FEDERAL COURT OF AUSTRALIA

TSG Franchise Management Pty Ltd v Cigarette & Gift Warehouse (Franchising) Pty Ltd (No 2) [2016] FCA 674

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| File number: | VID 764 of 2014 |
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| Judge: | **DAVIES J** |
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| Date of judgment: | 8 June 2016 |
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| Catchwords: | **TORTS** – economic torts – procuring or inducing breach of contract – relevant principles – element of intention  **TORTS –** economic torts – procuring or inducing breach of contract – availability of permanent injunction  **TRADE PRACTICES** – misleading or deceptive conduct – representations made to franchisees of the applicant – whether statements of fact – meaning conveyed by representations – whether representations misleading, deceptive or false |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2 ss 4, 18  *Federal Court of Australia Act 1976* (Cth) s 23 |
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| Cases cited: | *Allstate Life Insurance Company v Australia and New Zealand Banking Group Ltd* (1995) 58 FCR 26; [1995] FCA 1368  *Daebo Shipping Company Limited v The Ship Go Star* (2012) 207 FCR 220; [2012] FCAFC 158  *Donaldson v Natural Springs Australia Limited* [2015] FCA 498  *Fightvision Pty Ltd v Onis Forou* (1999) 47 NSWLR 473; [1999] NSWCA 323  *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157; [2001] FCA 1040  *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8  *LED Technologies Pty Ltd v Roadvision Pty Ltd* (2012) 199 FCR 204; [2012] FCAFC 3  *Sanders v Snell* (1998) 196 CLR 329; [1998] HCA 64  *Short v The City Bank of Sydney* (1912) 15 CLR 148; [1912] HCA 54  *Woolley v Dunford* (1972) 3 SASR 243  *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530; [2004] HCA 56 |
|  |  |
| Dates of hearing: | 13–16 July 2015 and 22–23 July 2015 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 120 |
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| Counsel for the Applicant: | M Robins QC with B Gibson |
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| Solicitor for the Applicant: | Mills Oakley Lawyers |
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| Counsel for the Respondent: | D Williams QC with D Manly |
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| Solicitor for the Respondent: | Nyst Legal |

ORDERS

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|  | | VID 764 of 2014 |
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| BETWEEN: | TSG FRANCHISE MANAGEMENT PTY LTD  Applicant | |
| AND: | CIGARETTE & GIFT WAREHOUSE (FRANCHISING) PTY LTD  Respondent | |

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| JUDGE: | DAVIES J |
| DATE OF ORDER: | 8 June 2016 |

THE COURT ORDERS THAT:

1. The parties provide, by way of email to Chambers, proposed short minutes of order to give effect to these reasons on or before 15 June 2016.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DAVIES J:

# introduction

1. Since 1996, the applicant, TSG Franchise Management Pty Ltd (**“TSG”**), has carried on a business of granting and managing franchises that sell tobacco and related products. TSG’s franchisees trade under the business name “Tobacco Station”. The respondent, Cigarette & Gift Warehouse (Franchising) Pty Ltd (**“Freechoice”**), is a direct competitor of TSG in the tobacco product franchise market and operates under the business name of “Freechoice Australia”. Its franchisees trade under the name “Freechoice”. Other competitors in the market include Cignall, CTC, and King of the Pack, all of which also operate under franchise arrangements.
2. In or around April 2014 Freechoice embarked on an aggressive expansion plan aimed at encouraging its competitors’ franchisees to enter into franchise arrangements with Freechoice. The strategy involved Freechoice actively targeting high-performing competitor franchisees and offering them various financial incentives to enter into franchise agreements with Freechoice, including offering to “pay out” their existing contracts with competitor franchisors as an inducement to persuade the competitor franchisees to terminate those contracts and enter into contracts with Freechoice.
3. Initially Freechoice focussed on Cignall franchisees and called the strategy the “Cignall Project”. Subsequently, in around October 2014, the strategy extended out to include other competitor franchisees and the name of the project changed to the “Competitor Project” (**“the Project”** or **“the Competitor Project”**).
4. It was not in controversy that Freechoice intentionally targeted high-performing TSG franchisees as part of the Competitor Project, whether or not the franchisee was still under contract with TSG. It was also not in controversy that Cheryl Walters (**“Ms Walters”**), the franchisee of the TSG Armidale and TSG Armidale Centro stores in NSW (**“the TSG Armidale Franchises”**), took up Freechoice’s offer to enter into franchise agreements with Freechoice and gave TSG notice that she was terminating her agreements with TSG. Freechoice’s offer to Ms Walters included reimbursement of costs she incurred by exiting her TSG contracts early. TSG alleged that Freechoice induced Ms Walters to terminate her franchise agreements with TSG by offering financial incentives to sign with it and the purported terminations and subsequent conduct of Ms Walters in establishing as a Freechoice franchisee were in breach of Ms Walters’ contracts with TSG. TSG has sued Freechoice for knowingly and intentionally inducing or procuring Ms Walters to breach her contracts with TSG.
5. TSG alleged also that Freechoice made representations to TSG franchisees that were false and misleading to induce them to terminate their contracts with TSG and enter into franchise agreements with Freechoice. TSG has, in addition, sued Freechoice for misleading and deceptive conduct in contravention of s 18 of the Australian Consumer Law(**“ACL”**) in Sch 2 of the *Competition and Consumer Act 2010* (Cth).
6. TSG has sought declarations that Freechoice engaged in the conduct alleged. TSG has also sought a permanent injunction restraining Freechoice from inducing or procuring (or attempting to induce or procure) TSG franchisees to terminate their agreements with TSG and enter into franchise agreements with Freechoice.
7. Freechoice has not disputed that it has sought to persuade TSG franchisees to terminate their contracts with TSG and enter into contracts with Freechoice and that it has offered them financial incentives to do so. Nor has Freechoice disputed that it was aware that Ms Walters’ contracts with TSG were for fixed terms which had not expired and could not be terminated without the consent of TSG. Moreover, Freechoice accepted that it induced Ms Walters to terminate her franchise agreements with TSG and enter into franchise agreements with Freechoice by offering her financial incentives. The primary area of dispute on the claim of inducing breach of contract was whether Freechoice intended to induce Ms Walters to breach her contracts with TSG by terminating those contracts early. On Freechoice’s case, the tort of inducing breach of contract was not committed because Freechoice lacked the requisite intention to procure a breach of contract by Ms Walters. Freechoice denied that it intentionally induced or procured Ms Walters to breach her contracts with TSG and alleged that it reasonably believed that it was open to Ms Walters to terminate the TSG agreements with the consent of TSG by paying TSG an amount calculated to reflect the value of the franchise fees that would otherwise fall due under the remaining term of the TSG agreements (a **“payout figure”**).
8. On the claims of misleading and deceptive conduct Freechoice admitted that it made the representations and admitted that one of the representations was misleading or deceptive. It otherwise denied the allegations.

# the witnesses

1. TSG called seven witnesses – Andrew Rankine (**“Mr Rankine”**), TSG’s Head of Operations; Ian Scholfield (**“Mr Scholfield”**), TSG’s franchise manager; Prakash Balia (**“Mr Balia”**), the franchisee of the TSG Burpengary (QLD) store; Carmen Moore (**“Ms Moore”**), the acting Corporate Director of TSG; Matthew Scesny (**“Mr Scesny”**), Freechoice’s Franchise manager for NSW, Victoria, Tasmania and South Australia at the relevant times; Janeen Norvock (“**Ms Norvock”**), the Franchise Communications Manager for Freechoice at the relevant times; and Jeffrey Williams (**“Mr Williams”**), Head of Trade Marketing at British American Tobacco. Ms Norvock and Mr Williams were both subpoenaed by TSG to give evidence and gave their evidence-in-chief orally. Ms Norvock was later recalled and gave additional evidence-in-chief by way of affidavit. All the other witnesses gave their evidence-in-chief by way of affidavit and all were cross-examined save for Mr Balia whose evidence was not challenged.
2. Freechoice called four witnesses – Murphy Ioane (**“Mr Ioane”**), Freechoice’s Queensland franchise representative at the relevant times; Luke Carter (**“Mr Carter”**) who at the relevant times was (and still is) the State Manager for Victoria and Tasmania; Ms Walters, the franchisee of the TSG Armidale Franchises; and, as an additional witness in response to Ms Norvock’s evidence, Andrew Whelan (**“Mr Whelan”**), Freechoice’s General Manager. Travers Beynon (**“Mr Beynon”**), Freechoice’s Managing Director, was not called as a witness, although he was present in Court throughout the trial.
3. TSG submitted that Mr Whelan was not a witness of truth and that his evidence should not be accepted unless corroborated by contemporaneous documents. TSG also submitted that the Court should draw relevant inferences from the failure of Freechoice to call Mr Beynon. I will return to these submissions in the course of reviewing the evidence and making findings of fact.

