Neutral Citation Number: [2022] EWHC 3195 (Comm)

Claim No: CC-2021-LDS-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
CIRCUIT COMMERCIAL COURT (KBD)

Leeds Combined Court Centre
The Courthouse
1 Oxford Row
Leeds, LS1 3BG

Date: 21/12/2022

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

HUNTERS FRANCHISING LIMITED	**Claimant**
- and -	
(1) BRYBOND LIMITED	
(2) STEPHEN PAUL BERSON	**Defendants**

- -
- -

Jason Evans-Tovey (instructed by **gunnercooke LLP**) for the **Claimant**
Simon Myerson KC (instructed by **Harrowells Ltd.**) for the **Defendants**

Hearing dates: 5-8 September, 29 November 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HH JUDGE KLEIN

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 a.m. on 21 December 2022.

HH Judge Klein:

1. This is the judgment following the liability trial of a claim by a franchisor, the Claimant ("Hunters"), against its Leeds master franchisee, the First Defendant ("Brybond"), and that master franchisee's principal, the Second Defendant ("Mr Berson"). Because of the sensible collaboration of the parties and their lawyers, and their welcome (and wholly appropriate) pragmatism, I need to determine only a few narrow issues on liability.

2. Even though the issues I have to determine are few and narrow, I do need to set out some of the background to the claim. In this judgment, I set out the background, evidence and submissions only to the extent necessary, to allow a reader to understand the reasons for my decision. Nevertheless, before reaching my decision, I considered all the evidence I was asked to read or that I heard, and all the very helpful submissions of Mr Evans-Tovey for Hunters and Mr Myerson KC for the Defendants.

3. Because many of the facts were not disputed at trial, where, in this judgment, I refer to facts without qualification that is because, as I understand it, they are not disputed.

4. Although there was originally a dispute between the parties about whether Mr Berson has had a primary, or only a secondary, liability to Hunters under the terms of the relevant (2014) master franchise agreement, the Defendants accepted, at trial, that Mr Berson and Brybond have the same liability (if any) to Hunters. At the trial, the parties referred to "Mr Berson" as a shorthand for both Defendants. I propose to do the same, unless it is necessary to distinguish Brybond from Mr Berson.

Background

5. The Hunters organisation is a well-known, now national, estate agency and letting agency business. Before the 2008 financial crash, at least until about 2006, it operated through its own estate agency offices. As a result of the financial crash, it was forced to close some of those offices, but, by 2009, had developed a franchise model for its business, which was attractive to other, independent, estate agents, who had likewise suffered as a result of the financial crash.

6. Hunters have offered two forms of franchise arrangement: a personal franchise arrangement and a premises franchise arrangement. Under the former, a personal franchisee could operate, as a Hunters estate agent, from their own home, whilst, under the latter, a premises franchisee operated from Hunters-branded premises.

7. Hunters have also formed master franchise areas (initially, in Leeds, and later in London, Bristol and Lincoln), within which personal and premises franchisees within the area have operated.

8. As is established by a master franchisee's "development requirement", which I will set out in more detail below, a key responsibility of a master franchisee has been to increase the number of franchisees in their area, in addition to, generally, supervising those franchisees, in return for, in effect, commission payments from Hunters. In this way, Hunters' business has grown, the responsibility for growing that business has largely fallen on its master franchisees in the areas where they have operated, and

those master franchisees have also benefited from an increase in the number of franchisees operating in their area.

9. Initially, Hunters' focus was on growing the number of its personal franchisees, but, by 2014, its focus pivoted to growing the number of its premises franchisees in particular.

10. Mr Berson has been a successful Leeds estate agent. He began in business in 1976, and sold his agency for a substantial sum in 1987. Having thereafter pursued a career in property development and house building, following the financial crash he turned his mind to the estate agency business again. He remained well-known in that field.

11. On 27 March 2009, Mr Berson entered into a master franchise agreement ("the 2009 MFA") for the Leeds area with Hunters. By the 2009 MFA, Mr Berson (or, to be precise, Brybond, but see above) was awarded "exclusive rights to sell a minimum of 20 x Personal Franchise Areas in the [Leeds area]". Thereafter (and at all the times with which I am concerned), Mr Berson was also, himself, the premises franchisee of the Hunters-branded Leeds city centre premises. The 2009 MFA was a conditionally-renewable five year agreement. The 2009 MFA provided that:

> "failure to adhere to each of the openings as per the Schedule will be classified as a material breach of this agreement which if not rectified within two months will enable [Hunters] to terminate the agreement."

The schedule provided, by way of extension to the award to Mr Berson of the exclusive "right" I have already set out, that:

> "the first Personal Agent will open within six months of the date of this agreement. Each subsequent month the cumulative number of agents must increase by one."

This (together with the exclusive "right") represented the 2009 MFA development requirement.

12. By November 2012, relations between Hunters and Mr Berson had deteriorated somewhat because, as Mr Berson accepted in his email dated 22 July 2012 to Kevin Hollinrake, Hunters' then managing director, he had not sold the number of personal franchises he had been required to sell under the 2009 MFA. However, Mr Berson also asserted that Hunters was in breach of its obligations under the 2009 MFA, by purchasing, and re-branding as Hunters premises, in the Leeds area, a Bairstow Eves-branded franchised estate agency in Pudsey (where, effectively, Martin Collins was, and at all times with which I am concerned remained, the franchisee) ("Pudsey") and in Yeadon (where, effectively, David Metcalfe was and remained the franchisee) ("Yeadon"). Hunters had promised, in the 2009 MFA, not to "open an estate agency office in [the Leeds area] whilst [the 2009 MFA] remains in force".

13. On 12 November 2012, Hunters and Mr Berson entered into a written amendment ("the 2012 side letter") by which, amongst other amendments, the schedule to the 2009 MFA was amended as follows:

> "Replaced by a minimum of 1 additional Unit each year - with a Unit being either 3 additional personal agents or an additional office. The start point for the Schedule is agreed as 3 offices (being City Centre, Pudsey and Yeadon) and 3 PAs (Ed, Pav and Gary) from 27 March 2012 which equates to 4 Units in total. For the avoidance of doubt as from 27 March 2014 the minimum cumulative number of operating Units must be 6. By 27 March 2019 and thereafter the minimum cumulative number of operating Units must be 11. All PAs in the region (direct or indirect through alternate hub will count)…
>
> In the event of a failure to adhere to the amended Schedule above, the Franchisee will lose its right to exclusivity over any location not already sold in the Area together with the associated income streams of such unsold location. Should exclusivity be lost due to failure to adhere to the Schedule, locations within the Area can be reinstated at no additional charge on a specific basis by the sale of Franchisees by the Master Franchisee, subject to the approval of the Franchisor which will not be unreasonably withheld."

14. Importantly for present purposes, not only was the focus of the arrangement thereby pivoted somewhat from personal franchises to premises franchises, but a breach of the 2009 MFA development requirement was, as is not disputed, intended by the parties to only bring about the loss of Mr Berson's exclusivity rights in the Leeds area and not to be a terminable breach of the 2009 MFA. (I do not need to decide whether the 2012 side letter did have that effect).

15. By March 2014, a Hunters-branded North Leeds estate agency ("North Leeds") had opened, under the management of Mr Berson's son, Jack, but the cumulative number of "Units" was only five, not six. The 2009 MFA was also due for renewal.

16. North Leeds had only opened after a detailed business plan, including a "P&L and cashflow" had been provided to Hunters (see the 16 July 2012 email from Mr Hollinrake to Mr Berson).

17. By February 2014, Mr Berson had indicated that he wished to renew the 2009 MFA. On 13 March 2014, Edward Jones, a Hunters director, sent an updated draft master franchise agreement to Mr Berson for his consideration. The draft provided that, in the event that the development requirement was not complied with, the agreement would automatically terminate. This was more onerous than the 2009 MFA and, more importantly, more onerous than the 2012 side letter. Mr Berson therefore emailed Mr Jones, and Andrew Grant, Hunters' operations director on 18 March 2014:

> "As per the side letter dated 1 November 2012, ... "In the event of a failure to adhere to the amended schedule, the Franchisee will lose its right to exclusivity over any location not already sold in the Area together with the associated income streams of such unsold location. Should exclusivity be lost due to failure to adhere to the schedule, locations within the area can be reinstated at no additional charge on a specific basis

> by the sale of Franchisees by the Master Franchisee, subject to the approval of the Franchisor which will not be unreasonably withheld"
>
> b. The [draft agreement] conflicts with our agreement as per the side letter."

It appears, therefore, that Mr Berson understood the 2012 side letter to make a breach of the 2009 MFA development requirement a non-terminable breach.

18. Mr Grant responded the following day:

> "Agreed, if you are opting for a renewal MFA based on opening an additional 5 premises (3 Personal Agents equates to 1 premises) over the next 5 years then we will either amend the MFA or enter into a Side Letter to the MFA wording to the same effect i.e. if you fail to meet the opening schedule you will only lose exclusivity and loss of shared MSF income from the unopened location, but you will be able to reinstate locations for no additional charge."

In other words, if Mr Berson, as he did, agreed to what became the 2014 Development Requirement, the relevant term of the 2012 side letter would effectively operate, which Mr Grant understood to mean that Mr Berson would "only lose exclusivity and loss of shared…income…"

19. Mr Grant then emailed Mr Berson on 25 April 2014 ("the Grant 25 April email"), attaching a further draft master franchise agreement, and said:

> "<u>Consequence of Failing to Meet Development Requirement</u>
>
> I have now made this a non-terminable offence. Instead I have added a new Clause 10 into the MFA which means you lose exclusivity but are still able to open additional locations…
>
> <u>Adel</u>
>
> We have an interested party in Adel. We have researched the area including potential penetration from Horsforth, Ed Catchpole [(the personal franchisee in the Chapel Allerton and Moortown areas of Leeds)], Pav Flora [(the personal franchisee in the Hyde Park area of Leeds)] and of course North Leeds and see no conflict - please see attached colour coded Index and Penetration Map. If this were to proceed any further you would be entitled to half the Initial Fee we receive and of course half of the MSF and it would be counted towards your Development Requirement. I have included this within the DOV relating to the new MFA."

20. On 30 April 2014, Mr Berson suggested that there was something about what became the development requirement (the 2014 Development Requirement) in the master

franchise agreement made a few days later (the 2014 MFA) which was "not quite right" and which may have been exploitative. Mr Grant responded the same day:

> "I cannot see how we could exploit this? The reason we would even consider entering into a master franchise agreement is that we genuinely believe that the master franchisee will develop the territory whilst we can focus our sales attention elsewhere. If a master franchisee losing its exclusivity then we have both failed."

In response to a comment from Mr Berson, that: "I think it is a trust issue and whether or not we both trust each other to do the right thing?", Mr Grant responded:

> "Absolutely Stephen - at the end of the day there has to be trust between the parties and in reality common sense will always prevail. For instance under the existing master franchise agreement you should have opened your 6th Outlet by the 27 March 2014 yet we have not yet breached you and we have recently passed you over a potential PA lead and, hopefully, will be celebrating (with you) the opening of Horsforth an Adel."

