Neutral Citation No. [2005] IEHC 16

THE HIGH COURT

[1993 No. 859 P]

BETWEEN

WILLIAM PEARSE VAVASOUR

PLAINTIFF

AND
PATRICK MICHAEL O'REILLY AND WINDSOR MOTORS LIMITED
AND
BY ORDER
WINDSOR RENT A CAR LIMITED

DEFENDANTS

Judgment of Mr. Justice Clarke delivered 28th January, 2005.

1. The plaintiff in these proceedings makes a number of complaints about the circumstances in which he ceased to be involved in aspects of the car hire rental business being conducted under the auspices of the Windsor Motor Group. The plaintiff has represented himself at all recent times in the course of these proceedings.

2. The proceedings commenced in 1993 in the immediate aftermath of the termination of the plaintiff's contract of employment with the third named defendants ("Windsor Rent a Car"). An immediate application for interim relief was granted by Lardner J. on 5th February, 1993 which restrained the then defendants (that is the first and second named defendants) from carrying on the business of a franchise arrangement, from terminating the employment of a Ms. Collins in relation to that franchise business or from procuring any alteration in the telephone or facsimile numbers of that business. The matter subsequently came before Costello J. (as he then was who delivered judgment in respect of an interlocutory application on 3rd March, 1993. There is extant an agreed counsel's note of the ex tempore judgment delivered by the court. From same it is clear that Costello J. was satisfied that the plaintiff had established a *prima facie* case to the effect that a contract existed between the plaintiff and the first named defendant whose terms included a provision that the profits of the franchise arrangements (to which I will refer in more detail later on in the course of this judgment) were, after deduction of all appropriate expenses, to be divided equally. Costello J. was also satisfied that a *prima facie* case had been established to the effect that there was an implied term in the aforementioned arrangements to the effect that the plaintiff's employment with Windsor Rent a Car would be retained during the currency of the franchise agreement. The court was not satisfied that there had been established a *prima facie* case to the effect that there was a breach of that agreement in various other respects which were then argued including in respect of the termination of Ms. Collins employment and the moving of the phone and fax lines. No order, in respect of these latter matters was, therefore, was made. In those circumstances Costello J. was not persuaded that he could make an order requiring the defendants to maintain the plaintiff in employment pending the trial of the action but by virtue of being satisfied that there was a *prima facie* case in respect of an entitlement on the part of the plaintiff to a 50% share in the net profits of the franchise the court ordered the first named defendant to account to the plaintiff's solicitors on a monthly basis "in respect of the turnover of the business of Holiday Autos Ireland Limited both in respect of the incoming and outgoing business the accounts to commence on 1st day of May, 1993 until the trial of the action or until further order".

3. For reasons some of which will be touched upon in the course of this judgment it has taken a very long time indeed for this action to come on for trial. It should be noted that the matter came on for hearing on 22nd June, 2004 before Kelly J. As I understand it by that stage the plaintiff was conducting the case himself. In the course of his presentation of the case to Kelly J. it became clear that some of the matters which he wished to pursue as part of his claim to damages were not pleaded. In that context Kelly J. considered an application made by the plaintiff for leave to amend his pleadings. I have had the opportunity of reading a transcript of the ex tempore ruling made by Kelly J. on 22nd June as a result of which such leave was granted.

4. It is therefore on foot of the amended pleadings authorised by that order of Kelly J. that this matter finally came on for hearing before me.

The Facts

5. The plaintiff left school in 1970 with what he described as a "good" leaving certificate. During the 1970s he had a successful and rising career. However he suffered a reversal in the early 1980s when, as a result of a change of direction in a major firm by whom he had been headhunted he was effectively left with no job to do. Thereafter the 1980s proved to be a most difficult period for him. He candidly outlined in evidence that he would have been, in effect, unemployed for three to four years of that decade and had also been involved in what ultimately turned out to be a failed hotel business venture. He also very candidly informed the court that he began, during that period, to suffer from serious alcohol problems. Ultimately those problems led him to seek, successfully, the assistance of a charitable agency experienced in dealing with such problems. Having come through those difficulties the plaintiff assisted in fundraising for that agency and it was in that context that he first met the first named defendant ("Mr. O'Reilly"). For those reasons it was common case that Mr. O'Reilly was well aware of the plaintiff's background at all material times.

6. Mr. O'Reilly had been the proprietor of a successful motor group for a significant period of time prior to the early 1990s. The primary business of the group was concerned with the sale of motor cars through, I am informed, a series of subsidiary companies which operated separate outlets. These companies were under the umbrella of the second named defendant. A further limb to the business was Windsor Rent a Car which carried on a relatively traditional car hire business.

7. It is again common case that Mr. O'Reilly offered the plaintiff a job whose principal initial focus was intended to be to bring marketing skills (an area in which the plaintiff had an established expertise) to bear on the car hire business. It is common case that his contract of employment was with Windsor Rent a Car.

8. The plaintiff and Mr. O'Reilly had first met during 1990 and the plaintiff joined Windsor Rent a Car in March 1991.

The Holiday Autos Connection

9. Holiday Autos is a large company based in the United Kingdom. No representative from the company gave evidence in the proceedings before me. However it would appear that its principal business is concerned with facilitating arrangements for the international hire of motor cars. To that end it operates through agents or franchisees in many countries. So far as material to these proceedings there are two elements of that business which require further consideration.

10. The first ("inward business") consists of the appointment of an agent within a country who will supply cars to the order of international clients of the Holiday Autos network. The second ("outward business") may involve the appointment of an agent or franchisee who will take bookings from within a country for the rent of cars in a second country. The arrangements would be

challenged through Holiday Autos who would arrange to have a car in the appropriate country made available by its agent in that jurisdiction.