# Freechoice’s “competitor project”

1. Although Mr Beynon was not called to give evidence, the account of both Mr Whelan and Ms Norvock was that the “Competitor Project” was instigated at Mr Beynon’s direction as a strategy to acquire Cignall’s franchise stores after Cignall’s owner rebuffed an approach by Mr Beynon to acquire the Cignall business. Within a few months the Project extended to other competitor franchisees and, according to Mr Whelan, became Mr Beynon’s “number one” strategy for growing Freechoice’s franchise business. Mr Whelan described the strategy of targeting Freechoice’s competitors’ franchisees as part of Freechoice’s “vision” to “win on all fronts with Vending, Wholesale, Retail and Company stores”.
2. Mr Whelan’s evidence was that he ran the Project at the direction of Mr Beynon. His job was to oversee the implementation of the Project and Ms Norvock, Mr Ioane and Mr Scesny “were tasked with driving” the Project under his supervision and oversight. They reported to him, and Mr Whelan, in turn, reported to Mr Beynon.
3. Mr Whelan’s evidence was that Freechoice initially targeted Cignall stores from particular geographical areas and stores that he “knew to have large sales volumes”. His instructions to the staff were to introduce themselves to competitor franchisees and “find out a bit about them and their contractual position whilst also talking up Freechoice”. He deposed that a large aspect of the Project was to gather market knowledge on Freechoice’s competitors’ businesses “such as finding out the stick volumes of each store, and to work out which franchisees were unhappy with their current franchisor, when they would come off contract and whether there was potential for [Freechoice] signing them to Freechoice”. “Stick volume” is a reference to the number of cigarettes sold. According to Mr Whelan, the Project “required” Freechoice staff to approach competitor franchisees presently under contract. He “didn’t see that as problematic as long as they paid out their contract prior to coming across to Freechoice”.
4. In or around October 2014, the Project was expanded to include CTC and TSG franchisees. It was elicited in cross-examination that Mr Whelan used confidential sales data that he had obtained from a former colleague at British American Tobacco Australia (**“BATA”**) (where he had worked before joining Freechoice) to prepare a “target hit list” of high-performing Cignall, CTC and TSG franchisees on whom he instructed Ms Norvock, Mr Ioane and Mr Scesny to focus. The list included the top 50 TSG franchise stores by stick volume.
5. A reporting system called the “MD Report No. 24” was set up to monitor the progress of the Project (**“MD Reports”**). “MD” stands for “managing director”. These reports were produced weekly from in or around July 2014 at the direction of Mr Beynon. In his affidavit, Mr Whelan explained that Mr Beynon wanted him to provide a weekly report on the progress of the Competitor Project so that “he (Mr Beynon) could keep an eye on how things were progressing”. Mr Whelan also gave evidence that Mr Beynon generally reviewed the reports at some stage during each week and later the same week, he would meet with Mr Beynon to discuss the contents of the report. As stated, Mr Beynon was not called by Freechoice but the MD Reports evidence that Mr Beynon kept himself fully informed about, and was heavily involved in, the progress of the Competitor Project.
6. Only Mr Beynon and Mr Whelan had authority to approve the payment of incentives to competitor franchisees. The evidence from Mr Whelan was that he would work with the franchise manager for the relevant area to calculate a possible offer to the competitor franchisee which would then be signed off by Mr Beynon or, in his absence, by Mr Whelan. In determining what offer would be made, Mr Whelan would take into account the competitor franchisee’s stick volume and projected return on investment to Freechoice in signing up the franchisee. Mr Whelan stated that Freechoice then often sought to recover the upfront costs by increasing the term of its own fixed term agreements with the franchisee by an amount that reflected the value of the incentives offered.
7. As stated also, Freechoice did not dispute that it targeted competitor franchisees still under contract. From the outset the strategy was to offer to pay out competitor franchisees’ contracts as an inducement for them to terminate their contracts and sign with Freechoice, and Freechoice staff were instructed to offer to pay competitor franchisees the costs associated with ending their contracts with their current franchisor. There was an abundance of evidence of offers made to competitor franchisees to pay out their contracts as an inducement to have those franchisees sign with Freechoice.

# THE tsg armIdale franchises

1. Ms Walters had two fixed term franchise agreements with TSG – one for the TSG Armidale Plaza store and the other for the TSG Armidale Centro store. The contracts were not due to expire until 30 June 2017 and 30 November 2015 respectively. The evidence was that Ms Walters and Ms Norvock first communicated with one another about the possibility of Ms Walters signing with Freechoice on or around 17 June 2014. Ms Walters’ evidence was that she had been dissatisfied with TSG since around mid-2013 and was contemplating changing franchisors and that Freechoice contacted Ms Walters’ husband, following a discussion he had with a Freechoice franchisee who said he was very happy with Freechoice.
2. Ms Norvock met with Ms Walters on 1 July 2014 to discuss what Freechoice could offer. Prior to the meeting, Ms Norvock told Mr Whelan that there was a TSG franchisee who may be interested in signing with Freechoice and asked Mr Whelan’s permission to do a road trip to Armidale to visit the owner of the TSG Armidale Franchises. According to Ms Norvock, whose evidence was not contradicted by Mr Whelan, she was coached by Mr Whelan about what she should say to Ms Walters and was told by Mr Whelan “to ask for a payout figure and various practical matters regarding recruiting Ms Walters”. At the time, Freechoice had an incentive plan in place for Ms Norvock and other staff members to sign on competitor franchisees and Ms Norvock’s evidence was that Mr Whelan told her that if she was able to convince Ms Walters to sign with Freechoice, she would be given an $8,000 incentive payment.
3. Although there was no specific evidence on what transpired at that meeting, it is reasonable to infer that there was some discussion concerning the payout of Ms Walters’ existing contracts with TSG as Ms Walters agreed in cross-examination that she knew at the time that she was still under contract in relation to both stores. Following that meeting Ms Walters telephoned Darren Hancock, her TSG relationship manager, and told him that she wanted to terminate the contracts and asked if he would get her a “payout figure”. It appears that Mr Hancock passed on that request to a Kate Avery at TSG. On 9 July 2014, Ms Avery emailed Simon Ritte of TSG, copied to Mr Hancock. Ms Avery wrote:

Hi Simon

Darren was just asking me about the payout costs for Armidale and Centro Armidale as the owners have asked when their contracts are up and the costs involved with exiting early.

Centro Armidale: Commencement date – 1st December 2010 – 5 year term

Armidale: Commencement date – 1st July 2012 – 5 year term

Can you please let Darren know what the costs for the stores would be please?

1. On the same day, Mr Ritte emailed to Mr Hancock a “rough break down” of the “exit costs” for the TSG Armidale Franchises, noting that the breakdown was “not to be sent to stores but to give you an idea”.
2. On 15 July 2014, Mr Hancock asked Mr Ritte for the exact amount that will be owed “as the owner is wanting something in writing today please”. Mr Ritte responded by email the same day as follows:

Hi Darren,

Please remind the owner that under the franchise agreement, the franchisee does not have a right to terminate at will.

However in case of breach of the contract resulting in a termination the following costs will be due:

**Centro Armidale**

**12.3** On the termination of this Agreement, within the timeframe the Company specifies, the Franchisee must pay to the Company an amount which is equal to the:

a) Annual Franchise Fee, POS Support Fee and Broadband Data Fee which the Franchisee would have paid to the Company during the remainder of the Term if this Agreement had not been terminated

Time left on Contract: 17 months

Term: 5 years

Due to expire: 30th November 2015

Annual Fee: $350 x 17 = $5,950 ($4200/12 = $350 per month)

Late fees: $25 (annual fee was not paid per 30/6/2014)

POS Support Fee: $27.50 x 13 = $357.50 ($330/12 = $27.50 per month)

Broadband Data Fee: $45 x 17 = $765

**Total Owed: $7,123.50**

**Armidale**

**12.3** On the termination of this Agreement, within the timeframe the Company specifies, the Franchisee must pay to the Company an amount which is equal to the:

a) Annual Franchise Fee, POS Support Fee and Broadband Data Fee which the Franchisee would have paid to the Company during the remainder of the Term if this Agreement had not been terminated

Time left on Contract: 36 months

Term: 5 years

Due to expire: 30th June 2017

Annual Fee: $350 x 24 = $8,400 ($4200/12 = $350 per month; 2014/2015 is paid)

POS Support Fee: $27.50 x 32 = $1,575.50 ($330/12 = $27.50 per month)

Broadband Data Fee: $45 x 35 = $1,575

**Total Owed: $10,855**

1. On 16 July 2014, Mr Hancock sent the email chain to Ms Walters with the comment “Please find payout figure attached”.
2. The following day Ms Walters forwarded these emails to Ms Norvock with the comment:

Have just received this email from Darren with payout figures, have a look and let me know what you think.

Talk soon.

1. Ms Norvock replied the same day, by email:

Hi Cheryl

I will have a look at these figures closer, they seem to be letting you off just with the fees which is very good.

Can you ask for a copy of the last TSG Armidale agreement – this is the Coles Centre Store. As you did not have a new agreement and it appeared to expire a few years ago, and by paying fees that would not stand up as agreeing to a new 5 year agreement. If this is the case then no fees for this store you can change when you like.

Once we finalise the fees we can move both stores and get those rebates aligned to what is due correctly for your store, under the Freechoice brand.

1. At this stage, it is relevant to note that both Ms Walters and Ms Norvock gave evidence that they read the complete email chain starting with the request from Ms Avery to Mr Ritte on 9 July 2014 and, in particular, had read the email from Mr Ritte to Mr Hancock of 15 July 2014. Ms Walters agreed in cross-examination that she “understood” the email. In re-examination she explained that she understood “that if I pay that money, then I am out of my contract”. Ms Norvock’s evidence was that she read the email carefully and regarded it as important. The email put Ms Norvock on notice that Ms Walters did not have the right to terminate her TSG contracts at will. The email also put Ms Norvock on notice that TSG had not given its consent to Ms Walters terminating early and would be in breach of her contracts if she did.
2. On 3 September 2014, Ms Walters obtained a copy of the TSG Armidale Centro franchise agreement from TSG which she forwarded to Ms Norvock later that day. Following receipt of the franchise agreement, arrangements were made for Ms Walters and her husband to attend a meeting at the Freechoice Head Office.
3. The terms of the TSG Armidale Centro franchise agreement relevantly included a five year term ending on 30 November 2015 with an option to renew on the part of TSG. The franchise agreement did not provide any right of termination by Ms Walters during the fixed term of the franchise agreement. Ms Norvock stated in evidence that she would have read through the agreement but all she was interested in was the expiry date. She was not interested in whether or not there was a right for Ms Walters to terminate that contract at will.
4. On 4 September 2014, Ms Norvock emailed Mr Whelan advising him that Ms Walters would attend the Freechoice Head Office on 8 September 2014 to sign one Armidale store over to Freechoice. Mr Whelan responded on 5 September 2014, copying seven other Freechoice employees, as follows:

I wanted to highlight the below result as it shows that we cannot give up EVER in our pursuit of the Company vision.

Here is a competition store (TSG) that told Janeen repeatedly they “weren’t sure”, “it will be easier to stay with TSG”, “we have a lot of things on at present” etc etc to change their TSG to a Freechoice.

By persistence and a game plan Janeen was able to get these guys over for one of their stores and no doubt after showing our service and professionalism we will get their other TSG store also.

Don’t accept NO as an answer and keep following up, as this ‘hunger’ and ‘mongrel’ in us all will ensure we win on all fronts with Vending, Wholesale, Retail and Company stores.