21. On 1 May 2014, Hunters and Mr Berson (and, to be clear, Brybond) entered into a (professionally-drafted) new master franchise agreement ("the 2014 MFA") for a slightly-expanded Leeds area (which agreement Mr Berson's lawyers had apparently previously considered). So far as is relevant, the 2014 MFA provided as follows:

> "1.1 In this Agreement unless the context otherwise requires…"Development Requirement" means the execution of the Franchise Agreements and openings in the [Leeds] Area in accordance with the Schedule…
>
> 2.1 The Master Franchisee shall comply with the Development Requirement…
>
> 2.4 When promoting the Proposition to third parties the Master Franchisee shall…always advise third parties that…they will need to go through the Franchisor's standard vetting process which will include (but is not limited to)… a financial evaluation and audit of the third party's business if an existing estate and/or lettings agency currently trading [and that (per clause 2.4.7.3)] an application to become a franchisee may be rejected with no reason given and the Franchisor's decision is final.
>
> 4.1 The Franchisor shall :-
>
> 4.1.1 (subject to the terms of this Agreement) enter into each of the Franchise Agreements but shall not be obliged to enter into more Franchise Agreements in the Area than those listed in the Schedule;

4.1.2 provide all reasonable assistance to the Master Franchisee to find suitable locations for the Premises within the Area…

4.2 The Franchisor shall as soon as reasonably practical after receiving all such details as it shall require concerning a proposed location for the Premises indicate in writing to the Master Franchisee whether such location is suitable. The Franchisor's decision shall be final.

4.3 For so long as this Agreement is in force and the Development Requirement complied with (and the Master Franchisee is fully compliant with the terms of this Agreement and the Franchise Agreements) the Franchisor shall not itself open an Outlet under the Brand in the Area nor enter into any franchise agreement licensing the use of the Brand with a third party in the Area, except if :-

…4.3.3 The Development Requirement has been met with all 10 (ten) Franchise Agreements executed and the cumulative number of Premises open reaches 10 (ten) as per the Schedule...

8.1 This Agreement terminates at the expiry of the term.

8.2 At that time, the Master Franchisee will be eligible to be awarded a Renewal Agreement subject to…

8.2.3 no breach of this Agreement, which would have entitled the Franchisor to terminate this Agreement, has occurred and no breach of any provision of this Agreement shall be unremedied at the time of the Master Franchisee's notice or the agreement date of the Renewal Agreement;…

8.2.5 the Master Franchisee having performed its obligations under this Agreement to the Franchisor's reasonable satisfaction.

9.1 Should the Master Franchisee fail to meet any of its obligations under this Agreement the Franchisor shall:-

9.1.1 advise the Master Franchisee in writing ("Written Notice") of the obligations it has failed to meet and provide the Master Franchisee with 5 (five) working days to remedy the breaches of its obligations to the reasonable satisfaction of the Franchisor…; and

9.1.2 in the absence of the breaches identified being remedied to the Franchisor's reasonable satisfaction within 5 (five) working days of the Written Notice, the Franchisor shall issue the Master Franchisee with a system violation warning letter ("SVL"); and

9.1.3 in the absence of the breaches identified within an SVL being successfully completed within the timelines required by the SVL, the Franchisor shall issue the Master Franchisee with a notice of breach ("Breach Notice") providing the Master Franchisee with a fixed period of time to remedy those breaches to the reasonable satisfaction of the Franchisor…

9.3 Whilst a breach identified within an SVL or Breach Notice remains unremedied to the Franchisor's reasonable satisfaction, the Master Franchisee will lose its rights to receive the Payments in Clauses 6.1 and 6.2 [(i.e. recurring commission payments to which Mr Berson was otherwise entitled under the 2014 MFA arising from the continued operation of the Leeds area franchisees)]…

10.1 If the Master Franchisee fails to comply with the Development Requirement :-

10.1.1 It shall lose the exclusivity afforded to it within Clause 4.3 of this Agreement allowing the Franchisor to open Outlets under the Brand in the Area itself or by entering into a franchise agreement licensing the use of the Brand with a third party; and

10.1.2 It shall not benefit from any Net Management Service Fees payable under the terms of Clause 6 of this Agreement for any new openings within the Area after its loss of exclusivity; and

10.1.3 Any new Outlets opened by the Franchisor as per Clause 10.1.1 of this Agreement shall not be counted towards the Development Requirement….

10.3 The Master Franchisee may still open Premises within the Area after loss of exclusivity subject to the Franchisor's then current entry criteria and vetting process and the location being available…

10.4 After loss of exclusivity, if the Master Franchisee subsequently meets the Development Requirement it will then retain the exclusivity afforded under Clause 4.3 of this Agreement except that any franchise agreements entered into by the Franchisor and/or Outlets opened in the Area between the original loss of exclusivity and the Master Franchisee regaining exclusivity shall not be included in, or subject to, this Agreement…

12.1 This Agreement shall terminate :-

12.1.1 on the Master Franchisee's failure to satisfy a Breach Notice to the Franchisor's reasonable satisfaction and/or within the fixed timelines set by the Breach Notice;

12.1.2 if the Master Franchisee commits two or more applicable defaults within any twelve consecutive Months, or three or more applicable defaults within any twenty four consecutive Months. An "applicable default" being a breach of the same obligation under this Agreement and/or the Manual, or any other Franchise Agreement between the Master Franchisee and the Franchisor;

12.1.3 [if Mr Berson committed a terminable breach of a franchise agreement];

12.1.4 [on the expiry of the term]…

12.3 On termination of this Agreement :-

12.3.1 the exclusivity granted in clause 4.3 shall terminate;

12.3.2 any Net Management Service Fees and/or Payments still owing to the Master Franchisee will no longer be due to the Master Franchisee…

THE SCHEDULE

Number of franchise agreements executed	Location Name	Date by which Premises opened	Cumulative Number of Premises opened
1st Premises	Leeds City Centre	Already Open	1
2nd Premises	Pudsey	Already Open	2
3rd Premises	Yeadon	Already Open	3
4th Premises	North Leeds	Already Open	4

5th Premises	PA's Ed Catchpole, Pav Flora, Gary Romans (part)	Already Open	5
6th Premises	TBA* (within the Area)	12 months from date of Agreement	6
7th Premises	TBA* (within the Area)	24 months from date of Agreement	7
8th Premises	TBA* (within the Area)	36 months from date of Agreement	8
9th Premises	TBA* (within the Area)	48 months from date of Agreement	9
10th Premises	TBA* (within the Area)	60 months from date of Agreement	10

* TBA = to be advised as and when Premises are located

> The Parties agree for the purposes of the Development Requirement that 3 (three) Hunters Personal Agent Franchise Agreements, executed with the Franchisor, shall count as the equivalent of 1 (one) Premises. The maximum number of Premises allowed under this Agreement is 10 (ten). However if, for example, only operating with Personal Agent Franchise Agreements within the Area, the maximum number of Personal Agent Franchise Agreements allowed under this Agreement would be 30 (thirty)."

22. The parties agreed at trial that, properly construed, the development requirement in the 2014 MFA ("the 2014 Development Requirement") imposed an obligation on Mr Berson to open, or procure one (or, as the case may be, more than one) third party to open, three additional personal franchises or one additional premises franchise annually in each year of the 2014 MFA term, and a further obligation to ensure that there remained open by the end of the first year of the 2014 MFA six "units" (for example, five premises franchises and three personal franchises), by the end of the second year of the 2014 MFA seven "units", and so on. To be precise, as recited in a consent order I made at trial, the Defendants conceded that:

> "the Development Requirement in clause 2.1 and the Schedule to the 2014 Master Franchise Agreement constituted primary obligations on each of them to have executed themselves or procured the execution of Franchise Agreements for, and to have cumulatively opened: six premises (as counted in the Schedule) by 1 May 2015, seven premises by 1 May 2016, eight premises by 1 May 2017, nine premises by 1 May 2018; ten premises by 1 May 2019."

23. Mr Berson also accepted that he had breached the 2014 Development Requirement in all respects. To be precise, as the consent order recites, the Defendants conceded that:

> "their failings to execute and open the applicable cumulative numbers constituted annual breaches by each of them."

24. Returning to the chronology, on 1 May 2014, the parties to the 2014 MFA also executed a deed of variation to it ("the 2014 Variation"). By the 2014 Variation:

> "6. <u>Horsforth</u>
>
> The Master Franchisee agrees that the Chris Martin Partnership Limited [(effectively, Mr Collins)] may open Premises in Horsforth. The Franchisor agrees that Horsforth will be treated as a Third Party Owner and consequently the Master Franchisee will benefit from half the monthly Net Management Service Fees received by the Franchisor.
>
> 7. <u>Adel</u>
>
> The Franchisor has received an approach from a third party who has expressed an interest in opening Premises in Adel. The

> Master Franchisee agrees, subject to the prospect passing the Franchisor's vetting procedures, that it will accept Adel as an Opening under the terms of the Agreement whereby it shall receive half of the Initial Fee payable and be entitled to half the monthly Net Management Service Fees received by the Franchisor."

It is not in dispute that the third party who was interested in taking a premises franchise of the Adel area of Leeds (including the Bramhope area) was Mr Metcalfe (i.e. Yeadon) (which probably explains why Mr Grant did not make any comment about "potential penetration" into Adel from Yeadon or "conflict" with Yeadon in his 25 April 2014 email to Mr Berson).

25. A premises franchise of the Horsforth area of Leeds was executed on 13 August 2014. The franchisees were effectively Mr Collins and the manager of Pudsey, Jonathan Malkinson. About that time they opened a Hunters-branded estate agency in Horsforth ("Horsforth").

26. To fully understand how the dispute has in fact come about, it is important to appreciate the following.

27. At all times there has been an area in north Leeds which has not been the subject of any franchise agreement, and so has not been exclusively available to any one Hunters franchisee. That area of north Leeds is roughly an inverted triangle, comprising, from north to south the following Leeds areas: Bramhope, Adel and West Park. (In some of the discussions which took place, the Adel area was treated as including the Bramhope area, as I have already noted). The inverted triangle to which I refer is roughly bounded, on the west, by Yeadon (in the north) and Horsforth (in the south) and, on the east, by (from north to south) North Leeds, and the Chapel Allerton, Meanwood and Headingley areas of Leeds. The pinnacle of the inverted triangle abuts Pudsey in the south.

28. In the summer of 2014, relations between Yeadon and Horsforth may well have broken down because both were operating in the non-exclusive area of Adel (described by the parties to the litigation as "free territory". They also referred to the practice of a franchisee operating outside their exclusive area, in particular in free territory, as "farming"). Whether that was or was not (because of the timing) the case, in later years, particularly in those with which I am concerned, a practice developed of Yeadon, in particular, farming in the Adel area, in particular in Bramhope (Bramhope"), ("Adel") and Horsforth farming in the West Park area ("West Park") and, although this may be less significant for present purposes, in Adel.

29. Returning to the chronology, in any event, on 1 October 2014, Hunters, Horsforth and Yeadon entered into a confidential deed ("the 2014 Settlement Agreement"), which provided as follows:

> "Postcode District LS16
>
> It is agreed that Yeadon will not open a Hunters franchised estate agency and lettings branch within LS16 without a mutually acceptable agreement between the parties with respect

> to operating boundaries, such agreement being written and signed by the parties."

