COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2013/CLE/gen/01344

BETWEEN

COMMONWEALTH FRANCHISE HOLDINGS LIMITED

Plaintiff

AND

CASUAL DINING RESTAURANTS LTD

First Defendant

AND

CHRISTOPHER A. MORTIMER

Second Defendant

AND

ISLAND BLOOM RESTAURANT LTD.

Third Defendant

AND

GALLERIA CINEMAS LTD.

Fourth Defendant

AND

MALL AT MARATHON LIMITED

Fifth Defendant

**Before Hon. Mr. Justice Ian R. Winder**

**Appearances:** **Sophia Rolle-Kapasouglou with Valdere Murphy for the Plaintiff**

**Gregory Moss for the First, Second, Third and Fourth Defendant**

**28 February 2019, 1 March 2019 and 9 May 2019**

**JUDGMENT**

**WINDER, J**

This is a claim by the plaintiff (CFH) for breach of contract. CFH seeks the recovery of $213,899.40 and other losses alleged to be due from the First, Second, Third and Fourth Defendants (collectively the Defendants) with respect to allegations of the breach of several contractual arrangements relative to the operation a Bennigan's restaurant franchise.

Background and Pleadings

1. CFH entered into a *Bennigan's International Master Franchise Agreement* with Bennigan's Franchising Company (BFC) on 23 December 2002.

2. The First Defendant (CDR) entered into a *Bennigan's Franchise Agreement* (the Franchise Agreement) with BFC, as franchisor, for the operation of a Bennigan's restaurant at the Mall at Marathon on 8 November 2006.

3. The Second Defendant (Mortimer) executed the Franchise Agreement on behalf of CDR, as president. Mortimer beneficially owns 100% of CDR. On 8 November 2006 Mortimer also executed a *Guaranty and Assumption of Obligations Agreement* (Guaranty Agreement) and a Confidentiality and Non-Competition Agreement on behalf of CDR. CFH says that the Guaranty Agreement provided that Mortimer, as guarantor, personally and unconditionally guaranteed to BFC, the Franchisor, its successors and assigns that CDR would punctually pay and perform each and every undertaking, agreement and covenant in the Franchise Agreement and is the guarantor of the obligations of CDR. Mortimer denies that he "*unconditionally*" guaranteed the obligations of CDR but contends that by his execution of the Guaranty Agreement he personally guaranteed the obligations of the CDR to BFC upon the terms and subject to the conditions mentioned in the Guaranty Agreement.

4. Clause 18 E of the Franchise Agreement provided that CDR or any Principal or any member of the immediate family of Franchisee is precluded for a period of twelve (12) months from the date of termination of the Agreement due to the Franchisee's default from having any interest as a disclosed or beneficial owner in any competitive Business located or operating at the premises formerly occupied by the Restaurant; or within the Exclusive Area; or within a three (3) mile radius of any other Bennigan's Restaurant in operation or under development on the effective date of termination or expiration of this Agreement. The Exclusive Area is defined the territory within a circle having the Restaurant at its center and a radius of one (1) mile.

5. The Confidentiality and Non-Competition Agreement provided that Mortimer agreed that for a period of twelve (12) months commencing on the effective date of a Termination Event [Mortimer] shall not directly or indirectly through members of [Mortimer]'s Immediate Family or otherwise, have any interest as a disclosed or beneficial owner in any Competitive Business located or operating, at the Restaurant; or within the Exclusive Area as defined in the Franchise Agreement.

6. On 11 February 2008, CFH entered into an Assignment & Assumption Agreement (the Assignment Agreement) with CDR and thereby became Assignee or Master Franchisee for BFC. Clause 1b of the Assignment Agreement provided for:
    (a) a royalty split whereby 50% of the amount of the royalty payments due to CFH from CDR was to be paid to BFC; and
    (b) CFH was to remit to BFC 50% of the amount of the advertising production fees received by CFH from CDR.

    In accordance with Clause 5b of the Franchise Agreement, the CDR was obligated to pay to BFC royalties amounting to 4% of gross sales. It further provides that failure to pay on the due date results in a late charge and interest.

7. Bennigan's Nassau opened at the Mall of Marathon in New Providence on or about February 2008.

8. CFH contends that since the commencement of the Assignment Agreement CDR and Mortimer have both failed to fulfil their obligations under the said agreement. Further, CFH claims that CDR has never fulfilled its advertising production fees obligations. CFH contends that that in October 2008 CDR and Mortimer failed to pay royalty fees.

9. The Fourth Defendant (Galleria), a company related to Mortimer, made 2 payments with respect to outstanding fees on 1 October 2009 ($7,520.55) and 25 September 2011 ($15,000.00). CFH contends that, in breach of the contractual arrangements, CDR and Mortimer failed on three (3) or more separate occasions to pay the royalty fees when due and upon demand.

10. At the date of the action royalty payments amounting to the sum of $126, 539.54 were alleged to have accrued under the Franchise Agreement.

11. In November 2012 Bennigan's Nassau closed its operations. CFH says that it was advised that the closure was for renovations. CDR and Mortimer says that to the knowledge of CFH, the Bennigan's Restaurant was abandoned by the first Defendant on 31st December, 2012 as a result of CDR's continuing insolvency which was contributed to, at least in part, by BFC's repeated breach of its covenant under clause 10.A of the Franchise Agreement which provided "…*for the purchase of media placement, advertising time and public relations materials in national, regional or other advertising and public relations media…*" to advertise and promote the said Restaurant #5240.

12. On or about 5 July 2013 Outback Steakhouse opened its doors on the same property previously occupied by Bennigan's Nassau. Outback Steakhouse is owned by the Third Defendant (Island Bloom). Mortimer and his mother, Mary Mortimer are the sole shareholders of Island Bloom.

13. On or about the 24 January 2013 CFH exercised its right to terminate the Assignment and Assumption Agreement and the Franchise Agreement in accordance with Clause 17(3)(c) of the Franchise Agreement.

