HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
KIRBY, HAYNE, CRENNAN AND KIEFEL JJ

MASTER EDUCATION SERVICES PTY LIMITED APPELLANT

AND

JEAN FLORENCE KETCHELL RESPONDENT

Master Education Services Pty Limited v Ketchell [2008] HCA 38
27 August 2008
S139/2008

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1, 2 and 3 of the orders of the New South Wales Court of Appeal made 19 July 2007, and also order 4 save insofar as it deals with costs, and in place thereof order that:*

   (i) there be judgment in favour of the appellant on the Statement of Liquidated Claim issued 15 August 2003, in the sum of $26,043.59 plus interest at the prescribed rate from that date;

   (ii) orders 2, 3, 4 and 5 made by Malpass AsJ on 15 February 2006 be set aside; and

   (iii) the appeal to the Court of Appeal otherwise be dismissed.

On appeal from the Supreme Court of New South Wales

Representation

C R C Newlinds SC with V V Bedrossian for the appellant (instructed by Meehans Solicitor Corporation)

T M Jucovic QC with S J Burchett for the respondent (instructed by McPhee Kelshaw Solicitors)

CATCHWORDS

Master Education Services Pty Limited v Ketchell

Contract – Illegality – Statute not complied with – Appellant franchisor contravened cl 11(1) of Franchising Code of Conduct ("Code") in entering into franchise agreement with respondent franchisee – Section 51AD of *Trade Practices Act* 1974 (Cth) ("TPA") provided that applicable industry codes must not be contravened by corporations in trade or commerce – Court of Appeal of New South Wales held franchise agreement to be unenforceable due to illegality at common law arising from contravention of Code and s 51AD – Whether contravention of Code and s 51AD resulted in illegality and unenforceability of franchise agreement – Whether legislative purpose of Pt IVB of TPA could be fulfilled without franchise agreement being unenforceable in light of remedies available in Pt VI for contravention of s 51AD.

Words and phrases – "code of conduct", "franchise agreement", "illegality".

Trade Practices Act 1974 (Cth), s 51AD, Pt IVB.
Trade Practices (Industry Codes – Franchising) Regulations 1998 (Cth), Sched, cl 11.

1 GUMMOW ACJ, KIRBY, HAYNE, CRENNAN AND KIEFEL JJ. Section 51AD, in Pt IVB of the *Trade Practices Act* 1974 (Cth) ("the Act"), provides that a corporation must not, in trade or commerce, contravene an applicable industry code. The Franchising Code of Conduct[1] is such a code. Clause 11(1) of the Code provides that a franchisor must not enter into a franchise agreement[2] or receive non-refundable money under a franchise agreement[3] unless the franchisor has received from a prospective franchisee a written statement that the prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code.

2 Master Education Services Pty Limited ("the appellant"), as franchisor, provided a disclosure document and a copy of the Code to Ms Jean Ketchell ("the respondent") as required[4], prior to executing a Franchise Agreement with the respondent on 11 February 2000, but it failed to obtain the statement required by cl 11(1). An appeal by the respondent against a judgment in favour of the appellant for $31,887.71, representing fees payable under the Franchise Agreement of $26,043.59 with interest, was allowed by the Court of Appeal of the Supreme Court of New South Wales[5]. Mason P delivered the principal reasons, with which Basten JA and Handley AJA agreed. The Court of Appeal held that the contravention of the Code and of s 51AD led to illegality at common law and consequent unenforceability of the Franchise Agreement. The issue on the appeal to this Court therefore concerns the interaction between Pt IVB of the Act and the common law.

Procedural history

3 The litigation has a complicated procedural history with a hearing in the Local Court, an appeal to an Associate Judge of the Supreme Court, a remitted hearing by the Local Court, a second appeal to the Supreme Court and the appeal to the Court of Appeal.

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1 Scheduled to the Trade Practices (Industry Codes – Franchising) Regulations 1998 (Cth).

2 Clause 11(1)(a).

3 Clause 11(1)(c).

4 Clause 6.

5 *Ketchell v Master Education Services Pty Ltd* [2007] NSWCA 161.

4 In August 2003 the appellant brought proceedings in the Local Court at Campbelltown by Statement of Liquidated Claim under the *Local Courts (Civil Claims) Act* 1970 (NSW), to recover unpaid monthly fees payable under the Franchise Agreement in consideration of the grant of the franchise, together with interest. In her cross-claim the respondent set up contravention by the appellant of the "unconscionable conduct" provision of s 51AC of the Act. In her defence the respondent alleged failure by the appellant to comply with cl 11 of the Code, with the consequence that it was "unlawful for the [appellant] to receive any of the monies claimed by [the appellant] in these proceedings."