The LS16 postcode comprises Bramhope, Adel, and West Park. In short, although Yeadon had apparently received Hunters', perhaps tentative, in principle, consent to open a Hunters-branded estate agency in Adel, Yeadon was agreeing that it would not do so without reaching an agreement with Horsforth with respect to the boundaries of the exclusive area of that premises franchise.

30. Perhaps surprisingly, because he was the Leeds area master franchisee and the LS16 postcode is in the Leeds area, Mr Berson did not learn of the 2014 Settlement Agreement at the time it was made. With hindsight, that may have been unfortunate, because a significant complaint of Mr Berson has been that Hunters did not act fairly and openly with him by omitting to tell him about the agreement.

31. Before continuing the chronology, it is helpful to explain how Mr Berson went about trying to develop the Leeds area during the term of the 2014 MFA. His focus was, despite Hunters encouragement to look more widely in Leeds, on the north Leeds area. The following introductory explanation is very much a thumbnail sketch, because, as at least some of the proposals that I am about to mention developed, they were refined to try to address the risk of competition between Hunters franchisees.

32. Walker Smale was an independent estate agency, which, at the times I am concerned with, was apparently more or less struggling to survive. It had premises in Bramhope (to the north of Adel itself) and West Park and it had had premises in Ilkley, but they had been closed and only the front window was being used to advertise properties.

33. In about May 2016, there was a proposal for Walker Smale to become a Hunters-franchised business, so that its Bramhope and West Park premises would be Hunters-branded estate agencies. I refer to this proposal as "the Walker Smale rebrand 1".

34. In about February 2017, there was a proposal for Horsforth to open a further Hunters-branded estate agency, under a separate premises franchise, in Adel. This proposal, having not come to fruition then, was resurrected in about October 2017. I refer to this proposal as "the Horsforth 2017 extension proposal".

35. In about November 2017, the Walker Smale rebrand 1 was resurrected. I refer to this proposal as "the Walker Smale rebrand 2".

36. In February 2018, there was a proposal for Horsforth to merge with Walker Smale, with the effect that Horsforth would then have had an interest in Hunters-branded premises in Adel and West Park. I refer to this proposal as "the Walker Smale merger proposal".

37. Under the Walker Smale rebrand 1, the Walker Smale rebrand 2 and the Walker Smale merger proposal, because Walker Smale had premises in Bramhope, Yeadon was at risk, more or less, of losing business in what had been the free territory of Adel and, because Walker Smale had premises in West Park, Horsforth was at risk, more or less, of losing business in what had been the free territory of West Park.

38. Under the Horsforth 2017 extension proposal, Yeadon was at risk, more or less, of losing business in what had been the free territory of Adel.

39. For completeness, I should add that, in July 2018, there was a proposal for Horsforth to buy Walker Smale's West Park premises, but that proposal did not proceed because of dilapidations in those premises. That the proposal did not proceed was not the fault of Hunters or Mr Berson. There had also been a proposal for Mr Malkinson to open and/or manage a Hunters-branded estate agency in the Meanwood area of Leeds but he, and not Hunters or Mr Berson, chose not to proceed with that proposal. I therefore do not consider further any of these proposals (or others which were mentioned in the written evidence in passing which did not proceed but not because Hunters was at fault).

40. Returning to the chronology, Mr Berson introduced the Walker Smale rebrand 1 to Andrew Bushell, a Hunters director, on 9 May 2016, by telephone and (follow-up) email. Mr Berson asked Mr Bushell if Walker Smale could have an initial telephone conversation with him. Having apparently not heard that that conversation had taken place, on 10 July 2016 Mr Berson emailed Mr Bushell asking if Mr Bushell had made contact with Walker Smale. The following day, 11 July 2016, Mr Bushell emailed Mr Berson:

> "I'm trying to remember exactly what happened, I did call and I'm sure I spoke to them, I'm assuming they didn't wish to go any further with it.
>
> It might be worth you having another chat with them?"

There the correspondence between Mr Berson and Hunters about the Walker Smale rebrand 1 ended.

41. Before this, Mr Berson had been asked by Hunters for his view about Yeadon advertising on the Hunters website as the Hunters branch for Adel. Mr Berson responded, on 11 April 2016:

> "The areas Adel, Cookridge and Bramhope are free territories and as such should probably remain that way.
>
> I have also spoken as a matter of courtesy to [Horsforth] and he objects for the same reasons.
>
> Also, Adel and Bramhope have been on our hit list for some time as potential new branch locations and we have identified an existing agent who may be interested in joining the group…
>
> Please could you confirm that Yeadon will not now be proceeding down this route."

Mr Berson received the confirmation he had sought the same day.

42. In relation to the Horsforth 2017 extension proposal, Mr Berson emailed Mr Bushell on 4 February 2017:

> "Whilst I can understand that…Yeadon might be affected slightly, it is only because he has chosen to "farm" an area that is open to anyone until a franchise is found for the location…
>
> I would…like to be able to give [Horsforth] the go ahead to start looking for premises…"

43. Mr Bushell replied the same day:

> "I'm not so sure, happy to look at it again, but we will never open a new branch at the detriment of an existing branch."

44. Mr Bushell emailed Mr Berson on 23 February 2017 regarding "Adel":

> "Further to our various emails etc. I have now looked at this in detail and I have also spoken to [Yeadon].
>
> As I mentioned previously, I am nervous that opening in Adel will have a hugely detrimental effect on [Yeadon's] business. I have tracked every sale [Yeadon] produced last year and a sizeable percentage sits in the Adel area, on top of this he is already restricted with Ilkley and Otley branches, by opening in Adel this would simply cut too much from his potential area. From speaking to [Yeadon] he has stated exactly the same thing and therefore I couldn't authorise an opening when it would have such a negative impact on an existing franchisee.
>
> I appreciate that [Horsforth] wants to open another branch (we would be very keen for him to do so) and from looking at potential locations…surely Headingley represents a far better opportunity for everyone?"

45. Mr Berson replied the same day:

> "I am afraid that I cannot agree with your conclusions on this and feel that you are being unfairly biased towards [Yeadon].
>
> For all the reasons I mentioned in my previous email, Adel is the perfect link between the Horsforth branch and the North Leeds branch and we really do need a presence in this location…
>
> I think there may be a middle ground where [Yeadon] could retain Bramhope as part of the deal and I think that if you were to go into more detail of [Yeadon's] sales, you will see that the majority of them will be Bramhope and not Adel."

46. Within a few minutes, Mr Bushell responded:

> "We are not against the idea of opening in Adel, we want to open as many as possible, but from looking at it and speaking

> to [Yeadon] I think it will cripple him (plus limit potential growth for the future).
>
> I don't believe this affects the value of the master franchise, in fairness you receive income from [Yeadon] and therefore surely you would want to protect that going forward also, therefore if we could get [Horsforth] to invest in a different location that has to be preferred for everyone?
>
> If there is a deal to be done with [Yeadon/Horsforth] that everyone was happy with then we would support it, but I can't see how that can be.
>
> I will rerun the figures and send them over to you so you can see what I mean."

47. On 27 February 2017, Mr Bushell emailed Mr Berson:

> "Attached is Yeadon's last 2 years sales which clearly shows how much of an impact it would have on [Yeadon's] business.
>
> He is showing 39 sales, with an average price of £300,000 and a fee of 1.25%, this equates to £146,000 of income (roughly) over 2 years, we couldn't take £75 pa off him.
>
> Let's speak to [Horsforth] about Headingley, or anywhere else you would recommend?"

48. On 20 April 2017, Mr Berson emailed Mr Bushell:

> "I have looked at the map you sent showing Yeadon Branch sales in LS16 over the last 2 years and…the breakdown is as follows:
>
> LS16 9
>
> Bramhope - 10
>
> [Yeadon] is very strong in this location…
>
> LS16 6 & 7
>
> Cookridge - 24
>
> These two postcodes sectors are adjacent to…Horsforth…but [Yeadon] continues to "work" this patch…and [Horsforth] tells me they even compete against each other for the same properties…
>
> LS16 8 - 3

> This location is Adel proper and [Yeadon] has only sold 3 properties in this location in over the last 2 years so the impact of an Adel branch should have no impact…provided we allowed him to retain…Bramhope.
>
> I think a very fair compromise would be to allow [Yeadon] exclusivity over…Bramhope and [Horsforth] to open in Adel…"

49. Mr Berson emailed Horsforth on 23 April 2017:

> "I still cannot see any logical argument against the proposal other than that they are concerned that…Yeadon will be affected and they obviously do not want to upset him.
>
> I think [Yeadon] has taken advantage of the fact that [Adel] has been open house [(i.e. free territory)]…"

50. In May 2017, Horsforth was not attracted to the proposition that Bramhope should become Yeadon's exclusive territory. Rather, it was content for Bramhope to remain free territory (so accessible to it from its Horsforth, and its proposed Adel, branches) (see Mr Malkinson's 31 May 2017 email to Mr Berson).

51. On 7 June 2017, Mr Berson emailed Glynis Frew, then Hunters' managing director, and Mr Bushell:

> "It was good to see you and Andy today and have the opportunity to further discuss the merits of opening a branch in Adel.
>
> As you know it is [Horsforth's] intention to expand into this location.
>
> As discussed, you will now be making contact with [Yeadon] to "sell" your proposal for him to expand his area into Shipley and Bramhope in return for [Horsforth] being able to operate exclusively in the rest of LS16 from any new Adel Branch.
>
> I will not disclose your proposal to [Horsforth] until you have come back to me following your approach to [Yeadon]."

52. On 7 June 2017, Mr Jones sent an internal email to Mr Bushell and Ms Frew ("the Jones 7 June email"), in which he said:

> "His role as MF as he knows originally and at the renewal last time is to develop the area, supervise and audit. He does as I can see none of these actions.
>
> He cannot hide behind us doing those jobs. He has to do them. So to the extent we may or may not have doesn't get him off his obligations in any way.

> His contract clearly states he has to do it, he was reminded he had to do it (yesterday) and at his last renewal…
>
> Ultimately he says he hasn't the skills required.
>
> He has had 8 years and in that time opened North Leeds, Jack, Simon, Ed and Pav and David and his dad. Ed, Pav and David/father were hopeless.
>
> I agree with him he isn't cut out for this/can't do it on his own.
>
> The half split of income is based (in part) on his pushing additional development (as he knows) which hasn't really happened.
>
> Therefore:
>
> - it's not working for him;
>
> - it certainly isn't working for us
>
> - On that basis I'd suggest we are unable to renew (in due course)."

Mr Jones then set out the text of a suggested email to Mr Berson. Mr Jones suggested that Mr Berson should be informed that he had lost the exclusivity he otherwise had under the 2014 MFA because he had breached the 2014 Development Requirement but that the default could be remedied and that:

> "The issue for us as you will appreciate is that the area hasn't developed and isn't developing (save now for Adel potentially) as we want it to. The issue will then crystalise at renewal. If you can't persuade us that you can build a branch network we will be forced to look elsewhere/at alternatives."