11. While there were minor discrepancies of an immaterial nature in the respective accounts given by the plaintiff and Mr. O'Reilly as to the precise circumstances in which a business relationship between Holiday Autos and either or both of them emerged it seems clear that in general terms the initial idea came about as a result of Mr. O'Reilly noticing a Holiday Autos outlet while on other business in London while much of the detailed work in setting up the arrangements between Holiday Autos and the Windsor Group and/or the plaintiff was in fact conducted by the plaintiff himself.

12. Initially the business consisted of inward business as a result of which Windsor Rent a Car as was appointed as the entity which would supply cars in Ireland for Holiday Autos international customers. There is no dispute but that those arrangements were with Windsor Rent a Car rather than with the plaintiff and/or Mr. O'Reilly. As this business was in the course of being established it would appear that the plaintiff broached with Holiday Autos the possibility that the outward business might also be secured. The plaintiff gave a clear account of being told by the representatives of Holiday Autos that as a matter of policy they did not consider it appropriate to allow the same entity to act as an agent or franchisee for both outward and inward business within the same jurisdiction. I did not understand Mr. O'Reilly to differ significantly from that evidence. There is no doubt but that a franchise agreement came to be executed which provides for the granting of the outward business of Holiday Autos within Ireland. That agreement is at the core of the dispute between the parties. The first significant issue is as to whether the benefit of that franchise arrangement is conferred upon the plaintiff and Mr. O'Reilly personally (as the plaintiff contends) or upon both of them in their capacity as agents of the second named defendant or other companies within the Windsor Motors Group (as the defendants contend).

The Franchise Agreement

13. The relevant agreement is relatively straightforward in its terms. It is dated 14th November, 1991 and appears, on the evidence, to have been drafted by Messrs. Rochman Landau who are English solicitors and who acted on behalf of the franchisor which is stated to be H A International Limited of 12 Bruton Street, Mayfair, London W1, England. Insofar as the issue of the identity of the franchisee is concerned the following further provisions appear to me to be material:-

> (1) The franchisee is defined as "PATRICK MICHAEL O'REILLY and WILLIAM PEARSE VAVASOUR of Windsor Car Rentals Limited, South Circular Road, Dublin 8".
>
> (2) The agreement bears the signature of both the plaintiff and Mr. O'Reilly who are stated as having signed "for and on behalf of the franchisee".
>
> (3) Clause 3.18 prohibits the grant of any sub franchise in respect of the business mark or know-how of the business.
>
> (4) Most particularly clause 3.21 specifies that the franchisee "may on one occasion only within six months of the date of this agreement assign the benefit of this agreement to a limited liability company of which Patrick Michael O'Reilly and William Pearse Vavasour both be directors and majority shareholders and upon such assignment Patrick Michael O'Reilly and William Pearse Vavasour shall forthwith give notice of the assignment and the identity and registered office of the assignee to the franchisor but otherwise not to assign transfer or otherwise deal with the Mark and Know-How of the business or the benefit of this agreement in anyway without the prior written approval of the franchisor which shall not be unreasonably withheld in the following circumstances:-
>
> > 3.21.1 if the proposed assignee is acceptable to the franchisor and shall agree to be bound by the terms and conditions of the standard franchise agreement used by the franchisor at the time of such proposed assignment for the residue of the term and
> >
> > 3.21.2 if the franchisee shall pay to the franchisor the reasonable costs and expenses incurred by the franchisor in the assessment of each proposed assignee.
>
> (5) The agreement further provided:-
>
> > 6.17 The franchisee shall have the option to extend the term for a further period of one year commencing on the day following the expiry date subject to the following: 6.17.1 service of notice of extension by the franchisee on the franchisor not later than one calendar month prior to the expiry date and
> >
> > 6.17.2 proper performance and observance by the franchisee of all its obligations under this agreement throughout the term and
> >
> > 6.17.3 execution by the franchisee of a new franchise agreement in the standard form used by the franchisor at the time of service of such notice in respect of a further period of one year without any option to renew.
>
> (6) It should also be noted that the term is specified as being three years.

14. The defendants case is that by virtue of the fact that both the plaintiff and Mr. O'Reilly are described as being "of Windsor Car Rentals Limited" it is clear that their signatures the fact that they are named in the body of the agreement does not give rise to the inference that they were the contracting parties personally. I cannot agree.

15. In this context it is necessary to consider in some detail the provisions concerning assignment and/or extension of the franchise arrangements. The prohibition on assignment seems to be subject to two exceptions:-

> (a) there is an absolute entitlement on the part of the franchisee to assign the benefit of the agreement to a limited liability in which both the plaintiff and Mr. O'Reilly are to be directors and majority shareholders.
>
> (b) separate from that there is an entitlement on the part of the franchisee to seek the consent of the franchisor (which consent or approval cannot be unreasonably withheld) to the transfer subject to the provisions of clauses 3.21.1 and

3.21.2.

16. It is difficult to see how the provision referred to at (a) above would make any sense if it were the intention of the parties that the agreement was to be with the plaintiff and Mr. O'Reilly in their capacity as representatives of Windsor Motors Limited. In those circumstances it seems unlikely that there would be an automatic entitlement to transfer the franchise into a company which was owned by the plaintiff and Mr. O'Reilly. Furthermore if it were not contemplated by the parties that the plaintiff was to have a personal interest in the franchise it is difficult to see why he would be mentioned in the assignment arrangements at all. Furthermore, the construction of the agreement which treats Mr. O'Reilly and the plaintiff franchisees in their personal capacity (with an option to transfer the franchise into a corporate entity in which they would both have an interest) is consistent with the policy of Holiday Autos not to have inward and outward business in respect of any country in the hands of the same entity. It is reasonable to assume that the involvement of the plaintiff satisfied Holiday Autos that there would be a sufficient difference between the interests of their inward and outward agents/franchisees in Ireland so as to satisfy the concerns that clearly gave rise to that policy.