14. CFH contends that between 2008 and 2012, the annual sales of Bennigan's Nassau ranged between $900,000.00 and $2.4 million. That based on past royalty payments CFH had the ability to earn approximately $250,000 over a period of a further five (5) years had the contract not been breached by the defendants. Further, they contend that as a result of Island Bloom's breach of the non-compete clause by opening up a competing restaurant in the same location formerly occupied by Bennigan's Restaurant, BFC and CFH have suffered damage to its reputation and further damage to its goodwill. CFH has thereby lost an opportunity to open an alternative location for Bennigan's within the immediate three mile radius since the Outback Steakhouse is a competing business.

15. CDR denies the allegation of a purported breach of the *Post-Term Covenant Not to Compete* contained in clause 18.E of the Bennigan's Agreement, and the Plaintiff's claim for damages. CDR says that a claim for damages would only arise upon the termination "*by Franchisor due to Franchisee's default*". CDR and Mortimer say that CFH is not entitled to enforce the provisions of the Franchise Agreement.

The Trial

16. At trial, CFH called Christopher Tsavousis and Marcia Beneby as witnesses in its case. The Defendants called Mortimer and James Owens as witnesses in their case. Each of the witnesses settled witness statements and were subject to cross examination.

17. On the morning of the trial CFH was granted leave to withdrew its claims against the Fifth Defendant.

18. At the completion of the evidence, the CFH sought to obtain permission to re-amend the Statement of Claim to specifically plead a breach of the Guarantee Agreement and for injunctive relief. The application was opposed and it was agreed that the Court would make a determination on the issue at the same time as the claim is determined.

19. The allegation of breach of contract by CFH, and its prayers for relief in its proposed Re-Amended Statement of Claim, provides as follows

PARTICULARS OF BREACH

(i) The First and Second Defendants failed to pay the royalty fees due pursuant to the BFA;

(ii) The Second Defendant, in breach of the terms of the Guaranty failed to render as Guarantor, the royalty fees due under the BFA upon demand by the Plaintiff after the First Defendant failed and/or refused to do so.

(iii) The First and Second Defendants proceeded to operate a competitive business on the premises previously reserved for the operation of Bennigan's Nassau in breach of the Post Term Covenant Clause Not to Compete;

(iv) The Second Defendant performed the services as a director, officer, manager, employee, consultant, representative, agent, of a Competitive Business located or operating at the premises formerly occupied by Bennigan's Nassau, or within the Exclusive Area or within a five (5) mile radius of any other Bennigan's Restaurant in operation or under development on the effective date of termination or expiration of the Bennigan's Franchise Agreement;

(v) …

AND the Plaintiff Claims:

1. Payment of the sum of the sum of $213,899.40 plus late charges and interest on the late payment of royalty fees due and owing since the 15th November 2012
2. Damages against the Defendants for breach of contract.
3. Loss of Future Royalty Payments of $250,000
4. Loss of business opportunity
5. Damages related to breach of the Non-Compete Clause in the sum of $250,000
6. Damages for the Second Defendant's breach of the Guaranty.

7. Injunctive relief as against the Third Defendant and/or its agents or assigns or otherwise howsoever authorized until 11th February 2023, which represents the intended term of the BFA.
8. Rescission
9. Costs
10. Interest on damages recovered pursuant to Section 2 of the Civil Procedure (Award of Interest) Act 1997 and under the equitable jurisdiction of the Court
11. Further or other relief.

20. In respect of the application to re-amend I am guided by the dicta of ***Crane Scott JA*** in the Court of Appeal decision in ***Bahamas Telecommunications Company Ltd. v Island Bell Limited SCCivApp No. 188 of 2014,*** at paragraph 34;

> 34. As previously noted, such amendments should only be allowed if they can be done without injustice. In determining whether there is injustice, the court must consider the lateness of the application; the sufficiency of the reasons for the late application; whether a fair trial and the determination of the issues would be compromised by the granting of leave; and whether costs would compensate.

21. I am satisfied that the issues identified by ***Crane-Scott JA***, above, ought to be resolved in favor of granting the re-amendment with respect to the issue of the prayer for breach of the Guarantee Agreement. The Guarantee Agreement had always been a feature of this action. No injustice would therefore occasion as the Defendants could not be said to have been taken by surprise and the issues may still fairly be determined notwithstanding any delay. This amendment could be considered cosmetic. I will therefore grant the leave to re-amend with costs to Mortimer and Island Bloom in any event.

22. In respect to the amendment to plead the claim for injunctive relief this application will be refused on the basis of the lateness of the application and the absence of any good reason for its inclusion. Further reasons which will be apparent in the subsequent discussion on the substantive application this re-amendment was

refused. As with any amendment application the costs will be to the Defendants in any event.

Analysis and Discussion

23. CFH summarizes its case against the Defendants, at paragraph 3 of its submissions, as follows:

> 3. [CFH]'s case against the Defendants can be neatly summarized as follows:
>
> (i) Firstly, [CDR] entered into the [Franchise Agreement] for the operation of a Bennigan's Restaurant, in New Providence ('Bennigan's Nassau').
>
> (ii) Secondly, the Agreement was breached by [CDR], by virtue of the [CDR's] failure to pay royalty fees due expressly under the Franchise Agreement.
>
> (iii) Thirdly, [the Defendants], breached the [Franchise Agreement] by virtue of a contravening a non-compete clause and opening up another competing business on the premises formerly occupied by Bennigan's Nassau within the time period prohibited under the Franchise Agreement.
>
> (iv) Fourthly, [Mortimer], personally agreed to guarantee any and all sums due to the [CDR] under the [Franchise Agreement].
>
> (v) Fifthly, [Mortimer] facilitated the fraud committed on [CFH] with respect to the purported insolvency of [CDR], through the Defendant companies of which he is the controlling mind, by payment of past royalty fees, and as such, the Court should pierce the corporate veil and/or otherwise make each of the Defendants liable for the acts of [Mortimer].