1. At some stage prior to the 8 September meeting Ms Norvock provided Mr Whelan with a copy of the email chain between her, Ms Walters and the TSG representatives. It will be necessary to return to Mr Whelan’s state of knowledge about this email in dealing with the question of his credit.
2. Also prior to the meeting Mr Whelan had a discussion with Ms Norvock about the financial incentives that would be offered to Ms Walters to sign with Freechoice and authorised the terms of the offer to include “reimbursement of costs involved with paying out TSG Contract estimate $10,000”. Mr Whelan instructed Ms Norvock to prepare a letter of offer for the meeting with Ms Walters on 8 September 2014.
3. On 8 September 2014, Ms Walters and her husband met with Mr Beynon, Mr Whelan and Ms Norvock, and Ms Walters executed the letter of offer with Freechoice. This document was only produced by Freechoice during the course of the trial upon the document being called for by TSG’s counsel, although the document was within the terms of the discovery in the proceedings. This document was one of many that were produced for the first time at trial although within the terms of the discovery in the proceedings. Mr Whelan swore an affidavit on 20 July 2015 in which he purported to provide an explanation for the failure to provide proper discovery. His explanation was that he had “never been involved in any court proceedings in any jurisdiction” and “did not have a good understanding of [his] obligations to the Court” and indirectly sought to assign blame to Freechoice’s former solicitors. His explanation was both unconvincing and unsatisfactory. Freechoice did not otherwise seek to explain why the document had not been discovered.
4. On around 19 September 2014, Ms Walters executed franchise agreements with Freechoice for both Armidale Franchises stated to be effective as of 6 October 2014. Mr Beynon signed those agreements as Managing Director of Freechoice. Curiously only the Armidale Centro store contract was discovered before trial and both were discovered in redacted form. Freechoice also failed to give a satisfactory explanation for the failure to discover the other contract earlier than trial. However it is not part of Freechoice’s case that the contracts differed from the letter of offer. It was submitted for TSG that, in those circumstances, it follows that the agreement provided for reimbursement of estimated costs, not an “as agreed” payout figure, consistently, TSG submitted, with the state of fact that TSG had not agreed to release Ms Walters from her contracts and, TSG submitted, Freechoice’s knowledge of that state of fact.
5. On or around 23 October 2014, Ms Norvock drafted a letter of termination from Ms Walters to TSG which she forwarded to Ms Walters. The letter was headed “Re Termination of Franchise Agreements effective 3rd November 2014 both stores – TSG Armidale and TSG Centro Armidale”. The letter stated:

This letter is to officially inform you and TSG that we are leaving the TSG Group effective COB Monday, 3rd November 2014 and terminating our agreements with TSG. Monday 3rd November will be the last day we will be trading as TSG at both of the above mentioned stores.

We fully understand there is remaining term on each Franchise Agreement which previously you supplied us with an indicative termination figure, email of 15th July 2014.

We request please that you supply us with an official termination payment for each store for each Franchise Agreement. We agree to pay the following costs:

* Franchise Fee for remaining term
* POS Support Fee for remaining term

We do not agree to pay the following costs as they are not justified:

* Broadband Data Fee – only up to the 3rd November, as this service will no longer be supplied, and your national agreement would be flexible enough to cater for stores coming and going.
* Late Fee – fees were not paid as we reviewed our agreements and waited for payout figures.

Once we receive official termination figures and they are correct, we will make the payment via EFT to TSG on Tues 4th November 2014 … we would then request please that you advise all three suppliers – BATA, ITA and PML notification that we are no longer a member of the TSG group. Please also supply us with a letter officially releasing us from TSG and confirmation that all outstanding fees have been paid.

As per past conversations with you and suppliers, the back wall tobacco units belong to us at each store. Signage will be removed and these will be ready for your collection on Wed 5th November 2014, please contact us to arrange the collection.

1. Ms Walters emailed the letter of termination to Mr Hancock of TSG on 23 October 2014 without altering the draft prepared by Ms Norvock. Mr Ritte of TSG responded to Ms Walters the following day acknowledging receipt of her email and stating that TSG would respond in due course. Ms Walters forwarded that email to Ms Norvock who asked to be sent any other correspondence from TSG so that Freechoice “can make the payments to you next week on change over”.
2. On 31 October 2014, Mills Oakley Lawyers (**“Mills Oakley”**), the solicitors for TSG, sent substantially identical letters in respect of each franchise to Ms Walters as follows:

We refer to your recent letter to TSG dated 23 October 2014 requesting an early termination of the franchise agreement between TSG and Cheryl Walters dated [] (**Franchise Agreement**). We note that under the Franchise Agreement, you **do not** have the right to terminate the Franchise Agreement upon request. Accordingly, our client **does not** agree to release you from the Franchise Agreement and expects that you will perform your obligations under the Franchise Agreement until the expiration of the term …

1. On 3 November 2014, Ms Walters emailed one of the letters to Ms Norvock. Ms Norvock forwarded that email to Mr Whelan and asked him to call her to discuss.
2. Ms Norvock and Mr Whelan spoke early on 3 November 2014. Mr Whelan told Ms Norvock that “we can’t do anything”. Shortly afterwards, Mr Whelan replied to Ms Norvock’s email as follows:

As discussed you cannot give any advice to new franchisees or they will hold you accountable and [Freechoice] for legal costs. It is up to the franchisee to pay out their contract or a group will take legal action as I would. You cannot leave thing until the last minute which is why I have been asking “has the group been notified”. It [is] up to them to notify and pay out which is why we give up front payments.

Guys let me tell you. TSG, CTC and Cignall will come back hard so make sure you are aggressive and quick to sign the stores we have on at the moment.

Don’t let this fall down in the next 2 weeks. It needs to be ramped up harder.

1. After close of business on 3 November 2014, the TSG Armidale Franchises were rebadged as “Freechoice” and their fit out similarly changed. On 4 November 2014, the TSG Armidale Franchises ceased trading as TSG stores, reopened as Freechoice-branded stores and Ms Walters stopped providing TSG with daily reports.
2. On 6 November 2014, Ms Norvock sent Mr Ioane and other Freechoice staff an email congratulating them for “an exceptional job with the transition of the 2 TSG Armidale stores across to Freechoice.”
3. On 14 November 2014, Mills Oakley wrote to Ms Walters notifying her that by rebranding the stores to Freechoice and ceasing to provide daily reports she was in breach of the TSG franchise agreements. Mills Oakley demanded written confirmation that the stores would be rebranded as TSG stores by 24 November 2014 failing which it had instructions to issue proceedings.
4. On 19 November 2014, Mr Whelan sent an email to Mr Ioane, copied to Ms Norvock, in which he asked Ms Norvock to see him regarding the Armidale stores. He asked whether “they paid out their contract” and said “they need to as they will be in breach and TSG are trying to take action against Freechoice.” Mr Whelan asked what help the franchisees would need to make this happen and asked “do they need advice from our legal firm?”
5. On 20 November 2014, Ms Walters sent TSG a letter entitled “Contract terminated and costs paid”. This letter was also drafted by Ms Norvock. The letter referred to the correspondence in which TSG stated that Ms Walters was not free to terminate her agreements and specified the amount owing in the event of a breach. Ms Walters also referred to the notice from Mills Oakley that there had been a breach and said “as you believe we are in Breach of our Agreement we have paid today the costs due as stated in your email”. The letter attached receipts for EFT transfers that had been made and requested “written confirmation that TSG have released us from the group”. Although the payments were made after TSG advised that it did not accept the termination, TSG did not respond to Ms Walters’ letter nor return the payments made.
6. Senior counsel for Freechoice submitted that the Court should find that on 9 July 2014 Ms Walters requested a payout figure to end her contracts early and that on 16 July 2014 TSG provided a payout figure to Ms Walters which, if paid, would end her contracts early on a consensual basis. It was further submitted that the Court should find that taken as a whole the email chain conveyed to any reader of it, including Ms Walters and Ms Norvock, that Ms Walters could achieve an early exit from her TSG contracts by paying the payout figure and the Court should find, consistently with those emails, that as at 16 July 2014, TSG had consented to Ms Walters bringing her franchise agreements to an end on a consensual basis on payment of a sum of money.
7. I accept that on 9 July 2014 Ms Walters requested a payout figure to end her contracts early but otherwise reject those submissions. Neither Ms Walters nor Ms Norvock gave evidence that they understood from the email chain that TSG had agreed to release Ms Walters from her contracts early. Whilst Mr Whelan did give evidence that it was his understanding from reading the email chain that TSG had agreed to release Ms Walters and that she intended to pay out her contract, I do not accept his evidence, which I find implausible and self-serving. The email from Mr Ritte to Mr Hancock was clear in its terms that early termination would be in breach of contract. It did not convey that TSG consented to Ms Walters bringing her franchise agreements to an end on a consensual basis on payment of a sum of money. All it did was to notify the costs payable by Ms Walters if she breached her contracts by purporting to terminate them early.
8. I found Mr Whelan’s evidence on this matter on the whole evasive, non-responsive and most unsatisfactory. In his affidavit he deposed that “At some stage prior to our meeting with Ms Walters in early September 2014, [Ms Norvock] provided [him] with a copy of the email chain between herself, Ms Walters and TSG representatives”, yet when it was put to him in cross-examination that he first saw the email chain at some stage between July and early September 2014 he responded that he could not recall. When asked to agree that he had seen the email chain well before the letter of offer was signed on 8 September 2014 he stated that was incorrect and asserted that he could not recall seeing the email chain before that meeting. When pressed, he admitted that he remembered looking at the payout figures but then asserted that he did not remember seeing the words:

Please remind the owner that under the franchise agreement the franchisee does not have a right to terminate at will.

I do not accept that evidence as truthful. Mr Whelan’s evidence in cross-examination that he only read the email chain to ascertain the payout figures was self-serving. I find it inherently unlikely that he had not seen those words which immediately preceded the break-down of costs in relation to both stores and inherently unlikely that he overlooked that part of the email chain. It was not disputed that he was, in any event, aware that TSG contracts were for fixed terms and could not be terminated at will. His evidence, furthermore, was inconsistent with Ms Norvock’s evidence, which I consider has more plausibility and which I prefer. Ms Norvock’s evidence was that she provided the whole email chain to Mr Whelan and Mr Whelan told her he had read it carefully and they had laughed about the fact that TSG had forwarded on the entire email chain, despite Mr Ritte’s clear instruction to Mr Hancock not to do so.