17. I am therefore satisfied that the only reasonable construction of the agreement taken as a whole is that the inclusion of the phrase "of Windsor Motors Limited" after the names of the plaintiff and Mr. O'Reilly where they appear in the definition of franchisee for the purposes of the agreement was simply to provide an address for those individuals and not in anyway to indicate that they were contracting on behalf of Windsor Motors Limited. Finally in that context it should be noted that the agreement was drafted by experienced solicitors from a jurisdiction whose laws in this regard are very similar to the laws in this jurisdiction. If it were intended that the franchisee should be Windsor Motors Limited then it would have been very easy indeed to specify that in the written document.

The Arrangements between the Parties

18. In the light of that finding it is necessary to consider the legal arrangements which may expressly or by implication have been in place between the parties to these proceedings so as to give effect to the franchise arrangement. In that context the plaintiff described the arrangements as being a marriage on the one hand of the fact that he had come up with the idea and had the expertise to manage it and on the other hand the fact that Mr. O'Reilly was, through the various entities within the Windsor Motors Group, in a position to deploy the resources of that group to facilitating compliance with the obligations of the franchisee under the agreement. It is common case that the resources necessary to ensure that those obligations were met were provided from within the Windsor Motors Group. The principal employee of the group concerned with managing the franchise business was the Ms. Collins who was the subject of the order of Lardner J. at the interim stage, and who gave evidence in the course of the proceedings before me. She was at all material times employed by and paid from within the Windsor Group. Furthermore, the phone and other backup necessary together with the premises, from which the business was administered were supplied from within the group making use of existing resources. On the other hand it is not at all clear that the provision of those facilities for running the franchise business was a very costly affair. While certain figures were proved in evidence in relation to the damages claim (to which I will refer in more detail later) which suggest that the total cost of administering the business in the ten month period during 1992 when it was operational came to just over IR£68,000.00 it is also clear on the evidence that much of that expenditure would, as a matter of likelihood, have been incurred in any event by the Windsor Group in respect of the conduct of its existing businesses. That is not to say that it may not properly have being deducted from the gross profit of the franchise business in computing the profits attributable thereto but it nonetheless remains the case that the additional expenditure required to be put in place by companies within the Windsor Group for the purposes of facilitating the operation of the franchise agreement was relatively limited. Given the finding above, to the effect that the franchise was with the plaintiff personally and Mr. O'Reilly personally and given both the evidence of the plaintiff (which in this regard I accept) and the undisputed evidence as to how matters actually proceeded I am satisfied that there was an agreement between the plaintiff and Mr. O'Reilly to the effect that Mr. O'Reilly would procure that the appropriate entities within the Windsor Motors Group would provide the necessary backup to ensure that the franchise could operate including the provision of services, premises and the time of such employees as might be required. The profits of the franchise would be calculated by the deduction from the gross profits (being the difference between the moneys which would be received from Irish customers booking abroad through Holiday Autos and the (lesser) sums that would require to be paid through Holiday Autos to the agents in the relevant countries) of the reasonable sums attributable to the provision of those services to the franchise. I am also satisfied that it was agreed that the net profits after deduction of such expenses would be divided as to 50% to the plaintiff personally and 50% to be applied at the direction of Mr. O'Reilly, whether to himself personally or into an entity within the Windsor Group, should he so direct.

19. Before leaving this topic I should deal with a minor issue which arose in the course of the evidence. It was accepted by the plaintiff that he had not, from the commencement of the practical operation of the franchise business in the earlier part of 1992 up and until differences arising between the parties in the earlier part of 1993 ever sought any payment. However on the basis of the arrangement which he asserts (and which I have for the reasons indicated above accepted) existed between the parties this does not seem to me to be material. The plaintiff was, in any event, employed by Windsor Rent a Car (an issue to which I will return). His entitlement under the franchise agreement was to receive 50% of the net profits. At the time of differences arising between the parties that business had not yet completed its first year of operation. In the circumstances it does not seem to me to be likely that the plaintiff would have sought payment until such time as audited accounts showing those profits had been prepared. While the point might, therefore, have been of some considerable importance had the franchise business continued for some number of years without the plaintiff seeking any payment in respect thereof it does not, on the facts of this case, seem to me to be material.

20. In all the circumstances I am therefore satisfied that an agreement existed between the plaintiff and Mr. O'Reilly to the effect that they would jointly operate the franchise with Mr. O'Reilly agreeing to procure the provision of the necessary facilities from within the Windsor Motor Group and with both parties to participate in the net profits to the extent of 50%.

The contract of employment

21. It is common case that the plaintiff was served with a notice of termination of his employment with Windsor Rent a Car in early 1993. He served his notice period and was paid in respect thereof. No case is brought concerning the adequacy of the period of notice given.

22. Instead it is contended that there was (as Costello J. was satisfied a *prima facie* case existed in respect of) an implied term that his contract of employment with Windsor Rent a Car would not be terminated as long as the franchise agreement remained in place. A number of possibilities exist under this heading which were canvassed in the course of argument:-

(a) That such an implied term required the continuance of the plaintiff's contract of employment for at least the three year period contemplated in the franchise agreement unless that franchise agreement were prematurely determined (an event which did not occur).