24. The Defendants various defences may be set out as follows:

a) CFH is not entitled to enforce the terms of the Franchise Agreement;

b) CDR is not liable for royalty payments under the Franchise Agreement after the Franchise Agreement automatically terminated in March 2008 upon the insolvency of CDR to the knowledge or constructive knowledge of CFH *Alternatively* upon the abandonment of the franchise by the First Defendant on 31 December 2012.

c) Mortimer is not liable under the guarantee if agreement automatically terminated.

d) The contractual remedy for any alleged breach of the Covenant Not to Compete was for an injunction. There is no contractual right under the Franchise Agreement to a claim in damages.
e) CDR did not breach the Covenant Not to Compete. CDR is not Island Bloom and is not a shareholder or director of Island Bloom.
f) Breach of the Post Term Covenant Not to Compete would only arise upon the termination of the Franchise Agreement "by Franchisor due to the Franchisee's default" As the Franchise Agreement automatically terminated upon the insolvency of CDR clause 18E of the Franchise do not arise.
g) Breach of the Post Term Covenant not to compete (18E) was to operate only for a period of 12 months, commencing on the effective date of such termination or on the date which Franchisee ceases to operate the Restaurant, whichever is later, which date was March 2008 upon the automatic termination of the Franchise Agreement or in the alternative on 31 December 2012.
h) The Defendants did not breach the post term covenant not to compete contained in clause 18E of the Franchise Agreement as the definition of competitor business are unreasonable and therefore in restraint of trade, unlawful and void at common law.
i) No evidence of any damages.

25. The issues for determination which arise in this action are the following:
    a) Whether CFH has locus standi to pursue this claim.
    b) Clause 17A of the Franchise Agreement and the issue of the Insolvency of CDR.
    c) Whether CDR is in breach of the Franchise Agreement in failing to pay outstanding royalties.
    d) Whether Mortimer is liable to pay these sums due from CDR.
    e) Whether there has been breach of the non-compete clause by CDR, Mortimer and Island Bloom by opening up another competing business on the premises formerly occupied by Bennigan's Nassau within the time period prohibited under the Franchise Agreement.

Whether CFH has locus standi to pursue this claim

26. The Defendants argue that the CFH does not have the requisite locus standi to pursue this action against them. The Defendants say that

> "the foundation of the Plaintiff case must be that it has, and at the date of the filing of its claim herein that it had causes of action, against the First and Second Defendants under the Franchise Agreement by reason of the extant rights which were assigned to it under the Master Franchise Agreement by BFC."

27. The Defendants claim that CFH has not complied with the development schedule which required the completion of new Bennigan's restaurants in 2010, 2012, and 2015. Further, they submit, there is no evidence that CFH remains the Master Franchise for the purposes of the Master Franchise Agreement it would follow that pursuant to Article 4.7B of the Master Franchise Agreement CFH has no further right to act as Master Franchisee and to continue to collect a percentage of the fees under the terms of the Master Franchise Agreement and therefore no cause of action to pursue this action.

28. I did not accept this submission. Clause 4.6 of the Master Franchise Agreement provides:

> 4.6 FAILURE TO COMPLY WITH THE DEVELOPMENT SCHEDULE. The Master Franchisee's failure to comply with the Development Schedule will constitute a material breach of this Agreement by the Master Franchisee and in that event BENNIGANS will have the right to terminate this Agreement as provided herein. Termination of this Agreement as a result of the Master Franchisees failure to meet the Development Schedule set forth above will not affect any individual SubFranchise agreements … however, upon termination of this Agreement, all rights of any new SubFranchised Bennigan's restaurants rights to develop additional Bennigan's Restaurants in the Franchised Territory, and all other rights granted to the Master Franchisee under the Agreement will immediately revert to Bennigan's.
>
> 4.7 TERMINATION FOR FAILURE TO COMPLY WITH DEVELOPMENT SCHEDULE. If this Agreement is terminated by Bennigan's because of the Master Franchisee's failure to meet the Development Schedule set forth above, the rights and duties of Bennigan's and the Master Franchisee will be as follows: (A) Master Franchisee will have no further rights to open or develop or SubFanchise additional Bennigan's Restaurants within the Franchise Territory; (B) Master Franchisee shall have no further rights to

act as Master Franchisee and continue to collect a percentage of the fees under the terms of this agreement pertaining to any SubFanchised units developed by Master Franchisee under the terms of this Agreement; (C) the Master ...

(emphasis added)

It would appear that whilst these clauses vested BFC with the right to terminate the Master Franchise Agreement it was not an automatic event. The evidence of Tsavousis, who appeared in the witness box to have been surprised that his obligations under the Master Franchise Agreement, extended to 4 and not 2 stores, said that the additional stores were not opened as an arrangement between CFH and BFC. Tsavousis' evidence was that was that there was no notification of any default by BFC. He maintained in his evidence that there was no termination of their rights by BFC.

29. In the circumstances therefore I reject the submissions that CFH's rights had been terminated and I will find that, on balance, there is evidence that the CFH remains the Master Franchisee.

Clause 17A of the Franchise Agreement and the issue of the Insolvency of CDR

30. CDR and Mortimer contends that CDR was insolvent, in which event they say the Franchise Agreement automatically terminated. This they say is a reliance on Clause 17A(1)(a) of the Franchise Agreement which provides:

**17 TERMINATION**

**17A BY FRANCHISOR**

**(1) Automatic Termination.** Franchisee shall be in default under this Agreement, and all rights granted herein shall automatically terminate without notice to Franchisee, if:

(a) Franchisee becomes insolvent, makes a general assignment for the benefit of creditors, files a voluntary petition in bankruptcy, or an involuntary petition in bankruptcy is filed against Franchisee.

…

31. According to CDR and Mortimer, "[i]t is therefore clear as a matter of construction that the provisions of Clause 17A (1) (a) for automatic termination of the Franchise Agreement in the event of insolvency of CDR were intended to mean exactly what

it says and was intended to operate to automatically terminate the Franchise Agreement upon the insolvency of the [CDR]" Further they say, "bearing in mind that the Franchise Agreement was drafted by the assignor to [CFH] (and that [CFH] takes the benefit and the burden of that drafting), it is submitted that it is clear that the words "automatically terminate" in clause 17A (1)(a) of the BFA should be given their ordinary meaning as being in contra distinction to the rights of the Franchise to terminate upon written notice in the circumstances provided in clause 17A(1)(a) of the Franchise Agreement".

