FEDERAL COURT OF AUSTRALIA

Nicola v Ideal Image Development Corporation Incorporated [2009] FCA 1177

CORRIGENDUM

PRACTICE AND PROCEDURE – conflict of laws – exclusive jurisdiction clause

PRACTICE AND PROCEDURE – whether proceedings against non-parties to arbitration agreement may be stayed pending arbitration between parties

EVIDENCE - whether evidence as to content of law of Florida admissible

ARBITRATION – claim for stay under *International Arbitration Act* 1974 (Cth) - whether dispute capable of settlement by arbitration - authority of arbitrator to vary or set aside franchise agreement – whether dispute of a kind suitable for arbitration – whether right to mediation waived by commencement of proceedings

GEORGE NICOLA, MIRIAM NICOLA and GEORGE & MIRIAM NICOLA PTY LIMITED v IDEAL IMAGE DEVELOPMENT CORPORATION INCORPORATED and JOHN PACE
NSD 1738 of 2008

PERRAM J
16 OCTOBER 2009 (CORRIGENDUM 21 OCTOBER 2009)
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1738 of 2008**

BETWEEN:	**GEORGE NICOLA** **First Applicant**
	MIRIAM NICOLA **Second Applicant**
	GEORGE & MIRIAM NICOLA PTY LIMITED **Third Applicant**
AND:	**IDEAL IMAGE DEVELOPMENT CORPORATION INCORPORATED** **First Respondent**
	JOHN PACE **Second Respondent**

JUDGE:	**PERRAM J**
DATE:	**16 OCTOBER 2009**
PLACE:	**SYDNEY**

CORRIGENDUM

1 The judgment in this matter has now been replaced in its entirety.

I certify that the preceding one (1) numbered paragraphs is a true copy of the Corrigendum to the Reasons for Judgment of the Honourable Justice Perram.

Associate:

Dated: 21 October 2009

FEDERAL COURT OF AUSTRALIA

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BETWEEN:	**GEORGE NICOLA** **First Applicant**
	MIRIAM NICOLA **Second Applicant**
	GEORGE & MIRIAM NICOLA PTY LIMITED **Third Applicant**
AND:	**IDEAL IMAGE DEVELOPMENT CORPORATION INCORPORATED** **First Respondent**
	JOHN PACE **Second Respondent**

JUDGE:	**PERRAM J**
DATE OF ORDER:	**16 OCTOBER 2009**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The parties to bring in short minutes of order giving effect to these reasons within 7 days.
2. The applicants to pay the first respondent's costs of the motion.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1738 of 2008**

BETWEEN:	**GEORGE NICOLA** **First Applicant**
	MIRIAM NICOLA **Second Applicant**
	GEORGE & MIRIAM NICOLA PTY LIMITED **Third Applicant**
AND:	**IDEAL IMAGE DEVELOPMENT CORPORATION INCORPORATED** **First Respondent**
	JOHN PACE **Second Respondent**

JUDGE:	**PERRAM J**
DATE:	**16 OCTOBER 2009**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The applicants in these proceedings are Dr George Nicola, his wife Dr Miriam Nicola and their company George & Miriam Nicola Pty Limited. On 5 November 2008 they commenced proceedings in this Court against the first respondent, Ideal Image Development Corporation Incorporated ("Ideal") and one of its officers, a Mr Pace. Ideal appears to have been incorporated in Florida in the United States of America and, in practical terms, appears to conduct its business in that state.

2 The Nicolas contend that Ideal is a franchisor of technologically advanced lasers for hair and skin removal, and also for botox application and injection therapy. They say that on or about 1 September 2004 Ideal agreed to grant to them the exclusive right to conduct that franchise in certain parts of Sydney under the name "Ideal Image". It will be convenient to refer to this as "the agreement".

3 The Nicolas have many complaints about their experiences as franchisees at the hands of Ideal as franchisor. Broadly (and by no means not exhaustively) they complain that they were provided with inadequate or non-existent assistance, that Ideal did not own the relevant intellectual property in Australia, and that they were told that an Ideal franchise would have certain qualities which, as it transpired, it did not. They say their agreement with Ideal is void for uncertainty or has been repudiated by the conduct of Ideal. They claim entitlements to restitution of franchise fees paid to Ideal and for damages for breach of contract pursuant to s 52 of the *Trade Practices Act 1974* (Cth) ("the TPA"); also, for unconscionable conduct contrary to s 51AC of the Act. They contend that Ideal has infringed the *Franchisors Code of Conduct* contrary to the requirements of the TPA. They also seek to be relieved from certain restraints on their ability to compete imposed by the agreement after its determination. Finally, their application seeks to vary the agreement pursuant to the *Independent Contractors Act 2006* (Cth) ("ICA").

4 On 3 December 2008, I granted leave for the amended statement of claim to be served outside of the jurisdiction in Florida on Ideal but, at that stage, not on Mr Pace. Ideal has now conditionally appeared to seek the permanent stay of the proceedings. Mr Pace has not been served and did not appear.

5 The basis for the application for the stay is to be discerned from three matters. The first concerns cl 31 of the agreement which is in these terms:

> **31. ARBITRATION**
>
> a) Except as provided in this Agreement, Ideal Image Development Corporation and Franchisee agree that any claim, controversy or dispute arising out of or relating to Franchisee's operation of the Franchised business under this Agreement including, without limitation, those occurring subsequent to the termination or expiration of this Agreement, which cannot be amicably settled shall be referred to Arbitration in accordance with the Rules of the American Arbitration Association ("AAA"), as amended (and specifically including the optional rules). If such Rules are in any way contrary to or in conflict with this Agreement, the terms of this Agreement shall control. The Arbitrator shall apply the Federal Rules of Civil Procedure and the Federal Rules of Evidence to the extent possible while, in their discretion, still effecting the arbitration goal of streamlined administrative procedure. The parties hereto expressly agree that there will be no punitive damages awarded with respect to any Arbitration, regardless of each parties respective right to such damages under the choice of law provision herein. Only claims, controversies or disputes involving Franchisee and no claims for or on

behalf of any other franchisee, franchisor or supplier may be brought by Franchisee hereunder. The law of the State of Florida shall govern the construction and interpretation of this Agreement in Arbitration.