(b) That his contract of employment was not capable of being terminated until the expiry of the potential fourth year of the franchise agreement in the event that the franchisees exercised their clear entitlement under the terms of that

agreement to extend the franchise arrangement for a period of one additional year by the service of notice of extension contemplated by clause 6.17.

(c) That the contract of employment could not be terminated as long as the franchise agreement in any form continued in existence even on foot of some further arrangement between Holiday Autos and the franchisees to continue the agreement beyond the entitlements conferred upon the franchisee under the arrangements signed up to in November, 1991.

23. It should be noted that it is not contended that there was an express agreement to this effect. In opposition to the plaintiff's contention that such a term should be implied (which in fairness to the plaintiff he candidly attributed to the finding by Costello J. to the effect that there was a *prima facie* case to that effect), the defendant makes a series of points by way of defence which may be summarised as follows:-

(a) under the established case law concerning the circumstances in which a court will imply a term into a contract no such term should be implied;

(b) to imply such a term would be to require that the contract of employment would have a minimum anticipated duration of at least three years (or indeed a greater period in the event that the appropriate implied term was as at (b) and (c) above) and in those circumstances such a contract would be unenforceable under the provisions of the Statute of Frauds. In that context it is argued that it would be inappropriate to imply a term into a contract which would have the effect of rendering the contract unenforceable under the Statute.

(c) In the context of this aspect of the plaintiff's claim the defendant also places reliance upon the fact that there does not appear to have been any significant connection between the general business of Windsor Rent a Car (in which the plaintiff was employed) and the franchise business. There was not, therefore, it is said, any necessary reason as to why the plaintiff would have had to continue in employment with Windsor Rent a Car in order for the franchise agreement to continue to operate.

24. The circumstances in which the plaintiff's contract of employment with Windsor Rent a Car was terminated was the subject of evidence at the hearing. Mr. O'Reilly gave an account of the difficulties being encountered in the motor trade generally in the latter part of 1992. While the volume of sales in respect of the Rent a Car portion of the business had held up it was, he said, clear that insurance costs represented a very significant burden on the profitability of the Rent a Car business. It was the practice in the industry that a single policy of insurance in respect of all cars in the rental fleet was affected. The normal method used by insurance companies to determine the premium payable was a percentage of the total turnover. The Windsor Rent a Car fleet was insured with PMPA who intimated that with effect from early 1993 a significant increase in the percentage that would be required to be paid to secure a renewal of the insurance cover would be put in place. In Mr. O'Reilly's view payment of the increased premium demanded by the PMPA would have rendered the business loss making. In those circumstances he determined that it would be necessary to close the car rental business and gave notice of redundancy to some ten out of twenty employees (including the plaintiff). The business did, in fact, cease for a number of days but as a result of an apparent change of heart on the part of the PMPA (possibly as a result of being faced with the loss of a significant amount of business) a renewal was secured at an acceptable rate and the business was restarted.

Implied Terms

25. Counsel for the defendants referred me to *Sweeney v. Duggan* [1997] 2 I.L.R.M. 221 where at p. 216 in the course of delivering the unanimous judgment of the Supreme Court Murphy J. noted that there are at least two situations where courts will, independently as statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. As identified by Murphy J. the first such situation arises in circumstances where a term is inferred on the basis of the presumed intention of the parties. Reference was made to the celebrated passage from the judgment of MacKinnon L.J. in *Shirlaw v. Southern Foundries* [1926] Limited [1939] 2 K.B. 206 at 277 as follows:-

"*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to express provision for it in their agreement, they would testily suppress him with a common, 'oh, of course'."

26. The second category of implied contractual term derives not from the intention of the parties to the contract but from the nature of the contract itself.

27. Murphy J. went on at p. 217 to note that whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category of contract it must be not merely be reasonable but also necessary.

28. Applying that test it is difficult to see how the term contended for here must necessarily be implied. Would such a term as is contended for be necessary as a matter of law and logic to, in the words of Murphy J. at p. 222, "enable the provisions of the agreement to have operative effect". It seems to me that the clear answer is no. There was obviously no such term implied when the contract of employment initially commenced for at that stage the franchise agreement was not in contemplation. The only argument upon which the plaintiff can rely is to the effect that the term became implied into his contract of employment as soon as the arrangements in respect of the franchise agreement became operative. In what way was it necessary to the proper operation of the franchise agreement or the contract of employment that such a term be implied into the employment arrangements. While it was, of course, in the plaintiff's interests that he should continue to be directly involved in the franchise arrangement he did not necessarily have to be an employee of Windsor Rent a Car in order so to do. Similarly on the basis that I have found, as I would have to have done in order for the plaintiff to have a case in respect of the franchise agreement, that that agreement was a stand alone arrangement which was necessarily divorced by reason of the policy of Holiday Autos from the remainder of the Windsor Motor Group, it is difficult to see how it was in anyway necessary to the performance of the his contract of employment that there be an implied term that same should continue as long as the franchise should.

29. Similarly it does not seem to me that the hypothetical officious bystander would have received the required "of course" answer had he suggested such a term. Same might have been negotiated and if it were negotiated it could have been subject to various terms and conditions. No such negotiations took place.

30. In the circumstances it does not seem to me to be appropriate to imply a term into either the agreement between the plaintiff and Mr. O'Reilly in respect of the operation of the franchise (to the effect that Mr. O'Reilly who was the other party to that agreement would procure that the plaintiff's contract of employment with Windsor Rent a Car would be coterminous with the franchise

agreement) or a term in the contract of employment with Windsor Rent a Car itself to the same effect.