5 In the proceedings in the Local Court it was not disputed that the appellant had given the disclosure document to the respondent. Mr T H Hodgson LCM found that the disclosure provisions in the Franchise Agreement had been initialled by the respondent and that she had received legal advice. She had sought and obtained a number of amendments to the Franchise Agreement through her solicitor before the agreement was signed. The respondent had conducted the business on a "trial run" basis for twelve months prior to her signing the Franchise Agreement. These findings were made in connection with his Honour's dismissal of the claim of unconscionable conduct. No challenge is made in this Court to that part of the decision.

6 His Honour went on to find that there had not been compliance with cl 11(1) of the Code. A further ground, that the appellant had not complied with cl 11(2) of the Code, which requires that the prospective franchisor must have received statements from the prospective franchisee that the franchisee has been given advice by any of an independent legal advisor, business advisor or accountant concerning the agreement, before a franchise agreement is entered into, was not pursued to a conclusion before his Honour. The respondent's defence relied upon the appellant's lack of entitlement to enter into the Franchise Agreement or receive the monies claimed by reason of ss 51AD and 51AE of the Act and cl 11(1) of the Code. His Honour did not consider that the contravention made the contract illegal, although damages might be awarded for loss and damage suffered by reason of the contravention, his Honour held, in reliance upon the decision of Windeyer J in *The Cheesecake Shop v A & A Shah Enterprises*[6].

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6 [2004] NSWSC 625.

7 The judgment of the Local Court was set aside by Malpass AsJ, who remitted the matter for a full determination of the issue with respect to non-compliance with cl 11(1) of the Code[7]. On the remitted hearing the Magistrate gave judgment for the respondent, on the basis that the Court could not require payment, since it would involve the appellant breaching cl 11(1) by receiving the monies. The respondent adopts that opinion for the purposes of the appeal. On the further appeal Malpass AsJ did not accept this reasoning. He held that *The Cheesecake Shop v A & A Shah Enterprises* was authority for the proposition that non-compliance with the clause does not render the franchise agreement illegal[8]. It was against this decision that the respondent successfully appealed to the Court of Appeal.

8 The reasons of Mason P commence with a reference to the general rule of the common law that, if legislation prohibits the making of the contract, the contract does not give rise to any enforceable right or obligation[9]. In his Honour's view there is no need to seek guidance from implications in the legislative framework[10]. Section 51AD, read with cl 11 of the Code, directly prohibited the contract in question and the recovery of the monies claimed[11]. Nothing in the Act expressly or impliedly mitigated the general or ordinary rule[12].

9 His Honour did not agree with the view expressed by Windeyer J in *The Cheesecake Shop v A & A Shah Enterprises* as to the effect of the range of remedies provided by Pt VI of the Act, for contravention of Pt IVB, upon a

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7 *Ketchell v Master Education Services Pty Ltd* [2005] NSWSC 399.

8 *Master Education Services Pty Ltd v Ketchell* [2006] NSWSC 28.

9 *Ketchell v Master Education Services Pty Ltd* [2007] NSWCA 161 at [28], referring to *Trade Practices Commission v Milreis Pty Ltd* (1977) 14 ALR 623 at 637 per Brennan J; *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 430; [1978] HCA 42; *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at 532 [49], 546 [102]; [2006] HCA 31.

10 *Ketchell v Master Education Services Pty Ltd* [2007] NSWCA 161 at [31].

11 *Ketchell v Master Education Services Pty Ltd* [2007] NSWCA 161 at [30].

12 *Ketchell v Master Education Services Pty Ltd* [2007] NSWCA 161 at [33].

conclusion of illegality[13]. Mason P observed that in *Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd*[14] it was said that Pt VI was not intended to provide exhaustively for the consequences of a contravention of Pt IV (or Pt V). The passage from the judgment in *Carlton & United Breweries v Castlemaine Tooheys*, to which his Honour referred, contains a reference to the decision of the Federal Court in *Trade Practices Commission v Milreis Pty Ltd*[15], "where it was accepted that the ordinary consequences which the common law attaches to illegality would flow from a breach of s 45(2)"[16]. In his Honour's view the combined effect of s 51AD and cl 11 was on all fours with s 45(2)[17]. In the Federal Court, Rares J has declined to follow the reasoning of the Court of Appeal[18].

10 The appellant submits that, whilst its failure to comply with cl 11(1) was a contravention which might have attracted Pt VI, upon application of the respondent to a court invested with the necessary federal jurisdiction[19], it did not result in the illegality and unenforceability of the Franchise Agreement made between them. For the reasons which follow that submission should be accepted and the appeal allowed.