b) The Arbitration proceedings shall be conducted before a single Arbitrator, selected in accordance with AAA Rules, and shall be a member of the bar of the State of Florida has been actively engaged in the practice of law for at least five (5) years. Prior to the commencement of hearings, the Arbitrator shall provide an oath of undertaking of impartiality.

c) Arbitration shall take place at Ideal Image Development Corporation's principal place of business in Tampa, Florida. The award of the Arbitrator shall be final and judgment upon the award rendered in Arbitration may be entered in any Court having jurisdiction thereof. The costs and expenses of Arbitration, including compensation and expenses of the Arbitrators, shall be borne by the parties as the Arbitrator determines.

d) Any party to this Agreement may bring an action, including a summary or expedited proceeding to compel Arbitration of any such dispute or controversy, in a court of competent jurisdiction in the State of Florida and, further, may seek provisional or ancillary remedies including temporary or injunctive relief in connection with such dispute or controversy, without providing or posting any bond or security regardless of any legal requirements to do so, provided that the dispute or controversy is ultimately resolved through binding Arbitration conducted in accordance with the terms and conditions of this Agreement.

e) In proceeding with Arbitration and in making determinations hereunder, the Arbitrator shall not extend, modify or suspend any terms of this Agreement or the reasonable standards of business performance and operation established by Ideal Image Development Corporation in good faith. Notice of or request to or demand for arbitration shall not stay, postpone or rescind the effectiveness of any termination of this Agreement.

6 Clause 31(a) is, so Ideal submits, an agreement to arbitrate. The second matter relates to the first and concerns s 7(2) of the *International Arbitration Act 1974* (Cth) ("the IAA") which provides:

> **7 Enforcement of foreign arbitration agreements**
>
> (2) Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of

settlement by arbitration;

> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

7 The third matter concerns cl 40 of the Franchise Agreement, which provides:

> **40. GOVERNING LAW; CONSENT TO JURISDICTION**
>
> Except to the extent governed by federal law, this Agreement and the franchise right granted herein shall be governed by and construed in accordance with the laws of the State of Florida. If, however, any provision, or portion hereof in any way contravenes the laws of any state or jurisdiction where this Agreement is to be performed, such provision, or portion thereof, shall be deemed to be modified to the extent necessary to conform to such laws, and still be consistent with the parties intent as evidenced herein. All claims which, as a matter of law or public policy cannot be submitted to arbitration in accordance with Paragraph 31 shall be brought within the State of Florida in the judicial district in which Ideal Image Development Corporation has its principal place of business; provided, however, with respect to any action which includes injunctive relief, Ideal Image Development Corporation may bring such action in any court in any state which has jurisdiction. Franchisee irrevocably submits to the jurisdiction of such courts and waives any objection Franchisee may have to either the jurisdiction or venue of such court.

8 As a result of the first two matters, Ideal submits that the Court is bound to stay the Nicolas' proceedings pursuant to s 7(2) of the IAA. Whether that is so or not, Ideal submits that since the Nicolas have committed themselves, by cl 40, to the exclusive jurisdiction of the courts of Florida, the pursuit of the present proceedings is an abuse of process which ought, as a matter of discretion, to be stayed.

The Issues

9 The application gave rise to nine issues. These were:

(a) *The issue as to the content of the law of Florida.* The parties agreed that, in principle, an important issue between them was the proper construction of cl 31(a) and that, by reason of cl 40, that clause was to be interpreted in accordance with the law of Florida. Ideal led evidence from an expert about the law of Florida to prove how cl 31(a) should be interpreted. The Nicolas objected that this evidence was inadmissible. The first question, therefore, was whether the expert's evidence should be received.

(b) *The issue as to the proper construction of cl 31(a).* The critical words in cl 31(a) consigned to arbitration disputes "arising out of or relating to the Franchisee's operation of the Franchised Business under this Agreement". Ideal submitted that all of the Nicolas' allegations met this description; the Nicolas correspondingly denied that any did.

(c) *The issue as to the proper characterisation of the claims.* Both parties made submissions that the various integers making up the Nicolas' allegations fell within their competing constructions of cl 31(a).

(d) *The issue as to the authority of the arbitrator.* The Nicolas submitted that the effect of cl 31(e) was to prevent any arbitrator from making orders which would vary or set aside the agreement itself. So far as the proceedings sought relief of that kind they submitted, therefore, that the proceedings did not meet the requirements of s 7(2) of the IAA, that is, that the proceedings did not include the determination of a matter which was "capable of settlement by arbitration". Ideal, on the other hand, denied that cl 31(e) had that effect.

(e) *The issue as to the role of public policy.* The Nicolas submitted that the resolution of their proceedings raised important issues touching upon the public interest. As such, they pointed to an established line of authority which held such litigation to be unsuitable for arbitration in foreign parts. Ideal did not deny the existence of the principle but sought, instead, to deny that the Nicolas' proceedings had that quality.

(f) *The issue as to the exclusive jurisdiction of the Courts of Florida.* Ideal submitted that even if the present proceedings were not required to be submitted to arbitration, the Nicolas had agreed by cl 40 that any dispute that could not be referred to arbitration was required to be resolved by the courts of Florida. Accordingly, the present proceedings should be stayed to give effect to the exclusive jurisdiction of those courts. The Nicolas submitted that this was not what cl 40, properly understood, said; alternatively, it was submitted that this Court was bound to proceed on the basis that the claims made under the TPA and those made under the ICA had to be heard in Australia because both Acts contained overriding choice of law provisions which outflanked any jurisdiction clause contained in the agreement.

(g) *The attack on the arbitration clause issue.* The Nicolas submitted that their pleading attacked the arbitration clause itself pursuant to the TPA. It followed that that issue should not be resolved by the arbitrator. Ideal denied the pleading said any such thing.