31. Given that it does not appear to me to be appropriate to imply any such term into the contract of employment (or indeed into the arrangements concerning the franchise agreement in the collateral matter referred to above) there does not appear to have been anything unlawful in the termination of that contract of employment and thus the plaintiff's claim in respect of this heading fails.

32. The remaining element of the plaintiff's claim in respect of his employment concerns a possible bonus payment for the year 1992. In evidence the plaintiff suggested that his terms of employment included an entitlement to a bonus payment of IR£10,000 per annum. In support of this he produced a letter dated 22 April 1992 from his employer (Tom Magee FCCA, Financial Director) which specified his remuneration to be as follows:-

> Annual Salary £20,000
>
> Annual Bonus £10,000
>
> Profit Share 5% of profits over budget

33. Against this the defendant suggested that the letter was written as a comfort for the plaintiff's bank and did not reflect his actual package. Further it was suggested that profits were never sufficient to require the bonus payment.

34. In answer the plaintiff produced a print out from the relevant payroll of the defendants for that period which, insofar as it relates to him provides as follows:-

NAME	Nov 91 BASIC	EXTRA BASIC	MONTHLY BONUS	ANN BONUS
P VAVASOUR	18320	1680	6000	4000

35. On that basis I am satisfied that the plaintiff was at all material times during his employment entitled to a bonus of IR£10,000 per annum but that the profit share did not arise (nor was such claimed in these proceedings).

36. Therefore the plaintiff is entitled to recover the sum of IR£10,000 less tax and other deductions.

37. I will invite the parties to agree that net figure is converted into euro.

The cessation of the franchise arrangements

38. It remains, however, to consider the circumstances in which the plaintiff ceased to be involved in the franchise arrangements. It was common case that all of the moneys which were received on foot of the franchise arrangement were paid into a company known as Globetrade Marketing Limited. This company would appear to be a wholly owned subsidiary of the Windsor Motors Group. The plaintiff in evidence said, and I accept, that it was his understanding that this was a convenience having regard to the fact that the expenses associated with the running of the franchise were also being borne by that group and that it was a company over whose accounts he had a certain degree of control. On the basis of the findings set out above as to the arrangements between the plaintiff and Mr. O'Reilly and in the context of the acceptance by both of them that the funds attributable to the franchise arrangement should be paid into an account in the name of Globetrade Marketing Limited it seems to me that it is appropriate to construe those arrangements as obliging Mr. O'Reilly to procure that 50% of the net profits derived by the franchise should be paid to the plaintiff.

39. What in fact occurred after the plaintiff's contract of employment had been terminated was that the franchise business continued to operate as if Globetrade Marketing Limited was the franchisee. While there was little clear evidence as to the precise circumstances in which that occurred (and in particular no evidence by anyone representative of Holiday Autos) it would appear that Holiday Autos at least went along with that situation notwithstanding the exclusion of the plaintiff. Whether there was a formal transfer of the franchise agreement or not the franchise agreement operated as if Globetrade were the franchisee. It should of course be recollected in this context that the financial arrangements in respect of the business of the franchise (that is the receipt of moneys from customers and the onward payment to the appropriate agents of Holiday Autos) were already occurring through Globetrade prior to the plaintiff's departure. Therefore in practical terms nothing changed after that departure.

40. Thereafter (and subject to one significant alteration in 1998) the franchise appears to have continued to be operated by Globetrade up and until the time when it was terminated by Holiday Autos in 2001. It is not clear whether there was any formal exercise by Globetrade (or indeed anyone else) of the entitlement to extend the franchise for one year upon the completion of the initial three year period in 1994. Similarly there was no detailed evidence as to precisely how the arrangements continued thereafter notwithstanding the termination of the original franchise agreement. On this basis it is reasonable to infer that while no formality attached to the extension of the arrangements, Globetrade and Holiday Autos agreed expressly or by necessary implication to continue the arrangements subject to the 1998 variation up and until the final termination in 2001.

Conclusions on liability

41. For the above reasons I am satisfied that the first named defendant was in breach of contract when he failed to procure that 50% of the profits of the franchise would be paid to the plaintiff. Similarly I am not satisfied that there was any breach of contract on the part of any of the defendants in relation to the termination of the plaintiff's contract of employment. I am satisfied that the third named defendant failed to pay the bonus sum of IR£10,000 contracted for in respect of 1992.

Basis for Calculating Damages

42. The next issue which logically arises is as to the appropriate basis in law for the calculation of the damages to which the plaintiff may be entitled for the breach of the franchise contract referred to above.

43. While there are, on the fact of this case, a number of important other issues which require to be determined in order to proceed to assess damages it is, nonetheless, appropriate to commence with approaching damages on the basis of the traditional test for compensatory damages. On this basis it is necessary to seek to place the plaintiff into the position in which he would have been had the contract been complied with. There are detailed figures available as to the trading in relation to the franchise operation (the detail of which I will return to). Therefore there is no difficulty in relation to the calculation of the loss of profits attributable to any period of time.

44. The first problem that arises is as to the period of time by reference to which damages should be calculated. In approaching the matter at this stage I have deferred until later consideration in the course of this judgment the applicability of the defendant's contention that part of the plaintiff's claim is in any event statute barred. I have similarly deferred the considerations of the argument

made by the plaintiff as to an alternate basis upon which damages should be calculated.