53. The email which Ms Frew actually sent to Mr Berson on 9 June 2017 said something different, as follows:

> "…the whole point of you helping to push the proposal for Adel was in your capacity as Master Franchisee for your area. Obviously this is important to both of us, we want to drive branch numbers and business and so do you. As we discussed at the time we do not want to open branches though at the expense of current franchise partners so we have spent a lot of time trying to make this work for all parties (I use the word "we" loosely as it was Andy that put the work in!) As we agreed we will let you know re Adel and [Yeadon] once we have spoken to [Mr Metcalfe]…
>
> As we discussed on the day in 2 years your area should have 10 locations which leaves 5 to open. You asked what would be the implications if this didn't happen and I've checked with Ed as I

> said I would and Andy was correct in that exclusivity lapses through the failure to open. It has lapsed already, a while ago (under clause 10.1)…
>
> We are very committed to making sure we open branches in new locations around the Leeds area so please be assured it's not our intention to summarily terminate the arrangement with you, having not hit the openings to date. We have every confidence in your ability to open new locations and we both know you have been successful in this before…
>
> We have always worked alongside you Stephen and that will not change but we do need to press ahead with the openings so at present everything remains as is including your present income splits. This will remain as per your contract until 1st May 2019. The issue will then crystallise at renewal…"

54. On 2 October 2017, Mr Bushell emailed Mr Berson:

> "I appreciate that [Horsforth] is keen to open in Adel, as indeed you are and of course we too are keen to open further branches, but we have always been clear that this cannot be at the detriment of existing businesses, which is our position in this case.
>
> …We, as a franchisor, need to protect all of our franchisees (as we would for you and [Horsforth]) and therefore unless agreement can be made over Bramhope we are not prepared to support a franchise in that location.
>
> For both yourself…and [Horsforth] we need to be focused on areas where we can add a branch that can successfully trade without impacting existing businesses…
>
> To summarise, we want to expand the network and we want to support the growth of our franchisees, but this needs to be done without having a detrimental impact on existing branches (we wouldn't allow [Yeadon] to open in Adel for instance for the same reasons)."

55. Mr Berson responded the same day:

> "What do you think of the following:
>
> …2. We agree that [Yeadon] will retain all fees from the first 10-20 sales (or whatever number is agreed) [in Bramhope].
>
> 3. If we also accept that a new Adel branch will generate additional instructions and sales in Bramhope, could we say after the first 10-20 sales in any year, Adel would be entitled to a share of the net sales fee."

56. Mr Bushell responded a few minutes later:

> "That could work, or we could have the area open for all but 20% of any Adel led sales…"

57. On 11 October 2017, Mr Berson updated Mr Bushell:

> "I have now had chance to meet up with [Horsforth] to further discuss the present impasse.
>
> In an effort to reach a compromise, they have come up with the following proposal:
>
> 1. All Bramhope properties to be available to both Yeadon and Adel…
>
> 2. Whichever branch contacted to attend market appraisal.
>
> …4. Fees to be shared on the following basis:
>
> a. Branch introducing buyer – 2/3
>
> b. Other branch – 1/3.
>
> In addition, [Horsforth] would offer [Yeadon] the following option:
>
> 1. Adel can attend every valuation.
>
> …3. [Yeadon] would still receive 2/3 for introducing the buyer and 1/3 if introduced by Adel.
>
> In this way, [Yeadon] could, if he wished, greatly benefit from Bramhope sales whilst reducing the workload to just the sales progressions of the sales he agrees.
>
> Finally, it is hoped that a new Adel branch will significantly increase the number of Bramhope instructions which, together with the above proposed arrangement, should more than mitigate for [Yeadon's] loss…"

It is a reasonable inference, from this email, that Horsforth was not agreeable to the proposition that Bramhope should be a carved-out exclusive territory for Yeadon, separate from the rest of Adel and that, instead, Horsforth was content to pay part of its fee on sales to Yeadon, in return for Yeadon reciprocating. In fact, it may have been that, at least as matters stood later, in 2018, the benefits of this proposal would have been all one way, in Horsforth's favour. In 2018, according to a map prepared by Mr Jones and exhibited to his witness statement, Horsforth had no instructions in Bramhope, although it had many instructions in, and around, Adel and West Park, whereas Yeadon had instructions in Bramhope and almost none in the rest of Adel. If this represented the norm, under the proposal Yeadon could find itself paying one-third of its fee for its Bramhope instructions to Horsforth, whereas there would be no

fees payable by Horsforth to Yeadon. Mr Jones also exhibited a financial analysis to his witness statement (which I did not understand to be very controversial) which showed that, between 2014 and 2019, Pudsey and Yeadon were competing to be the Hunters franchises in the Leeds area with the highest turnover and that they had roughly similar turnovers, and that Yeadon contributed about £21,000 to Mr Berson's receipts under the 2014 MFA in 2016 out of a total of about £69,000 (as to which, see the comparable analysis, below, by Ms Frew in her 2 March 2018 letter to Mr Berson).

58. Returning to the chronology, on 17 October 2017, in the context of an email to Mr Berson from Mr Malkinson about the possibility of opening premises in Meanwood, Mr Malkinson did himself question the viability of Horsforth opening a Hunters-branded estate agency in Adel because of the impact, on Horsforth's business (at the Horsforth branch) of doing so.

59. In any event, on 7 November 2017, Mr Bushell reported to Mr Berson:

> "Been through everything with [Yeadon], but just can't agree Bramhope I'm afraid.
>
> To be fair to [Yeadon] he did carry out lots of research to understand what the impact would be and I can understand that it will be a big risk to him, so I have hit a brick wall. Not sure where we can go from here, I will speak to [Horsforth]…"

60. Attention now turned to the Walker Smale rebrand 2.

61. By December 2017, Mr Berson was complaining that, following Yeadon's expansion of its business by farming in Adel, a situation had arisen whereby Yeadon was "being protected" and the opening of a Hunters-branded estate agency in Adel was being frustrated, so preventing him from performing the 2014 Development Requirement and, thereby, from making a living. Ms Frew responded, on 18 December 2017:

> "…we don't see it like this because as we have stated on many occasions it is not in the company's interests, or indeed yours, to open offices that jeopardise or conflict with a current franchise branch. We have taken this decision across the board including locations in London, this is not new news, which you have always been made aware of, please see email attached from June. I am also surprised that you would consider the approach of jeopardising [Yeadon's] business when you also benefit financially from this arrangement. We are all aware that the market in changing and we must be ever mindful of this also."

62. On 6 February 2018, Mr Berson emailed Walker Smale and Horsforth about the Walker Smale merger proposal. He noted that the main barrier to that proposal was "the obvious conflict in LS16 [(i.e. Adel and West Park)]…"

63. On 21 February 2018, a meeting took place between Mr Berson, Ms Frew and Mr Bushell, during which Ms Frew reiterated that "they would never allow a branch to

open in an area that might damage the business of an existing franchisee". She made a similar point in a letter, dated 2 March 2018, to Mr Berson, as follows:

> "We have a company procedure whereby we do not and will not open in an area in which a local franchise partner with a turnover of £200,000 plus does not agree to the new branch opening. As Yeadon branch has generated over the last four years almost £2 million and provides the Master Franchise with £18,000 to £20,000 per year of income, it does not make commercial sense to either jeopardise or put that business or the brand image at risk. This message was relayed to you in June 2017."

Nevertheless, two days later, Mr Berson sent to Ms Frew an email promoting the Walker Smale merger proposal.

64. Ms Frew replied on 6 March 2018:

> "The below are some of the points I would be grateful if you could cover.
>
> • I am not sure how Bramhope will work, as again this amounts to approximately 40k in income to [Yeadon]? How will that work, will there be a compensation settlement to [Yeadon]? If so from whom/how much/for how long?
>
> • Re West Park, could you confirm the boundaries as it looks to me that [Horsforth] will be losing something like 30 sales to West Park?
>
> …And is [North Leeds] OK with the location of West Park too? whilst there are not many sales for him in what seems to be the West Park area, there were some.
>
> I think, just as we would normally, that before we meet there should be a business plan for each location and how the "area" arrangements would be adopted. We obviously don't want territory wars and we all want to drive the business forward which has always been our concern."

65. Mr Berson responded the same day. In relation to Ms Frew's request for a business plan, he said:

> "I think the proposed merger and Meanwood/Chapel Allerton option removes any possible territory wars and puts in to context the minor inconvenience to Yeadon office which as you know has only come about via "farming" of a location well away from its "catchment" area
>
> Following an informal chat with the parties and assuming they can get past "first base", we can ask them to submit a formal business plan."

There appears, therefore, to have been something of an impasse, with Ms Frew requiring a business plan, as, according to her, Hunters normally would, before considering the proposal further, and Mr Berson wanting an informal meeting and an agreement in principle, at least to a degree, before Horsforth prepared a business plan.

66. Also in March 2018, Mr Jones carried out an assessment of the Walker Smale merger proposal, and he:

    i) questioned whether Walker Smale was "on [its] last legs";

    ii) concluded that about 50% of Horsforth's listings were in West Park so that "significant [say 30%] cannibalisation" of Horsforth was expected;

    iii) concluded that Bramhope was "already traded [and] can't see obviously need for an office there? Yeadon already generates circa £40k pa. Assume Horsforth the same…for nil cost" (presumably because Adel was a free territory being farmed).

    (It is Hunter's case that, after being told of the "cannibalisation" of the Horsforth business, which I understand Hunters to contend a business plan would have revealed had one been prepared, Horsforth became cool on the Walker Smale merger proposal).

67. On 11 May 2018, by a letter from its solicitors, Cubism Law, Hunters confirmed that it did not approve the Walker Smale merger proposal.

68. In 2019, at about the time when the term of the 2014 MFA was due to end (by effluxion of time), the parties did try to negotiate the terms for the renewal of the master franchise agreement, but they could not agree terms.

The dispute

69. As pleaded, the dispute between the parties was broad ranging. However, at trial, the parties displayed commendable good sense and pragmatism, largely, perhaps, thanks to the fact that Mr Evans-Tovey and Mr Myerson, and their solicitors, are experienced commercial litigators, who worked collaboratively, in the best interests of their respective clients. As a result, against the background of the Defendants' acknowledgment that they have been in breach of the 2014 Development Requirement, the parties agreed, by the time counsel finished their first round of closing submissions, that (i) the trial was only to be on liability and (ii) (subject to a further point I will make) liability is to be determined by me resolving only the following issues ("the issues"):

    i) did the 2014 MFA contain an implied duty of good faith?

    ii) did Hunters breach that duty in how it responded to the Adel and/or Walker Smale prospects identified by Mr Berson?

    iii) if there was a duty of good faith owed by the Hunters, and if it breached that duty, does that amount to a defence to its claim that Mr Berson breached the 2014 Development Requirement?

iv) did clauses 10 and 12 of the 2014 MFA comprise a complete remedial code for a breach, by Mr Berson, of the 2014 Development Requirement?

The one further point I make is that, in his first round of closing submissions, Mr Myerson accepted that a breach, by Hunters, of any implied duty of good faith is not a defence to Hunters' claim that Mr Berson breached the 2014 Development Requirement, and he made no further submissions on the issue. I therefore do not need to determine that issue. It must follow that, unless clauses 10 and 12 of the 2014 MFA comprised a complete remedial code for breaches of the 2014 Development Requirement, there must be judgment for liability against the Defendants in favour of Hunters for the Defendants' agreed breach of the 2014 Development Requirement.