1. There is another reason to doubt the truthfulness of the answers that Mr Whelan gave in cross-examination about his knowledge and understanding of Mr Ritte’s email to Mr Hancock. Mr Whelan was shown not to have been candid in his evidence-in-chief that he did not recall ever seeing Ms Walters’ franchise agreement prior to these proceedings. He was cross-examined on that evidence and when pressed, ultimately conceded that he had read the contract before the 8 September meeting and knew that Ms Walters had no right to terminate the contract early unless TSG agreed. Ms Norvock in her evidence confirmed that she had shown the Armidale Centro contract to Mr Whelan when she received it. Mr Whelan’s lack of candour on this important factual matter left me with the impression that I could not safely rely on his testimony on controversial matters.
2. I also reject as untrue Mr Whelan’s evidence that he thought that TSG had agreed to release Ms Walters from her contracts when he authorised the terms of the offer to be made to her. It is clear, from the terms of the offer that Mr Whelan authorised, that Freechoice had not been given a “payout figure” by Ms Walters by the time the offer was made and it was not Ms Walters’ evidence that she had. Ms Walters could not recall having any discussion with Ms Norvock prior to the meeting about estimated payout costs and Ms Norvock did not give contrary evidence. Tellingly, whilst the evidence about what was discussed during the 8 September 2014 meeting was vague and general, none of the witnesses gave evidence that Ms Walters told the Freechoice representatives at that meeting that TSG had agreed to release her from her contracts. All this occurred in the context where Mr Whelan was aware that Cignall was “blocking every change of store with legal letters to current owners” in response to franchisees requesting payout figures, as was noted in the MD Report of 15 September 2014. This aspect of Mr Whelan’s evidence was also contradicted by the terms of the email he sent to Ms Norvock on 3 November 2014 in response to her email notifying him of the 31 October Mills Oakley letter advising that TSG did not release Ms Walters from her contracts. Mr Whelan’s 3 November email contains his reprimand to Ms Norvock that “You cannot leave thing until the last minute which is why I have been asking ‘has the group been notified’. It [is] up to them to notify and pay out which is why we give up front payments.” That email indicates that Mr Whelan was aware when Freechoice made its offer to Ms Walters that Ms Walters had not obtained TSG’s consent to early termination. I am accordingly satisfied on the evidence, and I find, that Mr Whelan knew at the time that TSG had not agreed to release Ms Walters from her contracts early and also knew at the time that TSG had not been paid out by Ms Walters when he authorised the offer to be made to Ms Walters and procured her to sign with Freechoice.
3. I am also satisfied on the evidence, and I find, that Freechoice, at the time that Mr Beynon executed the franchise agreements on its behalf on 19 September 2014, had no reason to believe that, in the interim, TSG had agreed to release Ms Walters from her contracts early. Ms Norvock did not give evidence that she understood as at 8 September (when the letter of offer was signed) or 19 September 2014 (when the contracts were executed) that TSG had given, or would give, its consent to Ms Walters terminating her contracts early and there was no evidence that Ms Walters had taken any steps in the meantime to obtain TSG’s consent to an early termination. To the contrary Ms Walters’ evidence was that she knew she was still under contract with TSG when she signed with Freechoice. Ms Walters also agreed in cross-examination that she did not make any payment to TSG between 19 September and 6 October (when the Freechoice contract became effective) because she knew that there was no agreed figure between her and TSG.
4. Mr Whelan also cannot be believed on his evidence that he was unaware from reading the 31 October 2014 Mills Oakley letter that TSG was not going to release Ms Walters from her contracts. That denial is rejected in the face of the clear terms of the letters in respect of each of the TSG Armidale Franchises that TSG did “not agree to release [Ms Walters] from the Franchise Agreement” and expected that she would “perform [her] obligations under the Franchise Agreement until the expiration of the term”. Mr Whelan admitted that he read this letter on 3 November 2014 and I find it implausible that Mr Whelan did not know from reading that letter that TSG would not release Ms Walters from her contracts. His denial was another of his attempts in cross-examination to refute that he had knowledge that Ms Walters did not have TSG’s agreement to terminate early, contrary to the objective evidence that he did know. He also gave later contradictory evidence that, having read the Mills Oakley letter, “that was the first I heard about it, that … they had not released TSG Armidale from their contract.”

# credit issues

1. Overall I found Mr Whelan to be an unreliable witness who did not give honest and frank evidence concerning what he knew about Ms Walters’ contractual right to terminate her TSG contracts early. He was also shown not to be an entirely truthful witness on a number of other occasions, which reflects adversely on his credit as a whole.
2. By way of example, Mr Whelan deposed that between May and August 2014, Freechoice was able to sign four or five former Cignall franchisees and of those, “some were off contract”. In cross-examination that evidence was shown not to be correct. Rather, four Cignall franchisees signed with Freechoice during that period (Cignall Kingswood, Cignall Miller, Cignall South Morang and Cignall Boronia), and all those franchisees were still in contract with Cignall at the time (though the franchisee for Cignall Miller had only three months left on his contract), which Mr Whelan accepted that he knew. Mr Whelan ultimately admitted that he could not identify any Cignall franchisee who signed with Freechoice prior to the end of August 2014 who, to his knowledge, was out of contract. Tellingly against the truthfulness of his own evidence, Mr Whelan’s instructions to the Freechoice staff were to prioritise targeting stores with less than three years remaining on their contracts.
3. Mr Whelan also deposed that Freechoice targeted Cignall franchisees on a geographical basis and those stores that he knew to have large stick volumes, which he had compiled in a spreadsheet. This evidence was not candid, nor entirely truthful. What Mr Whelan did not disclose in his affidavit was that the information in his spreadsheet came from confidential sales data given to him by a former colleague at BATA, where Mr Whelan had worked before joining Freechoice. This evidence was elicited from him in cross-examination. Mr Whelan also admitted in cross-examination that he knew that his colleague was not authorised to release that information to him and admitted that he used the data knowing that it had been unlawfully given to him. Cross-examination also elicited that geographical location had little, if anything, to do with the approaches made to competitor franchisees. The evidence clearly showed that Mr Whelan’s list of stores to target was based on stick volume, not geographical location. Mr Whelan was given several opportunities to correct his evidence that competitor franchisees were generally approached on a geographic basis which he continued to refuse, but he ultimately agreed in cross-examination that competitor franchisees with large stick volumes were the primary targets when confronted with the MD Reports which show that stick volume, not geographical location, was the criterion for targeting competitor franchisees.
4. At [38]–[39] of his affidavit, Mr Whelan deposed that Cignall agreed to allow the Cignall Miller franchisee to pay out his contract which was “consistent with [his] understanding of the industry that, provided the franchisor agreed to release the franchisee upon payment of certain fees, the franchisee could lawfully end their contract and move to a competitor”. Mr Whelan went on to say:

It is something I had also experienced at Freechoice whereby, if we had a franchisee that was unhappy and wanted to leave our group, or leave the tobacco sector, provided they paid us a set fee they could leave.

Mr Whelan referred to one Freechoice franchisee as an example but stated that “they ultimately ended up staying with Freechoice”. In cross-examination Mr Whelan admitted that in fact Freechoice had never consented to a Freechoice franchisee terminating their franchise early for the purpose of joining a competitor, and there was no industry practice of allowing franchisees to terminate early to join another franchisor.

1. It is relevant in this context also to raise Freechoice’s discovery in this proceeding. The MD Reports were not discovered but produced in answer to TSG’s call on the third day of trial on 15 July 2015. On 20 July 2015, after the fourth day of trial, Mr Whelan swore a supplementary affidavit of documents which discovered emails regarding the MD Reports. Mr Whelan deposed that on 14 July 2015 Freechoice’s solicitor informed him that the MD Reports had not been discovered but should have been discovered in these proceedings. Those reports were self-evidently directly relevant to the issues in these proceedings as they are a record of the Competitor Project as it was implemented in 2014 and 2015. On 3 July 2015, Freechoice was ordered to give discovery and produce any “Competitor Project MD report or equivalent document relating to TSG”, amongst other documents. On 8 July 2015, Mr Whelan swore an affidavit of documents but the documents did not include the MD Reports, save for an MD Report produced in December 2014. On the second day of the trial, a call was made for production of all the MD Reports which preceded the discovered MD Report dated December 2014. It is clear on Mr Whelan’s own evidence that he knew that there were other MD Reports on the Competitor Project. His explanation for the non-production of those other reports was that he recalled that his solicitor had requested a copy of the December 2014 MD Report but did not recall his solicitor asking him for a copy of all MD Reports and at the time he “did not appreciate that we were required to disclose all of those reports” as he “never closely examined the Court orders and simply relied on [his solicitor’s] instructions as to what was required”. Mr Whelan admitted in cross-examination that he was told that he had to make proper enquiries as to all relevant documents in respect of the case. Indeed he swore in his affidavit of documents that he had undertaken reasonable enquiries. Mr Whelan’s explanation for the non-production of the other MD Reports is not credible. Specifically, in his affidavit of 8 July 2015 he deposed that he “made reasonable enquiries as to the existence and location of the documents specified in the order.” Mr Whelan must have been on notice accordingly that the documents to discover included “any Competitor Project MD Report or equivalent document relating to TSG” and knew because of his involvement in the Project and his review of those reports that they comprised more than the MD Report dated December 2014. In the circumstances, I reject his explanation as to why those documents were not discovered earlier. I find his evidence in this regard untruthful: either he did not make all reasonable enquiries as to the existence and location of the documents specified in the order (contrary to his affidavit sworn on 8 July 2015), because, had he done so, he would have identified the other MD Reports; alternatively, assuming that Mr Whelan did make reasonable enquiries, he claimed that he did not appreciate that Freechoice was required to disclose all of the MD Reports, which is simply not plausible. Either way, I found his explanation in [84] of his affidavit sworn on 20 July 2015 evasive and not truthful.