(h) *The parties' issue.* The third applicant and the second respondent were not parties to the agreement. The Nicolas submitted that whatever else had happened there could be no stay so far as they were concerned. Ideal submitted that the third applicant was a privy of the Nicolas. Alternatively, if the rest of the proceedings were stayed, the Court should in the exercise of its discretion stay those claims as well.

(i) *The mediation issue.* The Nicolas submitted that the matter should not be sent to arbitration unless there was first a mediation as the arbitration clause required that the parties had been unable amicably to settle the dispute as condition precedent to its operation. Ideal submitted that the Nicolas had waived this point by commencing the present proceedings.

Consideration

First Issue: The content of the law of Florida

10 By cl 40 the parties agreed that their agreement was to be construed in accordance with the law of Florida. The content of the law of Florida is a question of foreign law and, therefore, in this Court a question of fact.

11 To identify the content of the law of Florida, Ideal sought to rely upon the expert evidence of Mr Michael Gerard Murphy Esquire who is an attorney working in Florida. He was admitted to the Florida bar in 1998 and is admitted to practice before all State and Federal courts in Florida. Mr Murphy is a litigation partner with Greenberg Traurig which is a United States firm with more than 1,800 attorneys practicing from a number of US cities as well as from Amsterdam, Shanghai, Tokyo and Zurich. Mr Murphy commenced with Greenberg Traurig in 2004 and became a shareholder in that firm in 2007. His principal area of practice is construction law which includes arbitration work. He has been a proponent of stay motions to compel arbitration and is "generally familiar with the leading cases in Florida addressing the scope of arbitration clauses". Mr Murphy was asked to say what the law of the State

of Florida (including Federal law) was in relation to the correct construction and interpretation of cl 31.

12 Mr Murphy's opinion, in part, was a follows:

> 6.1.1 It is my opinion that the laws of the State of Florida that would apply include the *Florida Arbitration Code*, Chapter 682, *Florida Statutes* (2008), and the decisional case law related thereto. The *Florida Arbitration Code* is included in Exhibit "B". There is no Federal statutory law that applies. The *Federal Arbitration Act*, Title 9, US Code, Section 1-14, does not apply to this transaction because the transaction does not involve interstate commerce. Federal decisional law that would apply includes the U.S. Supreme Court decision in *Buckeye Check Chasing, Inc. v. Cardegna, 546 U.S. 440, (U.S. 2006)*, a case that overruled a Florida Supreme Court case related to arbitration. The U.S. Supreme Court case of *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, is also controlling. The Florida Supreme Court case of *Seifert v. U.S. Home Corp.*, 750 So.2d 633, (Fla. 1999), also directly bears on the issues identified in the questions to be answered.

13 At paragraph 6.1.5-6.1.6 of his opinion Mr Murphy said:

> 6.1.5 In the context of the reach of arbitration clauses, the phrase "arising out of or relating to" has been construed by the Florida Supreme Court to be broad terms encompassing virtually all of the disputes between the contracting parties. *See, Seifert.* The Florida Supreme Court has qualified the reach of the arbitration clause by requiring some nexus between the dispute and the contract containing the arbitration clause. They have agreed with the reasoning that the dispute must "raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself." *Seifert* at 639.
>
> 6.1.6 The issues in this case and matters to be assumed in rendering this opinion, as restated above in paragraphs 5.2.3.1 through 5.2.3.5, as pled, all rely upon and require a reference to or construction of a portion of the Agreement and would, therefore in my opinion, be held to fall within the nexus required by *Seifert*. The issue related to application of interest pursuant to the Federal Court of Australia Act (paragraph 5.2.3.6 above) appears to be a ministerial task to be performed by the finder of fact, whether that is a court or an arbitrator. In my opinion, therefore, there would be nothing preventing an arbitrator in Florida from determining that issue in accordance with the law of any directions by the parties.

14 Mr Murphy's opinion is useful, I think, for identifying the sources in which the law of Florida may be found. However, I have found his opinion about the operation of cl 31 to be unhelpful. It is plain that he approached his analysis as if he was answering the question of whether the claims made by the Nicolas could be said to "arise out of or relate to the agreement". This, however, is not what clause 31(a)

says. Its language is quite different. What is assigned to arbitration by cl 31(a) is any dispute "arising out of or relating to the franchisee's operation of the franchise business".

15 Counsel for the Nicolas objected to the receipt of Mr Murphy's evidence on the basis that the authorities to which he referred did not support the opinion he expressed. That point is, I think, more likely to go to weight. However, the Nicolas' objection should be upheld for two other reasons.

16 *First*, although Mr Murphy can usefully identify the sources and content of the law of Florida the application of the law thus identified is for this Court and his opinion about it is inadmissible: see *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 371 [120] per Gummow and Hayne JJ; *United States Trust Co of New York v Australia & New Zealand Banking Group Ltd* (1995) 37 NSWLR 131 at 136 per Sheller JA; *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No. 6)* (1996) 64 FCR 79 at 82 per Lindgren J; *Stern v National Australia Bank Ltd* (2000) 171 ALR 192 at [52] per Hill, O'Connor and Moore JJ. That principle has been criticised by Mr McComish in his article "Pleading and Proving Foreign Law in Australia" (2007) MULR 17 in terms which are, perhaps, not without some force. However, it is not open to me to embark on that debate.

17 *Secondly*, I would also reject Mr Murphy's opinion on the meaning of cl 31(a) on the ground that he has failed to expose his process of reasoning. The text of cl 31(a) contains the relatively idiosyncratic expression "arising out of or relating to the franchisee's operation of the franchised business". None of the cases extracted by Mr Murphy deal with this phrase. By itself that can hardly be criticised. However, his opinion does not expose what his approach is to the difference between the wording of the clauses in the cases he says are relevant and the wording of cl 31(a). In *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* (2000) 120 FCR 146 at 151 [23] the Full Court (Black CJ, Cooper and Emmett JJ) said:

> The further requirement that an opinion be *based on* specialised knowledge would normally be satisfied by the person who expresses the opinion demonstrating the reasoning process by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialised knowledge. Similarly, opinion evidence given orally should be shown, by exposure of the reasoning process, to be based on relevant specialised knowledge.

