

Franchisee left empty-handed despite wrongful termination

A recent case in the English High Court shows how the drafting of brand protection provisions in a franchise agreement caused problems for a franchisor wishing to terminate, but also how problems with valuation methodology left the franchisee empty-handed.

In *MMP v. Antal*, MMP was a Swiss company which sued its franchisor, Antal, claiming wrongful termination of its franchise agreement under which it had run a recruitment agency. Antal had terminated immediately over the telephone, when a candidate who had used the Swiss agency complained that, after his personal relationship with one of the Swiss employees broke down, he had been harassed by her. She had sent him over 1,000 text messages day and night in a two-month period, using contact details from his CV.

The court had to decide:

- whether the employee's acts could be attributed to the franchisee company such that the franchisee might be in breach of its agreement;
- if yes, whether it had committed a breach of the kind which justified immediate termination; and
- if yes, how its losses for the wrongful termination should be calculated.

MMP claimed that its employee's activities in texting and ringing the candidate were wholly personal, but the judge gave this argument short shrift. She had clearly received the CV and contact details in the context of acting as his recruitment agent and the candidate had complained about her actions in her capacity as a recruitment consultant, rather than in her private capacity.

Next, the question was whether Antal had been right to terminate immediately, rather than on first giving 30 days' notice to give MMP time to cure the breach. It could only terminate immediately for a breach of certain specified clauses put in bold. The one on which it relied was the obligation on MMP "not at any time

[to] do anything to affect adversely our name, Trade Marks or other Intellectual Property". (Other clauses, which would have required Antal to give 30 days' notice, obliged MMP "not at any time [to] do anything to prejudice the operation or reputation of the Business, our business or any of our other franchise businesses" or gave the right to terminate for persistent client complaints.) The judge held that this specific clause could only be relied upon to terminate when there was actual damage to the Antal brand (including its reputation). Since Antal had acted quickly to terminate to avoid damage occurring, it could not rely on the clause.

The case is therefore an important reminder of the desirability of those licensing their brands (whether in the franchising context or otherwise) seeking protective clauses in their licences enabling them to terminate swiftly even if damage has not yet occurred, and of the need to check carefully the grounds on which termination can properly take place.

Having found that Antal was in repudiatory breach of the agreement (by having treated it as terminated when it was not), the judge moved on to look at MMP's loss. Much of the judgment is taken up with criticism not only of MMP's accountant's basis of calculating damages (since this looked, on a discounted cash flow basis, at the value of the franchise at the point of termination, rather than at the franchisee's loss of profits arising out of termination) but also of the main employee's evidence which was described as "evasive and unimpressive bluster". In summary, the appropriate basis for damages would have been the difference between the post-termination profits actually made by MMP and those which it could have expected to have made had the franchise arrangement continued. Only where wrongful termination of a franchise led to the franchisee ceasing business altogether would it be appropriate to use a different basis of damages. MMP's approach to damages was "an

hypothesis upon an hypothesis”, since it involved a hypothetical value of the company as at the date of termination as well as the hypothesis that it had ceased doing business altogether on that date, which was simply not the case.

What is more, the facts showed that MMP had had a poor financial performance throughout the five years during which it had been a franchisee and that, if the two main employees had paid themselves proper salaries rather than artificially low sums, it would have been loss-making. It was therefore at most entitled to nominal damages rather than the 2.5m Swiss Francs claimed.

If you would like more information about the subject matter of this update please contact:

Sarah Byrt

Partner

Tel: +44 20 3130 3832

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