# inducing or procuring breach of contracts

1. The parties were in substantial agreement on the elements of the tort of procuring or inducing a breach of contract. In *Daebo Shipping Company Ltd v The Ship Go Star* (2012) 207 FCR 220; [2012] FCAFC 158 at 240 (FCR) and [88], the Full Federal Court usefully summarised the essential elements of the tort as follows:
2. There must be a contract between the plaintiff and a third party;
3. The defendant must know that such a contract exists;
4. The defendant must know that if the third party does, or fails to do, a particular act, that conduct of the third party would be a breach of the contract;
5. The defendant must intend to induce or procure the third party to breach the contract by doing or failing to do that particular act;
6. The breach must cause loss or damage to the plaintiff.
7. The gravamen of the tort is the defendant’s intention to induce or procure the breach in the knowledge that such a breach will interfere with the plaintiff’s contractual rights: *Allstate Life Insurance Company v Australia and New Zealand Banking Group Ltd* (1995) 58 FCR 26*;* [1995] FCA 1368, 43 (FCR); *Fightvision Pty Ltd v Onis Forou* (1999) 47 NSWLR 473; [1999] NSWCA 323, 509–512 [159]–[171]; *LED Technologies Pty Ltd v Roadvision Pty Ltd* (2012) 199 FCR 204; [2012] FCAFC 3, 212–216 [40]–[54]. In *Sanders v Snell* (1998) 196 CLR 329; [1998] HCA 64, the High Court stated that:

To establish an inducing or procuring of breach, something more must be shown than that the alleged tortfeasor harboured an uncommunicated subjective desire that the contract would or might be breached.

Showing what the tortfeasor desired may well be very relevant to the issue of intention with which the alleged tortfeasor acted, but it is necessary to consider what was done, as well as what was desired. To persuade or direct a contracting party to terminate the contract lawfully is not to procure a breach of the contract.

So too, there is no requisite intention if a person believed on reasonable grounds that what they induced or procured the contracting party to do would not be in breach of contract: *Short v The City Bank of Sydney* (1912) 15 CLR 148; [1912] HCA 54, 160 (CLR).

1. Moreover, the relevant interference with contractual relations must be deliberate. In *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157; [2001] FCA 1040 at [127], Hill and Finkelstein JJ stated:

The gravamen of the tort of inducing breach of contract is intention. Although the requirement of knowledge of the contract is sometimes discussed as if it were a separate ingredient of the tort, it is in fact no more than an aspect of intention. The requirement that the alleged tortfeasor have sufficient knowledge of the contract is a requirement that he have sufficient knowledge to ground an intention to interfere with contractual rights. Both the intention to interfere with contractual rights and the necessary supporting knowledge of the contract refer to the state of mind of the alleged tortfeasor: *All State Life Insurance Co v ANZ Banking Group Ltd* (1995) 58 FCR 26 at 43.

Reckless indifference or wilful blindness can amount to knowledge for this purpose: *Donaldson v Natural Springs Australia Limited* [2015] FCA 498, [207]; *Fightvision Pty Ltd v Onis Forou* (1999) 47 NSWLR 473; [1999] NSWCA 323, 512 [171].

# Was the tort committed?

1. TSG has claimed that Freechoice, knowing at all material times that Ms Walters, the franchisee of the TSG Armidale Franchises, had entered into franchise agreements with TSG that remained on foot, wrongfully and intentionally procured and induced Ms Walters to breach the terms of those franchise agreements and to refuse to perform or further perform her obligations under the same. Those allegations were denied by Freechoice in its defence but in opening, senior counsel for Freechoice conceded that there was essentially only one question in issue in dispute in relation to this claim. Mr Williams QC stated:

We admit that we had a plan – a project of aggressively seeking to recruit people who were franchised to other systems. We admit that. We are allowed to do that provided we do it lawfully. We admit – we don’t dispute that in that process we sought to procure people and induce them to move from one to the other so that part of it’s not in dispute either. The only issue in the case about inducing breach of contract is whether it was the intention of Freechoice in doing that, that those franchisees should breach their contracts with TSG …

1. In written submissions, Freechoice accepted that it is open to the Court to find that Ms Walters breached her agreements with TSG either in purporting to pay out early in circumstances where she was on notice that she was not being released by TSG, or by rebadging with Freechoice when it was clear from the Mills Oakley letter of 31 October 2014 that she was not being released from her agreements. However, it was submitted, such a finding does not lead to or necessitate a finding that Freechoice intentionally procured or induced Ms Walters’ breach. Rather, it was submitted that the Court should find that it was not Freechoice’s intention that Ms Walters trade under the Freechoice banner regardless of whether or not she paid out TSG. It was submitted that the Court should find that it was Freechoice’s intention that Ms Walters trade under its banner after obtaining a payout figure to bring her agreements with TSG to an end on a consensual basis and paying that sum to TSG.
2. Freechoice submitted that as Ms Norvock was the point of contact with Ms Walters, it is Ms Norvock’s intention that is the relevant intention for the purpose of determining whether the tort was committed. It was submitted that the Court should find that Ms Norvock’s understanding throughout her dealings with Ms Walters was that Ms Walters’ agreements could be brought to an end on a consensual basis by payment of a sum of money and that this view was partly informed by the early success of the Competitor Project whereby Cignall franchisees moved to Freechoice on payment of a sum of money to end their agreements. It was submitted further that the Court should find that the relevant date for assessing Ms Norvock’s intention must be 8 September 2014 because it was on that date that Ms Walters informed Freechoice, at a meeting at Freechoice’s office, that TSG had given her a payout figure which she would need to pay to exit her agreements early and that she intended to pay that figure, or, at the latest, the date must be 19 September 2014 when Ms Walters executed her Freechoice franchise agreements.
3. I accept that Ms Norvock understood that Ms Walters’ TSG agreements could be brought to an end early with TSG’s consent by payment of a sum of money. Her evidence was to that effect in cross-examination and I found her generally to be a reliable and honest witness. However, whether she had that understanding is not to the point. The relevant factual inquiry is whether she understood as at 8 September (when the offer was made) or as at 19 September (when the Freechoice contract was signed) that TSG had given, or would give, its consent to Ms Walters terminating her contracts. Ms Norvock was on notice from the Ritte email that TSG had not consented to Ms Walters terminating her contracts early and the evidence did not show that she was led to any other understanding by Ms Walters before making the offer to Ms Walters or Ms Walters signing the Freechoice contracts. Furthermore, it is contrary to the evidence that she had reasonable grounds to believe that TSG’s consent would be forthcoming, as she knew that Ms Walters did not have the right to terminate the TSG contracts at will, and knew from the Ritte email that TSG had put Ms Walters on notice that she would be in breach of her contracts if she terminated them early.
4. Moreover, I reject the submission that Ms Norvock’s intention is the relevant intention for the purpose of determining whether the tort was committed. The evidence was to the effect that it was Mr Beynon and Mr Whelan who were the decision makers, not Ms Norvock, and therefore the relevant intention is that of Mr Whelan and/or Mr Beynon on whose authority Ms Norvock acted in making the offer to, and signing up, Ms Walters.
5. Senior counsel for Freechoice submitted that the Court should also find that Mr Whelan understood as at 8 and 19 September 2014 (and thereafter) that the agreements could be brought to an end provided the franchisor agreed to release the franchisee upon payment of a certain sum and if that occurred, the contract would end and the franchisee could move to a competitor. But whether or not he had that general understanding is not to the point. The question is whether he knew that TSG had not given its consent to the early termination of Ms Walters’ franchise agreements. In any event, Mr Whelan’s own evidence contradicted Freechoice’s defence that there was an industry practice of allowing franchisees to terminate early on payment of a “payout figure” to join another franchisor. I have disbelieved Mr Whelan on his evidence (which I did not find credible) that he thought that TSG had agreed to release Ms Walters from her contracts when he authorised the terms of the offer to be made to her and procured her to sign with Freechoice, and made the finding that he did know at the time that TSG had not agreed to release Ms Walters from her contracts early. I have also found that Mr Whelan knew at the time that TSG had not been paid out. In other words, Mr Whelan knew at the time that without TSG’s consent, Ms Walters could not terminate her contracts with TSG without breaching those contracts and that TSG had not consented. It was submitted for Freechoice that the Court should find that Mr Whelan’s instructions to Ms Norvock in the 3 November 2014 email, sent after Ms Norvock showed him the Mills Oakley letter of 31 October, showed his concern that Ms Walters needed to pay out her contracts with TSG and be released from those contracts before commencing to trade with Freechoice and showed his concern that “doing it the wrong way around may result in the franchisee being sued by TSG”. It was also submitted that Mr Whelan’s email was consistent with a belief that it would be wrongful to induce a franchisee to terminate their contract early “only if not done correctly” and demonstrated that it had not been his intention that Ms Walters would come across before paying out her contracts and obtaining a release from TSG. Telling against that submission is that despite acknowledging in his affidavit that he knew that competitor franchisees could only join Freechoice if “they paid out their contract prior to coming across” and despite stating that Freechoice did not want to sign any franchisees who had not been released by their franchisor, Mr Whelan failed to explain why he did not take any steps to satisfy himself that TSG had agreed, or would agree, to release the TSG Armidale Franchises before Freechoice induced Ms Walters to rebrand her stores. He gave no instruction to Ms Norvock that Ms Walters should not be signed up with Freechoice until (or unless) Ms Walters was able to terminate her TSG contracts by concluded mutual agreement. Moreover, despite being on notice by the Mills Oakley letter that TSG had not, and would not, release Ms Walters, Mr Whelan did not instruct Ms Norvock to cancel the shop fit out that was to proceed that evening to rebadge the Armidale Stores as “Freechoice”, nor did he instruct Ms Norvock to delay the commencement of Ms Walters’ trading with Freechoice. His conduct was entirely inconsistent with the claim that he did not intend to procure Ms Walters to breach her contracts.
6. I also found as self-serving Mr Whelan’s evidence-in-chief that one of the main reasons why Freechoice would want any new franchisee to be released from its previous franchise was that otherwise the store would not be supported by the tobacco manufacturers and this would prevent them from obtaining rebates, meaning that Freechoice would need to assist the franchisee with cash flow. There was nothing in the evidence to indicate that Mr Whelan at any time gave instruction to any of the Freechoice staff about the need to ensure that Ms Walters was released from the TSG contracts for that reason. Nor was there anything in the evidence of Ms Norvock or Ms Walters to that effect.
7. The evidence supports the finding, and I find, that Mr Whelan intended to procure Ms Walters to commence with Freechoice regardless of her contractual arrangements with TSG.
8. It was Freechoice’s own submission that there was no reason to infer or otherwise conclude that Mr Beynon’s state of mind was materially different to Mr Whelan’s. I accept that submission. It may be inferred, and I find, that Mr Whelan at all times was acting with the authority and knowledge of Mr Beynon. Mr Whelan did not give contrary evidence. Mr Beynon was not called to give evidence although he was plainly available as he sat in Court throughout the trial and I infer that his evidence would not have assisted Freechoice: *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8.
9. Accordingly, I am satisfied on the evidence that Ms Walters was induced by Freechoice to breach the terms of her franchise agreements with TSG by signing with Freechoice and terminating her TSG franchise agreements before their fixed terms had expired. The evidence did not show that Mr Whelan honestly believed, or had reasonable grounds to believe, that Ms Walters would obtain TSG’s consent to the early termination of her contracts and I reject Freechoice’s case that it was not Freechoice’s intention that Ms Walters trade under its banner without a lawful termination of the TSG franchises.
10. I accordingly find that Freechoice intentionally procured or induced Ms Walters’ breach of contract.