70. Mr Myerson did argue, in his first round of closing submissions, that clause 9 of the 2014 MFA also provides a defence to liability. I comment on that argument briefly below. For present purposes it is enough to note that (i) that argument was not an agreed issue, (ii) the agreed issues had been agreed at the beginning of the trial, in broad terms at least, (iii) they may well have affected the course of cross-examination and (iv) whilst Mr Evans-Tovey did respond to Mr Myerson's argument briefly in reply, he had not expected to have to do so.

71. I have referred to the "first round of closing submissions", because, in fact, there were two rounds. On the first day of the trial, I drew to counsels' attention that the Court of Appeal had heard the appeal in *Re Compound Photonics Group Ltd.*, but had not then handed down judgment. Counsel and I thought that the judgments of the court in that case might be relevant to the determination of the first issue. So, it was agreed (most consistently with the overriding objective, in my view) that counsel would make their closing submissions on all matters except the first issue immediately after the evidence was concluded, as scheduled, but that their closing submissions on the first issue would be made after the Court of Appeal handed down judgment in *Photonics*. That happened on 21 October 2022 ([2022] EWCA Civ 1371), and counsel made their submissions on the first issue on the first available date thereafter (29 November 2022). As it turned out, and as counsel explained to me, the decision of the Court of Appeal in *Photonics* was not central to the determination of the first issue and, in their second round of closing submissions, counsel did not make extensive reference to it.

72. This is a convenient place to say something about the parties' respective arguments on the issues I still need to determine.

73. Although there may be a further passing reference to a duty of good faith in paragraph 31 of the Defence, the only express reference to such a duty is in paragraph 18(l)(i) of the Defence, as follows:

> "Alternatively, in order to comply with the Development Requirement as contended for by the Claimant the contract [w]ould require a term that each party would act in good faith towards the other, to prevent the claimant being able to manipulate a breach of the term upon which it purports to rely. The written contract does not contain such a term, but the defendants will aver, if necessary, that one is implied by reason of business efficacy and the custom and practice that parties to

> commercial contracts should not be permitted to manipulate a breach."

74. Paragraph 31 of the Defence says:

> "If, contrary to the defendants' primary case, there was an obligation to open premises, clause 2.4.7.3 did not permit the claimant to reject an application to become a franchisee for no reason. It merely permitted the claimant to refuse to provide a reason. For the avoidance of doubt, the [2014 MFA] does not permit the claimant to exercise its rights arbitrarily, and thereby assert the defendants cannot perform the [2014] Development Requirement..."

By way of reminder, clause 2.4.7.3 of the 2014 MFA provides:

> "When promoting the Proposition to third parties [Mr Berson] shall…always advise third parties that…an application to become a franchisee may be rejected with no reason given and [Hunters'] decision is final."

75. As I read the Defence, there is actually no express plea that Hunters breached a duty of good faith, nor are there particulars of any such breach, nor are the consequences of any such breach pleaded. On this ground alone, I could decline to determine the second issue, but, because (as I will explain), without objection, most of the cross-examination was directed to that issue (or to the broader question of breach, at least) and because I heard detailed submissions from counsel on it, and because I have reached a decision on the issue, in this judgment I do determine the issue and give my reasons for my decision.

76. According to my note of Mr Berson's case, as explained to me by Mr Myerson principally in his first round of closing submissions, Mr Berson contends that Hunters did not act in good faith because it allowed a position to develop in which the only question Hunters asked or answered, when deciding whether to approve each of Mr Berson's proposals (set out above) ("the Proposals") to develop the Leeds area during the term of the 2014 MFA, was whether Yeadon would suffer under that proposal and Hunters did not allow itself to either measure that disadvantage objectively or to contrast it with the disadvantage to anyone else with whom it had legal relations by the rejection of that proposal. In consequence, Mr Berson contends, as Mr Myerson explained to me in his second round of closing submissions, Hunters did not use its power (or veto) to reject (or approve) proposals, in this case, for the purpose for which that power was granted, but, rather, used it for an ulterior purpose; either to favour Yeadon or to put Mr Berson in breach of the 2014 Development Requirement. It is this last point which was intended to be advanced by the reference, in the Defence, to the manipulation of a breach. I also understood Mr Berson to contend that Hunters was in breach of a duty of good faith because it did not act openly with Mr Berson, in that it did not say that its agenda was to keep Yeadon happy.

77. As I will explain, by the end of the second round of closing submissions, Mr Berson's case on the first of these points (that Hunters misused its power to approve the Proposals) was reframed as a breach of what is sometimes referred to as a *Braganza*

implied term (rather than what may be a broader, more free-standing, implied duty of good faith). As I will also explain, by the end of the second round of closing submissions, there appeared to be little of substance between the parties on the first issue I have to determine.

78. In relation to Mr Berson's case on the fourth issue, Mr Myerson argued that the choice facing the parties at the time the 2014 MFA was being negotiated was binary; would a breach of the 2014 Development Requirement be a terminable breach (as the draft master franchise agreement provided), or would a breach of the 2014 Development Requirement result in a loss, by Mr Berson, of exclusivity to operate as the master franchisee in the Leeds area (as, it is contended, the 2014 MFA provided)? Against that background, it is apparently Mr Berson's case (i) that, at the time the 2014 MFA was being negotiated, no-one turned their minds to the question of damages and (ii) in effect, that a damages remedy, for breach of the 2014 Development Requirement, has been excluded by the 2014 MFA, because of what (it is contended) was eventually agreed, as set out in clauses 10 and 12 of the 2014 MFA.

Witness evidence

79. Although Hunters intended to call three witnesses, Ms Frew, Mr Jones and Mr Bushell, Hunters pragmatically called only Ms Frew and Mr Jones to give evidence. Although Mr Berson also intended to call three witnesses, himself, Mr Collins and his (Mr Berson's) son, Jack, Mr Berson too pragmatically (and properly) did not call Jack to give evidence. Mr Bushell had not made a witness statement. Jack Berson had, but, because he did not give evidence, I do not take his witness statement into account. Because, by the end of the trial, the issues between the parties were so limited, much of the witness evidence is not germane, so that I can set out the witness evidence relatively briefly.

Ms Frew

80. Ms Frew has worked for Hunters since 1999. She was the company's managing director from 2015 until March 2022. She explained, in her oral evidence, that she and the other Hunters directors tried to reach a consensus about decisions but that, as managing director, she could override the other directors.

81. In her witness statement, she explained what she believed to be the purpose of the master franchise arrangement, and the primary obligations of a master franchisee thus:

> "The primary purpose of establishing the MFAs was to grow the Hunters' network and business while at the same time reducing costs and supervisory workload.
>
> The primary obligations of each Master Franchisee may essentially be summarised as follows:
>
> a. finding suitable locations and [personal franchisees] or prospective branch conversions [(i.e. independent estate agents with premises which might be re-branded as Hunters premises)] and referring them for approval by Hunters' head office;

> b. opening offices in those locations within the Master Franchise Area (either indirectly through franchisees or directly itself);
>
> c. managing, auditing, supporting and developing the businesses of each PFA and/or converted branches."

82. Ms Frew was cross-examined about whether Hunters had a settled plan, before the 2014 MFA was due to end, not to renew it. She responded that there was no time when she looked at the Defendants and concluded that Hunters did not want them any more, even though she realised, about half way through the term of the 2014 MFA, that things were not going well. She added that Hunters wanted to make the 2014 MFA work, because Yorkshire was a lucrative area, because Hunters did not itself have the staff to manage Hunters-branded estate agencies, and because Mr Berson had good contacts.

83. Although Ms Frew said, in cross examination, that she agreed with some of the sentiments in the Jones 7 June email, a consistent theme in her oral evidence was that Hunters tried to work with Mr Berson to make the Leeds area a success.

84. The reasons Ms Frew gave, in cross-examination, for Hunters' opposition to a Hunters-branded estate agency opening in Adel were consistent with what she had said in her contemporaneous emails; principally, that Hunters could not agree to a branch opening which would damage the business of an established Hunters franchisee. She suggested that Hunters has "a duty of care" to existing franchisees. She also suggested, as had Mr Bushell's second 23 February 2017 email and her 18 December 2017 email, that it would not advantage Mr Berson for a Hunters-branded estate agency to open in Adel to compete with Yeadon, because Yeadon's income, and therefore Mr Berson's fees under the 2014 MFA, would drop.

85. Ms Frew explained more generally that it is in no-one's interest commercially if there is conflict between franchisees or if franchisees are upset. She said that a falling out between territories (i.e. franchisees) is a major risk for Hunters and is time-consuming for it to resolve.

Mr Jones

86. Mr Jones was a Hunters director from 2011 to 2021.

87. In his witness statement, Mr Jones said as follows about the Walker Smale merger proposal:

> "To me the Walker Smale deal made no commercial sense. We were generally opposed to the deal in its various formulations for a number of reasons.
>
> a) They had to close their Ilkley business I understand, despite Ilkley being a substantial area/opportunity, as the business through Walker Smale was not viable.
>
> b) The locations and, in particular, the likely negative impact of (1) the West Park office on the Horsforth franchise and (2) the

> Bramhope office on our Yeadon franchisee.
>
> c) The potential franchisees and the financial state of the Walker Smale business. In particular, it was well-known that Walker Smale were struggling financially…
>
> d) Concerns about the long-term financial viability of the Walker Smale business.
>
> e) Wider risks. As finally re-packaged and put forward by the Defendants, the proposed deal was to be a merger of the Walker Smale business with the Pudsey/Horsforth franchise. As such, it had the real potential to all blow up with 6/7 interested parties, including (1) Hunters and the Defendants, (2) Martin Collins and Johnny Malkinson [(i.e. Horsforth)] (especially since there were already tensions in that partnership), (3) Yeadon…(whose business would be affected by the Bramhope office) and (4) the two partners in the Walker Smale business…
>
> …I do remember…spending time with Johnny [Malkinson (i.e. Horsforth)] to take him through the effect that the West Park part of the Walker Smale deal would have on…Horsforth…and what would be required to make that work…
>
> My preliminary analysis of the deal was that it would not work for the reasons set out above. These were the same issues set out in a contemporaneous note that was prepared internally to consider the deal when it was initially put forward. I remember Johnny being surprised by the extent to which the Horsforth franchise would be cannibalised by the West Park office of Walker Smale. He had not in my view appreciated that very clearly. In the end, having considered the points I made…, my recollection is that [Horsforth's] interest in the prospect of West Park being franchised in competition with Horsforth cooled significantly and led to them no longer wishing to take the same forward."

88. Mr Jones gave the following evidence in cross-examination.

89. Hunters had not decided in 2017 that it would not renew the 2014 MFA in 2019 when it was due to expire by effluxion of time. To the contrary, his approach to that matter at the time was influenced by the fact that he is "an optimist" who thought that Mr Berson "could go on the straight and narrow". The Jones 7 June email does not indicate that he, Mr Jones, had made up his mind that the 2014 MFA would not be renewed in 2019. At the time he wrote the email, he appreciated that, if Hunters did not have Mr Berson as the Leeds area master franchisee, someone else would have to take on that role, and that Mr Berson had been "exceptional" in 2009. He, Mr Jones, thought that, by 2017, the situation was not that Mr Berson could not meet the 2014 Development Requirement. Rather, it was that he was not meeting the requirement, and needed to be motivated, to apply himself and invest a bit of money. As a result,

Hunters "never burnt [its] bridges entirely". By the suggestion, in the Jones 7 June email, that "we are unable to renew (in due course)", he meant that a non-renewal in 2019 was where the parties "might end up if [Mr Berson] didn't turn things round" as he, Mr Jones, suggested the rest of the Jones 7 June email showed.