The correct approach

11 The question on the appeal is whether a franchise agreement is vitiated where it has been entered into by a corporate franchisor which has contravened

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13 *Ketchell v Master Education Services Pty Ltd* [2007] NSWCA 161 at [34].

14 (1986) 161 CLR 543; [1986] HCA 38.

15 (1977) 14 ALR 623.

16 *Ketchell v Master Education Services Pty Ltd* [2007] NSWCA 161 at [36], citing *Carlton & United Breweries v Castlemaine Tooheys* (1986) 161 CLR 543 at 554-555.

17 *Ketchell v Master Education Services Pty Ltd* [2007] NSWCA 161 at [37].

18 *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2)* [2008] FCA 810 at [93]-[109].

19 The respondent submitted that the Local Court would have lacked that jurisdiction but it is not necessary to the decision on this appeal to enter upon that question.

the Code, by entering into an agreement without receiving the required statement from the franchisee, confirming the receipt of information about the franchise and the franchisor and that the franchisee has had sufficient time to understand that information. It is not to be assumed that the common law sanction is to apply in the case of every contravention of a prohibition directed to one of the parties to a contract unless the statute contradicts or displaces such an effect. The correct approach to such a question was explained in the following passage in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*[20]:

> "In *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*[21], Mason J said:
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> > 'The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognised that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute itself is silent upon the question.'
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> That passage was cited by Kerr LJ in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd*[22], where his Lordship said that when a statute contains a unilateral prohibition on entry into a contract, it does not follow that the contract is void[23]. Whether or not the statute has this effect depends upon the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for

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20 (2007) 232 CLR 1 at 29 [45]-[46] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2007] HCA 38.

21 (1978) 139 CLR 410 at 423.

22 [1988] QB 216 at 270.

23 [1988] QB 216 at 273.

> the innocent party, and any other relevant considerations. Ultimately, the question is one of statutory construction."[24]

The statutory provisions and their construction

12 Part IVB was added to the Act by the *Trade Practices Amendment (Fair Trading) Act* 1998 (Cth) ("the 1998 Act"). The Part commenced on 22 April 1998. It deals with industry codes. Franchising is declared to be an industry for the purposes of the Part[25]. Part IVB is designed to operate concurrently with State laws which are not "directly inconsistent with it". Section 51AEA states:

> "It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part."

13 The legislative purpose apparent in s 51AEA is to deny any intention to "cover the field" in the sense of the authorities concerning s 109 of the Constitution[26]. However, so much is presumed in this appeal respecting State (or Territory) legislation. The dispute turns upon the interaction between Pt IVB and the common law, about which s 51AEA has nothing to say. The laws of which it speaks are statute laws of the polities concerned. This reflects the established understanding that s 109 of the Constitution is not directed to displacement of the common law[27]. That displacement occurs to the extent of the operation upon the common law of the federal statute law in question. The respondent's submission to the contrary should be rejected.

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24 See also *Yango Pastoral Company v First Chicago* (1978) 139 CLR 410 at 413-414 per Gibbs ACJ; *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457 per Mason CJ, Deane and Gaudron JJ; [1989] HCA 15.

25 *Trade Practices Act*, s 51ACA(3).

26 See, in particular, *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545; [1977] HCA 34. As to inconsistency between laws of the Commonwealth and those made by legislatures of the Territories, see *Northern Territory v GPAO* (1999) 196 CLR 553 at 580 [53], 581-583 [57]-[61], 586 [75]-[76], 636 [219], 650 [254]; [1999] HCA 8.

27 *Felton v Mulligan* (1971) 124 CLR 367 at 370; [1971] HCA 39; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 247 [183]; [1999] HCA 36.

14 Section 51AE of the Act provides that regulations may be made relating to industry codes. They may prescribe an industry code and declare it to be mandatory or voluntary[28]. Such regulations must be consistent with the Act and for the purposes of giving effect to it[29]. The Trade Practices (Industry Codes – Franchising) Regulations 1998 (Cth) commenced shortly after Pt IVB was inserted, on 1 July 1998. They prescribe the Franchising Code of Conduct, as it is scheduled to the regulations, and provide that it is mandatory[30]. The Code has been amended from time to time since 1998. In these reasons reference is made to the provisions of the Code which stood at the time of the events giving rise to the litigation.

15 Section 51AD is not expressed to prohibit entry into a franchise agreement where a franchisor has not complied with the Code. It does not make performance of such an agreement unlawful in that circumstance. Like the statutory provisions in *Yango Pastoral Company v First Chicago*[31], it contains no reference to contracts or transactions[32]. Its prohibition is directed to compliance with industry codes, which are central to the operation of Pt IVB. An industry code is defined to mean "a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry"[33].