# the remedy

1. The only allegation of a completed tort relates to the TSG Armidale Stores in respect of which TSG does not seek any pecuniary remedy because it accepted that it essentially has already been compensated for its loss and damage by the payment from Ms Walters on 20 November 2014. The remedy sought by TSG is a declaration to the effect that Freechoice knowingly and intentionally induced Ms Walters to breach the terms of her franchise agreements with TSG. TSG has also sought a permanent injunction to restrain Freechoice from procuring its franchisees to terminate their franchise agreements with TSG and sign with Freechoice whilst still under contract with TSG.
2. In my view, there is utility in granting the declaration sought for the purpose of identifying Freechoice’s tortious conduct where no order for damages is sought against Freechoice in respect of that conduct. For the reasons that follow, I consider that TSG has also made out a case for the grant of a permanent injunction restraining Freechoice from inducing TSG franchisees to breach their franchise agreements with TSG.

## The conduct

1. As mentioned, Freechoice’s strategy pursuant to the Competitor Project was (and still is) to approach competitor stores with high stick volumes still under contract with competitor franchisors with a view to inducing those franchisees to terminate their current contracts and join up with Freechoice. Freechoice’s practice was (and still is) to offer to pay any prospective franchisee who had to terminate their franchise agreement an amount of money equal to the amount that the franchisor was likely to recover from that franchisee as a result of the early termination. It was not in dispute that, as part of its strategy, Freechoice has deliberately targeted a number of TSG franchisees, still under contract with TSG, and offered to reimburse the payout costs of early termination as an inducement for those franchisees to terminate their franchise agreements with TSG and commence with Freechoice. Those franchisees included TSG Kings Cross, TSG Doreen, TSG Bayside, and TSG Burpengary.
2. The evidence showed a number of approaches by Freechoice representatives to TSG franchisees still under contract during the period of October 2014 to December 2014. The MD Reports over that period identify the TSG stores that had been, or were to be, targeted, the outcome of the approach, whether a verbal offer had been made and verbally accepted, whether Mr Beynon (or Mr Whelan) had authorised a letter of offer, whether the letter of offer had been signed, whether the franchise agreement had been prepared and executed and the estimated changeover date.
3. On 13 November 2014, TSG’s solicitors, Mills Oakley, wrote to the directors of Freechoice (who were Mr Beynon’s parents) in relation to the unsolicited offers made to TSG franchisees. The solicitors wrote:

Freechoice has made an active effort to interfere in our client’s existing contractual arrangements with its franchisees. Freechoice’s conduct involves committing the tort of “interfering in contractual relations”.

In the correspondence to an existing TSG franchisee from Murphy Ioane of Freechoice dated (the **Email**), a letter of offer was attached (the **Letter of Offer**). The Letter of Offer contained the terms upon which the relevant TSG franchisee could enter into a franchise agreement with Freechoice … This conduct is a clear example of Freechoice committing the tort of “interfering in contractual relations” as

1. Freechoice is aware that TSG has entered into franchise agreements with its franchisees; and
2. notwithstanding this, it has sent the Email and Letter of Offer to existing TSG franchisees in a blatant attempt to induce them to breach their contractual obligations to TSG.

Accordingly, our client demands that you do the following in relation to this allegation:

1. immediately stop all communications with existing TSG franchisees that Freechoice has contacted; and
2. do not contact any other TSG franchisees.

We have been instructed to issue proceedings against you if you do not stop engaging in the conduct … within two days of receipt of this letter.

1. Freechoice did not give the undertaking sought and continued its pattern of conduct. The only apparent effect of Freechoice having been put on notice as to the wrongful nature of its conduct was that by email on 19 November 2014, Mr Whelan instructed Mr Ioane, who was targeting the TSG Burpengary franchisee at the time, “NOT [to] put anything in writing to him, keep it all verbal at this stage”.
2. Mr Whelan agreed in cross-examination that he saw that letter around 17 or 18 November 2014. He also agreed in cross-examination that the letter did not deter him from instructing his staff to press on with approaches to TSG franchisees, one of whom was Ming Liang (**“Mr Liang”**), the operator of TSG Bayside who was under contract with TSG until 30 April 2015.

## TSG Bayside

1. The evidence was that TSG Bayside was initially targeted by Freechoice sometime in October 2014. TSG Bayside was one of TSG’s highest-performing franchises. On 24 October 2014, Ms Norvock emailed Mr Whelan, copied to Mr Scesny and Mr Carter, advising that it had been “confirmed” that Mr Liang would come over to Freechoice and requesting Mr Carter to visit TSG Bayside with the letter of offer. The email continued:

They [Mr Liang and his wife] will also need to advise TSG that they are leaving the group and want a termination payment ASAP. We need to get them to do this next week – we want TSG told next week – long term strategy here!!

TSG will be informed next week of TSG Armidale leaving as of the 3rd Nov[ember] and then this store TSG Bayside so they will not be happy – losing 3 will make an impact.

Mr Whelan, replying to all, asked to be advised of the offer to TSG Bayside so he could approve it. That week’s MD Report records TSG Bayside as having signed on to Freechoice on 27 October 2014 for a seven year contract.

1. On 27 October 2014, Mr Scesny emailed Mr Whelan requesting approval for the terms of the letter of offer to Mr Liang. Mr Whelan responded later that day, confirming that Freechoice could offer Mr Liang a $40,000 sign on fee once the store was open, up to $25,000 for shop fit and “payout of contract up to $15k [$15,000]”, with the proviso that “if more comes out of cash sign on”. Mr Whelan instructed Mr Scesny that the “offer is for signature today only, MUST be done today”. Later that day, Mr Liang executed a letter of offer with Freechoice and Mr Carter signed the offer on behalf of Freechoice.
2. As stated, on 13 November 2014, Mills Oakley wrote to the directors of Freechoice (who were Mr Beynon’s parents) in relation to the unsolicited offers made to TSG franchisees.
3. On 20 November 2014, and it may be inferred with Mr Whelan’s authorisation, Mr Scesny emailed Mr Liang a draft termination letter for Mr Liang to send to TSG. The letter was in the following terms:

We wish to advise in writing what we have already communicated to our Franchise Manager that we are terminating our TSG Franchise Contract. We have made several verbal requests for a payout figure and nothing has been given to us from TSG. We advise the following:

* We are Terminating the TSG Franchise Contract on the 30th November 2014
* Request a payout figure in writing from TSG for the remaining term which ends April 2014 (sic)
* We are not in breach of any contractual agreements as we are terminating and agree to pay all remaining fees due.
* As per the Franchising Code of Conduct under section 22 – Termination no breach by Franchisee, we have the right to terminate the contract, and we have given reasonable notice, without the consent of the Franchisee.
* TSG are requested to respond by Monday 24 November 2014 by 5pm.

1. Later that day, Mr Liang emailed Mr Scesny asking for him to clarify “a few things about Freechoice” that “Ian from TSG” had said about Freechoice, namely whether Freechoice pays rebates on time, whether the “sign on bonus [would be] paid on time like you said” and whether “with Freechoice Bata ranging will affect [his] PML and ITA rebates” – ie his rebates with competitor tobacco suppliers.
2. The MD Report from on or around 24 November 2014 noted that TSG had refused to give TSG Bayside a “payout figure”. Also on 24 November 2014, Mr Liang received an email from Mills Oakley attaching a letter. The letter provided as follows:

We confirm that we act for TSG Franchise Management Pty Ltd ACN 052 370 733 (**TSG**).

We refer to your recent letter to Simon Ritte of TSG dated 20 November 2014 in which you –

1. request a payout figure for early termination of the franchise agreement between TSG and Optimus Melbourne Pty Ltd ACN 142 645 449 dated 1 May 2010 (**franchise agreement**); and
2. claim that, as franchisee, you are entitled to terminate the Franchise Agreement pursuant to section 22 of the Franchising Code of Conduct (**Code**).

We note that you **do not** have a right to terminate the Franchise Agreement under the Franchise Agreement or under the Code. Section 22 of the Code applies if a *franchisor* (i.e. TSG) terminates a franchise agreement. It does not apply if a franchisee terminates the agreement as you have claimed.

Accordingly, our client **does not** agree to release you from the Franchise Agreement and expects that you will perform your obligations under the Franchise Agreement until the expiration of the term (i.e. 30 April 2015) (the **Term**). As such, our client has no obligation to provide you with a payout figure for the remainder of the Term.

Our client reserves it[s] rights under the Franchise Agreement and at law if you fail to perform your obligations under the Franchise Agreement during the Term.

1. Mr Liang forwarded the letter to Mr Scesny who told Mr Liang that he would “see what we can do”. Mr Liang responded “The worst case will be we have to wait another 5 months …” In response, Mr Scesny urged Mr Liang to “see if we can piss them off now”.
2. On 27 November 2014, Mr Scesny responded to Mr Liang’s email regarding the Mills Oakley letter, telling him that:

We have checked and you can terminate the agreement as long as you are willing to pay any fee’s (sic) associated with this and you are.

I would send to TSG every day until you get a response. We can prepare to start Monday the 15th.