32. CFH says that the burden rests on CDR to prove that it was insolvent and that the statutory test of insolvency under Bahamian law is set out in ***Section 187*** of the ***Companies (Winding Up Amendment Act) 2011*** **('CWUAA')** provides:

> A company is insolvent if
>
> (a) the company is unable to pay its debts as they fall due; or
>
> (b) the value of the company's liabilities exceeds its assets.
>
> …

33. CDR and Mortimer relied upon the evidence of James Owen, the Accountant for CDR. His evidence was that CDR never made a profit. He confirms that a "going concern warning" was not issued to CDR until the financial period ending 31 March 2009. His evidence was that the company was insolvent from the end of its first month of operation as it never made a profit. According to Owens, no "going concern warning" was given earlier because the company was obviously in a startup position and from a balance sheet point of view, the liquidity test would not necessarily give rise to a warning at that stage as the company had a million dollars in the bank.

34. CFH says that there is a material distinction between a going concern warning and insolvency and that the representations made with respect to CDR's insolvency are entirely false. They allege that that has been utilized in an attempt to skirt around CDR's and Mortimer's debts and obligations to CFH to claim that the

Franchise Agreement automatically terminated. They say that even though CDR was purportedly insolvent, Mortimer admitted that rent, salaries and utilities were continually paid. CFH says that it had no knowledge of any such claims of insolvency with respect to CDR and the first time it was made aware of such claims was upon receipt of the Defendants' Defenses.

35. The Defendants argue that "to the knowledge or constructive knowledge of the BFC and or [CFH], [CDR] was insolvent in its operation of the Bennigan's Restaurant from the commencement of the operation of the same in or about March 2008 to the abandonment of the same by [CDR] in December 2012."

36. Clause 17 is titled ***TERMINATION***, 17A is headed, ***"BY FRANCHISOR",*** and 17B is headed, ***"BY FRANCHISEE".*** By these divisions, it appears to me that the Franchise Agreement demarked the means by which either party may terminate the agreement. Clause 17A identified three means by which this may occur from the Franchisor' perspective – (1) Automatic Termination, (2) Termination Upon Written Notice and (3) Termination after cure period. Mortimer accepted, during cross-examination, that the right to terminate pursuant to Clause 17A (1) (a) of the Franchise Agreement was a right which accrued to CFH as Franchisor.

37. Automatic, in subparagraph (1) of Clause 17A, in my view, merely means that the happening of any of the events in subparagraph (1) permits the Franchisor to treat the Franchise Agreement as having been terminated, without any further action on its part. These events include: (a) insolvency of the Franchisee; (b) general assignment for the benefit of creditors, voluntary petition in bankruptcy or insolvency petition; (c) proceedings for the appointment of a receiver of the Franchisee; (d) proceedings for composition with creditors, etc; (e) judgment remaining unsatisfied for 30 days; (f) dissolution of the Franchisee; (g) levying of execution against business property of the Franchisee; and (h) suits for foreclosure, etc.

38. In contrast, subparagraphs (2), and (3) of Clause 17A, which refers to Termination Upon Written Notice and Termination after the cure period, requires action by the Franchisor before termination could become effective:
    (1) In the case of 17A(2): Where the Franchisee has committed a material breach of the Agreement as listed in the sub paragraph, a written notice of the Franchisor will terminate the Franchise Agreement.
    (2) In the case of 17A(3): Where certain events or defaults (listed in the subparagraph) may have occurred, the Franchisor may terminate the Franchise Agreement, on 30 days' notice, if after giving notice to the Franchisee to cure the default, the default remains uncured.

39. In my view the mere fact of the insolvency did not terminate the Franchise Agreement until CFH was aware of that fact and acted upon it. I did not find that that evidence bore out any knowledge. I do accept the evidence of Owens, which is supported by accounts produced, that the restaurant was clearly a loss-making venture. This however, on Owens' evidence, did not mean that CDR was insolvent at the onset of the operations, as contended for by CDR and Mortimer. Owens' evidence was that, notwithstanding the losses at the onset of the operations, on a balance sheet assessment the company did not merit a "going concern warning" as it had a million dollars in its accounts by way of fixed deposits etc. I did find, on my assessment of the evidence, in particular that of Mortimer and Tsavoussis that CFH knew or ought to have known of the insolvency. CFH was not made aware of the poor financial state of CDR. Clause 17A (1)(a) of the Franchise Agreement could not be invoked if CFH had no knowledge of any insolvency.

Whether CDR is in breach of the Franchise Agreement in failing to pay outstanding royalties

40. CFH's claim under this head is simply that CDR failed to comply with the express conditions of the Franchise Agreement and the Assignment Agreement. In particular, they say that pursuant to Clause 5(b) of the Franchise Agreement CDR

had a positive obligation to pay royalty fees and pointing to the payment of these fees by CDR in 2008, 2009, 2010, 2011, 2012 and 2013. During this period CDR paid $309,758.49 to CFH.

41. Mortimer, in his examination-in-chief, acknowledged paying the sum of $309,758.49 during the life of the agreement and in cross-examination he accepted that 4% in royalty fees were due to CFH on the gross sales. Mortimer admitted that there was an indebtedness in relation to the Franchise Agreement.

42. Subject to the technical defenses raised by the Defendants, there is little doubt that CDR was indebted to CFH up to the termination of the Franchise Agreement. These fees were assessed at Clause 5(b) of the Assignment Agreement as 4% of the gross sales in the restaurant. CFH terminated the Agreement on 24 January 2013 and therefore royalties due up to that date would be due and owing in addition to agreed interest and late payments.