16 As was pointed out in the passage from *Yango Pastoral Company v First Chicago*[34], cited in *ACCC v Baxter Healthcare*[35], it does not always follow from

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28 *Trade Practices Act*, s 51AE(a) and (b).

29 *Trade Practices Act*, s 172(1).

30 Regulation 3.

31 (1978) 139 CLR 410.

32 As observed by Mason J: (1978) 139 CLR 410 at 423.

33 *Trade Practices Act*, s 51ACA(1).

34 (1978) 139 CLR 410 at 423.

35 (2007) 232 CLR 1 at 29 [45]-[46]. Also cited in *Phoenix General Insurance Co v Halvanon Insurance Co* [1988] QB 216 at 270.

a prohibition directed to one party to an agreement that the contract is void. In *Yango Pastoral Company v First Chicago* the statutory prohibition in question[36] prohibited a corporation from carrying on any banking business without an authority to do so, and provided a daily penalty for contravention. It was held that securities taken by a corporation which contravened that provision were not rendered void and unenforceable by the Act. Gibbs ACJ observed that it was directed not at the making or performance of particular contracts, but at the carrying on of any banking business[37].

17 The statutory provision considered in *Australian Broadcasting Corporation v Redmore Pty Ltd*[38] was addressed to the ABC and enjoined it not to enter certain classes of contract without the approval of the Minister. The section did not specify any penalty. The section was concerned with the manner of exercise of powers conferred by other provisions of the statute and was not directed to outsiders having contractual dealings with the ABC. It followed that the failure by the ABC to observe its internal procedures was no answer to an action against it for breach of such a contract.

18 In the present case, the prohibition in s 51AD is directed to securing compliance by franchisors with the requirements of industry codes, and the consequence of contravention is the grant of remedies provided for in Pt VI of the Act[39].

19 In the absence of an express prohibition in the Act, any such prohibition against the making of an agreement, unless there has been compliance with an industry code, must be found by a process of implication, as Mason J observed in *Yango Pastoral Company v First Chicago*. The Court of Appeal relied upon the terms of cl 11(1) of the Code in concluding that entry into a contract was prohibited by the Act. It may be useful to read together regulations and the Act with which they were made, in order to identify the nature of a legislative scheme which they comprise[40]. That is not a warrant for the use of the Code to construe,

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36 Section 8 of the *Banking Act* 1959 (Cth).

37 *Yango Pastoral Company v First Chicago* (1978) 139 CLR 410 at 415.

38 (1989) 166 CLR 454.

39 There is also the possibility of an action under s 51AC.

40 *Brayson Motors Pty Ltd (In liq) v Federal Commissioner of Taxation* (1985) 156 CLR 651 at 652 per Mason J; [1985] HCA 20.

and expand, the terms of s 51AD, in particular by reference to the nature of the language of cl 11(1)[41]. Regulations are to be construed according to ordinary principles of construction[42]. That requires that they be placed in their statutory context[43]. In the case of regulations that includes the legislation under which they are enacted[44] and with which they are required to be consistent.

20 In the Second Reading Speech of the Trade Practices Amendment (Fair Trading) Bill 1997[45] it was stated that it was proposed to strengthen legal rights available with respect to unfair business conduct, the enforcement of rights and access to remedies. The Bill was said to achieve these objectives by implementing industry codes of practice and by providing access to protection against unconscionable conduct. The latter is obviously a reference to the inclusion of s 51AC in Pt IVA, to which reference will later be made.

21 In the Explanatory Statement with respect to the regulations which prescribe the Code, it was said that the operation of the franchising sector had been of concern to the Government for many years. The sector was characterised by high levels of dispute, generally arising out of the imbalance of power between franchisors and franchisees. Major problems in the sector included inadequate disclosures by franchisors prior to franchise agreements being entered into.

22 The purpose of the Code is stated to be "to regulate the conduct of participants in franchising towards other participants in franchising"[46]. This is

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41 See also Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at [3.41]; *Webster v McIntosh* (1980) 32 ALR 603 at 606.

42 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ; [1996] HCA 36.

43 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

44 *One.Tel Ltd v Australian Communications Authority* (2001) 110 FCR 125 at 141 [64] per Hill J.

45 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1997 at 8799-8800.