Mr Berson

90. Mr Berson explained the genesis of clause 10 of the 2014 MFA as follows, in his witness statement:

> "Even though I had agreed with Hunters in 2012 that failure to achieve the number of openings set out was not a terminable event, but just resulted in loss of exclusivity, the draft Ed [Jones] sent me in March 2014 was trying to pin me down to a strict development requirement and reintroduce a clause that terminated the MFA if I did not comply with the development requirement.
>
> I explained that I was happy to sign up to a proposed schedule but not one that could result in termination of the agreement if I failed to meet the requirement.
>
> …Ed…passed the matter over to the then Franchise Director Andrew Grant to progress matters and we exchanged emails on the detail.
>
> …We discussed my concerns including about the unrealistic terms of the previous development schedule and my desire to ensure that the Agreement could not be terminated as a result of a failure to comply with any proposed schedule.
>
> Andrew understood my concerns and whilst he made it clear that there had to be some form of development schedule, he also understood the volatile nature of the residential property market and that there was no guarantee that I would be able to comply with the development schedule. I believe that Andrew understood that if Hunters could simply terminate the agreement if I did not meet the development requirement it would make the agreement uncommercial for me. He therefore agreed that failure to comply with the development requirement would not be a terminable offence and would result only in loss of exclusivity which could be reinstated if the terms of the schedule were subsequently complied with…"

91. In an earlier witness statement, Mr Berson said, perhaps slightly differently, of Mr Grant's "agreement":

> "Andrew Grant fully understood my concerns and in our telephone conversation on 29 March, he promised to come back to me on his return from holiday with proposals to add a clause to the Master Franchise Agreement that would ensure that

> failure to comply with the Development Agreement would now make this a Non Terminable Offence."

92. In the context of the Walker Smale rebrand 1, Mr Bushell had suggested, in his 11 July 2016 email that he had spoken with Walker Smale and that he presumed that it did not want to proceed with the rebrand. He also suggested, in the email, that Mr Berson might have a follow up discussion with Walker Smale. It is not clear, from Mr Berson's witness statement, if he did have such a discussion shortly after Mr Bushell's email or whether, in the context of the Walker Smale rebrand 1, his last conversation with Walker Smale was before the email. It is also not clear that Mr Berson did have a follow up conversation to progress the proposal, but, if he did, it appears, from his witness statement, that Walker Smale chose not to proceed with the proposal because "business had improved in the first 6 months of 2016".

93. Mr Berson's oral evidence was conspicuously thoughtful, fair and given moderately. He gave the following evidence in cross-examination.

94. He did not ask Hunters to exclude any form of liability for breach of the 2014 Development Requirement at the time the 2014 MFA was being negotiated. Instead he made clear to Mr Grant that he did not want to find himself in a position where Hunters could terminate the 2014 MFA for breach of the 2014 Development Requirement.

95. He accepted that Hunters had a legitimate commercial concern to ensure that there was harmony amongst franchisees. He accepted that Hunters' policy of not granting a franchise which provided exclusivity in a previously free territory in which a franchisee was already operating was commercially justified.

96. He accepted that Hunters was entitled to decide on the suitability of premises for Hunters-branded estate agencies, that its decision on that matter was final, that it could put its commercial interests ahead of his and that, before reaching a decision, it could ask for details such as a business plan. He later accepted that Mr Bushell was entitled to decide whether a proposal might result in a conflict between franchisees and was entitled to prefer his judgment to Mr Berson's judgment.

97. He accepted that the rebranding of Walker Smale's Adel premises as a Hunters-branded estate agency would have upset Yeadon. He accepted that it was in his financial interest that Yeadon prospered. He said that he knew that there would be conflict with Yeadon if another franchisee, with exclusivity, proposed to open a Hunters-branded premises in Adel. He accepted that Hunter's wish not to upset Yeadon was a "powerful commercial consideration".

98. He argued, as he had effectively done in his witness statement, that Mr Grant's assertion, in the Grant 25 April email, that Hunters could "see no conflict" if a Hunters-branded estate agency opened in Adel, established beyond doubt, effectively for the whole of the period with which I am concerned, that there would in fact be no conflict with any established franchisee if another franchisee with exclusivity opened premises in Adel. He placed significant weight on the Grant 25 April email. Indeed, in answer to a question from me, he said that, because, in 2014, Hunters had suggested that the opening of a Hunters-branded estate agency in Adel would not result in

conflict, to oppose the proposals for premises in Adel was an act of bad faith by Hunters because "nothing had changed" before 2019.

99. He accepted, nevertheless, that Horsforth and Yeadon had increased their "farming" of Adel after 2014.

100. He also accepted that Mr Bushell had tried to find a solution which allowed the 2017 Horsforth extension proposal to proceed in some form and that, when the Walker Smale rebrand 2 was proposed, if he had found a solution which Horsforth and Yeadon supported, Hunters would have considered it sympathetically.

101. In answer to a question from me, he said that Hunters' opposition to the proposals relating to Adel was not contrived.

Mr Collins

102. In his witness statement, Mr Collins confirmed that the reason he and Mr Malkinson (i.e. Horsforth) decided not to proceed with the Horsforth 2017 extension proposal was because Yeadon "would only agree to this if Bramhope…was given to him as his own exclusive territory…[A]s Bramhope would be within a mile of the new office in Adel we decided not to open in Adel…as we thought that not being able to trade in Bramhope was too restrictive on the success of the new business". He added that Horsforth had "countered" the proposal that Yeadon should operate in Bramhope exclusively "by offering that we could leave Bramhope as free territory…but [Yeadon] rejected this idea".

103. In relation to the Walker Smale merger proposal, Mr Collins said, in his witness statement, that Horsforth would have submitted a business plan to Hunters in support of the proposal if Hunters had agreed the proposal in principle.

104. In cross-examination, Mr Collins gave the following evidence.

105. Had Hunters granted Yeadon a franchise in Adel (and so the exclusivity that, for example, Horsforth had itself originally sought by the Horsforth 2017 extension proposal), Horsforth "would have been miffed". He accepted that disagreements between franchisees of nearby territories was not good for "the brand" because that caused confusion. He added that it was quite common for one franchisee to try to undercut another and that, if he had been Mr Bushell, he would have been "conscious" about conflict between neighbouring franchisees. He accepted that, had the Walker Smale merger proposal become real, Horsforth's revenue would have been "cannibalised", describing it as "a point well made". Nevertheless, he said, Hunters and Horsforth were looking at the proposal in different ways. He thought that the benefits of Horsforth extending thereby into Adel would have outweighed that disadvantage. He acknowledged that he and Mr Malkinson (i.e. Horsforth) had not themselves "worked through" the "cannibalisation" effect of the proposal.

Did the 2014 MFA contain an implied duty of good faith?

106. It is helpful to begin a consideration of this, and the following, issue with a reminder of how Mr Berson's case (on the following issue, relating to breach of duty, in

particular) was framed. By the end of the first round of closing submissions, it was that (as paraphrased, I believe accurately):

i) in deciding whether to support any of the Proposals, Hunters only considered their effect on Yeadon;

ii) Hunters did not measure objectively the effect of the Proposals on Yeadon;

iii) Hunters did not weigh in the balance the disadvantage to others, in particular Mr Berson (as the beneficiary of the duty of good faith), of the Proposals;

iv) Hunters did not deal openly with Mr Berson;

(together "the Braganza breaches").

By the end of the second round of closing submissions, it became clearer that Mr Berson's case was that, in responding as it did to the Proposals, by rejecting them, Hunters was using its power (or veto) to reject (or approve) proposals for an ulterior purpose; either to favour Yeadon or to put Mr Berson in breach of the 2014 Development Requirement.

107. As a result of a discussion between me and Mr Myerson during the second round of closing submissions, it also became clearer that Mr Berson's complaint was that (i) what I have referred to as a *Braganza* implied term was implied into the 2014 MFA in relation to Hunters' obligation in clause 4.2 of the 2014 MFA, (ii) it is that implied term which he contends Hunters breached and (iii) he was not contending for a broader, more free-standing, implied duty of good faith in the 2014 MFA.

108. By way of further reminder, clause 4.2 of the 2014 MFA provided:

> "The Franchisor shall as soon as reasonably practical after receiving all such details as it shall require concerning a proposed location for the Premises indicate in writing to the Master Franchisee whether such location is suitable. The Franchisor's decision shall be final."

109. What do I mean when I refer to a "*Braganza* implied term"? Mr Evans-Tovey and Mr Myerson agreed that Chapter 14, Section 11 of Lewison: The Interpretation of Contracts (7th ed) accurately summarises the law as it stands on that implied term, as follows:

> "Where a contract confers a discretion on one party, and the exercise of that discretion may adversely affect the interests of the other party, it will usually be implicit that the discretion must be exercised honestly and rationally and for the purpose for which it was conferred. An exercise of contractual discretion may be challenged on the same grounds that apply to a challenge to an administrative decision in public law.
>
> 14.69 …if a contract confers an apparently unfettered discretion, then that discretion must not be exercised capriciously or unreasonably…

> 14.70 However as Mance LJ said in *Gan Insurance v. Tai Ping Insurance:*
>
> > "the authorities do not justify any automatic implication, whenever a contractual provision exists putting one party at the mercy of another's exercise of discretion. It all depends on the circumstances …"…
>
> 14.72 …the principle applies:
>
> > "whenever the contract gives responsibility to one party to make an assessment or exercise a judgment on a matter which materially affects the other party's interests and about which there is room for reasonable differences of view"…
>
> The trend of recent cases supports the view that such an implication will usually be made. In *British Telecommunications plc v. Telefonica O2 UK Ltd.*, Lord Sumption said:
>
> > "As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously…This will normally mean that it must be exercised consistently with its contractual purpose."
>
> It appears, therefore, that the default rule is that the implication will be made…The implied term is necessary to give effect to the reasonable expectations of the parties. It is "likely to be implicit in any commercial contract under which one party is given the right to make a decision on a matter which affects both parties whose interests are not the same"…
>
> 14.77 …in *Horkulak v. Cantor Fitzgerald International*, Potter LJ, giving the judgment of the court, said:
>
> > "It is pertinent to observe that, in cases of this kind, the implication of the term is not the application of a "good faith" doctrine, which does not exist in English contract law; rather it is as a requirement necessary to give genuine value, rather than nominal force or mere lip-service, to the obligation of the party required or empowered to exercise the relevant discretion…"

110. I have cited what Potter LJ said in *Horkulak* in 2005 because there was an inconclusive discussion between me and counsel during the second round of closing submissions about the degree to which the *Braganza* implied term and implied duties of good faith are related, and about the extent to which Snowden LJ may have had in

mind the *Braganza* implied term when giving his judgment in *Photonics*. As it happens, I do not need to reach a conclusion on these matters because, as I have said, both Mr Evans-Tovey and Mr Myerson accepted that Lewison accurately represents the law on the *Braganza* implied term and because Mr Evans-Tovey also sensibly accepted, as I understood him, that Hunters' power (veto) in clause 4.2 of the 2014 MFA was limited by a *Braganza* implied term (so that Hunters' power to consent to, or veto, a premises franchise had to be exercised honestly, rationally and for the purpose for which it was conferred).