18 This was applied by Heydon JA in *Makita (Australia) Pty Ltd v Sprowls* (2001) 52 NSWLR 705 at 744 [85]. In the present case, Mr Murphy's reasoning is not exposed. It follows that I must reject paragraph 6.1.2 of Mr Murphy's opinion and the first sentence of paragraph 6.1.6.

19 This, however, leaves unscathed Mr Murphy's opinion that the relevant law of Florida is located in the materials exhibited to his affidavit. I will not set those materials out but it suffices to observe that they consist largely of decisions of the Supreme Courts of the United States and Florida.

20 So far as I can tell, the only use Mr Murphy makes of these materials is to establish the proposition that the phrase "arising out of or relating to" has been construed in broad terms to include virtually all disputes between the contracting parties. There must still be, however, a nexus between the agreement and the dispute. Unfortunately, the language of cl 31(a) is not couched in terms of the agreement but instead in terms of "the franchisee's operation of the franchised business". To resolve the present debate one would need to know a good deal more about the approach of the law of Florida to the construction of arbitration clauses.

21 This creates something of a conundrum. The case law exhibited to Mr Murphy's affidavit contains many such statements and I could attempt to synthesise my reading of those cases into a distillation of the case law. However, I do not think that that would be appropriate to do for two reasons. The first is practical – I cannot be sure that the materials collected by Mr Murphy are all of the cases relevant to that issue. As I have indicated, Mr Murphy appears to have considered the wrong question. I cannot be sure that they may not be other authorities to which he might have referred it he had asked himself the correct question. The second is the question of procedural fairness. Any such attempt by me to formulate the law of Florida would result in a distillation of that law which the Nicolas have not been given an opportunity to test.

22 In those circumstances, I do not think that Ideal has succeeded in proving anything useful about the law of Florida's approach to the construction of cl 31(a).

23 This eventuality was not unforeseen by counsel for Ideal. He submitted that if Ideal had failed to prove the contents of the law of Florida, then the law of Australia was to apply. I accept that submission. It is supported by the High Court's decision in *Neilson*. There Gleeson CJ would only have permitted the principle to apply where it could be given practical content (343 [16]) – in this case it is clear that it can. A majority of the Court thought the presumption useful: 372 [125] per Gummow and Hayne JJ, 411 [249] per Callinan J and 420 [275] per Heydon J. Accordingly, cl 31(a) is to be construed according to Australian law.

Second issue: the proper construction of cl 31(a)

24 It is as well to recall the critical words of cl 31(a), "arising out of or relating to the franchisee's operation of the franchise business under this agreement".

25 As might naturally be expected, Ideal stressed the breadth of the words "arising out of" and "relating to". The cases referred to showed that those words indicated only that there needed to be some rational nexus between the claim and the operation of the franchised business and that, by and large, that nexus was provided by the relationship between the franchisor and the franchisee. The effect of that approach was that cl 31(a) operated essentially as if it referred to any claim arising out of the agreement, an expression whose width was, at least in this Court, beyond question.

26 The Nicolas, on the other hand, submitted that that approach ignored the critical words "the franchisee's operation of the franchised business", leaving them largely as meaningless surplusage. Here, so they submitted, it was Ideal's misconduct which was the subject of their claim and not their own conduct. So viewed, that conduct could not be said to arise from the "franchisee's operation of the franchised business" and could not, therefore, be within the terms of cl 31(a).

27 Both of these positions are, I think, too extreme. It is true that words such as "arising out of" or "relating to" are words of very broad connexion. But that concept, must, of course, yield to the context of the particular clause in question. Ideal's construction of the clause means that the phrase really does no work at all. For, so construed, it operates as if it applied to claims "arising out of or relating to the agreement"; more significantly, it seems to me that it operates the same way it would

have if it had read "arising out of or relating to the operation of the *franchisor's* business".

28 Giving all due latitude to the breadth of the connective expressions, I do not think that the parties should be taken to have embraced a view of their agreement which leaves words with an apparently precise meaning having little or no operation.

29 On the other hand, the Nicolas' construction is not itself without difficulties. It assumes that because the claim "arises out of" or "relates to" the operation of Ideal's business as a franchisor that it cannot also "relate to" the operation of the franchisee's business. But that assumption is, so it seems to me, unsound. The words "relating to" are very broad and it is possible, in the commercial relationship between a franchisor and a franchisee, that a claim that relates to the operation of one of their businesses may well "relate to" the operation of the other.

30 Putting the matter slightly differently, the Nicolas' contention is that nothing which relates to the operation of Ideal's business can also "relate to" the operation of their business; Ideal's is that everything which relates to the operation of its business necessarily relates to the operation of the Nicolas'.

31 In my opinion, little illumination is obtained by considering whether the claims relate to Ideal's business as franchisor. The question, as a matter of the text of cl 31(a), is simply whether a particular claim "relates to" the franchisee's operation of the franchised business. That question is not to be answered at a theoretical level – it is to be answered by looking at the claims which are, in fact, made and comparing them with the operation of the franchisee's business to see if there is a rational nexus.

Third issue: the proper characterisation of the claims

32 What then are the claims which the Nicolas make? The first part of the claims contained in the amended statement of claim are a series of allegations that Ideal breached various terms of the agreement. These are contained in a sprawling fashion in paragraphs 40-115 of the pleading. The Nicolas' claim damages for breach of those terms. The damages are not particularised in the amended statement of claim, however, each of the claims relates to deficiencies in Ideal's support for the Nicolas in their operation of the franchise. For example, paragraphs 44-54 allege deficiencies in

the computer software which was provided by Ideal to the Nicolas and paragraph 60-65 allege a failure on Ideal's part properly to advertise the franchised business.

33 If these allegations are to attract more than nominal damages it seems to me that this will be so because the alleged defaults have affected the conduct by the Nicolas of their operation of the franchised business. For example, the failure properly to advertise the franchise is presumably alleged because it has had an impact on the smooth running of the business and, most likely, its profitability. Once that position is reached, it is difficult to see why those claims do not relate to the operation of the franchised business. I would accept that such claims probably do not "arise out of" the operation of the franchised business but it is difficult to see why they do not "relate to" that operation. Nor, as I have already indicated, do the claims cease to "relate to" the operation of the franchised business merely because they may also be said to relate to Ideal's conduct of its business as franchisor. Accordingly, I would conclude that all of the claims for breach of contract in the amended statement of claim are caught by cl 31(a).