46 Franchising Code of Conduct, cl 2.

consistent with the purpose of Pt IVB, seen in particular in the definition of "industry code". Part 2 of the Code is concerned with the disclosure of information by a franchisor to a franchisee. Clause 6, appearing in that Part, requires a franchisor to give a disclosure document to a prospective franchisee, or a franchisee proposing to renew or extend a franchise, in accordance with Annexure 1 to the Code. That Annexure provides for the content of a disclosure document. Such a document is to commence with advices to a franchisee, including advice that they assess their financial position and obtain independent advice, and is to include information about the franchisor – their business experience, litigation history, and whether they have any criminal convictions. It extends to information about any requirements of the franchisor for the supply of goods and services and the maintenance of a level of such goods and services by a franchisee, any restrictions upon a franchisee's right to supply goods, payments to be made by a franchisee under the agreement, the franchisee's obligations under the agreement and conditions of the agreement, amongst other things. It specifies how and on what basis information concerning earnings of the franchisee is to be given. The information contained in Annexure 1 "must" be included in a disclosure document (cl 9(2)) which "must" be given to a prospective franchisee at least 14 days before they enter into a franchise agreement or pay non-refundable money to the franchisor (cl 10(a)). The purpose of a disclosure document is stated, by cl 9(1), to be:

> "to give to a prospective franchisee, or a franchisee proposing to enter into, renew or extend a franchise agreement, information from the franchisor to help the franchisee or prospective franchisee to make a reasonably informed decision about the franchise."[47]

23 Clause 11 is entitled "Advice before entering into franchise agreement". Clause 11(1) provides:

> "The franchisor must not:
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> (a) enter into, renew or extend a franchise agreement; or
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> (b) enter into an agreement to enter into, renew or extend a franchise agreement; or

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47 Clause 6A in the current version of the Code expands on this. Its provisions were referred to by Rares J in *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2)* [2008] FCA 810 at [94].

(c) receive non-refundable money under a franchise agreement or an agreement to enter into a franchise agreement;

unless the franchisor has received from the franchisee or prospective franchisee a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and this code."

24 Part 3 of the Code is concerned with the conditions of a franchise agreement. The term "franchise agreement" is defined, in cll 3(1) and 4, to include an express, oral or implied agreement. The reference to an agreement which may later be found by the courts to exist may suggest that the obligations and prohibitions contained in the Code were not intended to prevent such an agreement arising, but this was not a matter taken up in submissions.

25 The purposes of the scheme of Pt IVB and the Code in question are to regulate the conduct of persons in the franchising industry in order to improve business practices, to provide some protection to franchisees proposing to enter into franchise agreements and to decrease litigation. Those purposes are sought to be achieved, in large part, by ensuring that a prospective franchisee is in a position to make an informed decision about the operation of the franchise and is encouraged to take independent advice before entering into a franchise agreement. The scheme is largely directed to the franchisor, who is obliged to provide that information and advice. Section 51AD may be seen to promote compliance with the Code, by providing, in effect, that non-compliance will amount to a contravention, for which there are remedies available under Pt VI. It is no part of the scheme, and unnecessary to the purposes mentioned, to strike down a contract made by a non-complying franchisor. It is sufficient for the purpose of the scheme that a franchisor is aware of the obligations imposed by the Code and that action may be taken by a franchisee under the Act with respect to a contravention of s 51AD.

26 Section 51AD is not converted into a prohibition upon the making of an agreement where there is non-compliance with the Code because cl 11(1) of the Code is expressed in imperative terms. It is not necessary to resort to the principle that regulations cannot be used to add to or alter provisions in the Act which created them. It is not to be inferred from the language of cl 11(1) that the stated prohibition is to have the result that a contract entered into by a non-complying franchisor is to be void and unenforceable. The use of imperative language in cl 11(1) does not require that conclusion. As was pointed out in

Project Blue Sky Inc v Australian Broadcasting Authority[48], it is necessary to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. In determining the question of purpose, regard must be had not only to the language of the relevant provision but also to the scope and object of the whole statute.

27 It was pointed out in *Archbolds (Freightage) Ltd v S Spanglett Ltd*[49] that, if a court too readily implies that a contract is forbidden by statute, it takes it out of its power to provide remedies according to the circumstances of the case. Pearce LJ was there referring to the use of public policy to hold a contract unlawful. Such an issue does not arise in the present case. The provision of remedies in Pt VI may be seen as directed to the range of circumstances which may arise in cases where there has been a failure by a franchisor to provide some or any information to a prospective franchisee or to evidence the giving of that information and the receipt of the necessary advices, as cl 11(1) requires. In some cases the non-compliance may be such as to warrant the court striking a contract down on the application of a franchisee. Such a result would not necessarily follow upon any breach of cl 11(1), which may not have involved any failure to give the required information or the franchisee not understanding it.

28 Part VI of the Act contains a range of remedies for a contravention of s 51AD (and s 51AC). They include the grant of an injunction with respect to conduct engaged in, or which is proposed to be engaged in, which would constitute a contravention of Pt IVB (or Pt IVA) (s 80), damages (s 82), non-punitive orders (s 86C) and the range of orders laid out in s 87(2), including orders varying contracts and refusing to enforce all or any contractual provisions[50]. In *Murphy v Overton Investments Pty Ltd*[51] it was said of these remedies that:

> "This Court has now said more than once[52] that it is wrong to approach the operation of those provisions of Pt VI of the Act which deal

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48 (1998) 194 CLR 355 at 390-391 [93] per McHugh, Gummow, Kirby and Hayne JJ.