43. CFH claims loss of future royalty payments in an amount of $250,000. Firstly there is no evidence, which I accept to support any such loss. Secondly, in my view, there is no basis under the Franchise Agreement for such a claim. Clause 18 of the Franchise Agreement provides:

> 18 OBLIGATIONS UPON TERMINATION OF EXPIRATIONS
> 18A PAYMENTS OF AMOUNTS OWED TO FRANCHISOR
>
> Upon expiration or termination of this Agreement Franchisee shall immediately pay to Franchisor all royalty fees, advertising contributions amounts owed for products purchased by Franchisee from Franchisor or from its affiliates and interest due Franchisor or its affiliates on any of the foregoing. Franchisee must contemporaneously with payment furnish a complete accounting of all amounts owed to Franchisor and its affiliates.
>
> 18B LICENCE MARKS AND COPYRIGHTED WORKS…
> 18C CONFIDENTIAL INFORMATION…
> 18D CONTINUING OBLIGATIONS
>
> All obligations of Franchisor and Franchisee under this obligation which expressly or by their nature are to survive or are intended to survive the termination of this Agreement or expiration of this Agreement shall continue in full force and effect subsequent to and notwithstanding its

termination or expiration until they are satisfied in full or by their nature expire.

18E POST-TERM COVENANT NOT TO COMPETE…

The Franchise Agreement contemplate a decoupling of the parties in that the Franchisee is no longer permitted to utilize the products branding and other proprietary material of the Franchisor. Outstanding fees become immediately due and there are the restrictions on post term completion. It is inconceivable how any loss of future royalties could arise under the terms of the Franchise Agreement. There is no allegations, as in the case of ***Subway International BV v Bastian*** **[2011] 1 BHS No. 63,** of use of propitiatory material upon the termination of the franchise agreement.

44. I find therefore that CFH is entitled to payment of all outstanding royalty fees owing by CDR up to 24 January 2013 inclusive of interest and late payments up to the date of the commencement of this action.

Whether Mortimer is liable to pay the sums due from CDR.

45. CFH claims against Mortimer pursuant to the Guaranty Agreement. CFH says that the Guaranty Agreement is a contract to indemnify the creditor upon the happening of a contingency, namely the default of the principal to perform the principal's obligations. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point. The Guaranty was signed by Mortimer, the 100% beneficial owner of the Franchisee. They say that the liability under the Franchise Agreement to pay the sums due to CFH is joint and several and is a primary liability which continues notwithstanding any purported insolvency claims as alleged. Further, CFH alleges that the liability continues notwithstanding any abandonment of the Franchise Agreement.

46. Mortimer says that his obligations under the Guaranty Agreement fell away on the basis that the Plaintiff breached its contractual obligations towards the First Defendant in terms of supervision, oversight and advertisement. This was not supported by the evidence which I accepted. The evidence of Tsavoussis was that Mortimer indicated that he was going to manage his own advertising and was not prepared to pay into the marketing fund. He also indicated that there was efforts to offer limited assistance in management. I prefer the evidence of Tsavoussis on this issue.

47. Mortimer admits to executing the Guarantee Agreement. Having found that CDR is liable to CFH in respect of outstanding royalty fees and related charges, as sureties for this obligation, Mortimer is liable to satisfy this obligation. Any claim that Mortimer is not liable under the Guarantee Agreement with respect to the outstanding royalty payments of CDR is, in my view, untenable.

Whether Mortimer and Island Bloom had breached the Non-Compete Clauses

48. CFH's case is that Mortimer has breached the In-term and Post-Term Non-compete clauses. These relevant clauses of the Franchise Agreement are as follows:

> Clause 1
> Definitions
> 'Competitive Business' - ,"Any restaurant or food service business, other than Permitted Competitive Business or a BENNIGAN'S RESTAURANT, that is in any way similar to a BENNIGAN'S RESTAURANT."
> 'Principal' - "The term 'Principal' includes collectively and individually, (a) the officers and directors of Franchisee (including the officers and directors of any general partner of Franchisee) who hold an ownership interest in Franchisee, (b) the managing member or member if Franchisee is a limited liability company, (c) all holders of an ownership interest, directly or indirectly…the initial Principals are listed in Exhibit D."
>
> Clause 7A IN-TERM COVENANT NOT TO COMPETE
> …
> Franchisee therefore agrees that during the term of this Agreement, neither Franchisee, its affiliates, nor any principal, nor any member of the immediate family of the Franchisee or any Principal, shall directly or indirectly:

(1) have any interest as a record or beneficial owner in any Competitive Business:

…

Clause 18E

18E. POST-TERM COVENANT NOT TO COMPETE

Upon expiration or termination of this Agreement by Franchisor due to Franchisee's default, neither Franchisee, its affiliates, nor any Principal, nor any member of the immediate family of the Franchisee or any Principal, shall directly or indirectly for a period of 12 months commencing on the effective date of such termination or expiration, or the date on which Franchise cease to operate the Restaurant, whichever is later:

(1) have any interest as a disclosed or beneficial owner in any Competitive Business located or operating:
   (a) at the premises formally occupied by the Restaurant; or
   (b) Within the Exclusive Area; or
   (c) Within a three (3) mile radius of any other Bennigan's Restaurant in operation or under development on the effective date of termination or expiration of this Agreement.
(2) Perform services as a director officer, manager, employee, consultant, representative, agent, or otherwise for any competitive business located or operating:
   (a) At the premises formally occupied by the Restaurant;
   (b) Within the Exclusive Area; or
   (c) Within a three (3) mile radius of any other Bennigan's Restaurant in operation or any Competitive Business, provided that the Franchise's affiliates may otherwise advertise and
(3) Divert or attempt to divert any business or any customers of any Bennigan's Restaurant to any competitive business, provided that Franchise's affiliates may otherwise advertise and operate the Permitted Competitive Businesses in their ordinary course; or
(4) Employ or seek to employ any person who is employed by Franchisor, its affiliates or any developer or franchisee of Bennigan's Resturant nor induce nor attempt to induce any such person to leave the said employment without the prior written consent of such person's employer.

…

49. CFH says that Mortimer, as the principal and shareholder of CDR, breached the in-term covenant not to compete. They say that:

(a) Pursuant to Clause 7.A. (1) of the Franchise Agreement, CDR or any Principal or any immediate family of the Principal were precluded during the term of the Agreement from directly or indirectly having any interest as a record or beneficial owner in any Competitive Business.

