictions are perfectly ordinary and seek to stop Fredbar Limited and Mr Bartlett from being engaged, concerned or interested in a business similar to or competitive with the Drain Doctor Business either within the former franchise territory or within a radius of five mile from it. He submitted that the provisions are carefully defined by reference to express definitions and only cover the ex-franchisee's former territory as well as a small peripheral ring around it. Mr Strelitz referred me to the decision of ***Kall Kwik Printing (UK) Ltd v Rush*** *[1996] FSR 114* to establish that a post-termination restriction in a franchise agreement was akin to a buyer/seller covenant with a retransfer of goodwill taking place on termination of the franchise agreement. He also referred me to the Court of Appeal's decision in **ChipsAway International Ltd v Kerr** [2009] EWCA Civ 320, where a post-termination restriction provided that the franchisee would not compete with the franchise business for 12 months post-termination.

296. Mr Strelitz submitted that the Court of Appeal established that a purpose of a restraint of trade covenant was to enable the franchisor to protect the goodwill built up during the term of the franchise. This protection was required to enable the franchisor, for example (and most obviously), to recruit another franchisee for the same territory. As

a result, he submitted, the court should uphold these restrictions because they are no more than necessary to enable the Claimant to be able to sell a replacement franchise within the territory of the Agreement either during the 12 months after the term (when there can be no competition from the former franchisee) or in the period after that (when the former franchisee would be able to recommence trading but would effectively be starting from a new client base again).

297. As to definition, Mr Grant submitted that *"the Drain Doctor Business"* is the Claimant's franchise business, which is the sale of franchises not the carrying out of a plumbing and drainage business. Alternatively the only potential definition which might otherwise apply is for the term "*Franchisee's Drain Doctor Business*" and the application of that definition would make no sense. Applying those definitions, Fredbar Limited and Mr Bartlett would not be in breach even if the clauses were enforceable.

298. As to enforceability, Mr Grant submitted in the alternative, assuming the definition proposed by the Claimant applied, that *"the breadth of the provisions is stark [creating] … a substantial buffer"*. He raised the following objections to their enforceability: They would prevent Fredbar Limited acting as a sub-contractor or Mr Bartlett being employed by other existing drainage and plumbing businesses even when there could be no confusion with the Drain Doctor Business or adverse effect upon the sale of a new Cardiff franchise capable of protection. The clauses were so wide they would prevent Mr Bartlett's home from being Fredbar's registered office or from being a centre of administration even if the business operated outside the geographical limits and could not have an effect upon sale of a new franchise within the EMT. The attempt to extend beyond the Agreement's exclusive territory was entirely without justification. The period of 12 months is unreasonable.

299. Mr Grant asked the court to take into account that the clauses applied little heed to the investment made by Fredbar Limited and Mr Bartlett or to the ability to find alternative employment/income if they are restrained. Little consideration was given to the duration of the franchisee and the extent to which the franchisee's turnover compared with the relevant projections. On the logic of those projections, the concerns of being undercut by competition were misplaced. There was no real evidence of the trade name having goodwill in Cardiff and no evidence of any confusion. It was incumbent on the Claimant to show that the covenants serve a purpose to justify their restraint of trade. The effect of the unenforceability of the covenants on other franchisees is nothing to the point.

I7iv) The Decision

300. Dealing first with the issue over construction: Despite the length of the Agreement and the inclusion of definitions within not only clause 1 but also Part 2 of Schedule 1, the term *"the Drain Doctor Business"* is not defined. It is first used in recital (C) to identify that the *"Franchisee wishes to acquire from the Franchisor the right to operate the Drain Doctor Business in accordance with the terms of [the] Agreement"*. That must refer to the business carried out under the "Drain Doctor" trade name referred to in recital (A), namely a business of plumbing and drainage. As a matter of construction, therefore, the restraint of trade provisions refer to that type of business.

It is also a construction consistent with the meaning of the separate term, "*Franchisee's Drain Doctor Business*" which reads.

> ***"Franchisee's Drain Doctor Business"*** *means the Franchisee's individual business as one of the Franchisor's franchisees carrying on the Drain Doctor Business under this Agreement within the Exclusive Marketing Territory".*

301. As to enforceability: In ***ChipsAway International Ltd v Kerr*** (above) the Court of Appeal was concerned with post-termination, restraint of trade provisions within a franchise agreement which included a 12 month prohibition that the former franchise should not engage in any business within the former territory which would compete with the type of business that had been carried on pursuant to the franchise agreement at the date of termination without the franchisor's prior written consent.

302. It was accepted by the Court of Appeal that the clause could be rewritten to the extent necessary to provide a meaning which made sense to a meaningless literal construction and would give effect to its commercial purpose. In doing so, the Court of Appeal rejected the Judge's redraft for reasons which included its failure to reflect the purpose of a post-termination franchise restraint of trade covenant. Namely, to avoid competition and thereby to allow the franchisor to exploit the goodwill that had accrued when recruiting another franchisee. That exploitation included the ability to sell a franchise with the protection of the restraint of trade covenants for the remainder of their term.