49 [1961] 1 QB 374 at 387 per Pearce LJ.

50 *Trade Practices Act*, s 87(2)(b), (ba).

51 (2004) 216 CLR 388 at 407 [44]; [2004] HCA 3.

52 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 503-504 [17] per Gaudron J, 510 [38] per McHugh, Hayne and Callinan JJ, 529 [103] per

(Footnote continues on next page)

with remedies for contravention of the Act by beginning the inquiry with an attempt to draw some analogy with any particular form of claim under the general law. No doubt analogies may be helpful, but it would be wrong to argue from the content of the general law that has developed in connection, for example, with the tort of deceit, to a conclusion about the construction or application of provisions of Pt VI of the Act."

29 The 1998 Act also effected amendments to Pt IVA of the *Trade Practices Act*. The Part at that time contained s 51AA, which provided in general terms that a corporation must not engage in conduct that is unconscionable. It is of some significance that s 51AC was added at the same time as provision was made for the regulation of business conduct as between franchisor and franchisee. Sub-section (1) of that section states that, in trade and commerce, a corporation, in connection with the supply or possible supply of goods or services to a person, should not engage in conduct which is, "in all the circumstances, unconscionable." The section is clearly relevant to a situation of disadvantage, in which a franchisee, not properly informed by a franchisor, might be.

30 The operation of the Act with respect to a contravention of a provision of the Code therefore stands in marked contrast to a contravention of other statutory regimes which, beyond stating that contravention is an offence, are silent as to the remedial consequences for the relations in the civil law between the parties[53]. That was the difficulty presented by the terms of the legislation in *Yango Pastoral Company v First Chicago*[54], which provided only for the imposition of a penalty. The Court was nonetheless able to conclude that the legislative purpose, relating to the business of banking, could be fulfilled without the securities being void or unenforceable.

31 At the time of the additions to the legislation which were made by the 1998 Act, the significance for the operation of the Act, as a whole, of the imposition of norms of conduct such as those in s 51AD (and s 51AC) was well

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Gummow J, 549 [152] per Kirby J; [1998] HCA 69; *Henville v Walker* (2001) 206 CLR 459 at 501-502 [130]-[131] per McHugh J; [2001] HCA 52; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 124-125 [42]-[48] per Gaudron, Gummow and Hayne JJ; [2002] HCA 41.

53 cf *Victoria v Sutton* (1998) 195 CLR 291 at 305 [36]; [1998] HCA 56.

54 (1978) 139 CLR 410.

understood from the authorities dealing with s 52 of the Act. In *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*[55], decided in 1988, the Full Court of the Federal Court[56] said:

> "Section 52 does not purport to create liability, nor does it vest in any party any cause of action in the ordinary sense of that term; rather, s 52 establishes a norm of conduct, and failure, by the corporations and individuals to whom it is addressed in its various operations, to observe that norm has consequences provided for elsewhere in the Act[57]."

32 More recently in *SST Consulting Services Pty Ltd v Rieson*[58] it was confirmed that the proscriptions of certain forms of conduct in the Act take several different forms. They may hinge upon the making of a contract, arrangement or understanding (s 45(2)) or focus upon the supply of or acquisition of services, like the exclusive dealing provisions. Making a contract may constitute a contravention of the provisions, but they encompass many other kinds of conduct. Other provisions of the Act prohibit acquisitions of shares or assets in a corporation which may have a particular effect (s 50(2)). Provisions in Pt IVA prohibit unconscionable conduct; the provisions of Pt V prohibit various other forms of conduct including, of course, misleading or deceptive conduct.

33 Part IVB proscribes conduct by reference to industry codes of conduct. The language and purpose of s 51AD does not equate with s 45(2) of the Act, to which the Court of Appeal referred. That sub-section provides that a corporation shall not make a contract or arrangement, or arrive at an understanding, which would have or be likely to have the effect of substantially lessening competition, or give effect to a provision having that effect. The terms of the sub-section are a sufficient basis for distinguishing what was said in *TPC v Milreis*[59] about the operation of the common law to s 45(2), which was referred to in *Carlton &*

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55 (1998) 19 FCR 469 at 473.

56 Lockhart, Morling and Gummow JJ.

57 *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79 at 86.

58 (2006) 225 CLR 516 at 526 [26]-[28] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

59 (1977) 14 ALR 623.