The email attached the termination letter that Mr Scesny had drafted which Mr Liang had sent to TSG on 20 November. It appears that Mr Liang followed that advice and resent the letter of termination as, later that day, Mills Oakley sent a further letter to Mr Liang, which he forwarded to Mr Scesny. This letter referred to Mr Liang’s correspondence to Mr Ritte of TSG dated 27 November 2014 communicating Mr Liang’s intention to terminate the franchise agreement with TSG. The letter reiterated that Mr Liang did not have a right to terminate the franchise agreement at will and would be in breach of the franchise agreement if he proceeded to terminate it on 14 December 2014. The letter further requested that Mr Liang confirm in writing that he did not intend to terminate and that he would continue to fulfil his obligations under the agreement until the term expired on 30 April 2015. In response, Mr Scesny told Mr Liang that:

Given we understand there are no trading restraints, no tenancy control held by TSG and no enforceable penalties for termination or breach, beyond losses flowing from the breach (i.e. profits for the remainder of the term) there seems not too much TSG can do to hold a Franchisee.

What I am finding out is to see how this will effect (sic) rebates being paid, as this is the only thing I can think of.

Just to be a pain to TSG, I would send the letter again just to piss them off but [it’s] your call.

1. It appears however that Mr Liang decided not to terminate his TSG contract early. On 2 December, Mr Scesny sent an email to Ms Suzie Ozioko (the HR & Operations Manager at Freechoice), Ms Norvock and copied to Mr Whelan, advising that:

I have spoken with [Mr Liang] and he wants to wait until the New Year. He said it is a busy time of the year and does not want a new pos system two weeks before X-Mass and also deal with getting a solicitor and TSG. He just said it [was] too hard to handle his WS and also deal with emails from TSG and there (sic) solicitor regarding injunctions and rebates. He said mid-Jan we can give it a go.

1. Mr Whelan’s reaction, rather than respecting Mr Liang’s position, was to ask:

how do we firm this up with a commitment?

we don’t want to let this go, has he signed the letter of offer and possibly the franchise agreement so we can plan this for early next year?

do all you can with this one as it is a large ‘fish’ to catch.

1. The evidence did not explain what happened thereafter in relation to TSG Bayside save that Mr Liang waited until his contract with TSG had expired before commencing with Freechoice.
2. Mr Whelan expressly conceded that he continued to press Mr Scesny and other Freechoice staff to pursue TSG Bayside notwithstanding that he knew of TSG’s objection because, he said, he “knew that eventually they would come across to us”. All this occurred in the context where Mr Whelan was aware that TSG had not consented to Ms Walters terminating her franchise agreements with it and Cignall and CTC also were not agreeing to the early termination of their franchise agreements.
3. There are other instances of persistent conduct on the part of Freechoice in respect of TSG Bayside. An MD Report records a store visit to TSG Bayside on 17 November 2014 and notes that:

A lot of work has been done with this store. Owner emailing [TSG] daily for payout figure but [TSG] replied with legal letter. Our lawyers have assisted and phoned [Mr Liang] to discuss the legalities of the [TSG] threats. Owner will continue with Change over and we are installing POS Mon 8th Dec for change over next week.

Notably, despite the letter from Mills Oakley of which Mr Whelan was aware, Mr Whelan did not give any instruction to hold off from proceeding with the change-over. To the contrary, Mr Ioane confirmed in cross-examination that Mr Whelan had instructed him to continue to approach TSG stores but not to put anything in writing.

1. On 16 December 2014, TSG commenced these proceedings by originating application. The application included a claim for an interim injunction in the following terms:

restraining [Freechoice] from procuring or inducing or attempting to procure or induce any franchisee of [TSG] to breach the terms of its Franchise Agreement, by inducing them to terminate their Franchise Agreements with [TSG] or enter into franchise agreements with [Freechoice] during the fixed term of the franchisee’s franchise agreements with [TSG], or from assisting in or receiving or retaining the benefits of any such breach until such time as the matter has been heard or resolved.

1. On 22 December 2014, an order was made in the following terms:

[Freechoice] be restrained from procuring or inducing, or attempting to procure or induce, any franchisee of [TSG] to terminate its franchise agreement with [TSG] and/or enter into a franchise agreement with [Freechoice] during the term of each franchisee’s agreement with [TSG] until hearing and determination of the proceeding.

1. Mr Whelan admitted in cross-examination that it was not until TSG obtained that injunction that he instructed his staff not to pursue Mr Liang to terminate early and join with Freechoice. Mr Whelan also agreed that, but for the injunction, he would have continued to instruct his staff to try to get TSG Bayside to terminate with TSG and start with Freechoice, even though he knew that TSG had not agreed to TSG Bayside terminating early.

## Other TSG franchisees

1. There is further evidence of aggressive tactics by Freechoice to induce other TSG franchisees to terminate their contracts early with TSG and start with Freechoice, notwithstanding Mr Whelan’s (and it may be inferred Mr Beynon’s) knowledge that TSG did not consent to the early terminations. Already mentioned were the approaches to TSG Kings Cross, TSG Doreen, TSG Bayside and TSG Burpengary. In addition, an MD Report from around 17 November 2014 records that an offer to TSG Narellan was waiting on approval from the General Manager (Mr Whelan). Further, recorded in the MD Report from around 24 November 2014 was a notation that TSG Oakleigh had been approached and the owner was “happy with TSG” but “store not dead yet just needs more visit and convincing. Not giving up on this one”. TSG Smithfield had also been approached and a letter of offer had been provided, though the owner had decided that:

he does not want to break his contract and does not want to proceed. This may be due to TSG scarring (sic) all their stores so Michael will need to continue working with this store on the benefits of coming to [Freechoice], contracts are for breaking and with the work we are doing on other TSG stores we can share with stores like this who are nervous. [Follow up] each week required.

1. In all there were 14 TSG stores still under active approaches by Freechoice even after Freechoice must have been aware that TSG would not consent to releasing its franchisees from their contracts. The stores included TSG Point Cook, the franchisee of which was Mr Xu. On 24 November 2014, Mr Scesny emailed Mr Xu, asking for him to find out how much time was left on his current agreement with TSG. Mr Scesny advised that “Freechoice would reimburse you the cost involved to pay out your contract so that you would be free to join another group”. Later that day Mr Xu forwarded that email to TSG’s Victorian franchise manager, Ian Scholfield, who sent it to TSG’s acting Corporate Director, Ms Moore. On 25 November 2014, Mr Xu emailed Mr Scesny and told him that he had checked with TSG and his five year contract was due to expire in July 2015 “and they want me to stay with them”. Mr Xu wrote that “I do need change something here, but it is cost more and not easy. I will think of your offer and get back to you later”. Mr Scesny persisted, replying the following day:

Great news with your agreement ending in six months!

Of course TSG would take for granted that you want to stay but as mentioned a change may be a good thing. We have had eight stores come over from other groups over the past three months that I can give you as a reference on how easy the changeover has been with the shop fitting. We work at night if permitted by the centre so no loss of trading.

By joining Freechoice we would make sure that there is no costs to you and to organise or project manage all steps for a smooth transaction.

TSG would like to try to prevent you from joining any other group but cannot stop you from doing so. Please look at this as making a great business decision for the future where you can get improvement to your current shop, two point of sale systems with IT support, I would say a cash sign on bonus too when you start trading as Freechoice and most of all you would be joining a group with a strong business plan to better its members thru its growth in Vending, Wholesaling and Franchised stores. No other group has this ability.

If you would like I can come visit you next Wednesday to speak with yourself and your wife.

1. The MD Report from on or around 3 December 2014 recorded in relation to the TSG Point Cook franchisee that the “TSG email would have spooked him [Mr Xu]” and that Mr Scesny needed to “talk through this and the [Freechoice] benefits” with him.
2. The MD Report from on or around 12 December 2014 recorded a visit to TSG Point Cook on 12 December 2014 with a notation that:

Matt visited store and talked to [Mr Xu] the owner. TSG have visited and filling his head with rubbish, so making him a little nervous. He is still interested and Matt was able to reassure him. [Mr Xu] wants to wait till the new year to talk. Matt will get offer approved so he can progress.

1. The same report records a visit to TSG Narellan, also on 12 December 2014 with a notation:

Offer approved, had meeting with owner on Friday and left them the Letter of Offer as they wanted to review over the weekend. [Follow up] Monday 15/12 to get signed copy and go ahead.

1. It also recorded that a verbal offer had been made to TSG Regents Park and accepted, with a meeting arranged for Monday 15 December 2014 to give a letter of offer “for signing”. The same report said that the TSG franchisees at Hassall Grove, Bundaberg, Bay Terrace and Ashfield were to be followed up. The MD Report from on or around 22 December 2014 recorded that TSG Regents Park had signed the letter of offer, there had been no contact that week with TSG Kings Cross “as we think they may be involved with TSG legal case”; and the owner of TSG Narellan “has done a backflip and now does not want to sign, the TSG email must have spooked him, plus he made mention of some past legal issue and he doesn’t want to go there again. [Follow up] in New Year see if any change”.
2. Notably, notwithstanding the letter from Mills Oakley of which Mr Whelan was aware and notwithstanding that TSG had commenced these proceedings for injunctive relief, Mr Whelan did not give any instruction to his staff to hold off from targeting and signing up TSG franchisees still under contract. Rather, it is noteworthy that on 17 December 2014, far from instructing the Freechoice staff that they should not continue to press TSG franchisees still under contract to terminate early and sign with Freechoice, Mr Whelan, in the context where legal action had been threatened (and by 16 December 2014 commenced) against Freechoice by TSG, directed his staff “at present” to “stay out of TSG stores” and “do NOT put anything in writing to them on soft copy or hard copy, unless the store is out of contract”. Mr Whelan instructed that “there is to be nothing said about ‘payout of contract’ in writing or even verbal. Keep pressing on others until I give you instructions otherwise.”
3. On 19 December 2014, Mr Whelan advised Mr Ioane and others that he was going to have Freechoice’s solicitors, Minter Ellison, draft up a “legal letter” with the “do’s and don’ts when approaching TSG or other customers, as we are saying this is not against the law.” Mr Whelan instructed:

We won’t ease up on our strategy and will continue to go harder, yet I wanted to arm you with the right information. Freechoice are growing due to a competitor that has lacked service, investment and standards … very simple that is why we keep getting referrals. Don’t stop doing this.

