VIDEO NIGHTMARE

In *Civic Video Pty Ltd v Paterson* [2016] WASCA 69 of the Western Australian Court of Appeal recently reviewed the principles that are applicable to assessing damages for repudiation of an agreement.

The Key Facts

1. Civic Video Pty Ltd (**Franchisor**) and the Thompsons (**Franchisee**) entered into agreements under which the Franchisee would operate two stores using the Civic Video System (**Franchise**).
2. Franchisor consent was required in order for the Franchisee to sell, assign or transfer any interest in the Franchise business or any rights under the Franchise agreements.
3. The Franchisee was required to pay a monthly franchise fee to the Franchisor under the Franchise Agreements.
4. The Franchisee fell behind in their payment of Franchise fees.
5. The Franchisee listed the stores for sale.
6. The Franchisee entered into an agreement to transfer all of their plant and equipment, excluding trade supplied equipment, to a competitor of the Franchisor so that the Franchisee would cease running the Franchise business. The Franchisee did not obtain the Franchisor's consent before doing so.

The primary judge

7. The primary judge found that the conduct of the Franchisee constituted a repudiation of the Franchise agreements.
8. In assessing damages, the primary judge found that at the time of the repudiation the Franchisee could not continue trading due to their financial position.
9. Accordingly, the primary judge found that the Franchisor would not have received any further Franchise fees from the Franchisee even if they had not repudiated the Franchise agreements in the manner that they did. Therefore, the primary judge found that there was no loss suffered by the Franchisor in this manner.
10. The primary judge assessed damages only on the basis of the loss of opportunity of the Franchisor finding another purchaser for the stores or the Franchisor itself taking over the stores. This opportunity was denied to the Franchisor by the Franchisee's breach of the Franchise agreements.

Issue before the Court of Appeal

11. The Franchisor appealed the primary judge's decision. The Franchisor argued that the damages should have been assessed on the basis of the Franchisor's loss of bargain rather than its loss of opportunity.

The Court of Appeal Decision

12. The Court of Appeal found in favour of the Franchisor.

13. The Court found:

    (a) the Franchisor was entitled to loss of bargain damages, to put the Franchisor in the position it would have been in if the Franchisee had performed the Franchise agreements for their respective terms;

    (b) those damages did not involve any question of loss of chance or opportunity on the part of the Franchisor; and

    (c) the poor trading performance of the Franchisee's stores and the Franchisee's financial position prior to the repudiation were irrelevant to the assessment of loss of bargain damages.

Conclusion

This case emphasises that the consequences of a repudiation can be severe. The Franchisee may have had a much better outcome if they had obtained consent to assign first (if necessary from the Court).

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