(b) Pursuant to Clause 7.A. (2) of the Franchise Agreement, the CDR or any Principal (i.e. the Mortimer) or any immediate family of the Principal were precluded during the term of the Franchise Agreement from directly or indirectly performing services as a director, officer, manager, employee, consultant, representative, agent, or otherwise for any Competitive Business.

50. Accordingly, they argue that the evidence adduced clearly demonstrates that Mortimer has committed material breaches by incorporating Island Bloom with the purpose of operating a Competitive Business within the premises formerly occupied by Bennigan's Nassau during the subsistence of the Franchise Agreement. There was evidence that Mortimer, as the principal of Island Bloom, served as a director for Island Bloom prior to the Franchise Agreement being terminated. The letter of intent was signed with Outback Steakhouse International LP and communication was exchanged in July and August, 2012 with the Mall at Marathon seeking to transfer the lease to the new entity.

51. I am satisfied that the Franchise Agreement came to an end by the letter of CFH of 24 January 2013, not by any automatic termination provision or abandonment of the property by CDR in November 2012. I am also satisfied that there was no beach of Clause 7A by anyone as there was no evidence that any Competitive Business, as defined by Clause 1 above, was in existence at the time of the termination of the Franchise Agreement. At best, Island Bloom may have been incorporated but it is clear that no business had commenced at that premises until July 2013.

52. Assuming there was a breach of the In-Term Covenant, what was the remedy? There is no evidence, which I accept, of any damages sustained to CFH. An Injunctive remedy would be useless as the contract has been terminated and the injunction, pursuant to Clause 7A, could only have subsisted during the term of the agreement.

53. CFH says that following the closure of Bennigan's Nassau in November 2012 Mortimer and Island Bloom subsequently opened a competing restaurant in the same location as Bennigan's Nassau within one year of the termination of the Franchise Agreement and within the exclusive area as defined by the Franchise Agreement. This, CFH says, was a breach of the post term covenant not to compete contrary to Clause 18E. (2) of the Franchise Agreement as:
    (1) Bennigan's and Outback Steakhouse are both casual dining restaurants.
    (2) Outback Steakhouse was opened in the location formerly occupied by Bennigan's Nassau.
    (3) Mortimer is/was a director of Island Bloom at all material times.
    (4) CFH terminated the Franchise Agreement on 24 January 2013.
    (5) Island Bloom opened the Outback Steakhouse on 5 July, 2013 and therefore the non-compete clauses remained operative until 24 January, 2014.

54. Further, they allege, Mortimer, as Covenantor breached the terms of the Confidentiality and Non-Competition Agreement which expressly provided that the Covenantor agreed for a period of twelve (12) months commencing on the effective date of a termination event that the Covenantor shall not directly or indirectly through members of Covenantor's Immediate Family or otherwise, have any interest as a disclosed or beneficial owner in any Competitive Business located or operating, at the Restaurant; or within the Exclusive Area as defined in the Franchise Agreement.

55. CFH says that Island Bloom's operation of the Outback Steakhouse and breaching the post-term non-compete clauses by opening up a competing restaurant in the same location formerly occupied by Bennigan's Nassau, CFH, as Master Franchisor has suffered damage to its reputation and further damage to its goodwill. In particular, CFH has unlawfully been deprived of the opportunity to open an alternative location for Bennigan's at or near the Mall at Marathon, the location known to Bennigan's customers.

56. CDR and Mortimer says that the CDR did not breach the Post-Term Covenant Not to Compete contained in Clause 18E of the Franchise Agreement as the definition of Competitor Business is those clauses are unreasonable and the restraint of trade unlawful and void at common law.

57. There is some merit in this submission.

58. Not surprisingly CFH argues that the provisions are reasonable in the circumstances. I fully accept CFH's statement of the legal principles with respect to the treatment of non-compete or restraint of trade clauses in the decisions of ***Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company [1894] AC 535, Herbert Morris Ltd. Saxelby [1916] 1 AC 688, Lindner v Murdocks Garage (1950) 83 CLR 628*** and ***Carewatch Care Services Ltd. v Focus Caring Services Ltd. and others [2014] EWHC 2313***. Respectfully, it is the application of these principles that I do not share CFH's view. The underlying principle is one of reasonableness in the circumstances.

59. In the House of Lords case of ***Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company [1894] AC 535*** Lord Macnaughten stated at page 565:

> The true view at the present time, I think, is this. The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and, therefore, void. That is the general rule. But there are exceptions. Restraints of trade and interference with individual liberty of action, may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed, it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.

60. Later in ***Herbert Morris Ltd. Saxelby [1916] 1 AC 688*** Lord Parker, following Nordenfelt, stated at page 708 that:

> In the *Nordenfelt Case* (1) that which it was required to protect was the goodwill of a business transferred by the covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on. Under the particular circumstances of the case a world-wide covenant against competition was held no more than adequate for the purchaser's protection. It was argued before your Lordships that no distinction can be drawn between the position of the purchaser of the goodwill of a business taking such a covenant from his vendor and the case of the owner of a business taking such a covenant from his servant or apprentice. In both cases it was said that the property to be protected was the same and the dangers to be guarded against the same. I am of opinion that this argument cannot be accepted. The distinction between the two cases is, I think, quite clear, and is recognized both by Lord Macnaghten and Lord Herschell in the *Nordenfelt Case*. (1) The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.

61. In the Australian case of ***Lindner v Murdocks Garage (1950) 83 CLR 628*** Lathan CJ, following ***Herbert Morris,*** stated at page 633 as follows:

> It is well established that prima facie all restraints upon trade are invalid, but that they may be upheld if the party seeking to enforce them shows that circumstances exist which make the restraint reasonably necessary for protection of a covenantee's business and that it is not contrary to public interests. A distinction is drawn between a restraint upon trade included in an agreement for the sale of a business and a restraint included in an agreement with an employee. The restraint is more easily upheld in the former than in the latter case. In the former case the purchaser is entitled to protect himself against competition on the part of the vendor, but in the latter case he cannot acquire such a right by agreement with the employee: Herbert Morris Ltd. v. Saxelby (1916) 1 AC 688; Attwood v Lamont (1920) 3 KB 571.