34 The next claim made in the pleading is a group of restitutionary claims based on the allegation that the consideration for the agreement failed either in whole or in part. In consequence, the Nicolas seek the repayment of certain franchise fees paid by them together with refunds of some royalties also paid to Ideal. The Nicolas allege that the royalties paid by them were incorrectly calculated by reference to revenue from which GST had not yet been deducted. They contend that on its proper construction the agreement provided only for payments of royalty by reference to revenue after the deduction of GST.

35 In both cases it is apparent that the payments relate to the operation of the franchised business. Franchise fees were paid by the Nicolas as an integral part of their business of operating their franchise, as were the royalties. The question of whether and, if so, to what extent those moneys are recoverable are claims which "relate to" the operation of the franchised business. They are, accordingly, within the terms of cl 31(a).

36 The Nicolas also allege that there were a number of misleading representations made to them by Ideal which antedate the agreement**.** For example, it is said that

Ideal represented to them that its services were "globally attractive and would translate well into Australia". In reliance upon those statements, the Nicolas contend that they paid the franchise fees, purchased laser machines and spent substantial moneys in excess of US$402,900 for the commencement and operation of the franchised business. They also contend that they suffered substantial losses in carrying on the business.

37 Each of these heads of loss involves an assessment of the manner in which the franchised business operated. The losses which are claimed, in a real sense, are losses to the franchised business and it is difficult to see how such losses could be said not to "relate to" the operation of that business. Accordingly, each of the misrepresentations claims is within cl 31(a).

38 The Nicolas allege that Ideal entered into another franchise agreement with them for the operation of other clinics in return for certain fees. The amended statement of claim refers to this additional agreement as a collateral agreement, a description which in my opinion is apt. The Nicolas complain that Ideal failed to obtain from them certain signed documents which were made legally necessary by the provisions of the *Franchising Code of Conduct* which was itself made compulsory by the strictures of the TPA.

39 The Nicolas paid Ideal US$200,000 towards various fees due under this collateral agreement. Apparently, the clinics did not proceed and Ideal charged the Nicolas US$72,975.16 for back royalties, which included withholding tax. It also charged them US$280,360.65 for expenses relating to the clinics which the Nicolas argue never became due. The Nicolas now submit that Ideal has threatened to use the US$200,000 held by it in payment of these disputed sums. Consequently, they claim to be entitled to recover the US$200,000 for their wasted expenditure on an additional clinic at Double Bay and also to recover from Ideal past and future trading losses at the same clinic.

40 The Nicolas characterised these claims as being concerned with the collateral agreement and hence being disconnected from the agreement containing the arbitration clause. I reject this submission. As Ideal correctly pointed out, it is

necessary to attend to the pleading of the collateral agreement itself. That pleading includes paragraph 164 which is in these terms:

> By the further agreement it was agreed that:
>
> (a) the first and second applicants were granted licence to open and operate a second clinic operating the franchised business within the territory referred to in paragraph 17 hereof, without payment of any further franchise or system fee *and upon the terms of the Agreemen*t; and
>
> (b) the franchise fee and Comprehensive System Fee for the clinic in the territory referred to in paragraph 18 would be reduced from US$195,000 to US$165,000; and
>
> (c) the first and second applicants were granted licence to open and operate three further Ideal Image franchise clinics severally in additional territories in the Sydney and Melbourne Metropolitan areas at franchise and comprehensive system fees of US$150,000 per additional franchise;
>
> (d) the first and second applicants would have the exclusive right to operate the franchised business within the Sydney and Melbourne metropolitan areas;
>
> (e) the first and second applicants were to pay US$200,000 as part payment of the franchise and system fees for the clinic in the paragraph 18 territory and for the clinics in the three additional territories;
>
> (f) some part of the US$200,000 part payment would be refundable in the event that the first and second applicants later decided not to open one or more of the clinics.
>
> (emphasis added)

41 What the pleading shows is that the collateral agreement was just that – collateral. The contract or arrangement to which it was collateral was the agreement itself. It follows that the collateral agreement necessarily picked up the terms of the main franchise agreement which, inevitably, included cl 31(a). This is the inevitable effect of paragraph 164(a).

42 That being so, the claims made under the collateral agreement are claims for the recovery of moneys paid under the agreement which "relate to" the conduct of the franchise business. The claiming, in addition, of trading losses makes that point all the clearer.

43 There then followed allegations of unconscionable conduct contrary to s 51AC of the TPA. The pleading alleges a number of wrongful acts by Ideal. There is no present need to set them out. Instead, it suffices to observe that the loss claimed by

the Nicolas in each case includes the recovery of moneys they claim to have paid Ideal in franchise fees and also for the recovery of trading losses both past and future. Once that is appreciated it will be seen that the claim necessarily "relates to" the operation of the franchised business.

44 The final claim made is that the franchise agreement contained unlawful post termination restraints. Necessarily, the issues which arise from that allegation arise only after the agreement has come to an end for whatever reason. I do not think that such a claim may be said to "arise" from the operation of the franchised business. I have found the question of whether it "relates to" that operation rather difficult to resolve. Clearly, it relates to the agreement but that is not the issue which is posed by cl 31(a). The only nexus between the post termination restraints and the operation by the Nicolas of the franchised business itself is that the parties are the same and that they have in common their prior contract. Not without some hesitation I have come to the view that that nexus is not sufficient to be caught by clause 31(a).

45 I conclude, therefore, that the whole of the claims contained in the amended statement of claim are amenable, in principle, to arbitration under cl 31(a) save for those claims arising from the allegations concerning the unlawful nature of the post-termination restraints contained in paragraph 216.