United Breweries v Castlemaine Tooheys[60] with apparent approval, when construing s 51AD. However, that reasoning was relied upon by the respondent in supporting the approach of the Court of Appeal and further comment is necessary.

Earlier authorities cited by the respondent

34 In *TPC v Milreis* a Full Court of the Federal Court[61] was concerned with an argument that ss 87 and 45(2) of the Act were interdependent, in connection with the alleged invalidity of s 87. In concluding that that was not the case, the Court held that the ordinary consequences which the common law applied to illegality would flow from a breach of s 45(2)[62]. It should be noted that the case was decided on 22 June 1977, before the inclusion of s 4L in the Act[63] and before the decision in *Yango Pastoral Company v First Chicago*[64]. Section 4L provides that if the making of a contract contravenes the Act, by reason of the inclusion of a particular provision in the contract, then, subject to any order made under ss 87 and 87A, nothing in the Act affects the validity or enforceability of the contract otherwise than in relation to that provision insofar as the provision is severable. In *SST Consulting Services v Rieson* it was observed that the central proposition of s 4L is that a contract is valid and enforceable, which is the direct opposite of the ordinary rule that a contract, the making of which is illegal, will not be enforced[65]. What was said in *TPC v Milreis* must now be read with s 4L and the analysis of that provision in *SST Consulting Services v Rieson.*

35 The fact that the Act contains elaborate provisions with respect to contraventions of Pt IVB was pointed out in *ACCC v Baxter Healthcare*[66]. As

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60 (1986) 161 CLR 543 at 554-555.

61 Bowen CJ, Brennan and Deane JJ.

62 (1977) 14 ALR 623 at 629-631 per Bowen CJ, 636-640 per Brennan J, 645-646 per Deane J.

63 By the *Trade Practices Amendment Act* 1977 (Cth), which commenced on 1 July 1977.

64 Which was delivered on 2 November 1978: (1978) 139 CLR 410.

65 (2006) 225 CLR 516 at 528 [34].

66 (2007) 232 CLR 1 at 29 [46].

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ there observed, the Act is far from being silent upon the question of the consequences of illegality. The intention, that contravention of Pt IVB would attract the range of remedies under the Act, including injunctive relief and damages, is confirmed in the Explanatory Memorandum to the Bill[67]. It is not to be inferred that the more drastic consequences of the common law were intended to follow upon a contravention of a code of conduct.

36 The respondent relied upon the rejection, in *Carlton & United Breweries v Castlemaine Tooheys*, of a submission that the Act "is a code and that the only consequences which flow from any contravention of the provisions of the Act are those for which the Act itself provides [in Pt VI]."[68] The submission was made with respect to a subsidiary argument in that case. The principal issue turned upon the interpretation of what was the then conferral, by s 86 of the Act, of jurisdiction upon the Federal Court to hear and determine proceedings under Pt VI of the Act, that jurisdiction being "exclusive of the jurisdiction of any other court", other than that conferred on the High Court directly by s 75 of the Constitution. This Court held[69] that the Supreme Court of New South Wales had jurisdiction to entertain a defence to an action to enforce a contract, that the contract was "in breach of" s 45 and s 45D of the Act and that certain terms could not be implied because such a contract would contravene those provisions, and that the determination of the matters the object of the defence was not exclusively within the jurisdiction of the Federal Court. The Court had assumed that these matters of defence nevertheless arose under the Act[70]. It is not necessary to discuss the Court's reasoning further, as it does not bear upon the issues in this appeal.

37 In rejecting the submission that Pt VI was a "code", the Court in *Carlton & United Breweries v Castlemaine Tooheys*[71] identified a number of provisions which show that the Act itself does not intend Pt VI to provide for all

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67 Explanatory Memorandum to the Trade Practices Amendment (Fair Trading) Bill 1997 at 1.

68 (1986) 161 CLR 543 at 554.

69 (1986) 161 CLR 543 at 550, 555.

70 (1986) 161 CLR 543 at 551.

71 (1986) 161 CLR 543 at 554.

consequences: provisions such as ss 45(1) and 45B(1), which provide that certain contractual provisions or covenants are unenforceable; s 87(5), which provides that the powers under the section do not affect any other powers a court may have in relation to a contract or covenant in proceedings before it; and s 163A, which provides for the making of declarations and orders as to the operation and effect of certain provisions of the Act and as to the validity of an act, including orders by way of prohibition, certiorari and mandamus. These references do not support an argument that the Act as a whole is not intended to provide for the consequences of a contravention of its prohibitions upon conduct. The provision made for consequences other than those provided in Pt VI highlight the extent to which the Act does so provide. The term "code", with respect to the Act, may be more apt to confuse than enlighten. The operation of the Act was recently described in *SST Consulting Services v Rieson* as follows[72]:

> "The Act does much more than proscribe (with the elaborations mentioned) certain forms of conduct. It contains detailed provisions, in Pt VI, dealing with the enforcement of the Act and providing remedies for past or proposed contraventions of the Act. In addition, particular provision is made for the extent to which certain contractual provisions are enforceable."