45. It seems clear that the initial contract between the plaintiff and the first named defendant could only have been for the expected duration of the franchise agreement which was, subject to the negotiation of any further extension, a period of three years with an entitlement to extend for a further year. As the franchise did continue for that fourth year I have little difficulty in accepting that the plaintiff would be, in principle, and subject to the argument concerning the statute of limitations, be entitled to loss of profits for that four year period.

46. A more difficult question arises in respect of the question as to whether the plaintiff is entitled to damages based on any period beyond the fourth year. On the one hand it is clear that the franchise did continue for a significant period thereafter. On the other hand it can only have done so on foot of an express or implied agreement between Globetrade or other entities within the Windsor Motors Group and Holiday Autos, the plaintiff not being a party to any such agreement and it being known to all sides that the plaintiff was no longer involved in the franchise. Against that it also needs to be taken into account that at the time the continuance of the franchise occurred these proceedings were already in existence and any such continuance obviously must be viewed against that backdrop.

47. The real question seems to me to be this. Given that the plaintiff was no longer an employee of Windsor Motors but also given that he would have been an existing franchisee as of the date of the expiry of the extended fourth year period what would then have happened had the breach of contract not occurred so that the plaintiff was, at least up to that date, an existing and continuing franchisee.

48. Given that the franchise would then be about to expire and that holiday autos would be under no obligation to either the plaintiff or any of the defendants to continue same and equally given that the defendants would not have been obliged to continue with their arrangements with the plaintiff it seems to me that one cannot be certain that the franchise arrangement would have continued with the plaintiff as a co-franchisee in the same manner as it continued in favour of Globetrade in the events that actually happened. On the other hand there can be little doubt that the plaintiff lost an opportunity of being able to participate in such a continuing franchise by virtue of what I have found to be his wrongful exclusion in participating in the franchise up to that date. If he was the joint-incumbent as of that time then he had a real opportunity to be involved in some way in the continuance of the franchise. By virtue of his exclusion and his not being, then, an incumbent he in fact lost that opportunity.

49. The most recent case in which the courts in this jurisdiction have had to consider a loss of opportunity is *Philp v. Ryan and Others* (unreported judgment of the Supreme Court delivered by Fennelly J. on 16th December, 2004). While that case was concerned with the loss of an opportunity to avail of medical treatment which might or might not have affected his prognosis the court nonetheless addressed general principles concerning loss of opportunity.

50. Fennelly J. quoted with approval from the speech of Lord Reid in *Daveys v. Tailor* [1974] A.C. 207 at p. 213 as follows:-

> "When the question as whether a certain thing is or is not true – whether a certain event did or did not happen – the court must decide one way or the other. There is no question of chance or probability. Either it did or did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen.
>
> But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All you can do is to evaluate the chance. Sometimes it is virtually 100%; sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51% and a probability of 49%."

51. Furthermore the court placed reliance on the speech of Lord Simon of *Glaisdale* at p. 220 to similar effect:-

> "But this is one of those cases where a balance of probabilities is not the correct test. If the appellant showed any substantial (i.e. not merely fanciful) possibility of a resumption of co-habitation she was entitled to compensation for being deprived of that possibility. The damages would, of course, be scaled down from those payable to a dependent spouse of a stable union, according as the possibility becomes progressively more remote. But she would still be entitled to some down to the point where the possibility was so fanciful and remote as to be *de minimis*."

52. Applying those principles to the facts of this case it seems to me that I must access the likelihood of the franchise having continued with the plaintiff as a co-franchisee after year four on the basis that he remained a co-franchisee up to year four.

53. I have regard to the following factors:-

> (a) at least at the relevant time (in 1995) the business seems to have been satisfactory from the point of view of Holiday Autos and it seems unlikely that they would have had any difficulty with the continuance of the existing business with or without the plaintiff as a co-franchisee.
>
> (b) from the perspective of the defendants there would have been two competing requirements. If they wished to continue the business without the plaintiff then they would have to have attempted to negotiate a variation in the arrangements so as to exclude the plaintiff which fact might well not have commended itself to Holiday Autos. On the other hand the defendants might have been anxious, given that the plaintiff was no longer in their employ, to remove him from the picture.
>
> (c) the plaintiff would be most unlikely to have been in a position, in practice, to have carried on the franchise without the availability of the resources of the defendant. In this regard it is important to note that the profits attributable to the franchise in the first number of years were not very substantial so that even had the plaintiff had access to 50% of those profits it is unlikely that he would have been able to take over the running of the franchise entirely by himself. The reality was that the costs of running the franchise were reduced by the application of economies of scale to the operations of the defendants so that resources that were also being utilised in their general motor business were also utilised for the purposes of the franchise. Such economies of scale would not have been available to the plaintiff.

54. In all of the above circumstances it seems to me that there would have been a significant risk that the plaintiff would not have been able in practice to continue as a franchisee against the opposition of the defendants but that nonetheless, in all the

circumstances, it is more probable than not that he would have so continued. I would consider it appropriate, therefore, to reduce the profits attributable to any period after the fourth year to 60% of their full value to reflect the loss of opportunity. It is next necessary to consider two additional questions concerning the approach in principle to the calculation of damages before going on to assess the expert evidence in relation to the losses actually suffered.

Statute of Limitations
55. The defendants argue that the plaintiff's claim is, at least in part, statute barred. The basis upon which this claim is made stems from the amendment to the statement of claim permitted by Kelly J. and referred to above. I should note for completeness that the original statement of claim was amended at an early stage for the purposes of including the third named defendant as a defendant and further including appropriate pleadings in respect of the claim as against that party. At that stage the plaintiff's claim in respect of the franchise was as set out at para. 13 (iv) and amounted to a claim for a payment of IR£49,375.00 representing that the plaintiff's share of profits for the period to 31st January, 1993 and further an account of all profits of the franchise from that date to 14th November, 1994. This latter date was the date upon which the original three year term would have expired.