303. The Court of Appeal referred to the decision of Neuberger J, as he then was, in ***Dyno-Rod plc v Reeve*** [1999] FSR 148 at 155 (amongst other judgments) including the following words:

> *"It is obvious that the plaintiff will be likely, and one would have to judge this at the date of the agreement, to have far greater difficulty in attracting a new franchisee if the ex-franchisee is known as a Dyno Rod franchisee with all the Dyno Rod experience and contacts and is operating in the territory. An ex-franchisee has the benefit of considerable investment by the plaintiff which puts the ex-franchisee in a better position than others. Provided that it is reasonable in terms of the public interest and not unfair to the ex-franchisee in terms of time or area, the plaintiff is entitled in my judgment to ensure that his investments are protected by ensuring that unfair advantage is not taken by an ex-franchisee by for example for instance prematurely determining the franchisee agreement and setting out on his own."*

304. Mr Strelitz submitted that this is the answer to the claims that clauses 18.2.1.1, 18.2.1.2 18.3.1.1 and 18.3.1.2 of the Agreement are unreasonable and unenforceable. It might be but whether that is so will depend upon the circumstances of the particular agreement when it was entered into. It may be reasonable for one franchisor to be protected against another franchisee for 12 months or longer upon the terms drafted but not necessarily reasonable for another in different circumstances and/or on different terms.

305. Notwithstanding the goodwill to be protected by the restraint of clauses, they are unreasonable for the following reasons (which stand together and individually):

a) When the Agreement was made the Claimant knew that Fredbar Limited with Mr Bartlett as its only employee was starting this type of business with no previous experience, with the risk that average projections achieved by other franchisees would not apply to the Cardiff territory and/or be achieved by

Fredbar Limited taking into consideration the absence of any specific market information and/or that inexperience. In addition the Claimant knew that Mr Bartlett was investing all his savings, would have no other source of income other than his partner's relatively small one and would be at serious risk of losing the family home should Fredbar Limited's franchise business not succeed.

b) In that context of knowledge, the Claimant through Mr Jeannes had formed the opinion that failure was foreseeable because Mr Bartlett *"... required more support and hand-holding than any other franchisee in getting set up, including help with quite simple tasks ... he struck [him] as someone who was overactive and tended to be easily agitated ... he was needy, prone to agitation and had had difficulty in building relationships, including [subsequently] with customers"* (see paragraph 108 above) and was only being accepted because *"everybody deserves a chance"*.

c) It would be wrong to draw a distinction between Fredbar Limited and Mr Bartlett in this context for the purposes of Fredbar Limited's clauses. That is because Fredbar Limited's business would start as and could remain in effect a service company for Mr Bartlett. The Claimant understood it to be Mr Bartlett's vehicle.

d) There was no evidence of any discussion or negotiation of the restraint of trade terms to take into consideration the facts and matters above. This occurred in the context of a total inequality of arms. Instead the Agreement had to be accepted or rejected in its standard form.

e) Despite those facts and matters, the prohibitions did not provide for them to be disapplied with written consent with or without (although that in itself would probably have been unreasonable) a "not to be unreasonably withheld condition". That was unreasonable in itself but also in the specific context of the prohibitions failing to distinguish between terminations at an early stage of the franchise and terminations towards the end of the ten year term when the goodwill to be protected would probably be substantially more valuable. It was unreasonable for the 12 month restraint to apply however early or late in the term the Agreement terminated.

f) The first prohibition would prevent Fredbar Limited being used by Mr Bartlett or himself from being engaged or concerned in any plumbing or drainage business within the Cardiff territory without exception. It would mean, therefore, that Fredbar Limited could not act as a subcontractor and/or Mr Bartlett could not be employed by a plumbing or drainage company or use Fredbar Limited as his service company for that purpose. That would be the case even when such sub-contracting and/or employment would have no effect on the Claimant's protected goodwill. The unreasonableness of this is obvious in the circumstances known to the Claimant at the time the Agreement was made. In particular when it was reasonably foreseeable at the date of the Agreement that its application would seriously increase the risk of Mr Bartlett being unemployed and he and his family facing mortgagee possession proceedings for want of income.

g) In that context it is to be noted that the clause itself recognised the need to distinguish and exclude circumstances where there would be no influence on the economic conduct of the business. However, that was only in respect of obtaining a financial interest in a plumbing and/or drainage business during the 12 months. Having recognised the reasonableness of such an exception, it was unreasonable for that exception not to apply in the context of *"engagement [or] concern"*.

h) The second prohibition extended the prohibition to an unreasonable radius. There would be no goodwill to protect insofar as Fredbar Limited had not provided services within any part of the extended area. The fact that Fredbar Limited was able to work outside its territory in limited circumstances under clause 3 of the Agreement did not mean it would be reasonable to prohibit engagement concern or interest outside the territory of the Agreement whether any goodwill had been established or not. Especially when clause 3 provided that Fredbar Limited could not actively solicit customers outside the area.