Fourth issue: the authority of the arbitrator

46 The text of clause 31 has already been set out above. For present purposes three aspects of it deserve emphasis:

(a) clause 31(a) requires any arbitration to be conducted in accordance with the Rules of the *American Arbitration Association* ("AAA");

(b) to the extent that those rules conflict with the agreement, then it is the agreement which prevails: see cl 31(a);

(c) the arbitrator shall not "extend, modify or suspend" any terms of the Agreement: see cl 31(e).

47 The Nicolas submit that Rule 43 of the rules of the AAA limits the relief the arbitrator can award to that which is "within the scope of the agreement". There is no need to set out Rule 43.

48 The Nicolas submitted that this directed attention to cl 31(e) which, so they argued, meant that the arbitrator could not exercise a power to set aside or to vary the agreement itself. So much flowed from the words in cl 31(e) which prohibited the arbitrator from extending, modifying or suspending the operation of the agreement. Since the Nicolas' claims for relief included claims for orders setting aside or varying the agreement, it followed that the arbitrator would not be able to deal with those parts of their claims. Ideal submitted the words "extend, modify or suspend" were not apt to describe the relief sought by the Nicolas.

49 Clearly the orders sought would not "extend" the terms of the agreement. But would they "modify or suspend" it? "Modify" is, in its ordinary meaning, capable of including a variation of the agreement. More difficult to answer is whether the setting aside of the agreement would be a suspension of its terms. The verb "suspend" usually has a connotation of temporary, or at least not irreversible, cessation.

50 There are real difficulties in understanding what the parties intended when they chose to use the word "suspend" in cl 31(e). Terms are in force or they are not. To speak of a temporary suspension of terms is curious indeed. It is all the odder because the word "suspend" appears in the company of the two words "extend" and "modify", which in contradistinction are words of permanent alteration. Although it is not altogether satisfactory, the clause operates more harmoniously if "suspend" is read as meaning to "set aside" or "invalidate" – those meanings, in a sense, are close to "stop".

51 So read the clause makes some sense. The arbitrator is not to vary the terms of the agreement, whether that variation comes about by way of extension, amendment or repeal. Were the word "suspend" to be construed only as applying where there was a temporary suspension of a term, the clause would prevent the arbitrator from modifying or extending the terms of the agreement, but would not prevent him from deleting terms. This would be curious since a power to modify could always be used, in effect, to achieve a deletion. On Ideal's construction, a clause saying that the franchisor gave no warranties about its ownership of the intellectual property could not be deleted but the words "gave no warranties" could be "modified" to read "warrants". I do not think I should presume the parties to have

reached such an eccentric bargain unless a good reason for doing so presents itself. In my opinion, it does not.

52 Ideal submitted that cl 31(e) was directed towards preventing the arbitrator from making interim determinations which would have the effect of "extending", "modifying", or "suspending" the operation of the agreement or which would have the effect of amending the standard of the performance required by the franchisee. Why the clause was concerned with interim determinations was not explained and, to my mind, lacks a foundation in the text of the clause. Ideal also submitted that its construction was to be preferred because different wording could have been used to achieve the result for which the Nicolas contended. For example, it was said that the clause might have read "an arbitrator cannot determine any claim involving a challenge to the validity or enforceability of this agreement". Concomitantly, Ideal pointed to the absence in the clause of words such as "set aside", "terminate" or "declare void". I do not think that these arguments should be accepted. The task at hand is the proper construction of cl 31(e) which turns on what it says and not on what it might have said.

53 It follows in my opinion that the terms of cl 31(e) prevent the arbitrator from varying or setting aside the terms of the agreement.

54 Ideal also pointed to AAA Rule 7 which confers on the arbitrator a power to determine the validity of the agreement. I am not so certain that the Nicolas' claims are correctly characterised as being concerned with the validity of the agreement. However, even assuming that Rule 7 operates in a sufficiently broad fashion to allow the arbitrator to set aside or vary the agreement – a matter which I would not necessarily accept – it would be directly in conflict with cl 31(e) and would accordingly be rendered inoperative by cl 31(a).

55 If follows that the Nicolas' claims to set aside or vary the agreement cannot be determined under the arbitration clause and hence cannot be described as being claims which are "capable of settlement" within the meaning of s 7(2)(a) of the IAA. That being so, the provision does not have the effect of staying the proceedings insofar as they involve those claims.

Fifth issue: the rôle of public policy

56 The Nicolas submit that those parts of their case which depend upon issues of competition law are not suitable for arbitration and hence should not be the subject of a stay. This involved the invocation of an established principle which keeps from arbitration certain categories of dispute involving issues of public policy or affecting a broader range of persons than the parties to the arbitration. Suits concerning competition law have frequently been cited as examples of claims unsuitable, by reason of public policy, for arbitration.

57 The competition laws identified by the Nicolas were laws prescribing industry standards (s 51AD of the TPA) and laws prescribing unconscionable or misleading conduct in trade and commerce (s 51AC and s 52 of the TPA). Such claims were said to involve issues of public policy. That public policy element was underscored, so it was submitted, by the capacity of the Australian Competition and Consumer Commission to intervene and to seek similar relief.

58 I reject the submission. The issue received some attention from Allsop J (with whom Finn and Finkelstein JJ agreed) in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 98 [200]:

> The types of disputes which national laws may see as not arbitrable and which were the subject of discussion leading up to both the New York Convention and the Model Law are disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency. It is unnecessary to discuss the subject in detail. (See generally Redfern A and Hunter M, *Law and Practice of Commercial Arbitration* (Thomson/Sweet and Maxwell, 2004) at 138 et seq; Mustill M and Boyd S, *Commercial Arbitration 2001 Companion* at 70-76; Sutton D St J, and Gill J, *Russell on Arbitration* (Sweet and Maxwell, 2003) at 12-15.) It is sufficient to say three things at this point. First, the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate. Secondly, the identification and control of these subjects was the legitimate domain of national legislatures and courts. Thirdly, in none of the *travaux préparatoires* was there discussion that the notion of a matter not being capable of settlement by arbitration was to be understood by reference to whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral forum applying the laws chosen by the parties to govern the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws.

59 I would not characterise the present proceedings as being "anti-trust or competition disputes". They are not concerned with the control or abuses of market power.