56. When the amendment was made in 2004, the claim was extended to cover damages in respect of breach of the franchise agreement to date. However, the defendants claim that the extended period in respect of which damages were claimed amounts to a fresh claim which was only brought on application being made to Mr. Justice Kelly in that regard on 22nd June, 2004. Thus it is argued that any loss that is attributable to the period from 15th November, 1994 up and until 22nd June, 1998, are not recoverable because they were not:-

> (i) Included within the original claim; or
>
> (ii) Attributable to a period within six years of the deemed commencement of the amended claim upon the making of the order of Kelly J.

57. Unfortunately for the plaintiff, and for entirely understandable reasons, he did not feel able to deal with the legal arguments raised by counsel for the defendant under this heading. In those circumstances I have considered same with particular scrutiny. However, I am driven to the conclusion that the defendants are correct in that contention. It is well settled that where pleadings are amended to include an additional Head of Claim, the statute only stops running as of the time of that amendment. It is, of course, the case that sometimes amendments are, in substance, merely a further particularisation of a claim which has already been made. The difficulty here is that the plaintiff's case was, on the original pleadings, expressly confined to a claim up to 14th November, 1994. There was thus no claim in respect of any loss of opportunity in relation to the continuance or renewal of the franchise or, indeed, any other breach of contract that gave rise to losses anticipated to extend beyond that date. In those circumstances it seems to me that such a claim must be regarded as a new claim. Indeed the fact that Kelly J. felt it appropriate not to consider such a claim on the existing pleadings without considering and ultimately allowing an application to amend strengthens me in that view.

58. In the circumstances it seems to me that I must exclude from consideration any damages in respect of the period from 15th November, 1994 to 22nd June, 1998.

Additional Damages
59. It is also necessary for me to deal with the contention made by the plaintiff that he should be entitled to additional damages based upon what he contends were the *mala fides* of the defendants and further based upon the undoubted hardship and distress which he has suffered over the last eleven or twelve years. In that regard he referred me to *Hickey v. Roches Stores*, an unreported judgment of Finlay P. delivered on 14th July, 1976. That case is concerned with the circumstances in which it may be appropriate to approach the question of damages on the basis of calculating the gain which the wrongdoer made rather than the loss suffered by the plaintiff. It is obviously only relevant in cases where there is a difference between those two sums such that the wrongdoer gains more by his breach than the plaintiff has actually suffered by the wrongdoing. On the facts of this case it does not seem to me that that principle has any relevance. The agreement between the parties (which I have held has been breached by Mr. O'Reilly) was that Mr. O'Reilly would procure that 50% of the profits attributable to the franchise should be paid to the plaintiff. What Mr. O'Reilly gained by his breach was, therefore, exactly the same as the plaintiff lost, i.e. 50% of the net profits. While there may be some debate between the parties as to how those profits should be calculated (to which I will return), nonetheless in principle, and on the facts of this case, there does not appear to be any difference between the gain achieved by the breach and the loss suffered as a result therefrom.

60. The other leg of the plaintiff's claim in respect of the payment of additional damages is one in which he seeks damages for distress. However, on the basis of the findings already made in the course of this judgment the plaintiff would not have been entitled to continue in employment and would only have suffered a loss in respect of 50% of the net profits. For reasons which will be clear later in this judgment those losses are relatively modest in most years. While undoubtedly accepting that the whole circumstances surrounding these proceedings have caused considerable distress to the plaintiff and his family it does not seem to me that having regard to the relatively modest financial losses which he suffered it can be said that any significant portion of that distress is, in reality, attributable to the wrongdoing which is actionable in these proceedings and in respect of which I have to calculate damages. For this reason I would not propose departing from purely compensatory damages to which I now turn.

The Calculation of Damages
61. There was certainly some confusion which was only cleared up in the course of the proceedings as to the precise manner in which the franchise continued in the years after the plaintiff had departed from active involvement. However, it is now clear that at the instigation of Holiday Autos what in substance amounted to a renegotiation of the arrangements between Holiday Autos and the franchisee occurred in the latter part of 1997 and became operative with effect from 1998. In substance the whole manner in which the franchisee was to be paid altered so that instead of the franchise making a gross profit derived from the difference between what it charged its Irish customers and what it had to pay to the relevant Holiday Auto agent in the country concerned all payments were subsequently made directly to Holiday Autos who paid a commission back to the franchisee which appears to have been as to 7% on the first IR£1 million of turnover and 5% thereafter. It seems likely that this change was significantly motivated by the increased use of the internet as a means of booking car hire. Indeed it seems quite probable that once the business began to operate in that fashion it became increasingly likely that Holiday Autos would wish to terminate the franchise in its entirety, which they did in fact do in 2001.