i) Mr Grant's approximation of the area covered on a map clearly showed the unreasonableness of its coverage taking into consideration not just measurement but the different markets within the area outside Cardiff. In addition, this second provision did not even contain the financial interest exception appreciated as reasonable for the first prohibition.

j) Although Fredbar Limited would gain knowledge from the Claimant concerning the operation of a plumbing and drainage business and the requirements of the services provided to customers during the franchise term, there were no trade secrets to be protected by these prohibitions. In any event insofar as there was knowledge to protect, protection could have been provided (to the degree entitled) by more specific provisions. For example, the prohibitions against soliciting or specifically from acting for former customers.

k) There was no reciprocity to be applied should the Claimant have committed a repudiatory breach.

306. In my judgment the covenants are unenforceable. This is not a case where the unreasonable part can be severed. These prohibitions do not strike a reasonable balance between the freedom to contract and the freedom of trade. They are far more extensive than was required to provide reasonable protection.

J) Conclusion

307. Mr Grant opened the defence by submitting that this was disproportionate litigation founded upon an inequality of arms, The major company against "a man in a van", as he put it. However, differences in scale do not mean that the dominant party should not be entitled to enforce its contractual rights and I do not accept that submission for the purposes of deciding this case. Any franchisor must be concerned by any franchisee starting up a new competing business whether within the franchise term or whilst restraint of trade provisions are in operation. If a franchisee, even one man in a

van, wrongly refuses to desist, the franchisor must normally take steps to protect its interests.

308. However, I do consider it unfortunate that perspective seems to have been lost. Mr Bartlett appears to have been perceived and at the trial was presented by the Claimant as a rogue, whereas there are many factors which point towards the conclusion that he did not receive the support and/or understanding that he should have had. He was inexperienced as explained above but he was committed and took an enormous risk for himself and his family by becoming a franchisee. He was not told of Mr Jeannes's adverse opinion and, although this was his choice, the Claimant knew his decision was made without any specific market information. The evidence reveals that he tried his best but for whatever reason, the business simply could not generate the returns required to meet the projections. This clearly created economic constraints and it was understandable that he delayed engaging a new employee and van. Matters not did not improve before the business was hit with the consequences of the Covid pandemic and I have already commented upon the Claimant's responses. The Claimant should be given credit for the offers made following the 16 July purported termination but as a matter of perspective all the problems summarised had already arisen. Mr Bartlett must have been under great financial pressure and particular stress because his decision to become a franchisee had placed his family in that situation. One which for a person in his position could lead to council accommodation.

309. None of that is an excuse for seeking and obtaining work for a new business whilst a franchisee but it potentially provides the parties with some perspective when deciding whether to try to reach an agreement as to the way forward, including the relief to be sought, when this judgment is handed down. The "man in a van" submission is relevant to that perspective and potential agreement.

310. However, that is for the parties to consider. The decisions I have made for the reasons set out above are:

a) Fredbar Limited and Mr Bartlett had no right to rescind the Agreement for misrepresentation (see paragraphs 221-227 above concerning advertising and oral financial statements and paragraphs 228-254 above concerning the projections).

b) The Agreement was not procured by undue influence (see paragraphs 255-260 above).

c) The Claimant was in breach of the Agreement by its failure to comply with the "force majeure" clause (see paragraphs 261-269 above) but the Agreement was affirmed through the acceptance of an alternative offer when Mr Bartlett decided to self-isolate (see paragraphs 270-274 above).

d) Fredbar Limited has established breaches of the Agreement by the Claimant by reason of the misuse of MAP Fund money and by the increase in the 3% National Account levy (see paragraphs 275-281 above). Only the former was a repudiatory breach but the Agreement was subsequently affirmed by Fredbar Limited (see paragraphs 282-285 above).

e) The Agreement was terminated by the Claimant by its letter dated 19 August 2020 as a result of its acceptance of Fredbar Limited's repudiatory breach of the Agreement, its decision that it no longer intended to be bound by its terms first notified by its purported termination letter of 16 July (see paragraph 286 above).

f) The Claimant is entitled to enforce the provisions of clauses 18.1.2 and 18.1.4 of the Agreement to the extent that enforcement is required and possible. In addition, £2,976.84 remains unpaid for MSF fees (see paragraph 287 above). Clause 18.1.4 of the Agreement requires the telephone number to be transferred (see paragraphs 288-289 above).

g) The Claimant has established a right to damages as a result of Fredbar Limited trading as "Daily Drains" before termination on 19 August 2020 (see paragraphs 290-291 above).

h) The restraint of trade clauses relied upon (clauses 18.2.1.1 and 18.2.1.2 of the Agreement against Fredbar Limited and clauses 18.3.1.1 and 18.3.1.2 against Mr Bartlett) are unenforceable (see paragraphs 300-306 above).

Order Accordingly