60 No doubt it is true that the consumer protection provisions contained in Parts IVA and V of the TPA serve the public interest by fostering competition. So much was accepted in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526. There, in disposing of the proposition that only those who were misled could seek relief under the TPA, Lockhart J said (at 531):

> … I can conceive of no reason why the Act, which is designed to foster and promote competition and, by Pt V, to prevent misleading or deceptive conduct, should be given a restrictive interpretation in s 82 such that only persons who relied upon the representation are entitled to recover loss or damage from the respondent. The evident purpose of the Act leads in my opinion plainly to a different conclusion.

61 However, to accept that Part V of the TPA fosters competition does not mean that such cases are "competition" cases. There is absent from such suits the element of broad public interest in the outcome to warrant the conclusion that only the local national courts should be involved in their resolution. In the case of Part V of the TPA, the standards which are imposed are clearly set; the arbitrator will not be called upon to assess the nature of the public interest thereby protected nor is it likely that any determination by the arbitrator is likely to have an impact beyond the parties to the arbitration. The same may be said of the claim under Part IVA.

Sixth issue: submission to the exclusive jurisdiction of the Courts of Florida

62 Clause 40 has been set out above. The relevant part reads:

> All claims which, as a matter of law or public policy cannot be submitted to arbitration in accordance with Paragraph 31 shall be brought within the State of Florida in the judicial district in which Ideal Image Development Corporation has its principal place of business; … Franchisee irrevocably submits to the jurisdiction of such courts and waives any objection Franchisee may have to either the jurisdiction or venue of such court.

63 Ideal submitted that to the extent that the proceedings were not able to be arbitrated pursuant to cl 31 then the parties had agreed to the exclusive jurisdiction of the courts of Florida, with the result that the proceedings should be stayed in any event. The principles governing the grants of a stay of proceedings which are

commenced in defiance of an exclusive jurisdiction clause are well established. They were set out in *The Eleftheria* [1970] P 94 at 99 by Brandon J in these terms:

> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case.

64 See also *Akai Pty Ltd v Peoples' Insurance Co Ltd* (1996) 188 CLR 418 at 427-428, 444-445; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 299, 259; *Huddart Parker Ltd v Ship Mill Hill* (1950) 81 CLR 502 at 508-509. These principles supplant the ordinary criteria upon which a stay on the grounds of forum non conveniens may be granted: *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association Ltd* (1997) 41 NSWLR 559 at 569. In that circumstance, I find it impossible to embrace the Nicolas' submission that "[o]rthodox doctrine is that there is no common law basis for a stay of proceedings based on an exclusive jurisdiction clause". To the contrary, orthodox doctrine requires such a stay unless the Nicolas show a strong case for one not being granted. The Nicolas relied upon the decision of French J in *Green v Australian Industrial Investment Ltd* (1989) 25 FCR 532 at 543, where it was suggested that, in the context of a forum non conveniens application, the existence of claims under the TPA considerably reduced the relevance of a non-exclusive foreign tribunal clause. However, the position of exclusive jurisdiction claims is not, as I have already said, governed by forum non conveniens principles.

65 The Nicolas submitted that, on its proper construction, the exclusive jurisdiction clause only applied to claims which were prevented from being arbitrated by "some rule of law preventing arbitration of that claim" or by "some rule of public policy preventing arbitration". What it did not apply to was claims which simply did not fall within the arbitration clause on its proper construction.

66 That submission is, in effect, that the words "as a matter of law or public policy" refer to doctrines or rules external to the agreement. In the case of the reference to public policy there is no particular difficulty in embracing that view.

However the expression "as a matter of law" is more difficult for, ordinarily, the meaning of an agreement is itself a question of law.

67 Thus, the expression "as a matter of law" is capable of referring both to rules of law affecting the operation of the arbitration clause (such as the competition principle referred to above) and also to the proper construction of the clause itself.

68 The Nicolas submitted that the words "in accordance with paragraph 31" told against this. They implied that the claims which "cannot be submitted" were claims which were themselves otherwise admissible under the arbitration clause. On this view of things the exclusive jurisdiction clause did not apply to claims which were altogether outside cl 31. Thus, on the conclusion I have reached, the claims to set aside or vary the agreement were not caught by the arbitration clause (because of cl 31(e)) and therefore were not caught by the exclusive jurisdiction clause either.

69 I do not think that this argument should be accepted for two reasons. *First*, the ordinary meaning of the expression "as a matter of law" is to the contrary and embraces issues of construction. *Secondly*, any contrary reading leads to an eccentric trifurcation of claims; claims within the arbitration clause to arbitration; claims within the arbitration clause but forbidden to be arbitrated for legal or policy reasons to the courts of Florida; and claims altogether outside the arbitration clause to the Australian courts. It is difficult to attribute to the parties a rational intention to deal with their dispute in that way. It is more natural, and more consonant with the language of the clause, to proceed upon the assumption that the claims referred to in cl 40 represent the universe of all claims with which the agreement could be concerned.

70 I conclude, therefore, that the effect of cl 40 is to require all claims between the parties that are not subject to arbitration – in this case those parts of the claims relating to the setting aside of the agreement and the post termination restraint issues – to be determined by the courts of Florida.

71 Against this conclusion the Nicolas argued that both the TPA and the ICA contained an overriding choice of law rule which meant that no Australian court could proceed on any other basis but that the claims under those acts had to be determined by Australian courts. As an alternative submission, they submitted that this Court would not stay their proceedings if there was a doubt that the courts of Florida could

entertain them. Since there is no evidence about the law of Florida on this issue, and since it was less than self-evident that the courts of Florida did have jurisdiction under the TPA (or the ICA), the stay should be refused.

72 I would reject the first of these arguments. There can be cases where a statute contains an overriding choice of law clause such that a forum court can proceed on no other basis but than in accordance with its terms. The decision in *Akai Pty Ltd* is an example of one such case. However, I do not think that either of the provisions relied upon by the Nicolas could possibly be characterised in that way. Section 86 of the TPA confers jurisdiction on a number of courts in respect of claims under it. I am unable to discern in its wording any language which would provide a basis for the Nicolas' argument. Ideal correctly submitted that the language of s 86 stands in stark contrast to the language of ss 67 and 68 of the TPA, which constitute a clear example of an overriding choice of law clause.