62. CFH sought to rely heavily on the English High Court decision ***Carewatch Care Services Ltd. v Focus Caring Services Ltd. and others [2014] EWHC 2313.*** The digested facts are the following: The claimant company, Carewatch, provided home care services in the United Kingdom through franchise and directly owned

branches. In recent years, it had moved from franchises to directly owned businesses. In 1999, the second and third defendants (together, the Graces) purchased a franchise, which granted them the right to operate a care business within a territory for period of seven years. They subsequently took over a second territory. They incorporated their business as the first defendant company, Focus. Focus began to provide live-in residential care under the separate trading name of Purely Care. In November 2013, Carewatch wrote to the Graces, stating that the Purely Care business was a material breach of the franchise agreements. It became clear that income from Purely Care was not being declared in their management service fees paid to Carewatch. In January 2013, without prior warning, the Graces sent a termination letter to Carewatch. Carewatch commenced proceedings, alleging, among other things, breach of covenants. … Carewatch sought to enforce four restrictive covenants in the agreement, which limited the activities that the signatory could carry out following termination of the agreement to prevent direct competition. Three of the covenants restricted competitive activity for 12 months, and the fourth restricted it for nine.

63. According to Henderson J, at paragraphs 127- 134 of the decision:

> THE RESTRICTIVE COVENANTS: VALIDITY AT COMMON LAW
> **[126]** Carewatch wishes to enforce against the Defendants the restrictive covenants contained in cl 22.2 of the Norwich agreement, and the identical or materially similar covenants contained in the other two agreements current at the date of termination of the franchises. It is common ground that, as covenants in restraint of trade, they are prima facie contrary to public policy and unenforceable, but they may be enforced if Carewatch can show that they were designed to protect its legitimate business interests and that they extend no further than is reasonably necessary to achieve that purpose. …
> **[127]** What will be treated as reasonable depends very much on the nature of the agreement. It is well established that the courts are far more ready to uphold a covenant in restraint of trade in an agreement for the sale of a business than they are in a contract of employment. It has also been consistently held in recent years that a franchise agreement is closer to a vendor and purchaser agreement than a contract of employment…
> **[128]** Apart from the provision of goodwill to the franchisee, other legitimate interests which a franchisor may reasonably protect are likely to include its

confidential information and know-how, the loyalty of clients of the franchise brand, and the loyalty of employees by whom the franchise system is operated.

…

**[130]** The first covenant (cl 22.2.1) prevents Focus and the Graces from engaging in, being employed by, or being concerned or interested directly or indirectly in, "any business which competes with the Business or the Franchisee's Business or in any business similar to the Business in the Territory". It will be noted that there are two types of prohibited business: (a) any business which competes with the Business or the Franchisee's Business, and (b) any business similar to the Business. I read the final words "in the Territory" as applying to both of types of prohibited business, and not just to the second.

**[131]** There is no dispute that the period of twelve months, and the limitation to the Territory, are in themselves reasonable restrictions in a covenant of this nature. …The areas of controversy, as I understand it, are:

> (a) whether the business of Purely Care does in fact compete with either the Business or the Franchisee's Business;
>
> (b) whether the scope of the covenant is extended unreasonably by the construction which I have placed on 'the Business'; and
>
> (c) whether the inclusion of 'any business similar to the Business' goes further than is reasonably necessary to protect the legitimate interests of Carewatch."

**[132]** The first point is essentially a question of fact, but it is convenient to consider it here. I am left in no doubt on the evidence that the business of Purely Care, even assuming it to be confined to the provision of live-in care, does indeed compete both with the business carried on by Carewatch and with the business which was carried on by Focus at the date of termination. … As to competition with the Franchisee's Business, the concept of competition with a business which is now defunct is admittedly a little strange, but in my view the parties must be taken to have intended a comparison with the business as it existed at the date of termination to the extent that it was carried on by the franchisee under the Carewatch name and in accordance with the agreement. So understood, there is a clear functional correspondence between the prohibited business and the business built up by the franchisee under the agreement. …

**[134]** I am also satisfied, in relation to the third point, that the extension to "any business similar to the Business" is reasonable. The requirement of "similarity", and the limitation to the Territory, keep it within reasonable bounds. A business which is similar is also almost bound to compete with the Business, so there is force in Mr Evans-Tovey's suggestion that the

> parties may have intended the requirement of similarity to be a convenient proxy for the measurement of competition. …
> **[136]** .... A franchisor has a legitimate interest in preventing competition by a former franchisee against its other franchisees, and it also has a legitimate interest in retaining customer loyalty built up by the former franchisee. This clause reflects and protects those interests in a way that seems to me entirely reasonable.
> **…**

64. ***Carewatch Care Services Ltd.*** is clearly distinguishable from this case on the facts. Most notably, Carewatch Care, as franchisor, was the second largest caregiver in the UK and not only had franchises but directly owned branches. CFH neither owns, manages nor is the franchisor for any other Bennigans restaurant in the island or the country. Unlike Carewatch Care Ltd, CFH has no *legitimate interest in preventing competition by a former franchisee against its other franchisees, and it also has a legitimate interest in retaining customer loyalty built up by the former franchisee.*

65. In all the circumstances I am satisfied that inclusion of the post term non-compete clause in the circumstances of this case was unreasonable. I have come to this conclusion for reasons which include but are not limited to the following:
    a) CFH has not discharged the burden of proof: The law is clear that covenants in restraint of trade, are prima facie contrary to public policy and unenforceable. In order to enforce such clauses, CFH must show that they were designed to protect its legitimate business interests and that they extend no further than is reasonably necessary to achieve that purpose. I am not satisfied that CFH has satisfied this burden. I did not find that CFH had discharged its burden of proof.
    b) There is no business interest of CFH to protect by the restraint: CFH neither owns, manages nor is the franchisor for any other Benegans restaurant in the island or the country. CFH has no *legitimate interest in preventing competition by a former franchisee against its other franchisees, and it also has a legitimate interest in retaining customer loyalty built up by the former franchisee.* In giving evidence, it was clear to me that Mr George Tsavoussis, a principal of the CFH was unaware of the extent of the obligation of CFH to introduce more stores

into the market. It is clear then that there was no such interest reflected or requiring protection by the restraint of trade clause. The presence of the clause in these circumstance is no more than a punitive measure as indicated

c) No harm to CFH: CFH has not demonstrated how and by what means it has been harmed or damaged by the opening of the Outback Restaurant on the property. The building in which the Bennigans restaurant was housed was built is owned by CDR, and the property is owned by it as a leasehold. There is no evidence of any real interest, at any time, in opening another Bennigans in or near that location. They were obligated by the Master Franchise Agreement to build restaurants in 2010, 2012 and 2014 yet none has been built. It would be fanciful to say that they are deprived of such an opportunity having regard to its default and requiring the restraint.