The majority went on to refer, in that regard, to s 45(1).

Conclusion

38 The detailed provision by the Act for the consequences of non-compliance with an industry code, such as the Franchising Code of Conduct, does not support a conclusion that it was intended that the harsh consequences provided by the common law were to follow upon contravention of s 51AD. The Act provides a more flexible approach. It allows a court to prevent entry into a franchise agreement, to vary the terms of an agreement entered into in breach of the Code, or to terminate such an agreement or provide compensation for loss and damage, if it is shown to have been caused by the contravention. In that regard the extended meaning which may be given to loss and damage by s 82, which is

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72 (2006) 225 CLR 516 at 526 [29] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

suffered by reason of entry into contractual obligations, may assume significance[73].

39 The final matter which supports the non-applicability of the common law sanction for contravention of s 51AD has regard to the position of the franchisee. One of the purposes of the Code is the protection of the position of the franchisee. It is not expressed to prohibit the franchisee from entering into an agreement where a franchisor had not complied with cl 11. As Rares J pointed out in *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2)*[74], it would be an unusual result if, in that circumstance, a franchisee's bargain was struck down in every case, regardless of the position in which it places the franchisee. It is not to be assumed in every case that a franchisee wishes to be relieved of their bargain. To render void every franchise agreement entered into where a franchisor had not complied with the Code would be to give the franchisor, the wrong-doer, an opportunity to avoid its obligations[75], and at the same time to place the franchisee in breach of obligations to third parties. A preferable result, and one for which the Act provides, is to permit a franchisee to seek such relief as is appropriate to the circumstances of the case. Some cases of non-compliance with cl 11 might involve substantial non-disclosure; others may only involve a failure to obtain the written statement, confirming that the franchisee has read and understood the disclosure document and the Code. This is such a case.

40 Section 51AD does not in its terms prohibit the making of a franchise agreement where a franchisor has not complied with the Code. That section and the Code are concerned with the regulation of the conduct of participants in the franchising industry; in particular the conduct of franchisors. It is not to be inferred from a purpose which promotes or prescribes better and fairer business practices that contractual relations between parties will be affected. As was pointed out in *SST Consulting Services v Rieson*[76], the Act is far from being silent upon the question of the consequences of illegality, but, rather, contains elaborate provision. That is not to say that the express provisions of the Act answer all

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73 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 33 per Black CJ, 42-43 per Gummow J, 46-48 per Cooper J.

74 [2008] FCA 810 at [103]-[104].

75 See also *Yango Pastoral Company v First Chicago* (1978) 139 CLR 410 at 426 per Mason J.

76 (2006) 225 CLR 516 at 527 [30].

questions that may arise, but they answer many of them, and set the context in which others are to be answered. The provision made by the Act, in Pt VI, for remedies for contraventions of Pt IVB, and the unconscionability provisions of Pt IVA, tell strongly against an intention that the common law remedy for illegality was to apply. Such a conclusion is reinforced by the disadvantage which may be caused to a franchisee, which would not be consistent with the purposes of Pt IVB and the Code. It follows that s 4L does not apply to require the severance of the respondent's obligation under the Franchise Agreement to pay monies, as the respondent contended.

41 It is possible to agree with the views of Mason P for the Court of Appeal[77] that the "franchisor's breach of cl 11 [of the Code]" was not "inconsequential" and that the "disclosure requirements of [the] Code were clearly enacted for the protection of prospective licensees" without embracing his Honour's conclusion that the remedy implicit in the circumstances was that provided by the common law. The context of the Act itself, and the range of remedies that it affords for an established breach of an industry code, produce the conclusion that the better view of the legislation is that propounded by the appellant. It is that view to which this Court should give effect.

Orders

42 The appeal should be allowed and the orders of the Court of Appeal of the Supreme Court of New South Wales set aside, save for the orders as to costs. In accordance with the undertaking provided by the appellant the order for costs in the Court of Appeal is not to be disturbed and no order is to be made in its favour on this appeal. In place of the substantive orders of the Court of Appeal, there should be an order (i) for judgment in favour of the appellant on the Statement of Liquidated Claim issued 15 August 2003 in the sum of $26,043.59 plus interest at the prescribed rate from that date, (ii) that orders 2, 3, 4 and 5 made by Malpass AsJ on 15 February 2006 be set aside, and (iii) otherwise dismissing the appeal to the Court of Appeal.

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77 [2007] NSWCA 161 at [44].