73 Further, although it is plain that the present argument was not put in *Comandate Marine* that decision proceeds on the assumption – entirely correct in my view – that this is simply not how s 86 operates. The position is no different – indeed worse – under the ICA, whose text lacks any indication that it is to operate as an overriding choice of law clause.

74 I also reject the second argument. Much of this part of the Nicolas' argument proceeded as if what was involved was *not* an exclusive jurisdiction clause. But this case is concerned with such a clause and the consequence is that "strong cause" by the party resisting the stay must be shown otherwise the stay will be imposed. Cases concerned with non-exclusive jurisdiction clauses have no particular relevance in that context. I do not accept, therefore, the applicability of any principle which would require there to be evidence before me showing that the courts of Florida could exercise jurisdiction under the TPA: cf. *Keenco v South Australia & Territory Air Service Ltd* (1974) 8 SASR 216 at 221.

75 On this issue, the Nicolas would need themselves to establish by clear evidence that their claim was not recognisable before the courts of Florida. That evidentiary onus has not been discharged. Accordingly there is "no strong cause" shown to depart from the ordinary position. I do not think, in the context of an

exclusive jurisdiction clause, that it is appropriate to approach the matter in the absence of evidence by reference to the presumption that foreign law is the same as Australian law. This is because the "strong cause" test could never be satisfied by a result flowing from the application of a presumption. It follows that I reject the Nicolas' argument.

Seventh Issue: the direct attack on the arbitration clause

76 The Nicolas made an additional submission that their pleading directly attacked the arbitration clause. I do not accept this submission. The pleading makes no such allegation and, in my opinion, the submission itself should not have been made. Even if the pleading did contain such an allegation (and it does not), it is well established in this Court that such a claim, even under the TPA, may be consigned to a foreign arbitration: *Comandate Marine* at [6], [7], [9] and [241]. In any event, my conclusion that claims to set aside the agreement are not, in fact, within the authority of the arbitrator means that such claims are within the exclusive jurisdiction of the courts of Florida. In those circumstances, the question does not arise.

Eighth Issue: the parties issue

77 The Nicolas next submitted that only they, and not their company, were parties to the agreement. Prima facie, therefore, it is only their proceedings which are affected by the conclusions which I have reached. That has the consequence, so they submit, that the claim brought by their company George and Miriam Nicola Pty Ltd is within the jurisdiction of this Court and should be permitted to proceed. Ideal submitted that this was not so because the dispute with the company was part of the same "matter" as the matter which existed between the Nicolas and Ideal. It pointed to the fact that the company's role in the pleading was essentially only that of a nominee. Alternatively, Ideal pointed to s 7(4) of the IAA, which extended the concept of a "party" to include another person claiming "through or under" another party.

78 I do not think that either of these propositions should be accepted. No doubt, the company was controlled by the Nicolas, but I do not think that it was their privy or that its claims and their claims are effectively the same or that the claim by the company is essentially a derivative claim of the Nicolas'. Indeed, it is very difficult

to understand what the third applicant's claim is. So far as I can see it only alleges that it entered into a lease (paragraph 171) and received an invoice (paragraph 100). Given that trivial role, I propose to stay the third applicant's proceeding until the determination of the proceedings in Florida. As currently conceived, it is likely that the third applicant's proceedings are liable to be struck out. Attempts to amend its position so that it, too, claims to have suffered similar wrongs to those suffered by the Nicolas may well lend substance to Ideal's presently unsound argument that the third applicant is the Nicolas' privy.

79 The Nicolas also claimed that the proceedings against the second respondent could not be stayed because he was not a party to the agreement. As yet, the second respondent has not appeared and, as I understand it, has not been served. To suggest in that circumstance that the proceedings against him should be stayed is premature when he has not yet appeared. If and when the second respondent does appear I will consider any application he wishes to make. At the moment, there is nothing before the Court to resolve.

Ninth Issue: mediation

80 The Nicolas submitted that the matter could not be sent to arbitration until there had been a mediation. This was because cl 31(a) was only activated when matters "could not be amicably settled". Since the parties had not had a mediation, it could not be said that the dispute "could not be amicably settled". I reject this argument. The Nicolas commenced proceedings in this Court, which is inconsistent with any entitlement to invoke the mediation clause.

Conclusion

81 The effect of this decision is that the first and second applicants' claims to set aside and vary the agreement, together with the matter involving the post termination restraints, must be heard in the court of Florida, but the balance should be arbitrated pursuant to cl 31(a). It follows, therefore, that the whole of their proceedings should be stayed. I stay those parts of the claim which I have determined to be arbitrable pursuant to s 7(2) of the IAA and the balance in the inherent jurisdiction of the Court.

82 I will stay the third applicant's claim until further order.

Conditions

83 Ideal did not oppose the imposition of the following conditions on the stay of the Nicolas' proceedings:

> (a) That the proceedings be stayed upon condition that such stay may be terminated upon application by the Applicants in the event that the First Respondent does not do all things reasonably necessary to be done on its part to have the matters referred to arbitration being determined in accordance with the arbitration agreement between the parties with reasonable expedition.
>
> (b) That the aforementioned stay is granted upon the basis that the First Respondent does not challenge the jurisdiction or authority of the arbitrator to hear and determine the claims, as identified in the Amended Statement of Claim filed in these proceedings, brought on behalf of the Third Applicant and against the First Respondent.

84 Since they are not opposed it is appropriate to impose them.

Result

85 The parties are to bring in short minutes of order giving effect to these reasons within 7 days. The applicants should pay the first respondent's costs of the motion.

I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 16 October 2009

Counsel for the Applicants:	Mr D Smallbone
Solicitor for the Applicants:	TressCox Lawyers
Counsel for the First Respondent:	Mr V Bedrossian
Solicitor for the First	Deacons Lawyers

Respondent:

Date of Hearing: 21 April 2009

Date of Judgment: 16 October 2009