111. Mr Evans-Tovey objected, however, that Mr Berson's case, as it had developed by the end of the second round of closing submissions, was not pleaded (as I have already demonstrated) and, indeed, that nowhere in the Defence was any reference made to clause 4.2 of the 2014 MFA. Rather, as Mr Evans-Tovey pointed out, in the Defence the plea that Hunters had to exercise its powers in a non-arbitrary way related to clause 2.4.7.3 of the 2014 MFA. (Mr Evans-Tovey also made the point that, to the extent that Mr Berson was in breach of the 2014 Development Requirement before about May 2016, any breach by Hunters of an implied term or duty took Mr Berson nowhere).

112. Mr Myerson accepted, fairly and properly, that, if Mr Berson's case is to be determined, the Defence ought to be amended. Mr Myerson was not apparently instructed to apply to amend the Defence.

113. I would therefore be entitled to determine this, and the following, issue in Hunters' favour on pleading grounds alone. Indeed, there would be good reasons to do so. As, for example, David Richards LJ explained in *UK Learning Academy Ltd. v. Secretary of State for Education* [2020] EWCA Civ 320, at [47]:

> " I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."

114. However, exceptionally in this case, most favourably to Mr Berson, I will consider the following (breach) issue on the basis that Hunters' power (veto) in clause 4.2 of the

2014 MFA was limited by a *Braganza* implied term.

115. Mr Myerson's forensic cross-examination of Hunters' witnesses clearly established that one of Mr Berson's principal complaints was that Hunters had vetoed the Proposals for ulterior purposes. Mr Evans-Tovey was able to, and did skilfully, cross-examine Mr Berson's witnesses on that issue and both counsel made detailed submissions on it. Indeed, it was very much a focus of the trial. In those circumstances, I am satisfied that the trial would not have taken a different course if Mr Berson's case had been fully pleaded.

116. After this very long introduction to my decision on the first issue I have to determine, I can give a very short answer to the question posed. Because, as I have explained, the parties were in agreement that Hunters' power (veto) in clause 4.2 of the 2014 MFA was limited by a *Braganza* implied term, and because Mr Berson's case was not any broader than that, in the end I do not need to determine whether there was implied into the 2014 MFA some other duty of good faith.

Did Hunters breach any implied duty in how they responded to the Adel and/or Walker Smale prospects identified by Mr Berson?

117. Because of the way Mr Berson's case had developed by the end of the second round of closing submissions, this question can be re-formulated as: was any rejection, by Hunters, of any of the Proposals irrational or for an ulterior purpose? (Mr Berson did not allege that Hunters acted dishonestly).

118. It will be recalled that it is the Braganza breaches which are the factual basis from which Mr Berson argues that Hunters' rejection of the Proposals was irrational or for an ulterior purpose.

119. None of the Braganza breaches is established by the evidence, however. To the contrary, the evidence establishes that each of the allegations is either wrong or mischaracterises Hunters' conduct.

120. Hunters' consistent policy was broadly that it would not support an exclusive franchise, in a free territory being farmed by an existing franchisee, to the detriment of that franchisee. It just so happened that Hunters' focus was principally on Yeadon because the Proposals related, more or less, to the establishment of an exclusive franchise in Adel which Yeadon was farming (although, as the evidence also demonstrates, Hunters also considered the effect on Horsforth of proposals for exclusivity in West Park).

121. Hunters' consistent policy can be seen from the following evidence, for example. Hunters was a party to the 2014 Settlement Agreement, before when there appears to have been a dispute about the extent of any exclusive franchise in Adel which Yeadon could have, which regulated that issue by requiring Horsforth's prior agreement. By being party to the 2014 Settlement Agreement, Hunters was giving effect to its policy. Similarly, when Hunters rejected, at the request of Mr Berson and Horsforth (which was farming Adel), Yeadon's attempt, in about April 2016, to obtain some exclusivity in practice in Adel, Hunters was giving effect to its policy. Hunters also consistently, and in line with its policy, supported the suggestion that Horsforth expand elsewhere

in the Leeds area, such as into the Headingley area (see, for example, Mr Bushell's 23 February 2017 email).

122. Hunters did measure the effect on Yeadon of excluding it from Adel. Mr Bushell confirmed as much by his 23 February 2017 email to Mr Berson, in which he referred to having "tracked" Yeadon's sales in the previous year. In any event, it can hardly be disputed that excluding Yeadon from Bramhope in particular would have damaged its business. As Mr Berson's contemporaneous emails establish, he was proposing that Yeadon have exclusivity in Bramhope because it was "very strong in this location" and to avoid "the obvious conflict" exclusivity in Adel would bring. Further, Horsforth's objection to Adel, in general, and Bramhope, in particular, becoming Yeadon's exclusive territory, and not remaining free territory, supports the conclusion that, by 2016, making Adel an exclusive territory would damage the franchisees who were then farming it (such as Yeadon).

123. Hunters did weigh in the balance the effect on Mr Berson of excluding Yeadon from Adel. Mr Bushell explained to Mr Berson, in his second 23 February 2017 email, that Mr Berson would lose income if Yeadon was excluded from Adel (which is consistent with Mr Jones' financial analysis and Mr Berson's evidence that Hunter's wish not to upset Yeadon was "a powerful commercial consideration").

124. Hunters did deal openly with Mr Berson. It repeatedly reminded him of its policy and Mr Bushell went so far as to provide Mr Berson, on 27 February 2017, with details of Yeadon's sales for the previous two years. Further, as the contemporaneous documents show, Hunters did consider the Proposals with an open mind. For example, in his first 4 February 2017 email, Mr Bushell offered to look at the Horsforth 2017 extension proposal again and, in his second email of the same day, he said that, if a solution acceptable to all interested parties could be reached, Hunters would support it (which was a point made again thereafter).

125. The following further points need to be borne in mind.

126. The parties' common purpose in entering the 2014 MFA was to develop the Hunters brand throughout the Leeds area (as is evident, for example, from Mr Grant's 30 April 2014 email). Conflict between franchisees in general, and damage to their business in particular, was inconsistent with that purpose. That conclusion was supported by Mr Berson, and it seems Mr Collins, who accepted that there was commercial justification in reducing the risk of conflict.

127. From all the evidence, it appears that Hunters was trying to ensure that conflicts did not occur, and thereby trying to support the parties' common purpose, whilst, at the same time, trying to encourage the development of other areas in Leeds, such as the Headingley area.

128. Further, granting an exclusive franchise of Adel did not further the common purpose because, as Mr Jones' March 2018 assessment noted, and Mr Berson's 20 April 2017 email corroborated, Yeadon, and so Hunters, was already established in Bramhope, which, by their conduct, both Yeadon and Horsforth (and, to an extent, Mr Berson) seemed to view, as the "jewel" in the Adel "crown", which was in turn something of a "crown" in the Leeds area. To have granted an exclusive franchise of Adel to a franchisee other than Yeadon would have damaged Yeadon's business (and thereby

possibly led to a reduction in income for Mr Berson and Hunters, and could have damaged Hunters' brand). Indeed, it is perhaps interesting to note that, before any of the proposals were put forward, Mr Berson was urging Hunters to keep Adel a free territory (see his 11 April 2016 response above to Yeadon's advertising plan), probably because, at some level, he appreciated that, overall, that was the best solution for Adel.

129. As I have noted, taking the evidence (such as Mr Bushell's 2 October 2017 email) as a whole and at face value, Hunters consistently sought to give effect to what even Mr Berson accepted was a commercially-justifiable policy of not supporting an exclusive franchise in a free territory being farmed by an existing franchisee to the detriment of that franchisee and, further, sought not to undermine the parties' common purpose in entering into the 2014 MFA but rather to promote it.

130. As I have noted, Mr Berson maintained that, in fact, Hunters was using its powers for an ulterior purpose; in particular, to put Mr Berson in breach of the 2014 Development Requirement. I reject that case.

131. Mr Berson accepted that Hunters' reasons for opposing proposals in relation to Adel were not contrived. In any event, Mr Berson's case is inconsistent with Hunters' repeated attempts to find solutions to the obstacles presented by the Proposals, by putting forward refinements to proposals or by being positive about refinements put to it. For example, in June 2017, Hunters promoted a refinement to the 2017 Horsforth extension proposal; namely, that Yeadon could operate exclusively in Bramhope and Shipley. Mr Berson's case is also inconsistent with Mr Bushell's apparently repeated discussions with Yeadon, which are unlikely to have taken place if Hunters was merely acting for form's sake, and it is inconsistent with Hunter's willingness to renew the 2014 MFA in 2019 (although I do not place a great deal of weight on that fact, because the parties were already in dispute). Further, if, as is not disputed, Hunters' reasons for not approving the Proposals was commercially justified, those reasons are most likely to have been why Hunters acted as it did.

132. For all these reasons, I have concluded that any rejection, by Hunters, of the Proposals was not irrational or for an ulterior purpose.

133. In any event, I am not satisfied that Hunters prevented the Walker Smale rebrand 1 from succeeding. As Mr Evans-Tovey suggested in his first round of closing submissions, that proposal seemed to fizzle out, perhaps because Mr Berson did not have the follow-up conversation Mr Bushell had proposed in his 11 July 2016 email and probably because, in any event, Walker Smale's business had improved whilst the proposal was being considered.

134. It may also have been that, by the time Hunters confirmed that it did not approve the Walker Smale merger proposal, Horsforth had decided not to proceed with it, because Horsforth had come to appreciate the likely "cannibalisation" of its own income.

135. Before deciding that any rejection, by Hunters, of the Proposals was not irrational or for an ulterior purpose, I considered the Jones 7 June email carefully. One reading, in isolation at least, of the line "on that basis I'd suggest we are unable to renew (in due course)" is that Mr Jones, at least, had already made up his mind in 2017 that the 2014 MFA would not be renewed in 2019, so that it can be inferred, it was suggested, that

Hunters' rejection of the Proposals was contrived. For the reasons I have already given for concluding that Hunters did not act for an ulterior purpose, I have concluded that this inference from the Jones 7 June email is not justified. Further, I am satisfied that Ms Frew at least, Hunters' managing director, had not concluded, in 2017, that the 2014 MFA would not be renewed in any event. She did not act as if she had reached that conclusion. Her 9 June 2017 email to Mr Berson was more positive and supportive than the Jones 7 June email. Her 6 March 2018 response to the Walker Smale merger proposal was constructive and, by it, she did not reject that proposal out of hand.