62. However, for the purposes of this case it is important to recall that at the interlocutory stage Costello J. (as he then was) directed that the defendants should account to the plaintiff on a monthly basis for the turnover of the franchise business. This they continued to do. When the alteration in the nature of the business occurred at the beginning of 1998, a certificate in a slightly different form was furnished which divided the business into "old business" and "new business". I was informed, and accept, that the new business was the grossed up turnover figure attributable to the commission paid to the franchisee. The old style business was a

figure for turnover which had occurred in the traditional manner by direct sales by the franchisee to the public. This old style business continued for some period into 1998. I am also informed by the plaintiff, and accept, that he was entirely unaware as to that change in the nature of the conduct of the franchise operation until the matter was put in evidence in the course of the hearing. He was therefore, not unreasonably, under the apprehension that turnover in the traditional manner (that is to say sales for which the franchisee would have received payment) in the volumes indicated in the certificates was occurring. On that basis the plaintiff's expert forensic accountant, Mr. Peter Johnson, had prepared figures for the profits of the franchise which were based on that assumption. Overnight (after the variation was clarified) he produced a revised report, dated 12th January, 2005, reflecting the new situation that had emerged in the course of evidence on the previous day. In that report he sets out what he describes as an upper estimate and a lower estimate of the value of 50% of the franchise net profits. The difference between the two stems from the treatment of the expenses attributable to the conduct of franchise business. The lower estimate is taken on the basis of accepting fully all of the expenses which were included in the statutory accounts of Globetrade Marketing Limited in respect of the business. The upper estimate is simply based on taking half of those expenses. The reason given by Mr. Johnson for tendering that figure was his experience that it was possible and not entirely unusual that accounts for companies within a group of companies do not necessarily allocate the expenses attributable to each company in an exact way. In this regard he noted, and I accept, that in most cases there are no revenue consequences resulting from any such distinction in that for practical purposes groups of companies, as defined in the Taxes Acts, are taxed on their collective profits by means of allowing losses occurring in one company to be the subject of an allowance in another profit making company within the same group. Mr. Johnson also accepted that it was entirely appropriate that where, as here, one company within a group provided services to another company within the group an appropriate charge for those services should be made. He did not, therefore, disagree in principle with the making of a charge but simply questioned whether the charge might not have been overstated.

63. To that end the defendants led evidence from Greg O'Shea, a partner in Burke & Company, who at all material times were auditors to Globetrade. Mr. Burke indicated that in respect of many of the years to which his evidence related he had himself carried out the calculation as to the sums attributable to the franchise business by way of costs and which should, therefore, be at least notionally paid by Globetrade to other companies within the group. While a number of minor matters were not absolutely clear (*vis* the fact that in some years there may have a round sum and the fact that for the last year the expenses seemed to continue beyond the date when the business ceased – this latter being explained by the need to wind-up the business) I am not satisfied on the evidence that there is anything like a sufficient basis for me to go behind the statutory accounts. In the circumstances it seems to me that the profits attributable to the franchise in respect of which the plaintiff was entitled to a 50% share are those set out in the lower figure given by Mr. Johnson. To those figures I must apply two reductions. For the reasons indicated above I must exclude the losses which appear to derive from the statute barred period. Furthermore I must reduce all losses subsequent to 1995 to 60% of their full value. On that basis the allowable losses appear to me to be the following:-

Table

Year	Profit/loss	50% Attributable to Plaintiff	Reduction	Allowable Balance
1992	2,203	1,102	N/A	1,102
1993	(9,036)	(4,518)	N/A	(4,518)
1994*	9,773	4,887	N/A	4,887
Net Share of profit to end 1994				1,471
Estimated net shares of profit to 14th November, 1994				1,000
1995	21,856	10,928	Statute Barred	0
1996	5,051	2,526	Statute Barred	0
1997	(24,824)	(12,412)	Statute Barred	0
1998*	39,891	19,946	60% and statute barred to 22nd June.	Estimated
6,000				
1999	31,771	15,886	60%	9,532
2000	65,000	32,500	60%	19,500
2001	(12,000)	(6,000)	60%	(3,600)
Total allowable losses				£32,432

Notes:-

* While no specific evidence was given as to how the profits attributable to 1994 and 1998 should be divided up as and between the periods which I found to be statute barred and those which I found not to be statute barred, I have made an estimate based on the proportion of the years concerned.

64. Furthermore, it will be noted from the above table that the net profits in the period which I found to be statute barred were in

fact extremely small in that the net position for the entirety of the years 1995, 1996 and 1997 showed a profit of just over IR£1,000 while the broken years showed an approximate profit in the statute barred portions thereof of approximately IR£10,000.

Interest

65. I have next to consider whether it is appropriate to allow courts act interest to the plaintiff. In the ordinary way the plaintiff has suffered commercial losses and a loss of his bonus payment and should be entitled to interest. I do have to have some regard to the fact that it has taken a very long period of time indeed for these proceedings to come on for hearing. There was a significant volume of debate at the hearing concerning the blame that might be attached, in particular to the defendants, in respect of delays experienced in the discovery process had otherwise in the proceedings. In particular reliance was placed upon the fact that Morris J. (as he then was) felt at one stage that the actions of the defendants warranted the dismissal of their defence. However, the precise circumstances which led to the making of that order are not a matter of record and furthermore the decision of Morris J. was in part overturned on appeal by the Supreme Court. However, for the purposes of this aspect of the case it seems to me sufficient to note that it is difficult to blame the plaintiff for any of the delays which occurred in the case up to the year 1999. Thereafter, and it would appear through no fault of his own, the plaintiff has had difficulty in obtaining legal representation which ultimately led to the circumstances in which he was required to represent himself. Equally it must be said that there is no basis for suggesting that the defendants were in any way responsible for those difficulties. Were it not for those difficulties it seems to me that it is likely that this case would have come on for hearing no later than 2001 and would have been the subject of a judgment by the end of that year. In the circumstances it seems to me that the justice of the case would be to award Courts Act interest on each of the sums allowed in the above table and the bonus payment at the appropriate courts act rate from the last day of the year to which the sum is attributable to the end of 2001. Hopefully it will be possible for the parties to agree the appropriate calculation together with the calculation of the sum in Euros to which the plaintiff should be entitled on the basis of the above together with interest calculated on the above basis.