If you get approached by a TSG or stores still wanting to come across, you can still see them about their business and sell the benefits of Freechoice. It is only when the franchisee says “I want to join now and break my contract” that we need to be careful of.

For those times I may get Minter Ellison to draft up a letter to say we have not “enticed” someone to break their contract and the franchisee can sign it.

Keep going as we have been, anything you need to put in writing to a TSG or go and see them, liaise with me directly.

1. Later that day, in a further email to Mr Ioane and others, Mr Whelan stated that:

As we still want to hit them hard, can you all call on a number of TSG franchises next week that you possibly have not been to yet?

The main purpose of this is so that TSG will still hear that we are out there selling our business …

1. On 22 December 2014, the Court granted an interlocutory injunction to TSG in the terms sought. It is noteworthy also that on the same day, in response to Ms Norvock asking her team to give her a daily update on the approaches made to TSG stores, Mr Whelan emailed Ms Norvock, Mr Scesny, Mr Ioane and a Mr Nurse. The subject matter was “TSG Store Visits”. The email stated:

again guys. don’t mention anything to do with ‘contract’ – ‘contract term’ – ‘length of current agreement’, when calling on these sites. We know TSG are just waiting on something in writing to use against us, we want them to ‘hear’ we are still going into their sites and the current legal argument has NOT stopped us.

1. On the same day, Mr Whelan emailed Ms Norvock in relation to the draft MD Report for that week, instructing her to “take out commentary saying ‘no follow up due to TSG legal issue’” and “also all the commentary pushing stores back to new year as it looks negative”.
2. The evidence showed that even following the grant of the interlocutory injunction, TSG stores were approached into early 2015 under the direction of Mr Whelan. The evidence established a clear pattern of conduct on the part of Freechoice representatives which involved approaching TSG franchisees still under contract to induce them to terminate their contracts with TSG and enter into contracts with Freechoice, regardless of whether or not TSG would agree to release the franchisee from the TSG contracts. It is beyond doubt that Mr Whelan (and it may be inferred Mr Beynon) knew and understood that TSG franchisees who terminated their contracts at will without the consent of TSG would be in breach of their contracts. The means employed by Freechoice staff to induce or procure TSG franchisees to terminate early, whether or not TSG gave its consent, was to offer to pay to the franchisee an amount equal to the estimated damages to which TSG would be entitled for early termination. Tellingly, the evidence showed that the offer to pay a prospective franchisee still under contract with another franchisor an amount of money equal to the amount that the other franchisor was likely to recover from that franchisee as a result of early termination was built into the economic analysis of the net benefits to Freechoice in signing up that franchisee. Freechoice calculated the net benefit to it of inducing these stores to move to Freechoice. In other words, its model factored in the cost of the franchisee terminating their existing franchising early. The evidence also showed that Freechoice was not deterred from its strategy by the threat of legal proceedings. It continued to pursue its strategy, and its view appeared to be that there was little that TSG could do to stop its franchisees going across to Freechoice beyond recovering its losses from early termination. This is evident from Mr Scesny’s email to Mr Liang, the operator of TSG Bayside, on 27 November 2014. In response to an approach by Freechoice, Mr Liang was contemplating moving across to Freechoice but was still under contract with TSG. Mr Scesny wrote:

Given we understand there are no trading restraints, no tenancy control held by TSG and no enforceable penalties for termination or breach, beyond losses flowing from breach (ie profits for the remainder of the term) there seems not much TSG can do to hold a Franchisee.

1. In similar terms, the termination letter that Ms Walters sent to TSG on 20 November 2014, which Ms Norvock had prepared for her, stated:

As you believe that we are in Breach of our Agreement we have paid today the costs due as stated in your email … We have paid all costs due to TSG so we request written confirmation that TSG have released us from the group.

1. These matters are all relevant to the likelihood that Freechoice’s unlawful conduct will continue if unrestrained.
2. Tellingly also, the evidence does not show that Freechoice told the TSG franchisees that it targeted that they could not sign with Freechoice unless TSG consented to the early termination of their franchise agreement. To the contrary, Freechoice representatives were instructed to pursue TSG franchisees to get them to sign with Freechoice, regardless of whether they were still under contract and had no right to terminate. Freechoice’s conduct was deliberate and calculated.
3. TSG appeared to argue for injunctive relief based on the ACL. However, the injunction sought in the originating application does not relate to the alleged misleading and deceptive representations. The Court nonetheless has the power under s 23 of the *Federal Court of Australia Act 1976* (Cth)to grant a permanent injunction on usual equitable principles: *Woolley v Dunford* (1972) 3 SASR 243, 296; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530; [2004] HCA 56, [129]. I am satisfied that this is an appropriate case for the grant of injunctive relief. By its conduct to date, Freechoice has demonstrated a persistent, deliberate and intentional disregard of the contractual obligations of TSG franchisees. It has done so in the context of its “number one plan” for expansion which it has pursued aggressively, systematically and strategically since mid-2014 and, but for the injunction granted on 22 December 2014, would have continued. As part of its strategy, it has deliberately targeted the highest-performing franchisees of other competitor franchisors, including TSG, using information in Mr Whelan’s possession which he knew had been unlawfully obtained. His preparedness to use that information, having that knowledge, reflects adversely upon his integrity and shows a contumelious disregard for the law in pursuit of commercial advantage. His conduct may be imputed to Mr Beynon who, on the evidence, was fully aware of what was going on. As mentioned, Mr Beynon was not called to give evidence and no explanation was given for not calling him. I have inferred that his evidence would not have assisted Freechoice. The evidence all points to a continuation of the tortious conduct unless restrained and in the circumstances, a case has been made out for a permanent injunction to protect TSG’s right to contractual performance by its franchisees which, until the grant of the interim injunction, was being tortiously interfered with by Freechoice.
4. The terms of the permanent injunction require consideration and will be a matter for further submission by the parties.

# MISLEADING AND DECEPTIVE CONDUCT – the representations

1. The representations in issue are as follows:

* when Trading Terms renewals approach for all groups, the suppliers will only support 3 Tobacco Specialists and we can guarantee “FREECHOICE” will be one of them

(**“the first representation”**);

* BATA have already agreed to support your new [Freechoice] store … as long as your stores meet the 46% SOR for BATA products

(**“the second representation”**);

* BATA will support your store with additional over and above promotions for joining Freechoice

(**“the third representation”**).

[BATA supplied tobacco and related products to TSG and Freechoice, amongst others.]

## The first representation

1. Freechoice did not defend the first representation and admitted that it was misleading or deceptive.

## The second representation

1. The second representation appeared in a letter of offer from Freechoice to the franchisee of TSG Urangan and TSG Eli Waters. It was also contained in the letters of offer executed between Freechoice and Ms Walters on 8 September 2014 in respect of the TSG Armidale Franchises, and between Freechoice and Mr Liang on 27 October 2014 in respect of the TSG Bayside franchise.
2. Mr Williams, the Head of Trade Marketing at BATA, gave unchallenged evidence that the representation was factually incorrect as BATA had not decided to provide additional support to franchisees of Freechoice solely on the condition that those franchisees sign up to a 46% share of range for BATA products. Mr Williams’ evidence was that any franchisee would have to satisfy BATA first, that it was a legitimate tobacconist (ie not engaged in the illicit sale of tobacco products) and secondly, that it would comply with BATA’s trading terms, before any additional support would be provided to it by BATA.
3. TSG submitted that the statement conveyed the false message that BATA had agreed to offer support to a particular franchisee (which it had not) in return for the franchisee moving to Freechoice (which was also not true). Insofar as the statement relates to a future matter, TSG relied on s 4 of the ACL and submitted that Freechoice had no reasonable grounds for making the statement. Freechoice conceded that the statement was misleading or deceptive if it is read “the way [TSG] seeks to read” it. It was submitted for Freechoice that this statement should, however, be read as conveying to a potential franchisee that BATA had an arrangement with Freechoice whereby BATA would give additional support to franchisees of Freechoice. I disagree. The plain words of the representation tell against that submission. The representation specifically referred to “your new store”. Further, TSG’s submission is supported by the context in which the representation appears. The representation was included within a letter of offer presented by Freechoice to the particular franchisee after initial discussions, and the letter of offer contained customised details, for example, the name of the franchise on cover sheet; specifications for the fit out of the particular store; and the term of the agreement. Accordingly I do not accept Freechoice’s submissions that the representation should be read other than as a statement of fact.

## The third representation

1. The third representation also appeared in the letter of offer to the franchisee of TSG Urangan and TSG Eli Waters, and also in the letters of offer to Ms Walters and to the franchisee of TSG Bayside, Mr Liang. It was submitted by TSG that the use of the words “for joining Freechoice” conveyed the impression that the promotions are made available by BATA as a reward for leaving a competitor and for joining Freechoice. It was submitted that insofar as it was a statement as to a present fact (that a decision had been made by BATA to support a store “for joining Freechoice”) this statement was false at the time it was made, as BATA had not agreed to provide additional promotions to any particular franchisee, let alone “for joining Freechoice”. Insofar as the statement relates to a future matter, TSG relied on s 4 of the ACL and submitted that Freechoice did not have reasonable grounds for making it.
2. Freechoice conceded that the third representation was also false and misleading if it conveyed the meaning for which TSG contended. However, Freechoice submitted that the representation conveyed to a potential incoming franchisee through the letter of offer that if the franchisee came across, benefits which were offered by BATA to Freechoice, including various promotions, would be available to a new Freechoice franchisee, which was true. Mr Williams from BATA agreed in cross-examination that BATA ran promotions with Freechoice which “were, in many cases, unique to Freechoice.”
3. The plain words of the representation and context in which the representation was made (namely the letters of offer) again tell against Freechoice’s construction.

## Remedy

1. TSG is entitled to a declaration that each of the representations constituted misleading or deceptive conduct.

# Conclusion

1. There should be judgment for TSG on each of its claims. The parties are directed to provide minutes of orders giving effect to these reasons within seven days.

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| --- |
| I certify that the preceding one hundred and twenty (120) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies. |

Associate:

Dated: 8 June 2016