136. For completeness, I add that I also do not accept Mr Berson's contention that, because of the Grant 25 April email, Hunters acted in bad faith thereafter. No weight can be attached to Mr Grant's comment that Adel and Horsforth would not conflict because it was made at a time:

i) before Horsforth had opened, and so before Horsforth had begun to farm Adel, and when there was no expectation that Horsforth would do so heavily, or at all (particularly if Yeadon was granted an exclusive franchise of Adel);

ii) when Yeadon was, it seems, the only franchisee farming Adel, at least with any vigour;

iii) when, as I have just said, there was no conflict in fact between Horsforth and Adel;

iv) when, by the proposal then being considered, the status quo would be maintained, because the intended franchisee of Adel was Yeadon;

v) before both Horsforth and Yeadon were increasingly farming Adel (i.e. from 2016 at the latest), by when the circumstances had changed.

<u>Did clauses 10 and 12 of the 2014 MFA comprise a complete remedial code for a breach by Mr Berson of the 2014 Development Requirement?</u>

137. To put the question another way, in the context of the claim: did the 2014 MFA, and, in particular, clauses 10 and/or 12 exclude a damages remedy for breach of the 2014 Development Requirement?

138. The answer to the question posed depends on the proper construction of the 2014 MFA.

139. Counsel were in agreement about how a contract should be construed. They agreed that HH Judge Pelling KC had, subject to one additional point, correctly summarised the correct approach in *TAQA Bratani Ltd. v. Rockrose UKCS8 LLC* [2020] 2 Lloyd's Rep 64, at [26], thus:

> "It is common ground that the general principles applicable to the construction of contracts governed by English law apply to the construction of the JOAs. In summary:
>
> i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the

light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see *Arnold v. Britton* [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 21;

iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focusing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 17;

iv) Where the parties have used unambiguous language, the court must apply it – see *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see *Rainy Sky SA v. Kookmin Bank* (ibid.) per Lord Clarke JSC at paragraph 21 – but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 19;

> vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see *Wood v. Capita Insurance Services Limited* [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 13 *and National Bank of Kazakhstan v. Bank of New York Mellon* [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40; and
>
> viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20 and *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 11."

140. The parties also agreed that, in construing a contract, the court cannot take into account the parties' negotiations for the purpose of drawing inferences about what the contract means. Mr Evans-Tovey summarised this point thus (without dissent from Mr Myerson):

> "…not only must a court disregard subjective intentions, it must also disregard the pre-contractual negotiations: *Chartbrook Ltd. v. Persimmon Homes* [2009] UKHL 38, [2009] 1 AC 1101. Lord Hoffmann noted at [41] that the rule:
>
> > "may well mean…that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended",
>
> but he none the less affirmed it, explaining at [42]:
>
> > "The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.""

141. In the present context, Mr Evans-Tovey drew to my attention what Lord Diplock said in *Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* [1974] AC 689, 717H:

> "It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law or such remedy may be excluded by usage binding upon the parties (cf. Sale of Goods Act 1893, section 55). But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption…"

Mr Evans-Tovey also drew to my attention what Lord Leggatt has said more recently in *Triple Point Technology Inc v. PTT Public Co. Ltd.* [2021] AC 1148, at [106]-[111]:

> "Even if the interpretation for which Triple Point contends were considered to be a possible meaning of the word, a further reason for giving the word "negligence" its straightforward and ordinary legal meaning is that clear words are necessary before the court will hold that a contract has taken away valuable rights or remedies which one of the parties to it would have had at common law (or pursuant to statute).
>
> The approach of the courts to the interpretation of exclusion clauses (including clauses limiting liability) in commercial contracts has changed markedly in the last 50 years…
>
> The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations.
>
> The first and still perhaps the leading statement of this principle is that in *Modern Engineering (Bristol) Ltd. v Gilbert-Ash (Northern) Ltd.* [1974] AC 689…

> …Notable statements of the principle are also contained in several judgments of Moore-Bick LJ in the Court of Appeal. In *Stocznia Gdynia SA v. Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27, paragraph 23, he said:
>
> > "The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be."
>
> [In] *Seadrill Management Services Ltd v. OAO Gazprom* [2010] EWCA Civ 691; [2011] 1 All ER (Comm) 1077…at paragraph 29, Moore-Bick LJ described the principle as "essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so"…"

142. The issue before me (the proper construction, in particular, of clauses 10 and 12 of the 2014 MFA) is not quite the same issue as was before the judges in the two cases Mr Evans-Tovey cited or the cases cited by Lord Leggatt in *Triple Point*. However, the general point that "the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from [the] normal rights and obligations" "established by the common law", is of more general application, and ought to be borne in mind in the present context, for the reasons Lord Leggatt gave in *Triple Point* as the justification for this approach.

143. The 2014 MFA was professionally drafted, and apparently considered by Mr Berson's lawyers. In construing it, particular weight must therefore be given to its text.

144. There are no clear words in clauses 10 or 12 of the 2014 MFA excluding a damages remedy for breach of the 2014 Development Requirement. Indeed, there is no clearly-expressed indication in any of the 2014 MFA that the parties intended to exclude a damages remedy for such a breach.

145. The negotiations which preceded the 2014 MFA are inadmissible in evidence for the purpose of construing it.

146. Of no weight is Mr Berson's view (and what may have been Mr Grant's view too) that the 2012 side letter made a breach of the development requirement which then operated a non-terminable breach (which, on the proper construction of the 2009 MFA, may be wrong). That view only adds colour to the negotiations which preceded the 2014 MFA and at least Mr Berson's subjective intention in entering into the 2014 MFA, which are, in turn, inadmissible in evidence.

147. Even if it is correct that the 2012 side letter made a breach of the then-operable development requirement a non-terminable breach, that fact alone sheds no light on what, objectively, the parties intended by the 2014 MFA.

148. As it happens, I do not think that the negotiations which preceded the 2014 MFA, in particular, support Mr Berson's case, even if they were admissible in evidence.

149. It is true that, on one reading of Mr Berson's trial witness statement and of Mr Grant's 19 March 2014 email, both of which say that it was intended that Mr Berson would "only" lose exclusivity if he breached the 2014 Development Requirement, it may be suggested that the parties intended (or negotiated) that a damages remedy would be excluded for breach of the 2014 Development Requirement. However, that would be to inaccurately portray the negotiations, as Mr Berson fairly accepted by acknowledging that the exclusion of a damages remedy was not discussed during those negotiations. As the contemporaneous evidence shows (see, in particular, the Grant 25 April email) and, as Mr Berson's cross-examination corroborates, the parties' discussions were only about whether a breach of the 2014 Development Requirement would, or would not, entitle Hunters to exercise a contractual right to terminate the 2014 MFA (i.e. whether a breach of the 2014 Development Requirement would, or would not, be a terminable breach). Those discussions shed no light on whether, objectively, the parties are intended to have excluded a damages remedy for breach of the 2014 Development Requirement, so that clauses 10 and 12 of the 2014 MFA comprise a complete remedial code for such a breach.

150. I have therefore concluded that the question I am now considering should be answered in the negative and that clauses 10 and 12 of the 2014 MFA do not have the effect of excluding a damages remedy for breach of the 2014 Development Requirement.

151. Reinforcing this conclusion, so far as it relates to clause 12, is the fact that the alternative, that clause 12 has the effect of excluding a damages remedy for breach of the 2014 Development Requirement, would be odd. Clause 12 only operates on termination. It could not exclude, in any event, a damages claim prior to termination. It would be odd if a damages claim for a breach of the 2014 Development Requirement could be brought before the termination of the 2014 MFA, but not after.

Clause 9

152. As I indicated, in his first round of closing submissions Mr Myerson argued that clause 9 of the 2014 MFA also provides a defence to liability. The circumstances in which the argument was raised, which I have set out above, would entitle me, on case management grounds, to refuse to consider the submission.

153. My note of Mr Myerson's submission records that he explained that clause 9 of the 2014 MFA sets out, in mandatory terms, what was to happen in the circumstances it applied to, although that the clause was mandatory in effect does not matter. Clause 9, he argued, could be operated to allow Hunters to get Mr Berson to effectively work for free (i.e. without him receiving the management service fees to which he was otherwise entitled under the 2014 MFA), so that it could have had the income to fund the opening of Hunters-branded premises in free territories in the Leeds area, which, in turn, would have compensated it for its losses. Alternatively, it could have held on to the income it retained by the operation of clause 9 and which was otherwise payable to Mr Berson, to compensate it for its losses, or it could have been effectively compensated by a combination of both options. In support of the submission, Mr Myerson asked me to take into account that, as currently formulated, Hunters has quantified its damages in part by reference to a loss of master service fees (income) it would have received and retained had Mr Berson not breached the 2014 Development Requirement. Ultimately, the argument went, I should infer that clause 9 represented

the parties' solution for regulating compensation for breach of the 2014 Development Requirement for example.

154. At one point during the trial, the parties appeared to agree that clause 9 of the 2014 MFA did not, on the proper construction of the 2014 MFA, cover breaches of the 2014 Development Requirement; perhaps because, if it did, clause 9 could be used to bring about a termination of the 2014 MFA, which is a weighty point in favour of the conclusion that clause 9 did not extend to such breaches.

155. In any event, however, it does not follow, because, on one construction of clause 9, it "could" operate to cause Mr Berson to work for free, which "could", directly or indirectly, have compensated Hunters for his breach of the 2014 Development Requirement, that the parties intended that clause 9 represented the parties' solution for regulating compensation for breach of the 2014 Development Requirement. Nor does the fact that, whether correctly or incorrectly (as I suggested, at trial, might be the case), Hunters has quantified its damages claim by reference to what it claims is its loss of income from fees, help in construing clause 9 (in part because the loss of income resulting from Mr Berson's failure to comply with a clause 9 Breach Notice would occur whatever the breach in issue of the 2014 MFA and whether or not it was possible for Hunters to quantify its damages as a loss of income, so that the operation of clause 9 could be wholly arbitrary, if not penal in effect).

156. The short, and unanswerable, response to Mr Berson's case on clause 9 is that there are no clear words in it excluding a damages remedy for breach of the 2014 Development Requirement, and nothing else in the 2014 MFA, nor the admissible context in which the 2014 MFA was made, supports a construction of clause 9 which would result in it excluding a damages remedy for breach of the 2014 MFA (even if the clause might have reduced any damages otherwise payable had it operated).

157. For these reasons, clause 9 does not assist Mr Berson in his defence of the claim.

Disposal

158. It follows therefore that, in answer to the agreed issues I have to determine:

i) as to the first issue: as counsel effectively agreed, any exercise, by Hunters, of its power to approve or reject the location for a premises franchise had to be honest, rational and for the purpose for which it was conferred. To put it another way, in the light of counsels' effective agreement, any rejection, by Hunters, of the Proposals could not be dishonest, irrational or for an ulterior purpose. Save to this extent, the first issue does not need to be determined;

ii) as to the second issue: No, Hunters did not breach any duty of good faith or any *Braganza* implied term in how it responded to the Adel and/or Walker Smale prospects identified by Mr Berson;

iii) as to the fourth issue: No, clauses 10 and 12 of the 2014 MFA did not comprise a complete remedial code for a breach, by Mr Berson, of the 2014 Development Requirement.

It must follow, it seems to me at the moment, that there must be judgment, in Hunters' favour, on liability for Mr Berson's breach of the 2014 Development Requirement.

159. I will need to hear further from counsel about the appropriate orders to give effect to my decision, and on all consequential matters include how the determination of the outstanding issues in the claim should be case managed.