d) Failure of the Business: The business of the Bennigans Resturant at the Mall of Marathon was an abject failure. It operated for years beyond the period it ought to have in an ordinary business setting. The store was a bust, the unchallenged evidence was that it made losses from inception and was carried by Mortimer only because it was in his personal interest to have done so. He was concerned that running as a candidate for political office would present bad optics have to lay off/terminate so many employees. In the result CFH likely obtained income for a considerable period (including the outstanding sums) when the restaurant ought to have long closed and none otherwise due to CFH.

66. If am wrong as to my finding, with respect to the unenforceability of the restraint of trade clause, I would nonetheless find that CFH has not demonstrated that it has suffered any damages as a result of any breach. CFH says “that the operation of the Outback Steakhouse and breaching the post-term non-compete clauses by opening up a competing restaurant, CFH, as Master Franchisor has suffered damage to its reputation and further damage to its goodwill. In particular, CFH has unlawfully been deprived of the opportunity to open an alternative location for Bennigan’s at or near the Mall at Marathon, the location known to Bennigan’s customers.” I did not find on the evidence that any of the claims of CFH have been

proven. In establishing the new restaurant there is no evidence that Bennigan's products, branding materials or anything was being used. As best there would be merely and award of nominal damages would be issued. I repeat subparagraphs b), c) and d) above.

67. Further, If am wrong as to my finding with respect to the unenforceability of the restraint of trade clause, I would nonetheless find that CFH has not demonstrated that the grant of injunctive relief would be appropriate in the circumstances. Incredibly, CFH seeks injunctive relief against Island Bloom and/or its agents or assigns or otherwise howsoever authorized until 11 February 2023, which they say represents the intended term of the Franchise Agreement. It is trite law that the grant of the equitable remedy of an injunction calls for the exercise of the court's discretionary power. Such a remedy ought only to be granted in appropriate circumstances. I have come to this conclusion for reasons which include but are not limited to the following:
    a) I repeat [65] above.
    b) Delay defeats equity. The Franchise Agreement was terminated by CFH on 24 January 2013 however Outback restaurant was not opened until 4 July 2013. Whilst this action was commenced on 31 July 2013 initially seeking injunctive relief, the Statement of Claim, filed on 17 September 2014 abandoned the claim for injunctive relief. No interlocutory application was made for interlocutory injunctive relief. Understandably, this claim was abandoned as the restraint to trade clause was limited in that it was only to last for 12 months, i.e to 24 January 2014. In the proposed amendment, CFH seeks to restrain Island Bloom until February 2023. 24 January 2014 has long since passed and in my view, the injunction sought by CFH to enforce a restraint which had a time limit which passed 6 years ago, untenable.

Whether Island Bloom is liable for breach of the Non-compete clause and for the debts of Mortimer and CDR

68. Having determined that the restraint of trade clause is not enforceable against Mortimer or CDR, it is axiomatic that the claim against Island Bloom must likewise fail

69. CFH says that Island Bloom was incorporated for the sole purpose of facilitating Mortimer's blatant breach of contract, the corporate veil ought to be pierced with respect to Island Bloom and the company be made liable for the breaches of contract. According to CFH, at paragraph 147 of its submissions:

> 147. Where it is established that a company has been formed for the purposes of carrying out a façade or sham or that the company is an agent or shareholders, the Court will not hesitate to disregard the principles of separate legal personality and lift the corporate veil and make the directors and officers liable for the debts of [CDR].

70. I will simply say that, in assessing the witnesses and the evidence as a whole, I did not find that the facts as alleged by CFH came up to proof. In particular, I was not satisfied that Island Bloom was formed for the purposes of carrying out a façade or sham or that the company is an agent or shareholders.

71. The claim against Island Bloom is therefore dismissed.

Claims against the Galleria

72. CFH says that as Galleria is a company of which Mortimer is the beneficial owner, and assumed responsibility for several of its franchise payments, it is submitted that the corporate veil ought to be pierced and Galleria be made liable for breach of contract and non-payment of royalty fees by CDR, particularly as it is claimed that CDR has no assets.

73. Notwithstanding the submissions of CFH the Re-Amended Statement of Claim did not raise any claims against the Galleria. The substance of the references to it in the Statement of Claim, against Galleria was that Galleria paid some of the royalty payments which CFH says were due by CDR and that it is a related company as Mortimer is the principal of both companies. These are not proper claims for which a judgment may be obtained against Galleria. I repeat my finding in relation to Island Bloom. I dismiss the action as against Galleria.

Conclusion

74. For the avoidance of doubt the decision of this court is a follows:

(1) CDR and Mortimer do pay to CFH all outstanding royalty fees owing by CDR up to 24 January 2013 inclusive of interest and late payments in accordance with the terms of the Agreement up to the date of the commencement of this action. [The parties are invited to settle the calculation of the said sum, failing which the Court will make the calculation.]

(2) All other claims against CDR and Mortimer are dismissed.

(3) CFH shall be entitled to interest on the said sum from the date of the filing of the Amended Statement of Claim to the date of judgment in the amount of 4% and to accrue interest at the statutory rate

(4) Claims against Island Bloom are dismissed.

(5) Claims against the Fourth Defendant are dismissed

(6) Parties to make written submission as to the appropriate order for costs within 28 days of the date of this ruling.

Dated the 22nd day of April AD 2020

Ian R. Winder

Justice